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The Division of Legal Labour

THE DIVISION OF LEGAL LABOUR

By ERIC COLVIN*

There are few more important but neglected subjects in legal theory than the division of legal labour. The term "division of labour" refers generally to the differentiation of roles through which various kinds of work are distributed among the members of a society. For example, there are the differentiated roles of wage-earner and home-maker within a family, or of the designer, builder and salesman of a product. In the same way, I use the term "division of *legal* labour" to refer to the differentiation of roles in legal work. For example, in contemporary western societies the work of identifying, changing, applying and enforcing legal rules is performed by specialists such as legislators, judges and policemen. In addition, professional lawyers play a special role as intermediaries between these public officials and the citizen.

A highly developed division of legal labour, with clearly defined, specialized roles, is not a necessary feature of law, in the sense that it is not usually treated in jurisprudence as a core element in the concept of law. It is, however, a characteristic feature of law in complex societies, where the general division of labour is well advanced, and an understanding of the division of legal labour is crucial to an appreciation of the role of law in such societies.¹ By creating specialized roles in legal work, divided labour makes a major contribution to the efficiency of law as a mechanism of social control. However, by restricting popular participation in legal decision-making, it also increases the risk that law may be used in pursuit of narrow sectional interests and values or as an instrument of repression. An understanding of the division of legal labour is therefore essential for the explanation of the control and use of law.

In the light of its social significance, it is surprising that hardly any attention has been paid to the topic in jurisprudential literature. One reason for this neglect may be that jurisprudence has been concerned primarily with the universal features of law, to the neglect of its form and role in particular kinds of society. The concern, therefore, of this exploratory analysis of some issues relating to the division of legal labour extends beyond the topic itself to include the direction of jurisprudence. The dominant orientation in the jurisprudence of the common law world has been toward the analysis of a few basic concepts of legal thought: such as the concepts of "law," "legal system," "legal rule" and "legal obligation." Until recently, very little concern has been displayed to locate law in its varied social contexts, and to explain the forms that it takes, the purposes for which it is used, and the effects that it produces. In this enterprise of constructing a *sociological* jurisprudence, it would be a

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¹ See Colvin, *The Sociology of Secondary Rules* (1978), 28 U. Toronto L.J. 195.

mistake to reject the heritage of analytical jurisprudence. Conceptual analysis is a vital element in any approach to theorizing about law. However, when attention is directed to the social context of law, new conceptual frameworks need to be developed. The present discussion is a contribution to this enterprise. Its aim is to explore the nature and value of the division of legal labour.

I. *Divided Labour in Society and in the Law*

The division of legal labour may be viewed initially as one facet of the general division of labour in society. Some general division of labour is a feature of all societies, reflecting basic physiological differences between human beings. Even the simplest societies display a differentiation of roles based upon criteria such as age and sex. However, a "simple" or "primitive" society exhibits relatively little development in the division of labour, in contrast to a "complex" society in which the division of labour is greatly expanded. The historical trend of social development has been from simple to complex, but it was in the era of the Industrial Revolution that dramatic social changes focused the attention of western economic and social theorists on the phenomenon of divided labour.

The division of labour is not of recent origin, but it was only at the end of the eighteenth century that social cognizance was taken of the principle, though, until then, unwitting submission had been rendered to it. To be sure, several thinkers from earliest times saw its importance; but Adam Smith was the first to attempt a theory of it. Moreover, he adopted this phrase that social science later lent to biology.²

Although it was divided labour in the economic world that first attracted major attention, the early sociologists such as Durkheim diagnosed its advance in many other fields, including politics, administration, law, science and the arts.³

Durkheim argued that the expansion in the division of labour was caused by increases in social volume and density, with more and more people thrown ever closer together in the struggle for existence.⁴ He saw specialization as a cooperative and beneficial response to the resulting increased competition.⁵ Marx and Engels, on the other hand, stressed its darker side—the exploitation of those holding the less powerful roles.

The division of labour . . . simultaneously implies the *distribution* and indeed the *unequal* distribution, both quantitative and qualitative, of labour and its products, hence property, the nucleus, the first form which lies in the family, where wife and children are the slaves of the husband. This latent slavery in the family, though still very crude, is the first form of property, but even at this stage it corresponds perfectly to the definition of modern economists, who call it the power of disposing of the labour-power of others. Division of labour and private property are, after all, identical expressions: in the one the same thing is affirmed with reference to activity as is affirmed in the other with reference to the product of the activity.⁶

² Durkheim, *The Division of Labor in Society*, trans. Simpson (Toronto: Collier-Macmillan, 1968) at 39.

³ *Id.* at 40.

⁴ *Id.* at 256-63.

⁵ *Id.* at 266-75.

⁶ Marx and Engels, "The German Ideology" (1845-46), trans. Lough, in Marx and Engels, *Collected Works*, Vol. 5, (New York: International Publishers, 1976) at 46.

I shall return later to these contrasting critical responses to the division of labour. At this juncture, the nature of the division of *legal* labour needs to be analysed in more detail.

In the same way that physiological differences underlie the general division of labour, they also underlie the division of legal labour. Even in the simplest societies, legal work is usually performed by adult persons. However, in such societies there is minimal differentiation of legal roles. Matters of dispute resolution and rule enforcement tend to be handled by the individuals who are immediately concerned and their kin. In his classic study of primitive law, Hoebel viewed the transference of responsibility from the individual and his kinship group to official agents of society as the "really significant shift . . . in the development of primitive law."⁷ Thus, any attempt to describe the "law" of simple societies has required amendment to concepts of law that include reference to the division of legal labour. For example, in discussing the relevance of concepts that make "courts" a core element, Hoebel concluded that it would be necessary in studying primitive law to stretch the notion of courts to include tribal councils, and perhaps even the bar of public opinion, where, nonetheless, the proceedings "follow the lines of recognized and established order."⁸ Similarly, Weber, who had defined law in terms of a system of regulation with a special enforcement *staff* having the power to use coercion,⁹ expanded his concept to meet the circumstances of simple societies:

The enforcement staff does, of course, not necessarily have to be of the kind which we know today In the case of blood vengeance and feud the enforcement staff consists in the clan, provided that its reaction is actually determined by some kind of regulatory order.¹⁰

The minimal division of labour in the legal systems of simple societies may be contrasted with the situation in the complex societies of the contemporary western world. Not only are the basic tasks of identifying, changing, applying and enforcing legal rules handled by specialized personnel, but there are extensive subspecializations within these fields. Elected officials possess the supreme power to make laws, but limited powers frequently are delegated to a variety of appointed officials. Judicial work is divided through a system of courts in which judges specialize in hearing certain kinds of cases and cases at a certain level of proceeding. In addition, some types of cases fall outside the ordinary court system and under the authority of administrative tribunals with their own specialist officials. In the field of enforcement, work is also divided between officials such as policemen, sheriffs and prison staff.

Additional groups of specialists have emerged to perform ancillary functions, again with extensive fields of subspecialization. Professional lawyers handle various points of contact between the members of society and the legal system. Some are concerned mainly with representing and in various ways acting for private citizens or particular groups of private citizens, whereas

⁷ *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge, Mass.: Harvard University Press, 1954) at 329.

⁸ *Id.* at 25.

⁹ Rheinstein, ed., *Max Weber on Law in Economy and Society*, trans. Shils (Cambridge, Mass.: Harvard University Press, 1954) at 5.

¹⁰ *Id.* at 6.

others operate as agents of the system in activities such as conducting prosecutions. Some concentrate on court work and some on office work. In many jurisdictions there are even formally separate legal professions engaged in different kinds of work. At one time in the common law world, legal education was conducted by the professions, whereas now full-time legal educators work within universities. In recent years, we have witnessed the emergence of law reform as another partially differentiated career path for lawyers.

Schwartz and Miller have traced the sequential development of three specialized legal roles in relation to general advances in societal complexity.¹¹ They conducted cross-cultural research on data from a sample of fifty-one societies, mainly but not exclusively of the tribal variety, and recorded the presence or absence of three characteristics:

Counsel: regular use of specialized non-kin advocates in the settlement of disputes

mediation: regular use of non-kin third party intervention in dispute settlement

police: specialized armed force used partially or wholly for norm enforcement.¹²

Unlike the concepts of "counsel" and "police," the concept of "mediation" does not include express reference to a specialist role. However, at least some differentiation seems to be implied by the exclusion of kin from the process of intervention.

It was found that almost all of those societies with counsel also possessed police and mediation. Almost all of those societies with police also had mediation, but many did not have counsel. Many societies with mediation possessed neither police or counsel. This suggests a sequential development, with mediation emerging first, then police and finally counsel. In this context, the concept of "mediation" again creates some difficulty. It is broad enough to include the role of a "mediator" in the narrow sense of someone who assists disputants to reach agreement on their respective rights and duties, and the role of a "judge," who *imposes* a decision. Wimberley separated these roles and re-analysed the data used by Schwartz and Miller.¹³ He then concluded that the emergence of judges and courts formed a stage of legal evolution intermediate between mediation, in the narrow sense, and police. Neither of these studies paid attention to the role of legislator. This is, however, likely to be a late stage in legal development. In simple societies, including those with specialist judges and police, formal mechanisms for the routine change of legal rules are largely absent.¹⁴

Schwartz and Miller argued that the societies that lacked even mediation were of the simplest kind, without any substantial degree of specialization in the general division of labour. They also lacked the accumulations of property that would provide a basis for mediation. The societies with mediation had sufficient material wealth to develop payments of property in lieu of other sanctions. The emergence of police was associated with further economic development and also with a substantial degree of specialization in the gen-

¹¹ *Legal Evolution and Societal Complexity* (1964), 70 Am. J. Soc. 159.

¹² *Id.* at 161.

¹³ *Legal Evolution: One Further Step* (1973), 79 Am. J. Soc. 78.

¹⁴ See Colvin, *supra* note 1, at 206-07.

eral division of labour. Most societies with police had also developed full-time priests, teachers and governmental officials. The continuation of these trends eventually led to the emergence of counsel in societies that were quite urbanized and that had fully developed agricultural economies. It was suggested that the extent to which labour was divided in such societies "implies an economic base strong enough to support a variety of secondary and tertiary occupations as well as an understanding of the advantages of specialization."¹⁵ Partial literacy was an additional factor. The formulation of a written legal code, with problems of interpretation, "provides a niche for specialized legal counsel, especially where a substantial proportion of the population is illiterate."¹⁶

Some of the specializations that are now established in legal work (those adopted between and within firms engaged in the private practice of law, for example) are controlled mainly by market forces and administrative decisions. Others are subject to public regulation, which defines the role and prescribes the conditions under which persons may engage in it. Public regulation is concerned principally with the roles of public officials, but it also extends to some private practitioners. For example, the pursuit of certain kinds of legal work for monetary gain is controlled by law.

With respect to lawyers, legal work has come to exhibit the exceptional form of the division of labour termed "professionalism." Sociologists have adopted two divergent approaches to conceptualizing professionalism which may be called the "function" model and the "control" model. The function model stresses the service performed by "the professions," which it conceives as the application of "a systematic body of knowledge to problems which are highly relevant to the central values of a society."¹⁷ In consequence of their technical competence and valued role, the members are permitted to control entrance into the occupation and the manner in which tasks are performed within it, even as against the judgment of consumers of the service. Only the professional possesses the requisite knowledge to judge the needs of clients and the competence and ethical behaviour of colleagues. In contrast, the control model views the self-regulation of an occupational group as the core element in professionalism.¹⁸ Learning, skill and useful service are then seen only as conditions that may assist the successful maintenance of a claim to occupational control. In the function model, the value of the service performed by the professions is assumed, and it also assumed that self-regulation will be used in the interests of the general population rather than the profession itself. The control model, which does not make these assumptions, has become increasingly popular with the upsurge in criticism of professional self-regulation.

¹⁵ Schwartz and Miller, *supra* note 11, at 167.

¹⁶ *Id.*

¹⁷ Rueschemeyer, *Doctors and Lawyers: A Comment on the Theory of the Professions* (1964), 1 Can. Rev. Soc. Anth. 17 at 17. Also see Parsons, "A Sociologist Looks at the Legal Profession," in *Essays in Sociological Theory* (New York: Free Press, 1965).

¹⁸ See Johnson, *Professions and Power* (London: Macmillan, 1972); and Friedson, "Professions and the Occupational Principle," in Friedson, ed., *The Professions and Their Prospects* (Beverly Hills, Calif.: Sage Publications, 1973).

II. *Divided Labour and the Concept of Law*

In jurisprudential writings on the nature of law, the tendency has been almost to ignore the division of legal labour. None of the major theories contains any extended discussion of the topic. At times, however, there are suggestions that elements of divided labour may have been contemplated—for example, in Kelsen's notion of law as a system of norms providing for the imposition of sanctions by officials.¹⁹ Hart objects to Kelsen's theory on the ground that it obscures the guidance which many legal rules are intended to give to the citizenry.²⁰ However, although Hart proposes that law should be viewed as a union of primary and secondary rules,²¹ he seems to believe that the existence of such a union involves the presence of officials whose outlook upon the rules may be different from that of the citizens. He states that for a legal system to exist the official must accept secondary rules "as critical common standards of official behaviour," whereas the citizen need only obey.²²

It can be argued that for these writers official status simply involves acting in some way as a representative of society, and does not necessarily connote a specialist role. However, unless the two notions are identified clearly and their relationship specified, there is a risk of incorporating assumptions from our own experience that would distort material from the legal systems of other societies. Hart is guilty of this when he equates secondary rules of enforcement to "official agencies" for enforcement and to "centralized official" sanctions.²³ This implies a division of labour. As a result, Hart fails to recognize the extent to which enforcement in simple societies is governed by procedural rules. This has major and unfortunate implications for his analysis of secondary regulation, since it leads mistakenly to the conclusion that, in comparison with rules of adjudication, rules of enforcement have been a relatively late and unimportant development in law. In contrast, Hoebel has shown how the process of enforcement in simple societies is often extensively regulated without the presence of agencies that specialize in enforcement work.²⁴

To the extent that the division of legal labour is formally regulated, it can be viewed as a product of Hart's secondary rules. Secondary rules are those that specify the manner in which various tasks involved in the operation of rules are to be performed: for example, the basic tasks of identifying, changing, applying and enforcing rules. The existence of secondary rules is therefore dependent on the existence of other rules whose operation they regulate, and this dependence is their distinctive characteristic. They may usefully be regarded as *procedural* rules, because their rationale is as a means to the end of making other rules operate well.²⁵ One of the main functions of such procedural rules in complex societies is the prescription of who may

¹⁹ *General Theory of Law and State* (Cambridge, Mass.: Harvard University Press, 1949) at 58-64.

²⁰ *The Concept of Law* (Oxford: Clarendon Press, 1967) at 35-41.

²¹ *Id.* at 89-96.

²² *Id.* at 113-14.

²³ *Id.* at 91.

²⁴ *The Law of Primitive Man: A Study in Comparative Legal Dynamics*, *supra* note 7.

²⁵ See Colvin, *supra* note 1, at 200-01.

perform certain kinds of legal work, and in what manner—that is, the regulation of the division of legal labour.

There is also a close connection between the development of procedural regulation and that of an informal division of legal labour. With extensive procedural regulation, law becomes a complex phenomenon, the mastery of which demands concerted effort and lengthy training. The attention that is required, either to law in general or to its particular parts, must be at the expense of other activities.

The division of legal labour is therefore related to, but not an essential element in, a Hartian concept of law. This method of focusing attention upon the subject seems preferable to the alternative that generally has been adopted by legal and social theorists who have been concerned with it. This alternative has been, expressly or implicitly, to define law by reference to the presence of specialist roles. It can have two unfortunate consequences. First, an amendment may be required in order to include the rule systems of simple societies which, in some major respects, are similar to the legal systems of complex societies.²⁶ Second, and more important, it may lead to a neglect of systems of secondary regulation that do not include specialist roles, and therefore to a failure to explore fully the alternatives to dividing legal labour. This latter defect is apparent in some of the most interesting literature on the subject.

One of the best-known items of research on the division of legal labour is Schwartz's study of the normative systems of two Israeli communities.²⁷ He distinguished legal and informal forms of social control on the basis that, in the former, there are "specialized functionaries who are socially delegated to the task of intra-group control":²⁸ that is, on the basis of divided labour. He contended that "the entirely collective community, or *kvutza*, had no distinctly legal institution, whereas the *moshav*, a semi-private settlement, did."²⁹ In the *moshav* there was a specialized Judicial Committee that had no counterpart in the *kvutza* (or *kibbutz*). Schwartz reasoned that the nature of social organization in the collective community was such that informal controls generally were much more effective than in the semi-private property settlement. He proposed that "the likelihood of legal control arising at all in a given sphere is a decreasing function of the effectiveness of informal controls."³⁰

There can be little quarrel with Schwartz's assessment of the general relationship between legal and informal control. However, his approach to conceptualizing legal control tends to obscure the variety of forms of law and therefore risks giving misleading impressions of the nature of social control in a society. This danger is apparent in his own analysis of social control in the *kibbutz*. Although there was no specialized legal agency, the General Assembly of the community undertook some legislative and adjudicative work. And

²⁶ See the discussion of Weber accompanying notes 9 and 10, *supra*.

²⁷ *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements* (1954), 63 Yale L.J. 471.

²⁸ *Id.* at 473.

²⁹ *Id.* at 471-72.

³⁰ *Id.* at 473.

even though enforcement rested on the sanction of "community opinion," this could be focused by a decision of the Assembly.³¹ This process may not have involved a division of legal labour, but it does seem to have incorporated some elements of secondary regulation, and therefore of "law" in the Hartian sense.

On the evidence of Schwartz's own research and of other studies of Israeli communities, Shapiro has recently objected to Schwartz's conclusions about the lack of legal control in *kibbutzim*.³² He has contended that administrative agencies with powers of rule making and adjudication are widespread, and that the existence of legal control can only be denied if the test is the existence of a structurally differentiated court. Schwartz has replied to this objection in the following terms:

Shapiro questions whether the *kibbutz* ever really lacked legal control. By legal control, I had in mind particularly the presence of designated sanction specialists. In this regard, the *kibbutz* had no sanction specialists and the *moshav* did. The *kibbutz* relied instead on generalized agencies to solve problems. It used the General Assembly, consisting of all *kibbutz* members, to enunciate norms and even, rarely, to pass judgment as to proper behavior in particular instances. The *kibbutz* General Assembly was not, however, specialized—as was the *Moshav's* Judicial Committee. The *kibbutz* also solved problems through the use of various administrative committees. None of these committees was established with the specialized purpose of social control. . . . In this sense, I believe that at least relative to the *moshav*—if not absolutely—the *kibbutz* I studied lacked formal legal control.³³

Thus, Schwartz stands by his claim that the *kibbutz* had no "law," in the sense in which he defines law. However, it may be questioned whether his definition is helpful if it leaves no alternative but to categorize social control in the *kibbutz* as simply "informal." His notion of informality is sufficiently broad to include not only a regime of primary rules and what would generally be regarded as informal social control, but also a system of extensive secondary regulation, with formal machinery for making and applying rules, as long as there is no specialization in legal work. In order to understand social control in the *kibbutz*, it would be necessary to determine how far it approximates a regime of primary rules alone or a union of primary and secondary rules. However, Schwartz's conceptual scheme impedes, rather than assists, this kind of analysis.

Similar conceptual difficulties are found in a recent radical critique of law by Bankowski and Mungham.³⁴ In what they admit is a polemical book, the authors are explicit about their political message:

The message of this book is simple: law, in the forms that it is practised and taught, means domination, oppression and desolation. Law does not help but rather hinders people on the way to free society.³⁵

They reject attempts to liberalize law, to give it a "human face," or to advance a "law for the poor" movement. They advocate "a society where men

³¹ *Id.* at 475-76.

³² *Law in the Kibbutz: A Reappraisal* (1976), 10 *Law & Soc. Rev.* 415.

³³ *Law in the Kibbutz: A Response to Professor Shapiro* (1976), 10 *Law & Soc. Rev.* 439 at 439.

³⁴ *Images of Law* (London and Boston: Routledge and Kegan Paul, 1976).

³⁵ *Id.* at xi.

can freely come together and decide how to run their lives,"³⁶ and believe that this requires the destruction of law.

But one thing that we know is this: law is an imperial code, it emasculates man by offering the solution of his problems to "experts"; it reflects the professionalized society. The only way out is for men to seize their lives and transform themselves and the world.³⁷

Law is viewed essentially as a product of the professional or expert society, with the result that "people are dehumanized by being denied the capacity to determine, self-consciously, their own lives."³⁸ In a socialized society, organized on the premise that power comes from below, and not from above, Bankowski and Mungham endorse the Marxist prediction that law will "wither away."³⁹

Through much of their book, Bankowski and Mungham equate law with the division of legal labour, and echo the Marxist view of the detrimental effects of the division of labour in general. However, even if this view of divided labour is accepted, it can be argued that, in other senses, "law" is not immediately open to the objections that they raise. By launching their attack upon the division of legal labour under the guise of an attack on law in its entirety, the authors blunt the edge of their critique. They are not even consistent in their own usage of the concept of law. For example, they use it in a very different sense when attempting to meet the argument that, in a relatively complex socialized society, there will be disagreements and therefore a need for law as the expression of community power over a member of the community.

Obviously there will be difference of opinion, but that need not make the law oppressive. Law will be the product of socialized decision-making and control, and man as socialized being will be free, even though he disagrees with individual decisions.⁴⁰

However, the form of this socialized "law" is not detailed. Thus, law is left in an ill-defined position that may seem curious in a polemic against the institution. However, this lack of conceptual clarity has pervaded radical writings on the subject, and remains a major barrier to understanding the debate about the social necessity for law.

III. *Divided Labour and the Necessity for Law*

It has been a common theme in egalitarian and libertarian philosophy that law is a creature of stratified societies that would be dispensed with in a fully socialized society. There are, however, three major forms in which an argument for the demise of law under conditions of true socialism may be propounded. First, it may be argued that no rules would be necessary for the attainment of the objectives of a socialized society, and that law, as one

³⁶ *Id.* at xii.

³⁷ *Id.* at xiii.

³⁸ *Id.* at 28.

³⁹ *Id.* at 29-30. The phrase "wither away" originates in Engels' *Anti Dühring* (New York: International Publishers, 1939) at 307.

⁴⁰ Bankowski and Mungham, *id.* at 30.

set of rules, would be eliminated along with the rest. Second, it may be argued that secondary rules would be unnecessary, and that the elimination of "law" in Hart's sense would leave a society organized by primary rules alone. Third, it may be argued that the division of legal labour would be unnecessary, and that social order would be maintained through a union of primary and secondary rules in the operation of which all are involved. It is often unclear which of these arguments forms the basis of the radical critique, and undoubtedly each carries some measure of support. I believe, however, that it is the third argument that best fits the mainstream of socialist philosophy. Most of the evils that the radical left diagnoses in law may be traced to the division of legal labour. From the standpoint of a Hartian concept of law, the call for the elimination of law would, therefore, be better expressed as a call for its transformation.

The argument that no rules would be necessary for the attainment of the objectives of a fully socialized society rests upon the proposition that man's nature is basically good, and therefore that there is no universal need for regulation to ensure that man does not behave in a manner detrimental to others. That man does often cause harm to others is held to be due to social stratification, of which the division of labour and the institution of private property are the roots, and of which capitalism is the latest variety. It is not man who is evil, but his social environment. A fully socialized society would not produce the harmful behaviour that requires regulation.

One difficulty with this argument is that it views the only purpose of regulation as being the control of behaviour on the basis that it is harmful. However, regulation may be concerned with setting standards simply to coordinate action and to avoid confusion. It does not follow from the existence of a rule that the behaviour it prescribes is necessarily regarded as intrinsically preferable to the alternative behaviour. For example, it would be difficult to argue that a rule that specifies a proper side of the road on which to drive a motor vehicle rests upon a judgment that driving on the other side is socially harmful in itself, or even that it is casually related to something else that is harmful in itself. The felt need is for *some* shared standard, not a *particular* standard, to regulate the passage of vehicles. Driving on the proscribed side of the road is undesirable only because of the adoption of the other side as the standard for avoiding accidents.

MacCormick has distinguished generally between substantive rules and what he calls "procedural" rules, but I would prefer to call these "conventional" rules.⁴¹ Substantive rules are justified on the ground that "deviant behaviour is undesirable in itself or because of its consequences or both, and not simply because it deviates from a convention in relation to an activity to which having some convention is either essential or useful. . . ."⁴² Conven-

⁴¹ "Legal Obligations and the Imperative Fallacy," in Simpson, ed., *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Clarendon Press, 1973) at 119-26. MacCormick writes of both "procedural" and "conventional" standards of conduct. The alteration of terminology from "procedural" to "conventional" rules has been made in order to avoid confusion with the different sense in which I have used the term "procedural rules" in the text accompanying note 25, *supra*.

⁴² *Id.* at 123-24.

tional rules "establish a standard mode of performing some activity which is at least sometimes permissible in itself."⁴³

The difference is one of function: some rules function as substantive guides to conduct, guiding us as to what ought or ought not to be done, others as procedural guides, laying down in what manner this or that ought to be done.⁴⁴

The proposition that, in certain kinds of society, rules would not be needed because there would be no harmful behaviour is a proposition about substantive rules. Even if it is accepted, it provides no answer to a claim that conventional rules are a necessary feature of ordered social life. This latter form of regulation is especially prominent in complex societies, in which large numbers of people are engaged in many different but interrelated activities. The difficulties of coordination in such societies may suggest that conventional rules are a necessary condition for their maintenance. If such rules are ever to be dispensable, it is likely to be in societies that are so simple and static that social order rests upon a foundation of common habit and preference. In any event, few would categorically deny the need for at least some minimum substantive and conventional regulation in any society. A categorical denial would require assumptions about the nature of man and social life which even anarchist theorists generally have been reluctant to make.

Before, however, it can be concluded that at least some rules are a necessary feature of social life, the concept of a rule must be explored in more detail. If it is asserted that a rule involves a standard of behaviour that is always expected to be observed rigidly, then many will deny the necessity or desirability of rules in any society. General rules can never be framed in contemplation of all the circumstances to which they may be applied. There is therefore an inherent tension between the absolute language of an abstract rule and the demands of justice in the individual case. Strict construction and application of rules, whatever the circumstances, will lead inevitably to injustices that are intolerable, especially to egalitarian and libertarian philosophy. Dworkin has argued that legal systems attempt to overcome this difficulty through the use of other normative standards such as legal *principles*.⁴⁵ In his view, rules are applicable in an all-or-nothing fashion that necessitates a particular answer to a problem, whereas principles must be taken into account merely as considerations leaning in one direction or another. Principles sometimes permit departures from rule-following, but then the rule must be redefined to include the exceptions. Principles may not be applied, even after consideration, without this necessary redefinition. It may be objected, however, that this distinction is too sharp, since rules are not always applied in what can meaningfully be regarded as an all-or-nothing fashion. Dworkin's claim in this respect seems to rest upon the idea of a clear-cut distinction between the consequences of failure to apply rules and failure to apply principles. The one requires reformulation whereas the other does not. This, however, is misleading, since it is only with some consistency of application that it is possible to speak of the existence of a legal principle with a specific content. At

⁴³ *Id.* at 122.

⁴⁴ *Id.* at 121.

⁴⁵ *The Model of Rules* (1967), 35 U. Chi. L. Rev. 14 at 22-29.

a certain level of failure to apply the principle, it must be reformulated if it is to constitute any kind of meaningful standard of guidance. This same consideration underlies the reformulation of legal rules.

The core element of a rule is a standard of behaviour to which people are expected to give more or less consideration rather than to which they are expected always to conform. Thus, a sociological treatise has defined rules in a way that parallels Dworkin's definition of principles.

[S]ocial rules are the criteria that normal members of the society are expected to make [sincere] use of in deciding what to do in any situation for which they are seen as relevant.⁴⁶ (Emphasis deleted.)

The same could be said as an initial statement about legal rules. Similarly, Coval and Smith have argued recently that every legal rule has an implicit *ceteris paribus* clause that enables deviations in circumstances where, for example, compliance is impossible, the application of the rule will not produce its intended effect, or the effect is in conflict with other, more important, goals of the system.⁴⁷ Viewed from this relativist rather than absolutist perspective, rules become more compatible with even the most egalitarian and libertarian political theories.

If, then, it seems reasonable to suppose that at least some rules are a necessary feature of social life, does the same hold true for secondary rules? It has been noted already that these "procedural" rules specify the manner in which various tasks associated with the operation of rules are to be performed. Most procedural rules fall within MacCormick's broad category of rules that I have called "conventional," and their basic justification follows the general lines of that used for conventional rules.

In anything but the most simple and static societies, choices and actions cannot be predicted and coordinated on the basis of common habit and preference. If social order is to be attained, there is a need for agreement on certain conventional ways of doing things. Applying this argument to secondary rules, it would appear that there are few circumstances in which it is likely that there will be spontaneous and unanimous agreement about the proper content of the primary rules, their correct application to concrete cases and the most appropriate response to deviation. Yet there is a need for agreement on these matters if the primary rules are to maintain social order. One way of avoiding or resolving disagreements is the introduction of conventional standards to determine the content and operation of the system of rules in a manner independent of the imposition of individual preferences. Under these conventional standards, individual preference is foregone for the sake of social cooperation.

If secondary rules are essentially an expression of social cooperation, in the sense that they provide a cooperative foundation for social order, they are compatible with the fundamental tenets of egalitarian and libertarian

⁴⁶ Douglas, *American Social Order; Social Rules in a Pluralistic Society* (New York: Free Press, 1971) at 141. See ch. 5 and 6 of Douglas' book for a general discussion of the situational use of rules.

⁴⁷ *The Causal Theory of Law* (1977), 36 Camb. L.J. 110.

philosophy. This argument, however, should not be interpreted as a claim for the compatibility of procedural regulation of the scope, complexity and rigidity that is encountered in modern industrial societies. In these societies ordinary citizens are effectively excluded from any real understanding, and hence control, of the legal system. Only trained specialists have the knowledge and expertise necessary for effective participation in decision-making. Thus, developments in procedural regulation and in the division of legal labour are related. Radical criticism of law has always been concerned with the erosion of popular control that stems from division of legal labour. This has been at the heart of the call for the elimination of law in anarchist and Marxist writings.

It was argued earlier that the polemic of Bankowski and Mungham against "law" could be viewed as, more precisely, a polemic against the division of legal labour. The same argument may be applied to traditional anarchist thinking about law. For example, Bakunin assumes a division of legal labour, and his objections to this form the basis of his objections to law.

In a word, we reject all legislation, all authority, and all privileged licensed, official and legal influence, even though arising from universal suffrage, convinced that it can turn only to the advantage of a dominant minority of exploiters against the interests of the immense majority in subjection to them.

This is the sense in which we are really Anarchists. . . .⁴⁸

For Bakunin and many other anarchists, the objection to law is that it is imposed externally on man, rather than freely recognized. There is no objection to law that truly comes from the community. Thus, Godwin felt that injustice within the community could be handled by "the institution of the jury, to decide upon the offences of individuals within the community, and upon the questions and controversies, respecting property, which may chance to arise."⁴⁹ Read's acceptance of law is unusual in his adoption of the term, rather than in the sentiments which he expresses.

Anarchism means literally a society without an *arkhos*, that is to say, without a ruler. It does not mean a society without law, and therefore it does not mean a society without order.⁵⁰

Thus, the crucial issue in radical criticism of law is the loss of popular control that results from the division of legal labour, and, of course, if law is defined in terms of divided labour, then a strong argument can be made against the universal necessity for law. Many simple societies have managed without developing specialized legal roles. It was contended earlier that conceptualization of the law in this way is a source of confusion because it tends to obscure the variety of alternatives to the division of legal labour. Nevertheless, the radical critique does have the value of focusing attention on the disadvantages of dividing legal labour. I wish now to consider these, and their competing benefits, in more detail.

⁴⁸ Bakunin, "God and the State," trans. Tucker, in Shatz, ed., *The Essential Works of Anarchism* (Toronto: Bantam Books, 1971) at 146.

⁴⁹ Godwin, *Enquiry Concerning Political Justice, and its Influence on Morals and Happiness*, Vol. II (London: Printed for G.G. and J. Robinson, 1798) at 198.

⁵⁰ Read, "The Paradox of Anarchism," in *Anarchy and Order; Essays in Politics* (London: Faber and Faber, 1954).

IV. *The Value of Dividing Legal Labour*

The distaste with which the radical left views the division of legal labour reflects in part a more general theory about the socially harmful character of the division of labour in society. No objection is taken to the idea of voluntary specialization, which was the basis of Durkheim's approval of the phenomenon.⁵¹ It is asserted, however, that when an institutionalized division of labour is built into the organization of society, specialization is imposed on man and is not freely chosen. The result is one expression of that sense of frustrated powerlessness that Marx termed "alienation."⁵² The situation is worse for those who occupy the less advantaged roles, but all suffer some detrimental effects.

[T]he division of labour offers us the first example of the fact that, as long as man remains in naturally evolved society, that is, as long as a cleavage exists between the particular and the common interest, as long, therefore, as activity is not voluntarily but naturally, divided, man's own deed becomes an alien power opposed to him, which enslaves him instead of being controlled by him. For as soon as the division of labour comes into being, each man has a particular, exclusive sphere of activity, which is forced upon him and from which he cannot escape. He is a hunter, a fisherman, a shepherd, or a critical critic, and must remain so if he does not want to lose his means of livelihood; whereas in communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner, just as I have a mind, without ever becoming a hunter, fisherman, shepherd or critic.

This fixation of social activity, this consolidation of what we ourselves produce into a material power over us, growing out of our control, thwarting our expectations, bringing to naught our calculations, is one of the chief factors in historical development up till now.⁵³

A more specific objection to the division of legal and political labour is that the ordinary citizen loses control over the main instruments through which society is ordered, and hence cannot ensure that they will be used for his benefit. In anarchist theory, systems of representation are seen as no real answer to this problem.

We believe that the people will be happy and free only when they build their own life by organizing themselves from below upward, by means of autonomous and totally free associations, subject to no official tutelage but exposed to the influence of diverse individuals and parties enjoying mutual freedom.

These are the convictions of social revolutionaries, for which we are called anarchists. We do not object to the name because we are indeed enemies of all power, knowing that power corrupts those in whom it is vested as much as those who are forced to submit to it. Under its pernicious influence the former become ambitious and self-seeking despots, exploiting society for their own benefit or the benefit of their class, and the latter become slaves.⁵⁴

⁵¹ See text accompanying note 5, *supra*.

⁵² For a general discussion of the concept of alienation, see Marx, "Economic and Political Manuscripts of 1844," in Marx and Engels, *Collected Works*, Vol. 3, *supra* note 6, at 270-82.

⁵³ "The German Ideology," *supra* note 6, at 47-48.

⁵⁴ Bakunin, "Statism and Anarchy," trans. Shatz, in Shatz, ed., *supra* note 48, at 158-59.

From the standpoint of a claim to scientific objectivity, Michels built upon a similar analysis in formulating his "iron law of oligarchy."⁵⁵ This was held to apply to all organizations with differentiated leadership, even those committed to democratic ideals: "Democracy leads to oligarchy, and necessarily contains an oligarchic nucleus."⁵⁶

By a universally applicable social law, every organ of the collectivity, brought into existence through the need for the division of labour, creates for itself, as soon as it becomes consolidated, interests peculiar to itself. The existence of these special interests involves a necessary conflict with the interests of the collectivity. Nay, more, social strata fulfilling peculiar functions tend to become isolated, to produce organs fitted for the defence of their own peculiar interests. In the long run they tend to undergo transformation into distinct classes.⁵⁷

The potential for a slide towards oligarchy is inherent in what may be viewed as "internal control" over the law: that is, the control that is exercised through the restriction of formal decision-making to specialists who hold official positions, in contrast to "external control," which is exercised through the application of power or influence over the holders of official positions.⁵⁸ Even if the inevitability of oligarchy is rejected, it cannot be expected that those who hold formal power within a legal system will function simply as representatives of society or of broad social classes. Each group within the division of legal labour can have its own ideas about how the law should operate and its own interests in seeing it operate in a particular way. Interest groups can form that are concerned with the maintenance and improvement of their own occupational position rather than, or at least as well as, with a public interest.

Analysis of the legal process from an occupational perspective has been particularly fruitful in sociological studies of the criminal law. For illustrative purposes, it will suffice to mention two of the best-known items of research. One of these is Blumberg's study of criminal trials in the United States.⁵⁹ Blumberg was concerned with how the court process departs from the formal model of "adversary justice" for the sake of what is often called "negotiated" or "bureaucratic" justice, in which cases are handled through arrangements regarding guilty pleas.

[T]he court organization . . . possesses a thrust, purpose, and direction of its own. It is grounded in pragmatic values, bureaucratic priorities, and administrative instruments. These exalt maximum production and the particularistic career designs of organizational incumbents, whose occupational and career commitments tend to generate a set of priorities. These priorities exert a higher claim than the stated ideological goals of "due process of law", and are often inconsistent with them.⁶⁰

As Blumberg describes the system, the overriding goal for the court's officials is the smooth processing of large numbers of cases through negotiated guilty

⁵⁵ *Political Parties; A Sociological Study of the Oligarchical Tendencies of Modern Democracy*, eds. Paul and Paul (New York: Free Press, 1962).

⁵⁶ *Id.* at 6.

⁵⁷ *Id.* at 353.

⁵⁸ See Colvin, *supra* note 1, at 211-12.

⁵⁹ *The Practice of Law as Confidence Game; Organizational Cooptation of a Profession* (1967), 1 (2) Law & Soc. Rev. 15.

⁶⁰ *Id.* at 19.

pleas. Defence lawyers are drawn into the system by their need to build and preserve working relationships with court officials. They also need to limit the scope and duration of cases, rather than do battle, in order that cases will be financially profitable. Hence Blumberg argues that in this field the practice of law becomes a "confidence game."

A second example of the value of an occupational perspective on the legal system is Jerome Skolnick's study of police practices in criminal investigation.⁶¹ Skolnick suggests that there are substantial incompatibilities between the ideas of "law" and "order," because legality involves restraints upon the actions taken to achieve order.⁶² However, the working environment of the police leads to a stress on the priority of crime control and to little moral concern for the legal rules that govern police actions. Skolnick contends that the policeman draws a moral distinction between criminal law and criminal procedure.⁶³ Criminal procedure is viewed with "the administrative bias of the craftsman." The policeman sees himself as competent in the work of crime control, and believes that he should be free from procedural control. The result is widespread evasion of the formal rules of criminal investigation.⁶⁴

I have used these examples from sociological research merely to provide illustrations of how the division of legal labour involves the passage of some power to officials to operate the law in ways that they choose, and that may not fall within the scope of what was intended. The extent to which deviation will actually occur depends on a number of factors, and I do not suggest that the kind of analysis provided by Blumberg and Skolnick will necessarily fit all legal officials. For example, the role of judge in the superior courts is subject to considerable social pressure towards relatively strict construction and application of formal rules. The important point, however, is that there is always a risk that occupational control over elements of a legal system will lead to operation of that system in ways that are not publicly affirmed or approved.

Michels viewed the passage of power to officials largely as an inevitable product of efficient organization. Direct government by the masses was a practical impossibility.⁶⁵ Without necessarily endorsing this view, it is clear that the elimination of any substantial part of the division of legal labour could be achieved only at a tremendous cost to the efficiency of law. Phenomena of the scale and complexity encountered in modern legal systems require specialization in order to achieve mastery of even small parts of the whole. Indeed, the demands of efficiency underlie the trend towards further advances in dividing legal labour, such as the growth of delegated legislative power, the development of law reform commissions, the transfer of responsibility for legal training from the profession to the universities, and the cur-

⁶¹ *Justice Without Trial: Law Enforcement in Democratic Society* (New York, London, Sydney: John Wiley & Sons, 1967).

⁶² *Id.* at 6-9.

⁶³ *Id.* at 196-99.

⁶⁴ For a general discussion of the police from an occupational perspective, see Rock, *Deviant Behaviour* (London: Hutchinson University Library, 1973) at 172-203.

⁶⁵ *Political Parties; A Sociological Study of the Oligarchical Tendencies of Modern Democracy*, *supra* note 55, at 63-67.

rent debates about the role of juries⁶⁶ and specialization within the practising profession.⁶⁷

At the same time, however, the competition between efficiency and freedom has been a source of dilemma in societies that value democratic ideals, and may have inhibited the advance of the division of legal labour. For example, the jury still has an important role in the common law world. Moreover, whatever questions may be raised about the capacity of untrained legislators to comprehend the issues involved in the statutes that they pass, and about the capacity of general purpose legislatures to provide a forum for meaningful debate on intricate legislation, few would be prepared to forego the right of all adult citizens to stand for election to legislative bodies, or to release officials from any substantial part of their control.

Thus, within contemporary western societies, there is a broad measure of support for the existing compromise between the demands of freedom and efficiency in the organization of law. This compromise takes the form of a highly developed division of labour in legal work, with substantial power passing to officials, but subject to the overriding control of democratically elected legislative bodies. Insofar as there are major disputes, they tend to concern the detailed implementation of this compromise rather than its basic form. Challenges to the compromise have come from the extremes of the political spectrum, most commonly from the radical left.⁶⁸ Usually such challenges form part of a wider call for the restructuring of social life. It is accepted that only marginal changes in the organization of law are possible within the existing framework of society.

There is, however, one respect in which the existing division of legal labour may be seriously questioned. This concerns the role of the legal profession as the exclusive and self-regulating repository of systematic legal knowledge and of a capacity for many kinds of legal work. It may be questioned whether this reflects a genuine public interest.

V. *The Future of the Legal Profession*

The role of the legal profession traditionally has been viewed with deep-rooted suspicion:

Lawyers have never won a prize in the popularity stakes. It is a safe prediction that they never will. One has merely to speak of the *profession* of law, to detect that one has offended against the instinct that justice ought not to stand in need of the services of a middleman. The lawyer is an intruder into Eden; his presence an affront to the vision which men carry within them of a paradise lost, and hopefully to be regained, in which lambs and lions will congregate without specialist assistance.⁶⁹

⁶⁶ See, for example, Cornish, *The Jury* (London: Allen Lane, 1968); Simon, ed., *The Jury System in America* (Beverly Hills, Calif.: Sage Publications, 1975).

⁶⁷ See, for example, *Special Report on Advertising* (1977), 4(1) National (Canadian Bar Association) at 10-12, and 4(2) at 10-11.

⁶⁸ See, for example, Lefcourt, ed., *Law Against the People* (New York: Random House, 1971); Black, ed., *Radical Lawyers* (New York: Avon Books, 1971); *Images of Law*, *supra* note 34.

⁶⁹ Finer, "The Legal Profession," in Zander, ed., *What's wrong with the law?* (Montreal: McGill—Queen's University Press, 1970) at 45.

Nevertheless, the present criticism of the legal profession has not, for the most part, been motivated by the broad egalitarian and libertarian concerns that inspired theorists such as Marx and Bakunin to rail against the division of labour in general. Of course, the radical left has offered stringent criticism of the legal profession.⁷⁰ It is, however, a liberal concern to aid the disadvantaged members of society that, in recent years, has given major impetus to criticism of the profession. The profession is viewed as having failed to meet the legal needs of all sections of society, and therefore as having failed to meet the terms of its public mandate.⁷¹ Hence, the legitimacy of its authority and privileges has increasingly been questioned.

The legal profession has attracted liberal as well as radical criticism because of the peculiar circumstances of its role as middleman between the citizen and the system. The lawyer mainly provides personal services for the citizen which the latter, with sufficient ability and training, would not require. He would be able to do his own legal work if he so desired. In this respect, the role of the specialist lawyer is markedly different from that of the official who performs a public role in decision-making. The only alternative to the latter is a mass involvement that creates problems of efficiency. However, although the specialist lawyer finds a justification in the provision of personal services, the division of legal labour is structured in such a way that the consumer has little control over the services available to him and has little choice in his usage of them. The lack of systematic legal education for the general population means that the ordinary citizen must resort to an expert if he is to attain certain objectives, but the question of who may function as an expert, and in what manner, is controlled by the community of established practitioners. The consumer only has choice within the narrow area permitted by the legal profession itself. Under these circumstances, and by not declaring an inability to meet the needs of the population, the profession has assumed responsibility for the provision of legal services. It must, therefore, be held accountable for a failure to meet those needs, and this failure has been demonstrated conclusively by a number of empirical studies that have found substantial variation in lawyers' services for different classes.⁷²

Two major theories have been advanced to explain the "class" character of legal work. On the one hand is what some critics have called the "resources" theory of unmet legal needs, which has been associated with Carlin and Howard.⁷³ This denies that the poor have fewer legal problems than the wealthy, but contends that they lack the resources of knowledge to appreciate how lawyers could help them and the material resources to obtain legal help.

⁷⁰ See *supra* note 68.

⁷¹ For an overview, see Freeman, *The Legal Structure* (London: Longman, 1974) ch. 5 and 8.

⁷² See, for example, Carlin and Howard, *Legal Representation and Class Justice* (1965), 12 U.C.L.A. L. Rev. 381; Mayhew and Reiss, *The Social Organization of Legal Contacts* (1969), 34 Am. Soc. Rev. 309; and Abel-Smith, Zander and Brooke, *Legal Problems and the Citizen* (London: Heinemann Educational Books, 1973).

⁷³ *Id.* Also see Carlin, Howard and Messinger, *Civil Justice and the Poor: Issues for Sociological Research* (New York: Russell Sage Foundation, 1967).

On the other hand, the theory developed by Mayhew and Reiss claims that the crucial factor is the social organization of the profession.⁷⁴ In this view, lawyers do not normally handle certain legal problems faced by all segments of the community, including "a broad panoply of problems surrounding such daily matters as the citizens' relation to merchants or public authority."⁷⁵ Moreover, the poor do have fewer legal problems of the kind that the profession is organized to handle: "The legal profession is organized to service business and property interests."⁷⁶ In addition, many lawyers may not have the capacity or will to engage in some kinds of legal work that are neglected at present. In this context, the biases in law school curricula, which affect the consciousness and competence of graduates, assume major significance.⁷⁷

It is, however, a mistake to view the "resources" and "social organization" theories as necessarily in opposition. In defence of the profession, it could be argued that it is organized on the basis of the demand for its services, but this demand is affected by public perception of which services are offered by the profession, and to whom these services are available. A vicious circle operates that seems unbreakable within the model of private practice and professional autonomy. Against this background, it is to be expected that traditional legal aid programs, which provide limited financial assistance for those who seek legal services, will have little impact. These merely extend the availability of lawyers' services within the established sphere of lawyers' work. They do not alter the basic pattern of this work. Nor is it clear that the more innovative schemes, such as neighbourhood law centres, can produce major change if their members are subject to the substantial control of a conservative legal profession that is oriented towards the maintenance of its existing interests and status.

Indeed, although the legal profession has given qualified support to some new ideas about the provision of legal services, it has acted as a force against the exploration of more radical alternatives. For example, in Canada at present the advertisement of low-cost legal work has met with some hostility and disciplinary action from the profession,⁷⁸ and, although any major expansion in the provision of legal services will require many more lawyers, elements of the profession are beginning to call for restrictions on the number of law graduates, on the grounds that there are sufficient practitioners for the existing market and that any increase would drive down fees and hence endanger the quality of service.⁷⁹ The protection that could result for the market position of existing practitioners appears to be merely coincidental.

Under these circumstances, it seems likely that major change can be achieved only with initiatives from outside the profession. Innovative measures are pursued at present primarily through state-financed programs of legal aid.

⁷⁴ *The Social Organization of Legal Contacts*, *supra* note 68.

⁷⁵ *Id.* at 317.

⁷⁶ *Id.* at 313.

⁷⁷ See, for example, Rockwell, "The Education of the Capitalist Lawyer: The Law School," in *Law Against the People*, *supra* note 68.

⁷⁸ See *Jabour v. Law Society of B.C.*, [1979] 4 W.W.R. 385 (B.C.S.C.). Also see *Special Report on Advertising*, *supra* note 67.

⁷⁹ See, for example, 6(7) National (Canadian Bar Association) at 34.

This may eventually lead to the erosion of occupational self-control and its replacement by a system of what Johnson calls "mediative" control, where a third party (in this case, the state) assumes responsibility for regulating legal work.⁸⁰ If it does, the cure may be worse than the illness. However, some state intervention has traditionally been an element in legal work, through public regulation of who may engage in certain kinds of legal work for monetary gain. In the past, state intervention has been used to support the monopolistic position of the profession. In the future, it may be used more and more to correct the abuses of that position.

A more attractive alternative may be a shift in the balance of power from the professional to the consumer, and perhaps even the destruction of the present clear-cut and rigid distinction between the lawyer and the non-lawyer. If legal education were made more widely available, the citizen would have not only a greater capacity to judge when specialist lawyers are useful, but also less need to rely on them for routine work, and he would be in a better position to evaluate and control the services that they provide. I have in mind here much more than the teaching of law at the highschool and undergraduate levels. In a society organized substantially through the coercive mechanism of law, education in basic legal skills can hardly be of less importance than education in the basic skills of reading, writing and arithmetic. In addition, there may well be considerable room for a new approach to drafting laws and for a restructuring of the legal system that would reduce the need for expert assistance.

Furthermore, insofar as foreseeable circumstances will provide some role for the expert, it is difficult to justify the present scheme of public regulation which places restrictions on who may pursue legal work as an occupation. Milton Friedman views what he calls "occupational licensure" as an important restriction "on the freedom of individuals to use their resources as they wish."⁸¹ Although he also dislikes schemes that provide simply for state certification of the level of competence of practitioners, he considers such schemes preferable to licensure and contends that in no case can licensure rather than certification be justified.⁸² One of his most interesting arguments concerns standards of medical practice. Maintenance of a high level of quality is the most common defence of licensure in the medical profession, as it is in the legal field. However, restrictions on practice usually will reduce the amount of available medical care and thus can give an overall lower standard of care:

The relevant average quality of medical care, if one can at all conceive of the concept, cannot be obtained by simply averaging the quality of the care that is given; that would be like judging the effectiveness of a medical treatment by considering only the survivors; one must also allow for the fact that the restrictions reduce the amount of care. The result may well be that the average level of competence in a meaningful sense has been reduced by the restrictions.⁸³

The same argument applies to the provision of legal services. However admirable "Cadillac" service may be, it is poor service if it is exclusive but only meets some of the needs of a privileged segment of the population.

⁸⁰ *Professions and Power*, *supra* note 18, at 46.

⁸¹ *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 137-38.

⁸² *Id.* at 149.

⁸³ *Id.* at 156.

The present form of legal professionalism locks the vast majority of the population into the role of "non-lawyer," ignorant of the law and dependent on the expert for the satisfaction of the most minor needs. The only test by which such a forced division of labour can be justified is social efficiency, and the present form of legal professionalism has failed to meet this test. Any need that society has for expert lawyers can be satisfied by freely chosen specialization, subject perhaps to certification of a level of competence, within a general population who have all been exposed to some systematic legal education. Moreover, there may be an even heavier social cost to the denial of systematic legal knowledge to all members of the community. Only with such knowledge can the community exercise any real control over the officials to whom it grants power. In the final analysis, therefore, the present organization of legal knowledge and work is a potential threat to freedom.

VI. *Conclusion*

This discussion has sketched some of the issues that surround the division of legal labour: its historical development, its relation to the concept of law, its role in arguments about the necessity for law, and its value and relevance to the debate on the future of the legal profession. A complete analysis was not intended. The discussion simply expresses some preliminary thoughts that may serve to focus attention upon a subject that is clearly of crucial importance for legal theory but which has hitherto been neglected and obscured by conceptual confusion.

It has been demonstrated that a highly developed division of legal labour is not in any way a necessary feature of social life or of law. Indeed, in the legal systems of many simple societies, there is no more than the most elementary differentiation of roles, which arises primarily from physiological differences between human beings. The degree to which legal labour is presently divided is the product of social policies that could be amended or reversed if it were appropriate to do so. At one end of the spectrum of arguments for change is a moderate, reformist desire to see the ordinary citizen better equipped to handle his own legal problems and to judge when expert assistance is needed. At the other end of the spectrum is the full-fledged Marxist critique of the institutionalization of a general division of labour in society, and the resulting alienation of man. From the latter perspective, even the expert is a prisoner of his role.

A political question is at the heart of the debate about the value of dividing legal labour. At stake is the balance between the values of efficiency and freedom. The theorists of the radical left are not the only ones to have valued freedom, but they have been more sensitive than most to its vulnerability. Even if their solutions do not find ready acceptance, their polemics give clear warning of dangers that must be avoided.