Kentucky Law Journal

Volume 53 | Issue 2 Article 3

1964

The Law and Social Work

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INTRODUCTION

The art of communication is becoming increasingly difficult in this era of over-specialization and fragmentation of learning. It used to be that lawyers were authentic "jacks of all trades," but today perhaps the social worker more nearly fits that description, although both of our professions are split up into specialties. There seems to be a mania for splitting things, whether they be hairs, atoms, infinitives, or fees. Communication failure leads to misunderstanding or impedes understanding, and over-specialization, I suspect, leads to an intellectual provincialism. To a great extent the friction between our professions arises due to corresponding narrow points of view and a failure to understand the problems and perspective of each other's profession. In our quest for technical expertness we may have neglected the art of empathy and thus spawned technicians rather than well-rounded professionals.

Although I would not decry specialization in many fields, and perhaps would regard it as inevitable and socially useful, it is achieved at a high cost in terms of human values. Where we are dealing with human beings and social problems, too narrow a training leads to the error committed by the three blind men from Pakistan who examined the elephant. If our education has consisted of narrow classification of subject matter into tight little compartments, isolated and secure from exposure to outside influences and ideas, the result is a sequestration of knowledge, a "hardening of the categories," and a divorce from reality. Even though we would disagree on the ideal curriculum for a law school or a school of social work, I believe we share an appreciation of the need for an integration of knowledge and experience.

Assuming that we are professionals and persons of good will,

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and that law, social work, and social action are here to stay, it is mutually important that we apprehend the social functions of our professions and examine the image we have of the lawyer and the social worker.[1] For many centuries law has been a craft with inherited traditions and ways of doing things. To understand the lawyer we must consider his education.

EDUCATION, IMAGES AND VALUES

Legal education. In the seventeenth century, after a period of unlicensed open shop practice of law by amateurs armed with prayer books, secularization of the law was reestablished and formal training for the bar became essential.[2] Initially such training took the form of law office apprenticeship, although a few well-to-do sons studied at the Inns of court in London. After the Revolution, Jeffersonian and Jacksonian democracy espoused the notion that any person of good character was entitled to practice law.[3] The first professional and university affiliated law school was founded at Harvard in 1817. It did not amount to much until Justice Story reorganized it in 1829, and its present eminence dates from Dean Langdell's installation of the case method of study in the 1870's.[4]

Now the case method of study in some measure explains how lawyers get that way. Those of you who have participated in its socratic dialogue and unique manner of study and presentation may appreciate how it sharpens analysis and teaches the student to "strike for the jugular." With the possible exception of rigorous training in the subject of logic, I know of no educational equivalent to the painstaking hair splitting of the freshman law course. We contend, somewhat immodestly but I hope accurately, that we teach our freshman to "think straight." But there are side effects. One danger is that the law student may forget that logic is a tool rather than an end in itself. As Holmes once said, "The

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[1] The author has made more extended comments about the legal profession and legal education in Davis, Foster, Jeffery and Davis, Society and the Law, chapters 4, 9 and 10 (1962).

[2] For a significant study of legal education and attempts to infuse social science material into the law school curriculum, see Currie, *The Materials of Law Study*, 3 J. Legal Ed. 331 (1951), and 8 J. Legal Ed. 1 (1955).

[3] For a brief history of the legal profession, see Pound, The Lawyer from Antiquity to Modern Times (1953).

[4] For the history of the Harvard Law School, see Centennial History of the Harvard Law School, published by the Harvard Law School Association (1918).

whole outline of the law is the resultant of a conflict at every point between logic and good sense."[5] If we fail to appreciate that social advantage is the inarticulate major premise for decision, the result may be that the law is dehumanized.[6]

An even greater danger is that the case method of study by separating law from its social context will lead to what Pound has called mechanistic jurisprudence. The Supreme Court of the United States, from the 1890's to 1937, in its development of substantive due process so as to preclude social and economic experimentation,[7] reflected the political value or judgments which flow not only from a laissez faire philosophy but also a mechanistic jurisprudence of conceptualism, that was nurtured by the education of the justices. It was not until his heretical address to the American Bar Association in 1906 that Pound convinced some legal educators that law should be viewed as one means of social control and should be judged, at least in part, in terms of the consequences of decision.

Sociological jurisprudence attracted a few isolated champions from the bench, bar, and the law schools. It remained for Columbia Law School, however, to make an all out effort to integrate the social sciences into the law school curriculum. Under the direction of Leon C. Marshall, a professor of Political Economics, borrowed from the University of Chicago, the Columbia law faculty started extended weekly study sessions in 1926. The thesis was: Since law is a means of social control, it ought to be studied as such, and in order to do that, the law curriculum must be reorganized along functional lines so that the subject corresponds with the type of human activity involved, and the findings and insights of the social sciences, where relevant, must be integrated into the legal materials.[8]

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[5] Holmes, Collected Legal Papers 50 (1920).

[6] "Law must not become too scientific for the people to appreciate its working. Law has the practical function of adjusting every day relations so as to meet current ideas of fair play. It must not become so completely artificial that the public is led to believe it is wholly arbitrary." Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. at 606 (1908).

[7] For a description of the evolution of substantive due process, see Kauper, Frontiers of Constitutional Liberty (1956).

[8] Then Dean Stone described the prospectus for revising the law curriculum as follows: "We have failed to recognize as clearly as we might that law is nothing more than a form of social control intimately related to those social functions which are the subject matter of economics and social sciences generally . . . [that] the (law) student, in order to be adequately prepared for its

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It is not relevant to our present discussion to make extended comment upon the failure of the Columbia study. It is sufficient to point out that after Dean Harlan Fiske Stone left for Washington, the imaginative and ambitious undertaking of the Columbia innovators was abandoned, even though a measure of glory was achieved. From the Columbia study came the format of the modern "cases and materials" that rendered obsolete the old sterile collection of cases. As a bonus, we received several notable inter-disciplinary studies which today have the status of classics.[9] The course of legal education was altered but not revolutionized. Today at our better law schools there are versatile professors who combine technical skill and broad knowledge.

Images. Both the legal profession and social work have been victimized by stereotypes, and, as we know from Thurman Arnold and Stuart Chase, labels can be tyrannical. I may not be full bright but I hope I am forthright if I try to think the unthinkable. My thought is that there are myths which we have confused with reality. To the extent we can safely generalize, I believe we may say that there are few accurate generalizations to be made about the individuals in our professions, as distinguished from the professions themselves as social institutions.

I suppose that the popular image of the lawyer is a mouthpiece who bests an inept district attorney, or at the other extreme, a hypertechnical ribbon clerk or "sea lawyer" who complicates what otherwise would be a serene existence. The social worker fares no better. The myth is that he, or more often she, is a snooping busybody or do-gooder who on the one hand throws away the taxpayer's money, and on the other tries to regiment the lives of the distressed dispossessed. Note that the lawyer conjures up a father figure and the social worker a mother figure, but both are cloaked with parental authoritarianess.

As for the lawyer, I merely would point out that the trial lawyer is no more the prototype of the legal profession than the

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(Footnote continued from preceding page)
study ought, not only to have good mental discipline, but he ought to have a thorough-going knowledge of the social functions with which the law deals." Stone, *The Future of Legal Education,* 10 A.B.A.J. 233, 234, (1924). See also Stone, *Some Aspects of the Problem of Law Simplification,* 23 Colum. L. Rev. 319 (1923).

[9] For example, Jerome Hall's Theft, Law and Society (1935); Berle and Means, The Modern Corporation and Private Property (1934); and Llewellyn and Hoebel's The Cheyenne Way (1941).

brain surgeon typifies medicine. Over 90% of criminal cases involve guilty pleas, 96% of New York divorces are uncontested, and less than 5% of personal injury cases go to jury verdict. Whole industries resort to arbitration. Most lawyers in practicing their craft spend most of their time in negotiating, counseling, drafting documents, and planning business and personal affairs for the future. Law firms tend to create specialties within specialties, and trial work is assigned to a numerically small but important division of the firm. A substantial part of the law business is transacted outside of the adversary process. Moverover, depending upon economic conditions and opportunities, our law school graduates may as often drift into government or business as into active practice. In short, the legal profession is tremendously diversified, and lawyers tend to be so extremely individualistic that their differences outweigh their similarities.

It is a common phenomenon that although we may have a low opinion of a class or group, we regard some of its members as exceptions that prove the rule. This is true of law, social work, and perhaps medicine. It reminds me of the story of the Philadelphia rabbi who was deploring proscelyting and the loss of many members of his congregation to the Quakers. He remarked that it had reached the point that some of his best Jews were friends! The point, of course, is that most social workers can think of many lawyers who are useful members of boards or agencies concerned with social welfare work, and probably regard them as dedicated and competent, yet at the same time they may feel that lawyers as a class are obstructionists.

Values. Why should lawyers as a class project an image of obfuscation? May I suggest that at least in part it is due to the lawyer's concern with what is called the "rule of law." This magical phrase, sometimes also expressed as "due process of law" or "law of the land," has the Pavlovian effect on lawyers that "human dignity" or "social welfare" has on social workers. We may disagree about a specific application of the "rule of law" but we are sure that the rule itself is valid for all times and all places. At a minimum, the rule of law means that everyone affected by legal decision is entitled to his day in court before an independent and unbiased judge who will make a rational decision based on the facts presented. It also means that the rules

of law apply to everyone, to public officials as well as to the ordinary citizen. Through the political device we call the doctrine of separation of powers, we divide the functions of law enforcement from adjudication. This is one of the great social inventions of the Anglo-American system. Rules of law are addressed to the police, wardens, and the judge himself is bound by them, so it is no wonder that lawyers insist that administrators, bureaucrats and public agents of all sorts must abide by due process. Sir Edward Coke, on a memorable occasion, told even a Stuart king that he was under "God and the law,"[10] and later informed Parliament its statutes were unconstitutional if "against common right and reason, or repugnant, or impossible to be performed."[11]

What is this process that must be "due"? Why is procedure important? The "process" referred to is that of government. The due process clauses of the fifth and fourteenth amendments relate only to government action and to state activity. It is a limitation on government. Justice Douglas has pointed out that "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."[12] In a rare instance, Mr. Justice Frankfurter agrees with his colleague's emphasis and in another case observed that "The history of American freedom is, in no small measure, the history of procedure."[13]

So it is that what may seem to be red tape, legalistic formalism, may in reality be of substantive importance as well. Procedure or red tape is essential whether it be baseball, chess, artistic composition, or the administration of justice. Procedure is to law what the "scientific method" is to science.

Perhaps it would be an aid to understanding if we would select a specific example and descend to a lower level of abstractions. Lawyers are very much aware of that rule of evidence

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[10] For an extremely interesting biography of Coke, see Bowen, The Lion and the Throne (1957).

[11] Dr. Bonham's Case, 8 Co. Rep. 118a (1610).

[12] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951).

[13] Malinski v. New York, 324 U.S. 401, 414 (1945).

we call the "hearsay rule." The general idea behind the rule is that evidence not proceeding from the personal knowledge of a witness, but from the mere repetition of what he has heard others say, is lacking in reliability and probative value. Although at last count there were some thirty four exceptions to the heresay rule so that its status as a general rule is in doubt, nonetheless on the grounds of logic and human experience it deserves respect. It is not merely a matter of red tape. Permit me to quote from a psychiatrist who is commenting on agency records involving adoption:

> There was an amazing difference between these two groups of records. Those in which adoption was contemplated clearly had been studied more thoroughly, the data were well organized, and well articulated goals and procedures for handling were set forth. The foster care records, on the other hand, were chaotic and nearly impossible to analyze in any detail. The same workers had handled both sets. It was obvious that mere awareness that the adoption cases were to be subjected to an adversary procedure with a judge evaluating the data was sufficient to increase professional proficiency. It was apparent that the impact of authoritative surveillance is of some importance, even to professionals.[14]

I would go further than my psychiatrist friend. Not only is what he called surveillance important—even to professionals—it is the very core of our democratic system. Checks and balances and its concomitant separation of powers doctine is the matrix of a free society. The problem remains whether or not we can reconcile these attributes of the rule of law with what has been called the welfare state, or whether we must subscribe to the pessimism of Hayek who says "any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law."[15]

THE RULE OF LAW AND THE WELFARE STATE

First of all, it should be noted that a convincing rebuttal to Hayek's thesis has been given by Professor Harry W. Jones, who points out that mature legal systems have never been as blind to

[14] Watson, *Family Law and Its Challenge for Psychiatry*, 2 J. Family Law 71, 82 (1962).

[15] Hayek, The Road to Serfdom 79 (1945).

distributive justice as Hayek makes out.[16] The common law contains many examples of "distributive justice," so many that economic determinists are confounded by its humanity and social concern. We may regret particular cases and individual doctrines, for example the feudalistic origin and carry overs into the law of property, or the ecclesiastical antecedents of marriage and divorce law, but the fact that emerges from legal history is the conciliatory and reasonable character and pragmatic method of the common law as it builds case by case, equity by equity. The values of the time and place, the situation of the parties and the consequences of decision, including social advantage, are reflected by the case law.

Contrary to Hayek, it is my conviction that only by serving the ideal of what he calls "distributive justice" or what I would call "social advantage" will the rule of law be preserved and secure. The most serious recent threat to the Supreme Court as an institution came during the days of the New Deal when by paying false homage to the rule of law it frustrated welfare legislation. Hayek looks at only one side of federalism, that involving limitations upon government. He does not countenance the other side of her face, namely that side which Robert Hutchins calls "liberty under law" or the face of freedom which is seen by those interested in achievement.[17] From that vantage point the first question is whether the people can do for themselves what ought to be done. Instead of government being paralyzed so that individuals may be free, power is allocated according to law and subject to checks and balances. Hutchins notes that we need *both* faces of federalism, but that the first has dominated our talking and the second our way of acting.

Roscoe Pound has taught us that the function of law is the satisfaction of a maximum of human wants and desires with a minimum of friction and waste. This process he calls "social engineering." One characteristic of law in the twentieth century is its emphasis on the social interest in the individual. It is the difficult task of law to bring about a balance and adjustment between conflicting assertions of freedom so that from a

[16] Jones, The Rule of Law in the Welfare State, 58 Colum. L. Rev. 143 (1958), cites several examples, including the law of infants, bankruptcy legislation, homestead exemptions, water rights, etc.

[17] See Hutchins, Two Faces of Federalism (1961).

utilitarian point of view a maximum of freedom is enjoyed by all, license by none. If a liberty is subtracted from one person or group, it may augment the liberty of another person or group. The delicate task is to achieve equilibrium and to avoid an over-concentration of rights in one group because of the restraint that is thereby imposed on other groups.[18] If one group achieves a monopoly of rights or a super-abundance of freedom, necessarily at the expense of others, the excess becomes power or license, and the familiar dicta of Lord Acton is then applicable.[19] From this standpoint the judicial process becomes one of adjustment and compromise and rights and duties, instead of being "absolutes," are qualified by the overriding demands of society and the claims of other individuals. Paradoxically, freedom implies restraint. To be free there must be restraint, and perhaps restraint of restraint.

In dissenting from Hayek's misconception of the rule of law, however, it does not follow that we should ignore his warning. Those of us who believe that a democratic government has the power and obligation to fulfill the needs of its citizens and to serve humanitarian ends, should be alert to the dangers of abuse and officiousness. Discretion should be subject to the check and balance of meaningful statutory standards, fair and realistic procedure, and judicial review. For as pointed out by Harry Jones, as social justice becomes a conscious end of government policy the ordinary citizen comes into more frequent contact with regulatory authority, and "It is the task of the rule of law to see to it that these multiplied and diverse encounters are as fair, as just, and as free from arbitrariness as are the familiar encounters of the right-asserting private citizen with the judicial officers of the traditional law."[20] Thus the rule of law and the welfare state may be reconciled by a merger appropriate to the circum-

[18] See Foster, *The Relation and Correlation of Freedom and Security*, 58 W. Va. L. Rev. 325 (1956).

[19] Jones, *op. cit. supra* note 16, 147 n.8, gives the full quotation as follows: "I cannot accept your canon that we are to judge Pope and King unlike other men, with a favorable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority." Acton, *Essays on Freedom and Power* 335-336 (1955).

[20] Jones, *op. cit. supra* note 16, at 156.

stances, and it is not as Hayek would have it, a case of total destruction of one or the other.

PRESENT AND FUTURE INTER-RELATIONSHIP BETWEEN LAW AND SOCIAL WORK

From what I have said, it should be clear that I see and anticipate a very close cooperation between lawyers and social workers. In some instances the law of the past will give way so as to permit the fulfillment of present needs. At the same time, law trained people will remain adamant in their commitment to the essentials of due process. Moreover, we have a built in skepticism of administrators, executives, bureaucrats, and commisars. We are suspicious of short cuts and unchecked discretion, of evidence taken outside of the record, and we value confrontation and the chance to refute.

It is this latter commitment that may be difficult for others to comprehend. To the social scientist, a system that requires partisan presentation and employs adversary procedure may seem utterly "unscientific." Admittedly, the contention of a courtroom is far removed from the objectivity of the laboratory. But it should be remembered that a trial serves several functions in addition to that of discovering "truth." Historically, it is a substitute for self-help, the blood feud, and composition (*bots* and *wers*), and it must serve as a satisfactory alternative or there may be an atavistic return to lynch law or the vigilantes. In addition, trials may serve educational or recreational functions. I suspect that some of the celebrated English trials during the Stuarts had a greater affect in influencing the thinking of our founding fathers who drafted the Bill of Rights than did the writings of Locke and the French romanticists.[21]

As lawyers, we may be practically alone in our preference for adversary procedure, which had been our chief mode of operation since before Christ. It should be noted, however, that the client ordinarily wants and needs a lawyer who is *his* champion, not a representative of the public at large. One who is accused of crime or involved in an important civil dispute does not seek

[21] See Corwin, The "Higher Law" Background of American Constitutional Law (1955).

an impartial and objective counsel, he wants someone who will protect and further his interests even at the expense of others. Under our division of labor, it is for the court or jury to protect and further the larger public interest. I know that all of this seems barbaric to men of science, but centuries of experience convinces us that "truth" more often than not does emerge from the adversary process and that cross-examination, of even the most eminent expert, is one of the most effective means devised by man for getting at the truth and discouraging falsehood and unconscionable exaggeration.

Having stated our commitment and having confessed our bias, I hasten to concede that there are many places where law and society would profit by an abandonment or modification of the adversary system. In making such a concession, I realize that to some of my brethren I preach heresy. But by now it should be apparent that the adversary process in its traditional form is ill suited for some types of problems. To function well, the adversary process requires leisure and a light case load. In urban areas, the administration of justice is in greatest disrepute where the traffic is the heaviest. The police or magistrate's court, the support court, the personal injury action, and sometimes the family court, come in for most of the criticism. These are all areas where staggering caseloads may be on the dockets, where queues of parties may be lined up, where assembly line justice is most apt to be meted out. Tragically, they are the most frequent points of contact for the citizen and the courts.

If the administration of justice in urban communities has reached the sad state I suggest, what is the remedy?[22] The remedy most often employed is by one means or the other to bring about an informal disposition of the bulk of cases, leaving the hard core for the court to formally adjudicate. Where this is done, it means that staff rather than the judge process the matter. It means that an investigatorial and a counseling function supersede the adversary process. It means that social workers rather than law trained personnel become decision makers and problem solvers, that intake and probation become integral departments of the court set up. The case worker and her note-

[22] The most thorough socio-legal study of court congestion is that by Zeisel, Kalven and Bucholz, Delay in the Court (1959).

book may embody as much law as there is at the end of the policeman's proverbial nightstick!

But again, to refer back to the principle of rule of law, there are inherent dangers in notebooks or nightsticks. Either may be a dangerous weapon. There must be checks and balances. The history of the juvenile court in America affords an example. When the combined efforts of lawyers and social workers led to the establishment of the first juvenile court in Cook County some sixty-five years ago, the immediate problem was to spare youthful offenders from the traumatic affect of the criminal courts. Although I have nothing but admiration for the many fine juvenile courts we have in this country today, I also am aware that in too many instances their promise has not been fulfilled, usually because of inadequate resources or personnel. The broad discretion accorded such courts has been a mixed blessing. A legalistic judge assigned on rotation may convert such a court into an oppressive institution, a weak judge may abdicate judicial functions and become a mere figurehead. What is needed, of course, is an interdisciplinary team effort.

Hopefully, the latest modification of judicial structure, the family court, will guard against some of the abuses, real or potential, that have plagued some juvenile courts. It is noteworthy that in New York, again due to the concerted effort of our two professions, there was a reorganization of courts and procedure so as to meet current family needs. Walter Gellhorn, and the special committee of the Association of the Bar of the City of New York, demonstrated that research of outstanding quality could bring about significant reform.[23] Perhaps a similar pooling of inter-professional resources might even lead to a much needed reform of the substantive law of divorce, although probably that is wishful thinking.[24]

For the new family court to function effectively it must secure sufficient and divers personnel from the ranks of the social work profession. Therapists, counselors, probation officers, case workers, and others must be acquired, and induced to work in the court setting. Successful operation of the court is con-

[23] Gellhorn, Children and Families in the Courts of New York City (1954), contains the study and the report of the committee.

[24] The best recent review of New York divorce law is that by Blake, The Road to Reno (1962).

tingent upon the adequacy and competence of such personnel. The same will be true, when and if counseling services become an integral part of the procedure in divorce cases. Criminal courts, also, for effective operation must have adequate personnel for the important investigation and probation work that is so essential for the administration of the criminal law.

Thus we see that there are many points of contact between law and social work, that specialized courts are dependent upon effective social work assistance, and that the law has come to modify adversary procedure and courts today provide auxiliary services. In the court setting, final responsibility must rest with the court and social work practice must be adapted to meet judicial imperatives.

Be that as it may, in some other areas it is the law which has given way to the philosophy or needs of social work. This is manifest in much of the legislation relating to welfare and public assistance. Professor tenBroek of California in a fascinating article discusses *The Impact of Welfare Law Upon Family Law.* He observes that:

> In the creation of our present welfare system, however, welfare planners and legislators did not pause to reconsider the value and reassess the relevance of accepted legal doctrines in these areas. On the contrary, they accepted those doctrines lock, stock and barrel. They built the welfare system upon them. They shaped, trimmed and hewed the system to fit around them. The doctrines lurk in every silent presupposition and every explicit provision. They govern eligibility. They determine the amount of the grant. They are the heart and soul of the means test.[25]

Professor tenBroek then notes the legislative and decisional changes that occurred and how family law gave ground to welfare principles. He says:

> From these beginnings, however, many changes have been wrought. The basic anomalies and incompatabilities between these legal notions and welfare principles, while not resolved by a sweeping original act, have undergone a continuous process of adjustment. Through a progressive series of modifications, the legal notions have given way to the welfare

[25] 42 Calif. L. Rev. 458, 459 (1954).
[26] *Id.* at 460.

> principles. In various areas and to various degrees, the law of domestic relations has yielded to welfare law.[26]

As examples, he cites the modification of the community property regime and the tendency to regard all property as a resource, whether called community or separate, the rejection of the common law distinction between a trailer affixed to the realty and one on wheels, the fact that the recipient of Old Age and Survivor's Insurance is not required, and in some circumstances is not permitted to divide equally with the spouse, and the imposition of a support obligation that did not exist at common law as to some relatives who nonetheless now come within the statutory duty. It should be noted that these are not casual modifications but involve an alteration of significant legal rules.

But there are other areas of the law where as yet social work philosophy has not had the affect of ameliorating obsolete legal principles. I have in mind the attitude of many courts in custody cases where too often the matter is treated as if it were a dispute over property, as if there were a covenant running with the child, and the focus is on whether or not a litigant's behavior has been bad enough to forfeit rights, rather than on the real best interests of the child. I am appalled by the paucity of facts related in some opinions and by the reasoning adopted by some judges.[27] Surely investigation and reports by experts in behavioral science are essential if we are to serve the best interests of the child, and the child's welfare should be the dominant consideration in all cases.[28]

It is my impression that in adoption cases, as contrasted with custody awards, courts today place greater reliance upon staff and agency investigations and reports. Adoption proceedings rarely involve a contest or adversary procedure although such may come later. This difference as to the role of the case worker in different types of proceedings is to be expected even though when viewed objectively a custody case presents much the same social

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[27] See Foster and Freed, *Child Custody*, 39 N.Y.U.L. Rev. 423, and 39 N.Y.U.L. Rev. 615 (1964).

[28] Such was declared to be the law by Judge Cardozo in Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925), and by later Justice Brewer in Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321 (1881), but at the present time New York and many states apply the best interests tests only to contests between natural parents and require proof of parental unfitness in a contest with a non-parent. See Simpson, *The Unfit Parent*, 39 U. Det. L.J. 347 (1962).

problem as does an adoption case. Unfortunately, courts sometimes have difficulty in seeing that they are confronted with social problems and that society's interest should prevail even when the matter is presented within the adversary framework. It is interesting that one of the first statements adopted by the National Conference of Lawyers and Social Workers (January 30, 1963)[29] was one outlining the relevant considerations which should prevail in adoption cases. Cooperation is easier when the subject is one that is not resolved in contested cases.

The therapist, such as the psychiatric social worker, also has many points of contact with law. Whether the therapist is engaging in marriage counseling or is working with a mental patient, there should be due regard for the legal rights of the client. In the performance of counseling, the advice of the therapist may have an important bearing on such legal matters as the defense of condonation in divorce suits. There are reciprocal obligations here, however, and the ethical lawyer should show due regard for the professional status of the therapist and the work that she is doing.

I would be less than candid if I left with you the impression that I believed law and social work could marry and live happily ever after. Sources of irritation, differences in viewpoint, and vested interests will continue to exist even though we achieve a reasonably happy liaison. Lawyers will apply their own methods to interviewing, counseling, mediating, and problem-solving, and social workers will perform the same functions in their own way. The lawyer will continue to be preoccupied with individual liberty and personal rights, and social workers will tend to give priority to social policy, even though both professions start with the democratic value of the basic worth and dignity of man.[30] In addition, there are occupational hazards or diseases that impede understanding. The judge, like some doctors, may be afflicted with a "Jehovah's complex" and assume to be omniscient as well as omnipotent. Hopefully, he may be reversed on appeal. The caseworker may manifest symptoms of professional insecurity or suffer "battle fatigue" to such an extent that her work is un-

[29] The Conference was formed in May 1962, by the National Association of Social Workers and the Family Law Section of the American Bar Association.

[30] See Katz, *The Lawyer and the Caseworker: Some Observations*, 42 Social Casework 10 (1962).

professional. Both judge and caseworker may be lacking in professional qualifications and may have their position as a result of political patronage.

It is the matter of political patronage that poses a serious obstacle to effective teamwork. When an inter-disciplinary team studied the county court in Pittsburgh we found that all members of the staff were patronage appointees, that none had a graduate degree in social work and that only two out of seventeen had ever gone to college. They were deserving friends and relatives of the judges. In Salt Lake City an attempt to build a family court came to naught due to judicial rigidity, sloppy social work, and the patronage issue.[31] Ordinarily, there must be an effective merit system in order to attract competent personnel to government service.

If we look to the future and attempt to forecast inter-professional cooperation and conflict, we may agree that ours is an ambivilant relationship. We share many common goals, ideals, and values, but our training is different and our roles are not always compatible. It is the obligation of our law schools to try to socialize the aggressive young men and women who come to us for training. Justice Brandeis once said "a lawyer who has not studied economics and sociology is very apt to become a public enemy."[32] In the same speech, in commenting upon the lag between law and social science, he said that too many judges and lawyers "think with specialized minds," and that "What we need is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task." Harlan Fiske Stone made similar observations as to legal education and the need to give law students a balanced diet.[33]

I hope it is not too presumptious to suggest that students of

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[31] The story of the Salt Lake City fiasco is told by Bodenheimer, *The Utah Marriage Counseling Experiment*, 7 Utah L. Rev. 443 (1961).

[32] Brandeis, *The Living Law*, 10 Ill. L. Rev. 461, 470 (1916).

[33] Mason, Harlan Fiske Stone: Pillar of the Law 379 (1956), quotes Stone to the effect that expert legal scholarship which might otherwise have given balance to the law student's mental diet, persistently delved into the past, that there was little or no "reflection upon the relationship of law to social and economic forces which produce it." In short, both training and experience taught the lawyer to regard himself as a "technician rather than an originator of (social) policy," giving rise to the impression that "the lawyer existed to serve and not to counsel his clients." Fortunately, Stone's observations no longer hold true, due to the impact of sociological jurisprudence upon modern legal education.

social work also should be given a balanced diet, and included on the menu should be a meaningful course about law that brings out the social significance of the rule of law and its importance in a democratic society. The fact that fair procedure and social welfare are not inconsistent is illustrated by many historic examples not the least of which is the philosophy and career of "Freeborn John" Lilburne, the Leveller pamphleteer of the seventeenth century.[34] Short of revolution, significant social advance must come by "due" and democratic processes. If the lawyer seems to be preoccupied with means and the social worker with ends, perhaps it would be appropriate to concede that both are important.

The fact is that most intelligent citizens are curious about that mysterious thing called the law. I encourage your curiosity and remind you that formerly the law was not esoteric but lay in the public domain. Edmund Burke remarked about the avid interest of Americans in law[35] and Blackstone delivered his lectures to and wrote his commentaries for Oxford undergraduates. In the immediate future social workers and lawyers will be called upon to work together on multi-dimensional levels. As trouble shooters and problem solvers we will assume leadership in the mental health program and the war on poverty. Whether we work together in harmony and are productive depends in large measure upon our mutual tolerance and appreciation of each others viewpoint. The professional social worker and the lawyer with a social conscience already have much in common and the capacity to learn from one another.

In conclusion, we cite Dean Griswold's emphasis on the importance of facts which I believe should be heeded by both law schools and schools of social work. The dean, who for some time has had an interest in social work as well as law, in the foreword to a leading book on juvenile delinquency, says:

> Law, in any field, to be adequate and sound must rest on facts. It must grow out of experience. Thus, research designed

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[34] For a bibliography of this remarkable man, see Gibb, John Lilburne, the Leveller, a Christian Democrat (1947). See also Wolfram, *John Lilburne: Levellers and Civil Liberties*, in Civil Liberties, No. 214, March 1964, published by the American Civil Liberties Union.

[35] Burke, in his speech *On Conciliation With America*, remarked that "In no country perhaps in the world is the law so general a study. . . . All who read, and most do read, endeavor to obtain some smattering of that science."

> to make systematic investigations into human experience becomes indispensable to the healthy growth of the law.[36]

The greatest contribution of social work to law may be the gathering and presentation of facts and insights that will enable our courts to decide cases and issues within the appropriate social context, and the greatest contribution of law to social work may be its insistence that the rule of law apply to all public endeavor. The law needs the facts that careful case work can provide and social work needs the discipline that the rule of law imposes upon all of us who labor in a democratic society.

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[36] Forward in Sheldon and Eleanor Glueck's Unraveling Juvenile Delinquency (1950).