

May 1971

The Technique Element in Law

Robert S. Summers

Follow this and additional works at: <http://scholarship.law.berkeley.edu/californialawreview>

Recommended Citation

Robert S. Summers, *The Technique Element in Law*, 59 CAL. L. REV. 733 (1971).

Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol59/iss3/7>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38KX9V>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

The Technique Element in Law

Robert S. Summers*

In giving accounts of the nature of law, legal philosophers have, in the fashion of scientists,¹ broken law down into elements, such as legal authority, legal rules, moral aspects of law, and law's coercive features. In the vast literature of legal philosophy, all these elements have been subjected to intensive and illuminating analysis. But the "technique element in law"² remains neglected to this day. *How* does law do what it does? Does the law's methodology consist merely of criminal and civil techniques? Professor Hans Kelsen is one of the few legal philosophers interested in these questions, and his essay, *The Law As a Specific Social Technique*,³ is a classic on the subject. That essay, which I first read several years ago, initially inspired me to think about these questions. It is especially fitting, then, that the thoughts I offer as a kind of progress report should appear in a special issue of the *California Law Review* honoring Professor Kelsen.

To characterize the technique element in law faithfully and fully would be to write at least one book and perhaps several. My aim here must be far less ambitious. I hope merely to sketch a general theory of law's basic techniques and then indicate how this theory might be of value. This effort is intended only to be suggestive and not at all definitive.⁴ Along the way, and often by footnote, I will describe how the theory I offer draws upon and differs from the general views Professor Kelsen put forth in his classic essay.⁵

* Professor of Law, Cornell University. B.S. 1955, University of Oregon; LL.B. 1959, Harvard University.

1. R. POUND, *FASHIONS IN JURISTIC THINKING* (1937).

2. A phrase adapted from Dean Pound. See 1 R. POUND, *JURISPRUDENCE* 73 (1959).

3. 9 U. CHI. L. REV. 75 (1941). Professor Kelsen has dealt with the same ideas elsewhere in his writings, too. See, e.g., H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 15-29 (1961). Two works by other authors should also be noted: R. VON JHERING, *LAW AS A MEANS TO AN END* (1924); Hocking, *The Relation of Law to Social Ends*, 10 J. PHIL. 512 (1913).

4. Thus, this will be a sketch in several senses. First, it will be devoid of some of the usual detail. Second, it will, at points, rest rather more on assertion than on developed argument. Third, certain key concepts, such as primary thrust and variants, will be left more or less unanalyzed.

5. A subsidiary purpose of this Article will be to draw together some of the more significant literature as it relates to facets of the theory presented here.

I

SOCIAL TECHNIQUES DISTINGUISHED FROM SOCIAL FUNCTIONS

Preliminarily, it is necessary to distinguish social techniques for the discharge of social functions from those functions themselves.⁶ Different social functions are discharged in different societies in different degrees and by different techniques. There is no accepted framework for characterizing and differentiating possible social functions. For present purposes, the following is a useful, though in-exhaustive listing:

- Reinforcement of the family;
- promotion of human health and a healthful environment;
- maintenance of community peace;
- provision for redress of wrongs;
- facilitation of exchange relationships;
- recognition and ordering of property ownership;
- preservation of basic freedoms;
- protection of privacy;
- surveillance of private and official law-using activities.

The degree to which any of these social functions is discharged in a particular society will be determined not only by the effectiveness or ineffectiveness of its deployment of social techniques, but also by the nature and extent of private, noncollective efforts, and by such relatively uncontrollable factors as population density, the spirit of the populace, and the inherent limitations of social techniques of any kind.⁷

Social techniques—collective ways of discharging social functions—may be subdivided into the nonlegal⁸ and the legal.⁹ Professor Kelsen cites morality and religion as examples of nonlegal techniques.¹⁰ And doubtless morality and religion may figure prominently in the extent a specific social function is discharged in a given society. Consider, for example, the social function here called reinforcement of the family. The prospect of severe moral condemnation for marital infidelity might

6. The use of the word "function" here is, of course, metaphorical, and not without risk of distortion. But for present purposes, this risk can be incurred. On the ways in which it may materialize, see *FUNCTIONALISM IN THE SOCIAL SCIENCES* (D. Martindale ed. 1965).

7. It is sobering to be reminded that society *really* cannot have any social engineers. See Rhees, *Social Engineering*, 56 *MIND* 317 (1947). So, too, that the unanticipated consequences of social action are common and can be of great importance. See, e.g., Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 *AM. SOC. REV.* 894 (1936).

8. The role of essentially nonlegal factors in the discharge of social functions is, doubtless, very great; it is a subject that awaits systematic study.

9. Of course this, like all such distinctions, loses its sharpness at the borderlines.

10. Kelsen, *Law as a Specific Social Technique*, 9 *U. CHI. L. REV.* 75, 79-80 (1941).

induce husband and wife to remain faithful to one another. And most Western religions purport to support family life.¹¹ But law can be brought to bear to help reinforce the family, too. To cite examples at random, criminal law may prohibit bigamy, adultery, and other conduct likely to disrupt the family; tort law may provide redress for interferences with husband-wife relationships; property laws may give the wife an interest in the husband's property and thereby encourage man and wife to view themselves as working together; tax laws may favor the family by allowing husband and wife lower rates of tax on income than unmarried persons pay and by permitting deductions for dependents; compulsory military service laws may exempt certain married persons; other laws may impose duties to support family members; and so on.

In one of its aspects, then, the law is a source of techniques that may be marshalled to help discharge social functions. Professor Kelsen sometimes writes as if the law were just one single technique rather than a set of techniques:

The social technique that we call "law" consists in inducing the individual, by a specific means, to refrain from forcible interference in the spheres of interests of others: in case of such interference, the legal community itself reacts with a like interference in the spheres of interests of the individual responsible for the previous interference.¹²

At other times, Professor Kelsen differentiates penal, civil (compensatory), and administrative legal techniques.¹³ In my view, a still more refined analysis is needed.

II

SOCIAL TECHNIQUES OF A LEGAL NATURE

An account of law's basic techniques, then, is a response to the question of *how* law can help discharge social functions, rather than to the question of *what* social functions law can help perform. The account of law's techniques to be offered here will not be a description of the basic techniques of law that a particular society uses. Rather, it will be a description of the basic techniques of law that societies might possibly use.

11. It must be admitted that conceptual difficulties plague any effort such as Professor Kelsen's to characterize morality and religion as techniques.

12. Kelsen, *supra* note 10, at 81.

13. *Id.* at 89-93, 96-97. This apparent fluctuation can be readily explained. Professor Kelsen really considers two separate questions more or less at the same time: First, how do legal techniques as a whole differ from other social techniques such as morality and religion? Second, what different legal techniques are there? My main interest here is in the latter question.

To most laymen, there are only two basic possibilities: the criminal law and the civil law. Professor Kelsen adds a third, which he calls "administrative."¹⁴ It is my own thesis that an adequate theory must make an independent place for five basic techniques:

The grievance-remedial technique;
 the penal technique;
 the administrative-regulatory technique;
 the public benefit conferral technique;
 the private arranging technique.¹⁵

A. *The Grievance-Remedial Technique*

The grievance-remedial technique defines remediable grievances, specifies remedies, administers processes for resolving disputed claims to such remedies, and provides for enforcement of remedial awards. Although the particular combinations of legal resources that may be deployed in the workings of this technique are highly varied,¹⁶ its essentials are familiar and generally understood among social theorists. Accordingly, for present purposes, further elaboration is unnecessary.

B. *The Penal Technique*

The penal technique is probably even more familiar than the grievance-remedial. The penal mode prohibits certain antisocial conduct altogether (usually conduct that is already proscribed by moral rules), maintains police and other officials to keep its prohibitions credible and to detect violations, administers processes for resolving disputes over penal liability, and operates a correctional system.

The penal and grievance-remedial techniques probably exhaust the layman's inventory of legal techniques—the criminal law and the civil law. But for various reasons, to reduce or assimilate the other

14. *Id.* at 96-97.

15. These names may at first seem a bit odd. But in any analysis that is at all innovative, choices must often be made between use of old names with new meanings and the use of new names.

16. For example, it is by no means an inherent feature of the grievance-remedial technique that any and all disputes over the existence of facts which must be found before a remedy is available have to be resolved by adjudicative methods; administrative fact-finding may be appropriate in regard to some grievances: so-called workmen's compensation systems are illustrative. *See, e.g.,* Wainbaugh, *Workmen's Compensation Acts*, 25 HARV. L. REV. 129 (1911). Nor is it inevitable that the party suffering the grievance be always the only one empowered to seek redress: civil rights grievances are illustrative. *See, e.g.,* J. WITHERSPOON, *ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS* (1968). Nor is it inevitable that the party responsible for causing the grievance always be required to provide reparation. *See, e.g.,* Kalven, *A Schema of Alternatives to the Present Auto Accident Tort System*, 1 CONN. L. REV. 33 (1968). And remedies might be available before the fact of actual injury, as in the case of injunctions.

three basic techniques of law to either of these two would distort the reality of law. Viewed broadly as techniques for the discharge of social functions, all five have independent significance.¹⁷ Each has its own, distinctive primary thrust:¹⁸ the grievance-remedial is reparative, the penal is prohibitory, and, as will be suggested, the administrative-regulatory technique is regulative, the public benefit conferral mode is distributional, and the private arranging technique facilitates and effectuates private choice. In the face of this and still other differences, only dogmatic reductionists would insist upon reducing all of law's techniques either to the grievance-remedial or the penal.¹⁹

C. *The Administrative-Regulatory Technique*

This technique differs from the grievance-remedial in the respect (among others) that it is designed mainly to operate preventively, before any grievance has arisen.²⁰ The theory is that administrators will take precautionary steps to assure that parties subject to regulation comply with specified regulatory standards so nothing untoward will occur. This technique also differs from the penal mode in the respect (among others) that it regulates wholesome activity rather than prohibits antisocial forms of behavior altogether. Transporting the public by air is, for example, a wholesome activity,²¹ and in it an

17. The method of argument to be used here to establish the separate existence of five distinctive techniques will be this: As each technique is introduced it will then be shown how it would distort reality to reduce or assimilate this technique to any one of those already introduced. For a similar mode of argument, used to establish a distinction between duty imposing rules and power conferring rules, see H.L.A. HART, *THE CONCEPT OF LAW* 27-41 (1961). See also *THE DIVISION AND CLASSIFICATION OF THE LAW* 10-54 (J. Jolowicz ed. 1970). I am also indebted to Professor David Lyons of the Cornell University Department of Philosophy for thoughtful discussion of the method of argument used here.

18. This concept itself merits extended analysis.

19. It appears that Professor Kelsen is, at times, disposed to reduce all three techniques he recognizes—penal, civil, and administrative—to one basic type that is essentially penal in character. Kelsen, *supra* note 10, at 89-90, 96. But Professor Kelsen may really be more interested in the question of how legal techniques as a whole differ from other social techniques, than in the difference between available legal techniques *inter se*. Even so, there are, doubtless, other grounds on which to differentiate law as such from, say, morality. See, e.g., H.L.A. HART, *supra* note 17, at 181-207.

20. According to John Dickinson:

The distinctive feature of [the grievance-remedial system] . . . is to postpone the action of the executive branch of government to the last stage in the settlement of a private controversy between individuals. . . . Government is thus limited to the role of arbitrating differences between individuals through the courts after the difference has arisen, and then enforcing the court's award through the executive.

J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 7-8 (1927). See also Summers, *Law, Adjudicative Processes, and Civil Justice*, in *LAW, REASON, AND JUSTICE* 169 (G. Hughes ed. 1968).

21. A reader might counter that the penal mode, in reality, regulates a wholesome

ounce of prevention is worth tons of cure: compensatory claims by relatives of plane crash victims are nothing compared to lives in being; so, too, penal prosecutions. According to this technique, officials adopt regulatory standards, communicate them to those subject to regulation, and then take steps to assure compliance. Unlike the typical compensation claimant in the grievance-remedial mode or the typical prosecutor in the penal mode, the administrative-regulator need not wait until harm is done before taking action against a noncomplying regulatee. He will have various presanction control devices in his arsenal, including licensing, cease-and-desist orders, warning letters, and inspection requirements.²²

Since the regulatory and the penal modes are commonly confused, it may be helpful to identify at least two more general differences between them. First, regulators generally must tell regulatees what is expected of them to assure compliance with the regulatory program. Typically, regulators inform through promulgation of gen-

activity—interpersonal relations—in much the same way that, say, the FAA regulates the wholesome activity of air travel, that is, by proscribing certain dysfunctional conduct, such as theft. In response, I will, for now, offer only the following two points.

First, the foregoing counterargument shifts the level of generality upward to a point inappropriate to the purpose of my analysis. At this higher level of generality, all five of the law's techniques I intend to distinguish here could be said to regulate wholesome activity by proscribing certain dysfunctional conduct. For example, even a program for conferral of a public benefit such as welfare payments might be said to regulate wholesome interpersonal relations by proscribing unaided poverty as dysfunctional: one certainly cannot relate to others if dead from starvation. But my purpose here is to try to cast light by articulating certain differences between law's five techniques. These differences cannot be articulated at the level of generality introduced in the counterargument.

Second, the foregoing counterargument fails once it is restated in a fashion appropriate to the relevant level of generality. It might be argued, for example, that the law of theft regulates wholesome activity—the use of property—by proscribing stealing, much in the same way that the FAA and CAB regulate air transport. But a program for regulation of air transportation contemplates the lawfulness of airline flights, and the relevant agency may even license particular carriers to transport travelers. Such a program itself permits, implicitly if not explicitly, a wholesome social activity. It regulates this activity by seeking, first, to enhance the positive quality of air travel and, second, to minimize risks of airline mishaps. But the law of theft does not similarly contemplate the lawfulness of any particular activity. It does not itself permit owners to use their property. Rather, insofar as it permits or proscribes anything, it proscribes stealing. True, theft law may have wholesome consequences. For example, it may enable owners to keep and use their property. But it should not therefore be said that the law of theft licenses or authorizes the wholesome activity of property use or that the law of theft regulates the wholesome activity of property use by affirmatively enhancing its quality. Indeed, so far as the law of theft is concerned, owners might even destroy or waste their property with impunity.

22. See generally L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 15-23 (3d ed. 1968); Fainsod, *Some Reflections on the Nature of the Regulatory Process*, 1940 PUB. POLICY 297; Redford, *The Protection of the Public Interest with Special Reference to Administrative Regulation*, 48 AM. POL. SCI. REV. 1103 (1954); Rosenblum, Book Review, 20 PUB. AD. REV. 221 (1960).

eral standards and through issuance of specific statements. How well these informational activities are performed will often significantly determine the effectiveness of an overall regulatory program, for given the requisite knowledge, many regulatees can be expected to guide and coordinate their own behavior accordingly (provided the regulatory program itself is not generally unpopular). But the informational function is not similarly significant in the penal mode. It is hardly necessary for legislators, police, or prosecutors to tell citizens what conduct is wrong. Generally, they already know. Second, while the prospect of incurring moral disgrace for being convicted of a crime is one of the principal preventive mechanisms of the penal mode,²³ it is not similarly significant in the regulatory; as one scholar has put it, many persons who infringe regulatory standards are "morally innocent."²⁴

D. *The Public Benefit Conferral Technique*

Another basic legal technique is that of conferring upon individuals various substantive governmental benefits, such as education, highways, national defense, health programs, welfare payments, and tax exemptions. This is a *social* technique, for it can be used to help discharge a wide range of social functions,²⁵ but it is sometimes said that it is not a *legal* technique—only a governmental one. This objection has surface plausibility and requires consideration.

Presumably, public benefit conferral may be appropriately characterized as legal in nature if legal ordering actually plays a role in it, if that ordering is not merely accidental but based on sound reasoning, and if that ordering can have significant bearing on the quality of benefits conferred. Certainly, social theorists have long recognized that public benefit conferral involves legal ordering. As the French philosopher Leon Duguit put it:

23. See generally Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 404-06 (1958).

24. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 79 (1933). See also Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51 (1943).

25. See generally R. DAHL & C. LINDBLOM, *POLITICS, ECONOMICS AND WELFARE* (1953); J. MITCHELL & W. MITCHELL, *POLITICAL ANALYSIS AND PUBLIC POLICY* 97-132 (1969). There is no comprehensive study of the nature of legal ordering in governmental benefit conferral. A most useful study of certain aspects is R. O'NEIL, *THE PRICE OF DEPENDENCY* (1970).

Of course, public benefit conferral has a burden side as well as a benefit side. There are many useful studies of tax burdens and of other burdens, such as the draft. Once a tax system is in operation, it may actually be used as an indirect device for benefit conferral. See Heer, *Taxation As an Instrument of Social Control*, 42 AM. J.

[I]n those great state services which increase every day—educational, the Poor law, public works, lighting, the postal, telegraph and telephone systems, the railways—the state intervenes . . . in a manner that has to be regulated and ordered by a system of public law.²⁶

Such legal ordering may include the following: Providing for a taxation system; defining the nature of benefits to be conferred; specifying the beneficiaries and the terms and conditions, if any, upon which they are to receive the benefits; structuring the administrative and operational organization that is to implement the beneficial program; specifying the qualifications of required official personnel and the method of their recruitment; and so on.

If it be conceded that such legal ordering is common in public benefit conferral, the question arises whether this is merely accidental. It is not. Reasons can be given for the pervasiveness of this ordering which explain not only how it is such a common feature of benefit conferral, but also how it can significantly affect the quality of benefits ultimately realized. We might imagine, for example, a legislature that simply said, "O.K., you go out and confer a benefit." But what would be meant by "you"? And what would be the benefit? And to whom and on what conditions would it be available? And by what means would it be conferred? Thus one reason for the use of laws is to provide guidance to officials who are to confer benefits.²⁷ Moreover, the necessity of formulating guiding laws forces legislatures to face up to difficult questions and thus to deliberate about important aspects of beneficial programs. Furthermore, benefits cannot be conferred out of thin air: burdens must be imposed to make them possible, and citizens do not want their scarce resources expended lightly through informal, unregularized, verbal understandings. It is natural, then, for society to authorize public expenditures only through laws and legal forms. Similarly, ordinary citizens want fairness and equity in distributions. It is generally far easier to determine whether proposed distributions are fair and equitable if they are spelled out in law and not left to informal, ad hoc allocations. In addition, citizens usually want to take advantage of the best available means of conferring benefits. If these are spelled out in the law and ways are provided to help assure that officials follow the law, then the likelihood that these means will be pursued will be greater than would be the case if han-

Soc. 484 (1937); Surrey, *Tax Incentives as a Device for Implementing Government Policy*, 83 HARV. L. REV. 705 (1970).

26. L. DUGUIT, *LAW IN THE MODERN STATE* 31 (1919), *quoted in* Rees, *The Theory of Sovereignty Restated*, in *PHILOSOPHY, POLITICS AND SOCIETY* 56, 78 (P. Laslett ed. 1956).

27. It may even be possible to generate a conceptual argument that governmental action, if it is true governmental action, *must* be shaped by law in some way.

dled entirely informally. Then, too, the law helps combat official whim and caprice. So much is obvious.

From the foregoing, it can be seen why legal ordering is not merely a feature but a characteristic of public benefit conferral. Given this, and given that public benefit conferral is undeniably a technique for discharging social functions, it is not inappropriate to classify it as a basic technique significantly legal in nature, even though direct governmental action is more prominent in this technique than in any of the others so far considered.²⁸ And if public benefit conferral be, as Professor Kelsen himself thought, a technique significantly legal in character,²⁹ the question arises whether it can, without distortion, be reduced to or assimilated to the grievance-remedial, the penal, or the administrative-regulatory techniques. Obviously, it cannot. The nature and extent of direct governmental action involved helps distinguish it. So, too, its primary thrust, which is to give things as such to people, rather than to exact compensation, to prohibit and prevent, or to regulate.

E. *The Private Arranging Technique*

Some affairs, more or less, have to be left to private determination if they are to remain what they are. Marriage and parenthood are perhaps the best examples. With respect to these, direct government benefit conferral is not even a viable alternative, at least as marriage and parenthood have been known in Western culture.³⁰ The family is a private arrangement in essence and par excellence. Various private clubs and associations, religious and social, may be similarly classified. Then there are those activities where direct governmental action would be too cumbersome or costly. Imagine, for example, the army of administrators that would be required to minister periodically to the clothing needs of each individual member of a large population. Finally, there is a vast class of social activities that might well be left either to direct government action or to private arrangements. For example, ownership of basic means of production might be put in public hands, as in Britain, or left in private hands, as in the United States. In this final category, what is left to what tends to be in-

28. For other purposes, it is doubtless important to emphasize rather than minimize a distinction between legal action and governmental action.

29. Professor Kelsen concludes that this technique "remains within the framework of the specific technique of the law". Kelsen, *supra* note 10, at 96.

30. A state can distribute a welfare payment, but it cannot distribute a marriage, as that institution is known to us. Two persons are required. And they must for their own part each be willing to a substantial degree. Nor can the state create and confer parenthood, of the usual variety. Uncle Sam has no glands. And were he to force particular pairs to procreate, without more, it would not be appropriate to characterize their relationship to any offspring as parental, as that notion is known to us.

fluenced greatly by ideology. As two leading social scientists, Dahl and Lindblom, have stressed, direct governmental action and private arrangements are opposite extremes of a continuum along which there are many intermediate alternatives.³¹ It is always important to consider whether more or whether less should be left to essentially private arranging, a question plainly beyond the scope of this Article.

Now, many good things are thought to come from private arrangements, including self-determination, efficient distribution of economic goods, marital bliss, joys of parenthood, capacity to make gifts, the delights of good company and social life, happiness in one's chosen occupation, religious resources that help sustain oneself in the face of adversities, a sense of meaningful participation in service organizations, and even settlement of some controversies and disputes.

Given these potential benefits, it should not be surprising that many societies actively utilize law as an instrument to facilitate and effectuate those private arrangements that are their sources. This mode of legal activity may be broken down into three primary ingredients: First, a grant to citizens of legal power to create the relevant private arrangement, such as a marriage, a will, a contract, or a private association or corporation;³² second, rules of validation that specify steps to be taken if legal significance is to be accorded the arrangement; and third, affirmative significance that law will accord the arrangement once the appropriate validating steps are taken.

Possible forms of affirmative legal significance are varied in nature, and some are appropriate to certain kinds of private arrangements but not to others. Of these possible forms of significance, one is of special import: that of holding one party legally bound to another (or to several others) either to do or to refrain from doing something, and providing a method of enforcing this duty. But bindingness is not a universal feature of private arrangements. Private arrangements can exist and be accorded some forms of legal significance without any of the parties thereto becoming bound. For example, a voluntary organization might be accorded status as an entity for the purpose of bringing lawsuits without any member of the organization being bound to do or refrain from anything by virtue of his status as a party to the arrangement. Similarly, some private arrangements providing for the disposition of property may be recognized as validly created without imposing any duties whatsoever on their creators (or anyone else) prior to the occurrence of some future event. In some legal systems,

31. R. DAHL & C. LINDBLOM, *supra* note 25, at 3-24.

32. On private citizens and their lawyers as legislators, see H. KELSEN, *supra* note 3, at 90, 136; Cavers, *Legal Education and Lawyer-Made Law*, 54 W. VA. L. REV. 177 (1952).

this is true of wills and revocable trusts. Thus bindingness is not co-extensive with legal significance as such, nor with legal validity.

Another important form of significance that the law may accord private arrangements is the provision of remedies such as money damages or injunctive relief for unjustified departures from these arrangements. Generally, the law does not provide remedies of this kind unless the arrangement is one that the law also holds binding on one of the parties in some way. From this it does not follow, however, that no distinction is to be drawn between bindingness and the provision of remedies. For one thing, each may have its own distinctive impact on behavior. Thus a party aware that the law considers him bound to act for another's benefit may for this reason so act, and not because (or not wholly because) he thinks he will be subject to legal action or moral condemnation if he does not. Where this occurs, it is not inappropriate to say that the law, through one of its forms of significance—bindingness—is at work.

The law, too, may accord significance by recognizing a status, such as spouse, owner, or member, and attaching various legal incidents to that status, such as sexual privileges, rights to income, voting rights of shareholders, or due process rights of union members. Similarly, the law may, by virtue of some private arrangement, regard an individual or group as qualified for some general legal benefit, such as the power to sue, a grant-in-aid, or eligibility for certification or licensing. Then, too, by virtue of a private arrangement, the law may confer immunity on a person or group from certain claims or defenses of others, as in the case of corporate shareholders who have limited liability, or certain religious and public service organizations that are exempt from taxation.

Sometimes the law lends assistance to the administration of valid private arrangements in advance or even in the absence of any breakdown. For example, the law may provide facilities whereby public officials may indirectly help supervise the administration of a will, a trust, a guardianship, or the like. Similarly, a public agency like the National Labor Relations Board may indirectly help supervise the work of certain union officials who conduct union elections or other business.

The foregoing forms of legal significance are all beneficial in character.³³ Opposites may be imagined for most. Illegality, for example,

33. As indicated, the foregoing does not purport to be an exhaustive listing of all possible forms of legal significance. For example, it does not include the general supplementary terms that general law adds to many private arrangements, for example, contracts for sale of goods. See illustrative terms in UNIFORM COMMERCIAL CODE §§ 2-305, 2-308.

is a kind of opposite for legal validity. Revocability is a kind of opposite for bindingness. And so on.

As we have seen, private arrangements with which law reckons are highly varied in type: marriages, wills, contracts for food, shelter, clothing and employment, religious affiliations, membership in unions or in employer organizations, corporate and partnership relations, trusts, charitable foundations, social clubs, and more. Some of these arrangements are contractual and some are not. Some require the agreement of two or more persons and some, like wills, can be consummated by one person. Some are the work of individuals, while others involve various forms of organized group life. Some are commercial or economic in purpose, but others are not. Compared to public benefit conferral, private arrangements in many societies are the source of a far greater proportion of the total benefits that citizens derive from social life.

Does the private arranging technique have significance independent of the grievance-remedial, the penal, the administrative-regulatory, and the public benefit conferral techniques? Could it, without distortion, be reduced to one or more of these? The private arranging technique certainly draws on the other techniques in various ways, but it is not without independent significance of its own. First, unlike all the others, the primary thrust of this technique is to enable private citizens to realize benefits for themselves by themselves. It does not give them things as such (public benefit conferral); it is not primarily regulative (administrative-regulatory); nor is it primarily prohibitive (penal) or primarily reparative (grievance-remedial).

Second, private choice, private determination, private judgment is at the fore. Private parties determine the content of their arrangements. They act, as it were, as private legislators. And generally speaking, it could not be otherwise. For any very extensive substitution of official for private judgment would destroy the essence of this mode. Of course, the state could second-guess choice of marriage partners, could in the usual course decide whether six crates of oranges for \$25 is a subjectively fair exchange, could require citizens to join certain churches, and so on. But the resulting arrangements would not then any longer be properly characterized as essentially private. Moreover, private parties generally administer the arrangements they create. This is in sharpest contrast to penal, administrative-regulatory, and public benefit conferral techniques, in all of which government officials typically perform substantial administrative roles.

These differences are enough to show that it would be a serious distortion to reduce the private arranging technique to any of the other

four basic techniques considered here.³⁴ Admittedly, the private arranging technique draws upon other techniques. For example, the breakdown of some kinds of arrangements may constitute a grievance for which a remedy is available. Breach of contract is an obvious example. Thus some overlap is evident. But independent significance does not require mutual exclusivity.³⁵

F. Differentiation of Techniques

So much then for a sketch of basic socio-legal techniques. It should be apparent that the foregoing five-fold division is based on multiple criteria of differentiation. Each technique differs (more or less) from the others in what has been called primary thrust: one is reparative, one prohibitive, one regulative, one distributive, and one, finally, facilitative of private choice. Similarly, the immediate returns from each technique differ from one to the other: compensation, crime prevention, regulatory compliance, substantive public benefit, and individual self-realization, respectively. Then, too, the combinations of legal resources that make up each technique are not identical. For example, from technique to technique, there are differences in the relative roles of private citizens and government officials, and differences in the collaborative roles of adjudicative and legislative bodies. Furthermore, there are differences in the nature and extent of reliance on coercion in each technique.³⁶

Despite such differences, it must not be thought that each technique has its own separate field of operation and ne'er the five shall meet. On the contrary, all five may be marshalled to help discharge a given social function at one and the same time, depending, of course, on the nature of that function. Consider, for example, the problem of "slaughter on the highways." To the extent law effectively grapples with this problem, it helps discharge the broad social function of securing a safe and healthful environment. All five of the foregoing

34. On private arranging generally, see H.M. HART & A. SACKS, *THE LEGAL PROCESS* 207-365 (Tent. ed. 1958). See also F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* (1953); Ferson, *The Nature of Legal Transactions and Juristic Acts*, 31 *CORNELL L.Q.* 105 (1945).

35. In considering public benefit conferral, the large role of direct government action might be thought to preclude characterization of that technique as in any significant respect legal, an objection already considered in the text. Here an opposite problem arises: given the prominence of the roles of private parties in the private arranging technique, this might be thought to preclude characterization of it in any respect as legal.

36. The foregoing differences are in some sense natural or intrinsic. Cf. L. FULLER, *THE MORALITY OF LAW* 96-106 (2d ed. 1969). Of course what might be called partial differentiating criteria are at work here too. That is, some factors differentiate techniques *A* and *B* from *C* and *D*, but not from *E*, and so on.

basic techniques may be brought to bear here. The harm flowing from certain auto accidents may be made a remediable grievance. Reckless driving may be subjected to penal sanction. Driver's licenses and automobile certification may be required in advance as regulatory devices. Public benefits may be conferred in the forms of safe highways and driver education. Finally, various private arrangements may contribute: for example, private organizations such as the AAA *re* highway safety, and private insurance arrangements *re* compensation for losses.

Nor is it contended that the foregoing five-fold analysis of the technique element in law exhausts all possible techniques that a particular society might use. At least, variants and combinations are possible, too. Thus, to discharge a given social function, a society can consider utilizing techniques of the following kinds:

Grievance-remedial;

penal;

administrative-regulatory;

public benefit conferral;

private arranging;

some variant³⁷ of one of the foregoing;

some combinations of the foregoing or combinations of variants thereof.

In Professor Kelsen's analysis of the technique element in law, we encounter the penal, the civil, and the administrative.³⁸ Doubtless for him, the civil encompasses both the grievance-remedial and the private arranging techniques.³⁹ For reasons already given, these two are, in my view, independently significant and should be accorded distinct places in the analysis. By "administrative," Professor Kelsen appears to intend what is here called the technique of public benefit conferral, not administrative regulation.⁴⁰ Doubtless for him, the penal and the administrative-regulatory are really one and the same.⁴¹ But again, for reasons already given, these are in my view independently significant and should therefore be accorded distinct places in the analysis.

III

UTILITY OF THE PRECEDING ANALYSIS

A. *Descriptive Utility*

If the foregoing general theory is substantially accurate, then it

37. The idea of a variant, like the earlier notion of primary thrust, deserves further, more detailed analysis.

38. Again, Professor Kelsen seems disposed to reduce all techniques to one basic form essentially penal in character. See note 19 *supra*.

39. Kelsen, *supra* note 10, at 89-90, 96.

40. *Id.* at 89-90.

41. *Id.* at 96.

has descriptive, normative, and pedagogical significance. Its descriptive significance is not that it faithfully represents techniques that some particular society *actually* uses, but that it represents basic possibilities that any society *might* use. Since it does not describe actualities but possibilities, it is a kind of logico-descriptive account of the technique element in law.⁴²

The foregoing account is more faithful to the nature of law's methodology than accounts based on separation of powers theory encountered in many textbooks and other teaching materials.⁴³ This is so for at least two reasons. First, to represent law's techniques in terms of separate legal institutions—judicial, legislative, and executive—is to distort the actual operation of law, for law's techniques are really combinations of legal resources in which courts, legislatures, administrators, and private citizens function collaboratively rather than singly. Second, an analysis based on separation of powers theory focuses on public institutions and neglects the significant roles of private citizens in a legal system, whereas an analysis of the kind offered here explicitly accounts for these roles.⁴⁴

A five-fold theory of the kind offered here may have descriptive significance in another way, too. It allows for analysis of a variety of points of contrast, points of similarity, and points of relationship between techniques: analysis that might prove a fertile source of insights.

B. Normative Utility

If a managerial perspective towards law's techniques be adopted,⁴⁵ this theory opens up a variety of normative possibilities. For any given social function, a manager of law's techniques might utilize one or more of the five, or some variant or combination. Assuming that some legal technique should indeed be utilized,⁴⁶ the manager's choices

42. I have tried to characterize the nature of this kind of analysis in much more detail elsewhere. See Summers, *Legal Philosophy—An Introduction*, in *ESSAYS IN LEGAL PHILOSOPHY 1* (R. Summers ed. 1968); Summers, *Notes on Criticism in Legal Philosophy—An Introduction*, in *MORE ESSAYS IN LEGAL PHILOSOPHY 1* (R. Summers ed. 1971); Summers, Book Review, 53 *CALIF. L. REV.* 386, 389-92 (1965).

43. See, e.g., C. AUERBACH, L. GARRISON, S. MERMIN & W. HURST, *THE LEGAL PROCESS* (1961).

44. And thus hopefully helps expose the fallacy of the top and bottom theory of law, according to which officials are on top and citizens on the bottom, with officials dictating all to citizens. On this fallacy, see Jaffe, *Law Making by Private Groups*, 51 *HARV. L. REV.* 201, 207-21 (1937); Hart, *Introduction to J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED* vii, xii (1954).

45. Cf. Chroust, *The Managerial Function of Law*, 34 *BOST. U.L. REV.* 261 (1954).

46. This, of course, is far from a universally valid assumption. The books are full of over-uses of law: not just of one technique where others should be used, but

would still be subject to normative criticism. First, given the nature of the social function to be discharged, he might simply choose an inappropriate technique. For example, if the function be essentially that of assuring minimal living standards for all members of the society, then the manager should generally rely less on grievance-remedial methods and more on public benefit conferral.⁴⁷ Second, the manager's resort to a particular technique might, under the circumstances, be unnecessary and therefore wasteful of social resources. For example, given that drug manufacturers are already subject to grievance-remedial liability for negligent manufacture and for breach of warranty, and given that they are already subject to administrative regulation of the manufacturing process, it may be unnecessary and therefore wasteful also to impose strict penal liability for producing unwholesome drugs.⁴⁸ Third, a manager might choose an insufficient number of techniques. For example, it has already been shown how all five basic techniques can usefully combat the problem of slaughter on the highways.⁴⁹ Fourth, the choice of one technique rather than another may simply be unwise. Thus the penal technique was used to deal with alcoholic consumption during the prohibition era, with unfortunate consequences.⁵⁰ Today, we do not prohibit the sale and consumption of alcohol. Instead, we permit its sale and regulate sellers mainly through licensing schemes. But we continue to use the penal mode to restrain public drunkenness and related offenses. The legal literature awaits a systematic analysis of all the foregoing and related forms of criticism, and a general account of the conditions under which each is sound or unsound.

Beyond this dimension of criticism, which concerns the soundness of selections of techniques to be used, a second dimension of normative criticism opens up. Even if a chosen technique is appropriate,

also where no legal technique at all should be used. For examples and perceptive analysis, see Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1957).

47. Cf. Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969) (suggesting that grievance-remedial methods are not wholly appropriate for use on essentially distributive problems). See also Sax & Hiestland, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967) (suggesting that the problem of substandard housing is essentially distributive rather than grievance-remedial in nature).

48. This is hardly a fanciful possibility. See, e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943). Of course, it is possible that the end to be secured (e.g., wholesomeness of medicinal drugs) may be of such overriding importance to society that the deployment of multiple and perhaps duplicative legal techniques would be worth the social costs involved. Cf. text following note 36 *supra*.

49. See text following note 36 *supra*.

50. See Byse, *Alcoholic Beverage Control Before Repeal*, 7 LAW & CONTEMP. PROB. 544, 564 (1940). Today, proposals are being made to substitute regulatory methods for penal ones to deal with the use of marijuana. See, e.g., J. KAPLAN, *MARIJUANA—THE NEW PROHIBITION* (1970).

necessary, and wise, it may still be misused on a particular problem. Thus an insufficient remedy may be framed for a grievance, or an unduly stringent penalty for a crime, or an unrealistic standard for regulation, and so on. Critical criteria for judging misuses of each technique have yet to be systematically studied and articulated. Some of these criteria will vary with the nature of the technique. For example, criteria for identifying misuses of the technique of public benefit conferral cannot be identical with parallel criteria applicable to the penal technique. Thus, while we may criticize a particular use of penal methods for imposing excessive penalties, this form of criticism would hardly apply to conferral of a public benefit. Conversely, we may criticize a benefit conferral scheme for involving inequitable distribution of public goods, but this form of criticism would hardly apply to penalties as such.

A third normative dimension opens up, too. The foregoing analysis of law's techniques invites social theorists to accumulate wisdom with respect to optimal conditions for the use of each technique. It is already known that under some conditions one technique will work far better than under other conditions. For example, penal methods work better when supported by viable moral prohibitions and when they do not run counter to powerful human drives. Once knowledge of this nature is accumulated, it will be possible to offer forceful criticism of prospective or actual uses of specific techniques of still another type, namely, that certain uses are impracticable or unrealistic. When this kind of critical evaluation is applied to all five techniques in relation to a selected social problem, it will in turn be possible to judge whether law as a whole stands much of a chance with the problem; that is, it will be possible to offer a more empirically grounded account of the limitations of law as a whole than heretofore.⁵¹

C. Pedagogical Utility

The pedagogical potential of the preceding account of the tech-

51. The literature on law's limitations can be broken down in relation to each of law's basic techniques. On the limits of the grievance-remedial technique, see Pound, *The Limits of Effective Legal Action*, 27 ETHICS 150 (1917). On limits of the penal, see H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Million, *Limitations on the Enforceability of Criminal Sanctions*, 28 GEO. L.J. 464 (1970). On the administrative-regulatory technique, see J. DICKINSON, *supra* note 20; Jaffe, *The Effective Limits of the Administrative Process*, 67 HARV. L. REV. 1105 (1954). On the limits of public benefit conferral, see H. SPENCER, *Over-Legislation*, in 3 ESSAYS 229 (1910), and in *MAN VERSUS THE STATE* 121 (1940); Cohen, *Positivism and Idealism in the Law*, 27 COLUM. L. REV. 237 (1927). On limits of the private arranging technique, see F. KESSLER & G. GILMORE, *supra* note 34.

nique element in law is not altogether untried.⁵² The account itself offers an overview of the means at law's disposal. Moreover, it sets forth the possibilities in ways that invite illuminating comparisons of similarities and differences from technique to technique. For example, the collaborative roles of courts and legislatures typically differ in striking ways in the grievance-remedial and the public benefit conferral techniques. So, too, the roles of private individuals. Furthermore, the account invites the student to think in terms of the various normative dimensions discussed in the preceding paragraphs.

In one of those moments of indiscipline when I have allowed myself to indulge in reverie about the Ideal Law School Curriculum, I have even been tempted to think that the entire first year might be given over to five different courses, each devoted to intensive study of the anatomy and physiology of a different one of law's basic techniques. Actually, in some law schools this would not be such a radical innovation, despite the persistence of Blackstone's categories. Some law schools already have a first year course dealing with the elements of administrative regulation under the rubric of "Basic Concepts of Public Law" (or some such), as well as a first year course on the elements of public benefit conferral under the title "Legal Processes of Poverty" (or some such). Their contracts course could be generalized to treat cognate forms of private arrangements, and torts to treat the elements of the grievance-remedial technique. This leaves the penal mode, which could be approached through criminal law, already a first year subject in many schools. Of course, some further restructuring would be necessary in order to capitalize on the distinctive potentialities of a technique-oriented curriculum. For example, procedure teachers would not want to see their subject worked into other courses interstitially, yet this would have to be done. The concept of procedure would also have to expand to accommodate procedures other than the penal and grievance-remedial.

The major part of the second year could then be devoted to the study of law's techniques as they might be jointly brought to bear on a variety of problems, such as provision of basic education, the organization and distribution of goods and services, prevention of antisocial

52. It has been used in preliminary versions (for teaching purposes) of the forthcoming new edition of C. HOWARD & R. SUMMERS, *LAW: ITS NATURE, FUNCTIONS AND LIMITS* (1965), to appear in 1972. It has also been extensively used during 1970-1971 in teaching materials for 8th and 12th graders in certain New York public schools pursuant to a project to introduce legal concepts and processes into the social studies. This project, currently in operation, is called "Legal Concepts and Processes in the Secondary School Curriculum" and is directed by Mr. A.B. Campbell at the Cornell Law School. I am indebted to Mr. Campbell for numerous, useful discussions which helped clarify some of the ideas adumbrated in this Article.

behavior, reduction of racial discrimination, and control of environmental pollution. In the first instance, the focus would be on the nature of the social problem and its intrinsic complexities. Thereafter, the possible roles of each of law's basic techniques in dealing with the problem would be considered. Throughout the first two years, the varied activities of lawyers in the workings of each technique and in the processes that determine their use would be carefully studied.

The third and final year could be reserved mainly for writing courses, clinical work, and other forms of small group instruction. But no student would be permitted to graduate without having taken one course (or more) from the following list of alternatives: legal philosophy, jurisprudence, legal theory, or some other comparable subject, such as the philosophy of law. Whether or not the course would last the whole year would depend, of course, on the personal preferences of the instructor.

CONCLUSION

Professor Kelsen's inventory of law's basic techniques should be extended to include not only penal, grievance-remedial, and public benefit conferral, but also regulatory and private arranging techniques. These five techniques, with their variants and combinations, comprise the law's methodology. They explain not *what* social functions law discharges, but *how* law may help discharge social functions. They are descriptive of the basic legal methods that a society might possibly use, but are not necessarily descriptive of the methods any particular society actually uses. But the utility of the foregoing account is not confined to the descriptive. It might have normative significance, too. It might also suggest important topics for empirical research. And it might catch the eye of pedagogues.