LAW, LITERATURE, AND LEGAL EDUCATION:INNOVATION AND AMBITIONS IN BLACKSTONE'S *COMMENTARIES*

LEY, LITERATURA Y EDUCACIÓN LEGAL: INNOVACIÓN Y AMBICIONES EN LOS COMENTARIOS DE BLACKSTONE

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Matteo NICOLINI*

Abstract
The essay explores the relations between legal change and legal education in an attempt to shed new light on the first common-law law textbook, William Blackstone's *Commentaries on the Laws of England.* When it comes to examining the rise of the primer as a new legal textual genre, however, the potential of comparative law, in general, and of law and humanities, in particular, is scarcely employed. Scholars usually focus on Blackstone's influence on the evolution of common-law institutions and legal literature, without ascertaining how eighteenth-century England influenced the structure and contents of the *Commentaries*. The essay delivers a multidisciplinary assessment of Blackstone's *Commentaries* by exploring the educative ambitions of comparative law. Such an assessment is undoubtedly facilitated by the Commentaries, whereby Blackstone triggered noticeable changes in the contents, *form*, and *language* of legal education.

Keywords: Law and Humanities; Comparative Law; William Blackstone; Legal Education; Study of the Law; Legal Change.

Resumen
El ensayo explora las relaciones entre el cambio legal y la educación legal en un intento de arrojar nueva luz sobre el primer libro de texto de derecho consuetudinario, *Los Comentarios de William Blackstone* sobre las leyes de Inglaterra. Sin embargo, cuando se trata de examinar el surgimiento de la cartilla como un nuevo género textual legal, el potencial del derecho comparado, en general, y del derecho y las humanidades, en particular, apenas se emplea. Los académicos generalmente se centran en la influencia de Blackstone en la evolución de las instituciones de derecho consuetudinario y la literatura legal, sin determinar cómo la Inglaterra del siglo XVIII influyó en la estructura y el contenido de los *Comentarios*. El ensayo ofrece una evaluación multidisciplinaria de los comentarios de Blackstone al explorar las ambiciones educativas del Derecho comparado. Tal evaluación es indudablemente facilitada por los *Comentarios*, mediante los cuales Blackstone provocó cambios notables en los contenidos, la forma y el lenguaje de la educación jurídica.

Palabras clave: Derecho y humanidades; Ley comparativa; William Blackstone; Educación jurídica; Estudio de la ley; Cambio legal.

*Professor of Public Comparative Law in the University of Verona.

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This was already obvious to Gaius in the second century and still obvious to Blackstone in the 18th. The law simply could not be understood unless it took care to classify itself 'methodically.'
– Birks, Rights, Wrongs, and Remedies, 3.

SUMARIO: *I. Comparative Law, Educative Ambitions, and Blackstone's Commentaries. II. The "constitutive story:" Blackstone and the Creation of Legal Textual Genres. III. Lecturing Common Law; or, Politics, Society, and the Epic of the Common Law. IV. Comparative Law, Anecdotes, and the Effects of the Ab Ovo Doctrine on Legal Education. V. Making "Educational Innovation" Negotiable: Commentaries, Marketplaces, and New Textual Genres. VI. Continuity and Discontinuity in the "New Species of Writing". VII. A New Province of Legal Language? Digesting the "Arcane" Common Law in a "Clear, Concise, and Intelligible Form".*

I. COMPARATIVE LAW, EDUCATIVE AMBITIONS, AND BLACKSTONE'S *COMMENTARIES*

As they are unceasingly *à la recherche* of innovative approaches to the study of law, comparative legal studies engage in intense cross-disciplinary research. This is the case for law and humanities, which provide comparative scholars with new "possibilities" and renovated "perspectives," allowing scholars to assess how change affects several ambits of the legal spectrum, such as public law. Due to its critical approach, indeed, the comparative method assists us in detecting the non-legal variables that, underpinning the realm of the law, trigger such a change.[1]

When it comes to studying legal change there is room left for exploring the "potential of comparative legal thinking"[2] – and such potential discloses methodological and educative ambitions. As Ian Ward vividly argues, we should not waste that potential by making these educative ambitions "too intellectual and above all inaccessible for all but the most conversant in the intricacies of literary and legal theory."[3]

1 F.H. Lawson, Selected essays: The Comparison Vol II, 78 (North-Holland Publishing Company, 1977).
2 George P. Fetcher, *Comparative law as a Subversive Discipline, in* American Journal of Comparative Law, 684 (1998).
3 Ian Ward, Law and Literature: Possibilities and Perspectives of Comparative Law, IX (Cambridge

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This potential is rarely employed when we consider how legal education changed over time. On the one hand, we debate to what extent economics, globalisation, the practice of law and science impact on how we teach prospective lawyers. On the other hand, we rank universities and consider academic lawyers' background when these enter the profession and the judiciary.[4] In addition, we deplore the "intrusion of professional accrediting bodies" in defining legal curricula,[5] but, at the same time, we promote the digitalisation of "legal enculturation."[6] Finally, the convergence of laws at the supranational level and the impact of global financial dominance make the variety of domestic legal educational curricula coalesce towards a homogeneous transnational curriculum.[7]

To this extent, the educative ambitions of comparative law are usually limited within the domain of what de Vries terms as "reflexive courses on law", say, jurisprudence, legal theory and sociology of law.[8] Certainly, these courses permit students to develop a critical approach to the law: "Framing law as an active and intellectual activity rather than an exercise of reproduction triggers and maintains the student's curiosity."[9] Such a curiosity, however, should not be merely confined within the precincts of such reflexive educational laboratories. When we consider the interactions between legal education and legal change, we should also take into account another variable, i.e. the context within which changes and transformations in legal education actually take place.

Such a predicament is particularly true as regards William Blackstone's contribution to legal education. Manifold changes and transformations characterised eighteenth-century England, i.e. the context within which Blackstone developed his own educative ambitions: the Industrial Revolution, the

University Press, 1995).

4 Mark Davies, ***Educational background and access to legal academia,*** 38 Legal Studies, 120-146 (2018). DOI:10.1017/lst.2017.5

5 Ian Ward, ***Legal Education and the Democratic Imagination***, 1 Law and Humanities, vol. 3, 87-112 (2009), DOI: 10.1080/17521483.2009.11423761. Peter Birks, ***The academic and the practitioner,*** 4 Legal Studies, vol. 18, 397-414 (1998). DOI: 10.1111/j.1748-121X.1998.tb00073.x

6 John Snape and Gary Watt, ***How to Moot: A Student Guide to Mooting (Oxford University Press, 2nd ed., 2010); Gary Watt, Legal Education Creative Voices – Student Writing in Law and Literature***, 1 Law and Humanities, vol. 8, 104-110 (2014). DOI: 10.5235/17521483.8.1.104; Gary Watt, ***The art of advocacy: renaissance of rhetoric in the law school***, 1 Law and Humanities, vol. 12, 116-137 (2018). DOI: 10.1080/17521483.2018.1464243; Richard Mullender, ***Law, Undergraduates and the Tutorial,*** 3 Web Journal of Current Legal Issues (1997).

7 Muna Ndulo, ***Legal Education in an Era of Globalisation and the Challenge of Development***, 1 Journal of Comparative Law in Africa, 1-24 (2014); Franco Ferrari, ***International Business, Law Merchant, and Law School Curricula,*** 1 Yale Journal of Law & Humanities, vol. 6, 95-98 (1994); Jaakko Husa, ***Comparative law in legal education – building a legal mind for a transnational world,*** 2 The Law Teacher, vol. 52, 201-215 (2018), DOI: 10.1080/03069400.2017.1340532.

8 Bald de Vries, ***Law, Imagination and Poetry. Using Poetry as a Means of Learning, in*** Special Issue on Active Learning and Teaching in Legal Education, Law and Method (2019). DOI: 10.5553/REM/.000039.

9 Tim Blekker, ***Epilogue: an overview, reflections and a student's perspective, in*** Academic Learning in Law. Theoretical Positions, Teaching Experiments and Learning Experiences, 313 (Bart van Klink and Ubaldus de Vries eds., Edward Elgar publishing, 2016).

creation of the Empire, the consolidation of a capitalist economy, the growth of the public opinion had tremendous impacts on English public law. In *An Enquiry into the Causes of the Late Increase of Robbers* (1751), for example, the lawyer and novelist Henry Fielding highlighted how market, trade, and colonial expansion had some bearing on the English constitution and how this was taught. These changes resulted in an era of legal reforms:[10] "the law had therefore to consider all the complicated relationships which were being created through the machinery of credit and joint enterprise," agriculture, finance, and society.[11] The rise of the novel was also part of this context; and this new literary genre is considered "an experimental inquiry into the ethical implications of contemporary social change."[12]

The aim of this essay is to explore the relations between societal and legal change in William Blackstone's *Commentaries on the Laws of England*.[13] Legal and literary scholars have already acknowledged that Blackstone invented a new legal textual genre: the *primer* for law students. But, the legal-historical perspective has merely focused on Blackstone's influence over the evolution of common-law institutions, and little attention has been paid so far to how the eighteenth-century English environment influenced the structure of the first law textbook. We will see in due course that this environment contributed to shaping the new form of legal education invented by Blackstone – and Blackstone, in turn, had a huge impact on both his audience and the reading public of his *Commentaries*. The essay has a cross-disciplinary approach: as it considers the Blackstone's educative ambitions, it will focus on how changes in English society triggered changes in both the teaching of public law and private law.

Time is ripe, then, for both revising the relevance of Blackstone's *Commentaries* and assessing the educative ambitions of the law-and-literature movement. Under no circumstances must the relevance of the *Commentaries* be limited to the progress of legal education in the English-speaking world.[14] On the contrary, I argue that their relevance surpasses the legal educational debates occasioned after their publication.[15] Blackstone's contribution to legal educational studies has

10 Henry Fielding, *An Enquiry Into the Causes of the Late Increase of Robbers, and Related Writings*, 64 (Malvin R. Zirker ed., Oxford University Press and Wesleyan University Press, 1988). Martin A. Kayman, T*he 'New Sort of Specialty' and the 'New Province of Writing': Bank Notes, Fiction and the Law in 'Tom Jones',* in 68.3 ELH, 633-653 (2001).

11 Theodore F. T. Plucknett, A concise history of the common law, 68 (Butterworth, 5 ed, 1956).

12 Michael McKeon, The Origins of the English Novel, 1600-1740, xxiii (The Johns Hopkins University Press, 2002). Ian Watt, The Rise of the Novel. Studies in Defoe, Richardson and Fielding, 35 (The Bodley Head, 2015).

13 William Blackstone, Commentaries on the Laws of England, vols I-IV (1765-1769) (Wilfrid Prest gen. ed., Oxford: Oxford University Press, 2016). Further references in the text, abbreviated as ***CLE.***

14 David M. Rabban, ***Hammond's Blackstone and the Historical School of American Jurisprudence, in*** Blackstone and his critics, 173-191 (Anthony Page and Wilfrid Prest eds., Hart Publishing, 2018). William Gardiner Hammond, William Blackstone, Commentaries on the Laws of England, (San Francisco, Bancroft-Whitney Co., 1890).

15 David Liebermann, ***Professing Law in the Shadow of the Commentaries, in*** supra note 14, 153–

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always been lively; and the *The Vinerian Chair and Legal Education* by Harold G. Hansbury, eleventh Vinerian professor, upholds such an assumption.[16]

Hence, the *Commentaries* are a crossroads, which facilitates the contacts between legal education and the social, linguistic, and literary context which is eighteenth-century England. Apart from Thomas Holcroft and Harper Lee,[17] however, only legal scholars have praised the "power and elegance" of Blackstone's prose. Not only is there still room left for writing the multidisciplinary "constitutive story"[18] of the *Commentaries*, but it also is the duty of the comparative legal scholar to participate in such an assessment.

II. THE "CONSTITUTIVE STORY:" BLACKSTONE AND THE CREATION OF LEGAL TEXTUAL GENRES

As is known, the *Commentaries* enjoy a prominent position in English legal literature – a position which they attained soon after the publication of the first Book (1756).[19] Furthermore, their influence goes beyond the limits marked by English legal literature so as to encompass the whole common-law legal tradition.[20] Blackstone was "much admired" in the Americas. On the one hand, the Commentaries were praised by U.S. scholars, such as Justice Joseph Story, who considered Blackstone "one of those great men raised up by Providence" because of the "salutary revolution" he had triggered within the common law.[21] On the other hand, Blackstone exerted noticeable influences on the development of the Latino-America legal and educational mentality[22].

As Baker argues,

> "Blackstone conveyed to a wide readership on both sides of the Atlantic Ocean the essential and beauty [...] of a system of law [... he] was at once a final survey of the old common law and the first textbook of a new legal era."[23]

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16 Harold G. Hansbury, The Vinerian Chair and Legal Education (Basil Blackwell, 1958.

17 Thomas Holcroft, The Adventures of Hugh Trevor, 142 (Lippincot, 1960).

18 Rogers M. Smith, Stories of Peoplehood: The Politics and Morals of Political Membership, 72 (Cambridge University Press, 2003).

19 Anthony Page and Wilfrid Prest, ***Introduction***, in ***supra*** note 14, ix-xxi, xiii.

20 Albert W. Alschuler, ***Rediscovering Blackstone***, 145.1 University of Pennsylvania Law Review, 1–55 (1996).

21 John Adams, Diary and Autobiography of John Adams, 275 (L. H. Butterfield ed., Harvard University Press, 1961); Joseph Story, The Miscellaneous Writings of Joseph Story, 114 (Little Brown, 1852).

22 Alejandro Guzmán Brito, ***La doctrina de la consideración en Blackstone y sus relaciones con la "causa" en el "Ius commune"***, Revista de Estudios Histórico-Jurídicos, 375–406 (2013); Javier Grandon Barrientos, Blackstone y su uso por Bello en la formación del Código Civil de Chile. Un ejemplo en sede de nulidad del matrimonio, Revista de Estudios Histórico-Jurídicos, 305–315 (2019).

23 J. H. Baker, An Introduction to English Legal History, 201 (Oxford University Press, 5th ed., 2019).

There is something intriguing in this statement. The *Commentaries* are certainly a milestone in common-law legal literature; but Baker raises new issues related to the changes that they impinged on legal education.

With the inauguration of the Vinerian Chair of Law at Oxford (1758), English common law was eventually admitted into the academic curriculum – and Blackstone, who had already started lecturing in 1753, would hold the Chair until 1766.[24] These changes did not directly affect the legal profession: common lawyers were still trained in the Inns of Courts and attended Westminster Hall to learn the law.[25] Legal education certainly existed before Blackstone started lecturing the common law; but this was mainly tailored to the needs of prospective professional lawyers, without mirroring the necessities that had been emerging within the eighteenth-century English society. Holdsworth warns us about the state of legal education: this was that of "a melancholy topic", which "delayed the public and professional recognition of the importance of establishing for all lawyers a sound system" of legal training.[26]

As they were not addressed to common lawyers, Blackstone's lectures fulfilled a different purpose. Indeed, they intended to reach a new type of students; among them, university graduates, "country gentlemen and clergymen who needed an outline knowledge of the legal system."[27] These were non-prospective practitioners, who nonetheless would be called upon to play their part in the legal system – say, for example, in the criminal justice system. Consequently, English gentlemen required a clear and ordinate introduction to all the subtle niceties of the English legal system, in general, and of criminal law and procedure, in particular.[28] In Blackstone's opinion, the *Commentaries* provided non prospective lawyers with "a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities." (*CLE*, I.35)

This is particularly evident if we consider how their publication was enthusiastically praised. For example, the *Critical Review* (July 1768 n. 36) published the following book review:

> "[I]t is paying Mr. Blackstone too poor a compliment to call him the English Cujas, or the modern Cujas, or the modern Coke, as perhaps neither of these authors have equalled him in that perspicuity and order, which has been so much wanting in the study of the law. He has cleared it from

24 Wilfrid Prest, William Blackstone. Law and Letters in the Eighteenth Century, 119 (Oxford University Press, 2000).
25 William S. Holdsworth, ***Blackstone***, 17.3 North Carolina Law Review, 233–241, 234 (1939).
26 William Holdsworth, A History of English Law, vol XII, 77-78 (Methuen & Co., 1938).
27 Baker, ***supra*** note 23, 201.
28 Ruth Paley, ***Editor's Introduction to Book IV,*** Commentaries on the Laws of England, vol. IV, (Oxford University Press, 2016).

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> technical terms; so that we can venture to assert, that every gentleman of tolerable good sense, though is no scholar, by carefully perusing this work, may become no contemptible lawyer."

There is something intriguing in such a predicament, too. On the one hand, the anonymous writer of the *Critical Review* endorses Blackstone's arguments according to which "the study of the law [should be] part of the polite learning of the gentleman."[29] It was an ambitious proposal, because it delivered a radical change in the legal profession and suggested how prospective gentlemen should be nurtured and academically educated. In so doing, the *Critical review* pointed to the merits of the *Commentaries*: among Blackstone's achievements there were both "perspicuity" and "order." By cleansing the common law from its more contentious "technical terms", he undoubtedly rendered an "unparalleled service"[30] to English law and triggered long-term transformative effects on *contents*, *form,* and *language* of common-law legal literature.

I do not intend to focus on each institution examined in the *Commentaries*. Certainly, Blackstone contributed to the renovation of the English legal system, as well as its lexicon: whilst still referring to the dichotomy felony-misdemeanour, he favoured the use of "crime" and "criminal" as part of the legal jargon.[31] By contents, I rather understand the process of digestation of legal institutions introduced by the lectures and then by the *Commentaries*. Even Thomas Jefferson, a strenuous antagonist of Blackstone's conservative legal arguments, had to admit that the textbook was "the last perfect digest of both branches of law".[32]

This is not to deny that the *Commentaries* gave a conservative flavour to the common law: Bentham, who attended Blackstone's lectures, considered him a "bigoted or corrupt defender of the works of power;" for his "blind complacence about the state of the law," he was labelled "the great supporter [of] a plan of systemic despotism."[33] However, Blackstone's digestation earned more admirers than detractors. "We have a high Character of a Professor at Oxford, who they say has brought that Mysterious Business," which is the common law, "to some

29 Paul Lucas, ***Blackstone and the Reform of the Legal Profession***, LXXVII The English Historical Review, 456–489 (1962).

30 Julian S. Waterman, ***Mansfield and Blackstone Commentaries***, 1 The University of Chicago Law Review, 549–571 (1934).

31 Paley, supra note 28.

32 W.H. Bryson, ***English Ideas on Legal Education in Virginia***, in Learning the Law: Teaching and the Transmission of English Law, 329-249 (Jonathan Bush and Alain A. Wijffels eds., Hambledon, 1999).

33 Jeremy Bentham, A Fragment of Government, 94 (Clarendon Press, 1891); Baker, supra note 23, 191; James Wilson, Of the General Principles of Law and Obligation, The Works of James Wilson (Harvard University Press, 1967). Howard L. Lubert, ***Sovereignty and Liberty in William Blackstone's 'Commentaries on the Laws of England'***, 72 The Review of Politics, 271-297 (2010); Richard Posner, Blackstone and Bentham, 19 The Journal of Law & Economics 569-606 (1976).

System" by collecting his lectures in a "rational," "stylish," and "readable" way.[34] To sum up, Blackstone succeeded in reducing "to system a farrago of legal knowledge scattered over a vast range of black-letter lore."[35]

III. LECTURING COMMON LAW; OR, POLITICS, SOCIETY, AND THE EPIC OF THE COMMON LAW

As I have already noticed, comparative legal scholars are unceasingly à la recherche of paradigms that are able to explain legal changes and to disclose their long-term trends.[36] This *recherche* broadens the legal experience and allows comparative legal scholars to engage in an intense cross-disciplinary dialogue with other disciplines. As these dialogues demonstrate, "Law need not be like sawdust. It need not be anything like as complex inaccessible or downright dull as it too often seems."[37] Within this cross-disciplinary context, the *Commentaries* cease to be "a mere dry legal text," allowing us to value Blackstone's "modest, pragmatic and humanistic approach to the conceptualization of society and social relations."[38]

The *Commentaries* clearly reflect such a cross-cutting approach: "[Blackstone] has not confined himself to discharge the task of a mere jurisconsult; he takes a wider range and unites the historian and politician with the lawyer"[39]. As a general introduction to English law, the *Commentaries* describe how the law actually worked in eighteenth-century England. This is apparent in Book IV, Chapter 33 ("Of the Rise, Progress, and Gradual Improvements, of the Laws of England"), which is entirely devoted to the epic of "English law liberties" (*CLE,* IV.435). There are "flashes of patriotic colouring" in these lines, as well as hints of poetic inspiration: "the protection of the liberty of Britain is a duty which [English people] owe to themselves, who enjoy it" (*CLM*, IV.436).[40]

"Epic analogy" also characterised the novel: it was a crucial feature in Defoe's

34 Baker, *An Introduction, Letter Book of John Watts: merchant and councillor of New York, January 1*, 1762-December 22, 1765, 13 (Printed for the Society, 1928)

35 Thomas Ruggles, The Barrister: or Strictures for the Education Proper for the Bar, 8 (Clarke and Sons, 1818).

36 Mathias Reimann, ***Comparative law and neighbouring disciplines, in*** The Cambridge Companion to Comparative, 13-34 (Cambridge University Press, 2012); Vicki. C. Jackson, ***Comparative Constitutional Law: Methodologies, in*** The Oxford Handbook of Comparative Constitutional Law, 55-74 (Oxford University Press, 2012); Jaakko Husa, A New Introduction to Comparative Law, 104 (Hart, 2015); Mathias Siems, Comparative Law, 368 (Cambridge University Press, 2nd ed., 2018).

37 Ward, ***supra*** note 3, ix.

38 Wilfrid Priest, Commentaries on the Laws of England, vol. I, Of the Rights of Persons, vii–xv (Oxford University Press, 2016).

39 Edmund Burke, in Annual Register, or a View of the History and Politics and Literature for the Year 1767, 287 (J. Dodsley, 1796).

40 Paley, ***supra*** note 28, x.; David Lemmings, Editor's Introduction to Book IV, Commentaries on the Laws of England, vol. I, Of the Rights of Persons, xvii–xl (David Lemmings ed., Oxford University Press, 2016).

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and Richardson's works; and epic style was highly influential in both Henry Fielding's *Tom Jones* and Laurence Sterne's *Tristram Shandy*, whereby both authors to engage in a vivid representation of English society.[41]

According to both novelists, however, epic did not deserve any form of celebration. "[S]teeped in the classical tradition," Fielding "was by no means a slavish supporter of the Rules." Although he resorted to them in order to satirise society and social conventions, "he felt strongly that the growing anarchy of literary taste called for dramatic measures."[42]

> "For this our determination we do not hold ourselves strictly bound to assign any reason; it being abundantly sufficient that we have laid it down as a rule necessary to be observed in all prosai-comi-epic writing. [...] the world seems to have embraced a maxim of our law, viz., *cuicunque in arte sua perito credendum est:* for it seems perhaps difficult to conceive that any one should have had enough of impudence to lay down dogmatical rules in any art or science without the least foundation. In such cases, therefore, we are apt to conclude there are sound and good reasons at the bottom, though we are unfortunately not able to see so far" (*TJ*, 181).

By contrast, Sterne exhibited a huge, anti-epic attitude:

> "Horace, I know, does not recommend this fashion altogether: But that gentleman is speaking only of an epic poem or a tragedy;—(I forget which)—besides, if it was not so, I should beg Mr. Horace's pardon; —for in writing what I have set about, I shall confine myself neither to his rules, nor to any man's rules that ever lived" (*TS*, 8).

Blackstone's hints of poetic inspiration assisted him in participating in an intensive dialogue about English legal institutions. In so doing, he developed a political and social manifesto according to which educated English people would be offered an insight into the legal implications of England's economic prosperity and trade ascendancy.

The *Commentaries* explore the interrelations between English legal culture and society. Although the text still refers to some cases in which judges may hold a statute void (*CLM* I.90-91), Blackstone upholds Parliamentary supremacy, thus narrowing judicial authority to uphold the common law over statute law.[43] He then expounds the *democratic progress* of English representative institutions: this was

41 Henry Fielding, Tom Jones, 132, 181, 425 (Oxford University Press, 2008); Laurence Sterne, The Life and Opinions of Tristram Shandy, Gentleman (Oxford University Press, 2009).
42 Watt, ***supra*** note 12, 248.
43 See Lubert, ***supra*** note 33, 281.

relevant for his reading public, who exerted "predominant influence in national affairs"[44] through the system of borough and county representation (*CLE* 1.172–174).

Blackstone's social engagement is also patent in how he examines both the "liberties of Englishmen" (*CLE*, I.144)[45], the constitutional documents which embed them, such as *Magna Charta*, the *Petition of Rights*, the *Bill of Rights* and the *Habeas Corpus Act* (*CLE,* I.123-124). The engagement is also apparent when it comes to determining the law applicable to trade and colonies (*CLE*, I.242) or the scope of the Privy Council's jurisdiction (*CLE*, I.231).[46] The *Commentaries* also challenge slavery: "the spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave [...], the moment he lands in England [...] becomes *eo instanti* a freeman" (*CLM* I.123). However, Blackstone ultimately agreed with Lord Mansfield's (i.e., his Patron) seminal-but-ambiguous opinion in R. v. Knowles, ex parte Somerset: slavery was odious, albeit not unlawful. In the successive editions of the Commentaries he cautiously avoided addressing the issue directly by deliberately using hedged language.[47]

IV. COMPARATIVE LAW, ANECDOTES, AND THE EFFECTS OF THE *AB OVO* DOCTRINE ON LEGAL EDUCATION

The origins of the *Commentaries* display a deep connection with politics. I am not referring to Blackstone's election as a Member of Parliament (1761-1768), nor to his appointment as puisne justice of King's Bench and of Common Pleas by virtue of political preferment (1770). Rather, I consider how politics affected Blackstone's career as a lecturer, and how politics could easily have subverted the same course of common-law legal education.

We have been traditionally told that Blackstone started expounding the law of the land – thus becoming an Oxford don – because he had previously been an unsuccessful barrister. We have also been taught that such failure in practice, and "the grossly inadequate state of English legal education" caused him to engage in such a cultural project. It was a very lucrative one, indeed: as a member of the board of Oxford University's printing house, Blackstone had good knowledge of the book trade.[48]

44 Sir David Lindsay Keir, The Constitutional History of Modern Britain *1485-1951*, 330 (Adam and Charles Black, fifth edn., revised, 1957).
45 Posner, ***supra*** note 33, 569; Priest, William Blackstone, 41.
46 William Holdsworth, ***supra*** note 26.
47 R. V. Knowles, ex parte Somerset (1771-72) 20 State Tr. 1; Norman S. Poser, Lord Mansfield, ***Justice in*** An Age of Reason, 292 (Montreal et al., McGill–Queen's University Press, 2013); Prest, ***supra*** note 24, 251-253; James Oldham, English Common Law in the Age of Mansfield, 305 (The University of Carolina Press, 2004); Alexander Jackmna, Judging a Judge: A Reappraisal of Lord Mansfield and Somerset's case, 39 The Journal of Legal History, 140-156 (2018).
48 Posner, ***supra*** note 33, 569-606 (1976); Priest, General Editor's Introduction, vii.

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He was also inclined to academic studies;[49] but this could have led to a different ending by virtue of political patronage. What I am arguing here is that there had been contingencies related to politics that dramatically altered the course of Blackstone's career. As is known, his Patron Lord Mansfield recommended him to Thomas Pelham-Holles, I Duke of Newcastle, who controlled the academic preferment. The Duke, however, frustrated Blackstone's hopes of becoming Regius Professor of Civil Law: "when Blackstone declined to become Newcastle's political toady, merely saying that he would fulfil his lecturing duties as well as he could, Newcastle turned him down".[50] Such a denial changed the course of events; and Mansfield "advised Blackstone to proceed with a project which he had already considered:" giving lectures on English law.[51]

Anecdotes also offer a contour on how the Vinerian Chair was established. Viner had a strong "concern for legal education," and a high "sense of vanity" – not to say of his "web of benefactors", mainly composed of those educated gentlemen who benefitted from Blackstone's lectures.[52]

However anecdotal they might be, changes in the course of the events are also common in novels. Fielding warns us "not too hastily to condemn any of the incident in this [...] history as impertinent and foreign", because we do not "immediately conceive in what manner such incident may conduce to that design" (HF, 453). Laurence Sterne does the same in *Tristram Shandy*, where he turns the "anecdote" (TS, 7) of Shandy's birth into a real *Ab ovo* doctrine (TS, 8):

> "I wish either my father or my mother, or indeed both of them, [...] had minded what they were about when they begot me; had they duly consider'd how much depended upon what they were then doing [...] – I am very persuaded I should have made a quite different figure in the world, from that, in which the reader is likely to see me (*TS*, 5)".[53]

Anecdotes may be misleading – as is misleading the reference made by Sterne to Horace when forging the *Ab ovo* doctrine.[54] The application of the *Ab ovo* doctrine to legal education was also misleading. Had Blackstone started lecturing the civil

49 Priest, William Blackstone, 58.
50 Poser, ***supra*** note 47, 201; William B. Odger, ***Sir William Blackstone***, 27 The Yale Law Journal, 599–618, 603-604 (1918); William S. Holdsworth, ***Some Aspects of Blackstone and His Commentaries***, 4 The Cambridge Law Journal, 261-285 (1932); Waterman, supra note 30, 550; Prest, ***supra*** note 24, 108-109.
51 Holdsworth, ***supra*** note 50, 262.
52 David John Ibbetson, ***Charles Viner and His Chair: Leg Education in Eight-Century,*** in ***supra*** note 32, 1150-1900, 315-328.
53 Andrew Wright, ***The Artifice of Failure in 'Tristram Shandy'***, 2 NOVEL: A Forum on Fiction, 212-220 (1969).
54 Ian Campbell Ross, ***Explanatory notes***, The Life and Opinions of Tristram Shandy, Gentleman, 542.

law instead of his fee-paying course on English law, the course of common law would have been completely different. Anecdotal as it may see, the lectures on English law attracted many non-prospective lawyers, and prompted Blackstone to change the contents, form, and language of legal education.

V. MAKING "EDUCATIONAL INNOVATION" NEGOTIABLE: *COMMENTARIES*, MARKETPLACES, AND NEW TEXTUAL GENRES

There are two additional arguments associated with the *Ab ovo* doctrine.

The first argument refers to the publication of the *Commentaries*, i.e. the most important eighteenth-century "educational innovation" in legal studies.[55] We have already noticed that Blackstone became a Delegate of the University Press in 1755. He had profound knowledge of the academic book market: he sold "his copyright in 1772 to a consortium of booksellers-publishers," for £2,000: "[t]his brought his proceeds from the *Commentaries* to a then truly stupendous total of £ 14,488, the equivalent of at least £ 1.3 million in twenty-first century money values."[56] The same occurred in the United States of America, where the 1771 Philadelphia edition and the English ones were "widely sold".[57]

But his direct financial interests had been relevant even before the publication of the 1772 edition of the *Commentaries*. The *Ab ovo* doctrine discloses that he published them because students took notes of his lectures: "copies have been multiplied [...] some of which have fallen into mercenary hands, and become the object of clandestine sale." (*CLE,* Preface).[58]

Yet, financial interests were also present in the novel marketplace – and, to various degrees, the book trade triggered a marketplace for history, biography, poetry, and any other print genres one might name.[59] Unlike the historians – who would consider all these marketplaces as the context of their research –, I shall focus on the equation between the ambitions of two specific marketplaces, i.e. those of legal education and literature.

On the one hand, Laurence Sterne published *Tristram Shandy's* first two books at his own expense – the Londoner bookseller James Dodsley bought the copyright of the volumes after the novel had gained success.[60] On the other

55 David Lieberman, Blackstone's Science of Legislation, in Law & Justice 60, 60-74 (1988).
56 Priest, General Editor's Introduction, ix.
57 Bryson, ***supra*** note 32, 332; Subscribers in Virginia to Blackstone's Commentaries on the Laws of England, Philadelphia, 1771-1772, The William and Mary Quarterly, 183-185 (1921).
58 Holdsworth, ***supra*** note 50, 269.
59 John Feather, British Publishing in the Eighteenth Century: a preliminary subject analysis, 32-46 (The Library, 1986); George Justice, The Manufacturers of Literature: Writing and the Literary Marketplace in Eighteenth-century England (University of Delaware Press–Associated University Presses, 2002); James Raven, Publishing Business in Eighteenth-Century England (Boydell & Brewer, 2014);
60 Ian Campbell Ross, Introduction, to The Life and Opinions of Tristram Shandy, Gentleman, x, xii–xiii (Laurence Sterne ed., Oxford World's Classics, 2009).

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hand, Henry Fielding took part in the eighteenth-century legal and cultural debate "over literary property" as a "peculiar property." Blackstone himself took part in the debate, by making imagination negotiable, and rendering it a type of property was not an easy task. The *Commentaries* devoted several lines to this new type of property, assuming the right to dispose of it:

> "[T]his is the right which an author may be supposed to have in his own original literary composition: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it appears to be an invasion of that right." (*CLE*, II, 405-406)

This type of property raised issues related to its "*substance*:" the rise of trade with its individualistic values and proprietary narrative made it possible "that ideas and the imagination were becoming commercially valuable."[61] According to Blackstone,

> "Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent." (*CLE,* II, 405-406)

In England "hath there been (till very lately) any final determination upon the right of authors at the common law." (*CLE*, IV.406). But literary property had to fit the system; otherwise common law, which assigns "to every-thing capable of ownership a legal and determinate owner," would be disturbed (*CLE* 2.15). Blackstone was directly involved in the litigation, as he represented a bookseller in *Tonson v Collin*[62]. Although the statute of Anne (1710) granted book publishers legal protection only for 14 years with the commencement of the statute,[63] Blackstone pressed the argument for perpetual copyright in *Millar v. Taylor* (1769).

61 Kayman, ***supra*** note 10, 639, 649; Watt, ***supra*** note 12, 60.
62 Tonson v Collins, 1 Black. W. 301, ER 169 (1761).
63 Meredith L McGill, American Literature and the Culture of Reprinting 1834-1853, 46-47 (University of Pennsylvania Press, 2003).

From footnote 21 of Book II, Chapter 26 we infer the he won the litigation, and also that the House of Lords subsequently "overruled *Millar*, opting for a limited term of protection" in *Donaldson v. Becket* (1774)[64].

And yet, further equations can be drawn between the novel and the *Commentaries*. There is indeed the change in the reading public – both the primer and the novel address an "unlearned" reader: Blackstone's "Lectures and Commentaries are therefore an attempt to explain and justify the common law in the eyes of the laity, [...] the law is not merely the concern of a small and exclusive profession, but a matter of broad public importance which is the proper interest of every educated man."[65] As William Warner explains in *Licensing Entertainment*, the "elevation" of the novel involved a process by which novelists such as Fielding and Richardson took their "elevation" precisely from the claim that they were writing for better classes of reader.[66] This is another interdisciplinary engagement of the research; and this is an addition link between knowledge, textual genres, and book sale proceeds: the more the reader purchases, the more he reads, the more he accrues his knowledge – and the author's proceeds. As Sterne puts it,

> "Read, read, read, read, my unlearned reader! read [...] I tell you beforehand, you had better throw down the book at once; for without much reading, by which your reverence knows, I mean much knowledge, you will no more be able to penetrate the moral of the next marble page [...] than the world with all its sagacity" (TS, 180).

This also explains the address to Learning in *Tom Jones:* "And thou, o Learning, (for without thy assistance nothing pure, nothing correct, can genius produce) do thou guide my pen." (*TJ*, 601) Learning therefore assists the author in writing a book with its negotiable copyright – and the book is virtually capable of reaching a wide reading public; or, as Henry James says, "critics:" "By this word here, and in most other parts of our work, we mean every reader in the world." (TJ, 346).

The second argument related to the *Ab Ovo* doctrine is the rise of the primer as a textual genre in legal education.[67] Like the novel, the legal primer has indeed "a strong cultural component which can be uncovered by historical examination;" both genres were created "under the aegis of commercial, social and cultural institutions that mark the period's turn toward modernity and that link its concerns to ours today."[68] Both Blackstone and Fielding were lawyers – and both

64 *Millar v Taylor* (1769) 4 Burr. 2303, 98 ER 201; *Donaldson v Becket* (1774) 4 Burr. 2408, 98 ER 257.
65 Plucknett, *supra* note 11, 286.
66 William B. Warner, Licensing Entertainment: The Elevation of Novel Reading in Britain, 1684–1750 (University of California Press, 1998).
67 John W. Cairns, *Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State*, 4 Oxford Journal of Legal Studies, 318-360 (1984).
68 Watson, The Structure, 795; John Bender, Introduction, to Tom Jones, ix–xxxiv, xvii.

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explored different literary genres during their career.[69]

The novelty of both genres is measured by scholars: Ian Watt considers the novel "a break with the current literary tradition"; McKeon does the same when referring to the "formal breakthrough" which was the publication of *Tristram Shandy*.[70] As for the *Commentaries*, Baker considers that Blackstone's "success in breaking new ground is attributable partly to the discipline of trying to explain the law to educated gentlemen." Liberman labels the *Commentaries* a "methodological novelty;" and Milsom, consistently with the *Ab Ovo* doctrine, assumes that "important consequences for the law followed because Blackstone was addressing laymen and not lawyers."[71]

Fielding himself was conscious of such textual innovation:

> "My reader then is not to be surprized, if, in the course of this work, he shall find some chapters very short, and others altogether as long [...] in a word, if my history sometimes seems to stand still, and sometimes to fly. For all which I shall not look on myself as accountable to any court of critical jurisdiction whatever: for as I am, in reality, the founder of a new province of writing, so I am at liberty to make what laws I please therein." (TJ, 68).

The same holds true in the Preface to the *Commentaries:* he points out "the novelty of such an attempt in this age and country" comprised, as it is, in "the following sheets", it contains "the substance of a course of lectures on the laws of England." (*CLE*, Preface, i).

VI. CONTINUITY AND DISCONTINUITY IN THE "NEW SPECIES OF WRITING"

When examining the novel and the primer, we also have to consider a further argument, which describes English history in accordance with the narratives of *continuity* and *discontinuity*. I am not denying the new features introduced by both genres: both reflect the needs and aspirations of English society; and, at the same time, demonstrate how law and literature "operated to achieve [its] economic, political, and other goals."[72]

The narrative of discontinuity, I contend, must necessarily complement that

69 Bender, ***supra*** note 68, xi–xii; Prest, ***supra*** note 24, 43.
70 Watt, ***supra*** note 12, 25; McKeon, ***supra*** note 12, 419.
71 Baker, supra note 23, 191; Lieberman, supra note 55, 63; Stroud F. C. Milsom, The Nature of Blackstone's Achievement, 1 Oxford Journal of Legal Studies, 1-12 (1981).
72 Posner, ***supra*** note 33, 571–572.

of continuity. On the one hand, the process of literary and legal digestation lacked precedents in point; on the other, the authors had to engage with a rich literary and legal tradition. In *An essay on the new species of writing* – published anonymously in 1751 –, the author praised "the New Species of Writing lately introduc'd by Mr. Fielding," acknowledging that Fielding had a "Design of Reformation noble and public-spirited."[73] And yet, discontinuity is unavoidably likened to previous literary experiences:

> "Sometime before this new Species of Writing appear'd, the World had been pester'd with Volumes, commonly known by the Name of Romances, or Novels, Tales, &c. fill'd with any thing which the wildest Imagination could suggest."[74]

Fielding actually introduced the literary category of "realism", which involved "a break with the old-fashioned romances", and, as the *Essay* states, "a lively Representative of real life". This is even more obvious in *Tristram Shandy:* "Sterne [reconciled] Richardson's realism of presentation with Fielding's realism of assessment," and "showed that there was no necessary antagonism between their respective [...] approaches to character."[75] Again, Blackstone himself advocated both *continuity* and *discontinuity.* I am not refuting the existence of law-books before the advent of Blackstone. When framing the four-book *Commentaries*, he heavily relied on Justinian's *Institutes,* thus accommodating "the structure of his treatise" to a "source external to the common law."[76]. But he was also in continuity with the common-law legal tradition,[77] as the "Preface" to his *An analysis of the laws of England* upholds.[78] He had had to "adopt a Method, in many respects totally new;" but he was part of a historical lineage which stretched back through the centuries to Glanvill, Littleton, Bracton, Fitzherbert, Coke, and Hale – whose textbooks, abridgements and treatises are part of the canon embedded in the *Commentaries*, as well as suggested further reading.[79] There is then continuity with Henry Finch's Law, or a Discourse thereof, Thomas Wood's *Institutes of the Laws of England,* and Matthew Hale's *Analysis of the Law*.[80]

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73 An essay on the new species of writing founded by Mr. Fielding: with a word or two upon the modern state of criticism (printed for W. Owen, near Temple-Bar, MDCCLI, 1-17 [1751]); William B. Warner, *Definitions of the novels*, in The Encyclopaedia of the Novel, ed, Peter M. Logan, vol I, 224-228 (Chichester: Blackwell, 2011).
74 An essay, 13.
75 Watt, ***supra*** note 12, 290.
76 Watson, The Structure, 796.
77 William Blackstone, An analysis of the laws of England (Dublin: Printed for E. Watts 1766).
78 Blackstone, ***supra*** note 77, iv–vi.
79 Holdsworth, ***supra*** note 50, 272.
80 Watson, The Structure, 799.

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Other references to law books can be found throughout the *Commentaries*, as in the case of Sir Geoffrey Gilbert, Chief Baron of the Exchequer (1675-1726). Blackstone quotes his "excellent treatise on evidence; a work which it is impossible to abstract or abridge, without losing some beauty and destroy the chain of the whole." (*CLE* III.367).[81]

As for continuity, a textbook "had not existed for Blackstone to summarize. [...] In trying to give laymen a view from above the procedural technicalities, he had given lawyers a new vision of the law."[82] Blackstone himself acknowledged that

> "The objects of the laws of England are so very numerous and extensive, that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion" (*CLE*, I.117).

Quite paradoxically, Blackstone's continuity lies in the discontinuity he triggered in the exposition of the common law. By framing it after the Justinian's *Institutes*, Blackstone reflected "the ideology of eighteenth English society"; furthermore, the *Institutes* were unfit to encompass English law, and therefore "the treatment of each subject had to be geared to the English law".[83]

Not only did Blackstone succeed in giving an accurate, albeit general, overview of the English legal system, but he also made legal concepts accessible to the general reader. Without neglecting the historical lineage of common law authors to which he pertained, he improved "the kind of institutional method suggested by Hale" and put the common law "into a narrower compass and method, at least for ordinary study".[84]

Continuity and discontinuity then overlap and reveal the cultural-specific features which link the *Commentaries* and the novel. These features also mirror the general state of the eighteenth-century English mind, and therefore equally apply to speculative history, natural knowledge, moral philosophy and various other emerging nonfictional genres, such as the scientific treatise prompted by the Newtonian revolution.[85]

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81 Michael Macnair, ***Sir Jeffrey Gilbert and his treatises,*** 15 The Journal of Legal History, 252-268 (1994); Frederick Pollock, ***The Continuity of the Common Law,*** 11 Harvard Law Review, 423-433 (1898).
82 Milsom, ***supra*** note 71, 10.
83 Watson, The Structure, 810.
84 Matthew Hale, Preface, in Henry Rolle, Un Abridgement des Plusiers Cases et Resolutions del Common Ley (1668); Michael Lobban, ***Rationalising the Common Law: Blackstone and His predecessors***, in supra note 14, 1-22.
85 The Uses of Science in the Age of Newton (John G. Burje ed., University of California Press, 1983);

In the eighteenth-century context, continuity generates discontinuity, which is indeed based on a renovated scientific approach to the study of the law. Blackstone considered it a "rational science, which meant overcoming the long monopoly enjoyed by Roman law (the 'civil law') in the curriculum at Oxford and Cambridge."[86] Such an effect was vividly epitomised by Edmund Burke:

> "It is not to be denied, but that many law-writers have before wrote treatises, which were very much to the purpose; their institutes, their digests, their abridgements, and their dictionaries have all their use. But Mr. Blackstone is the first who has treated the law of England as a liberal science. His Commentaries, besides affording equal instruction, are infinitively better calculated to render that instruction agreeable"[87].

The *Commentaries* disclose a rational digestation of the various institutions by considering "them [...] in a logical sequence." This evident in the case of "public wrongs:" Blackstone began "with the nature of crimes, proceeding through the question of criminal responsibility and the various types of offence in ascending order of gravity, followed by the way in which a defendant was processed"[88]. Such a rational digestation also finds an explanation in "the spirit of the age as it is illustrated by some aspects of 18th century architecture".[89]

I do not believe to make a large claim by stating that this argument holds true for both the *Commentaries* and the novel. As for the *Commentaries*, Blackstone's biographers have already noticed how he nurtured his architectural interests: not only did he write a poem and a treatise on classical architecture, but he was also involved in building projects.[90] Again, such architectural interests set Blackstone within the eighteenth-century cultural milieu. As Carol Mathews highlights, knowledge of classical architecture was part of the gentleman's background; furthermore, references to architecture percolate through the Commentaries. For example, Blackstone compares the evolution of the common law to an edifice:

> "The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence

Nature transfigured: science and literature, 1700–1900 (John Christie and Sally Shuttleworthy eds., Manchester University Press, 1989); Edward S. Corwin, *The Higher Law Background of American Constitutional Law*, in 42 Harvard Law Review, 365-409 (1928).

86 Liebermann, supra note 15, 155.

87 Burke, ***supra*** note 39, 287.

88 Paley, ***supra*** note 28, ix.

89 Ernest Giddey, ***The structure of Tom Jones: regularity and extravagance***, 3 SPELL: Swiss papers in English language and literature, 193-199 (1987)

90 Carol Matthews, ***A 'Model of the Old House': Architecture in Blackstone's Life and Commentaries,*** in Blackstone and His Commentaries: Biography, Law, History, 15-34 (Wilfrid Pres ted., Hart Publishing, 2009); Prest, ***supra*** note 24, 44-45, 66-67, 77-81, 82.

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> frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties" (CLE, III.10).[91]

Architecture also percolates through Fielding's Tom Jones[92]. *An Essay on the New Species of Writing* praised Fielding's literary-architectural invention: "Mr. Fielding ordain'd, that these Histories should be divided into Books, and these subdivided into Chapters; and also, that the first Chapter of every Book was not to continue the Narration but should consist of any Thing the Author chose to entertain his Readers with."[93]

As a comparative lawyer, I share Holdsworth's assumption on the interrelations between law and literature in the *Commentaries*, which he terms as the "only law book that can be classed as literature."[94]

VII. A NEW PROVINCE OF LEGAL LANGUAGE? DIGESTING THE "ARCANE" COMMON LAW IN A "CLEAR, CONCISE, AND INTELLIGIBLE FORM"

I will now consider Blackstone's last educational innovation, i.e. the renovation of legal language. To this extent, I will not delve into how the *Commentaries* were praised or criticised: suffice it here to remind that Bentham's Comment on the *Commentaries* and Bentham's *Fragment on Government* proved to be influential, as they caused the decline of the influence of the *Commentaries* in England.[95]

As the *Annual Register for the year 1768,* at 268, states, "the utility of the work, and the great merit of the elegant and masterly writer, are so generally understood as to require no additional illustration also the beauties of English prose." The *Commentaries* also "received extensive attention" both by prominent figures (such as Burke) and by "rival literary journals of the day, Ralph Griffith's Monthly Review and Tobias Smollett's *Critical Review*".[96] The qualities of the text were also praised by nonconformist legal scholars, who confronted Blackstone's fervent Anglicanism and the treatment reserved to Protestant dissenters in Book

91 Matthews, ***supra*** note 90, 33-34.
92 Giddey, ***supra*** note 89, 198–199.
93 An essay, 18–19.
94 Holdsworth, ***supra*** note 25, 237.
95 Holdsworth, ***supra*** note 25, 238; Philip Schofiel, ***The 'Least Repulsive' Work on a 'Repulsive Subject': Jeremy Bentham on William Blackstone's Commentaries on the Laws of England Philip***, in supra, note 14, 23-40.
96 Page and Prest, ***supra*** note 19, ix-xxi. Simon Stern, ***Editor's Introduction to Book II,*** in Commentaries on the Laws of England, vol II, Of the Rights of Things, vii–xxvi, xiii. (Simon Stern ed., Oxford University Press, 2016).

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IV.[97]Whereas their influence diminished in nineteenth-century England by virtue of Bentham's criticism, in the United States they became "the standard beginner's introduction to legal studies", and were soon Americanised."[98] As Hammond put it, Blackstone's *Commentaries* "have for more than a century enjoyed a position in our legal literature, which has never been equalled by any other work";[99] and the proposal to establish a professorship of law at the College of William and Mary in Virginia in 1773 drew inspiration from Blackstone's lectures.[100]

Furthermore, Edmund Burke remarked, "nearly as many copies of the *Commentaries* had been sold on the American as on the English side of the Atlantic;" and Chief Justice Marshall, "by the time he turned twenty-seven [...] had read the *Commentaries* four times."[101]

Bentham himself had to acknowledge the novelty of Blackstone's style and language: "He [...] has taught jurisprudence to speak the language of the scholar and the gentleman, put a polish upon that rugged science, cleansed her from the dust and cobwebs of the office."[102] Comparable positive assessments were also formulated by his contemporaries: the Annual Register considered them written "in a clear, concise, and intelligible form"[103];Thomas Jefferson and Lord Mansfield did the same.[104] Positive assessments can also be found among the successive generations of legal scholars: for example, Thomas Ruggles wrote that the book was "the first and best book to be put into the hands of the Students of the law."[105]; Albert Venn Dicey stated that "The *Commentaries* live by their style";[106] Holdsworth admired Blackstone's genius, his work, and the "excellence of the Commentaries."[107] Plucknett defined them "an attractive piece of literature".[108]

The changes in the audience and in the reading public had the most dramatic transformative effects on the legal language. These were triggered by the decline

97 CLS, IV.51–54. Page and Prest, ***supra*** note 19, and Anthony Page, ***Rational Dissent and Blackstone's Commentaries***, in supra note 14, 77–96.
98 Alschuler, ***supra*** note 20 5; Dennis R. Nolan, ***Sir William Blackstone and the New American Republic: A Study of Intellectual Impact***, in 51 New York University Law Review, 731-768 (1976); Albert S. Miles et al., ***Blackstone and His American Legacy***, in 5 Australia & New Zealand Journal of Law & Education, 46-59 (2000); Robert D. Stacey, Sir William Blackstone and the Common Law: Blackstone's Legacy to America (ACW Press, 2003).
99 Hammond, Hammond in Blackstone's Commentaries, ed. Hammond.
100 Bryson, ***supra*** note 32, 332.
101 Nolan, ***supra*** note 98, 757. Re-Interpreting Blackstone's Commentaries (Wilfrid Prest ed., Oxford University Press, 2014). Edmund Burke, ***Speech on Moving his Resolutions for Conciliation with the Colonies*** (Mar. 22, 1775), in The Works of the Right Hon. Edmund Burke, 99, 125 (Little Brown, revised ed., 1865).
102 Bentham, ***supra*** note 33, 116.
103 Annual Register 1767, 287 (London, 4th ed., second pagination, 1786).
104 Bryson, supra note 32, 329-352; David Lemmings, ***Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth-century England***, in 16 Law and History Review 211-255 (1998).
105 Ruggles, ***supra*** note 35, 201.
106 Albert Venn Dicey, ***Blackstone's Commentaries,*** in 1 Cambridge law Journal 1, 286-294 (1932).
107 Holdsworth, ***supra*** note 50, 267-268
108 Plucknett, ***supra*** note 11, 286.

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of traditional forms of legal education and by the inaccessibility of the English legal language.[109] In Blackstone's words, Law Latin, Law French, and the arcane jargon used in common-law courts were "a Character, and Language, unknown to any, but the learned in the Law."[110] As Milsom argued, "If he wanted to explain the law to laymen, to give as it were a consumers' view of the law, then of course as far as possible he must expound the substantive rules without reference to the procedural framework in which they existed for law."[111]

In the *Commentaries*, Blackstone is aware of this; but, at the same time, he is conscious that substantive law, procedure, and the legal languages used in the courts were unavoidably imbricated. This is apparent in Book III. On the one hand, we may expect that the volume examines "matters of private substantive law, such as tort, contract, or property;"[112] as Blackstone clarifies, however, the book has to focus on remedies, and on the "redress of private wrongs, by suit or actions in courts" (*CLE,* III.2). In common law, indeed, remedies precede substantive rights; and rights exist "through court judgement."[113] This also explains the order of institutions digested in Book III: the description of English jurisdictions precedes substantive law, which is then followed by litigation before the courts of common law and equity. Evidently, this is a legacy of the common-law legal tradition: a "procedural" state of mind, I dare say, where "substantive law administered in a given form of action" governs legal education.[114] As Birks points out, the essential point is that for him rights were always superstructural, in the sense that they provided the framework which explained the wrongs which alone were the business of the courts. The courts did not deal in the direct enforcement of rights, they dealt in remedies for wrongs.[115]

Blackstone did not intend to pursue a reform by legislation: such reform was occurring as far as literary property was concerned, and legislation itself regulated "modern properties which the tradition of the Common Law could not absorb."[116] A linguistic reform by means of legislation would have meant interrupting the epic of English law. It is true that Latin and Law French had challenged the place of English until the seventeenth century, and that Law French was dislodged in 1731 by Parliament.[117] This, however, merely confirms that the epic of English law

109 Lemmings, ***supra*** note 104, 216, 335.
110 Commons Journal 21, 622–624.
111 Milsom, *supra* note 71, 6.
112 Thomas D. Gallanis, Editor's Introduction to Book III, in Commentaries on the Laws of England, vol III, Of Private Wrongs, vii–xviii, vii (Thomas D. Gallanis ed., Oxford University Press, 2016).
113 Stephen A. Smith, Rights, Remedies and Causes of Action, in Structure and Justification in Private Law: Essays for Peter Birks, 405-420 (Charles E. F. Rickett and Ross Grantham eds., Hart 2008).
114 Frederick W. Maitland, The Forms of Action at Common Law, 3 (A. H. Chaytor and W. J. Whittaker eds., Cambridge University Press, 1936); Pollock, supra note 81, 426.
115 Peter Birks, **Rights, Wrongs, and Remedies**, in 20 Oxford Journal of Legal Studies, 1-37 (2000).
116 Kayman, ***supra*** note 10, 645.
117 See 83 Statute 4 Geo. II. C. 26.

is one of emancipation from Law French, a "barbarous dialect," and a "shameful badge [...] of tyranny and foreign servitude" (*CLE*, III. 318-323). Legislation was indeed done "in order that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings;" but, as Blackstone argues, "the people are now, after many years [...], altogether as ignorant in matters of law as before." (*CLE,* III. 322). Reform by legislation did not achieve Blackstone's aim: educating the unlearned and challenging the "elitism" which characterised legal jargon "increasingly remote from the mainstream of English society."[118]

Blackstone contrasted the reforms by legislation made by MPs: as they ignored the common law, they were losing sight of its precious freedoms and liberties. Blackstone, who favoured incremental reforms, pursued his transformative project by education;[119] and the scarcity of textbooks and the decline in the traditional legal training favoured his policy.

After describing how the "raw and unexperienced youth, in the most dangerous season of life, [...] is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning," he proposed to make "academical education a previous step to the profession of the common law, and at the same time [to make] the rudiments of the law a part of academical education." *(CLE,* I.31, 33)

To this extent, his engagement with *reform by education* probably reflects another trend in eighteenth-century England, i.e., a society that "started to privilege the written over the spoken word."[120] Blackstone's educational commitment through the establishment of a new legal textual genre is apparent in how he discusses the conveyance of property by deed – and, probably, this commitment encouraged him to "put [the lectures] in writing:"[121]

> "The deed must be written, or I presume *printed*; for it may be in any character or any language; but it must upon paper, or parchment. [...] writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alternation, that is at the same time so durable" (*CLE*, 2.297).

Hence, the new provinces of both legal writing and language are the most successful of Blackstone's achievements. Indeed, they have ensured "durability" and "security" to the most relevant textual genre in legal education. It is the

118 Lemmings, ***supra*** note 104, 217.
119 ***Id.,*** 216.
120 Michael Hancher, ***Littera Scripta Manet: Blackstone and Electronic Text***, in 54 Studies in Bibliography, 115-132 (2001).
121 ***Id***., 120.

primer for the “unlearned,” as his contemporaries Fielding and Sterne would have defined prospective Law School students. Or, as we would say in our globalised society, “every reader in the world” without a background in legal studies (*TJ*, 346).

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