DEVELOPMENT AND SOCIETY
Volume 40 | Number 1 | June 2011, 117-138

Making the Sociology of Human Rights More Sociological

Anthony Woodiwiss | Seoul National University

This paper is an exercise in reflexive theoretical sociology which marks a shift in my approach to the sociology of human rights. It begins by critically examining my past practice in the light of the general criticisms of the sociology of law recently set out by Mariana Valverde. My conclusion is that, while Valverde's particular criticisms, as mediated through Christopher Tomlins' discussion of my work, have little force, the radical nature of her challenge has the considerable merit of forcing the recognition and clarification of other very significant problems with my work, notably the absence of a distinctively sociological conception of rights. Having filled this gap, the paper goes on to provide a formal analytical description of the scope of the sociology of human rights. What is distinctive about this description is the fact that it recognizes that sociology should be as concerned with the causes of abuse as with the legal and other responses to abuse. The paper ends by suggesting that such an approach should greatly enhance the value-added provided by sociology to the study of human rights since it promises to provide a means of investigating the causes of human rights abuses that looks beyond the guilt or innocence of individual perpetrators of abuse.

Keywords: *Sociology of human rights, Law, Good and Evil*

I first began to realize that there may be a need to make the sociology of human rights more sociological in the course of writing my book *Human Rights* (2005a). On the one hand, I had argued for some time that whether one was interested in understanding or enforcing human rights the 'law was not enough,' but on the other hand most of what I was writing was actually rather narrowly concerned with human rights law or those non-legal developments that most directly affected the course of rights discourse. Fortunately for me, I was able to stop the anxiety produced by the resulting discomfort from becoming a block by inserting a chapter in Human Rights on what I called the comparative sociology of human rights and suggesting that interested readers should look at my earlier case studies (Woodiwiss, 1990b, 1992, 1998, 2003), if they wanted to know exactly how the general social processes specified in the chapter affected the development of labour rights in the particular societies I was discussing.

Fine though I hope it is in its own terms, the comparative sociology chapter was undoubtedly something of a bandaid. However, it is true that in my original case studies there is a lot about the pertinent non-legal and indeed wider legal aspects of social life and their role not just in directly prompting human rights developments but also in producing the underlying problems that the rights involved were a response to. Nevertheless, looking back, I can now see that if the source of the strength of my case studies lay in their rather tight focus on labour rights, this same tight focus was also a major source of the frustration I experienced when it came to trying to transfer the insights I felt I had gained from the labour rights case studies to the broader phenomena that are human rights. The principal symptom of my frustration was my inability at the time I was writing Human Rights to formulate any sort of general analytical statement as to the nature of the relationship between social-structural developments and human rights as a whole. Instead I scurried back to the comfortable resting place that for me was represented by Durkheim's insight as to the indexical character of the law and resorted to the metaphor of human rights being the tip of a social iceberg.

With the benefit of hindsight and thanks to the comments of a couple of perceptive commentators on my work, I can now see that the ultimate source of my problem was that I wanted to understand rights as uniform moments in a single causal process, whereas I should have been trying to see them as differentiated moments in a generic causal process. Further, my continuing inability to grasp what that generic process might look like resulted from simultaneously taking my analysis of labour rights to be more abstract than it

was and failing to think in sufficiently abstract terms about non-labour rights. That is, while understanding labour rights, as I do, to be both constituted by and constitutive of class relations represented a pretty abstract way of thinking about labour rights, this same understanding made it very difficult to understand the social-structural and wider legal conditions affecting and affected by non-labour rights. This was because as far as I could see very few of the latter had any class-structural pertinence at all. In other words, although I formally declared my desire to avoid doing such a thing, I both continued unconsciously to confuse class relations with social relations as a whole, and failed to think structurally about social relations as a whole. For this reason, I could see no commonality at all (not even generically) between the two categories of rights (labour/non-labour), although I knew that it must be there somewhere. Hence, again, the attraction of Durkheim's idea of the law's indexicality and the iceberg metaphor — only the tip is visible while the rest is hidden and so does not have to be displayed, or at least not until someone asks to see what is beneath the waterline. The rest of the paper, then, is an account of how I got to what I would now say were anyone to make such a request.

The most fundamental problem that all sociologists face when studying any legal phenomena is that created by the mutual antipathies between law and sociology as academic disciplines. Lawyers, well at least very conventional lawyers, tend or have tended to think of the law in a Neo-Platonic way as a realm of pure thought disconnected not just from the hurly burly of everyday life with its venalities, special pleadings and petty squabbles but also from history and the social forces that determine its course. Such pretensions have represented a red rag to generations of sociological bulls who in one way or another have sought to bring law and lawyers down to earth. Unfortunately, the net result of such iconoclasm has too often been what some Critical Legal Scholars of the 1980s proudly called the 'trashing' of the law and, perhaps more importantly, the consequent loss of any sense of the distinctive character of the legal realm.

Taking Nietzsche Seriously?

In other words, the problem I was struggling with was perhaps rather more profound than I had imagined. Certainly this would be the view of prominent sociologists of law like Mariana Valverde and Christopher Tomlins. Valverde begins her apparently increasingly influential critique of

the Sociology of Law with the following quotation from Friedrich Nietszche:

> Legal conditions may be nothing more than exceptional states of emergency … A state of law conceived as sovereign and general, not as a means in the struggle between power-complexes, but as a means against struggle itself … would be a principle hostile to life, would represent the destruction and dissolution of man, an attack on the future of man, a sign of exhaustion, a secret path towards nothingness (Nietzsche (1887) 1996, p. 57; quoted in Valverde [2006, p. 591]).

Valverde's claim is that Sociology's interest in looking at the relations between the legal and other spheres of life discloses a commitment to just that conception of law as a distinct, 'sovereign and general' sphere of social relations that Nietszche identifies as anti-life. She continues:

> Sociology is full of static models of motion? or more accurately, static models of that very special, evolutionist form of motion that is called 'social change' … [By contrast] my key interest is experimenting with concepts that are themselves dynamic, rather than working with concepts that, like cameras, are designed to 'capture' flows and struggles by means of static photographs or static X-rays. We can at least try to think about knowledge production and use without positing 'laws of motion,' trying instead to document actually existing 'translations' (Latour 1987) and other moves made in the knowledge game. The moves can be mapped and to some extent inventorized in analyses that avoid positing social ontologies and therefore avoid positing any 'boundaries,' and that instead highlight the creativity of both human and nonhuman actors (cf. Latour 2002) and the contingency of all legal situations (Valverde 2006, p. 592; see also Tomlins [2007, p. 61-67]).

It is of course a surprise to hear an avowed Foucaultian so enthusiastically speaking up for creative individualism and against social ontologies and one wonders where this leaves the category of discourse for example. Also, it should be noted that the quote from Nietzsche with which Valverde begins her article provides no support whatsoever for the argument that she derives from it.[1] This said, I would nevertheless like to begin my argument by taking

[1] Unfortunately, Valverde seems to have been misled by the modish style of the translation she uses which to my mind tries a little too hard to give Nietzsche's text a contemporary feel. Older

Valverde seriously since doing so will require me to revisit some of the most basic propositions of the Sociology of Law and check their cogency which seems a sensible thing to do when embarking on a new venture since there is little point in building castles on sand. Thus I will begin the positive part of the paper by indicating what sort of account of the development of human rights would be produced by using the 'dynamic methods' that Valverde commends and which some other Foucaultian scholars have summarized as follows:

> [the description of the] multitude of ways of dividing and managing a territory and its inhabitants including not only humans, but animals, motor cars, mechanical and electrical devices, transport networks, flows of energy and the like in the process of governing it as a society (Osborne, Rose, and Savage 2008, p. 531).

In other words, human rights discourse would be represented as a collection of administrative texts, and the methods used to produce and apply them — that is, as texts all the way down.

In some ways this is actually fine by me as is, given the recent dominance of Sociology by a fact free theoreticism a la Giddens, the assertive empiricism Valverde uses to justify her proposed method. Moreover, the Foucaultian governmentality school to which Valverde belongs has already produced some excellent templates for such studies like Nikolas Rose's Power of Freedom (1999). In my view it would, however, be a great shame if the analytical possibilities created by the more detailed knowledge of the 'hows' of social change produced by such as Rose were not taken advantage of in the pursuit of knowledge of the 'whys' of interest to more conventional sociologists because of a self-denying ordinance that was rooted in a misconception as to the nature of what such analytical possibilities might be. Troublingly, or perhaps I should say thankfully, there does seem to be

---

translations render the italicised section and its immediate context thus: 'from the biological point of view legal conditions are necessarily exceptional conditions since they limit the radical life-will bent on power.' (Nietzsche 1956, p. 208) Despite the implications Valverde draws from her translation's use of 'states of emergency' in the same passage, the point Nietzsche is making is in no way the same as that which Schmidt (1932) and Agamban (2005) have in mind when they speak of 'states of emergency' or 'states of exception.' Rather what Nietzsche is objecting to is conceptions of law that do not regard it 'merely as an instrument in the struggle of power complexes.' In other words, he is espousing an understanding of the role of law that seems very similar to that of what today we would call 'vulgar Marxism,' except that in his case it would seem to have been part of an even more vulgar biological evolutionism.

evidence of just such a misconception in the writings of this group. For example, Osborne et al. state that their aim is to produce a 'sociology which is happy to remain on the surface … without reducing that superficial array to the status of derivatives of more fundamental laws' (Osborne et al. 2008, p. 530). As far as I know the only sociologists who continue to talk of 'fundamental laws of motion' are a tiny number of marginal Marxists who retain a belief in the positivist version of Marxism associated with the nineteenth-century Second International.

Another example of Osborne et al's misconception of what the analytical possibilities might be is provided when they state that: the fragmentation of the idea of the nation state requires us to also recognize the social, moral, technical practices by which it was assembled in the first place … [and] it was never, in fact, a question of adhering to this or that concept of society but of inventing forms of visualization and inscription, of thinking with hands, eyes and ears, to render and manipulate phenomena into a social form and organizing them in the frame of 'society' (Osborne et al. 2008, p. 531).

Again I know of no sociologists who would today argue that the shaping of, for example, capitalist societies is a product of any sort of conscious overall design effort inspired by a concept of what their shape, so to speak, should be. In the 1960s there were, of course, some instrumentalist Marxists, like Ralph Miliband in his The State in Capitalist Society for example, who argued in this way, but the arrival of structuralism sharply reduced the influence of such ways of thinking.

Although Osborne et al do not cite Valverde's paper with approval or otherwise, it is clear from their stress on the importance of describing surfaces and their dismissal of any idea of social life having any depth that they share her distaste for boundaries other than very strictly nominalistic ones and therefore for any idea that there might be an outside to law or indeed to any other particular region of the social. To my mind, what this must mean is that they and Valverde either think that the law or whatever is self-constituting and self-enforcing or that such processes simply cannot be understood. Fortunately, there is no need for the rest of us to share either their delusion or their despair. Most sociologists these days are neither positivistic economic determinists nor rationalistic instrumentalists but what I term 'ordinary realists' (Woodiwiss 2005b) who organize their research not on the basis of any supposed laws or intentions but on the basis of explicit or implicit and always fallible theoretico-empirical models constructed on the basis of the discipline's ongoing theoretical and research efforts. Generally, the authors of these models are thoroughly aware that the elements of actual

social structure's are much more closely intertwined with and permeable to one another than is sometimes suggested by their models.

Finally, if one has had a sociological education, which many of the Governmentality School have not, it really is just not that difficult to see that the sets of social relations that produce, for example, legislatures, courts and the discourses that emanate from them as different from those sets of social relations that produce the sites where these discourses are applied or consumed and have to be reconciled (or not) with pre-existing discourses. Given this, it also does not seem to be at all disastrous if for analytical purposes one regards each set of these relations as external to one another. By contrast, what does seem to me to be absolutely disastrous is to conclude, as Valverde et al appear to, that since there is no outside there must only be one inside, namely that of the world- creating text.

Sociologists Taking Rights Seriously

Moreover and again contrary to what Valverde et al appear to believe, there have in fact been many notable exceptions to the alleged rule that, even if they only do so for analytical purposes, sociologists who talk as if the legal and the social exist in some sense externally to one another always end up denigrating the law as a meaningful area of endeavor and therefore an effective social force. Among these exceptions are two of the sociological greats, Max Weber and Emile Durkheim. Classical sociology contained not just a keen appreciation of the limited nature of the social amelioration made possible by the development of rights, but also most of the elements necessary to create a sophisticated sociology of human rights that is not prey to Valverde's criticisms.

Thus none of the classical theorists, not even Marx, 'trashed' either rights or the law in general. On the contrary, the development of rights discourse was regarded by each of them as an highly significant aspect of the great transformations that were their principal objects of study. Indeed, each of them regarded rights as having positively shaped the course and outcomes of these transformations (for Marx rights played a positive role in facilitating the transition from feudalism to capitalism but threatened to obstruct the transition from capitalism to socialism because of the way in which they entrenched egotism). I have written at length elsewhere (Woodiwiss 1990, 2003, 2005a) about the classical theorists' contributions to the conceptual architecture of a sociology of human rights and it would not be appropriate to

attempt any sort of summary here. What I will do instead is simply draw your attention to a couple of quotations that are particularly germane in the present context. The first is from Max Weber:

> Rigorously formalistic and dependent on what is tangibly perceivable as far as it is required for security to do business, the law has at the same time become informal for the sake of business good-will where this is required … [and] interpreted as some 'ethical minimum'. The law is drawn into anti-formal directions, moreover, by all those powers which demand that it be more than a mere means of pacifying conflicts of interest. These forces include the demand for substantive justice by certain social class interests and ideologies; they also include the tendencies inherent in certain forms of political authority of either democratic or authoritarian character concerning the ends of law … finally … anti-formal tendencies are being promoted by the ideologically rooted power aspirations of the legal profession itself … [Nevertheless] the notion must expand that the law is a rational technical apparatus, which is continually transformable in the light of expediental considerations and devoid of all sacredness of content … All of the modern sociological and philosophical analyses … can only contribute to strengthen this impression (Weber 1922, pp. 894-95).

The second is from Durkheim and in it he anticipates by some 80 or so years many of the insights contained within Foucault's concept of 'governmentality':

> [The political economists] have, however, been mistaken as to the nature of this liberty. Since they see it as a constitutive attribute of man, since they logically deduce it from the concept of the individual in itself, it seems to them to be entirely a state of nature, leaving aside all of society. Social action, according to them, has nothing to add to it; all that it can and must do is to regulate the external functioning in such a way that the competing liberties do not harm one another. And, if it is not strictly confined within these limits, it encroaches on the legitimate domain of the individual and diminishes it. But, besides the fact that it is false to believe that all regulation is the product of constraint, it happens that liberty itself is the product of regulation. Far from being antagonistic to social action, it results from social action. It is far from being an inherent property of the state of nature. On the contrary, it is a conquest of society over nature (Durkheim 1893, pp. 386-87).

In the first extract, Weber, on the one hand, confirms Marx's judgement that in the end, and as defined by the clash of class and political forces, rights exist in order to provide the 'security to do business' and, on the other hand, he acknowledges far more directly than Marx did that rights may also provide a means of securing what he terms an 'ethical minimum' in the conduct of such business. In the second extract, Durkheim may be read as developing these points by explaining that the market-critical concept of 'liberty' or freedom is a social product rather than a god-given benefit which means that it has no essential content and may therefore be further shaped and reshaped (that is, regulated) by 'social action'.

Lawyers Taking Sociology Seriously

There have also, of course, been exceptions to the equally well-established rule on the legal side that 'trashing' is all you can expect from sociology. And again these exceptions are among the jurisprudential greats including the American Legal Realists. The only one I will mention here is the Oxford legal philosopher Herbert Hart, who was just as insistent on the analytical utility of separating the legal from the social as any sociologist.

In the United States and Britain for the past thirty of so years the intellectually most influential Neo-Platonist legal text has been Ronald Dworkin's *Taking Rights Seriously* (1977). But prior to the appearance of Dworkin's book, and still today for many of those who have not fallen under Dworkin's spell, the most influential theory of law was or remains the restatement of what is known as Legal Positivism set out in Hart's *The Concept of Law* (1961). According to the Legal Positivists whom it should be said are by no means always also Logical Positivists, individuals only have rights insofar as such rights have been created by positive (that is, explicit) and legitimate legal or political actions. Any suggestion that there might be rights that are naturally or morally inherent in human beings is, to use the famous words so often taken from Jeremy Bentham's Anarchical Fallacies, 'nonsense upon stilts.' This is the view that, as his title suggests, Dworkin challenged. His counter argument was that, in one way or another and so far from promoting anarchy, those rights that are termed 'natural' or 'human' and the morality they consequently carry into legal reasoning impart not just ethical significance but also an essential intellectual coherence to legal systems and indeed societies. According to Dworkin the unlegislated moral principle that provides this coherence is the idea that society owes all its

members a certain 'equality of concern and respect' (cp. 'dignity' in human rights discourse). However, for Hart the separation of law from morality was important not simply because it made it easier to demarcate the basic lineaments of the legal but also precisely because it preserved the idea that morality 'is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience' (ibid., p. 206). By keeping law and morality separate from one another, Hart sought to preserve an autonomy for the moral sphere that would allow both the distinguishing of certain legal rights as natural rights and the possibility of criticizing this idea and the content of any particular effort to specify the rights that should be afforded this status.

In contrast, what Dworkin meant by 'taking rights seriously', given that his principle of 'equality of concern and respect' was derived from his reflections on the 'original position' set out in John Rawls' Theory of Justice, was that liberalism was a universal ethical necessity in the sphere of governance and one moreover that legitimated many of the less capital-threatening aspects of the socialist approach to social development (for an highly influential example of the role of the work of Rawls and Dworkin in the making of contemporary Neo-Platonism in the human rights sphere, see Donnelly [2003, p. 44ff]). Also, because his text revived philosophical interest in rights by presenting itself as a critique of Hart, Dworkin's intervention greatly reduced the likelihood that much interest might be shown in developing the approach to the study of legal phenomena such as rights that Hart had pointed towards when he wrote in the preface to *The Concept of Law*, that the book could be read as 'an essay in descriptive sociology.' From my particular sociological viewpoint this was especially regrettable since, despite his unpromising formal commitment to Peter Winch's (1958) far from epistemologically positivist variant of social constructionism, Hart's sociology was far from simply descriptive, animated as it was by the following 'sobering truth':

> the step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers of those with whose support it can dispense, in a way that the simpler regime of primary rules could not (Hart 1961, pp. 197-98).

In other words, whereas Dworkin assumes that certain rights are the inherent property of all human beings and unproblematically serve to protect them against the abuse of power, Hart acknowledges that the law and therefore rights too exist in a world where power is unequally distributed and he therefore allows the possibility that rights might embody and so be complicit with this inequality to the degree that it may even be that some individuals have no rights at all. By developing his Legal Positivist concept of law, then, Hart appears to have hoped to separate the law from liberal morality in particular in order to preserve not only the possibility of other moralities but also the concepts of law and rights too for articulation with such other moralities. In Hart's own case his preferred morality was markedly, and to me surprisingly, socialistic in character. In sum, then, and regardless of its disciplinary source, the preference for thinking of the law and the social as analytically separable spheres of social life by no means necessarily results in the 'trashing' of the law. On the contrary, when acted on with the skill and sophistication of a Weber, a Durkheim, or a Hart, this is a preference that has proved highly effective in enhancing our knowledge of the law.

Taking Myself Seriously

Now, of course the reason I have spoken about Weber, Durkheim and Hart is because, alongside Foucault, they are the thinkers I have drawn upon as I have tried to work myself away from the Marxist (n.b. not Marx's) mode of trashing the law without losing sight of Marx's great insight as to the inherently social character of the law. Humblingly, it has only been since I have been able to see the pertinent parts of my work through the eyes of others that I have been able to appreciate fully what its contribution might be. In a paper published a couple of years ago, Tomlins correctly and appropriately in the current context identifies my theoretical work as a contribution to the debate concerning the autonomy or otherwise of the law.

His excellent summary of my conceptualization of the law is as follows:

> Starting from Marxist theory's convergence upon relative autonomy … Woodiwiss attempted a further and more rigorous specification of autonomy's relativity at any given moment by turning to Foucault. Relative autonomy, he argued, inhered not in the structural relationship between law and society but in the particularities of legal discourse. For Woodiwiss, what was law at any given moment was determined by legal discourse's own rules

> of formation. Law's relationship to economy, as to any social process, was hence decisively mediated by the particularities and anomalies of its own process of creation. Intrinsic to that process and the basis of law's autonomy, Woodiwiss (1990a, p. 10) argued, was a foundational and constitutive impulse to "consistency." Consistency was legal discourse's guiding sign, it was "the prime discursively produced object of law" (Woodiwiss 1985, p. 68). It was the foundation upon which was built law's potent "background ideology-effect" of legitimation in relation to the social formation of which it is part. Precisely to enjoy social authority as a modality of rule, however, legal discourse had also to remain consistent with "the principles structuring the dominant or hegemonic discourses" abroad in society at large This was "the most important criterion against which its consistency is judged' (Woodiwiss 1990a, p. 11). Here that is lay the relativity of law's autonomy.

Understanding law as a compound of discourses and their practices, Woodiwiss argued, enabled one to investigate with some precision how law produces its effects, both foreground (specific outcomes) and background (ideology). Recalling Poulantzas, law "interpellates the subjects it addresses in such a way that they will be law- abiding" (Subject positions "are constituted by the rights and duties that define them and therefore determine the relations that can or should exist between them"? husband/wife, employer/employee, and so forth. Subject positions are also simultaneously and independently constituted in other discourses with which law seeks consistency, but which may also interpellate subjects differently. When disciplinary equilibria achieved in one discourse, or among discourses, break down, they become the object of reinforcement in others. In law, reinforcement is performed by transpositioning changing the position of the subject (from wife to civil respondent, for example; from employee to criminal defendant potentially effecting "a transformation of rights, duties and therefore relations" (Woodiwiss 1985, p. 73). As a medium of transpositioning, law enjoys autonomy its transpositional capacities are not exercised functionally, according to the needs of capital, but according to the dictates of its own intrinsic technology as a discourse (its particular tactics, its power effects); nor is law necessarily the transpositioning discourse: one can imagine many other discourses with transpositional capacities. However, "conditions appropriate to the securing of capitalist production and exchange may strongly suggest an affinity with legalistic forms" (Woodiwiss 1985, p. 73). Moreover, in that affinity lies an ultimate (and restated) relationality. "In the same way that a particular legal system as an ideological and political

element represents a condition of the existence of the economy, then so too economic, as well as other political and ideological elements represent the conditions of existence of the legal system. For this reason one has to look beyond the law if one wishes to understand fully such juridical signifiers as constitutions, statutes, juristic arguments, and such disciplinary effects as decisions to proceed or not, degrees of enforcement and even judgments themselves" (Woodiwiss 1985, p. 75; see also Woodiwiss [1990b, p. 120]; on transpositioning, see also Hunt [1992, p. 31]).

Accurate though this summary is, and I feel distinctly churlish saying this since, as I have already indicated, I have learnt a lot from Tomlins' discussion of my work, it is seriously incomplete as regards what to me at the time of writing was one of my most important achievements, namely my recognition of at least something of the complexity of the social/legal interface. Tomlins does not neglect all of what I say on this issue since he generously makes the point that, formally at least, I do not regard class relations as exhaustive or even necessarily an at all pertinent aspect of the social insofar as it affects and is effected by the law. However, he neglects four further points. The first is that the passage that he quotes about the law interpellating 'the subjects it addresses in such a way that they will be law-abiding,' continues in the following way that he does not quote: 'provided that such subjects do not successfully resist this disciplining because of prior or other interpellations produced by counter discourses' (Woodiwiss 1990a, p. 115). The significance of my continuing in this way is that, contra Valverde but as is also the case with most other sociological formulations of the law/society relation, including those produced by contemporary Marxists as indeed Tomlins himself makes so brilliantly clear, there is no way that my understanding of the law can be represented as anything other than as the 'means in the struggle between power-complexes' that Nietzsche says it is.

Tomlins' second omission relates to my recognition that the transpositioning that for me is law's raison d'etre takes a wide variety of forms which is what one would expect given the diversity of contexts within which rights play a role:

> In other words, and in the end rather obviously to any kind of conventional sociologist, the only way to begin to uncover the variety of legal relations is by thinking of the law and the remainder of the social as external to one another and noting the many different tasks that the law is asked to perform (Woodiwiss 1990a, p. 117).

Tomlins' third omission concerns my conception of the law as necessarily 'intermittently operative' with respect to individuals, which is to say that: (Woodiwiss 1990a, p. 119). Three points may be made on the basis of this extract. First, 'intermittently operative' is a less dramatic way of saying the same thing as Nietzsche when he talks of 'states of emergency.' Second, the idea of law as 'intermittently operative' has long been central to social-scientific thought about the law. See for example the characterization by Otto Kahn-Freund (a judge in the Weimar Labour Court and the doyen of British labour lawyers in the 1960s) of the law as a 'secondary force in human affairs … [since] … it can only effectively intervene in human affairs if what is socially desired is not being otherwise obtained, if the existing arrangements between "social powers" are insufficient, or if nationally specific reasons require it' (Woodiwiss 1990a, pp. 93-94). And third, for sociologists law's 'intermittent operation' has long been one of the key factors explaining why the entwining of the Law with other sets of social relations such as those pertaining to the state is a real necessity rather than an artifact of any analytical error consequent on trying to look beneath the social surface.

All that said, the foregoing simply establishes that my theorization of the law as a transpositioning mechanism avoids all of Valverde's criticisms and this is because it remains consistent with what might be termed the three practical research verities of the Sociology of Law: If you want to understand legal institutions or almost any other institutions for that matter, and even when they are as socially insulated and as constrained as are those associated with the law, it is a good idea to begin by assuming that they are subject to all kinds of cross-cutting pressures and are therefore inevitably locations of conflict with the result that there must always be uncertainty as to the ultimate significance of what goes on within them.

If you want to find out how the law like anything else works, you have to open the box, lift out what you find inside and take it apart. The trick is to find the key.

If you want to understand why there are not even more judges, lawyers and policemen than there are already, you have to realize that this is because societies are basically self-regulating so therefore continuous legal intervention is not necessary and 'intermittent operation' is generally sufficient to deal with any failures of self-regulation.

Tomlins' fourth and most important omission is, however, one that I have to admit is far more understandable than those listed so far since it concerns an element that was added to transpositioning theory long after the main body of the theory had been set out. That is, some eight years after the

publication of the books that Tomlins discusses, I realized that something was missing. This was any account of what were the means as opposed to the manner whereby the legal and the social were connected. And I also have to admit that I came to this realization and filled the gap that it represented not in a logical fashion by first identifying a gap and then filling it but serendipitously by finally finding the intellectual courage to try to provide a sociological specification of a right (Woodiwiss 1998, pp. 47-48). In doing this I, first, followed Paul Hirst (1979, p. 104) in rejecting the idea of natural rights and replacing it with the much more mundane conception of rights as discursive entities that serve 'certain socially determined policy objectives and interests.' Second, I recognized with William MacNeil (1992, 1995) that to view rights as separately existing discursive entities rather than things that were somehow inherently part of individual human beings immediately foregrounds the question as to whether and how such discursive entities are actually connected or attached to the agents, human or otherwise, that are their supposed bearers. Third, I followed Wesley Hohfeld (1921) in understanding that these entities can take the form of either a liberty, a claim, a power or an immunity depending on the nature of the particular legal culture. In sum, then, and regardless of whether it is a human or a plain right, a right may be understood sociologically as a discursive entitity that can take the form of either a liberty, a claim, a power or an immunity and whose attachment or otherwise to individuals is socially determined.

I made the point earlier that, if you want to open any box you have first to find the key. And it turned out that the key to opening the black box that the law is for most of us lay not simply in understanding rights as core elements in the internal life of the law but also in understanding them to represent precisely the means through which the law and the social are connected and which therefore make it possible for the law to play its transpositioning role. In other words, the critical insight that dissolves the mystery of the law continues to be that which Marx expressed when he said in Capital 1 what Evgeny Pashukanis' renders as, 'Commodities cannot themselves go to market and perform exchange in their own right. We must therefore have recourse to their guardians, who are the possessors of commodities' (Pashukanis 1978, p. 112). And all that is necessary to extend this insight so that the rather different role of rights in non-commodity exchanges is similarly illuminated is to restate and paraphrase Marx's little scenario thus: 'guardians (that is, people) cannot be exchanged so we must have recourse to their rights which can be.'

In sum, then, I would now specify the generic causal process in which

rights of whatever kind are critical moments as follows; first, it is a process in which failures of actors, whether human or non-human, or indeed and most excitingly, to follow Johan Galtung (1994, p. 143), structures of social relations to live up to whatever might be the prevailing expectations as regards decent behaviour or treatment lead to the legislating of rights written (depending on the nature of the failure and the wider social context) either as liberties, immunities, powers or claims; second, the result of such legislation is that the population is made subject (again as appropriate) to one or other mode of legal transpositioning, and therefore at risk of repositioning (for example by being put on probation, required to do community service or whatever) or depositioning (for example by being imprisioned) in the hope that such transpositionings or the fear of them will prevent the initiating failures from recurring.

Taking Religion Seriously

In a recent review of my Human Rights Gert Verschraegen (2009) comments that the author 'establishes an analogical link between human rights and human sacrifice … [but] … does not elaborate upon it in the rest of [the book].' Of course when I first read this criticism I bristled as one does when one has been found out and recalled my guiltily pre-prepared response to any such charge. This response was that I had used the observation as to the almost universal practice of human sacrifice as a counter-metaphor to that of the social contract because the figure of human sacrifice sensitizes one to the double-sidedness of the history of rights. And what I meant by double-sidedness was that for every benefit granted by the passage of a piece of rights legislation not only had blood often have to have been spilt but something else had been taken away, given up, or lost. All this is true but, as explained earlier, what is also true is that my analysis had remained metaphorical and implicit because I was not able to do anything else. Even today I have still not actually provided an analysis that substitutes the sociological for the metaphorical and therefore the explicit for the implicit for any rights apart from those pertaining to labour. The difference is that I now think I know how such an analysis should be carried out.

Just as I owe my understanding of the significance of human sacrifice and my understanding of law as an index that discloses certain otherwise invisible social relations to Durkheim and his school, so I also owe my new analytical confidence to further reflection on the work of this school. In my

Globalization, Human Rights and Labour Law in Pacific Asia (1998), I used Marcel Mauss's analysis of the gift relationship and his concept of the 'total social fact' alongside Weber's ideal type of patriarchalist domination in order to establish the possibility that there might be something 'good' and therefore supportive of respect for human rights in contemporary Pacific-Asian discourses of rule. Because my analysis was driven by this purpose, I ended up understanding the 'total social fact' in entirely positive terms and therefore as some sort of repository of 'goodness' in human social life. I now understand that this was, almost literally, a one-sided conclusion. And this is thanks to reading an essay by one of Durkheim's lesser-known but most long-lived students, Robert Hertz. The essay concerned is entitled The Pre-Eminence of the Right Hand: a Study in Religious Polarity (1909) and the analytical clues it contains are summarized in the following passage:

> The impure is separated from the sacred and placed at the opposite pole of the religious universe. On the other hand, from this point of view the profane is no longer defined by purely negative features: it appears as the antagonistic element which by its very contact degrades, diminishes, and changes the the essence of things that are sacred. It is a nothingness, as it were, but an active and contagious nothingness … There is an imperceptible transition between the lack of sacred powers and the possession of sinister powers. Thus is the classification which has dominated religious consciousness from the beginning and in increasing measure there is a natural affinity and almost an equivalence between the profane and the impure. The two notions are combined and, in opposition to the sacred, form the negative pole of the spiritual universe.

Dualism, which is of the essence of primitive thought, dominates primitive social organization. The two moieties or phratries which constitute the tribe are reciprocally opposed as sacred and profane. Everything that exists within my own phratry is sacred and forbidden to me: this is why I cannot eat my totem, or spill the blood of a member of my phratry, or even touch his corpse, or marry in my clan. Contrarily, the opposite moiety is profane to me: the clans which compose it supply me with provisions, wives, and human sacrificial victims, bury my dead, and prepare my sacred ceremonies. Given the religious character with which the primitive community feels itself invested, the existence of an opposed and complementary section of the same tribe, which can freely carry out functions which are forbidden to members of the first group, is a necessary condition of social life. The evolution of

society replaces this reversible dualism with a rigid hierarchical structure; instead of separate and equivalent clans there appear classes or castes, of which one, at the summit, is essentially sacred, noble and devoted to superior works, while another at the bottom, is profane or unclean and engaged in base tasks …

The whole universe is divided into two contrasted spheres … Powers which maintain and increase life, which give health, social pre-eminence, courage in war and skill in work all reside in the sacred principle. Contrarily, the profane and the impure are essentially weakening and deadly: the baleful influences that oppress, diminish and harm individuals come from this side. So on one side there is the pole of strength, good and life; while on the other there is the pole of weakness, evil and death. Or, if a more recent terminology is preferred, on the one side gods, on the other side demons (Hertz 1909, pp. 95-6). On my reading, what Hertz does in this remarkable passage is to demonstrate once again the power of Durkheim's insight as to the fact that collective representations, in this case the ideas of good and evil that are central to human rights discourse, have both their origins and sources of sustenance in social conditions and especially the collective rituals that seek to propitiate the evil as well as celebrate the benign spirits. In this case, these conditions are those that secure the existence of clans and early states. The 'good' may therefore be understood as everything that supports the existence of such clans and states, while the 'evil' may be understood as everything that threatens this existence. And, truer to the Durkheimian tradition than I had been, for Hertz the differentiation of the two sets of conditions of existence leads not to a utopian fantasy as to the possibility of a purely good society but to a recognition of the unavoidable coexistence of good and evil.

I do not know if everyone will agree, but I think that it would be true to say of the general and more theoretical Sociology of Human Rights literature we know and indeed have produced that it focuses much more on trying to explain the good than the evil. Notable exceptions would be Bryan Turner's identification of the shared recognition of 'human vulnerability' as the key element allowing or supporting the universalization of human rights discourse, and Stan Cohen's study of the role of denial in accounting for our continuing toleration of human rights abuses. Of course there are huge legal, political, historical and indeed sociological literatures relating to human rights abuses and the conditions that produce them, but for some reason we rarely try to theorize the data provided in these literatures. The one exception to this rule that I know of is Darren O'Byrne's (2003) version of the book called Human Rights. Disappointingly, while O'Byrne's text points in the

right direction it does little more than just point since, not only is it completely unsociological in its approach to understanding the genealogy of human rights discourse but it also does not so much develop a sociology of human rights abuse as invoke the possible relevance of isolated concepts such as Louis Althusser's 'repressive state apparatuses' to understanding why and how abuses occur. In the end, though, the very weaknesses of O'Byrne's study make it a valuably suggestive work since, while a single Althusserian concept does not represent a theory of human rights abuse, thanks to O'Byrne it is now much easier to see than it was that Althusser's or indeed Habermas' theories as wholes could provide theories of human rights abuse and indeed its mitigation.

For my own part though, it seems to me that Durkheim and his School occupy pole position when it comes to the race to provide a sociological account of human rights abuses since their prime object of study from the beginning was morality with the result that their whole conceptual system is already pointing in the right direction, so to speak. In the societies that Durkheim and Hertz studied the forces behind good and evil were understood in cosmological terms as gods and demons respectively. Even today many people continue to share this cosmological understanding. However, of course and almost by definition, sociologists cannot share such an understanding but must regard it as a metaphor that it is their task to replace with a properly scientific account (Lopez 2003). And to do this with regard to the human rights of individuals, and whether one is concerned with historical or contemporary situations, one must shift the object of study from the conditions that are positive and negative for the survival of whole societies to those that are positive and negative for groups and individuals in particular societies. That is, one must look for the pertinent equivalents of the 'suicidogenic currents' that, according to Durkheim, explain why societies exhibit distinctive levels and varieties of voluntary deaths, and explain them. In the case of suicide, the ultimate causes of these currents were the conditions making for anomic, altruistic, fatalistic and egoistic suicides.

In the case of human rights one would be looking for what might be termed the social- structurally induced 'rights-destructive' and 'rights-restorative' currents that explain both societal abuse and response profiles and why they differ with respect to the balance between different kinds of abuse (i.e. civil, political, economic, social and cultural etc.), the distribution of particular abuses within these categories and the modes and effectivity of responses. Put more concretely, on the one hand, one would be trying to understand if and why particular groups or individuals were selected for

abuse, what form the abuse took and why, as well as, on the other hand, trying to establish and explain what protective responses, if any, had been mobilized and how effective they had been. More concretely still, with respect to groups, one would be carrying out human rights-focused variants of existing studies of discrimination and efforts to counter it, while with respect to individuals, it strikes me that studies of phenomena like bullying might provide a useful, indeed even an archetypal model since there is the shared mystery of why particular individuals are 'picked on' as targets for abuse.

In this way, then, we should be able to outline the lineaments of contemporary evil and its causes as well as assess the adequacy of any counter-measures. And this, then, would be at least one way in which we could bring more of the social into the Sociology of Human Rights and so increase the value- added of our contribution since the study of these currents promises to provide a means of investigating the causes of human rights abuses that looks beyond the guilt or innocence of individual perpetrators of abuse.

References

Agamben, Giorgio. 2005. *State of Exception*. Chicago: Chicago University Press.

Donnelly, Jack. 2003. *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press.

Dworkin, Ronald. 1977. *Taking Rights Seriously*. London: Duckworth.

Hart, Herbert. L. A. 1961. *The Concept of Law*. Oxford: Oxford University Press.

Hertz, Robert. 1909. *Death and the Right Hand*. Abingdon: Routledge.

Hirst, Paul. 1979. *On Law and Ideology*. London: Macmillan.

Hohfeld, Wesley. 1921. *Fundamental Legal Conceptions as Applied in Judicial Reasoning: And Other Essays*. New Haven: Yale University Press.

López, José. 2003. *Society and Its Metaphors: Language, Social Theory and Social Structure*. London: Continuum.

MacNeil, William. 1992. "Righting and Difference." Pp. 86-119 in *Human Rights in Hong Kong*, edited by Raymond Wacks. New York: Oxford University Press.

_____. 1995. "Enjoy Your Rights: Fantasy, Symptom and Identification in the Discourse of Rights." *Mimeo*. Hong Kong: Department of Law, Hong Kong University.

Mauss, Marcel. (1924) 1990. *The Gift: The Form and Reason for Exchange in Archaic Societies.* Routledge: London.

Miliband, Ralph. (1966) 2009. *The State in Capitalist Society*. London: Merlin Press.

Nietzsche, Friedrich. (1887) 1956. *The Birth of Tragedy: The Genealogy of Morals*.

New York: Anchor.
O' Byrne, Darren. 2003. *Human Rights: An Introduction*. Harlow: Prentice-Hall.
Osborne, Thomas, Nikolas Rose, and Mike Savage, Mike. 2008. "Editor's Introduction—Reinscribing British Sociology: Some Critical Reflections." *The Sociological Review* 56 (4): 519-34.
Pashukanis, Evgeny. 1978. *Law and Marxism: A General Theory*. London: Ink Links.
Rose, Nikolas. 1999. *Powers of Freedom: Reframing Political Thought*. Cambridge: Cambridge University Press.
Schmidt, Carl. (1932) 1996. *The Concept of the Political*. Chicago: Chicago University Press.
Tomlins, Christopher. 2007. "How Autonomous Is Law?" *Annual Review of Law and Social Sciences* 3: 45-68.
Valverde, Mariana. 2006. "The Sociology of Law as a 'Means against Struggle Itself.'" *Social and Legal Studies* 15 (4): 591-97.
Verschraegen, Gert. 2009. "Review: Violence and Vulnerability" *International Sociology* 24 (2): 216-220.
Wacks, Raymond, ed. 1992. *Human Rights in Hong Kong*. Hong Kong: Oxford University Press.
Weber, Max. 1922. *Economy and Society*. Berkeley: University of California Press.
Winch, Peter. 1958. *The Idea of a Social Science*. London: Routledge.
Woodiwiss, Anthony. 1990a. *Social Theory after Postmodernism: Rethinking Production, Law and Class*. London: Pluto.
_____. 1990b. *Rights v. Conspiracy: A Sociological Essay on the History of Labour Law in the United States*. Oxford: Berg.
_____. 1993. *Law, Labour and Society in Japan: From Repression to Reluctant Recognition*. London: Routledge.
_____. 1998. *Globalization, Human Rights and Labour Law in Pacific Asia*. Cambridge: Cambridge University Press.
_____. 2003. *Making Human Rights Work Globally*. London: Glasshouse Press.
_____. 2005a. *Human Rights*. Basingstoke: Routledge.
_____. 2005b. *Scoping the Social: An Introduction to the Practice of Social Theory*. Maidenhead: Open University Press.

ANTHONY WOODIWISS has degrees from the Universities of Leeds, London and Essex. He taught at Essex for many years before becoming Head of the Department of Sociology and latterly Dean of Social Sciences at City University, London. In 2008 he was appointed Distinguished Professor of Sociology at Seoul National University. Apart from numerous articles, he has published nine books, all in the areas of Social Theory and the Sociology of Human Rights. His most recently published books are *Human Rights and Scoping the Social: An Introduction to the Practice of Social Theory*.

An earlier book, *The Visual in Social Theory* was translated into Chinese and published by Peking University Press in 2009 [*Email*: tonyw@snu.ac.kr]