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Reviews of “The Mysterious Science of the Law,” By Daniel Boorstin and “Blackstone's Commentaries on the Law,” Edited By Bernard Gavit

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trolling force, else the administrative agency's real function might largely be destroyed and the interest of the general public be made to suffer.

In publishing this little book, Mr. Gellhorn has performed a highly useful service, one that should earn him the thanks not only of all careful students of the administrative process but particularly of those practicing lawyers who have not made a special study of the administrative tribunal, many of whom have been led to believe that it contains the seeds of democracy's destruction.

ROBERT LORENZO HOWARD.†

THE MYSTERIOUS SCIENCE OF THE LAW. By Daniel J. Boorstin. Cambridge: Harvard University Press, 1941. Pp. 257. \$3.00 cloth.

BLACKSTONE'S COMMENTARIES ON THE LAW. Abridged edition of William Hardcastle Browne edited by Bernard C. Gavit. Washington: Washington Law Book Company. Pp. 1040. \$6.00.

The vigorously perennial dispute as to whether the age creates the man or the man his age is sometimes rendered moot in the person of those felicitous individuals who conform so closely to the ideals of their own age that they influence the behavior of a succeeding one. This is particularly true when the times are big with potentialities, as was Eighteenth Century England. Sir Henry Maine slightly referred to Blackstone as "always a faithful index of the average opinions of his day."¹ Where the times are right such an index, happily phrased, can become a classic. Horace's "*aurea mediocritas*" may aptly describe even a writer of commentaries. In Blackstone's age the great stores of learning laid up in the Renaissance were being inventoried and appraised; the first tide of the industrial revolution was beginning to run; the age of contract, the age of the modern lawyer and constitution maker was about to emerge from beneath the horizon. And sometimes chance takes a hand. Gibbon was about to write his *Decline and Fall* in French until he considered the prospects of an English speaking posterity in the American colonies.² These same colonies were to make Blackstone's work greater than when it left the author's hands.

Had the age turned out badly, there would have been another story; but the age turned out well, all things considered; and in due time Macaulay in England became the golden index,³ and Marshall in America the golden jurist, of the next century.

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1. Sir Henry J. S. Maine, *Ancient Law* (N. Y. 1927) E. P. Dutton & Co., p. 148.

2. Edward Gibbon, *The Autobiographies of Edward Gibbon* (London, 1896, Murray) p. 277; *The Decline and Fall of the Roman Empire* (London, 1898, Methuen) Edited by J. B. Bury, Vol. IV, p. 166.

3. "The more I contemplate our noble institutions, the more convinced I am that they are sound at heart, that they have nothing of age but its dignity, and that their strength is still the strength of youth." Inaugural Speech delivered at the College of Glasgow, on the 21st of March, 1849. T. B. Macaulay, *Speeches and Poems*. (N. Y., A. C. Armstrong & Son, 1880) Vol. II p. 81.

Mr. Boorstin's volume is narrowly devoted to the thesis that Blackstone's apparently rational exposition of the laws of England was everywhere informed by the desire to rationalize the existing social structure. In his early chapters, Mr. Boorstin shows the Eighteenth Century mind torn between the ancient faiths and the science of Newton and Locke. He examines the characteristic interest of the age in universal history and in the attempt to formulate general principles of human conduct, as in the case of Hume and Robertson. All of these influences are seen in Blackstone's careful use of scientific terminology and of examples drawn from universal experience. In history Blackstone found one of his chief tools of exposition. The idea of the *Natural Law* which became so popular after its use by Locke to justify the Revolution of 1688 was employed by Blackstone as the cornerstone of his system. Under Blackstone's skillful phraseology it was made to appear that the laws of nature in most instances were identical with those of England: "as one could discover what the laws of England were by examining the laws of nature, so one could discover the laws of nature from looking at the laws of England."⁴

Along with its interest in science, the Eighteenth Century was fascinated by the primitive. Omai, brought by Captain Cook from the Pacific Islands, became an exemplar of the noble savage. Thus Blackstone praised the ancient simplicity of English law and found that all that was admirable in it sprang from the primitive Saxon virtues. Such a doctrine justified retaining institutions simply because of their age and origin in a presumably happier time. Yet, at the same time, Blackstone's contemporaries were possessed of an unconquerable and not ill-founded belief in the inevitability of progress. The Golden Age might be in the future after all.⁵ Hence, frequently Blackstone, in order to discourage tinkering, advanced the concept that by automatic degrees the laws of England were inevitably improving. To interpose a conscious innovation would endanger disturbing the automatic processes.

Similarly Blackstone reflected the current aesthetic taste for balance and order. He arranged the great scheme of his work in symmetrical parts of two each: The Rights of Persons, The Rights of Things; Private Wrongs, Public Wrongs. He insisted upon simple classifications even where such a method involved placing a heterogeneous residue in a single residuary category appropriately named. Similarly the ideal of balance was found convenient to inhibit altering an existing law lest the taking away of one element disarrange the whole. Just as his time was fearful of the dark abysses of metaphysics and sought refuge in the "common sense" whereby Dr. Johnson refuted Bishop Berkeley by the kicking of a stone, so Blackstone rested his case upon the "universal experience of mankind" and upon the well proven maxim.

In his discussion of "values," Mr. Boorstin arrives at the heart of his thesis. British Law converged upon the Protection of Life, Liberty and Property. By "Life" Blackstone meant "humanity" in the humanitarian

4. Boorstin op. cit. at p. 60.

5. J. B. Bury: *The Idea of Progress* (N. Y. 1932) *passim*.

sense. This quality of law Blackstone defended by showing, as Mr. Boorstin puts it, how "one-half of English criminal law consisted of devices for mitigating the severity of the other half."⁶ Liberty was interpreted in terms of the liberties granted by the English law. But, as one might expect, Mr. Boorstin finds that the central core of Blackstone's system was the protection of property. The apex of this system is found in the freedom of the Eighteenth Century Englishman to do what he wanted with his own. From this freedom grew commercial prosperity and social well-being.

Mr. Boorstin has done a competent and at times an amusing job; but, unfortunately, as the author makes his points, one is from time to time reminded of Dr. Johnson's vigorously contemptuous retort to a not too original remark of Boswell's: "Why yes, Sir; and what then? This now is such stuff as I used to talk to my mother, when I first began to think myself a clever fellow and she ought to have whipped me for it."⁷ Frankly, this sort of thing has been done before. Jerome Frank has done it. Thurman W. Arnold has done it twice. The terminology and the approach will not appear novel to the admirer of *The Symbols of Government* or *The Folklore of Capitalism*. One soon begins to recognize the cliché. This is unfortunate chiefly because of the technical craft with which Mr. Boorstin does his job. It is regrettable that the job is not entirely original.

If the approach has once been successful, why should repetition create surfeit? What makes the technique appear ephemeral? Perhaps it is the very narrowness of the approach, the care with which a single thesis is built up. This thesis is based upon the single premise that much of what has been accepted in the past as reason is merely rationalization. Almost implicit in such an approach is the denial of objective reason. Thus of necessity the approach becomes "psychological"; it may soon become "literary."

Mr. Boorstin's volume is a skillful bit of *ad hoc* pleading rather than a work of seasoned scholarship. The authorities cited are numerous—but too frequently secondary. Thus in citing Aquinas the author refers only to Gierke's prior citation of that author. Portions of the book will appear familiar to those who have studied the Eighteenth Century under Mr. Chauncey B. Tinker. Few references are made either to legal or general authorities outside of the immediate field. Thus in the lengthy and able discussion of primitivism, one will look in vain for any references to Toynbee's illuminating study of the morphology of archaism.⁸ Few citations to cases appear. The illustrations are familiar but well chosen.

William Hardcastle Browne's edition of Blackstone has long been a useful abridgment for the laity and for armchair reading by the lawyer. Certain portions, such as the "Biography of Lawgivers and Writers" might be omitted without loss to the adult reader. The glossary of legal terms

6. Boorstin op. cit. p. 147.

7. Boswell: *The Life of Samuel Johnson* (Ingpen's Ed. 1925) Vol. I, p. 308.

8. Arnold J. Toynbee, *A Study of History* (Oxford, 1939, University Press) Vol. VI pp. 49-97 inc.

and the Biography of Blackstone are of some value. The chief addition to the former edition consists in "Dean Gavit's Notes" which are appended to each abridged chapter. These notes briefly discuss the text and indicate the later progress and the present status of Blackstone's rules. The notes are usually succinct and well stated and constitute a welcome aid to the reading of the work. The lawyer will be slightly nonplussed by the total absence of citations of authorities in either the text or Dean Gavit's notes. The slight shock, however, may help to induce a realization of the essential similarity between Blackstone's original work and the Restatements of the Law by the American Law Institute.

CHRISTIAN B. PEFER.†

HOW TO PROVE A PRIMA FACIE CASE. By Howard Hilton Spellman. New York: Prentice-Hall, Inc., 1940. Pp. xviii, 815. \$6.50.

This is an enlarged and revised edition of a book under the same name by Samuel Deutsch and Simon Balicer, printed in 1928. That the book is in its third printing, and that the earlier book went through five printings indicates that there has been a demand for a treatment of the subject indicated by the title. Why? To whom does a book like this appeal?

In the Introduction¹ we find that "The elements of a prima facie case rest in the substantive law of the various subjects *embraced within a given litigation.*"² Surely the graduates of any member school of the Association of American Law Schools go into their profession qualified to recognize those elements. It is difficult to believe that such persons would have to look into a handbook to find that³ "To establish a prima facie case based on fraud and deceit, the plaintiff must prove: (1) that the defendant's representation was false; (2) that the defendant knew it to be false (*sic*); (3) that he intended to defraud the plaintiff; (4) that the plaintiff believed the representations to be true and relied thereon; (5) that the plaintiff sustained damage." There may be many members of the bar to whom such elementary and inadequate statements of law, and the little bits of additional substantive law appended thereto under the title, Hints, are enticing. If so, it is a sad commentary on the courses in Legal Bibliography and the use of Digests and other material that a list of cases must be supplied in this way. The portions of the book given to such matter must be superfluous to lawyers, and this book is surely not merely for information to the layman.

The Introduction further states,⁴ "In the broad sense, the presentation of the plaintiff's case involves a series of separate minimum requirements of proof." If the lawyer knows the "elements" he surely knows they must be proved. He has, in any accredited law school, taken thorough courses

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1. Introduction, p. 3.
2. Italics ours.
3. P. 209.
4. P. 4.