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WRITING FOR THE “SCHOLAR AND THE GENTLEMAN”.
LANGUAGE, SOCIETY, AND LEGAL EDUCATION
IN BLACKSTONE’S *COMMENTARIES*

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L’AFRIQUE, SES CONSTITUTIONS ET LE DROIT COMPARÉ

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IN THE ITALIAN NATIONAL HEALTH SYSTEM:
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RECENSIONE
ROSTAM J. NEUWIRTH,
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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.

1. “A constitutive story that has yet to be written.” *Blackstone and the Creation of Legal Textual Genres*

Blackstone’s *Commentaries on the Laws of England* enjoy an outstanding position in English legal literature¹. Not only are they authentic books of authority, but they also set the canon of “authors, to whom great veneration and respect is paid” by common lawyers, and “whose treatises are cited as authority” in the courts of justice (*CLE*, I.72).² The *Commentaries* gained such position in English legal literature soon after the publication of the first Book (1756). As in-depth analyses have been dedicated to the topic,³ suffice it to say that the *Commentaries* “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*”.⁴ The qualities of the text were also praised by nonconformist legal scholars, who confronted Blackstone’s

¹ William Blackstone, *Commentaries on the Laws of England*, vols I-IV (1765-1769), gen. ed. Wilfrid Prest (Oxford: Oxford University Press, 2016). Further references in the text, abbreviated as *CLE*.

² On the “books for authority” see Boris M. Komar, “Text-Books as Authority in Anglo-American Law,” *California Law Review* 11 (1923): 397–422, 405, 409 ff.

³ See, among others, Anthony Page and Wilfrid Prest, “Introduction,” in *Blackstone and His Critics*, eds. Anthony Page and Wilfrid Prest (Oxford: Bloomsbury, 2018), ix–xxi, xiii.

⁴ Anthony Page and Wilfrid Prest, “Introduction,” in *Blackstone and His Critics*, eds. Anthony Page and Wilfrid Prest (Oxford: Bloomsbury, 2018), ix–xxi, xiii. An accurate examination of the reception of the *Commentaries* (especially of Book II) is in Simon Stern, “Editor’s Introduction to Book II,” *Commentaries on the Laws of England*, vol II, *Of the Rights of Things*, ed. Simon Stern (Oxford: Oxford University Press, 2016): vii–xxvi, xiii.

fervent Anglicanism and the treatment reserved to Protestant dissenters in Book IV.⁵

But the influence of the *Commentaries* goes beyond the limits established by English legal literature. They gained prominence throughout the common law legal tradition.⁶ Blackstone was “much admired” by the Americans, such as the U.S. President John Adam and Justice Joseph Story – according to the latter, Blackstone “was one of those great men raised up by Providence,” which prompted “a salutary revolution” in common law.⁷ William Gardiner Hammond, who edited the 1890 annotated American edition, considered the *Commentaries* the most important legal text in the English-speaking world.⁸

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.⁹

⁵ *CLS*, IV.51–54. See also Page and Prest, “Introduction,” xii ff. and Anthony Page, “Rational Dissent and Blackstone’s *Commentaries*,” in *Blackstone and His Critics*, 77–96,

⁶ Albert W. Alschuler, “Rediscovering Blackstone,” *University of Pennsylvania Law Review* 154.1 (1996): 1–55, 2.

⁷ *Diary and Autobiography of John Adams*, ed. L. H. Butterfield. (Cambridge, MA: Harvard University Press, 1961), III.275; Joseph Story, *The Miscellaneous Writings of Joseph Story*, ed. William W. Story (Boston: Little Brown, 1852), 114.

⁸ David M. Rabban, “Hammond’s Blackstone and the Historical School of American Jurisprudence,” in *Blackstone and His Critics*, eds. Anthony Page and Wilfrid Prest (Oxford: Bloomsbury, 2018), 173–191, 173. See William Gardiner Hammond, in William Blackstone, *Commentaries on the Laws of England*, ed. William Gardiner Hammond (San Francisco, Bancroft-Whitney Co., 1890).

⁹ J. H. Baker, *An Introduction to English Legal History*, 4th edn (Oxford: Oxford University Press, 2002): 191.

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

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 1766.¹⁰ The 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.¹¹ Legal education had already existed before Blackstone started lecturing the common law, but it was mainly limited to (and tailored to the needs of) prospective professional lawyers, without mirroring the necessities that had been emerging within the eighteenth-century English society. Furthermore, Holdsworth warns that the its state 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 education”.¹²

As they were not addressed to prospective common lawyers, Blackstone’s lectures fulfilled a different purpose: they were intended to reach a different type of students; among them, university graduates, “country gentlemen and clergymen who needed an outline knowledge of the legal system.”¹³ 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

¹⁰ Wilfrid Prest, *William Blackstone. Law and Letters in the Eighteenth Century* (Oxford: Oxford University Press, 2000), 119 ff.

¹¹ See William S. Holdsworth, “Blackstone”, *North Carolina Law Review* 17.3 (1939): 233–241, 234.

¹² See William Holdsworth, *A History of English Law*, vol XII (London: Methuen & Co., 1938), 77–78.

¹³ Baker, *An Introduction*, 191.

justice system. And they undoubtedly required to be introduced into the system through a clear and ordinate exposition of all the subtle niceties which were (and still are) criminal law and procedure.¹⁴

We will see in due course that this new audience influenced the new form of legal education prompted by Blackstone – in turn, the same Blackstone had an impact on both the audience and the reading public of the *Commentaries*. There is, then, a variable that is external to the legal environment that has to be considered when examining Blackstone’s contribution to legal education. I am referring to the changes and transformations which had been characterising eighteenth-century English literature and society: the industrial revolution, the Empire, and the advent of a capitalist economy, which forged eighteenth-century public opinion. And the novel, which is part of this context, may be considered “an experimental inquiry into the ethical implications of contemporary social change.”¹⁵

As the lawyer and novelist Henry Fielding argued in *An Enquiry into the Causes of the Late Increase of Robbers* (1751), market, trade, colonial expansion had a deep impact on the English Constitution. These changes resulted in an era of legal reforms:¹⁶ “the law had therefore to consider all the

¹⁴ Ruth Paley, “Editor’s Introduction to Book IV,” *Commentaries on the Laws of England*, vol IV, *Of Public Wrongs*, ed. Ruth Paley (Oxford: Oxford University Press, 2016): vii–xxix, viii.

¹⁵ Michael McKeon, *The Origins of the English Novel, 1600-1740* (Baltimore and London: The Johns Hopkins University Press, 2002), xxiii. On the concept of reading public see Ian Watt, *The Rise of the Novel. Studies in Defoe, Richardson and Fielding* (London: The Bodley Head, 2015), 35 ff.

¹⁶ Henry Fielding, *An Enquiry Into the Causes of the Late Increase of Robbers, and Related Writings*, ed. Malvin R. Zirker (ed.) (Oxford: Oxford University Press and Wesleyan University Press, 1988): 64. See Martin A. Kayman, “The ‘New Sort of Specialty’ and the ‘New Province of Writing’: Bank Notes, Fiction and the Law in ‘Tom Jones,’” *ELH* 68.3 (2001): 633–653.

complicated relationships which were being created through the machinery of credit and joint enterprise,” agriculture, finance, and society.¹⁷

The turmoil which is the eighteenth century explains why it is impossible to keep Blackstone’s *Commentaries* separate from its social, literary, and cultural context; and why an equation may be drawn between the rise of the novel and the *Commentaries*.

As “the prose epic of the common law,” the *Commentaries* rendered an “unparalleled service”¹⁸ to English law with transformative effects on the *contents, form, and language* of common-law legal literature.

I do not intend to focus on each institute examined in the *Commentaries*. Certainly, Blackstone contributed to the renovation of English legal system and lexicon: for example, the *Commentaries* – which still refer to the dichotomy felony-misdemeanour – also favoured the use of “crime” and “criminal” as part of the legal jargon.¹⁹ By *contents*, I rather understand the process of digestion introduced by both the lectures and the *Commentaries*. The same Thomas Jefferson, who was a strenuous antagonist of Blackstone’s conservative legal arguments, had to admit that the *Commentaries* were “the last perfect digest of both branches of law”.²⁰

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

¹⁷ Theodore F. T. Plucknett, *A concise history of the common law*, 5 edn (London: Butterworth, 1956), 68.

¹⁸ Julian S. Waterman, “Mansfield and Blackstone’s Commentaries,” *The University of Chicago Law Review* 1.4 (1934): 549–571, 549.

¹⁹ Paley, “Editor’s Introduction to Book IV,” vii.

²⁰ W.H. Bryson, “*English Ideas on Legal Education in Virginia*,” in *Learning the Law: Teaching and the Transmission of English Law, 115-1900*, eds. Jonathan A. Bush and Alain Wijffels (London: Hambledon, 1999): 329–249, 337 and 346 for Jefferson’s assumptions that, by reading Blackstone, young Americans could have been turned into anti-republican.

complacence about the state of the law,” he was labelled “the great supporter [of] a plan of systemic despotism.”²¹

But Blackstone’s digestion 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 System;” and the Vinerian Professor is said to have collected his lectures in a “rational,” “stylish,” and “readable” way.²²

Contents, form, and language are thus interwoven in Blackstone’s *Commentaries*. Apart from Harper Lee,²³ only legal scholars have praised the “power and elegance of his prose,” and acknowledged that Blackstone invented a new legal textual genre: the *primer* for law students. This means that there is still room left for a multidisciplinary assessment. The *Commentaries* are a crossroads, which facilitates the contacts between English legal narratives and the social, linguistic, and literary context which is eighteenth-century England. The multidisciplinary “constitutive story”²⁴ of the *Commentaries* has yet to be written – and it is the duty of the comparative legal scholar to participate in such assessment.

²¹ See, respectively, Jeremy Bentham, *A Fragment of Government* (1766), ed. F. C. Montague (Oxford: Clarendon Press, 1891): 94, 100; Baker, *An Introduction*, 191; James Wilson, “Of the General Principles of Law and Obligation,” in *The Works of James Wilson*, ed. Robert G. McCloskey (Cambridge, MA: Harvard University Press, 1967), 1:105. See Howard L. Lubert, “Sovereignty and Liberty in William Blackstone’s ‘Commentaries on the Laws of England,’” *The Review of Politics* 72.2 (2010): 271–297. See also Richard Posner, “Blackstone and Bentham,” *The Journal of Law & Economics* 19.3 (1976): 569–606, 572.

²² Baker, *An Introduction*, 191; *Letter Book of John Watts: merchant and councillor of New York, January 1, 1762-December 22, 1765*, ed. Dorothy C. Barck (New York: Printed for the Society, 1928), 13.

²³ “Mr Blackstone wrote fine English”: Harper Lee, *To Kill a Mocking Bird* (New York: Lippincot, 1960), 142.

²⁴ Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge: Cambridge University Press, 2003), 72 ff.

2. *Lecturing Common Law; or, Politics, Society, and the Epic of the Common Law*

This is not another legal historical essay on Blackstone's *Commentaries*. By contrast, it aims to deliver a truly interdisciplinary assessment on how the change in audience, the rise of the capitalist society, and the advent of the novel – i.e. socio-legal variables usually considered external to the legal systems – had affected the development of legal education from the eighteenth century onwards. I want neither to use historians' practices and methodologies nor make large claims focusing on historical contexts. The purpose of my essay is limited in scope and methodology: as a comparative legal scholar, I merely intend to complement the research by setting it in its socio-legal historical context. As Maitland upheld, "History involves comparison, and the [...] lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history".²⁵

As a consequence, comparative legal scholars are unceasingly *à la recherche* of paradigms that are able to explain legal changes, and to disclose long-term trends that go beyond both the social environment which originated them, and the domain of legal historical studies.²⁶ This also sheds new light on the relevance of Blackstone's *Commentaries*, which is usually likened to their importance in the evolution of English-speaking legal education, and, to a lesser extent, to the legal educational debates that have been occasioned since

²⁵ Frederick W. Maitland, *Why the History of English Law is Not Written: An Inaugural Lecture delivered in the Art School at Cambridge on 13th October 1888* (Cambridge, Cambridge University Press, 1888), 11.

²⁶ On history and comparative law see Mathias Reimann, *Comparative law and neighbouring disciplines*, in *The Cambridge Companion to Comparative Law*, eds. Mario Bussani and Ugo Mattei (Cambridge: Cambridge University Press): 2012, 13–34, 22–24; Vicki. C. Jackson, *Comparative Constitutional Law: Methodologies*, in *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó (eds) (Oxford: Oxford University Press), 2012, 55–74; Jaakko Husa, *A New Introduction to Comparative Law* (Oxford and Portland, OR: Hart, 2015), 104, 165 ss.; Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2018, 2nd edn), 368 ff.

Blackstone lectured and published them.²⁷ Blackstone’s contribution to legal educational studies has been constantly lively; and the *The Vinerian Chair and Legal Education* by Harold G. Hansbury, eleventh Vinerian professor, upholds such assumption.²⁸

Whereas the merely legal (historical) perspective aims to explore Blackstone’s influence over the evolution of common-law institutes and legal literature, the comparative multidisciplinary “constitutive story” likens Blackstone to his eighteenth-century English environment, in order to ascertain whether and how the latter influenced the first law primer. Influences on legal education – may they be economical, social, or literary – are continuously being brought back to the fore. We usually debate to what extent economics, globalisation, the practice of law, and science impact on how we teach law: not only is there the “intrusion of professional accrediting bodies”²⁹ in defining curricula in Law Schools, but there is also the need of developing students’ legal skills via “Mooting and Forensic Rhetoric” or by digitalising “legal enculturation,”³⁰ not to say of how global financial dominance makes domestic legal educational curricula coalesce towards the convergence of laws.³¹ Within this context of mutual interference and

²⁷ David Liebermann, “Professing Law in the Shadow of the Commentaries”, in *Blackstone and His Critics*, eds. Anthony Page and Wilfrid Prest (Oxford: Bloomsbury, 2018), 153–172.

²⁸ Harold G. Hansbury, *The Vinerian Chair and Legal Education* (Oxford: Basil Blackwell, 1958).

²⁹ Ian Ward, “Legal Education and the Democratic Imagination,” *Law and Humanities*, 3.1 (2009): 87-112. See also Peter Birks, “The academic and the practitioner,” *Legal Studies*, 18.4 (1998): 397–414.

³⁰ See John Snape and Gary Watt, *How to Moot: A Student Guide to Mooting* (Oxford: Oxford University Press, 2nd edn, 2010) Gary Watt, “Legal Education Creative Voices – Student Writing in Law and Literature,” *Law and Humanities*, 8.1 (2014): 104–110; Gary Watt, “The art of advocacy: renaissance of rhetoric in the law school,” *Law and Humanities*, 12.1 (2018): 116–137; Richard Mullender, “Law, Undergraduates and the Tutorial,” *Web Journal of Current Legal Issues*, 3 (1997), available at <http://webjcli.ncl.ac.uk/1997/issue3/mullen3.html>. *Law and Humanities*, 3.1 (2009): 87-112.

³¹ See Muna Ndulo, “Legal Education in an Era of Globalisation and the Challenge of Development,” *Journal Of Comparative Law in Africa*, 1 (2014): 1–24; Jaakko Husa, “Comparative

interdisciplinarity, 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.”³²

As they lie at the crossroads of law, society, and politics, the *Commentaries* clearly reflect such 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”³³. 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).³⁴ “Epic analogy” also characterised the novel: it was a crucial feature in Defoe’s and Richardson’s works; and epic style was highly influential in both Henry Fielding’s *Tom Jones* and Laurence Sterne’s *Tristram Shandy*, which allows both authors to engage in a vivid representation of English society.³⁵

law in legal education – building a legal mind for a transnational world,” *The Law Teacher*, 52.2 (2018): 201–215.

³² Wilfrid Priest, “General Editor’s Introduction,” to the *Commentaries on the Laws of England*, vol I, *Of the Rights of Persons* (Oxford: Oxford University Press, 2016): vii–xv, xv.

³³ Edmund Burke, in *Annual Register, or a View of the History and Politics and Literature for the Year 1767* (London, J. Dodsley, 1796), 287.

³⁴ Paley, “Editor’s Introduction to Book IV,” x. See also David Lemmings, “Editor’s Introduction to Book IV,” *Commentaries on the Laws of England*, vol I, *Of the Rights of Persons*, ed. David Lemmings (Oxford: Oxford University Press, 2016): xvii–xl, xxv.

³⁵ See Henry Fielding, *Tom Jones*, ed. John Bender and Simon Stern (Oxford: Oxford University Press, 2008), 132, 181, 425. Further references in the text, abbreviated as *TM*. See also Laurence Sterne, *The Life and Opinions of Tristram Shandy, Gentleman*, ed. Ian Campbell Ross (Oxford: Oxford University Press, 2009), further references in the text, abbreviated as *TS*.

But for 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 it in order to satirise society and social conventions, "he felt strongly that the growing anarchy of literary taste called for dramatic measures."³⁶

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., *cuicumque 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).

³⁶ Watt, *The Rise*, 248.

Blackstone's hints of poetic inspiration allowed him to participate in an intensive dialogue about English legal institutions: he really developed a political, social, and institutional manifesto according to which educated English people would be offered an insight into the legal implications of England's economic prosperity, trade ascendancy, as well as British institutions. educated English people an insight into the legal implications of England's economic prosperity, trade ascendancy, as well as British institutions and Empire.

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.³⁷ He then expounds the *democratic progress* of English representative institutions: this was relevant for his reading public, which exerted “predominant influence in national affairs”³⁸ through the system of borough and country representation (*CLE* 1.172–174).

Blackstone's social engagement is also patent in how he examines the “liberties of Englishmen” – which reflect Adam Smith's conception of a free society (*CLE*, 1.144)–,³⁹ in the determination of the law applicable to trade and colonies (*CLE*, I.242), and in the scope of the Privy Council's jurisdiction (*CLE*, I.231)⁴⁰. 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). But, Blackstone eventually agreed with Lord

³⁷ See Lubert, “Sovereignty and Liberty,” 281 ff.

³⁸ Sir David Lindsay Keir, *The Constitutional History of Modern Britain 1485-1951*, fifth edn., revised (London: Adam and Charles Black, 1957), 330.

³⁹ Richard Posner, “Blackstone and Bentham,” 569; Priest, *William Blackstone*, 41.

⁴⁰ See William Holdsworth, *A History of English Law*, vol XI (London: Methuen & Co., 1938).

Mansfield’s (i.e., his Patron) seminal-but-ambiguous opinion in *R. v. Knowles, ex parte Somerset*, where slavery was declared slavery odious, albeit not unlawful. In the successive editions of the *Commentaries*, indeed, Blackstone cautiously avoided addressing the issue directly, and deliberately used hedged language.⁴¹

He also questioned Locke’s narrative of rightful resistance to political authority. One may contend that Blackstone himself acknowledged that Englishmen had been “depressed by overbearing and tyrannical princes” (*CLM*, I.123). However, the *Commentaries* challenge Locke’s narrative because it defies England’s epic by endorsing the resistance to legitimate civil authority in American colonies.⁴²

3. *How Comparative Legal Scholar Handles with Anecdotes: The Commentaries and the Effects of the Ab Ovo Doctrine on Legal Education*

The origins of the *Commentaries* display a connection with politics. I’m 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

⁴¹ *R. v. Knowles, ex parte Somerset* (1771-72) 20 State Tr. 1; Lofft 1. Norman S. Poser, *Lord Mansfield. Justice in an Age of Reason* (Montreal et al.: McGill–Queen’s University Press, 2013), 292 ff. See also Prest, *William Blackstone*, 251-253. On Mansfield’s ambivalence towards slavery see James Oldham, *English Common Law in the Age of Mansfield*, (Janson, CL; The University of Carolina Press, 2004), 305 ff.

⁴² See Lubert, “Sovereignty and Liberty,” 281 ff.

practice, and “the grossly inadequate state of English legal education” caused him to engage in such cultural project. It was a very lucrative one, indeed: as a member the board of Oxford’s University printing house, Blackstone had good knowledge of the book trade.⁴³

He also was inclined to academic studies;⁴⁴ 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, Duke of Newcastle, who controlled the academic preferment. But Blackstone’s hopes of becoming Regius Professor of Civil Law were frustrated by the Duke: “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”.⁴⁵ Such denial changed the courses of the events; and Mansfield “advised Blackstone to proceed with a project which he had already considered:” giving lectures on English law.⁴⁶

But, additional anecdotes 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 the “web of benefactors” composed of educated gentlemen who benefitted from Blackstone’s lectures. And these

⁴³ Richard Posner, “Blackstone and Bentham,” *The Journal of Law & Economics* 19.3 (1976): 569–606, 572. See also Priest, “General Editor’s Introduction,” vii.

⁴⁴ Priest, *William Blackstone*, 58.

⁴⁵ Poser, *Lord Mansfield*, 201; William B. Odger, “Sir William Blackstone,” *The Yale Law Journal*, 27.2 (1918): 599–618, 603-604; William S. Holdsworth, “Some Aspects of Blackstone and His Commentaries,” *The Cambridge Law Journal* 4, 3 (1932): 261–285, 262; Waterman, “Mansfield and Blackstone’s Commentaries,” 550; Prest, *William Blackstone*, 108-109.

⁴⁶ Holdsworth, “Some Aspects,” 262.

anecdotes are probably additional variables causing the establishment of the Vinerian professorship.⁴⁷

However anecdotal they may appear, such 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). And 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).⁴⁸

Anecdotes may then be misleading – as misleading as is the reference made by Sterne to Horace when forging the *Ab ovo* doctrine.⁴⁹ However, the course of common law would have been completely different if Blackstone had taught civil law, and therefore not started his fee-paying course on English law in 1753. The latter course attracted so many non-

⁴⁷ DJ Ibbetson, “Charles Viner and His Chair: Leg Education in Eight-Century,” in *Learning the Law: Teaching and the Transmission of English Law, 1150-1900*, ed. Jonathan Bush and Alain A. Wijffels (London and Rio Grande: Humbledon Press, 1999): 315–328.

⁴⁸ See Andrew Wright, “The Artifice of Failure in ‘Tristram Shandy’,” *NOVEL: A Forum on Fiction* 2.3 (1969): 212-220.

⁴⁹ “Tristram misleadingly refers” to Horace’s *Ars Poetica*: “Horace, in fact, commends Homer for not starting his tale of the Trojan War *ab ovo* – that is, from the birth of Helen from Leda’s egg.”: Ian Campbell Ross, “Explanatory notes,” to *The Life and Opinions of Tristram Shandy, Gentleman*, 542.

would-be lawyers, and this prompted Blackstone to change the contents, form, and language of legal education.

4. An “Educational Innovation” triggering a New Province of Writing: The Commentaries as a new textual genre

Blackstone’s inclination to academic studies, the application of the *Ab ovo* doctrine to legal education, and the needs of both a new audience and a new reading public cohered in the *Commentaries*, i.e. the most important eighteenth-century “educational innovation” in legal studies.⁵⁰

There are two additional arguments associated with the *Ab ovo* doctrine – and neither has not been examined with accuracy.

The first argument refers to the publication of the *Commentaries*. 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.”⁵¹ The same occurred in the United States of America, where the 1771 Philadelphia edition and the English ones were “widely sold”.⁵²

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:

⁵⁰ David Lieberman, “Blackstone’s Science of Legislation,” *Law & Justice* 60 (1988): 60–74, 62.

⁵¹ Priest, “General Editor’s Introduction,” ix.

⁵² Bryson, “English Ideas,” 332; “Subscribers in Virginia to Blackstone’s *Commentaries* on the Laws of England, Philadelphia, 1771-1772,” *The William and Mary Quarterly*, 1.3 (1921): 183–185.

“copies have been multiplied [...] some of which have fallen into mercenary hands, and become the object of clandestine sale.” (*CLE*, Preface).⁵³

Yet, financial interests were also present in novel marketplace – and, to various degrees, book trade triggered a marketplace for history, biography, poetry, and any other print genre one might name.⁵⁴ Unlike the historians – which would consider all these marketplaces as the context in legal research –, I shall now focus on the equation between 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.⁵⁵ On the other 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

⁵³ Holdsworth, “Some Aspects,” 269.

⁵⁴ John Feather, “British Publishing in the Eighteenth Century: a preliminary subject analysis,” *The Library* 1.1 (1986): 32–46; George Justice, *The Manufacturers of Literature: Writing and the Literary Marketplace in Eighteenth-century England* (Newark and London: University of Delaware Press–Associated University Presses, 2002); James Raven, *Publishing Business in Eighteenth-Century England* (Rochester, NY, Boydell & Brewer, 2014);

⁵⁵ Ian Campbell Ross, “Introduction,” to *The Life and Opinions of Tristram Shandy, Gentleman*, x, xii–xiii.

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.”⁵⁶ 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). Indeed, Blackstone was directly involved in the litigation: not only did he represented a bookseller in *Tonson v Collin*⁵⁷, but he also pressed the argument for perpetual copyright in *Millar v. Taylor* (1769). From footnote

⁵⁶ Kayman, “The ‘New Sort of Specialty’,” 639, 649. On individualism, trade, and the novel see Watt, *The Rise*, 60 ff.

⁵⁷ *Tonson v Collins* (1761) 1 Black. W. 301, ER 169.

21 Chapter 26 in Book II we infer that he won the litigation, and that the House of Lords subsequently “overruled *Millar*, opting for a limited term of protection” in *Donaldson v. Becket* (1774)⁵⁸.

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.”⁵⁹ 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 a better class of reader.⁶⁰ This is another interdisciplinary engagement of the research; and the 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 before-hand, you had better throw down the book at once; for without *much reading*, by which your reverence knows, I mean much

⁵⁸ *Millar v Taylor* (1769) 4 Burr. 2303, 98 ER 201; *Donaldson v Becket* (1774) 4 Burr. 2408, 98 ER 257. As Stern, “Editor’s Introduction to Book II,” xviii, states, “Blackstone, by that time a justice of King’s Bench, was ill on the day when the judgments in *Donaldson* were rendered. He sent in a short statement affirming that copyright originated at common law and lasted in perpetuity, but instead of elaborating his reasons, simply responded ‘in general terms’ by answering yes or no to each question.”

⁵⁹ Plucknett, *A concise history*, 286.

⁶⁰ See William B. Warner, *Licensing Entertainment: The Elevation of Novel Reading in Britain, 1684–1750* (Berkeley: University of California Press, 1998).

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.⁶¹ 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.”⁶² Both Blackstone and Fielding were lawyers – and both explored different literary genres during their career.⁶³

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 is *Tristram Shandy*.⁶⁴ Similar phrases may be found in legal handbooks and essays: Baker considers that Blackstone’s “success in breaking new ground is attributable partly to

⁶¹ On Nation State, teaching of national laws, and textbooks see John W. Cairns, “Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State,” *Oxford Journal of Legal Studies* 4.3 (1984): 318–360, 324.

⁶² Watson, “The Structure,” 795; John Bender, “Introduction,” to *Tom Jones*, ix–xxxiv, xvii.

⁶³ John Bender, “Introduction,” xi–xii; Prest, *William Blackstone*, 24, 43 ff.

⁶⁴ Watt, *The Rise*, 25; McKeon, *The Origins*, 419.

the discipline of trying to explain the law to educated gentlemen;” Lieberman 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.”⁶⁵

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 in “the following sheets [that] contain the substance of a course of lectures on the laws of England.” (*CLE*, Preface, i).

5. *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

⁶⁵ Baker, *An Introduction*, 191; Lieberman, “Blackstone’s Science of Legislation,” 63; Stroud F. C. Milsom, “The Nature of Blackstone’s Achievement,” *Oxford Journal of Legal Studies* 1.1 (1981) 1-12, 5.

the same time, demonstrate how law and literature “operated to achieve [its] economic, political, and other goals.”⁶⁶

The narrative of discontinuity, I contend, must necessarily complement that of continuity. On the one hand, the process of literary and legal digestion lacked precedents in point; on the other, the authors had to engage with a rich literary and legal tradition, with which they engaged in an intense dialogue. 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.”⁶⁷ 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.⁶⁸

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.”⁶⁹ Again,

⁶⁶ Posner, “Blackstone and Bentham,” 571–572.

⁶⁷ *An essay on the new species of writing founded by Mr. Fielding: with a word or two upon the modern state of criticism* (London: printed for W. Owen, near Temple-Bar, MDCCLI. [1751], 1, 13, 17. On the identity of the essayist see William B. Warner, “Definitions of the novels,” in *The Encyclopaedia of the Novel*, ed, Peter M. Logan, vol I, (Chichester: Blackwell, 2011): 224–228

⁶⁸ *An essay*, 13.

⁶⁹ Watt, *The Rise*, 290.

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.”⁷⁰ But he was also in continuity with the common-law legal tradition,⁷¹ as the “Preface” to his *An analysis of the laws of England* upholds.⁷² 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.⁷³ 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*.⁷⁴

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).⁷⁵

As for continuity, a textbook “had not existed for Blackstone to summarize. [...] In trying to give laymen a view from above the procedural

⁷⁰ Watson, “The Structure,” 796.

⁷¹ William Blackstone, *An analysis of the laws of England* (Dublin: Printed for E. Watts 1766).

⁷² Blackstone, *An analysis*, iv–vi.

⁷³ Holdsworth, “Some Aspects,” 272. See also *supra* para 1.

⁷⁴ In the “Preface,” Blackstone claimed to have followed the arrangement of Sir Matthew Hale, *The Analysis of the Law: being a Scheme, or Abstract, of the several Titles and Partitions of the Law of England, Digested into Method, which was first published in 1733*: see Watson, “The Structure,” 799.

⁷⁵ Michael Macnair, “Sir Jeffrey Gilbert and his treatises,” *The Journal of Legal History*, 15.3 (1994): 252–268. See also Frederick Pollock, “The Continuity of the Common Law,” *Harvard Law Review* 11.7 (1898): 423–433.

technicalities, he had given lawyers a new vision of the law.”⁷⁶ 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).

But this continuity lies, quite paradoxically, in the discontinuity they triggered in the exposition of the common law: on the one hand, by framing it after the Justinian’s *Institutes*, Blackstone reflected “the ideology of eighteenth English society”; on the other hand, the *Institutes* were unfit to encompass English law, and therefore “the treatment of each subject had to be geared to the English law”.⁷⁷

Thus, Blackstone was able to write a work that covered the whole law of England, delivering a general overview of both English legal system and lexicon; concepts were thus made accessible to the general reader. Without neglecting the historical lineage of common law authors to which he pertained, he succeeded in improving “the kind of institutional method suggested by Hale”, which the latter had not been able to perfect, i.e. to put the common law “into a narrower compass and method, at least for ordinary study”.⁷⁸

⁷⁶ Milsom, “The Nature,” 10.

⁷⁷ Watson, “The Structure,” 810.

⁷⁸ Matthew Hale, “Preface,” to Henry Rolle, *Un Abridgement des Plusiers Cases et Resolutions del Common Ley* (London, 1668). See Michael Lobban, “Rationalising the Common Law”: Blackstone and

Continuity and discontinuity then overlap and reveal the cultural-specific features within which the *Commentaries* and the novel are indissolubly likened, but these features mirror the general state of Eighteenth-century English mind, and 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.⁷⁹

In the eighteenth-century context, thus, 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.”⁸⁰ Such 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 agreeable⁸¹.

His predecessors,” in *Blackstone and His Critics*, eds. Anthony Page and Wilfrid Prest (Oxford: Bloomsbury, 2018), 1–22, 5.

⁷⁹ See John G. Burje (ed.) *The Uses of Science in the Age of Newton* (Los Angeles: University of California Press, 1983); John Christie and Sally Shuttleworthy (eds.), *Nature transfigured: science and literature, 1700–1900* (Manchester: Manchester University Press, 1989). See also Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, in *Harvard Law Review*, 42.2, (1928): 365–409, 382 for “Newton’s achievement on the formulation of the inherently just and reasonable rules of social and political relationship.”

⁸⁰ Liebermann, *Professing Law*, 155.

⁸¹ Edmund Burke, in *Annual Register, or a View of the History and Politics and Literature for the Year 1767* (London, J. Dodsley, 1796), 287.

The *Commentaries* disclose a rational digestion of the various institutes, but considering “them [...] in a logical sequence,” such as in the case of the “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”⁸². Such rational digestion also finds an explanation in “the spirit of the age as it is illustrated by some aspects of 18th century architecture”⁸³. And I do not believe to make a large claim by stating that such argument holds true for both the *Commentaries* and the novel. Not only did that Blackstone nurture such architectural frame in his early literary production,⁸⁴ but it also percolates through Fielding’s *Tom Jones*⁸⁵. *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.”⁸⁶

And it is neither a large claim nor the habit of a comparative lawyer the assumption made by Holdsworth on the interrelations between law and literature, and the conclusion he inferred from them, i.e. that the *Commentaries* are the “only law book that can be classed as literature.”⁸⁷

⁸² Paley, “Editor’s Introduction to Book IV,” ix.

⁸³ Ernest Giddey, “The structure of Tom Jones: regularity and extravagance,” *SPELL: Swiss papers in English language and literature*, 3 (1987): 193–199, 196.

⁸⁴ Prest, *William Blackstone*, 44-45, 66-67.

⁸⁵ Giddey, “The structure,” 198–199.

⁸⁶ *An essay*, 18–19.

⁸⁷ Holdsworth, “Blackstone,” 237.

6. *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 *Commentaries*’ influence in England.⁸⁸

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.”⁸⁹ As Hammond put it, Sir William 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”;⁹⁰ and the proposal to establish a professorship of law at the College of William and Mary in Virginia in 1773 drew inspiration from the Blackstone’s lectures.⁹¹

Furthermore, Edmund Burke remarked, “nearly as many copies of the *Commentaries* had been sold on the American as on the English side of the

⁸⁸ Holdsworth, “Blackstone”, 238. See also Philip Schofiel, “The ‘Least Repulsive’ Work on a ‘Repulsive Subject’: Jeremy Bentham on William Blackstone’s *Commentaries on the Laws of England* Philip,” in *Blackstone and His Critics*, eds. Anthony Page and Wilfrid Prest (Oxford: Bloomsbury, 2018), 23–40.

⁸⁹ Alschuler, “Rediscovering Blackstone,” 5. For Blackstone’s influence on U.S. common law see, among others, Dennis R. Nolan, “Sir William Blackstone and the New American Republic: A Study of Intellectual Impact,” *New York University Law Review* 51 (1976): 731–768; Albert S. Miles, David L. Dagley and Christina H. Yau, “Blackstone and His American Legacy,” *Australia & New Zealand Journal of Law & Education* 5.2 (2000), 46–59; Robert D. Stacey, *Sir William Blackstone and the Common Law: Blackstone’s Legacy to America* (Eugene, OR: ACW Press, 2003).

⁹⁰ Hammond, Hammond in Blackstone’s *Commentaries*, ed. Hammond, I, title page.

⁹¹ Bryson, *English Ideas*, 332.

Atlantic;” and Chief Justice Marshall, “by the time he turned twenty-seven [...] had read the Commentaries four times.”⁹²

In this respect, Blackstone’s written legal language might have backed the process of Americanisation of the common law and its translation “into some form of a written code, or digest, which would be concise and comprehensive enough” under the authored text of the U.S. Constitution,⁹³ but the legitimacy and sovereignty of the ancient English constitution also entailed the idea of laws enacted in the best interests of English subjects.

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.”⁹⁴ Comparable positive assessments were also formulated by his contemporaries: the *Annual Register* considered them written “in a clear, concise, and intelligible form”⁹⁵; and Thomas Jefferson and Lord Mansfield did the same.⁹⁶ Positive assessments

⁹² See Nolan, “Sir William Blackstone,” 757. See also Wilfrid Prest (ed.), *Re-Interpreting Blackstone’s Commentaries* (Oxford: Oxford University Press, 2014). See Edmund Burke, “Speech on Moving his Resolutions for Conciliation with the Colonies (Mar. 22, 1775),” in *The Works of the Right Hon. Edmund Burke*, revised edn (Boston: Little Brown, 1865), 99, 125.

⁹³ On the Americanisation of the common law in the perspective of the law-and-literature movement see Peter Schneck, *Rhetoric and Evidence. Legal Conflict and Literary Representation in U.S. American Culture* (Berlin et al.: Walter de Gruyter, 2011), 120 et seq.: this led to the “simplification and standardisation of American laws,” as well as the revision of several common-law core concepts, such as that of property. Furthermore, “[n]ew forms of social and mercantile interaction radically changed old and opened new fields of legal conflict for which the Common Law had no ready concepts or precedents.”

⁹⁴ Bentham, *A Fragment of Government*, 116.

⁹⁵ *Annual Register* 1767, 4th ed., second pagination (London 1786), 287.

⁹⁶ See W. H. Bryson, “English Ideas on Legal Education in Virginia,” in *Learning the Law: Teaching and the Transmission of English Law, 1150-1900*, ed. Jonathan Bush and Alain A. Wijffels (London and Rio Grande: Humbledon Press, 1999): 329–352, 346. For a comprehensive assessment of the topic see David Lemmings, “Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth-century England,” *Law and History Review* 16.2 (1998): 211–255, 243.

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 Student’s of the law.”⁹⁷; Albert Venn Dicey stated that “The *Commentaries* live by their style”;⁹⁸ Holdsworth admired Blackstone’s genius, his work, and the “excellence of the *Commentaries*.”⁹⁹ And Plucknett defined them “an attractive piece of literature”.¹⁰⁰

It was, however, the change in the audience and in the public reading that prompted the most dramatic change in legal language. Blackstone’s vivid language is partly triggered by the decline of traditional forms of legal education,¹⁰¹ and partly by the inaccessibility of the legal English language: 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.”¹⁰² 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.”¹⁰³

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 this is “a volume on matters of private substantive law, such as tort, contract, or property;”¹⁰⁴ but, as Blackstone

⁹⁷ Thomas Ruggles, *The Barrister: or Strictures for the Education Proper for the Bar* (London, Clarke and Sons, 1818), 201.

⁹⁸ Albert Venn Dicey, “Blackstone’s *Commentaries*,” *Cambridge Law Journal* 1 (1932): 286–294.

⁹⁹ Holdsworth, “Some Aspects,” 267–268

¹⁰⁰ Plucknett, *A concise history*, 286.

¹⁰¹ On the decline of legal education see Lemmings, “Blackstone and Law Reform by Education,” 216, 335.

¹⁰² *Commons Journal* 21:622–624.

¹⁰³ Milsom, “The Nature,” 6.

¹⁰⁴ Thomas D. Gallanis, “Editor’s Introduction to Book III,” *Commentaries on the Laws of England*,

clarifies, 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.”¹⁰⁵ This also explains the order of institutes 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: it is a “procedural” state of mind, I dare say, and “substantive law administered in a given form of action” governs legal education.¹⁰⁶ 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.¹⁰⁷

Blackstone did not intend to pursue a reform by legislation as it was already occurring with literary property, where legislation itself regulated “modern properties which the tradition of the Common Law could not absorb.”¹⁰⁸ A linguistic reform of common law by means of legislation would

vol III, *Of Private Wrongs*, ed. Thomas D. Gallanis (Oxford: Oxford University Press, 2016): vii–xviii, vii.

¹⁰⁵ Stephen A. Smith, “Rights, Remedies and Causes of Action,” *Structure and Justification in Private Law: Essays for Peter Birks*, eds. Charles E. F. Rickett and Ross Grantham (Oxford and Portland, OR: Hart 2008): 405–420, 411.

¹⁰⁶ Frederick W. Maitland, *The Forms of Action at Common Law*, eds. A. H. Chaytor and W. J. Whittaker (Cambridge: Cambridge University Press, 1936): 3. See also Pollock, “The Continuity,” 426.

¹⁰⁷ Peter Birks, “Rights, Wrongs, and Remedies,” *Oxford Journal of Legal Studies* 20.1 (2000): 1–37, 5.

¹⁰⁸ Kayman, “The ‘New Sort of Specialty’,” 645.

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 the Parliament.¹⁰⁹ But this merely confirms that the epic of English law 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 a legal jargon “increasingly remote from the mainstream of English society.”¹¹⁰

By contrast, he pursued his transformative project by education;¹¹¹ and the scarcity of textbooks and the decline in the traditional legal training favoured this. 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

¹⁰⁹ See 83 Statute 4 Geo. II. C. 26.

¹¹⁰ Lemmings, “Blackstone and Law Reform by Education,” 217.

¹¹¹ Lemmings, “Blackstone and Law Reform by Education,” 216.

privilege the written over the spoken word.”¹¹² 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.”¹¹³

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 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).

¹¹² Michael Hancher, “*Littera Scripta Manet*: Blackstone and Electronic Text,” in *Studies in Bibliography* 54 (2001): 115–132, 119.

¹¹³ Hancher, “*Littera Scripta Manet*,” 120.