

**THE 2013 LINDA HASKELL MEMORIAL CLASS
ARIZONA STATE UNIVERSITY 15TH NOVEMBER 2013**

**A LONG AND WINDING ROAD: SOCIAL WORK, LAW, AND THE CHALLENGES OF
CHILD AND ELDERLY PROTECTION**

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Thank you for this invitation to give the 2013 Linda Haskell Memorial Class. It's a great honour to be asked to travel from England to join you at this prestigious and important event, in memory of Linda – a social worker, like me, and like many of you. We have quite a job on our hands in this profession of ours.

In 2007, Baby Peter aged just 16 months, died from over 50 injuries, including a broken back, while in the care of his mother, her boyfriend and boyfriend's brother. Social workers, health professionals and the police had visited 60 times in 8 months, but despite evidence of both abuse and neglect Peter remained in the care of the adults who killed him. Consider too the case of JayKay, a woman in her 70s who led a reclusive lifestyle, accompanied by her dogs. She had been referred to social services many times due to her neglect of herself and her home, but she always refused services, and wouldn't hear of relocation to a care environment. So her case was closed each time. She died at home in neglected, filthy and unhygienic conditions.

These tragedies are shocking. They join a roll call of similar notorious events and they place social work in the spotlight, again and again. *"If only (said the chair of the enquiry) social workers had done what the law requires them to do, this child would not have died"*; *"Surely (said the coroner) somebody could and should have done something to prevent this older person's death in such shocking conditions"*. Yet contrast those stories, where social workers and others respected autonomy and family privacy, with these, where they intervened through because they believed they owed a duty of care:

In the late 1980s, 121 children from 57 families in one local authority were removed from their parents following a medical diagnosis of sexual abuse; the majority were

eventually returned home, with all proceedings against the parents dismissed and the strongest possible condemnation of the 'misguided' actions of the professionals. Just last year, Katherine, aged 82, with Parkinson's disease and vascular dementia, was admitted by social workers to a nursing home. She had made over 1,000 calls to the emergency services in six months, and the professionals believed they should act in her best interests because she lacked mental capacity. But Katherine went to court to challenge their action. She told the judge: "*if I fall over and die on the floor, then I die on the floor*". He found she was clear and articulate, and understood her situation, and had the mental capacity to decide where she should live. He warned professionals against obeying the 'protection imperative' at all costs. As a judge in another case put it: "*what good is it making someone safer if it merely makes them miserable*".

These are extreme outcomes, but they illustrate the tough choices that face social workers every day, choices in which they are "damned if they do, and damned if they don't". We must evaluate safety, risk, wellbeing and independence in the most complex of environments. Our decisions have a high public profile, and our judgement is closely scrutinised. If we see decision-making as a journey, then ours is a rocky track with perilous features – unmapped territory with few known routes or landmarks, cross-roads with no signposts, and destinations hidden well beyond the horizon. We travel in adverse weather conditions with equipment that is sometimes not fit for purpose. We must seek the right path, and follow it right, even where there is no right way – this is a long and winding road indeed.

In this talk I argue that legal rules can be seen as *features on a map* [SLIDE 2] to guide our way in professional practice. I'm talking here about three kinds of legal rules [SLIDE 3]:

- First, Acts of Parliament that confer powers and duties on social workers. Examples include the duty to assess the needs of adults for care and support, or to investigate the significant harm of a child.

- Second are legal rules that confer rights and entitlements on individuals: in the European context, we would include the European Convention on Human Rights, and the UK Equality Act 2010 on grounds such as their age, disability, race or sex. But we're also talking about international conventions such as the UN Convention on the Rights of the Child and the UN Convention on the Rights of People with Disabilities.
- Third are those rules that hold social workers to account. In England these are rules arising from administrative law, expressing the principles of natural justice in dealings between the individual and the state. Decisions made by those with power must be rational, transparent, reasonable, fair and proportionate. These rules in themselves are interesting; they have evolved over 800 years, since a deal was struck between King John and the feudal barons in England to guarantee the freedom of the individual against the arbitrary authority of a despotic ruler. You might have heard of the treaty – it's called the Magna Carta.

And just a word about the function of different tiers of government in England [SLIDE 4]: Only parliament makes statute law – Acts of Parliament (and the courts make case law). Social workers are employed by councils with social services responsibilities (the majority) or by independent agencies (both charitable and commercial bodies) funded by the council. As such, they are working under the legal rules described above, as a result of their employment status.

I first encountered the legal rules that underpin social work when, as an assistant social worker, I took part in the compulsory admission to psychiatric hospital of a sensitive and engaging young man in his 20s whose delusional thinking posed great risk to his mother's life. I was curious about the nature of the authority by which I could curtail someone's liberty before they had caused any harm.

So I was drawn in to this question of the law/social work relationship, and have spent a good part of my academic and practice career exploring how it works. And it is in the twin areas of child and adult protection that the most precarious balance

must be found between respecting an individual's right to self-determination and exercising a duty of care that upholds their human dignity.

So, what does our research tell us about the law/social work relationship?

First, law is often seen as central to what social workers need to 'know'. In the UK, for example, social work students must gain experience of statutory interventions in their training; the Health and Care Professions Council says *"they must be able to practise within the legal and ethical boundaries of their profession"*. The College of Social Work says social workers must understand *"the legal and policy frameworks that inform and mandate social work practice"*. They must *"understand how legislation and guidance can advance or constrain people's rights"*. Yet these simple statements hide a wealth of complexity. If we think back to the social workers in those examples I gave at the beginning, their legal and ethical deliberations resulted in very different courses of action in each case. But the place of law in social work is contested [SLIDE 5].

Some have gone as far as to say that law is at the heart of social work, that if we follow the legal rules, we will get to where we want to be. Thirty years ago a senior barrister chaired the enquiries into the deaths in England of a series of children known to social services. He maintained that if the social workers had done what in law they were meant to do, the children would not have died. He also said [SLIDE 6]: *"We are strongly of the view that social work can, in fact, be defined only in terms of the functions required of its practitioners by their employing agency operating within a statutory framework"* (Blom-Cooper, 1985, p. 12). Yet he was challenged by a senior social work academic, Professor Olive Stevenson: *"The image of the social worker as 'agent of the law' is ... partial and dangerous. For it encourages a view of professional competence which rests solely or mainly on an ability to interpret and execute legal requirements"*; instead, *"at the heart of social work is an ethical duty of care"* (Stevenson, 1986, p503).

The polarising debates have continued [SLIDE 7]. *“Professionals involved in child welfare are not moral crusaders; they are empowered in law to act in certain prescribed situations in certain prescribed ways, no more, no less”* (Platt and Shemmings 1996); versus *Law cannot be substituted for sound professional practice; critically social workers need to abide by a code of ethics and set of practice principles that are over and above what the law may offer”* (Johns 2009).

Why is this a problem? Because we know that the complexity of human need is such that there can be no rules on whether what could be done should be done in each and every individual case. All we have are powers and duties that can be exercised in particular circumstances, not a set of instructions about what to do in the life of *this* child, or *this* older person. And that was the position I took, back in 1990 when, along with my colleague and partner Michael Preston-Shoot, I joined the debate [SLIDE 8]; we argued that the polarised positions gave a simplistic, falsely comforting view, distorting the realities of practice. Instead, social work sits uncomfortably between the two, and requires a dynamic balance between legal and ethical rules.

The second think the research tells us is that social workers are ambivalent about the law [SLIDE 9]. Social work students get seduced by its promise: “here at last, amidst all the uncertainty of social work, we’ll find some clear rules on what must be done when”. But at the same time, law and legal processes are seen hostile, associated with actions to restrict liberty and coerce clients – which indeed it can do. They reject it as inimical to the empowerment goals of social work. And some have described it as “a big stick to beat social workers with”, a source of intense stress, an arena in which social work has limited credibility and status. Students find it one of the most difficult and technically challenging aspects of their learning, and they know just as soon as they’ve learnt it, it will change, and their knowledge will be out of date.

Why is this a problem? Because legal rules, as well as giving powers to coerce, also contain key mandates for the promotion of social justice (for example, through provisions on equality and discrimination), and of human rights (for example in the

UK through the Human Rights Act 1998). If we keep law at arm's length through fear, or reject it through false assumptions, we miss the opportunity to use it proactively in pursuit of human rights.

Third, [SLIDE 10] we know from our research that social workers in practice are likely to place greater reliance on their employers' procedural guidance – on “the way we do things round here” - than on their knowledge and understanding of the legal rules. That ‘law talk’ is missing from social workers' narratives about the decisions they make.

Why is this a problem? Because employers such as state social services are struggling to make ends meet; they may cut corners and deny people their entitlements because of lack of resources. Yet legal knowledge can be used to challenge withdrawal of services on resource grounds alone, and a profession that sees its mission as being to promote social justice and human rights cannot afford to ignore such a valuable tool as the rights that are enshrined in law.

So what is behind these findings? [SLIDE 11] Let's look first at how we might explain the belief that law is the main pivot of social work. We live in a society that is hyper-attuned to danger and risk. The growing reliance on rule systems and rule-following practice can be seen as a product of these fears; rules become a source of comfort and security. They help us believe that something can be done, that risk can be contained, hence we regulate, and regulate some more. And the danger is that work dominated by legal rules becomes a technical activity, shaped by tools like risk measurement checklists) to predict and control social problems, limiting the scope for exercising professional discretion based on ethical and analytical engagement. It can be reduced to the process of gathering ‘evidence’ to take into the legal arena. [SLIDE 12] *“Legalism ... involves the superimposition of legal duties and rights upon therapeutic and preventive responsibilities ... the rule of law as judged by the court takes priority at the expense of other considerations, including that which might be deemed by the professionals as optimally therapeutic or in the best interests of the child”* (Parton 1991). This of course is an over-simplification that takes no account of

the extent to which law engages with civil and political rights, or the fact that the proper exercise of discretion is a fundamental administrative law principle. And of course we know that the existence of legal rules guarantees nothing; the social workers in the cases of Baby Peter and the Cleveland children were working under the same legal principles, yet the outcomes were so different.

Second, an explanation for apprehension about law among practitioners and students may be the nature of the legal rules themselves [back to SLIDE 11]. While law often supports social work goals, at times it is genuinely incompatible with professional morality. One example are asylum and immigration rules in England, which leave asylum seekers without any social support and without the right to work in order to support themselves, resulting in circumstances of appalling destitution, a position judged by our Supreme Court as breaching article 3 of the ECHR (the right to protection from inhuman and degrading treatment). And at times the law is silent, adding no features to our map. My recent research on social work responses to extreme self-neglect shows that when an adult with mental capacity chooses a lifestyle that demeans their dignity, powers and duties to protect are absent from our legal framework. So social work's ambivalence about the place of legal rules in its practice is in part justified; working out its relationship with law requires more than knowledge, it requires critical analysis and negotiation of the nature of interface between legal and ethical rules.

Third, an explanation for our findings about reliance on employer procedures is the organisational context of social work practice. *"The profession of social work hovers in uncomfortable places, always caught between transformative aspirations and bureaucratic constraints"* (Beddoe 2010). We must consider how this environment influences how social workers use their legal knowledge to challenge those constraints. Where do we stand when we know that the financial allocation made to an older person for their care arrangements is insufficient to meet the needs we've assessed them as having? Where do we stand when we are told to close a case because we are making no progress in persuading a self-neglectful person to accept some help as in the case of JayKay earlier? We know that building that relationship is

a slow process; the organisation cannot afford for us to spend the time. It takes courage as well as knowledge to challenge,

So, back to that long and winding road – how can social workers equip themselves for the journey?

I talked earlier about legal rules being features on the social work map. We clearly, therefore, need to know how to map-read [SLIDE 13]. Anyone who has placed their trust in a satellite navigation system only to find themselves driving along the bed of a stream will know the value of using skill and judgement alongside technology. So how can the legal features on the map help us to exercise our professional judgement? [SLIDE 14]

Well, **law can help define our destination** – the outcomes we seek from our intervention. For example: in the UK the Children Act 2004 spells out five outcomes for children's wellbeing, which services should seek to achieve; our Children Act 1989 talks about the goal of safeguarding and promoting the welfare of children in need; our new Care Bill, likely to become a Act of Parliament next year, sets out the general duty to promote individual wellbeing of adults in need of care and support. And the law identifies some of the ways to reach those destinations: the duty to investigate significant harm of a child, or to assess a vulnerable adult's need. **These are the main roads on the map.**

Other documents, such as codes of practice, provide some of the **minor roads too**, often setting out alternative routes and advising on how to choose the best one in particular circumstances. For example, we have at least 3 ways of ensuring that we provide appropriate care and treatment to someone who lacks the mental capacity to give their own consent. The Code of Practice to the Mental Capacity Act 2005 tells us when each might best be used. And we have case law – judicial decisions made in court cases that have considered difficult and contested situations, which sometimes provide precedent that we can look to in similar situations.

As well as major and minor roads, law provides some of the landmarks that we'll find on our journey – things we need to look out for to reassure ourselves we're on the right route: the definition of significant harm that would lead us to act, the markers of a lack of mental capacity that would lead us to make decisions based on the person's best interests. It shows us the lie of the land: the high ridges of human rights principles that we must keep in our sights - the right to private and family life, the right to liberty, the right to a fair hearing; principles that are sometimes embedded in legislation, such as the Mental Health Act 1983 (amended 2007), and the Mental Capacity Act 2005 (for example the presumption of capacity that must be applied, and the right for someone with capacity to make unwise decisions). **It provides the contours** of administrative law, setting out the qualities that social work decisions must demonstrate. It can **define too some of the obstacles** we will encounter – discrimination, poverty, inequality, homelessness, violence – and **mark out the bridges and crossings** we can use to navigate round them.

But maps pose challenges too:

- The map is a map, it is not the territory, merely an attempt to describe to ourselves the landscape we inhabit; things look different down there in the “swampy lowlands” of practice – using the map requires a change of perspective to apply the legal rules to what we observe on our journey;
- To understand the features on the map, you need to know how to understand those contours and symbols in order to interpret their meaning on the ground – legal terminology is a challenge, but not an insurmountable one;
- The map may be undeveloped in relation to some parts of the territory we're travelling through, as is the case with adult protection in England, where no duty to investigate yet exists. This doesn't mean that adults are not being safeguarded – it means that law has not yet caught up with practice;
- We forget to consult the map or we get lost, seduced by alternative destinations, deterred by the scale of the ascent; or we experience things the map cannot show us (mist and bad weather, poor leadership, wrong advice).

[SLIDE 15] And even if we have a compass, it's not simple. There are 3 versions of North – magnetic, grid and true. The magnetic variation between true and magnetic north varies from year to year, and from location to location. You have to remember whether to add or subtract the magnetic variation to your bearing (i.e. angle between north and your direction of travel). You have to have at least a rough idea of where you are. You might just have forgotten that your compass reading will be affected by that penknife in your pocket, the buckle on your belt, your mobile phone.

Does this begin to sound just a little like social work practice?

So how to we make sense of all this and find our way through our decision-making journey?

We're social workers, not legal practitioners; social work is the field of practice, as well as its academic discipline. It's probably helpful, instead of seeing law as 'received knowledge' (Osmond 2005), to engage with law as interpreted and practised in the professional context [SLIDE 16]. The concept of *law in between* (Jenness and Grattet 2005) is useful – the stage between intention and practice; legal rules are given meaning through localised interpretation and application. So we're talking here about 'situated knowledge', contextualised by the circumstance in which it's used, and potentially transformed by that context. The context changes the particular components in the mix at any one time – for example the balance being struck between observance of competing human rights, and the notion of what might be a proportional intervention, and so on. So in child protection cases we see social workers having to balance the right of the parent to private and family life against the right of the child to protection against inhuman and degrading treatment. The latter is an absolute right, and could be argued to take precedence provided the evidence is strong enough; a proportionate response could be removal of the child, in effect breaching both the parent's and the child's right to private and family life. But where the evidence of significant harm is less compelling, and protection of the child could be achieved less invasively, then the child's removal

would be disproportionate, and the social worker might rely instead on legal powers to provide family support services.

Or we can see the space between the two disciplines of law and social work as a kind of contact zone, where symmetrical relations are played out – an **'interdiscipline'** (a term used in relation to translation studies) to describe what is created in the space between clearly defined territories. This is quite an attractive concept, because what is created is greater than the sum of the parts. Neither social work nor law alone can solve social problems but they share concerns for human relationships and the rights and responsibilities that govern them. Thus we have law providing leverage and social work providing agency (Grodovsky 2007) in a kind of 'uneasy interdependence' that emphasizes the(ir) dynamic, mutually transforming relationship (Dickens 2008).

So my argument is that social work's relationship to law is a little like the relationship of the ground to the map. We take our map and compass with us, but out there we have to interpret what they tell us, and sometimes we have to continue when the map runs out. In effect each decision-making journey is inevitably guided and influenced by legal rules, but that it's the territory and the conditions we meet en route that determine how we travel.

And like all travellers, we approach the journey, and use our map, in different ways. Some hill walkers carry their map in their hand, consulting it every step of the way; they know from its features what to look out for on the ground, and can spot that next turning, and steer us round that marsh, or away from that precipice. The danger is they see only what they're looking for.

Others leave the map in the bottom of the rucksack, preferring to experience what they see in the terrain around them. They might use other means of navigation – the sun or the stars – or a sense of what feels the right way to go, or which looks the most interesting track. They may have even walked this way before. The danger is

that what they knew before may have changed, and that attractive path may lead straight over the edge of the cliff face.

As it is with travellers' use of maps, so it is with social workers ways of using law in their practice. We know from our research that there are different orientations to law [SLIDE 17]:

- Some take a **'rational technical' approach**, in which the legal rules are the driver of intervention; evidence is sought that fits legal definitions; technical knowledge is prioritised so that we can *do things right*, map in hand.
- Some take a **'moral/ethical' approach**, in which the search for ethical practice is the driver, determining *the right thing to do* by reference to professional morality, taking the map out of the rucksack only if the way forward is unclear;
- Others take a **'rights/justice-based' approach**, in which law is a resource for securing user and carer rights; legal rules for challenging inequality and injustice, securing resources and building capacity are prioritised. So only some parts of the map are paid attention to.
- And, as mentioned earlier, once in practice, it's **employers' procedures that are likely to be followed** – so the map doesn't even get into the rucksack and is left on the shelf. Here's one fieldwork educator of social work students talking: *"I've often said to social work students, when you're qualified you really can't go out there and change the world, you can only work within the requirements and statutes that your local authority allows you to."*

These four orientations are neither right nor wrong in themselves; they can perhaps be likened to points on the compass – ways of naming and understanding approaches that assist the travelling social worker to identify and keep their bearings. We need to be able to locate North, South, East and West; thus we need rational/technical knowledge, moral/ethical sensibility, rights-based thinking and to know what our employer's procedure is. But we must synthesise these approaches on each particular journey. This skill is what we have termed "law literacy" [SLIDE

18], where social workers engage critically with a discipline that is not social work but that provides navigational tools for a profession undertaking complex and uncertain journeys. Here are the building blocks of law literacy [SLIDE 19].

None of this is to excuse real failures of care: Earlier this year Gloria, aged 81, who was totally dependent for her personal care on visits from a care agency, received no visits, and hence no food, for 9 days. The agency had been closed down by the UK Border Agency because it employed illegal workers; social services were informed, but somehow took no action to make arrangements for Gloria's care. She died in hospital having been discovered starving and lying in squalor. Here there was gross disregard of common sense apart from anything else, and certainly a breach of a duty of care. Worse, it has emerged that during the investigation that followed Gloria's death, a social worker claimed to have made a phone call to Gloria's home to check out her wellbeing, which the police, working with the phone company, have proved was never made. Clear breaches of both legal and ethical duties are completely off the map, and should form no part of our practice.

Think back to Baby Peter, JayKay, the Cleveland children and Katherine, with whom we started this talk. I would argue that their cases are qualitatively different from Gloria's. The practitioners were working within the legal rules, trying to do things right; they were doing what they thought was the right thing to do, they were observing people's rights. Yet something went wrong on the decision-making journey: perhaps they didn't consult the map; perhaps they did consult the map but found the features of their journey didn't figure on it; perhaps they were failed by poor support structures within their organisation. Perhaps, in trying to respond proportionately to Baby Peter and JayKay, they failed to notice that the landscape had changed, or a storm was brewing - that the threshold of serious harm had been reached and overtaken, requiring them to raise their game. And in intervening with the Cleveland children, and trying to keep Katherine safe, they had listened exclusively to the 'protection imperative', perhaps failing to conduct a proper balance of the evidence or, in Katherine's case, properly observe the legal rules on assessing mental capacity.

Finally, social work, as Lorenz (2000) says, “has to constantly renegotiate its position in its host state nation”. While I have focused on the context with which I am most familiar, I invite you to populate my argument with examples from your own. There is much to be gained by global awareness and connectedness; legal mandates for social work vary considerably around the world, and that variability reminds us that the social work/law relationship will change with location. But there are some constants too. Our individual journeys are above all driven by a deep engagement with injustice and exclusion, and a commitment to action that seeks to ameliorate lived experience. But we have to be clear about the authority we have to intervene and where that authority comes from; and we have to be clear about the reasoning that determines how it is to be applied in each individual circumstance. I hope this talk has gone some way to drawing you a map to help you on your way. Thank you.

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Body of work on social work law

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