

LAW, LAWYERS & SOCIAL WELFARE

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I am a lawyer and not a social worker. I have never had the benefit of studying in a department of social work and my knowledge of the social work profession is based upon my reading, my association with social workers at a university level and from my association with organised legal aid activities in the United States. In addition, I visited Australia for only three months and do not purport to understand fully the social work or legal professions in your country. Necessarily, my comments will relate more to the American experience. I shall rely upon your judgment to discard those observations that are not apposite to the Australian scene.

Presumably, lawyers and social workers have a common objective in the broadest sense: the social welfare of the citizens of a democratic society. My purpose is to discuss some of the challenge of co-ordinating the approaches of these two great disciplines for the purpose of providing the maximum possible benefit to our society. In particular I shall discuss the problems of using social workers and lawyers in working together.

LAWYERS AND SOCIAL WORKERS

Most lawyers in America have never dealt with a social worker in a professional capacity. Many are engaged in providing advice to the major business and financial institutions upon which a capitalist society depends for the production of goods and services, tax revenues and employment of the people. Others represent private citizens who are hit by a car, seek a will, wish to buy or sell a house, desire an uncontested divorce or encounter similar problems characteristic of middle class life. Few are engaged in the kind of practice that places them in regular contact with victims of societal disintegration.

The social worker, however, is frequently concerned in large part with areas of social disorganisation. Originally this concern may have been focussed on economic dependence, but the last half century has witnessed a great expansion of social services "above the poverty line". Nevertheless, I do not think it would be inaccurate to say that the profession still deals largely with the problems of dependency; the dependency of the child, the dependency of the mentally ill, the dependency of the aged and the infirm, the dependency of others.

The general practitioner of law may occasionally represent a defendant in a criminal case. This usually occurs in America when counsel is appointed by the court to represent a defendant who cannot afford to select his own lawyer. Middle-class clients may seek the advice of a private lawyer when a child has encountered difficulty with school authorities or the police. Occas-

ionally the lawyer may participate as a counsellor or as a legal adviser for a party in a marital dispute involving divorce, annulment or custody. But in general, the private lawyer is removed in his professional activities from the kind of clients who have problems, the solution of which are the objectives of the profession of social work.

The difference in the nature of their work is reflected in their employment status. In America, two thirds of social workers are employed by the government agencies, while most of the remainder hold salaried positions with private charitable organisations. The private lawyer depends upon clients for his income and frequently the people who have the greatest problems of dependency are those who can least afford to pay for representation. The tax structure contributes to the problem in that the average individual cannot deduct lawyers' fees. Thus, legal services incidental to obtaining a public benefit for which a client is eligible, seeking release from confinement, or a stay of an eviction, do not constitute tax deductible business expenses, even for a client who has income.

The relationship between lawyers and social workers has gone through several stages of evolution. Initially I think it is fair to say that lawyers and the law were suspicious of the concept of social work in general, and as a result social workers and their contributions to the legal process were generally ignored or misunderstood. There followed a stage in which social work was conceived of as a valid auxiliary enterprise but not in the mainstream of the legal process itself. A court might occasionally refer domestic relation cases to a conciliation service, but the conciliation service was not conceived of as an essential ingredient of the court system. During the last decade lawyers in America have finally begun to understand that in some areas of the legal process the concept of case work and social workers have a fundamental role to play in our legal system. process the concept of case work and social workers have a fundamental role to play in our legal system.

Frequently the areas of the greatest potential contribution are areas where the adversary system has long been regarded as an inadequate means of dealing with particular problems. For example, probation officers in juvenile and criminal courts are now accepted. Conciliation services have been made a part of some family courts and courts of domestic relations. A social worker is regularly used in adoption cases for the purposes of investigating and making recommendations.

Structural arrangements for integrating social workers into the legal process differ, depending largely upon the function they are asked to perform. All cases of a certain nature may be screened by a social worker be-

fore they come before the court for adjudication, as in the intake procedure of a juvenile court, or the social worker may function only at the end of the judicial process, (and then perhaps only in selected cases), as when a judge seeks a presentence report before sentencing an offender.

PROBATION OFFICES:

Lawyers in private practice probably have the most frequent contact with social workers by virtue of their contact with probation officers. In the United States it has become increasingly common for judges to seek the advice of a probation officer before imposing a sentence. Many probation officers are fully trained in the profession of social work; ideally all should have some social work training. The well advised lawyer will attempt to form a close relationship with the probation officer because the lawyer's best chance of assisting his client will probably be at sentencing, where the probation officer's recommendation will be an important, if not a crucial factor. Most defence counsel do not experience the good fortune of a Perry Mason who is blessed with innocent clients and understanding juries. A high percentage of criminal cases which go before juries result in convictions. Sentences imposed following a jury verdict of guilt generally exceed those imposed following a plea of guilty. Realistically, the lawyer must appreciate that unless he can dispose of his case by obtaining a voluntary withdrawal of the crown case or, by the assertion of some procedural defence, his most effective opportunity to assist his client in a meaningful way may be through an attempt to convince the probation officer, and through him the judge, that a light sentence is an appropriate disposition of the case.

The recommendation of a probation officer is transmitted to the trial judge in the form of a pre-sentence report. A defence counsel may wonder about what is contained in the report, whether all of the information is accurate, whether all the information favourable to his client has been included, and whether appropriate weight has been given to the sources of different pieces of information. In America, he will be frequently confronted with a coalition of a trial judge and a probation officer who insist that he should not have access to matters contained in the report because secrecy is necessary to maintain the confidentiality of the sources upon which probation officers must rely. In part this attitude results from an unwillingness on the part of some probation officers to defend their recommendations from vigorous attack by defence counsel, and by trial judges who enjoy the extraordinary power conferred upon them under Anglo-Saxon law of restraining liberty or imposing the ultimate sanction without the responsibility of stating reasons and generally without fear of effective review of their actions. It is inconceivable to many lawyers that a court order should be made on the basis of information received *ex parte* without an opportunity for response. Their faith in the adversary system makes it difficult for them to understand why the techniques that are appropriate for determining

whether a defendant is guilty should be totally inappropriate for the purpose of determining the sentence he should receive. Hopefully, more probation officers will alter their professional outlook and accept the need for reports to be revealed to defence counsel at sentencing. Hopefully, the judges will agree or alternately legislative will limit their power to deny access to reports.

JUVENILE COURT PROCEEDINGS:

Since the landmark decision in *In re Gault*,¹ lawyers have become a much more common sight in American juvenile court proceedings. Although the Constitutional right to counsel is technically limited to adjudicatory hearings in cases where a deprivation of liberty may result; in practice, lawyers are participating to a much greater extent in dispositional hearings and to a lesser extent during the intake phase of the juvenile court. The opportunity for friction is the greatest in intake hearings, ie, where the decision is made whether to present a case formally to the court. Many juvenile court social workers, who are charged with the responsibility of determining which cases will be referred for adjudication by a judge, believe that they can operate effectively only when they are permitted to exercise their discretion broadly without the distractions caused by the assertion of legal technicalities or strident advocacy by a lawyer. At the same time it is difficult for the lawyer to understand why the introduction of counsel will frustrate the fair operation of a process. Most lawyers would not intentionally impede any legal process unless it is necessary to assert a client's rights, and believe fervently that a client who is in danger of being deprived of his rights needs and should be entitled to counsel to assist him.

SOCIAL WORKERS IN THE ADVERSARY SYSTEM

MISUNDERSTANDINGS:

Much of what we have attributed to interdisciplinary misunderstanding is in reality a conflict brought on by the ambivalent role required of the social worker adviser-investigator in the midst of a battle between the individual and the state. The social worker, whether serving as a probation officer with the responsibility of recommending a sentence or as an intake officer in a juvenile court, represents neither adversary. In theory he does not have decisional authority, but functions as an arm of the court. Frequently he stands in the place of a court without its power or prestige. Frequently he exercises an inquisitorial or advisory function in a system that is adversarial.

The lawyer appears as an advocate. He confronts the social worker not as an intellectual man of letters bent upon interdisciplinary rapport, but as the fierce advocate of the rights of an individual. His responsibility to his client is of paramount significance. Even if he questions the validity of the assumptions underlining the adversary system during leisure periods, at the moment of his contact with a social worker, he will normally be

a partisan asserting the interests of his client rather than the more abstract notions of the common good.

We are still developing techniques by which the social worker can play an active role as a participant in the adversary system, other than as an arm of the court. It is important that the social worker be at the core of the process rather than on its fringe. During the last decade we have taken the first steps towards including social workers as a part of the defence and prosecutorial functions in criminal cases.

DEFENCE FUNCTION: REHABILITATION PROGRAMMES

Traditionally in an American court a defendant who has been convicted is asked whether he has anything to say before sentencing. He may reply in person or through counsel. Normally counsel asserts to the court that his client has learned his lesson, argues that incarceration is unnecessary to rehabilitate him, or to deter either him or others, and in general seeks mercy. The Court may have available a presentence report prepared by a probation officer but, as I have indicated earlier, the report may not have been seen by defence counsel. Not surprisingly, the argument of counsel or plea of a defendant normally falls on deaf ears unless the result urged has already been advanced by the probation officer in the report.

An alternate approach is to permit defence counsel to utilise the expertise of a social worker in preparing his own presentence report. The report evaluates the background and present attitude of the defendant; and predicts his future behaviour in much the same manner as would a probation officer, but with a concededly partisan outlook. In addition, the social worker has the responsibility of developing a specific program for rehabilitation of the defendant in the event that probation is ordered. Counsel is therefore in a position where he may argue to the court that this program should be accepted by the court.

In its most developed form, a staff of social workers is made available as part of a Public Defender's Office to assist private counsel or public staff counsel. At an early stage of the proceedings a staff member interviews the defendant with the consent of counsel. He studies the defendant's prior case history and discusses the case with defence counsel. He makes known to defence counsel the services that are available in the community to assist the offender. The agencies are contacted to determine whether they are willing to provide assistance. Independently, efforts are made to obtain employment for the defendant if he is released before trial, and to obtain training if he is unskilled. If the defendant is convicted, defence counsel and staff members develop a program which they submit to the court as an alternative to incarceration. On many occasions defence counsel will submit a pre-sentence report on behalf of the defendant dealing with matters such as family, school,

religion, employment, criminal record, special physical, mental or emotional problems, letters of character reference, assurance of professional therapy upon release, present employment or promised position upon release, and assurance of counselling or specialized training. Thus, the defendant is not totally dependent upon the probation officer's sources of knowledge, his evaluation of the facts brought to his attention, or his relationship with other social agencies whose help is needed. Two examples will illustrate how the program works:

TWO EXAMPLES: One defendant was charged with unauthorized use of a motor vehicle for the sixth time. He was twenty-five years old and had never committed an offence of violence. He received probation for the first two offences and was imprisoned for the third, fourth, and fifth car thefts. After release into the community, he was never given outpatient psychotherapy even though an earlier diagnostic evaluation classified him as a borderline schizophrenic with passive tendencies. He received limited therapy while in prison. He had no realistic home environment. At the request of the staff member and defence counsel, two independent psychiatrists were asked to examine the defendant and each stated that imprisonment would serve no useful purpose. Each recommended release to the community in a halfway house setting. A private charitable facility agreed to accept him. A University's outpatient psychiatric service agreed to provide him with the prescribed treatment. On this basis probation was granted.

A second defendant was charged with assault with a dangerous weapon. He had received probation as a juvenile and had acted violently two or three times earlier while a juvenile. He subsequently married and fathered one child. Pretrial release was obtained, and employment was obtained for him. A psychiatric examination resulted in a diagnosis of mixed psychoneurosis (severe anxiety and compulsive features). The doctor felt, however, that the defendant was motivated towards solving his problems and would not be a menace if placed in society. An outpatient psychiatric clinic agreed to accept him and give him psychotherapy if probation was granted. The staff member obtained assurance from the employer that the defendant would be provided with training in a skill that would provide him with remunerative employment. The trial court granted probation on these conditions.

OTHER ASPECTS: The rehabilitative program is not designed solely for the defendant who seeks or obtains probation. A defendant who has been acquitted may need assistance as much as one who has been convicted and placed on probation. In the first place it is obvious that some defendants who have committed crimes are able to escape conviction. Furthermore, individuals who may be not guilty of an offence may be plunged back into an environment in which the probability of future crimes is great. Similar services should also be available to defendants who have been convicted and imprisoned. The legal problems of the typical defend-

ant do not end with a final judgment. His family needs legal assistance in civil matters while he is in prison. He needs to maintain a relationship with counsel to advise him prior to parole hearings and perhaps to prepare a motion for the reduction of sentence or a collateral attack on his conviction. It is extremely helpful if he has someone to assist parole or prison authorities in seeking employment upon his release. The social worker can be of invaluable service in performing these functions. When he does so he is serving as an integral part of the adversary system.

A rehabilitation program serves another purpose as well. It educates many lawyers to the fallacy of attempting to isolate the needs of the poor in the administration of criminal justice from the overall impact of poverty upon the individual. Crime, criminals, falsely accused defendants, and the criminal process do not exist in a vacuum. Many crimes are unrelated to economic status but may have their roots in poverty. A system which is content to provide counsel in a criminal trial and to ignore the problems of pretrial release, the social problems resulting from the defendant's poverty and his incarceration, and the prospects for his rehabilitation, is very much like giving morphine to a patient who has a leg infected with gangrene. It may give temporary relief from the pain but it doesn't help to solve the problem. The infection will continue to get worse unless something is done about the cause of the pain.

PROSECUTION FUNCTION: CHARGING

The need for social workers within the adversary process is not limited to the defence function. A similar use of social workers within the prosecutorial process is needed. A vital ingredient in our system for the administration of criminal justice is the determination of when a defendant will be charged with a crime and for which offences. Traditionally these decisions have been made by the police, a prosecutor or private citizen. In most American jurisdictions the ultimate decision is made by prosecutors after screening citizen and police complaints. Frequently, the prosecutor does not have the necessary information nor the background to place the alleged offender and the crime in their social setting although an understanding of the context in which the crime took place is essential to a wise decision of how the state should respond.

Social workers can provide valuable assistance in screening many of these cases and providing advice concerning others. In particular social workers can perform counselling functions in husband-wife, boyfriend-girlfriend and parent-child disputes which might avoid recourse to the criminal process as the societal mechanism for dealing with the problem. Many persons who may potentially be required to answer formal charges have need for the specialised expertise of social agencies which is available in a city but which may be unknown to the crown prosecutor. The time of the lawyer may in turn be conserved in order to be utilised for ultimate decisions or the trial of criminal cases.

AMERICAN PROGRAMMES: A few American cities have such a program. A prosecutor may have a bureau of family relations which investigates all current complaints involving family problems including failure to provide care, interfamily assaults, and miscellaneous domestic difficulties. Interviews on citation may dispense with the necessity of criminal warrants in many cases. The facts may be ascertained at informal hearings and appropriate remedial action taken without recourse to the criminal law. Such a procedure saves valuable resources, lessens the congestion of court calendars, and eliminates unnecessary police work.

Interesting experimentation is now taking place with a technique known as pre-trial diversion. The programs differ, but the common theme is that potential defendants who may be charged with an offence are, with their consent, placed under supervision without formal charge, trial or conviction. Their cases are diverted out of the criminal system, and if they demonstrate a capacity to function successfully in society, no criminal charge may ever be filed. Obviously there are dangers to civil liberties in such a system. Equally obvious is the potential elimination of much of the stigma associated with a criminal conviction. Such a system depends to a large extent on the availability of capable and qualified social workers to screen potential diversion cases and supervise those whose cases have been diverted. . . .

FOOTNOTES:

- * From a paper presented at a "Law, Lawyers and Social Work" Seminar at Monash University on October 26th, 1974. A concluding article will appear in the next edition of the *Legal Service Bulletin*.
- 1. Ariz, 407 P. 2d. 760; 87 S.ct. 1428.

