REVIEWS

STRATEGY AND MARKET STRUCTURE. By Martin Shubik. New York: John Wiley & Sons, 1959. Pp. 327. $8.00.

THE urge to reform, the aspiration to guide the hand of the lawmaker and the adjudicator, is a dominant theme in the economic literature of the West.[1] The desire to be objective, disinterested, or *wert-frei* is a newer aspiration, indeed a categorical canon of modern economic "science." Mr. Shubik exhibits both of these aspirations[2] in his new publication. He seeks to help steer the course of our antitrust policy by injecting greater clarity and systematization into such concepts as collusion, control, and cooperation in markets, without presumptuous dicta about just what constitutes "fair or workable" competition or just what sort of "fitness" ought to survive.[3] An evaluation of Shubik's effort seems naturally to lead to an assessment of the utility of theoretical economic advice to judges and legislators in general.

That Shubik has widened the scope of traditional economics is not to be questioned. To a rudimentary doctrine of monopolistic competition he has assimilated a number of significant variables: entry conditions, asset structure, information costs, contingent demand, inventory policy. His analysis, which he calls "institutional dynamics," is therefore far more hospitable to empirical data than has generally been the case. This enables him to transcend many of the convenient fictions employed as behavior axioms in the familiar explorations of technical possibilities that have passed as a theory of the firm.

His thesis, which is consistent with Adelman's,[4] is that we need to decide what kinds and degrees of market control we will permit. To this end he builds a bridge from traditional economics to the law by means of the theory of games. Thus he escapes the confines of the false dichotomy between competition and collusion which has colored much economic and legal thought, and replaces that dichotomy with a continuum of market structures differentiated according to "strategic interlinkages," "stability structures," and "strategy spaces."

In this new frame of reference the traditional view of fair competition both in law and economics turns out to be a very special type of "game" involving a pure opposition of interests. In such a game there is no point in the opponents' communicating or cooperating with one another. Many champions of consumer sovereignty dream fondly of such pure opposition among competitive producers, just as some champions of justice are fond of the system of competitive exaggeration by rival attorneys. The idea seems to be, "Every

1. See Samuelson, *What Economists Know*, in THE HUMAN MEANING OF THE SOCIAL SCIENCES 195 (Lerner ed. 1959).

2. See pp. 329, 336.

3. P. 335.

4. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1287 (1948).

part a mass of vice, and yet the whole is paradise."[5] Classical economics, with its predilections for equilibria and harmony of interests,[6] set itself the task of devising just such a set of axioms and congenial assumptions as would provide a model of this type of game for a free market "system." So attractive and beguiling was the outcome of this game that its purchase price in terms of abstraction was cheerfully forgotten, or else the validity of the assumptions was derived from the strength of the conclusions they permitted. Great drafts of vulgarized economic theory were gulped down by Court and Congress, and not a few economists were self-intoxicated, "taking for truth the maddest of miracles,"[7] relying as it were on *machinae ex deo.*

Economists, after a decade of struggle with their "new welfare economics," have lately purged themselves of once inarticulate value premises embedded in what had been considered positive generalizations.[8] The purely ancillary character of such terms as "economizing" and "efficiency" is now more widely recognized. Shubik scrupulously shows his cleanliness in this regard, points to old errors and sounds the new warnings. He stakes his claim to objectivity on a ruthless separation of "physically measurable factors of a problem from the behavioristic factors."[9] He carefully buries the behavioral uncertainties which plague the market phenomena he is studying; like many other economists, he appears to have had enough of giving the benefit of the doubt to improbable cases, enough of the trivial business of concocting logically sufficient human "reaction functions" which purchase determinateness for a game by calling on the players to show "repeated misconceptions" or "compulsive idiocy."[10] Such tactics only add up to irrelevance[11] or nonsense.[12] With commendable caution and appropriate intellectual honesty and modesty he sets out to narrow the long-acknowledged "ranges of indeterminacy" in market theory "without being forced to make assumptions about behavior which could be verified only by psychologists."[13] Though he writes of motives, strategies, threats, and so forth, he professes a wish to avoid "realistic complications," "psychological factors,"[14] "socio-political sentiment,"[15] and "complex behavioristic assumptions."[16]

This passion for behavioral antisepsis leads him to incessant mathematical ablutions. Fingers are counted and shoes are put off lest we lose a variable or allow one to sneak in under its own power. A whole font of type, ordinarily reserved for comic strip expletives, is used to translate blackmail threats or

5. MANDEVILLE, THE GRUMBLING HIVE lines 155-56 (1772).
6. See MYRDAL, RICH LANDS AND POOR ch. 2 (1957).
7. Quoted in MORGENSTERN, THE LIMITS OF ECONOMICS 113 (1937).
8. See GRAAFF, THEORETICAL WELFARE ECONOMICS (1957).
9. P. 148.
10. See pp. 27, 92, 164, 166, 173-74, 224.
11. P. 275.
12. P. 157.
13. P. 275.
14. P. 57.
15. P. 329.
16. P. 275.

maximization rules[17] into mathematical form, but it has served mainly, it seems, to hypnotize the proofreaders.[18] A major reason given for avoiding "realistic complications" is that "the mathematical difficulties are considerable."[19] The notion that this demonstrates the unsuitability or limitations of mathematics in behavior studies would of course be an unpardonable affront to current epistemological fashions in economics.

When real human behavior is discussed, cold rationality gets the benefit of the doubt. Thus Shubik leans, albeit hesitantly, toward the notion that rivals in a bilateral-monopoly "game" will first maximize joint payoff and then settle up;[20] that a calculation of expected costs and revenues will reveal the "plausibility" of a threat;[21] that elements of uncertainty can be assigned probabilities;[22] that mathematical probabilities can be calculated in games of short duration.[23]

Thus a nice question is posed: If heroically contrived behavioral assumptions are to be renounced, and if objectivity precludes treatment of such phenomena as motive, purpose, and will, where can one turn? Several possibilities arise:

1. Indefinite postponement of all attempts to forecast, advise or promulgate policy.
2. A desire to command behavior consistent with the assumptions known to be associated with desirable outcomes.
3. A resort to fictions, by terms of which certain acts, *ex post*, are "deemed" to have arisen from certain conditions.
4. Empirical compilation of a population of events sufficiently homogeneous to permit a statistical inference of probable causation.
5. An exhaustive notation for arranging all conceivable patterns of behavior, permitting categorization of acts for policy purposes.

The last response is Shubik's. "At least theoretically," he asserts game theory permits a complete catalog of all alternative actions available to all participants.[24] Mapping out "the extensive form of a game," by means of a construct known as a "game tree,"[25] is akin to composing a completely explicit handbook, such as would enable an agent (perhaps a mechanical one) to play for a completely relaxed principal. A single path down through the "branches" of this "tree" might be prescribed by rules or assumptions, or classes of alternatives could be stipulated as unfair or unreasonable as a matter of social policy.[26] The economist serves society well who delineates the structure of the tree fully and disinterestedly.

17. P. 220.
18. Pp. 99, 126, 173, 202, 267, 336.
19. P. 276.
20. P. 49.
21. Pp. 231, 283.
22. P. 216.
23. P. 205.
24. Pp. 149, 330.
25. Pp. 186-90.
26. Pp. 201, 227, 242, 250, 271.

A market "game tree" shows at once the possibility of market games or structures which, while not games of pure opposition, are not necessarily collusive or cooperative,[27] a point noted by Smithies in his commentary on the *Cement* and *Conduit* cases.[28] The proposition is that structure as well as conspiracy can restrain commerce, as appears to have been acknowledged in the *Armour* dismissal.[29] Perhaps because "structure" is free of sentiment, psychological complexity, and the like, Shubik tends to agree with the *Alcoa* rule [30] that degree of control of the market is the central issue, rather than with the *U.S. Steel* rule,[31] that the manner of getting and wielding power is crucial. He would rather refine economic tests of market control than "fall back on" the fiction of "implicit collusion" or "conscious parallelism."

To this end he offers five different "indices for the measurement of strategic interlinkage between firms." These are long-run and short-run market vulnerability, long-run and short-run financial vulnerability, and control vulnerability.[32] These "rule of thumb" measures of interdependence are derived from the theoretical construct of a "game of economic survival," and are intended to illuminate the range of possible behaviors on the competition-collusion continuum. They purport to measure the reciprocal damage that can be done by firms through strategic shifts of policy, the resistance that firms' assets can offer to bankruptcy, and the ability of firms to forestall capture.

These indices purport to, but do not, measure; they are concepts. To be operational they would have to specify what is meant by "an incremental change in strategy" by a rival firm, and they would have to isolate the substantial elements of unpredictability in the success of various strategies. Though he has told us something new about market structures, Shubik has for the most part told us what we *would* have to know about structure if we *were* to use it *ex ante* in policy prescriptions. With respect to market behavior he offers no advice, since behavioral rules would, after all, be no stronger than their weakest subjective or psychological links. But with respect to market structure he feels bolder, forging chains of reasoning which are, after all, no weaker than their weakest well-formed mathematical links. Yet any court or administrative agency relying on his structural criteria would have to be pretty good at entrail reading.

But if reliable criteria *were* at hand, it would be possible to estimate which of several varieties of "stability" are consistent with the state of a market. By "stability" of a market structure, Shubik means a set of conditions under which it does not pay to take any action to upset the status quo. Stability is absolutely competitive if there are no collusive gains to be had even by those who wish to collude; stability is completely collusive if the status quo can be

27. P. 330.

28. Smithies, *Economic Consequences of the Basing Point Decisions*, 63 HARV. L. REV. 308 (1949).

29. United States v. Armour & Co., Civil No. 48-C-1351, N.D. Ill., Sept. 15, 1948.

30. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

31. United States Steel Co. v. United States, 251 U.S. 417 (1920).

32. Pp. 293-95.

upheld only by having every "player" retaliate against a single deviant.[33] Between these limiting cases lies a range in which varying degrees of collusive policing or cautious inhibition may support various equilibria.

The vagueness and elusiveness of Shubik's conceptual criteria provide a sandy foundation for policy formulations. Although the criteria are admittedly more sophisticated than the simplistic stab in the same direction made by Judge Learned Hand when he applied his percentage-control-of-the-market test in *Alcoa*, no reliable test emerges from the book. The lacunae in his catalog of market structures are as frustrating as his renunciation of the cataloging of market behaviors.

II

This now raises the more general question, can positivistic, normative social scientists offer useful expert testimony to legislators and judges? Can economics help the law?

I have already alluded to the dangers inherent in the older, more crudely ideological economics. Eighteenth and nineteenth century judges boldly fashioned this into law—witness, for example, the economic rationale of such a sequence of decisions as *Pullis, Carlisle, Adair, Locwe, Lochner, Adkins*, with its sorry impact on generations of American wage-earners.[34]

One way to avoid rendering faulty or irrelevant economic generalizations into law is the unintentionally ironic method employed by Holmes (dissenting) in *Plant v. Woods*.[35] Indicating his own calm confidence in the now thoroughly discredited wages-fund doctrine of J. S. Mill, he urged that, even though they were deceiving themselves, workers should be allowed to build up their collective strength for the struggle for higher wages. Smug but generous deference to the majority of reasonable but uninformed men can thus save society from the well-intended mistakes of the educated. The best insurance against premature acceptance of economics by the law might well be some kind of majoritarian referendum.

Another way in which society might protect itself is by employing the nakedly honest arbitrary fiction[36]—much to be preferred to the seemingly scientific, objectively induced, undeclared fiction which is ushered in with such phrases as "in the light of economic fact." When, as with captured Romans, the alive are "deemed" dead, or when parallel market action is "deemed" collusive, less harm may be done than when inferences from hypothetical structural tests are submitted as "facts of common knowledge." Where ignorance must rule, let it be brazenly emblazoned; the door to learning is thus left irritatingly ajar.

Does the economist protest that society no longer needs to protect itself from economic findings, now that economists have grown up? Now that

33. Pp. 276-78.

34. See COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1945); GREGORY, LABOR AND THE LAW (2d ed. 1958); JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1951).

35. 176 Mass. 492, 504, 57 N.E. 1011, 1016 (1900) (dissenting opinion).

36. See Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 513, 870 (1930).

economists have said so many *mea culpas* and have sworn to purge themselves—like Shubik—of the value judgments that threaten to deprive them of the accolade of scientists, is it not safe to consult them? If economics has outgrown (or is at least now shedding) apologetics, tautologies and ideologies, if it is ready to talk structure and function, if it is self-conscious about wanting to turn out tools that can be used by anyone, not just by mechanistic, optimistic, rationalistic, nineteenth-century Americans, why not listen?

Yet persuasive reasons remain for urging continued resistance to the rendering of economic intelligence into law. There is a total qualitative leap from economic prescription to law. The problem of "fit" remains to be worked out. The shared predilection, which once provided a kind of apparent fit, especially when ideological constructs were regarded as "systems" having objective validity, is now disavowed by economics and by those jurists who wish to minimize judge-made law. If analytically indeterminate problems are to be arbitrarily resolved, let such Gordian knots be sliced by those holding public trust in a context of constitutional safeguards. What causes the lack of fit between economics and law?[37] For the law, the business of economizing is an activity; for economics it is a body of doctrine, a set of norms. Economics is conceptual, but economic policy is performatory. Since conceptual language abstracts from the complexity of performatory detail, it can never be directly prescriptive. Prescriptive language contains a value aspect which is situational. Thus the value content of a prescription is not merely ambiguous, it is polyguous, having as many connotations as there are situations. Believing a conceptual doctrine calls for reasons, but the reasons for believing something are not necessarily the reasons for doing something—witness the economic doctrine of free trade based on the principle of comparative advantage. Economics is wholesale; the law is retail, to paraphrase Hall.[38] Economics is grammar; the law is speech. As Einstein once observed, economics is sure of itself only when it deals with unreality.[39] In matters before the House or the Court it is hesitant, hedging, and halting—if it is honest.

A distinction between "planning" and "administration" advanced by Mannheim[40] is useful here. According to Mannheim, an administrative mentality thinks in terms of systematization, determinateness, generalization—a settled course of action. A planning mentality, on the other hand, thinks in terms of experimentation, improvisation, reconstruction—a learning course. Economics, as a formal, behavioristic set of norms, hungers for determinateness and universality; it generally despises meandering discursiveness, inconclusiveness and particular anecdotes. It has therefore retreated deep into abstraction, as

37. My answer borrows the terminology of Hartman, *General Theory of Value*, in LA PHILOSOPHIE AU MILIEU DU VINGTIÈME SIÈCLE (Klibansky ed. 1958).

38. Hall, *Practical Reason(s) and the Deadlock in Ethics*, 64 MIND 319 (1955).

39. Quoted in Kaufman, *On the Postulates of Economic Theory*, 9 SOCIAL RESEARCH 379 (1942).

40. MANNHEIM, MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION (Shils transl. 1949) (especially part IV).

its patron saint mathematics has done, confident that, like mathematics, it will return to earth girded for impressive concrete triumphs.

As it streaks into abstract space, economics shucks off the sources of its indeterminateness; values, motives, purposes are all consumed in the white heat of dispassionate objectivity. For the administrative mentality the subjective value element in behavior measures the extent of his lack of mastery or organization and must be shed if a unique solution is to be found for each economic process. Such explorations of abstract space are of course legitimate, but a staggering reentry problem must be faced if the doctrines thus discovered are to be brought down to earth to govern men.

So the barrier remains. Having solved its problems with fictions, economics cannot offer its findings as facts. Motives, banished in favor of arbitrary axioms or probabilistic correlations, cannot suddenly reappear, tamed, as handy imputations. How then can economists "sell" their "semifinished intellectual goods"?[41] A mathematical methodology makes for eye-catching packaging, but if the models of a science are mathematical, and the conclusions are offered as relevant, the prior premise must be that the world is mathematical.[42] This is a value judgment, vitiating any claim to objectivity, the worship of which is another value judgment. It also frustrates "reentry" in any society which is not positivistic.

What does this add up to? An indefinite postponement of *all* attempts by economists to forecast, to advise, or to promulgate policy prescriptions? Not that.

Some scope exists for fruitful consultation between economics and the law. Just how much depends on knowing what economics is good at and what it is not good at. Economics is at its worst when it tries to offer conclusive instruction with respect to conflicts of individual interest; it still knows nothing very useful about problems of fair division. It is at its best when it advises on the compensation of impersonal aggregates or issues programmatic statements about interdependent variables. When economics becomes personal and individual, it pays the price for its behavioristic dehumanization; when it becomes impersonal and systemic, it can contribute valuable advice on the design of social apparatus.

To illustrate: The most significant and complicated issue in labor relations is the division of jointly created, anticipated revenue into "fair shares" for the contributing factors of production. Attempts on the part of economists to impute proper income shares to these factors add up to a widely confessed "indeterminateness," except when improbable assumptions are contrived. For economics to be useful in social policy formulations, it should recommend an income distribution formula (*e.g.*, collective bargaining) which in its initial premise confesses the analytical indeterminateness of the problem.

A second illustration: One of the most vexing economic problems in our

41. See Kaufman, *supra* note 39, at 379.

42. See Deutsch, *On Communication Models in the Social Sciences*, 16 PUBLIC OPINION Q. 364-66 (1952).

society is the avoidance or mitigation of inflationary and deflationary trends. Here lie all our hopes for full employment and our fears of the cost of living. Attempts on the part of economists to control these fluctuations through policies deduced from classical models of individual investment and consumption decisions were conspicuously unsuccessful. To be useful, economics had to devise systemic models from which emerged flexible instruments for compensating aggregate streams of expenditures.

Economics is most useful when it avoids direct prescriptive contact with individuals, applying its structural, systemic insights to individuals only through impersonal alteration of the weights assigned to individual tastes and plans. Such an approach is consonant with the doctrine of functional jurisprudence, which is concerned not with states of mind, but with states of affairs; not with fault or blame, but with effects. Without pretending to know the structural or behavioral intricacies of antecedent conditions, we can let "good" results live on and stamp out "bad" ones. If conceptual economics cannot be translated directly into performatory terms for use in value-laden economizing situations, it should ally itself with that style of jurisprudence which declares bankrupt "any word that cannot pay up in the currency of fact...."[43]

Economists should not help legislators and judges evade moral obligations by delegating decisions to abstract concepts and hidden forces. Instead they should program the probable ramifications of adjustments of policy instruments (*e.g.*, taxes, public investment, unfair labor practices, minimum wages), so as to help the majority decide how to alter an unwanted state of affairs.

To return at last to Shubik's book, his objectives are not altogether unlike those endorsed here, but his confidence in the ultimate as well as the present worth of his structural concepts, indices, and criteria seems both excessive and premature.

DANIEL HALE GRAY†

THE NATURE AND FUNCTIONS OF LAW. By Harold J. Berman. Brooklyn: The Foundation Press, Inc., 1958. Pp. xviii, 662. $7.50.

Is there a place in the undergraduate curriculum for a course on the legal process? If so, what should be its content? These, as I see it, are the central questions raised by the publication of Professor Berman's pioneering text, *The Nature and Functions of Law.*

This reviewer comments as a political scientist engaged in teaching public law and government courses to undergraduate and graduate students in liberal arts. But before the shattering cry goes up, "He's not a lawyer!" I might note for the record that I received a diploma from a well-known legal trade school off Massachusetts Avenue in Cambridge, visited on the faculty of its

43. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 823 (1935).

†Associate Professor, Economics, Tufts University.

sister institution fronting Wall Street in New Haven, and have been initiated into the solemn company of the District of Columbia Bar. Thus, if I misunderstand the noble purposes of both law and liberal arts, it is not from a failure of exposure to either.

Courses dealing with law have been a standard item in the undergraduate curriculum for many decades. Departments of Political Science usually offer constitutional, administrative, and international law, and some teach jurisprudence. Departments of History provide studies of the constitutional and legal histories of particular countries or cultures. Anthropologists teach "Law in Primitive Societies" and Philosophy Departments rarely omit a course in some aspect of legal theory. Economics Departments and Schools of Industrial Relations give labor law, while Business Schools feature assorted offerings on contract law, law of business associations and the like. These are all courses dealing with small-"l"-law, or the law of something. What Professor Berman wants taught is capital-"L"-Law, or, as law students quickly learn to intone reverentially, "*the* Law"—the total mystery, from seamless web to "solemn Ass."

A course of this kind, listed variously as "Law and Society," "The Legal Process," or "The Growth of the Law," has appeared in a number of leading universities in recent years. At times, as at Harvard and Yale, the course has been taught by law professors. If I sense at least a part of their primary motivations, these law professors mix a missionary zeal to spread the message of the Law as Philosopher-King in the heathen clime of the college with a bit of personal hunger for the broader intellectual atmospheres of the Arts School, the opportunity it provides to speculate about problems of philosophy, politics, and history without having to sandwich these in, somewhat guiltily, among the daily bread-and-butter sessions of the Law School. And, to put it frankly, when it comes to probing the *fundamentals* of "the Law," law students are not as lively and as adventurous a group to teach as the good undergraduates. In other instances, the course on "the Law" has been given by political scientists. My colleagues, I observe, often undertake this mission because they feel it grossly unfair that law faculties should have a monopoly on the fun of playing Socrates, although it must be noted that the political scientists rarely know what it is to face the cup of hemlock that a crack law school class can thrust forward in the midst of a daily dialogue on a fine point of law.

Professor Berman, a member of the faculty of the Harvard Law School, has taught courses on the Law at Harvard College and M.I.T., and has conducted an experimental seminar in legal method for younger faculty members in the social sciences. From this experience, he is convinced that "a basic understanding of the nature and functions of law is by no means inaccessible to the non-lawyer, and . . . can be of the greatest interest and value"[1] to college students. The trouble with existing Law courses, Berman states in his

1. P. iv.

preface, is that the instructor must choose at present between bad texts or his own set of readings.

> Books written for laymen which attempt to present an overall picture of the legal system are usually either too technical or not technical enough, and in any case are not suitable as textbooks for a course. As a result each instructor has tended to compile his own special selection of readings. While this diversity of approach has certain advantages, there is also a need for a common effort toward creating a common discipline, through which the benefits of diverse experience may be shared.[2]

Berman's contribution toward a common curriculum is divided into four sections. In Part One, "Law as a Process of Resolution of Disputes: Illustrations From Civil and Criminal Procedure," and Part Two, "Law as a Process of Maintaining Historical Continuity and Doctrinal Consistency: Illustrations From the Development of Doctrines of Manufacturer's Liability in Tort," Berman has assembled a nice set of original essays, case materials and edited articles. His technique of orienting the student into the subject is concrete enough to hold their interest while speculative enough to fire their minds. I particularly like the choice of the manufacturer's tort liability problem because it shows the concepts of common law growth, change, and search for continuity. In Part Three, "Law as a Process of Facilitating and Protecting Voluntary Arrangements: Illustrations From Judicial Remedies for Breach of Contract," and Part Four, "Law as a Process of Resolving Acute Social Conflict: Illustrations From Labor Law," Berman reproduces substantial chunks from two distinguished casebooks written by his colleagues Lon Fuller and Archibald Cox,[3] with some questions and notes interspersed by Berman to fix the attention of the non-law-student on special points.

All of this is mounted, it is a sad duty to report, in the worst of the law school book format. The Foundation Press, as though to impart utter authenticity, has employed the lack-lustre hornbook covering, dense typography, formalistic heading-type system, and sterile page format which has signified to generations of law students that their adventures with graceful books were over for three years. And, while there is no accounting for taste in humor as in other matters, it is strange to find two dreadfully dreary cartoons thrown into the first fifty pages, as if to show that law isn't really so stuffy, after which a desert of type ensues for the next 600. At least political scientists have had the inspiration to employ Herblock as their graphic colleague in textbook ventures.

To turn to the questions raised by this book, first, is there a valid place in the undergraduate curriculum for a course on "the Law"? I will not deal with this issue in terms of academic nihilism, as by saying that there is as much place as for the courses in basket weaving, driver education, social dancing, or folk music which have elbowed their way into the curriculum of some of our most distinguished universities. The question is whether such a course belongs in a university which offers subjects appropriate to the liberal arts concept.

2. *Ibid.*

3. FULLER, BASIC CONTRACT LAW (1947); COX, CASES ON LABOR LAW (1958).

At this level, two possible objections to a course in Law might be projected. One is that such a course is too career-oriented. Berman's text is clearly not vulnerable to that protest. The materials do not teach the law on any subject in the professional sense, nor do they aim to rehabilitate lawyers from their periodic lows in public esteem, nor to train students in the great American legal game of Judge-Watching. The basic question Berman raises: What is a system of law? If it is appropriate to say that a student leaves college incompletely equipped if he lacks an awareness of what is involved in the problems of science, history, literature, or politics, surely an ignorance of the process of law is equally damaging. Yet most undergraduates have astoundingly ignorant concepts about the legal process, and only a few will have this remedied by law-school work. While I would not suggest that an undergraduate who failed to take a course in a particular subject was doomed to eternal ignorance on that matter, self-education in the process of law is harder, and less likely, for the arts graduate than his obtaining a generalist's grounding in history or economics or sociology, fields in which books for laymen are more frequently and better written than in the field of law. In short, I see no validity in a criticism of a course on Law such as Professor Berman's on the basis that it represents a careerist intrusion into the liberal arts cloister.

Another possible objection is that the undergraduate is not prepared for such a course. Sometimes this is urged on the ground of his tender years. Sometimes, it is suggested in terms of the undergraduate's lack of mastery of the rudiments of economics, history, government, and the like, which are described as necessary prerequisites for a consideration of law. Neither argument is persuasive. Those law professors who teach undergraduates usually come away pleasantly surprised at their capacity to handle legal materials, when properly presented, and it is hard to see that a college senior, only one year away from his entrance to law school (were he to choose that course) is so incompletely endowed as to bar him from work in legal processes. More important, the kinds of questions which flow from the Berman materials—the transfer of social conflicts into courts, the reasoning method in law, the comparison of procedural systems in America with those on the Continent—complement intellectual inquiries in main areas of the liberal arts curriculum and are concerns worth the attention of an undergraduate seeking to understand what society is and how it functions.

The second major question raised by the Berman book deals with course content. My main reaction is not to disparage what Berman has placed in his collection, which I find for the most part attractive, but to question what he has omitted, which seems too much and too fundamental.

For example, no use is made of available documentary materials to portray a legal proceeding from its beginning to its end. The only thing in Berman's book which comes near to this is the report of a demonstration of a pretrial conference in federal court.[4] Surely there was no need to rely on a mock trial when tons of original records and transcripts beckon for skillful editing and

4. Pp. 134-49.

presentation to the student. The late Judge Jerome Frank noted eloquently that presentation of the documentary materials of legal proceedings and conflicts was absolutely essential for law students,[5] and I think undergraduates would profit from it as well. The idea of using transcript materials of a case has already been experimented with in law school texts,[6] utilized in moot court programs at several law schools, and is the basis of a current text primarily intended for liberal arts students,[7] and I think that Berman's is preeminently the type of work which should include such materials.

Another shortcoming of the Berman collection is its overly impersonal presentation of the nature and functions of law. This is not to say that students receive a wholly mechanistic impression; there are, for example, two short selections of comments by judges as to the external and internal processes of their profession.[8] But the Berman text falls quite short in making the student aware of the men who shape the law as counselors, advocates, legislators, judges, executives, and even law professors. One could think of a variety of techniques to use here, from biographical selections and excerpts from revealing historical episodes to originally written descriptions by the editor of the characteristics of the roles played by the above men in making law. At any rate, something more is needed, especially since the question of the personal factor in the judicial process is a topic of great interest to the liberal arts student in the contemporary climate of legal realism.

Finally, I think that it would have been useful to employ some hypothetical cases to provide the basis for *extended* classroom discussion. The cases devised by Lon Fuller, such as his "Case of the Speluncean Explorers"[9] and the "Case of the Grudge Informer,"[10] are so excellent for undergraduate use —as this reviewer has found—that something like this would be a fine teaching tool to include in future editions of the Berman volume.

A final word might be said about the undergraduate course on Law and champions of it such as Professor Berman. Not the least justification for such a venture would be the result that the most broad-minded of the law professors, men such as Mark deWolfe Howe, Jr., Charles L. Black, Jr., the late Zachariah Chafee and Berman himself, who have taught arts courses on Law, become involved in the arts arena, and thereby enrich the life of the colleges and the hours of arts faculties by their presence.

ALAN F. WESTIN†

5. FRANK, COURTS ON TRIAL 233 (1950).

6. MORGAN & MAGUIRE, CASES ON EVIDENCE 1082-1124 (2d ed. 1942). Unfortunately, this was dropped from the latest edition, on what I believe was a mistaken assumption by the authors that because the transcript was not discussed in class it was not useful to the student. See MORGAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE xii (1957).

7. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE (1958).

8. Pp. 252-75.

9. FULLER, THE PROBLEMS OF JURISPRUDENCE 2-27 (temp. ed. 1949) (also printed in 62 HARV. L. REV. 616 (1949)).

10. 1950 (unpublished manuscript in Harvard Law School Library).

†Associate Professor of Public Law & Government, Columbia University.