# The Schizophrenic Jury and Other Palladia of Liberty: A Critical Historical Analysis

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The Schizophrenic Jury and Other Palladia of Liberty:
A Critical Historical Analysis

Markus D. Dubber*

I

The jury’s history is interestingly schizophrenic, even paradoxical. On one side is the history of the jury as palladium of liberty, often along with other such palladia, notably habeas corpus. On the other is the history of the jury as instrument of oppression. On one side is the jury as English, local, indigenous, democratic; on the other is the jury as French, central, foreign, autocratic. This paper reflects on this paradox, regarding it as neither sui generis nor in need of resolution. Instead, it critically analyzes the jury’s schizophrenic history from the perspective of New Historical Jurisprudence, as an illustration of the fundamental tension between two modes of governance, law and police, which ultimately are rooted in the distinction between autonomy and heteronomy that has shaped the conception and practice of government since classical Athens.¹

The history of the jury, viewed in this light, consists of two distinct, yet interconnected, parts, a legal and a political—or more precisely, and awkwardly, a policial—history. “Policial” simply means polizeilich (policier), i.e., related to police (Policey, police), a once comprehensive term that has splintered into nominally distinct categories like police (narrowly speaking, as an executive agency of prevention and enforcement: Polizei), policy, and politics (both Politik).² Police here is understood in the traditional broad sense of an essentially discretionary mode of governance, rooted in the householder’s virtually unlimited power over animate and inanimate constituents of his household and then transferred onto the state household: “the power of sovereignty, the power to govern men and things within the limits of its dominion.”³ In Blackstone’s terms, “public police and oeconomy” is the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.⁴

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* University of Toronto, Faculty of Law. This is a draft of a paper written for “Lay Participation in Modern Law: A Comparative Historical Analysis,” University of Helsinki, Sept. 18-19, 2014. I thank the conference host, Heikki Pihlajamäki, and my fellow workshop participants for their helpful comments.


³ License Cases, 46 US (How.) 504, 583 (1847).

Rousseau, a few years earlier, captures—and historicizes—the same idea in his definition of “political economy” in Diderot’s *Encyclopédie*:

> The word Economy, or OEconomy, is derived from oikos, a house, and nomos, law, and meant originally only the wise and legitimate government of the house for the common good of the whole family. The meaning of the term was then extended to the government of that great family, the State. To distinguish these two senses of the word, the latter is called general or political economy, and the former domestic or particular economy.\(^5\)

The police in early American constitutionalism was cast as that awesome sovereign power that “is, and must be from its very nature, incapable of any very exact definition or limitation,”\(^6\) “the most essential, the most insistent, and always one of the least limitable of the powers of government.”\(^7\) The police power thus defined was essential to the very project of American federalism: as sovereigns, the “states” had to retain the police power, by definition, and the federal government (not the federal state) could never have it. In theory, if not in practice, the federal government’s power could never be policial, general and originary; it had to be limited to the specific—explicitly non-policial—powers delegated to it by the sovereign states.\(^8\)

At the same time, on the European continent, the application of the Enlightenment’s critical force to the realm of state power was cast as the struggle between the law state (*Rechtsstaat, l'état de droit*) against the police state (*Polizeistaat, l'état de police*), an existential confrontation from which the former emerged utterly and irrevocably victorious, in name, if not in practice (through various curious doctrinal creations such as police law (*Polizeirecht*) and, eventually, administrative law (*Verwaltungsrecht*), which carried on a small subset of the enormous tasks once assigned to the science of police (*Polizeiwissenschaft*)—notably those marginal aspects of the administrative (*not* police!) state subject to occasional judicial oversight.

New Historical Jurisprudence zeroes in on this fundamental distinction between law and police, sharpens it by historicizing it, and then uses it to frame a dualistic critical analysis of state action over the *longue durée*.\(^9\) New Historical Jurisprudence historicizes the distinction in two ways: by grounding it in the long-standing distinction between autonomy and heteronomy in Western political history and by locating the distinction between law and police at a specific moment in that history, the Enlightenment’s radical critique of state power and the idea of modern law to which it gave rise. The modern idea of law—of the law state, of the rule of law—is defined in contradistinction to the modern idea of police. The project of the

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\(^6\) Slaughter-House Cases, 83 US 36, 49-50 (1873).

\(^7\) ‘Constitutional Law,’ *American Jurisprudence 2d*, vol 164 § 317.


Rechtsstaat is the legitimation of state power in light of the Enlightenment’s fundamental principle of legitimacy, the autonomy of its subject-object, the person, through the replacement of the Polizeistaat, an institution devoted to the systematic manifestation of the rational heteronomy of a “well-governed” or “well-policied” state household (gute Policey) according to guidelines developed by a comprehensive science of police.

Against this backdrop, the jury, it turns out, is noteworthy not because its history must be rescued from the monorail linearity of orthodox legal history by retelling it from two diametrically opposed perspectives, but because its history already has been schizophrenic for a long time, at least since the arrival of the Brunner thesis of the late nineteenth century. Dualistic accounts of the jury as “Tool of Kings, Palladium of Liberty” (to quote a 1973 celebratory “illustrated history of the trial jury from its beginning in early Greece to the most recent U.S. Supreme Court decisions,” by a trial lawyer) are the norm, not the exception. The historiography of the jury is not marked by a succession of traditional (“Whig”) and revisionist accounts so much as by the uneasy, yet nonetheless apparently happy, coexistence of not merely different, but diametrically opposed, accounts. In the case of jury historiography, paradox is not a problem that needs solving but a characteristic that needs analyzing.

Once one takes the view of the longue durée, there is nothing surprising about the jury’s function as both tool of kings and palladium of liberty, depending on whether it is viewed as an instrument of heteronomy or the manifestation of autonomy, whether it is meant to well, efficiently, or perhaps even prudently govern others as such or to justly, legitimately, or rightly govern others as oneself. The jury is “inherently” neither policial nor legal, but always potentially both at the same time, depending on who wields it against—or upon—whom (subject and object), where and when (space and time). The history of the jury is full of traces of heteronomy and autonomy; the historiography of the jury might reveal and develop them into parallel, yet opposing, accounts, rather than privilege one over the other, in the search for the correct one or, for that matter, the properly revisionist one (itself subject to revision later on). 

Brunner’s account of the jury as a French royal other-governance tool thus complements the alternative account of it as an institution of English local self-government, rather than displace it. At the same time, the history of the jury can be seen to reflect its historiography; viewed in its institutional context, the legal jury did not replace the policial jury any more than the law state replaced the police state (or Brunner’s policial account of it replaced the—“palladial”—one it debunked). In

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12 This differentiated historiography can be undertaken for its own sake. From the perspective of New Historical Jurisprudence, the point of this—as any other—exercise in historical analysis of law, in the end, would be to facilitate the critique of contemporary exercises of state power in the name of law. See MD Dubber, ‘New Historical Jurisprudence: Legal History as Critical Analysis of Law,’ (2015) 2 Critical Analysis of Law 1; see also infra at 16 (discussing jury’s in the American War on Crime).
The jury itself was replaced by other institutions and practices of norm imposition, most notably the plea bargain (in criminal law). Today, it may be argued, the jury survives as a rare, symbolic ritual that obscures and facilitates the operation of the penal policial state, with few traces left of its significance as the manifestation of self-government (either of the victim, or the offender, through representative “peer” or “vicinage” judgment) at the crucial impositional stage of the legal process.\(^\text{13}\)

In this, longer and broader, perspective (both *longue durée* and *large portée*), Brunner’s account is not revisionist but critical. It disrupts the then-orthodox, and uncritically self-celebratory, account of the jury as distinctly English; the older account is not “disproved,” but incorporated into a more comprehensive and nuanced dualistic account of the jury as both legal and policial, English and French, local and central, legitimatory and alegitimate. The jury may provide a particularly convenient and dramatic illustration of the general phenomenon of dualistic—or, if you like, schizophrenic—historiography; but it is by no means the only one.

II

Consider other candidates for fundamental—and essentially English—guarantors of law, justice, and righteousness, such as the rule of law and habeas corpus. All turn out, upon even moderately close inspection, to have a similarly checkered—or at least two-faced—history. Douglas Hay, among others, has famously pointed out the usefulness, and uses, of the rule of law as an instrument of heteronomous governance.\(^\text{14}\) Critical analyses of this sort tend to be regarded, and framed (even by their protagonists), as revisionist, suggesting a view of historiography that can accommodate only one (correct) analysis and the perspective that generates it, instead of making room for alternative conceptions, or critical vantage points.

Despite its nominal reference to “law,” the rule of law, for instance, is “necessarily,” “by definition,” or “properly understood” concerned neither with legitimate government nor with effective governance. Instead, depending on one’s perspective and on one’s understanding of its substance and context (what “rule,” what “law,” by whom of whom, when and where?), rule of law may appear either as a principle of legitimacy or a tool of good governance. Hay’s work on the significance and meaning of the rule of law in the era of the Bloody Code sensitively explores the rule of law’s ambivalence in a particularly moment of in the history of English penalty. Morton Horwitz was right to chastise the otherwise critically alert E.P. Thompson for labelling the rule of law an “unqualified human good” and warning against the possibly catastrophic consequences of denying it that status, but not because the rule of law can never have a role in an account of legitimate state

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\(^{13}\) See infra at 16.

The problem with the rule of law, as with all other norms, institutions, or practices of state government, is not that it is unqualifiedly this or that, but that it is also qualifiedly one thing and another. Historical analysis—as a form of critical analysis of law—seeks to capture these qualifications, i.e., the concept's characteristics and context.

It's worth briefly to differentiate among varieties of critical analysis here. New Historical Jurisprudence, at least in the form considered here, engages in a dualistic critical analysis of a given governmental norm, institution, or practice from two perspectives, law and police. This parallel analysis opens up various critical perspectives. Within each paradigm, internal critique can investigate consistency among higher- and lower-order norms, the comprehensiveness—and “gaplessness”—of a normative system, and so on. The entire normative system (what Hart & Sacks would call “The Legal Process”) can also be assessed in terms of its aim, order (or public welfare, efficiency, prudence, etc.) in the case of a policical system and legitimacy (or justice, right, fairness, etc.) in the case of a legal system.

The case of the rule of law illustrates another, common, critical stance, one that straddles the two paradigms, rather than situating itself in one or the other. One might say, for instance, that the state—or the organs of government—tries to pass off a police action as a legal one, or even an entire policical system as a legal system, a police state as a law state. In other words, the state might engage in a deception that—like a magician's sleight of hand or skilful misdirection—either makes something policical appear as something legal (by giving it a “veneer of legality”),(ab)uses a formally (externally) legal institution for policical purposes in particular cases, or—at the systemic level—detracts attention from a police system through more or less elaborate public performances of a legal ritual in a small minority of cases. These performances are often described as “symbolic”; this may be misleading, however, unless it is understood that they symbolize the state’s attempt to create the false impression that they symbolize its commitment to a system of law, rather than of police.

The rule of law carries its deceptive potential on its sleeve. Its mere invocation identifies the state action in question as an exercise of the state’s law power, with its attendant claim to legitimacy, in aspiration if not also in fact. The assertion of lawness, however, is easily exposed as merely nominal as soon as the “rule of law” is invoked by both the subjects and the objects of state power. For instance, the need to “maintain”—or perhaps to reestablish—the “rule of law” might be invoked by state officials to justify, or more precisely to motivate, a Draconian penal regime such as the one under the Bloody Code in 18th and early 19th century England or during the U.S. War on Crime of the turn of the 21st century. At the same time, however, the objects of these penal police actions—or those speaking on their behalf, at the time or, in the case of the Bloody Code, centuries later—might invoke the

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“rule of law” to challenge the very state action supposedly motivated by it, asserting violations of various procedural and substantive legal rights. Whether the invocation of the rule of law on all sides of a conflict also reveals the hopeless vacuity of the concept is another question; it might be more productive to consider the rule of law as an essentially contested concept, in the precise sense of its straddling the distinction between police and law.

Hay’s critical analysis of the rule of law under the Bloody Code revealed a penal system characterized by the combination of harsh norms (by the legislature) and lax enforcement (by the judiciary). This system can easily be seen as a penal police regime that combines the exercise of unlimited discretion by two sets of state officials (legislators, judges), with the former group making sharp general threats that are then mercifully blunted by the latter in their application to particular cases. This subsequent, impositional, stage of the penal process is often described as “discretionary,” which should not obscure the fact that the definitional (legislative) stage was no less discretionary. The decision whether, when, and how to define a penal threat was no more constrained than the decision whether, when, and how to make the threat real. The entire penal system was “shot through with discretionary powers” in John Beattie’s words,17 as one would expect from a penal police regime.

Hay’s historical analysis, however, went beyond highlighting the policial aspects of the Bloody Code regime. Hay also argued that the rule of law took on a life of its own and, in this way and in this sense, came to supply the English penal regime with aspects of legality. According to Hay, the rule of law could serve its purpose of policial governance effectively only if applied to the subjects and objects of state power alike. Over time, however, the subjects of state power came to internalize the “legal” norms, to drink their own Kool-Aid, in other words. To the extent that self-limitation of power itself morphed from merely discretionary to mandatory, from toothless to toothful, the English penal regime legalized itself, in spite of itself.

Ironically, constraints on discretion throughout the regime would have fettered the discretion not only at the legislative stage of norm definition—the threat of the Bloody Code—but also at the judicial, and executive, stages of norm imposition and infliction, i.e., at the stages where discretion served to limit the state’s power not in threat, but in fact, on the ground. It is debatable whether, apart from the reduction in the number of capital felonies in the early nineteenth century, the discretion of English legislators in the penal realm has been limited by meaningful constraints of legality. Consider here the failure of a series of codification projects since the nineteenth century, at least insofar as they sought to enunciate and implement constraints of this kind (in substantive, but also in procedural, penal law).18 At the implementation stages of the penal process, the discretion of English (and American) prosecutors and police officers appears to have continued largely unabated, beyond meaningful constraints and review.

By contrast, Germany (and its predecessor states) codified substantive (and procedural) criminal law early, and often. If we ignore the Constitutional Criminalis

Carolina, the list includes the Allgemeine Preußische Landrecht, (Feuerbach’s) Bavarian Penal Code of 1813, the Prussian Criminal Code of 1851, and the (first) German Penal Code of 1871 and German Criminal Procedure Code of 1877. Germany also radically limited—if not entirely eliminated—discretion at the enforcement end of the penal spectrum. The Legalitätsprinzip (literally, principle of legality), or principle of compulsory prosecution, applied to prosecutors and police officials alike and first appeared in the (first) German Code of Criminal Procedure of 1877.

Whether the codification of norms and limitations on their enforcement in fact, or even in aspiration, indicate a legal—as opposed to a policial—regime is another question, as a matter of theory and as a matter of history. In the shadow of accounts of the history of German criminal law that trace a more or less (1933-45) continuous trend of the progressive manifestation of the idea of the Rechtsstaat, a small but lively historical literature has begun to develop a critical analysis of ostensibly “legal” norms, institutions, and practices that in some respects parallels the dualistic legal-policial analysis of New Historical Jurisprudence. Other critical historical analyses draw attention to the beneficiaries—and advocates—of early nineteenth-century reforms, within the state bureaucracy (i.e., among the subjects of state power: judges vs. legislators) and outside (i.e., among its objects: the rising bourgeoisie).

The progressive, if not perfectionist, tenor of standard (non-critical) accounts of the rule of law in the history of German criminal law is matched by the Whiggish tone of traditional English criminal historiography. Domestic self-analysis, particularly in law, easily slides into self-celebration.

III

Comparative analysis, and comparative historical analysis in particular, provides a helpful critical vantage point from which the possibility of alternate realities becomes apparent. I don’t mean comparative analysis for the purpose of self-celebration, a long-familiar feature of parochial legal scholarship, including legal historical scholarship, on both sides of the common law/civil law divide. Think, for

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instance, of Dicey’s still-influential 19th century patriotic-imperialist account of the rule of law as a distinctly English notion, all the more distinctly English because of its supposed total absence from French law, where such oppressive and un-English concepts as “police” and “code” reflected a totalitarian centralized state appropriate for a nation of Frenchmen without the benefit of the inborn rights of Englishmen.22 (A similar Francophobia appears in Paul Johann Anselm Feuerbach’s rejection of early nineteenth-century proposals to introduce the (French) jury in parts of Germany not at the time under French occupation.23 Still, Feuerbach invoked the jury’s oppressive potential under military occupation; Dicey used French law to highlight the global superiority of English law.)

The comparative analysis I have in mind instead is the kind that explores another legal system on its own terms, not as a prop for self-celebratory, or simply parochial, domestic legal history. In fact, this analysis need not be comparative in the strict sense of comparing two or more systems; it may simply consist of a hard but fair look at a “foreign” legal system, using one’s critical distance neither to praise nor to condemn it in comparison to one’s “own.” Take, for instance, Brunner’s (also broadly comparative) work on the history of the English jury or, for that matter, (the American) John Dawson’s history of the English jury a century later, which relied heavily on Brunner’s account.24 Maitland’s reliance in the second edition of *History of English Law* on Gierke’s work on the history of the German corporation combines both types of comparative analysis in a way that captures Maitland’s genius as a critical legal historian *avant la lettre*.25 (Maitland also relied on Brunner’s work on jury.26)

Finally, consider (the American) Paul Halliday’s brilliant recent English history of the writ of habeas corpus, which relies heavily on what one might regard as a dualistic analysis of “the Great Writ” in light of the distinction between police law, as a manifestation of both sovereign power and its limits.27 Halliday’s account parallels Brunner’s in that it, too, is seen as a work of “revisionist” history that highlights the painful origins of a core legal institution, each considered a—if not *the*—“palladium of liberty.”28 As Brunner’s jury was “in its origin . . . not popular

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23 PJA Feuerbach, *Betrachtungen über das Geschwornen-Gericht* (Krüll, 1813); see also PJA Feuerbach, *Erklärung des Präsidenten von Feuerbach über seine, angeblich geänderte Ueberzeugung in Ansehung der Geschwornen-Gerichte* (Palm & Enke, 1819) (a sequel published after the end of French occupation).
but royal,”29 French, not English, so Halliday’s habeas was rooted not in “ideas about liberty” but in the king’s prerogative,30 in notions of royal privileges (liberties), not individual right (liberty).31 Brunner’s story is more antiquarian, Halliday’s more presentist; Brunner is interested in the jury’s origins for their own sake, Halliday is (also) after the contemporary significance of habeas’s origins, picking up on the U.S. Supreme Court’s insistence that contemporary habeas jurisprudence “be informed by the legal and constitutional history of the ‘Great Writ.”’32 Brunner’s account therefore is premodern, while Halliday’s traces the transition to modern conceptions of law—including the rule of law and notions of individual liberty and autonomy. In fact, Halliday’s habeas history is precisely about this transition, from police to law, placed in contrast with the traditional, static and anachronistic, view of the birth of habeas as the fully-formed embodiment of modern liberty and the rule of (modern) law.

Even a cursory comparative analysis of the non-self-congratulatory sort reveals that, curiously, parochially domestic accounts of the rule of law on both sides of the common law/civil law divide exude similarly unshakeable confidence in the superiority of one’s “own” system vis-à-vis the other. Not only is each system convinced of its own, singular, manifest destiny as the one and only ultimate manifestation of lawness, but that conviction is based on completely different characteristics, each of which is considered an absolute prerequisite and tell-tale sign of lawness by the system displaying it. What’s more, the same feature identified as an essential indicium of lawness by one system may be regarded as definitive evidence of policeness by the other.

Take codes, for instance. From the (long-dominant) English perspective, codification is anathema to the rule of law, that quintessential English achievement and national character trait. The sensible Englishman, endowed with his panoply of rights since time immemorial (or at least since 1215), has no need for a comprehensive systematic statement of legal norms composed, applied, and enforced by a central state authority. The English are perfectly capable of governing themselves, drawing on their well-honed common sense that only in exceptional cases might benefit from the dispute settlement services provided by a judge who manages the proceedings with a watchful eye and a light touch. Codes, from the English perspective, are for others less fortunate: colonial subjects and the French (or the similarly policeable Germans).

From the other side of the Channel, codes appear not as the instruments of central state oppression that trample age-old communities of local self-government, but as the very hallmark of the Rechtsstaat. The absence of codification in England is regarded as a failure, or rather as evidence of England’s premodern status, characteristic of a country governed not by rational general rules of law

systematically defined and objectively enforced but through a haphazard process focused on individual cases and issues without regard to the essential requirements of government under the rule of law, including consistency, rationality, objectivity, and generality.\(^{33}\)

In the realm of procedure (i.e., in the application, rather than the definition, of norms), consider prosecutorial (and police) discretion. We’ve already noted that discretion in enforcement has long been a central feature of the English (and Anglo-American) criminal process, as a crucial opportunity for good-sense front-line judgments about the appropriateness of applying legislative norms in particular cases, to particular individuals. Recall that in Hay’s account of English penalty at the turn of the nineteenth century, the discretionary exercise of mercy in enforcement worked hand-in-hand with the sharp threats of the Bloody Code to create a criminal process under the rule of law. More generally, discretion at the back-end of the process took pressure off decisions at the (uncodified) front end. By contrast, German law considers discretion at the enforcement stage of the criminal process to be inconsistent with the rule of law; where English law sees room for reasonableness in the face of potentially overbearing state (legislative) norms, German law sees potential for arbitrariness and subjectivity that must be eliminated (through the principle of compulsory prosecution).

Last, but for present purposes most, consider the jury and habeas corpus, two features of English law, both celebrated for centuries as essential “palladia of liberty,” independently and together, neither of which played a significant role in German law, if they played any role at all. The jury, at least in some of its modern accounts, also appears as a locus of discretion in the applicatory phase of the Anglo-American criminal process (at the moment of imposition of norms, rather than of their enforcement, through prosecution and, eventually infliction of penal pain). However the jury is said to fulfil it, there is no doubt about its central role as a—if not the—“palladium of liberty” in Anglo-American law, originally in the legal process as a whole and more recently in the criminal legal process (the civil jury having all but disappeared in England).\(^{34}\)

German criminal law, by contrast, rather than seeing the jury as an essential feature of any legal system committed to the rule of law is just as likely to see it as a fundamental threat to the rule of law. Independent juries, under this view, introduce an element of irrationality and arbitrariness into the criminal process. The German criminal process has nominally retained lay participation in some cases, but only in the form of largely ceremonial lay judges who sit on mixed panels alongside professional judges and have little, if any, impact on the proceedings.\(^{35}\) Independent

\(^{33}\) Even today, in Germany codification—or, more precisely, a legislative act—is considered a constitutional requirement for norms governing state actions that interfere with basic rights. For instance, the German Bundestag passed the (first) German Prison Law of 1977 in response to a 1972 decision by the German Federal Constitutional Court striking down the previous—regulatory—scheme as unconstitutional. BVerfGE 33, 1.

\(^{34}\) See DK Brown, “Jury Nullification Within the Rule of Law,” (1997) 81 Minn L Rev 1149 (arguing that even the jury’s controversial power to “nullify” the law may further the rule of law).

juries, introduced in parts of Germany in the nineteenth century, first under French occupation and then as part of the 1848 movement, were soon phased out, and eventually abandoned.  

Finally, there is habeas corpus, another palladium of liberty celebrated in Anglo-American law, without which a legal system under the rule of law is unimaginable. And yet, as Halliday points out, “Frenchmen and Germans may, I do not doubt it, exist happily under their own civil law, even without a jury, or the Habeas Corpus Act, and the other safeguards which English men think their birthright and their palladium.” Unlike the jury, a medieval extraordinary prerogative writ like habeas corpus may appear to Frenchmen and Germans as merely anachronistic and unnecessary—rather than anachronistic and counterproductive—in a properly constructed rule-of-law system. In fact, England and other Commonwealth countries have largely rerouted extraordinary habeas corpus matters into ordinary channels of appellate review. As with the jury, habeas corpus today plays a considerably more significant—albeit still only marginal—role in the one common law jurisdiction that is not part of the Commonwealth, the United States. Ironically, then, the jury’s and habeas corpus’s continued elevated status as palladia of liberty (though presumably no longer distinctly English palladia of liberty) is today most loudly celebrated in the common law jurisdiction farthest removed from each institution’s English origins, supposed or real.

As a result, the Anglo-American histories of the jury and habeas corpus present promising opportunities for exploring the interesting, but too little studied, question of the continuity between English and American legal institutions and practices and, ultimately, of the analytic usefulness—never mind the historical foundation—of the oft-invoked but rarely-substantiated notion of “Anglo-American” law. Brunner obviously did not concern himself with this issue; he was after the medieval origins of the jury. Halliday’s history of habeas corpus has the requisite contemporary reach, or at least motivation, but emphasizes aspects of continuity, locating the key moment of transition in the early 17th century, seized by the judges of King’s Bench who “captur[ed] the king’s prerogative for their own,” long before the first stirrings of an Anglo-American jurisprudence.

We still await a critical history of the Anglo-American jury from its origins to the present day, along with an extension of Halliday’s brilliant history of habeas both temporally and conceptually, within the general framework of the distinction between (rule of) law and (rule of) police as basic modes of governance. This task

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39 P Halliday, Habeas Corpus: From England to Empire (Harvard UP, 2010) 22. Recall that the issue in Boumediene—and other War on Terror cases—was the (federal) courts’ willingness to assert habeas corpus jurisdiction in the teeth of (federal) executive (and legislative) power.
obviously is beyond the scope of this paper. In the next few pages, I will instead conclude by highlighting some traces of policial and legal aspects in the history of the jury, with occasional (intra-systemic) comparative glances at the history of habeas corpus (in Anglo-American law).

IV

The element of autonomy, or self-government, is easy enough to trace in the history of the jury, going back to classical Athens, where the imposition of (city-) state norms was no less a matter of self-government of the city’s subject-objects than was their definition. The Athenian conception of autonomy, of course, differed significantly from the modern conception of autonomy associated with the Enlightenment; the capacity for autonomy was limited to an elite subclass of persons whose membership in the community of autonomous citizens was essentially connected to their status as subjects of heteronomous household governance. The public citizen was the private oikonomos: the public autonomy of the Athenian agora was built on the private heteronomy of the Athenian oikos, and political government in public rested on oeconomic governance at home.

The Enlightenment, by contrast, assigned the capacity for autonomy to all persons as such. In theory (if decidedly not in practice), modern autonomy was the common denominator uniting all persons, not the characteristic that separated subjects from objects of government. All persons, including those persons long considered incapable of self-government (and instead destined to a fate of other-government), now had the requisite characteristic of citizenship. In reality, the modern liberal political project has never lived up to this ideal; American legal-political history, for instance, is at best the history of a slow, non-linear, and still incomplete attempt to overcome the deeply and widely felt sense that, despite claims of universality, the political project does not embrace all persons (or, perhaps, the sense that not all human beings, or other objects of governments, are not persons, despite appearances to the contrary).

The history of “the jury” tends not to take a sufficiently longue durée view to reach back to classical Athens, apart from an obligatory, but disconnected, introductory chapter. Instead, it begins around the year 1000, still deep in the Middle Ages, and the dispute between Brunner and his predecessors (and some of his successors) concerns the question whether, around this time, the jury first appeared as a tool of royal governance in France or as an institution of local self-government in England. However this may be, it is clear that England’s new French rulers used local juries as tools of oeconomic management, to take stock of their newly acquired state household so as to tax it better. In the end, it appears that whatever notion of local self-government survived in England fit into a centralized system of delegated royal power that was content to leave the resolution of matters of local importance to the locals, much as the expansion of the royal household and its peace throughout the land integrated lesser lords’ authority (and jurisdiction)
through delegation (franchises, liberties) occasionally policed at the margins as ultra vires.\textsuperscript{40}

The history of the English jury, then, can be seen as the history of two visions of the jury, one as an open instrument of heteronomous governance (exemplified by the use of local juries as investigative instruments), the other as manifesting some (usually undefined) notion of self-government or at least of participation in the imposition (if not the definition) of (often royal) norms. Even the latter view of the English jury, however, may appear as merely as part of a more sophisticated—in the sense of less heavy-handed, cheaper, and less apparently intrusive—system of central administrative control, exemplified not only by juries, but also by local lords holding delegated—as opposed to originary sovereign, if limited—power and an army of local justices of the (royal!) peace. Overall, the jury often appears as convenient (even efficient) rather than as necessary, as a sensible dispute resolution mechanism than a demand of legitimate (self-)government. Not surprisingly, the “self” in jury as an institution self-government is not the liberal person endowed with the capacity for autonomy, against which the legitimacy of state action is measured. It is perhaps the community of free or unfree tenants in some lord’s manorial court (with the distinction between the two apparently eroding over time) or the community of peers enjoying the privilege of peer judgment (a status-, rather than liberty-, based conception of the relevant self in judgment that persists in military courts to this day).\textsuperscript{41}

As in the case of habeas corpus, then, one might tell the story of the English jury as one of transformation from policial origins to legal institution, from privilege to liberty. But also as in the case of habeas corpus, its fellow palladium of liberty, the transition from premodern to modern, from policial to legal, is gradual, evolutionary rather than revolutionary, without a clear moment of rupture or reconceptualization.

On the European continent, the distinction between the police state and the law state was drawn much more starkly, and internally, rather than externally through favourable comparison to other, inferior, systems of government (recall the above discussion of Dicey’s celebration of the English rule of law in contradistinction to the French rule of police, a term that the English—Blackstone, not to mention Scots like Adam Smith and Patrick Colquhoun, notwithstanding—tended to avoid precisely because they associated it with France). Even there, however, the jury occupied an uneasy space straddling the distinction between policial instrument and legal institution, heteronomy and autonomy. In Germany, for instance, the jury was criticized (by, among others, Feuerbach), as a political instrument of (foreign, in particular French) oppression. A sophisticated police state could—and in the case of the French occupiers did—wield the jury as a powerful tool of governance, notably by controlling jury selection. In this way the jury was turned upside down, into an apparent institution of self-government that in fact provided heteronomy with a

\textsuperscript{40} See e.g., F Pollock, ‘The King’s Peace,’ (1885) 1 LQR 37.

veneer of autonomy. Note how Feuerbach’s critique of the French jury in occupied Germany in particular resembles Hay’s analysis—centuries removed—of the rule of law in Bloody Code England at the same time, without, however, the mollifying suggestion that state officials’ deception might over time come to limit themselves, through a sort of creeping and unintended self-deception.

Feuerbach did not deny the potential of the jury as an institution of self-government. He pointed out that it was neither heteronomous nor autonomous by nature, but could be seen as serving either function depending on the fundamental mode of governance it exemplifies. In the end, the German jury debate in the nineteenth century came to form part of a larger struggle over the emergence and definition of the German people and its sense of justice and Romantic notions of the priority of lay judgment uncorrupted by book learning (i.e., Roman law). The jury as an essential institution of self-judgment that legitimated the imposition of state (penal) norms on their subject-object attracted less attention than the jury as manifestation of community, and in particular Volk, sentiment.

In other words, the jury did not play an important role in the supposedly complete transformation of the Prussian police state into the German law state. In fact, it appeared as an anachronistic holdover from a time when vigilance against state overreach might have been more appropriate. With state power systematically constrained by the rule of law, the jury lost whatever minor legitimating purpose it might have had as an institution of indirect self-judgment (through persons-as-peers). The jury long having been abandoned, lay participation in German trials today survives, as we’ve seen, in the form of lay judges on mixed tribunals who so minimally contribute to proceedings and outcome that their role can at best be described as symbolic, or more accurately as harmless, if not pointless. The German constitution does not guarantee a right to a jury trial, nor does it guarantee a right to a trial with lay participation. In fact, given the jurisprudence of the European Court of Human Rights (applying the European Convention on Human Rights, which likewise contains no right to a jury trial), it may well be that the reintroduction of German jury trials would be unconstitutional, as a violation of the right to a fair trial (which provides, in art. 103(1), that “[i]n the courts every person shall be entitled to a hearing in accordance with law” (emphasis added)).

No country celebrates the jury’s palladial status more loudly, and is more closely associated with the jury, than the United States. Its constitution guarantees a right to a jury trial, a right that today retains enough significance to have provided the rationale for a decision as momentous as the U.S. Supreme Court’s striking down of the long-established, comprehensive, and influential federal sentencing guidelines,

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42 PJA Feuerbach, Erklärung des Präsidenten von Feuerbach über seine, angeblich geänderte Ueberzeugung in Ansehung der Geschwornen-Gerichte (Palm & Enke, 1819).
45 Taxquet v Belgium, (2012) 54 EHRR 26 (GC).
in 2005. And yet, even in the United States, the history of the jury is schizophrenic and characterized by the jury’s marginalization, or transformation, in ways that interestingly both resemble and differ from its history in other countries, including England.

American celebrations of the jury as a bulwark against state oppression are a dime a dozen; they exult the jury as a final check against state overreach—or incompetence—if other safeguards at earlier stages of the legal process—in legislation, interpretation, and execution—had failed for one reason or another. The jury might also allow local communities to resist the application of centrally generated, interpreted, and enforced laws and in that way preserve a modicum of local self-government, even if only as a final safety valve. This view of the jury, however, is not necessarily inconsistent with its conception as a policing tool of governance, particularly if it is seen as permitting a modicum of local community self-government at the impositional stage of the legal process in particular cases, which the central government may be willing to accept as a matter of good, or prudent, governance.

Through the individual defendant’s participation in the selection of the petit—though not of the grand—jury, the jury could also be said to provide an avenue for self-judgment. The jury was to be a jury of the defendant’s peers, vicinage, community, and more generally share certain of the defendant’s key characteristics beyond membership in a geographically defined group.

In this, the connection between the defendant and “his” jury, lies the potential for the jury as an institution of modern law, by contributing to the legitimation of the use of state power against a constituent subject-object, i.e., against the defendant regarded as a person endowed with the capacity for autonomy. In this conception, the jury, in the absence of a fully voluntary confession (an actual exercise of autonomy in self-judgment), provides an empathic imaginative or constructive self-judgment by a group of fellow persons.

The more the jury is regarded as some “community’s” self-judgment, rather than as the defendant’s constructive personal self-judgment, the farther it is removed from its possible function as an institution of modern law or a palladium of liberty in the modern, liberal, sense, grounded in the conception of the criminal defendant as no less a person than any other subject-object of state government. Consider, for instance, the jury’s role in the so-called American War on Crime of the past few decades. The jury did not stand in the way of a mass incapacitation campaign directed primarily against poor minority men that resulted in the world’s highest incarceration rate and largest prison population, by wide margins. It is difficult to

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47 Compare the toleration by a strong royal state of local self-government in English legal history, discussed above —.

reconcile mass warehousing of minority populations with a widespread conception of the jury as a palladium of liberty as personal autonomy, rather than as an instrument of state policing governance in a penal system designed to bring to bear the judgment of the community of the “peace forces” against the “criminal forces,” “the enemy within” (to quote from Nixon’s 1968 “Toward Freedom From Fear” speech)\textsuperscript{49}—in other words a sustained episode of mass heteronomy through community judgment (in general policy and, through the jury, in particular cases).\textsuperscript{50}

The jury’s failure to impede the War on Crime also reflects its marginalization. Continued celebrations of the jury notwithstanding, the jury plays a negligible role in the contemporary American penal process. The paradigm of the American penal process is the plea bargain, not the jury trial, and the paradigm of its resolution is the guilty plea, not the jury verdict. Jury trials have become rare in state cases, and almost non-existent in federal cases. The performance of occasional full-fledged jury trials therefore threatens to obscure the overwhelming reality of the penal process. In this light, jury trials misdirect public attention toward the (ideal) exception, distracting it from the (non-ideal) norm, creating the misleading impression of a penal process operating within the strict rule-of-law constraints imposed by an institution designed to protect individual liberty from illegitimate state intrusion. Whether this appearance of legal limits on state penal power manages to exert actual constraints on the behaviour of state officials, as Hay suggested in his analysis of the rule of law under the Bloody Code, is another question.

Once the jury is seen within the framework of the distinction between law and police, autonomy and heteronomy, a non-parochial historical analysis of the jury suggests that, as an institution, the jury doesn’t necessarily fall within one paradigm or the other, or—if you prefer—on one end of the spectrum of governance or the other. The same is true of other norms, institutions, or practices. The existence of state prosecutors or other enforcement officials (“police” or “peace” officers) by itself does not indicate either the presence or absence of state government under the rule of law, despite insistence to the contrary on both sides of the common-civil law divide: one side (the English) long declaring the very notion of a state prosecutor or police officer incompatible with the rule of law, and the other postulating the exact opposite.\textsuperscript{51} Judges aren’t institutionally incapable of interpersonal empathy, nor jurors of heteronomous condemnation. And plea bargains aren’t institutionally incompatible with the ideal of self-judgment, nor courtroom trials (bench, jury, or “mixed”) with heteronomous oppression.\textsuperscript{52}

\textsuperscript{49} R Nixon, ‘Toward Freedom From Fear,’ (1968) 114 Congressional Record 12936, 12937 (May 13); see generally MD Dubber, Victims in the War on Crime (2002) ch 1.
\textsuperscript{50} Paul Butler’s famous call for jury nullification by black jurors at the height of the War on Drugs should be consider in this context. P Butler, ‘Racially Based Jury Nullification: Black Power in the Criminal Justice System,’ (1995) 105 Yale LJ 677.
\textsuperscript{51} See supra at 7.