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.

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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).

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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.

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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).

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