

New Historical Jurisprudence: Legal History as Critical Analysis of Law

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Abstract

This modest manifesto—or *manifesto*—portrays legal history as a mode of critical analysis of law, using the historical analysis of American penalty as an illustration and the full-fledged manifestos by Piketty and Guldi & Armitage as points of reference. Historical analysis of law, in this light, appears as one mode of critical analysis among others, including, notably, comparative analysis of law, along with economic, philosophical, sociological, or ethical analysis of law, and so on. Historical analysis of law, in other words, is itself a mode of legal scholarship, not a subspecies of law or history. It is a comprehensive view of law from a particular critical vantage point: a way of doing law, rather than of doing things with law. Historical analysis of law in this sense is less “law and history” than “law as history,” less legal history than historical jurisprudence.

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Ours is an age of manifestos. I don’t mean political manifestos, though there certainly are plenty of those around as well. I mean academic manifestos, and, within this genre, the sub-genre of historical manifestos. There is, for starters, the conveniently named *The History Manifesto* by Jo Guldi and David Armitage,¹ previewed by its authors in a provocative, even rousing, article that calls for the revival of historiography in the *longue durée* (and provides an entertaining tour of the various recent “turns” in historical scholarship, each of which presumably came with its own manifesto, if not in name and perhaps only *ex post*).² Then there is Thomas Piketty’s academic blockbuster, *Capital in the Twenty-First Century* (2014), a work of history as much as of economics that—though less conveniently titled—is, in its introduction, no less explicit in its manifest ambitions. Both of these exciting and important projects, particularly—and again, explicitly—the former, can be seen as belonging at least partly to another, broader, genre of manifesto, the digital humanities manifesto.³

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¹ Available both in print (Jo Guldi & David Armitage, *The History Manifesto* (2014)) and online (<http://historymanifesto.cambridge.org/>).

² David Armitage & Jo Guldi, *The Return of the Longue Durée: An Anglo-American Perspective* (<http://scholar.harvard.edu/files/armitage/files/rld Annales revised 0.pdf>) (forthcoming in *70 Annales: Histoire, Sciences Sociales* (2015) (in French)).

³ Including the “Digital Humanities Manifesto” itself, available in several versions, helpfully and appropriately numbered 1.0 and 2.0 (by last count). A Digital Humanities Manifesto (v. 1.0) (<http://manifesto.humanities.ucla.edu/>); The Digital Humanities Manifesto 2.0 (<http://manifesto.humanities.ucla.edu/2009/05/29/the-digital-humanities-manifesto-20/>).

These two foundational projects have more than their general manifesto-ness in common; they also share important aspects of their particular vision for historical work, and in the case of Piketty's, also for work in economics. Besides their excitement about data, including technological advances that make possible new means of data accumulation and "mining" or "harvesting," not to mention visual presentation, they reflect a desire to expand the scope of inquiry, in two directions: time and space. In other words, they call for a historical-comparative method, broadly conceived, an approach that is not only *longue durée*, but also *large portée*. Further, their approach is explicitly, and importantly, critical. Their brand of history (and, in fact, of scholarship) has a point, and that point is to critique present conditions from a historical (and comparative) vantage point: the crises of global income inequality in one case and of global warming (and other "contemporary global issues and alternative futures"⁴) in the other. The history of the new manifestos is, in other words, meant to be a form of "engaged" scholarship.⁵

The aim of this mini-manifesto, or *minifesto*, is far more modest. It deals not with scholarship in general, nor one of its branches (e.g., humanities), nor even with a scholarly "discipline" (e.g., history or economics). Instead, it focuses on the relatively narrow scholarly project of legal history, which—at least at first glance—looks like a subdiscipline, of history or of law. The view of legal history set out here regards it not as a type of applied history, i.e., "historical" methodology straightforwardly applied to "law," a something (an institutional fact perhaps) that sits still for historical inspection as a model might in historical sketching class. Instead, the conception of legal history explored in this minifesto portrays legal history not as a subdiscipline of either history or law, but instead as a mode of *critical analysis of law*.⁶ Historical analysis of law, in this light, appears as one mode of critical analysis among others, including, notably, comparative analysis of law, along with economic analysis of law, or philosophical or sociological or ethical analysis of law. Historical analysis of law, in other words, is a mode of legal scholarship, not a subspecies of law (nor of history). It is a comprehensive view of law from a particular critical vantage point: a way of doing law, rather than of doing things with law. Historical analysis of law in this sense is less legal history than historical jurisprudence, less "law and history" than "law as history."⁷

Regarding historical analysis of law as critical analysis of law means putting legal history in context, or—more precisely—in two contexts: first, historical analysis of law is only one mode of *critical analysis* of law; second, historical analysis of law is critical analysis of *law*. From the standpoint of the *subject*—or the method—of inquiry, there are other modes of critical analysis of law (economic analysis of law, for instance); and from the

⁴ Armitage & Guldi, *supra* note 2, at 33.

⁵ *Id.* at 5 ("engaged academia").

⁶ See Special Issue, *Critical Analysis of Law and the New Interdisciplinarity*, 1:1 *CAL* (2014).

⁷ See Catherine L. Fisk & Robert W. Gordon, "Law As . . .": Theory and Method in Legal History, 1 *U. Irvine L. Rev.* 519 (2011). "Law as . . ." in this sense differs from "law as literature," which reads law as literature, and then subjects it to literary critical analysis. See Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* (2000).

standpoint of the *object* of inquiry, there are historical analyses of other institutions or practices (the economy, for instance).⁸ Situating legal history as historical analysis of law within the enterprise of legal scholarship, and in fact of scholarship generally speaking, thus requires an account of both *historical analysis* and *law*, without taking either as a given. In the end, it means locating legal history in a broad and pluralistic account of interdisciplinary scholarship in and on law that nonetheless retains the distinction between subject (or method) and object of analysis and does not treat law as *sui generis* among objects of scholarly inquiry.

I. Legal History as *Critical Analysis of Law (Subject/Method)*

Critical analysis is the method of legal history as historical analysis of law. Method here is understood broadly to address not only the question of *how*, but also that of *why*. The answer to the first question is: analysis. The answer to the second is: critique. The reason for differentiating between these two aspects of legal history's method is not to draw a categorical distinction between one and the other. There is little doubt—and certainly nothing to be gained by doubting—that analysis of a particular object is affected by one's reason(s) for bothering with the analysis in the first place. Analysis without critique is pointless, and critique without analysis is baseless.

In fact, one of the distinguishing features of legal history as critical analysis of law is that it insists on the importance of analysis without attributing that importance to some claim of objectivity. Even if it were possible to engage in analysis for its own sake, to discover some objective truth or facts about the object of one's inquiry, this analysis quite literally would be pointless. The only reason for analyzing the object of inquiry is to make critique possible.

This critique may come in two forms; let's call them internal and external for purposes of this minifesto (we might also label them formal and substantive, or abstract and particular). *Internal* critique tests (implied or explicit) claims regarding a particular state of affairs or a means-end relationship between an action and a given state of affairs, regardless of the particular end (or the means) at issue. For instance, if a particular action is said to have had (or to have, or to be expected to have) a particular effect, then a means-end critique might point out a discrepancy between claimed or anticipated and actual effect. *External* critique, by contrast, holds up the state of affairs or action against a justificatory (rather than a performatory) norm, and against a claim of legitimacy in particular. Here the question is not whether the action is successful, or as successful as claimed, but whether it is legitimate (or just, or right). The test is not one of competence, or prudence, or efficiency, but of legitimacy. A competent (or successful, etc.) action may (but needn't) be illegitimate, and an incompetent (or unsuccessful, etc.) one may (but needn't) be legitimate.

⁸ For a fascinating extensive historical analysis of "economy" as an object of inquiry, see David Grewal, *The Invention of the Economy: A History of Economic Thought* (Ph.D. dissertation, Harvard University, 2010).

External critique tends to get all the attention, at least partly because it is considered the more controversial, or intrusive, of the two. (This manifesto is no exception, as we'll see shortly.) But internal critique is worth a closer look, even though—or perhaps because—it may appear, and is often presented, as straightforward, as self-evident and -executing. There is, first, the perhaps obvious, but occasionally neglected, point that the mode and accuracy of measuring the claimed effect—both independently and in its supposed causal connection to the means—is itself contestable. Empirical or statistical research that tests claimed policy successes, for instance, or efforts to take credit for improved (economic, social, etc.) conditions purportedly triggered by some state action or other, can usefully ground critique; it can start and frame a productive discussion about “facts,” but it cannot be—and should not aim to be—the last word.

The seductiveness of facts and data may appear as either naivety or ideology. In either case, their presentation (or revelation) is taken to resolve an issue, rather than to guide its scholarly, or for that matter its public, consideration, as if facts—once “mined” or “harvested” through the wonders of “digital technology”—need only be stated, and data displayed, requiring no interpretation (either because facts are taken as self-interpreting or because there is only one possible interpretation: naivety or ideology⁹). In history as critical analysis, however, history is only a tool of critical analysis, one among others.

A. *New Political Economy & New Longue Durée*

Take Piketty's work for instance. Piketty draws on several (disciplinary) perspectives to construct a comprehensive and multifaceted critical analysis of political economy. He presents a mass of economic data not only within individual “economies” but also across space, or systems (comparative analysis), and across time (historical analysis). (Here, Piketty's wide-ranging approach, by going both long, historically, and broad, comparatively, reflects a view not only of the *longue durée* but also of what we might call the *large portée*; more on these aspects of critical analysis below.) Remarkably, and refreshingly, Piketty also turns to literature as an analytic tool, in occasional readings of novels as indicators of conceptions of wealth and its distribution, again across space and time. His use of literary materials is openly impressionistic, even playful, and yet it is illuminating in its own right.

Piketty's project should be seen in the context of other similar data-driven projects, notably the Digital Humanities movement, that are fueled by—often contagious—enthusiasm about the new opportunities for data assembly, “mining,” and—last but certainly not least—display, made possible by technological (“digital”) progress. This excitement about new data and what to do with them can appear uncritically confident in data's ability to speak for themselves, as if the “future of the humanities,” say, can be se-

⁹ His critics have tended to accuse Piketty of ideology rather than naivety, leaving it unclear whether the problem is ideological use of facts in general or the particular (Marxist, socialist, social democratic, “French”) ideology in question. Faith in data appears to straddle ideological divides, unless the data are said to be “flawed.” Chris Giles, *Piketty Findings Undercut by Errors*, Financial Times (London), May 23, 2014 (<http://www.ft.com/intl/cms/s/2/e1f343ca-e281-11e3-89fd-00144feabdc0.html#axzz3QXMA31zW>).

cured by grounding them in a flood—or less obviously futile, even a mountain—of hard data and facts, like the hard sciences. In this light, Piketty’s project (and similar data-driven efforts) may seem not only naive, but—despite its embrace of “modern” technology—also surprisingly quaint, given that the belief in the redeeming power of numbers, facts, statistics, and their display in graphs, tables, and pie charts has been around for quite some time, just about as long as self-consciously “modern” ideas of “empirical,” “hard,” “natural,” “exact,” or even “real” science. (We will discuss notions of “legal” science when we turn from critical analysis in general to critical analysis of law, in part II.)

Interestingly, however, Piketty and others more or less loosely affiliated with the Digital Humanities project acknowledge and embrace their unoriginality (if not necessarily in this respect). They see, and portray, themselves not as doing something new, but as doing something old, only better, and faster, and on a larger scale, thanks to advances in technology. This initially may look like adding the insult of blind faith in technology to the injury of blind faith in data. But the combination of honesty and modesty is refreshing nonetheless and may, more sympathetically, be taken as evidence if not of what Piketty calls admiringly “the true scientific ethic,”¹⁰ then of a general curiosity, a willingness to question perpetuated assumptions, and to remain sensitive not only to the context of one’s object of inquiry, but also to one’s approach to it: call it a spirit of critical analysis (without the need to appropriate scientific garb, which—as Piketty also cautions—will never quite fit the “social” scientist, not to mention the humanities scholar).

This willingness to critique—and to contextualize—one’s own critical posture and method (and pretensions!) is an important feature of the project of critical analysis in general, and of critical analysis of law in particular. Critical analysis ought always to be aware of its place within a broader intellectual or discursive enterprise or enterprises, again both temporally and systemically, across time and space, in length and in breadth. If one has a look around, beyond one’s immediate object of inquiry, it quickly becomes clear that critical analysis—as a general critical method of inquiry—is not limited to one particular object: law, the economy, society, literature are all possible objects of critical analysis.

This is not to say that to undertake a critical analysis of literature, for instance, is indistinguishable in method or aim from a critical analysis of law. Instead, in each case, analysis would aim to set a framework for critique that reflects its object.¹¹ For instance, a critical analysis of literature may—but need not—operate with different norms than a critical analysis of law. Just what distinguishes one from the other obviously will depend on its object; if, for instance, a critical analysis of literature broadly speaking seeks to develop and apply aesthetic norms, a critical analysis of law instead might invoke legitimacy

¹⁰ Thomas Piketty, *Capital in the Twenty-First Century* 14 (2014).

¹¹ It may well be illuminating to critically analyze one object qua another, for instance, by treating “law as literature.” In that case, one simply ascribes to, or recognizes, certain features in one object (law) that are ordinarily taken as characteristic of another (literature).

ones, again depending on how one regards the object of inquiry in each case.¹² In particular, given the focus of this manifesto, any critical analysis of *law*, including but not limited to historical analysis of law, must be grounded in an account of its object: law. It does not matter which account one adopts; what matters is that law is not treated as a self-evident uncontested datum that patiently awaits analysis. This is an important point, to which we'll return in part II, when we narrow our focus on the critical analysis of law in particular, and set out one possible, and perhaps critically fruitful, account of law.

Contextualizing, and thereby opening up to critique, one's project of critical analysis means not only seeing it as part of a more general critical enterprise—and, incidentally, in this way opening up, and structuring, a great many opportunities for interdisciplinary research and exchange. It also means *historicizing* it, i.e., seeing it not only in comparative but also in temporal context. Here, once again, it is useful to consider both the subject (or method) and the object of inquiry. In analyzing a given object of inquiry (say, law), it is important to consider it in historical perspective: for instance, the “modern” conception of law may turn out to differ substantially, even categorically, from its predecessor(s); in fact, as we will see shortly, that difference may consist precisely in its critical potential.

When it comes to the subject (or method) of inquiry, we already noted that Piketty, in his critical analysis of economy, sees himself as recovering a lost tradition of economic research and reflection—political economy, or oeconomy (from Greek *oikonomia*, household government)—that regarded economics as (also) the critical analysis of state action rather than as applied mathematics.¹³ (Let's call this New Political Economy.) Similarly, in the realm of history, Jo Guldi and David Armitage present their ambitious manifesto as a revival of the French *Annales* school of historiography in the *longue durée* (New *Longue Durée*). In both instances, the return to a (fairly) long lost (New Political Economy) and not-quite-so long lost (New *Longue Durée*) scholarly enterprise promises not a mere continuation, but a new and improved version of the original. Both emphasize, as we've already noted, the significant technological advances—in the production, mining, and display of data—since the previous version of their respective scholarly projects.

¹² See, e.g., Simon Stern, Law and Literature, in *The Oxford Handbook of Criminal Law* 111 (Markus D. Dubber & Tatjana Hörnle eds., 2014) (on legal aesthetics); Simon Stern, Effect and Technique in Legal Aesthetics, 2:2 *CAL* (Special Issue on “The Arts in Legal History”) (forthcoming 2015). On the potential of “genre” as a common tool of critical analysis in law and literature, see Mark Antaki, Genre, Critique, and Human Rights, 82 *U. Toronto Q.* 974 (2013); Markus D. Dubber, Paradigms of Penal Law, in *The Oxford Handbook of Criminal Law*, supra, at 1017.

¹³ The title of his book makes this point explicit. Portraying Piketty as having written a twenty-first-century version of *Das Kapital*, however, misrepresents and—oddly—understates his ambition. Piketty is not interested in reviving Marxian economic-historical analysis, substantively or even methodologically; he wants to revive economic-historical analysis, period, supplemented by a comparative, even global, dimension made possible by the development of modern technologies of data collection, harvesting, and display. On the connection between the history of “political economy” and “police” as *oikos*-centered modes of governance, see Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

These data are significant also because they allow the humanities (in one case) and the social sciences (in the other) to approximate, if not to match, the scientific rigor of the “exact” sciences. With scientific rigor comes expertise and with expertise, status. This status in turn is significant because it makes possible the sort of “engaged” scholarship that expands its practitioners’ audience from a few (increasingly) specialized scholars to the general public and, most important, to decision makers, not only at the level of domestic government but, eventually, at the global level. In other words, with status comes relevance.

Both New Political Economy and New *Longue Durée* are eager to reach a wider audience because their vision of engaged scholarship is sharply, proudly, and crucially *normative*. Both reflect an urge to abandon the (real or imagined) conception of their respective disciplines as merely descriptive—or if you like, analytic—enterprises that either (profess to) abandon all normative aims or, at least in the case of (U.S.) economics, are seen as primarily pursuing a particular, and particularly “conservative,” normative agenda (if not ideology). This normative turn, too, appears as a re-turn to an earlier time when economists and historians chimed in on the weighty issues of the day and had the ear of policy makers. (Whether this vision of scholarly engagement and influence is itself a revision is another question; it’s irrelevant for our present purpose of noting the importance of contextualizing one’s mode of critical analysis.) Once again, however, it is a superior version of the original project, one bolstered by a broad and deep analysis aided by technological innovation and, also important, generated by expert scholars in contradistinction to, as Guldi and Armitage put it, the “dirty *longue durée*” history produced by “non-historians” at “think-tanks and NGOs,” the “tool of journalists and pundits, hardly a science at all.”¹⁴

To say that neither New Political Economy nor New *Longue Durée* is satisfied with analysis for its own sake but instead seeks analysis for the sake of normative engagement is, of course, just another way of saying that they are engaged in critical analysis. The targets of their critical attention, the triggers of their normative engagement, differ, but their central significance to both scholarly projects does not. Piketty may be motivated to act by what he sees as widespread, and growing, global income and wealth disparity, a troubling phenomenon that in his view has been largely, and disturbingly, ignored by his home discipline, economics. Guldi and Armitage may be troubled by global warming and violence. All are driven not merely to better understand, but to influence, and to change. Guldi and Armitage go so far as to speak of a “moral rethinking of historians’ place in the university and in the world beyond” and to see themselves as “faced with two frontiers, one of moral duty and the other of technological opportunity.”¹⁵ (Perhaps not surprisingly, this rethinking—presumably like most other similar exercises—does not result in a call that the person, or group, doing the rethinking assume a more marginal role in the relevant context, or contexts.)

¹⁴ Armitage & Guldi, *supra* note 2, at 28, 32.

¹⁵ *Id.* at 35, 38.

When it comes to *historical* analysis, of particular interest for our inquiry into the enterprise of legal history, this pointedly normative approach translates into an openly presentist drive to draw (again, at least in New *Longue Durée*'s case, "moral") "lessons" from the past.¹⁶ The point of historical analysis here is, once again, critique, and more specifically critique of present conditions. New Political Economy and New *Longue Durée* see their contribution not only as countering an anti-presentist orthodoxy that defines historical inquiry as history for its own sake, thereby (at least apparently) disqualifying itself from contributing to discourse about important issues of the day. New *Longue Durée* instead explicitly derives critical purchase from history. It does not shy away from rewriting history or, perhaps more precisely, from revealing histories that so far have been submerged under layers of conventional historical narrative, and thereby not only drawing lessons from history, but drawing *different* lessons from *different* histories. So international history might reappear as a history of peace—rather than of warmaking, marked not by episodes of armed conflict, but by moments of reconciliation and tranquility (if that is what marks "peace," rather than the mere absence of war). Also consider here Steven Pinker's—also data- and graph-laden—recent revisionist and (very) *longue durée* history of violence, which seeks to stand on its head what he considers to be the orthodox, and literally false, narrative of humankind's continual descent into ever greater violence.¹⁷

Piketty similarly challenges what he sees as the standard (if not necessarily explicit) historical narrative, but draws a *less* optimistic picture of past and—presumably, though as he acknowledges, unpredictable—future trends. His subject is not the history of war and violence (or of peace and tranquility) but the history of income and wealth inequality; and where others, in his view, claim (or at least assume) a continuous trend toward ever greater equality, he documents a continuing development in the exact opposite direction, toward greater disparity.

The stories may be different; the approach is not. A history is found wanting and replaced with a counter-history, which is backed up by newly found, newly harvested, and newly presented data, and is then, in New Political Economy and in New *Longue Durée*, used to launch a critique of present conditions. This critique is *constructive*, in the sense of being designed to produce a (positive) effect in the real world. It does not see itself as a (merely) academic exercise, as just another turn in the parade of turns that mark the history of scholarship (and, apparently, of historiography in particular). The analysis may be the means to the end of critique, but the critique itself is merely a means to the end of progress (or justice, or right): analysis grounds critique, and critique produces change.

¹⁶ Id. at 34.

¹⁷ Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (2011). While it's not clear whether Pinker would count as a "historian" in Guldi and Armitage's book, his analysis presumably would qualify as "science" of some sort.

B. *New Historical Jurisprudence*

This modest manifesto does not set out to reorient major academic disciplines, never mind to reshape public debate or to trigger reform at the local, national, or global level by, say, assigning legal historians a more prominent advisory role in policy making. It does not hope to tackle global warming or global wealth and income disparity, nor to harness the power of recent advances in digital technology.

And yet, despite these obvious differences in form and scale, there are also important similarities between this minifesto and the more ambitious programmatic contributions by Piketty and Guldi and Armitage. Most important, this minifesto sets out a scholarly agenda that revolves around—and makes explicit—the idea of critical analysis, that combination of understanding and critique which analyzes for the sake of critique, rather than for its own sake, and at the same time eschews critique not founded on analysis: legal history as historical analysis of law is a mode of critical analysis of law.

This minifesto of legal history as historical analysis of law critiques and contextualizes its critical approach, both comparatively (by locating itself in relation to other projects of critical analysis in other fields, like New Political Economy and New *Longue Durée*) and historically (by historicizing its method).¹⁸ Rather than appearing as a radical departure, it can be seen as breathing new life into a once flourishing scholarly project, long defunct or modified beyond recognition and drained of its original animating idea: historical jurisprudence. In this respect historical analysis of law, as New Historical Jurisprudence, resembles not only Piketty's New Political Economy and Guldi and Armitage's New *Longue Durée*, but also the New Police Science, an attempt to reconnect with a once sprawling intellectual, and institutional, project that attempted to rationalize, if not to critically analyze, the sovereign's exercise of its all-encompassing, ill-definable, and discretionary power to police, in the traditional broad sense of the power to maintain the peace.¹⁹ (More below on the power to police, and the distinction between police and law as basic modes of governance.)

Regarded as New Historical Jurisprudence, historical analysis of law returns to the project of historical analysis as a mode of legal scholarship, rather than as applied historiography—as historical jurisprudence, rather than as legal history. In particular, New Historical Jurisprudence reaches back to the original conception of historical jurisprudence, by Savigny, as the critical analysis of contemporary law on the basis of norms emerging from historical analysis of foundational moments in the evolution of a particular legal system.²⁰ Savigny saw classical Roman law as that moment (from the perspective of

¹⁸ In fact, it also historicizes its object, law, as we'll see in the next part.

¹⁹ See, e.g., *The New Police Science: The Police Power in Domestic and International Governance* (Markus D. Dubber & Mariana Valverde eds., 2006).

²⁰ This ignores other aspects of Savigny's wide-ranging and evolving views, such as his proto-sociolegal comments in his polemic against codification, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), on the *Volksgeist* as source of law and the role of jurists as agents of legal evolution, which proved

early nineteenth-century Germany) and viewed the analytic task of historical jurisprudence as the careful discovery and formulation of pure norms of Roman law cleansed of layers of, at best, unknowing editorial interference. Following his classical Roman law sources, Savigny also limited himself to the study of private law, and focused on the construction of a system of legal norms out of the basic building blocks he found in these sources, showing no interest in questions of legitimacy. But there is no reason why historical analysis of law in this critical spirit would have to take this form, use this method, or select this focus, here and now or, for that matter, there and then (as many of Savigny's contemporaries—and fellow historical jurists—already recognized, subsequently abandoning the historical analysis of Roman law in favor of German law).

New Historical Jurisprudence recovers the animating spirit of Old Historical Jurisprudence rather than its particular manifestation in Savigny's work or, for that matter, in the work of any other of the many scholars associated with the quickly multiplying projects that went by the name "historical jurisprudence," either in Germany or elsewhere, over the course of the nineteenth century. It regards history as one way of doing law: it sees historical analysis of law as one form—not the only form, or the only true, or correct, or "scientific" form—of critical analysis of law.

There are many perspectives on law, some more fruitful, illuminating, or disruptive than others, but none can claim superiority over another on the ground of its unique, or uniquely elevated, objectivity or scientific status. This is a point worth making, and repeating, since claims of superiority and exclusivity, often in the guise of a supposedly unique scientificity, have been common, even—and perhaps surprisingly—with respect to historical analysis, whether it is presented as the mere inquiry into historical "facts" or the revelation of purified ancient legal norms, supposedly produced—as Savigny claimed—at the perfect Goldilocksian moment in the evolution of a legal order (not too early, not too late, but just right). The appearance of historical jurisprudence in early nineteenth-century Germany coincided with the appearance of German legal science, and the origins of the German university: *historische Rechtsschule* and *geschichtliche Rechtswissenschaft* were synonyms. Historical analysis was said to be superior to philosophical analysis precisely because it was grounded in the truly scientific study of historical sources, rather than the unmoored speculation characteristic of eighteenth-century natural law theory.

influential in Germany and elsewhere (notably in the nineteenth-century American codification debate). We'll also leave aside the "historical jurisprudence" of Henry Sumner Maine or other "historical jurisprudences" that populated Anglo-American legal thought at one point or another. In the Anglo-American literature, the work of Maitland and Pollock better captures the critical spirit of historical analysis of law as New Historical Jurisprudence. Maitland in particular was heavily influenced not by Savigny, but by Gierke, a "Germanist" historical jurist who used historical analysis to critique legal norms and institutions for which Savigny and his "Romanist" followers claimed foundations in Roman law. See, e.g., Markus D. Dubber, *The Comparative History and Theory of Corporate Criminal Liability*, 16 *New Crim. L. Rev.* 203 (2013) (discussing Maitland's reliance on Gierke's historical analysis of corporate personhood in *Das deutsche Genossenschaftsrecht* (4 vols., 1868-1913)).

Historical analysis of law (as New Historical Jurisprudence) parallels New Political Economy and New *Longue Durée* in another, important, sense: its normativity. In one respect, this goes without saying; after all, what makes critical analysis critical is precisely its search for a normative payoff. Still, it is worth taking a closer look at the particular form this normativity—or, if you prefer, this commitment to critique—takes in these scholarly projects. Insofar as the normativity of historical analysis of law turns on the conception of its object, law, this discussion will also take us into the next part, which moves from a consideration of the context of the subject, or, method, of historical analysis of law to that of its object.

Recall at this point the previously drawn distinction between two modes of critique, internal and external. Internal critique investigates actions and states of affairs under norms of prudence and instrumental rationality. External critique holds up actions and states of affairs against substantive norms of justice, or right, to assess the legitimacy of the action in question. So far, we have focused on internal critique, and in particular on its (only) apparently unproblematic operation. Besides the importance of avoiding the pitfalls of naive or ideological faith in the self-execution of presentations of facts and “hard” data—with or without technological enhancement—another question is worth keeping in mind: even if we assume for the moment that a means-end mismatch, say, can be made out with sufficient reliability to all concerned, so what?

In other words, what is the significance or “salience” of imprudence, or incompetence, or any deviation from the norms of good governance, instrumental rationality, and so on? Why would it matter? Now, the very *existence* of a conversation about means-end relations, about states of affairs, assumed or asserted, may well indicate that non-compliance with norms of good governance is a matter worthy of consideration. But here, too, it would matter whether that conversation is a public one, or one that occurs among state officials and experts, and—of course—whether the inquiry into governmental prudence qualifies as a conversation in the first place, rather than, say, a one-sided internal request for information about the operation of the state bureaucracy.

The crucial question concerns the bite of critique, i.e., the *significance*, or consequence, of non-compliance. The answer turns both on the nature of the critique and on the conception of governance framing it.

Take, for instance, a patriarchal householder whose discretionary dominion over his *domus* or household (and all of its constituents or resources, human or not) is not subject to constraint or control, except perhaps at the very margins of extreme incompetence policed by a superior (macro) householder who is the source of the micro householder’s delegated power. In this marginal case, at least in theory if not in practice, the macro householder can interfere in the micro householder’s governing of his micro household—which has been integrated into the sovereign’s macro household—and deprive him of his householder status and thereby of his authority.

The legitimacy, as opposed to the (delegated) authority, of the householder’s power, and of any actions taken in exercise of that power, is beyond question or, more precisely, is not *in question* to begin with. The source of the householder’s power is delegation from a

superior householder, except in the unique case of the macro householder—the king, or sovereign—who, or which (in the case of modern, apersonal sovereigns, such as “the people”), holds undelegated, original, power. The authority of the sovereign householder’s actions does not derive from their compliance with any norm, including something as apparently simple, or commonsensical, as compliance with means-end rationality. The sovereign/*dominus/oikonomos* is free to choose his ends and, given an end, is free to choose the means to achieve it. More to the point, he (or it) is free *not* to choose ends, or to choose different ends, and not to be guided by means-end rationality, or any other norms, including norms apparently less commonsensical (or “objective”), like justice or (public) welfare, or the consolidation and perpetuation of power.

Sovereignty, in this conception of governance, extends not only to the content of ends but also to their salience. The sovereign may choose to consult certain norms; he does not subject himself to them nor could anyone else subject him to them. Norms addressed to a sovereign, or rather norms a sovereign addresses to himself, are by their nature flexible standards that might guide the sovereign’s deliberations and possibly his actions. They could not be mandatory; failure to consult them, never mind to comply with them, would have no consequence.²¹

In other words, norms of sovereign governance are discretionary guidelines of good governance that the governor is free to ignore and non-compliance with which does not draw into question his authority (except in the mentioned, exceptional cases of debilitating incompetence that may trigger interference by a macro householder, if any). Since the sovereign’s power is based on authority, rather than legitimacy, any claim of non-compliance with an internal norm of competence can have no effect on his (or its) legitimacy, even in extreme cases. For the same reason, an external critique framed in terms of legitimacy would be beside the point.

Now consider a governing regime that explicitly grounds its power in legitimacy, rather than in authority, delegated or not. More specifically, let’s say the legitimacy of its power derives from the (actual or constructive) consent of its constituents, which in turn manifests each constituent’s distinctive capacity for autonomy, or self-government.

Under this conception of governance, the significance of non-compliance with an internal norm of competence resembles that in the previous case. It is not fatal; failure to achieve an end, even through obvious failures of analysis or execution, does not deprive the regime of its legitimacy. In certain extreme cases, however, perhaps as a result of persistent fundamental errors of judgment indicating extreme incompetence (or persistent deception), the regime may be said to lose the “confidence”—and therefore the legitimacy—of its constituents, justifying a call for early elections to confirm, or deny, the required consent (assuming regular elections are used to measure consent).

²¹ More precisely, the sovereign’s non-compliance with self-imposed norms would have no consequence for the *authority* of his power or actions; it may affect his *effectiveness*, by compromising his ability to extract others’ compliance with the norms he imposes on them. Cf. Douglas Hay, Property, Authority and the Criminal Law, in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* 17 (Douglas Hay et al. eds., 1975).

But, as in the case of patriarchal sovereignty, incompetence ordinarily does not have fatal consequences to the basis of the state's power—in this case legitimacy, rather than authority. Insofar as a perception of incompetence may reduce the likelihood of retention, office holders will have an incentive to comply with norms of good governance. But their failure to comply does not threaten the legitimacy of their office, even if—as in the case of the patriarchal sovereign—it may interfere with their ability to govern effectively.

The two scenarios differ more clearly in the significance of non-compliance with external norms, i.e., in the bite not of internal, but of external, critique. This is hardly surprising. After all, the distinction drawn above between internal and external critique turns on the role of the concept of legitimacy. Internal critique challenges competence; external critique questions legitimacy. External critique in the first scenario doesn't merely have less bite than in the second; it is toothless. Since the patriarchal sovereign—either as macro or as micro householder—neither seeks nor requires legitimacy, non-compliance with legitimating norms is irrelevant. By contrast, in the second scenario, non-compliance with external norms, as substantiated by external critique, is fatal. Government may be more or less competent; but it is either legitimate or it is not.

The general point here is that a critical analysis of an exercise of governing power—say, state action or keeping the (micro or macro) household peace—operates against the backdrop of a particular conception, or mode, of governance. Historical analysis can contribute to the construction of this analytic framework. In particular, the program of legal history as historical analysis of law set out in the present manifesto draws on one such framework, defined by two basic modes of governance—heteronomy and autonomy—that can be traced throughout the evolution of Western political and legal thought and action, and most recently in its modern manifestation of the distinction between “police” and “law.”

In sum, this manifesto's historical analysis of law is critical analysis of law, grounded in a (*longue durée* and *large portée*) historical analysis of “law” as the mode of governance that regards state power as legitimated through, and only through, the autonomy of state constituents qua persons, all of whom share a definitive capacity for autonomy.

II. Legal History as Critical Analysis of Law (Object)

A critical analysis intent on going beyond internal guidelines to external critique with bite needs a theory or an account of legitimacy (or justice, morality, right—whatever the relevant critical register happens to be): it needs to specify the norm against which it measures the legitimacy (justice, morality, rightness) of the action or state of affairs in question. In the case of critical analysis of law, and therefore also of historical analysis of law, this account emerges out of an analysis of the object of analysis itself: law. Moreover, as this manifesto argues, the modern concept of law is distinctive precisely in its sharp and constitutive normativity, and more specifically in its grounding of the legitimacy of state action on and against persons in the capacity for autonomy of these persons. This autonomy-based conception of the person is the central invention, or discovery, of the Enlightenment and the modern idea of law manifests that conception in the realm of state action, i.e., in

the “political” realm.²² The political realm, with the Enlightenment, ostensibly becomes the legal realm—is legalized—insofar as state action becomes subject to the legitimacy constraints imposed by the person- and therefore ultimately autonomy-based conception of modern law; the state becomes the law state (*Rechtsstaat*), in ideal, if not in practice. In fact, much of the critical analysis of state action since the Enlightenment’s critical moment has consisted of comparing the ideal of the law state with the reality of state power.

Historical analysis plays a central role in the development of an account of legitimacy that can ground critical analysis. In particular, critical analysis of law—i.e., critical analysis of state action qua law—depends crucially on historical analysis of law. The distinctive critical bite of the modern concept of law emerges out of a deep and wide—broad historical-comparative—analysis of conceptions of government.²³ The scope of this inquiry, of course, is contestable; it is here limited to what is ordinarily called the Western tradition and so reaches back to what is generally regarded as the, or certainly a key, formative moment in that tradition: classical Athens. The resulting, Enlightenment-formed and autonomy-based, conception of modern law can be seen as “liberal”: in the end, then, the historical-comparative inquiry, though long and broad, is limited to the Western liberal tradition.

Historical analysis contributes to critical analysis in two, related, ways. It can ground and reveal critical norms, through a genealogical inquiry tracing them to foundational moments in the evolution of a particular phenomenon or practice, such as government, state power, or state action. But it can, at the same time, historicize and shape supposed foundational critical norms by placing them in historical context. The critical norms may be foundational, but they are foundational within a specific historical (and systemic) context.

Historical analysis in this way both makes possible and frames critical analysis for its particular object. For instance, a critical analysis of a particular exercise of state power (e.g., a state practice or institution) qua law—i.e., from the perspective of law—at a particular time (and in a particular place) would draw on the historically (and systemically) relevant conception of law, assuming it was not meant as a productive exercise in anachronistic analysis, perhaps designed to illustrate the very historical developments (or systemic differences) that make it inapposite. To subject a seventeenth-century criminal prohibition in an American colony (say, of witchcraft) to critique in light of the modern autonomy-based conception of law is historically inapposite—and perhaps even systemically, depending on whether or not the modern liberal conception of law as outlined above can be said to be rooted (also) in the history of political and legal thought and action of the state, or government, in question.

²² See J.B. Schneewind, *The Invention of Autonomy* (1998).

²³ For a related discussion, focused on the historical analysis of criminal law, see Markus D. Dubber, *Histories of Crime and Criminal Justice and the Historical Analysis of Criminal Law*, in *The Oxford Handbook of the History of Crime and Criminal Justice* (Paul Knepper & Anja Johansen eds., forthcoming 2015).

Within a given historical, and systemic, context, further analytic framing may be appropriate. Take, for instance, the critical analysis of law (as opposed to some other object, like the economy). From the perspective of historical analysis, the modern conception of law appears as a recent manifestation of one mode of governance (autonomy) that has stood in tension with another (heteronomy) since classical Athens. The relationship between these two conceptions of governing—or, to invoke Foucault’s useful, if awkward, term: governmentalities—was reinterpreted, and renamed, during the Enlightenment, which redefined (autonomous) “law” in contradistinction to (heteronomous) “police,” pitting the new ideal of the modern law state (*Rechtsstaat*) against the patriarchal police state (*Polizeistaat*). The tension between heteronomy and autonomy originally was managed, if not resolved, in classical Athens by confining them to separate, though connected, spheres of government: the private realm of the household for one and the public realm of the city for the other. The household was the locus of heteronomy, with a categorical distinction between the autonomous *sui iuris* householder and the heteronomous household (including human, nonhuman, and inanimate resources); membership in the autonomous, democratic, realm of the *agora* was limited to householders, whose distinctive capacity for autonomy manifested itself in their government of a heteronomous household, thus establishing the link between both governmental spheres.

This minifesto is not the place to set out the *longue durée* (and *large portée*) history of the tension between autonomy and heteronomy in Western government.²⁴ For present purposes, it is enough to suggest that the collapse of republican government in Athens, and then in Rome, can be seen as the breakdown of the original division of labor between a heteronomous private and an autonomous public sphere, as the model of patriarchal household governance was expanded into the public realm, with the state’s macro householder being regarded as the *pater patriae*. The patriarchal model eventually became so dominant as to become synonymous with government at all levels, from the family to the church to the state. The concept of police represented an early modern attempt to rationalize and systematize this mode of governance, aided (primarily) in continental Europe by the development of a police science (*Polizeiwissenschaft*) that produced compendia and guidebooks of good governance (“good police”) addressed to sovereigns who governed a “police state” (*Polizeistaat*) like a “large family” (Rousseau) or a “well-governed family” (Blackstone).²⁵

The fundamental Enlightenment critique of political power challenged the long-dominant conception of government as heteronomous household government. The capacity for autonomy was no longer limited to the sovereign/householder, but now was posited as the definitive feature of personhood, shared by all persons as such. The radical

²⁴ For more on this see, e.g., Dubber, *supra* note 12.

²⁵ Jean-Jacques Rousseau, Discourse on Political Economy, in *On the Social Contract*, with Geneva Manuscript and Political Economy, 209, 209 (Roger D. Masters ed. & Judith R. Masters trans., 1978) (1755); 4 William Blackstone, *Commentaries on the Laws of England* 162 (1769).

distinction between governor and governed was replaced by the identity of persons capable of self-government. Autonomy once again became the mode of public government, but only after having been dramatically expanded from a sign of distinction to a common ground (in theory, if not in practice).

The radical identity of governor and governed, subject and object of government, required legitimation, i.e., the explicit justification of the former's power over the latter consistent with their shared characteristic: the capacity for self-government. This legitimation had—or could have—procedural and substantive aspects: procedurally, it required the consent of the governed; substantively it required justification of each state action in terms of its consistency with the autonomy of its constituents. Rule by a patriarchal sovereign—however benign—was replaced by rule by abstract norms, by definite enforceable rules rather than flexible discretionary standards

The concept of police became associated with an illegitimate conception of government, and the term police state, once merely descriptive of a comprehensive and ambitious attempt to rationalize and scientize state government, gained the negative connotations it carries to this day. In direct—and often explicit—contradistinction, the law state—or “the rule of law” (in state-phobic Anglo-American discourse)—represented modern legitimate state power.

This historical analysis of the ideal of modern law is told in broad strokes, as accounts of *longue durée* and *large portée*, covering much time and space, will tend to be. Even in a significantly more detailed version than the above sketch, this account will not exactly fit any particular system, or country; at best, it will pick out common features across time and space, common enough at any rate to add up to one long and wide account rather than several shorter and narrower ones. Undertaking a historical analysis of law of this sort, then, also requires critically negotiating the relationship between the long and broad account and a particular historical and systemic context.

Take American political and legal history, for instance, and more specifically still, the political and legal history of American penalty. The conception, manifestation, and application of the state's penal power suggests itself as a focus of inquiry because contemporary American penalty qualifies as the sort of state of affairs or state action that may trigger among scholars of law the sort of normative engagement that motivates, in their respective fields, Piketty's critical (historical-comparative) analysis of political economy or Guldi and Armitage's historiography as moral duty. The features of contemporary American penalty during the war on crime are well documented: millions incarcerated in warehouse prisons and under other forms of penal supervision, the world's highest rate of incarceration, racially disproportionate impact in all aspects of the penal regime, and so on. Our question is what historical analysis of law, as outlined in this manifesto, can contribute to the analysis and critique of this phenomenon.

To once again cut a fairly long (and wide) story short: historical analysis of law suggests that the current state of American penalty reflects a conception of penal power as an exercise of the “power to police.” As objects of the patriarchal, discretionary, flexi-

ble, and virtually unlimited police power, the objects of state penal power fall within the radically heteronomous realm of household government, subject to the illegitimate power of the sovereign/householder. The apparently comprehensive foundational moment in American political and legal history, the American Revolution, did not in fact mount a fundamental critique of state power as a whole on the basis of the radical idea that all persons as such shared the capacity for autonomy, or self-government. Certain objects of state power—notably the poor, women, and slaves, but also criminal offenders—continued to be regarded as incapable of self-government and, as such, as mere household resources subject to heteronomous government by those who possessed the requisite capacity to govern themselves, and others.²⁶

In this telling, then, the American Revolution did not seek to replace a comprehensive police state with a comprehensive law state; instead, it celebrated the fundamental role of the “rule of law,” while retaining a rule of police for certain objects of state power. For the latter group—which was substantial—the Revolution brought a change in sovereign (from the king to the people), not a change in governmentality. They remained subject to the police power, “the power of sovereignty, the power to govern men and things within the limits of its dominion,”²⁷ even if this heteronomous power was now wielded by an (even more) impersonal and abstract patriarchal sovereign/householder. In other words, the American Revolution did not merge the American political and legal projects; the political (or rather policial) project ran parallel to the legal project, each applying to different objects of power (or, more precisely, objects of power differently conceptualized).

Today, criminal offenders—and, by extension, presumed criminal offenders (with a generally informal presumption that leaves room for, among other things, racial discrimination)—remain outside the American legal project insofar as they are regarded as carriers of criminal dangerousness, subject to penal treatment at the hands of the state. In theory, that treatment may, at the discretion of the state, take the form of rehabilitation or of incapacitation, depending on whether the offender is regarded (“diagnosed” would imply a fine-grained analysis absent in a mass penal regime) as treatable or not. In fact, however, the war on crime has been fueled by a widespread, and virtually irrebuttable, presumption of dangerousness resulting in a penal regime of mass incapacitation.

Leaving aside the (all-important) details, and with them much of its potential critical bite, the above historical analysis of penalty qua law frames the critical analysis of American penalty in two ways. First, it suggests a historically grounded account of law that generates a critical norm (autonomy), in this case of the legitimacy of state power, against which current practice can be measured. Second, it locates this account within a

²⁶ For a longer version of this argument, see, e.g., Markus D. Dubber, “An Extraordinarily Beautiful Document”: Jefferson’s Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment, in *Modern Histories of Crime and Punishment* 115 (Markus D. Dubber & Lindsay Farmer eds., 2007).

²⁷ *License Cases*, 46 U.S. (5 How.) 504, 583 (1847).

broader framework for the analysis of state power, which distinguishes between two modes of governance, law and police. As a result, the sketched historical analysis of law makes room for a comprehensive critical analysis of current practice that, rather than merely holding it up against a single measuring stick (and finding it wanting), differentiates between realms of state action that are subject to different norms or logics, if any. The American penal regime of mass incarceration thus appears not as an inexplicable exception to a supposedly fundamental norm of legitimacy, but as the reflection of a different governmentality, one that does not require, or seek, legitimacy in general, nor legitimation grounded in the autonomy of its objects in particular.

In light of this historical analysis, it is as inappropriate to assail the American penal regime for its lack of legitimacy (or justice, or rightness), as it would be to critique the *Constitutio Criminalis Carolina* for its lack of respect for human rights. Contemporary American penalty appears not as illegitimate (or unjust), but as a legitimate (or a just); it has not regarded, and still does not regard, the state's penal power as subject to the legitimacy constraints constitutive of the modern concept of law.

Every aspect of this historical analysis of American penalty qua law is subject to doubt, as is every aspect of the more general account of the enterprise of historical analysis of law as a mode of critical analysis. There are certainly many other possible ways of fleshing out the object of historical (and, more generally, of critical) analysis of law.²⁸ Some of these accounts of law will carry greater critical potential than others. This may or may not be significant, depending on one's commitment to legal history—and, more generally, to engaged scholarship in any field—as a normative enterprise and on one's understanding of the nature of the critique in critical analysis.

²⁸ For instance, "Law As . . .," a recent stimulating collective reflection on the future of "sociolegal history" featured a wide array of conceptions of law, including law as consciousness, enchanted ritual, spectacle, sovereignty, economic/cultural activity, fetish, framework, and grace. See Fisk & Gordon, *supra* note 7; Christopher Tomlins & John Comaroff, "Law As . . .": Theory and Practice in Legal History, 1 U. Irvine L. Rev. 1039 (2011).