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THE LAWYER AND THE SOCIAL WORKER—COMPATIBLE CONFLICT

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TWO-THIRDS of a century has elapsed since Justice Holmes, in an address to the law students of Boston University,¹ suggested that, although lawyers and judges at the time too frequently failed to appreciate the significance of social issues in legal controversies, the lawyer of the future would be well grounded in the social sciences.² Within that sixty-six year period our courts, at various levels, have demonstrated an increasing tendency to utilize the findings of the social and behavioral sciences as legally determinative factors in the judicial process. This may be attributed in part to the predominance of juristic pragmatism or legal realism in American jurisprudence; quite possibly it is simply a development naturally concomitant with wide popular acceptance of recent advances in socio-economic and socio-psychological theory.

In the endless search for solutions to legal-social problems (a mode of inquiry singularly suited to the courts) the necessity of combining social and legal remedies has been recognized, particularly in problem areas related to basic social institutions. The recognition and acceptance of this principle has led to the inauguration of the Family Court as a social-legal instrument. It is within this court structure that lawyers will more frequently than ever before come into contact with social science philosophies and methodologies, and specifically with those of the relatively new profession of social work.

Social work, unlike the legal profession,³ is not clearly understood by society in terms of its professional functions and responsibilities.⁴ There is a failure to distinguish clearly between social work and social welfare.⁵ And, despite almost fifty years of social services, expanded "above the poverty line"⁶ to individuals in every socio-economic level, there persists a popular image of the social worker as the "toter" of groceries to the economically depressed, reminiscent of a classic characterization of social workers as "the wrecking

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1. Holmes, *The Path of the Law*, Jurisprudence in Action 287 (1953).

2. Holmes referred to economics rather than social science, but the suggestion is implicit. Holmes, *op. cit. supra* note 1, at 288.

3. But see Riesman, *Toward an Anthropological View of the Law and the Legal Profession*, Individualism Reconsidered 440 (1954).

4. For an indication of the plethora of efforts encompassed in the phrase "social welfare," consult the list of affiliated organizations comprising the National Social Welfare Assembly, Inc.

5. Social welfare is a broad field of concern comprising a variety of efforts in which several professions are engaged. Social work, far from being synonymous with social welfare, is but one of the professions involved in social welfare pursuits. Like other professions it utilizes specific methods and processes, differentially and appropriately, in carrying the functions and responsibilities which comprise its unique contribution in the field of social welfare.

6. Ferguson, *Social Work, An Introduction* 70 (1963).

crew that attempts to salvage the derelicts produced by our economic system."⁷

A number of factors have contributed to the lack of understanding and clarity from which such misconceptions have developed. One of these factors relates to the origin and evolution of social work practice.⁸

Social work has been aptly referred to as "humanitarianism in search of a method,"⁹ and humanitarianism as "devotion to the welfare of all human beings."¹⁰ Undoubtedly all service-oriented professions obtain common linkage in the humanitarian impulse.¹¹ Their practices and methodological directions, however, must necessarily differ, since their peculiar *raison d'être*, their historical evolutions, and their theoretical bases¹² necessarily differ.

Social Work—An Historic Perspective

Social work has traditionally been identified with a concern for the underprivileged, the unfortunate. This appears to be a logical identification since social work practice developed in response to social disorganization, and its concern was with those persons whose social functioning was hindered or undermined by this disorganization.

A brief review of the evolution of social work suggests that the extension of social disorganization and the related expansion of social work practice have developed in response to the increasing complexities of our industrialized-urbanized society.¹³ Many factors are operative in the transition from a "folk society"¹⁴ to an industrialized-urbanized society; and disorganization at many levels of societal structure is an inevitable effect of basic change in the socio-economic system.

Every society, from the most primitive, pre-literate to the most advanced and sophisticated, has devised various institutional arrangements and forms of association for the purpose of meeting the biological, emotional and social needs (variously defined) of its members. Under conditions of stability these arrangements and associations become traditional cultural patterns about

7. 2 Barnes, *The History of Western Civilization 966-67* (1935).

8. For excellent discussions of purpose and evolution of social work see Bisno, *The Philosophy of Social Work* (1952); Cohen, *Social Work in the American Tradition* (1958); Bruno, *Trends in Social Work 1874-1956* (1957); and Robinson, *A Changing Psychology in Social Case Work* (1930).

9. Cohen, *op. cit. supra* note 8, at 2.

10. Cohen, *op. cit. supra* note 8, at 3.

11. "Probably all professions would stake out an interest in these same objectives, (economic well being, or a health and decency standard of living and satisfying social relations), but there is little doubt that social work occupies a peculiarly inclusive position in regard to both. For the social worker the problems involved in economic well-being and social behavior are usually interwoven. It is this essentially dualistic relationship which consistently has shaped social work and gives it its distinguishable if not yet wholly distinctive pattern." Hamilton, *Theory & Practice of Social Case Work* 4 (1940).

12. The primary behavioral theory on which social work practices are based comes from sociology, psychology, economics and social-psychology.

13. For a detailed discussion of social welfare in the context of social change, see Wilinsky and Lebeaux, *Industrial Society and Social Welfare: The Impact of Industrialization on the Supply and Organization of Welfare Services in the U.S.* (1959).

14. See generally Redfield, *The Folk Society*, 52 *Am. J. of Sociology*, 293 (1947).

which some anthropologists have written extensively. Under the impact of change, however, many of the intricate patterns of interrelationships, interdependencies and responsibilities become ineffective, and new patterns must be devised. It is in these circumstances of cultural upheaval that social work practice has developed, attempting on the one hand to remedy or at least ameliorate conditions of "unmet" human need, and on the other to formalize new institutional arrangements and associations devised to meet unsatisfied need where necessary, and preclude its development where possible.¹⁵

It can be said that social work developed without format or theoretical base. Its direction evolved from a series of human crises brought on by cultural change, and its inspiration derived from the humanitarian base of the Christian-Judaic tradition.

In England and America the practice of social work originated in the 19th century as a protest against the current methods of dealing with the indigent.¹⁶ At its inception, then, its focus of concern was in areas of social disorganization and malfunction which derived from economic dependency. With time, social work practice expanded its focus to encompass problems associated with other kinds of dependency,¹⁷ the dependency of the child, the dependency of the mentally ill and retarded, the dependency of the aged and infirm.¹⁸ Implicit in this expansion of practice was a growing concern with problems not only of economic distress, but also of social deviance and personal-emotional disequilibrium. Social work practice in these problem areas became possible only as society became more broadly concerned and translated its concern into pertinent social legislation. Thus, much of social work practice today was originally given legislative fiat in the reform legislation during the first four decades of the twentieth century.¹⁹

Although social work originated under private auspices, the bulk of its practice today is under public authority.²⁰ Social services have become an integral part of society's preventive and rehabilitative programs in the area of human welfare, and they are available in a variety of settings under both public and private direction.²¹

15. For discussion in greater depth as to the place of social work as an institutional arrangement of society compare Wittmer, *Social Work, An Analysis of An Institution* (1942); Chapin, *Contemporary American Institutions* (1935).

16. Wittmer, *op. cit. supra* note 15, at 127.

17. See generally Robinson, *A Changing Psychology in Social Case Work* (1930).

18. These areas of dependency concern have been identified as fields of social work practice, *e.g.*, Child Welfare, Public Assistance, School Social Work, Psychiatric Social Work, Medical Social Work, and Family Social Work.

19. For explicit discussion of social concerns and reform movement after the turn of the century see generally Abbott, *Some American Pioneers in Social Welfare: Selected Documents with Editorial Notes* (1937); 1 Sherwood, Roosevelt and Hopkins (1950); Cohen, *op. cit. supra* note 8; and Lurie, *The Development of Social Welfare Programs, Social Work Year Book* (1960).

20. In 1960, 63% of all social workers worked for federal, state or local departments according to Bureau of Labor Statistics Report, *Social Work Education*, Vol. 9, No. 3, June 1961, p. 6.

21. For the most current listing of all public and private agencies at national level

Social Work—A Practice Perspective

Social work has been multifariously defined by leading scholars in the field. One of the more recent definitive efforts views social work as "the art of bringing various resources to bear on individual, group, and community needs by the application of a scientific method of helping people to help themselves."²² Implicit in this and in similar definitions are certain basic assumptions, rooted in philosophy and behavioral theory, which underlie the entire process, purpose, and methodology.

One of these assumptions is a belief in the worth of every human being regardless of race, creed, intelligence level, or socio-economic circumstance, a concept of worth related to human ethics rather than material productivity. In this context the facts of objective reality have no relevancy except in the assessment of individual potential or limitations at a point in time at a given place.

Another assumption is that society has established norms in terms of "needs," and expectations in terms of their minimal satisfaction. Deviation and non-fulfillment can only be discerned on the basis of norms and expectations. The recipients of social services comprise persons, as individuals or groups, who for some reason deviate from their own or society's expectations of social role performance.²³

A third assumption underlying this definition of social work is that help is most meaningful and effective when the individual toward whom it is directed is involved in the helping process. This is a many faceted assumption.²⁴

Diagnosis in the social work process comprises not only definition of the problem which requires amelioration or resolution, but also assessment of those assets and liabilities which will affect problem resolution. Treatment consists primarily of attempts to mobilize assets, eliminate or minimize liabilities, and marshal resources pertinent to the problem-solving task. Inherent in this concept is the belief that growth and change are possible. The specific treatment methods of social work are identified as social casework,²⁵ social group

see Social Work Yearbook, 1962. The major settings which encompass social services include: family counseling agencies, child guidance clinics, psychiatric clinics, schools, institutions for children and adults, medical hospitals, public assistance departments, child welfare agencies, courts. For detailed discussion of services in these settings, see Ferguson, *op. cit. supra* note 6, ch. 3-11.

22. Stroup, Social Work (1960).

23. For exposition of the sociological concept of "social role" and its contribution to the development of social work practice theory, see Perlman, Social Casework: A Problem-Solving Process (1957); Perlman, *Role Concept and Social Casework: Some Explorations*, 35 Soc. Service Rev. 17 (1962).

24. This concept is emphatically stressed in social work literature today and stands in marked contrast to any earlier view of social work practice as something done *to* clients. See Perlman, Social Casework: A Problem-Solving Process 58-60 and ch. 6 (1957).

25. Social casework is the method of social work which is concerned with helping *individuals* cope more effectively with their problems in social functioning which may be either internally or externally engendered. As process, it has been described as a combination of art and science merged into a problem-solving methodology which is rendered effective by a one-to-one relationship of purposeful, therapeutic intent.

work,²⁶ and community organization.²⁷ Each of these treatment methods, although linked to the others by a shared methodological base, has developed specialized techniques singularly appropriate to its focus.

As indicated, practice developed empirically in response to "need" which became explicit via crisis situations and humane enlightenment. In its inception, then, there was no theoretical base upon which practice expertise might have been developed; nor was there a clearly defined frame of reference regarding purpose or goal which might have given appropriate form and direction to program expansion.

The fact that social work practice existed long before the establishment of professional standards of training has created an additional complication—a wide disparity in educational qualifications among practicing "social workers." The overwhelming majority of social work practitioners are not professionally trained, and of these untrained practitioners many are not even college graduates; in fact, a significant percentage have had no formal college training at all.²⁸ Undeniably this has distorted the public image of what social work is and what social workers do. Confusion is compounded by the fact that some positions in social work do not appear in the public view to bear any relationship to educational attainment. It is not uncommon, for example, to find positions at even the highest levels of responsibility and authority manned by workers representing all levels of educational qualifications, particularly in those agencies which are governmentally sponsored.²⁹

Some Conflicts Between Law and Social Work

Although a distortion in the public image of social work may impede advances in social welfare programs generally, the specific attitudes of the

26. Social group work as a method is concerned with helping individuals, not in their insularity, but as integral, functioning members of a small *group*. Much of the theory and purpose underlying the group work method derives from sociological and psychological theory regarding the significance of small group interaction in personality development and social functioning. As in social casework, the purpose of any group work effort is related to problem identification, but the focus of treatment is group rather than individual.

27. The community organization method is concerned with bridging the gap between *community* need and community resources. As in the other methods, problem identification is an integral part of the process, but treatment focus is more broadly directed to problems in the social structure or institutional arrangements in the community. It attempts to direct community concern about broad social problems and inadequacies in the social structure into action aimed at resolution of these problems, and elimination of structural inadequacies.

28. The first formalized educational program for social work in this country was established in 1898 in what is now the Columbia University School of Social Work. At the present time there are sixty-one accredited schools of graduate social work in the country, and thirteen schools offering advanced programs leading to the degrees of Ph.D. or D.S.W. For information regarding location of schools, enrollments and degrees offered, see Council on Social Work Education, No. 62-42-12 (1962). Professional education for social work comprises two years of post-baccalaureate education leading to a master's degree. With some slight variation, the curriculum is equally divided between formal classroom instruction and clinical experience. For content of curriculum, see *The Curriculum Study*, CSWE (1959).

29. According to the Bureau of Labor Statistics, Vol. 9, No. 3, 1961, in 1960 there were 105,531 social work practitioners in the U.S. Of this number, only 21% were professionally trained for their positions and 9% did not have any college training at any level.

THE LAWYER AND THE SOCIAL WORKER

participating professions toward each other must be the primary concern of those who would resolve socio-legal problems in an inter-disciplinary setting such as the Family Court. What is the lawyer's view of social work, and, conversely, what is the social worker's view of the law and lawyers?

Thirty years ago a legal writer observed the critical judgments of social workers with regard to the law and the legal system and enumerated them as follows:

- (A) Social workers contend that the law is a body of rigid, arbitrary, artificial rules creating red tape instead of solving problems.
- (B) They also claim that the law is antiquated in its conception. It is said to resist change, and therefore, to ignore modern problems.
- (C) They also urge that those who administer the law are to a large extent not socially minded.³⁰

It is suggested that similar criticisms are not infrequently voiced by practicing social workers at the present time.³¹

It should be noted that social workers are not themselves immune to criticisms raised by members of the bar. A member of the Michigan bar drew up the following six count indictment of social workers:

First: Personal rights created and recognized by law are too often either unknown, forgotten or ignored by social workers.

Second: Social workers are too credulous toward their wards or charges, and too suspicious of adverse claimants, forming beliefs on slight evidence which cannot be shaken by stronger evidence to the contrary.

Third: They are influenced too much by ideals and not enough by practical considerations.

Fourth: Information obtained in confidential relations is not properly guarded.

Fifth: They arrogate to themselves the control of other people's affairs, without solicitation or consent by the persons being managed.

Sixth: They give out too much legal advice.³²

30. Bradway, *Social Work and the Law* 21 (1929).

31. A questionnaire designed to explore social worker attitudes toward the law and lawyers was submitted in October 1962, to 42 second year students in the State University of New York at Buffalo School of Social Welfare. The results indicated attitudes roughly equivalent to those observed by Bradway in 1928. One unanticipated addition was the criticism that lawyers did not know the law in social welfare areas.

32. Wesner, *A Lawyer Looks at Social Workers*, 1925 Survey 585. As a specific answer to the first charge it can be said that the value system and ethics of the social work profession are deeply rooted in the democratic ideal of the basic worth and dignity of man and in the concept of the inalienability of personal rights which preserve that worth and dignity. It is probable that what has been interpreted by lawyers as the ignoring or forgetting of personal rights by social workers reflects, rather, a difference between legal and social work opinion regarding personal right priorities in specific case situations. Whether the rights of parents or the rights of children should be paramount in a custody case, for example, does not have an absolute answer. Frequently the lawyer and social worker, by virtue of their different orientations and purposes, are in opposite corners on this question in specific cases. It is suggested that on matters involving personal right priority, one would not find inter-professional unanimity in either the law or social work.

It is submitted that many of the criticisms of both professions represent misconceptions which can potentially be clarified and eliminated by a sharing of information and knowledge. The remaining counts would appear to require substantiating research before acceptance, since by their nature and implication they are suggestive of behavior contrary to the theoretical base and ethics of the profession involved. Nevertheless, such criticisms, valid or not, reveal attitudes that should be examined.

From the lawyers' point of view it seems apparent that frequently social workers, trained as well as untrained, experience discomfort and difficulty in a legal setting. These experiences may derive from unfortunate preconceptions or from lack of knowledge concerning the nature of the legal system and the role of the lawyer in this system. The social worker tends to equate the law with lawyers in the same manner as the public fails to distinguish social welfare from social work. Frequently the inadequacy in law is attributed to lawyers rather than to the legislative process from whence it came, a process in which the social worker and lawyer share equally on the basis of citizen responsibility.

Within the judicial system, particularly within those specialized courts charged with primary jurisdiction over juvenile and family problems, social workers have tended to view formal legal procedures as inappropriate, time consuming and as obsolete technicalities, designed, in part, to perpetuate the lawyers' craft. They have contended that legal procedures, if rigidly applied, complicate and impede the diagnostic and dispositional processes involved in the treatment of social disorders. The significance of the fair trial concept, comprising sequential, formalized safeguards essential to due process, may not be as clearly evident to the inexperienced or untutored social worker as it is to the lawyer versed in the adversary system.

Resolving the Conflicts

A considerable number of social work practitioners are involved in actual contact with the legal profession and the courts. If they are to function effectively within the legal framework, they cannot maintain the attitude attributed by David Riesman to some sociologists, an attitude ". . . whose aim is to show up, perhaps to change, the law and the legal mentality rather than to understand it sympathetically."³³ To insure inter-disciplinary compatibility "the social worker must understand the limitations of the law as well as the possibilities which law provides for meeting a particular situation. On the other hand the attorney should have an appreciation of what the caseworker or groupworker is trying to accomplish with a given client."³⁴

Social workers will in all likelihood have accumulated most of their

33. Riesman, *supra* note 3, at 444.

34. Zuckerman, *Law and Social Welfare*, 24 *The Jewish Social Service Quarterly* 142 (1947-48).

practical legal experiences through involvement with problems requiring the specialized services of a family court, or a court with similar functions and jurisdiction. However, although such courts make use of procedures encouraging informality, privacy, and non-contentious hearings, they are only subordinate components of the larger judicial structure which is designed to operate with the adversary system.³⁵ While there has been criticism, by lawyers as well as social workers, directed at the use of such methods in these specialized courts,³⁶ judicial determinations in all of our courts are accomplished through essentially adversary proceedings.

Since the adversary system requires an impartial judge, the responsibility for investigation, proof and argument are necessarily placed upon the parties seeking judicial relief or opposing it. With appropriate training and experience the social worker will distinguish the methodological differences between obtaining "legal facts" and obtaining informational data for casework problem solving.³⁷ Consequently it may be anticipated that the reasons for rules of evidence and procedure will become apparent; with this added knowledge the concept of "fair hearing" should gain increased significance.

Having attained this level of sophistication in legal perspective the social worker should appreciate, with Dean Roscoe Pound, ". . . the importance of the ethos of judicial adjudication—of open hearing of both sides with full disclosure of the case to be met on each side, of acting upon evidence of logically probative force, of care not to combine the positions of accuser, prosecutor, advocate of the complainant, and judge, and of a record from which it can be seen what has been done and why, and of possibility of review before an independent bench of judges in order to secure constitutional and legal rights"³⁸—a point of view with which he might have at one time disagreed.

It would seem that much of the apparent conflict between law and social work which has imposed barriers to productive inter-disciplinary cooperation can be dispelled through mutual enlightenment.³⁹ This is fundamentally an educational problem. The process can be accelerated through organized pro-

35. For an excellent presentation for the lay reader, see Fuller, *The Adversary System*, Talks on American Law 30 (Berman ed. 1961).

36. Schinitzky, *The Role of the Lawyer in Children's Court*, 17 Record of N.Y.C. B.A. 24 (1962).

37. Fact-finding methodology is related to two primary factors: (1) the purpose for which the fact-finding is intended; and (2) the delineation of what facts warrant finding. In social work the purpose of this activity is to give direction to treatment planning and method selection. And "facts" for social work practice comprise feelings and attitudes as well as objective reality. Since this purpose and definition of "fact" are different from their counterpart in the legal profession, one would anticipate difference in fact-finding methodology.

38. Pound, *The Place of the Family Court in the Judicial System*, 5 NPPA J. 166-67 (1959).

39. Since this paper is intended to be a brief introduction to a narrowly focused aspect of the conflict between law and social work, implicit in the title, no attempt has been made to explore areas of conflict which are not compatible nor expeditiously reconcilable. Similarly those conflicts attributable to status seeking or other personal factors and the regrettable lack of lawyer leadership in the creation of social legislation must be examined in another context.

grams at (1) the professional training level, (2) the practice level, and (3) the administrative and planning level.

In the professional schools there should be formal course offerings designed to familiarize the student lawyer and the student social worker with the basic approaches of the other discipline to social-legal problems of mutual concern. To achieve maximum benefits of curriculum "cross-fertilization" such courses should be taught by, or in direct collaboration with, a member of the other profession.

At the practice level there is a great deal of room for improvement of working relationships between the professions. As has been suggested, misconceptions and biases still exist; these must be subjected to clarification and correction in order to reach a level of mutual understanding. In addition to the presentation of legal-social work forums or institutes, the formation of joint committees composed of representatives of local social work and legal professional organizations can establish continuing liaison between the professions.

And at the administrative and planning level there must be organized efforts to clarify principles, to plan programs including legislation when needed, and to gather and distribute information affecting both professions. Such an effort has already been initiated by the American Bar Association and the National Association of Social Workers. In May 1962, the two national organizations formed a National Conference of Lawyers and Social Workers for the stated purposes of promoting understanding and active cooperation between the two professions.

In a very broad sense the ultimate purposes or rationales for the existence of the legal and social work professions are not different. Variations regarding ultimate goals, or philosophical interpretations of them, may be more apparent within each of the professions than between them. One might realistically anticipate this, since both share a common base of ideals, ideas, and historic facts; and both professions are charged with dual responsibilities to the individual on the one hand, and to the larger social community on the other. When a profession assumes such a dual commitment, the practitioner carries a burden laden with conflict potential. And in a profession whose ". . . generalizations of jurisprudence are imperfect and provisional . . ."40 the probability of inconsistencies among the ultimate resolutions of conflict in this dualism is high.

In the Family Court, definition of purpose and method commitment will evolve from precedent and give direction to law and social work in related areas. Undoubtedly some *laissez-faire* decision making by practitioners is necessary to the expansion and enhancement of a profession's accumulation of knowledge and skill, but whether this level of decision making should prevail

40. Cardozo, *The Paradoxes of Legal Science* 9 (1928).

in the judicial determination of social-legal problems raises serious question. On the other hand, an understanding and acceptance of the philosophy and theories of the social sciences should in no sense justify an abdication by the lawyer of his unique professional responsibility and orientation in surrender to the social sciences. Rather, there should be an exhaustive inter-disciplinary attempt by the social worker, law teacher, and practicing lawyer to develop a compatible general philosophy—a jurisprudence of social welfare⁴¹—within which each profession can make its specialized contribution and which might furnish “a greater degree of precision in answers to social-legal problems than we [now] possess.”⁴²

41. See generally Pekelis, *Law and Social Action* (1950).

42. Pekelis, *op. cit. supra* note 41, at 40.