

“An Unqualified Human Good”? On Rule of Law, Globalization, and Imperialism

Mark Brown

Forty years ago, E. P. Thompson praised the English rule of law forged during the bloody and fractious eighteenth century, calling it not only “an unqualified human good,” but also a “cultural achievement of universal significance.” This article examines colonial rule-of-law development as another example of law and state building. Both have relevance for contemporary rule-of-law programming in the Global South where Thompson’s “cultural achievement” has resisted fabrication by legal technicians. The problems faced today are not new, for colonial rulers also engaged with complex indigenous norms and forms and sought to balance universal principles with political control imperatives. Contra arguments about colonial “lawfare,” colonial rule of law often frustrated authoritarian tendencies while developing new forms of legal subjectivity and avenues for redress of grievances. Using data from the Indian province of Punjab, the article illustrates how historical case studies might aid contemporary rule-of-law programming in the Global South.

INTRODUCTION

It is forty years since E. P. Thompson penned a brief, twelve-page coda to *Whigs and Hunters: The Origins of the Black Act* (1975), his magisterial study of eighteenth-century English law and punishment. Titled simply “The Rule of Law,” Thompson attempted in this endpiece to stand back from the immense detail of his main study and to reflect more broadly on the importance of the system of English law that emerged from the eighteenth century. By the time Albert Venn Dicey wrote his *Introduction to the Study of the Law of the Constitution*, he could claim that this system of legality had become rooted within the English psyche. “An Englishman naturally imagines that the rule of law . . . is a trait common to all civilised societies,” Dicey commented, “But this supposition is erroneous” ([1885] 1889, 182). Although many might argue about the quality of that law, and that after all

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was one of Thompson's main observations, there seems little doubt that the vision and legal structures that developed in England through the eighteenth and nineteenth centuries became a model for what rule of law was later imagined to be and to achieve.

The purposes of this article are fourfold. First, it aims to use the fortieth anniversary of Thompson's (1975) radical reappraisal of one of English law's bloodiest moments to pose some questions about the possibilities of law as a vehicle for social transformation in developing, fragile, and conflict-affected states. Many of us likely remember *Whigs and Hunters* primarily as a study of punishment: the Black Act's notorious extension of capital sentences to eventually around 200 often minor offenses. Thompson's work began as an essay for the collection *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, edited by Douglas Hay and colleagues (1975), but soon outgrew the essay form. Yet together with Hay's contribution to that collection, "Property, Authority and the Criminal Law," *Whigs and Hunters* was also, and probably more importantly, a study of the development of law itself. Perhaps it was in recognition of this wider significance that Thompson concluded his forensic examination of the bloody travesty of justice the Black Act represented not with a final denunciation, but with a plea to concentrate instead on its larger meaning and repercussions. In penning his coda "The Rule of Law," Thompson thus put aside the blood and injustice of the Black Act. He concentrated instead on the questions of how an alien and formal law came to replace customary norms, even when the outcomes of this new justice so seldom favored those upon whom it was imposed, and how ultimately this law also captured and tamed those in whose vested interests it had been constructed. Thompson's eighteenth-century case study is liable to make his question seem arcane, but in fact it has enormous contemporary relevance.

Describing that relevance is a second purpose of this article. The last two or three decades have seen a resurgence of interest at an international level in the possibilities of spreading safety and security through enhanced efforts to promote the rule of law. A global industry has emerged, focused on building legal, policing, and penal capacity in developing, fragile, and conflict-affected states. Those concerned primarily with questions of domestic justice might thus be wholly unprepared for the scale of the rule-of-law industry and the vast sums expended on it. In 2012, for example, the latest year for which figures are available, OECD overseas development assistance on legal and judicial development alone totaled USD 3.27 billion. Another USD 1.32 billion was spent on the related goals of securing human rights and women's rights, for which much rule-of-law work aims to establish respect. A further USD 2.93 billion was spent on the wider conflict, peace, and security environment (OECD 2014). Atop this, there are rule-of-law promotion efforts by other multilateral organizations like the United Nations and the World Bank. In 2008, *The Economist* magazine concluded that "almost half the [World] bank's total lending of \$24 billion in 2006 had some rule-of-law component" (*Economist* 2008). In 2014, UN rule-of-law programming extended to 150 nations and in almost half of those, three or more separate UN agencies were engaged in rule-of-law support activities (UN 2015).

Despite all this, it is now widely accepted that the tsunami of spending, effort, and goodwill has brought little positive result. Martin Krygier (2017, 133–34) succinctly sums up the situation, noting that:

Rule of law programs are implemented at vast expense in countries from Afghanistan to Zambia. Billions of dollars are spent; thousands of intelligent, ambitious, dedicated people have been involved. But the results have not been especially happy.

Why so? One reason is that existing forms of traditional justice and customary law continue to attract support and local use, while modern rule-of-law institutions and processes either are co-opted by powerful elites or regarded by locals as unfit for purpose. The problem, then, is not altogether different from that considered by Thompson: How can a new system of law, bringing with it new notions of rights, obligations, and norms, be established in an environment where inhabitants may feel they already have perfectly good institutions of their own?

The two situations invite comparison, and indeed an attempt at such follows a little later, but it is a third aim of this article to notice first a curious lacuna in contemporary rule-of-law literature and practice guides and to offer a suggestion to its solution. The broader context of this lacuna is a not unreasonable focus within the rule-of-law community on lesson learning and the dissemination of effective practice insights. Part of the problem, however, is that unlike economists, for example, who have been able to reach back to the great crash of 1929 and further still in their efforts to explain why no one adequately foresaw the recent global financial crisis, rule-of-law scholars and practitioners alike hold a highly truncated view of their own discipline and its history. For the most part, rule-of-law programming is something imagined to have developed solely in the wake of World War II, and not truly in earnest until at least the late 1980s or early 1990s (O'Connor 2015). The putative lessons to be learned are therefore very short-term ones, generally cast in terms of what people in other spheres would understand simply as program evaluation results. Intimations are made that change—true, deep change—may take a long time. In 2011, for example, the World Bank mooted the idea of forty years, possibly, but no one really knows. Quite absent from this discussion is the long history of the introduction of laws in colonial and imperial contexts (cf. Klingner and Jones 2004; Pimentel 2010).

Yet in a variety of places, colonial administrators introduced English-styled rule of law as they sought to reshape often highly plural and localized legal cultures. The approaches and results were uneven across the British Empire, but in many cases they did a good enough job that courts complained of being oversubscribed with local litigants attracted by the predictability of procedural justice. Many of those same systems remain in place today. There is thus a much longer history to rule-of-law reform than many contemporary scholars would allow. What is more, colonial and postcolonial scholars alike have critiqued these developments, with many engaging directly with the claims and insights of Thompson with respect to the uptake of new law in old places and the restraining character of procedural law. Thus it is that on the fortieth anniversary of E. P. Thompson's study, we have

something of a neat circle before us: an insightful account of the development of a form of law in England that went on to become an international benchmark and aspirational norm; a contemporary rule-of-law industry desperately in search of some better understanding of how to bring rule of law to distant parts; and an until now largely unexamined corpus of historical material and contemporary postcolonial critique that may bridge the gap between the two.

Referencing this historical bridging, the final purpose of the article is to respond to calls increasingly made across the spheres of development, economics, and law for planners, policy makers, and thinkers to become more historically aware. Partly this stems from the enduring influence of the work of Charles Tilly (1985) whose bold claims on the virtues of violence in European state-making continue to stimulate debate on development under conditions of conflict and rapid globalization (Meagher 2012). But there is also a broader movement afoot to bring the more long-term, nuanced, contextualized, process-sensitive, and contingent insights generated from historical analysis to an area of endeavor characterized by blunt, monocausal, and, in particular, short-term visions of change. Thus, Michael Woolcock, Simon Szreter, and Vijayendra Rao (2011, 75) argue that to the extent that history is present at all in development programming, “the ‘history’ which policy makers use is likely to be naïve, simplistic and implicit, often derived from unconscious assumptions or vague memories.” As we move forward in this article toward a reconsideration of colonial engagements with law, we quite clearly move into one of the prime contexts in which history has been avoided precisely on the basis of such factors. But as Woolcock, Szreter, and Rao go on to observe, ignorance is costly:

The (ab)use of history in this form not only represents a problem of commission but also of omission, in that it both invokes a defective and distorted rendering of history but also denies the policy process the vast reservoir of imaginative resources available from more formal historical research. (Woolcock, Szreter, and Rao 2011, 75)

Mark Massoud’s (2013) *Law’s Fragile State*, a study of law and politics in Sudan and the subject of a recent special issue of this journal, is one example of the deep historical research Woolcock, Szreter, and Rao would seem to value, as too is Nick Cheesman’s (2015) *Opposing the Rule of Law: How Myanmar’s Courts Make Law and Order*. This article aims to extend this deepening interest in rule of law’s historical contexts and contemporary forms by contemplating colonial rule of law not simply as antecedent to the contemporary, but also as a source of data and insight with significant implications for today’s programming dilemmas.

Yet precisely what contribution could studying English and colonial legal history make to understanding or solving these contemporary rule-of-law dilemmas? What, in other words, is the argument here for attending to colonial law? There are three intersecting legs to it. The first is that the kernel of Thompson’s argument in *Whigs and Hunters*—that despite the illiberal forms it might sometimes take, law ultimately works to constrain arbitrary power, to protect those subject to it, and to draw those new subjects toward an ideal of universal procedural justice and its

forums—is borne out by studies of law across a variety of colonial contexts and over a long period. Thus, Thompson’s single-case conclusions have now been widely reaffirmed. This is particularly important to understanding the failure of contemporary efforts to inject rule of law successfully into development and the transition of fragile and postconflict societies. For it suggests that in sites of imperial contact we may, if we care to look, find detailed historical records of success and failure in tasks not wholly dissimilar to those currently being undertaken in countries as various as Afghanistan and South Sudan, and for which it is currently thought there are not good data to guide practice.

As we move back and forward in time and across literatures, however, certain disjunctions in the conceptual landscape inevitably appear. One of the most significant may be concern over the theoretical appropriateness or material relevance of a distinction that is drawn throughout this article between formal and informal or customary law. Within the colonial legal history literature, scholars have come increasingly to soften and downplay notions of a strict formal versus customary law divide, being inclined instead to emphasize both the instability of custom as law and the deep and mutually constitutive relationship between so-called custom and legal politics (Mallampalli 2010). This is not to say the distinction is entirely facile, however. Respected scholars of law and state making have agreed on the ultimate ascendancy of state-based law in colonial societies. Lauren Benton (2002, 260), for example, writes that “by the end of the nineteenth century the subordinate status of nonstate law to state law no longer required a formal ideological defense.” This chimes with contemporary rule-of-law thinking that tends to reify the importance of the two legal spheres while also programming toward the ultimate primacy of formal law. A sense of how the formal and informal are currently thought to relate is given in the World Bank’s *World Development Report*, this year dedicated to the theme “Governance and the Law.” There, “transitions to the rule of law” are characterized in terms of the “shift from a customary or pluralistic system to a codified modern one” (2017, 96). Moreover, and in support of this strand of the article’s argument, the *Report* concludes that, ultimately:

[R]elatively little is known about the historical dynamics of that transition, and thus too little by way of theory is available to guide contemporary developing countries as they seek to implement the rule of law. (World Bank 2017, 97)

A second intersecting element of this article’s argument concerns the study of colonial law per se. It is a critical point and it will bear a slightly extended elaboration. It may be prefaced by noting that the idea that hundreds of years of colonial experience might hold some lessons of contemporary relevance has, with limited exceptions (Klingner and Jones 2004), been either studiously ignored or dissembled within the rule-of-law practice literature. David Pimentel, a former Head of Rule of Law for South Sudan under the UN Mission in Sudan, speaks of “the stigma of imperialism” haunting contemporary law-bringing efforts and warns that “[r]ule of law reformers must learn the lessons of colonialism, lest they perpetrate a new imperialism” (2010, 1). Colonial history, clearly, is a topic of almost excruciating

complexity and potential moral turpitude for rule-of-law programmers. Understandably so perhaps, since they form a cadre of international actors who wish to act imperially—that is, to intervene in a foreign country with ulterior motive, whether that be *mission civilisatrice* or rebalancing gender rights—yet cannot speak its name. In a footnote, Pimentel observes that “[u]nfortunately, much of the modern rule of law literature seems to treat issues of colonialism as irrelevant ancient history, i.e., it ignores them. Yet in that history lie important lessons for rule of law efforts today.” Pimentel thus describes a rule-of-law industry fearful of “cultural imperialism” (2010, 1). Yet as that industry recoils in fear, its only vaguely apprehended images of colonial encounters appear to it in quite Orientalized form. Indeed, one is minded of Derek Gregory’s (2004, 7) description of those who would “reduce everything to the marionette moves of a monolithic colonialism.”

None of this, of course, is to suggest that colonialism was or is a human good. The shelves of most libraries are lined with accounts of why it was not and that litany is so well rehearsed as to not bear repeating here. So the purpose of this article is not to resurrect or reclaim imperialism for a new day. But if we may reprise E. P. Thompson’s approach to the Black Act, it is possible to say this, which is the second leg of the argument: that to agree that colonialism was not a universal good is not at all the same thing as to say there is nothing to be learned from it, or indeed that it left no positive legacies. In many postcolonial states, for example, the colonial-origin Supreme Court stands today as a powerful bulwark against the exercise of arbitrary power, be that exercised by generals, politicians, bureaucracies, or elites. Pakistan and India both leap to mind in this respect, but South Africa is also an example. In each of these places this colonially derived institution is the most trusted in the land: more so than the army, more so than the politicians or the police. We can make such observations without at all affecting our broader view of colonialism as a political, economic, or moral form of oppression. So the purpose of studying colonial law is not to dust off colonialism, it is rather to place the experience of colonial rule alongside that of Hanoverian England as described in E. P. Thompson’s *Whigs and Hunters* and to ask: Is there nothing at all to be learned from these pasts?

The third and final leg of this article’s argument is that understanding colonial legal history matters because the problems with which colonial governments wrestled were not radically different to those confronting rule-of-law planners in developing, fragile, and postconflict states today. This leg of the argument is developed further toward the end of the article, but in order to give a sense of its contours a few features are worth picking out here. We may start by noting that colonial law regularly wrestled with what are today perceived as common problems of legal reform: how to reconcile reform agendas with governments’ tendencies toward authoritarian rule; how to position the state as the ultimate source of legal authority, while still recognizing, ordering, and having oversight of authority distributed through plural legal orders; how to manage and regulate the impact of national and global economic forces on previously isolated communities; how to secure rights in property and other justiciable entitlements without disturbing social structures or transferring wealth to small elites; and how to balance notions of right and obligation drawn from universal norms with the demands on the one hand of political order and on the other of tradition and custom.

Better understanding of the consonance of colonial law's core questions with those of contemporary reform work will be found not only in the colonial contexts themselves, but also in the literatures of colonial legal history, primary *and* secondary. Thus, understanding how colonial regimes handled matters such as, for example, forum shopping, or as Lauren Benton (2001; Benton and Ross 2013) has termed it, jurisdictional politics, or how varieties of liberal state-subject relations reflect different challenges posed to the developmental state, will be better appreciated by attention to the literatures of colonialism and colonial legal history.

All of this is by way of preface, however. We should move now to examine history's lessons for global rule-of-law programming by first revisiting E. P. Thompson's work in *Whigs and Hunters*. In the sights of his historical analysis was the emergence of a system of English law and a new social order from the bonfire of the eighteenth century's bloody code, exemplified most acutely in the Black Act of 1723.

WHIGS AND HUNTERS AND THE RULE OF LAW

The opening passage of E. P. Thompson's *Whigs and Hunters* gave notice of three intersecting themes with which his study would be centrally concerned: the emergence of an increasingly centralized, autonomous, and in many ways modern state in Britain; the importance of property in reshaping state-society relations; and the recruitment of law by the intermediate, propertied, but nevertheless vulnerable social class known as Whigs, as a tool critical to shoring up their interests against threats from both above and below. Thus he began:

The British state, all eighteenth century legislators agreed, existed to preserve the property and, incidentally, the lives and liberties of the propertied. But there are more ways than one of defending property; and property was not, in 1700, trenched around on every side by capital statutes. It was still not a matter of course that the legislature should, in every session, attach the penalty of death to new descriptions of offence. (Thompson 1975, 21)

In the chapters that followed, Thompson examined the importance and application of one such legislative tool, 9 George I c.22, the Waltham Black Act, enacted over the four weeks of May 1723. The Black Act, as it came to be known, was not so named for its profligate application of the sentence of death. Rather, it derives from the Act's initial purpose to outlaw and make capital the bearing of arms and blacking of faces by alleged miscreants in the area of Waltham Forest whose ultimate purpose, it was held, was the stealing of deer. New offenses were soon added, including collecting firewood, taking turf, grazing animals, lifting fish, catching rabbits, burning haystacks, sending threatening letters, and so on. Although the threat posed by the Waltham Blacks was held to be exceptional, in fact the focus of the Act on forest crimes reflected a long-running but increasingly acute contest between ancient and modern views of property and right.

Central to the Black Act and its application, therefore, were changing conceptions of use and ownership. On one side were forest dwellers and the property-less

workers of the land who could cite rights in use to the commons going back deep in time. On the other were aristocratic and wealthy landowners who increasingly pressed their claim to ownership and sole use (or, importantly also, nonuse) of land through its enclosure and the policing of its boundaries and contents. What laws or rules should regulate these contests was also unclear due to confused and overlapping jurisdiction between (royal) forest law and (parliamentary) statute law. Indeed, sometimes the tussle was a three-way affair, pitting royal prerogative against local landownership and below that the commoners whose rights in use were critical to livelihoods. Thompson describes one such conflict in Windsor Great Park between 1717 and 1723, noting: "It was one of those tripartite conflicts . . . in which each party held documents and could cite precedents, but which in practice was decided by force and stealth" (49).

After 1723, that force by which wealthy landowners could press their claims to ownership, encroach upon commons, redefine wastes, erect fences, and more generally break down longstanding patterns of social organization was bolstered by the Black Act. In a scathing assessment of the politics of Hanoverian England, Thompson describes that Act as "an original charter of death for eighteenth-century legislators, against whose bulk successive capital statutes seemed mere petty annexes" (197). Together with the Riot Act, he argued, it came to form "a model for subsequent terrorist legislation against disaffected Highlanders, Irish agrarian rebels and English smugglers" (197). And of the men who enacted it? Such an Act could only have been drawn up and pressed to service, he proposed, "by men who had formed habits of mental distance and moral levity towards human life" (197). It responded to an emergency, real or perceived, for sure, but it was a response that cannot be explained by the emergency alone. Rather, he suggests, it was:

an emergency acting upon the sensibility of such men, for whom property and the privileged status of the propertied were assuming, every year, a greater weight in the scales of justice, until justice itself was seen as no more than the outworks and defences of property and its attendant status. (Thompson 1975, 197)

This, then, was the "trench[ing] around on every side by capital statutes" to which he referred in his opening lines. The mindset itself, he suggested, was a peculiar feature of the Hanoverian Whigs, whom he described as "a curious junta of political speculators and speculative politicians, stock-jobbers, officers grown fat on Marlborough's wars, time-serving dependents in the law and the Church, and great landed magnates" (198). That such a bunch, led on by the sinister Walpole, could have achieved and held on to power was explained by Thompson by the dissolute state of English politics at the time. In this mix, Whigs, despite their grasping and avarice, were tolerated as possibly "the only alternative to civil war or to Stuart or Catholic repossession of the island" (198). The law this Whig oligarchy had inherited from the sixteenth and seventeenth centuries had been forged in a conflict with royal power. Its success as a strategy had been to place royal absolutism "behind a high hedge of law" (263), securing and protecting the interests of the new landed class against royal prerogative and arbitrary intervention. But what

began as a defensive mechanism turned out also to be suitable as a tool for the extension and protection of class interests, as the criminal law was recruited by the propertied against the property-less. This, ultimately, is what *Whigs and Hunters* described, in forensic detail.

In concluding his tale, Thompson observed “[w]e might be wise to end here” (258). Had he done so, his book might have remained an articulate if somewhat obscure footnote within the corpus of British social history. But he did not. Instead, he sought to make some concluding observations on the importance and significance of all this blood and suffering; on the travesty of justice wrought by cynical and self-interested legislators and judges bringing forth terror in the name of class interest. On the one hand, he suggested, there might be little significance to what his study of the Black Act revealed. After all, he observed:

the story of a few lost common rights and of a few deer-stealers strung from the gallows is a paltry affair when set beside the accounts of mass repression of almost any day in the day-book of the twentieth century. . . . Did the villagers of Winkfield lose access to the peat within Swinley Rails? What is that beside the liquidation of the *kulaks*? (Thompson 1975, 259)

On the other hand, and speaking to the Marxist brethren among whom he had been a leading light, perhaps his study had taken far too long to say far too little that could not be determined a priori. Thus:

to express surprise at the Black Act or at partial judges is—unless as confirmation and illustration of theories which might easily be demonstrated without all this labour—simply to expose one’s own naivety. (Thompson 1975, 259–60)

But he sought, instead, a middle ground between these different justifications for the irrelevance of his study. Taking the long view, he observed that the landed gentry of the eighteenth century had not simply used the system of law passed down to them as a tool of terror and oppression. They had, by some means, also fashioned that inheritance that we today regard as the rule of law, a bedrock of our society and social order. Looking across the period, Thompson noted that the criminal law worked most effectively as a tool of class oppression probably for not much more than fifty years. Then, as broader social changes began to undercut the power of Whig elites to capture the state as a vehicle for their own private interests, they found themselves on the horns of a dilemma:

They could either dispense with the rule of law, dismantle their elaborate constitutional structures, countermand their own rhetoric and exercise power by force; or they could submit to their own rules and surrender their hegemony. In the campaign against Paine and the printers, in the Two Acts (1795), the Combination Acts (1799–1800), the repression of Peterloo (1819) and the Six Acts (1820) they took halting steps in the first direction. But in the end, rather than shatter their own self-image

and repudiate 150 years of constitutional legality, they surrendered to the law. (Thompson 1975, 269)

The significance of Thompson's work lies in his efforts to tease out the enduring legacy of this cultural moment. For it was a point when "the rulers [became], in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric" of law and thus subject to its rules (263). It was also and quite as importantly a moment when "the ideology of the great struck root in a soil, however shallow, of actuality" (264) and men and women who held ancient rights in custom began to think of themselves as formal legal actors, turning to the law to reconcile their differences and to seek redress for grievances.

To his Marxist colleagues who would see law as nothing more than an instrument of class oppression he insisted that "there is a very large difference . . . between arbitrary extra-legal power and the rule of law" (264–65). Indeed, after his study of the bloody code he was not at all "starry eyed" (266) about the law. All that is wrong with a law should indeed be exposed:

But the rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. (Thompson 1975, 266)

Indeed, he said, this process by which men and women at all levels of society agreed to resolve conflicts through clearly elaborated rules and procedures, even if these often only approximated to the ideal of justice, "seems to me a cultural achievement of universal significance" (265). It was the capacity of these rules and procedures to take on a life of their own, to escape the confines of hegemonic control, that ultimately led ordinary men and women to it. If the rhetoric of law offered out hope of justice and evenhandedness, then it must to some degree be allowed to do so. "If the law is evidently partial and unjust," Thompson argued, "then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony" (263).

When these statements first appeared, they sparked enormous controversy among legal historians and in the field of critical legal studies (see Horwitz 1977; Cole 2001; Levinson and Balkin 2010). In a book review, which to date has itself attracted more than 200 citations, Morton Horwitz (1977) exclaimed, "I do not see how a Man of the Left can describe the rule of law as 'an unqualified human good!'" (566). Here the quality of Thompson's research was a question largely set aside (cf. Broad 1988) as thinkers of the left ranged against his critique of Marxist structuralism reductionism. For it had been they who were in Thompson's sights when he urged the need to "resist any slide" into viewing the law as no more than a tool of hierarchical class oppression and when he referenced the evidence of twentieth-century totalitarianisms that should "have made clear even to the most exalted thinker" the differences between unconstrained power and the rule of law (264–65).

Yet *Whigs and Hunters* attracted and continues to attract little notice within wider discussions of law and justice development. It is frequently cited in an

offhand sort of fashion as evidence of “history from below,” recovering voices of plebeian classes otherwise overlooked in grand historical and institutional narratives. Overall though, it is perhaps thought to be of questionable relevance to law and justice problems of today. However, this is to miss exactly those contextual insights that historical research has to offer. Moreover, if we look carefully to the outworkings of global rule-of-law efforts and the problems they face, this picture will surely change. So it is to these developments that we now turn.

GLOBAL RULE OF LAW: FACTS AND FAILURES

In late December 2015, a ground-breaking ceremony was held in Mogadishu, the Somali capital, on the site of the soon-to-be-constructed Mogadishu Prison and Court Complex (UN Office on Drugs and Crime [UNODC] 2015). Funded under the UNODC’s Global Maritime Crime Program, it is possibly the largest infrastructure project ever undertaken in the country. The court complex and attached secure facilities form part of a wider effort to bring piracy suspects from across East Africa to trial and to provide secure custodial facilities for medium- and high-risk detainees. In nearby South Sudan, the world’s newest country, the state (re)building process is to include development of a common law system, the conduct of which will be in English. In support of this, the International Development Law Organization (IDLO) has helped develop a new common law curriculum, provided training and capacity support for the judiciary, and provided assistance toward the writing of a national constitution (IDLO 2017).

In a separate compound in Juba, South Sudan’s capital, work is being directed by the UN Development Program (UNDP) to ascertain the customary law of the country’s various tribal and ethnic communities. Once these are known, it is intended that their common principles should be distilled with a view, ultimately, to find a way of knitting customary and statutory law into a coherent legal framework (UNDP 2012a). Much of the planned work being undertaken by the UNDP in South Sudan is modeled on previous efforts in Kenya, Malawi, and elsewhere in Africa (UNDP 2015). Yet, as 2016 drew to a close, progress in South Sudan’s legal redevelopment had been curtailed. For as so often seems to be the case, renewed civil conflict and a general deterioration of the security situation across the country had thrown plans awry.

It is against backdrops such as these that much contemporary rule-of-law development work takes place. Programming runs the gamut from improving access to justice (US Institute for Peace 2016) through development of community policing initiatives (Denney and Jenkins 2013), statutory drafting and legal and judicial training and infrastructure, as indicated above, novel adjudication models, such as drug courts (Haisley 2013), alternatives to imprisonment (UNODC 2007), and human rights and gender-sensitive capacity building (Penal Reform International 2013). This is contemporary rule-of-law building in practice. There is almost unconditional support for the idea in principle, even if how that is translated on the ground may vary substantially from the ideal (for a Myanmar case study, see Cheesman 2015). In a clear nod to E. P. Thompson, Brian Tamanaha (2004, 3)

describes a wide acceptance that the rule of law is “good for everyone.” The idea, he claims, finds a “unanimity in support” that is “unparalleled in history”: “[n]o other single political idea has ever achieved global endorsement” in quite the same way. For Tom Ginsburg (2010, 224), “[t]he rule of law is not only a philosopher’s concept but a multi-billion dollar industry and the dominant ideal of our time.” It is, he says, something that has “captured the policy-making imagination of the West and become our modern *mission civilisatrice*.” In 2016, the UN Secretary General described it as “one of the foundations of progress in virtually all areas of our work” and “an essential thread in the new 2030 Agenda for Sustainable Development” (UN 2016).

Yet it is also clear that such widespread endorsement has not translated into an easy transition from fragility and conflict to peace and happy statehood. Setting aside the complex security and safety situations in places like South Sudan, Afghanistan, Mali, and other contemporary hot spots, diagnoses of the failure of an English-style rule of law to take root on foreign shores are various, but also variously pessimistic. There is not space here to contemplate these diagnoses in their specific detail, other than to observe that their multifactorial and multidimensional nature has to date defied reduction into any general set of conclusions, or at least any that fit easily with donors’ and programmers’ preferred response modes (see Pasara 2012; van Veen and Price 2014; Independent Commission on Aid Impact 2015). Attempts at such reduction have also often been less than satisfying. Stromseth, Wippman, and Brooks (2006, 9–10), for example, began with intimations of success: “the international community is finally beginning to have a sense of ‘best practices,’” they wrote, producing “an increasingly nuanced understanding of what works and what doesn’t in post-conflict settings.” What this turns out to be, however, is:

that there is no “one size fits all” template for rebuilding the rule of law in post-conflict settings: to be successful, programs to rebuild the rule of law must respect and respond to the unique cultural characteristics and needs of each post-intervention society.

One thing we *can* do here is note that attempts to distill conclusions, where they have advanced on this radical *sui generis* hypothesis, have tended overall to be technical or legally technocratic in nature. To the extent that the analysis is wider, it is one that frequently jumps outside the realm of legality and penalty altogether, positing (not unreasonably) the centrality of politics to the whole law-bringing, state-building enterprise. Thus, Cassie Copeland (2015, 19), for example, observes of the international community’s work in South Sudan that:

donors [have] generally programmed to the assumption that these [rule-of-law] challenges were a result of low capacity, leading to a reliance on technocratic solutions for many essentially political problems—with predictably poor outcomes. . . . Despite clear evidence, emerging over years, that hundreds of millions of dollars of national-level, technocratic programmatic funding was not producing results, donors largely failed to reassess their framework of support.

Martin Krygier has also noticed this entrenched focus on technical solutions, but his conclusion draws us back in toward law rather than leapfrogging it altogether in favor of political economy. Part of the problem, he asserts, is that contemporary approaches are both planned and led by lawyers who, perhaps naturally, perhaps not, seem to have an almost unshakeable focus on collecting “legal *bric-a-brac* for export and installation” (2016, 18) rather than thinking about what law ultimately aims to do, the ends of law itself. The *bric-a-brac* to which he refers are Copeland’s “technocratic solutions,” often utilizing manualized intervention models, legal toolkits, and checklists (OHCHR 2006; UN 2011; Moderan 2015). In essence then, contemporary approaches begin “with some particular box of legal tricks and [then identify] it as the rule of law” (Krygier 2016, 487). Before hearing the conclusion of Krygier’s analysis, however, it is worth noticing a second general feature of the way conclusions within this domain have been drawn.

Here we may note that rule-of-law programming is shoehorned into an uneasy alliance with, on the one hand, the state (or lack of it) as an object of international development assistance and, on the other, the challenge posed by extant forms of traditional justice or customary law. Building formal law is regarded as going hand in hand with state form and capacity, yet each seems in practice to be undercut by the power, position, and authority of nonstate, traditional, and religious sources of authority and social ordering. In a report for the UNDP in 2006, Ewa Wojkowska drew together a large of body of evidence to conclude that despite years of rule-of-law programming, roughly 80 percent of inhabitants in fragile and conflict affected states, places such as Malawi, Bangladesh, and Sierra Leone, seek justice through informal, customary avenues. Furthermore, she noted, around 75 percent of all land tenures in Africa are covered by customary jurisdiction, with this proportion rising to 90 percent in places like Mozambique and Ghana (Wojkowska 2006). Nonstate and informal law and justice actors have thus proven a problem to rule-of-law programming and for a number of reasons. Principal among them, however, has been this entwining of rule-of-law activities with the wider goal of liberal state building. In *Law’s Fragile State*, Mark Massoud (2013, 4) describes the current programming logic thus:

Contemporary law-building programs in fragile states operate on two primary assumptions about the law. First, the law is either tarnished or entirely lacking in these places, and, second, through foreign assistance and “capacity building” states may build up a legal order rooted in the rule of law, to move from authoritarianism and war to democracy and peace. . . . Ultimately the goal is to transform traditional or conflict-ridden societies into modern, liberal states.

Yet as the presence of customary and informal justice mechanisms ipso facto indicate, wild places may often seem lawless, but that does not mean they are entirely without law or, indeed, visions of justice. Unfortunately, these forms of law seldom work through or integrate well with the top-down mechanisms of formal, state-based law, and nor do they necessarily comply with international norms around human rights, especially those of women and girls, ethnic and religious minorities,

and so on (UNDP 2012b). The result has been for rule-of-law programmers to question whether some wild places are in fact ready for law and justice as “we” conceive it. In one variation, this is reflected in a questioning of the idea of the state itself. The Danish Institute for International Studies, for example, has proposed that since “[n]on-state actors are the primary providers of justice and security in the Global South where they deal with an estimated 80 to 90 percent of disputes . . . it is necessary to rethink the state-centric agenda” (Albrecht and Kyed 2010, 1). In another variation, customary law is presented as an inescapable reality given the weakness of the state. A recent report on rule of law in Mali, for example, suggested a rapprochement between formal and customary law in the short-to-medium term (ten to twenty years) before an ultimate ascendancy of state-based law into the longer term (twenty to forty years):

Accepting that the Malian state does not have, will not have and should not aspire to have a monopoly on the provision of justice for the next few decades is a critical starting point for making improvements to how justice is provided in matters that affect Malians in their daily lives. (van Veen, Goff, and van Damme 2015, 3)

The main problem for state builders posed by the presence of informal, nonstate, and customary legal actors and mechanisms is that too little is known about how to connect them with higher order (state and international) norms of justice and human rights. As Erica Harper, a leading figure in this field, notes, the largest “concern is the yawning gap between the proliferation of customary justice programming and the evidence and knowledge base on which such programming is grafted” (Harper 2011, 14). A signal feature of contemporary rule-of-law programming, then, is this contrast between top-down, formal law, associated with the Westphalian state on the one hand, and on the other a plural order of authorities distributed across tribal and religious domains that transcend not only sovereign state borders, but also the temporal or cosmological frames within which modern statecraft and its laws are situated.

So what, if anything, might E. P. Thompson’s work on law and justice in eighteenth-century England add to all this? Can it assist in resolving these conundrums of how to advance the rule of law and citizen security in the Global South? We may begin to answer this by returning to Martin Krygier’s analysis of rule-of-law failure and the problems of conceiving law and justice as technocratic problems. For what Krygier (2016) concluded was that Thompson’s work in fact adds quite a lot. The problem with much contemporary activity aimed at building law and justice, he suggests, is that these approaches head in an almost completely opposite direction to the insights gained by Thompson’s study of eighteenth-century England. Whereas Thompson in his final analysis shifted attention away from the virtues or otherwise of particular legal strategies so as to look at the rule of law for what it broadly achieved—“the imposing of effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims” (Thompson 1975, 266)—contemporary programming is damned by its myopia and failure to grasp what law ultimately stands for: taming and restraining arbitrary power. But while

this “eye on the prize” reminder is almost certainly correct, it does not take us closer to solving the key problem law bringers and state builders face. This is the from-scratch and please-deliver-tomorrow aspect of the contemporary problem space. Rule-of-law programmers and practitioners cannot solve it partly because they inhabit it. But partly also they cannot solve it because they have been blind to the work and lessons of a previous era of law bringing and state (though not nation) building.

RULE OF LAW: COLONIAL AND POSTCOLONIAL REFLECTIONS

E. P. Thompson’s ruminations on the importance of rule-governed and procedural justice have attracted much attention from historians and postcolonial scholars. In some instances, they have been no less outraged by his conclusions on the achievements and virtues of law than was the critical legal scholar Morton Horwitz (1977). In *Dominance Without Hegemony: History and Power in Colonial India*, for example, Ranajit Guha accused Thompson of being beguiled by the “hallucinatory effects” of rule of law’s own ideology. How else to explain, he asked, that “a cultural development of the bourgeoisie limited to a particular national experience should be hailed as an ‘achievement of universal significance’” (1998, 68)? With less fanfare, the noted South Asianist D. A. Washbrook simply declined to set his work in the context established by Thompson’s *Whigs and Hunters*: “The differing historical and historiographical contexts of Indian study,” he said, “make straight translation invalid” (1981, 649). Nevertheless, colonial and postcolonial scholars’ engagement with the problem of rule of law and, specifically, with Thompson’s work has been enormously productive. In its connection with the history and experience of bringing new, formal, state-centered law into contact with what were recognized as traditional and customary legal environments it has much to say. It will be convenient to begin with responses to Thompson’s claims about law in *Whigs and Hunters*, before moving to a wider evaluation of what colonial rule of law might teach us.

The most significant engagement with *Whigs and Hunters* in a colonial context is to be found in the final chapter of Lauren Benton’s (2002) *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*. There, in addition to defending Thompson against Guha’s misrepresentations, Benton evaluates the relevance to colonial and postcolonial scholars of Thompson’s claims about the significance of law, before suggesting how her own work and that of poststructuralists such as Pierre Bourdieu might further develop the picture. For Benton, the fundamental problem Thompson had before him was to explain how the apparent impartiality of legal formalism, giving out the hope, however slim, of justice for England’s plebeian classes, produced a “leap from this glimmer of hope to a generalized acceptance of the rule of law” and then why this “was the product neither of false consciousness nor of simple miscalculation” (Benton 2002, 256). Thompson’s answer, she concludes, is no more than that customary notions of rights and usage norms were sufficiently legal in character that the emerging “plural legal order contained within it

the power of mutual recognition” (256). In this way the grid of formal law and the grid of customary law intersected, drawing lower social orders toward formal law.

For Benton, this conclusion remains partial and thus unsatisfactory. Indeed, she says, Thompson’s failure to go further “in his critique of ‘structural reductionism’, the idea that law can be reduced merely to an instrument of oppression, is to my mind much larger as a shortcoming than his quip about the universal goodness of the rule of law” (256). In Bourdieu she finds a better account of how individuals engage with structures like law: “It is possible simultaneously to use imposed law (thereby reaffirming it) and to seek to undermine its authority” (258). But that brings us “only a little father than with E. P. Thompson toward an understanding of the production of legal legitimacy through legal conflict” (258).

The resonances with contemporary rule-of-law questions in programming for fragile and conflict-affected states should by now be clear. Extending that relevance still further, Benton goes on to make a number of powerful suggestions about the state itself. This, she says, is where Bourdieu cannot help and where Guha’s “approach goes wrong” (258): it is in missing the significance of the colonial state as a still yet-to-be entity:

Colonial states did not in an important sense exist *as* states in the early centuries of colonialism. They did not claim or produce a monopoly on legal authority or on the assignment of political and legal identity. Indeed, colonial conditions often intensified the fluidity of the legal order. . . . There was dominance, undeniably, but both colonizing and colonized groups were not irrational or deluded when they sought advantage in the fractured qualities of rule. (Benton 2002, 259, original emphasis)

Lauren Benton’s global study of empires across 500 years provides two important developments to Thompson’s vision. First, as the excerpt above illustrates, the importance of state-centered and formal law does not require the a priori existence of a state in the liberal, Westphalian sense. Nor are the contesting sites of authority that plural legal spheres entail necessarily inimical to state formation. More recently, Paul Halliday (2013, 268–69) has made the same point: “Early modern states,” he observes, “in their cores and on their peripheries, became strong not by squelching plurality, and thereby approximating the unity apparently required by our Hobbesian and Westphalian expectations. They became strong *because* of plurality” (original emphasis).

What Benton’s work thus suggests is that the instability, uncertainty, and fluidity of multiple legal jurisdictions in effect creates the demand that the state as a state emerges to satisfy. But how so? Her second conclusion answers this. The state emerges as the paramount authority within a plural legal order by dint of its claim to arbitrate upon questions of legal ordering and by the predictability of outcomes under its own state-centered contribution to the plural legal mix. Looking across continents and over centuries, she concludes that the foreignness of this state-centric law was in fact an advantage, a conclusion quite contrary to many claims within the contemporary development sector. To be sure, “the state-centered quality of the legal order was itself new,” but, and here she agrees with Thompson, it

was the capacity of the state to administer justice “with any degree of consistency or standards” that elevated it over other, possibly more precarious, options: “Procedure trumped justice; institutions outlived bandits” (260).

More recent work has confirmed this conclusion. In a study of corruption in the “native” lower courts of Burma at the turn of the twentieth century, for example, Jonathan Saha (2012, 217–18) concludes that “colonial law can be seen as a set of practices that were constitutive of the colonial state” and so it was “through people’s experiences of and engagement with legal institutions and practices [that] the colonial state, as an imagined entity, was made in every day life.” He, too, follows Thompson and Benton in observing the importance of the “material effects” of colonial justice, thus ensuring that the “benevolence” the rule of law offered “was not purely rhetorical” (193).

Once more echoing E. P. Thompson, Elizabeth Kolsky (2010, 13), in a study of white-on-native violence in British India, concludes that “while the legal system may not have been equal or impartial,” the effect of “the promise of colonial justice” was to “restrict the gross exercise of power by offering a language and a means to imprison India’s rulers within their own rhetoric.” Mark Massoud (2013, 224), in his study of British rule in Sudan agrees, remarking upon Thompson’s observation that law becomes a constraint upon the exercise of arbitrary power that “[m]y findings about colonial law in Sudan come to a similar conclusion.” Finally, in a study of colonial rule of law in the Indian province of Punjab, we hear David Gilmartin (2009, 8) echoing Thompson’s familiar phrasing:

But the courts nevertheless had sufficient independence, and challenged the state just frequently enough, that the notion of the law (and of records) as a source of authority superior to the immediate whims of officials gained significant purchase on the popular imagination.

The process by which ordinary colonial subjects chose between legal jurisdictions has come to be termed *forum shopping* (Schapper 2012). This refers to legal forum selection, of course, but the term also references legal actors’ recognition that different forums might serve their self-interest better or worse. In a study of marriage cases in colonial India, Mitra Sharafi (2010, 988) observes just how wide the range of legal options open to Indians could be:

All this—the personal law system of religious law, custom, neighboring and princely jurisdictions, the many legal links to England and Scotland, and the legal systems of other European colonizers who had ceded territory to the British—created an opulent feast of legal options for potential litigants.

In the end, however, she reaches a conclusion “along the lines of what E. P. Thompson proposed for England” and Lauren Benton for empires globally. She thus explains formal colonial law’s “relative success with colonized populations” (982), and indeed its “reinforced . . . hold on subjects,” through the attractions of law’s own formal character: in other words, “by dangling before [Indians] the possibility

of individual relief through rule of law proceduralism” (980). That proceduralism offered not only the possibility that justice would be delivered on the day, but also recourse to higher courts and external arbiters running all the way to the Judicial Committee of the Privy Council. Indeed, as Mitch Fraas (2014) has illustrated in the context of colonial India and Bonny Ibhawoh (2013) in respect of British Africa, the presence of Privy Council adjudication created a kind of second-order brake on “the exercise of unmediated force” that Thompson described, providing another means to “inhibit power and afford some protection to the powerless” (Thompson 1975, 266) across a range of legal forums within the British colonial domain.

One fault line running through this literature, however, has been the significantly different character of rule under the two principal forms imperialism took. These are what Kwasi Kwarteng (2010, 7) in his study of Britain’s postcolonial legacies, *Ghosts of Empire*, distinguishes as “the colonial empire” versus “the white dominions,” or settler societies. For relevance to modern rule-of-law dilemmas it is the former that would seem most important, though there also exists a significant literature on the latter worthy of notice (see McLaren 2015). Part of the difficulty, *prima facie*, of reconciling the relevance of colonial empires might seem to be their fundamentally authoritarian character. Kwarteng reiterates the oft-made point that “[n]otions of democracy could not have been further from the minds of imperial administrators” (2010, 6–7). He describes British colonialism as instead operating a form of “benign authoritarianism,” which we might otherwise understand as a paternalist, but ultimately despotic form of government in the sense described by J. S. Mill (1861) in *Considerations on Representative Government*. Taking the example of Hong Kong, Kwarteng argues that though clearly nondemocratic, it was also “probably the most successful exercise in benevolent dictatorship in history” (379).

This gives rise to questions about the contemporary connection between and even conflation of the goals of introducing rule of law and democratic liberal statehood. John McLaren (2015, 34) recognizes this and speaks of the need to “disentangle the history of the Rule from modern presentist interpretations that link it uncritically with democracy.” Similarly, in an against-the-grain thought piece titled “In Defense of Imperialism?” Tom Ginsburg argues that it is precisely the absence of strong authoritarian control within the societies toward which rule-of-law programs are directed that fatally undermines any hope of effectiveness. These days, he concludes, “[w]e are insufficiently imperialistic to carry out social transformation from abroad” (2010, 225).

Fleshing out his argument, Ginsburg utilizes Weingast’s distinction between self-enforcing democracies, in which rules are followed and all power holders acquiesce to their primacy, and external enforcement, wherein international or foreign actors take up the role of ultimate guarantors that legal and democratic processes are adhered to. Developing the latter, as is commonly required in fragile and post-conflict states, tends to undermine development of the former, though that is the principal feature of the democratic liberal statehood we seek to introduce. To untie this Gordian knot, Ginsburg suggests an examination of our own history. Most states that have developed effective democratic and rule-of-law structures generally

began to do so via forms of authoritarian government or authoritarian law. “Indeed,” he observes:

surveying members of the OECD as the most successful exemplars of democracy and the rule of law, one sees only a handful (Switzerland, along with settler societies such as the United States, Australia and Israel) that did not experience a long stage of authoritarian state building before developing the rule of law. (Ginsburg 2010, 235)

Moreover, he notes, this holds for former colonizers and postcolonial states alike: “many societies do attribute a positive legacy to colonial legal structures—take Hong Kong, Singapore or Malaysia, to name a few former British colonies” (236). Thus, rule-of-law promoters, he argues, need to recognize the internal conflict within their goals of introducing independence, democracy, and order simultaneously. “External intervention in the name of the rule of law and democracy has promised a good deal,” he concludes, but “[i]t has delivered very little” (238).

RETHINKING LAW, GOVERNANCE, AND THE STATE

If contemporary writers as varied as the legal theorist Tom Ginsburg (2010) and practitioners van Veen, Goff, and van Damme (2015), who it will be recalled placed formal law’s effective writ in Mali some forty years into the future, are despondent over the capacity of legal transformation and liberal state making to be effected together, what, if anything, could dusty old colonial history add? The answer is quite a lot, in fact. There is now an extensive literature on the relationship between law, governance, and state making under colonialism that places the foregoing insights about legal change in a larger context. Broadly, what this literature identifies is the central role of law in imperial expansion, from its force as an ideological justification to its role as a key vehicle through which colonial governance was exercised.

Importantly, though, this was not a one-way street. So, what the literature also reveals is the central role of imperial experience in the development of Western ideas about the liberal state as a general, and generalizable, form. Part of this literature tells us what colonial powers did wrong. Like the structural reductionists so outraged by Thompson’s work, for some writers in this literature the service law did to colonialism taints it fundamentally. Martin Chanock, for example, describes law as a “weapon” that operated as “the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion.” (1985, 4). Similarly, John Comaroff developed the neologism “lawfare,” which he describes as “the effort to conquer and control indigenous peoples by the coercive use of legal means” (2001, 306).

In making claims of this sort, writers have in some senses been doing no more than reflect what colonial officials had already said; particularly those of the later nineteenth century. One such, James Fitzjames Stephen, an influential English jurist

and law member of the Governor General of India's Legislative Council, for example, wrote that:

law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience. (Stephen 1876, 168–69)

Legal, political, and colonial historians have spilled much ink analyzing this cognitive structure of imperial rule (see particularly Mehta 1999; Matena 2010; Mukherjee 2010; Bell 2012; Dorsett and McLaren 2014).

The deep imbrication of the theory and practice of colonialism with the development of political liberalism as a general form, noted earlier, has been an important conclusion. Thus, the liberalism to which the contemporary term *liberal state* refers is a creature of the eighteenth and nineteenth centuries that perhaps much more so than is commonly recognized was conceived in intimate relationship to colonial governance. One of liberalism's chief architects, John Stuart Mill, was for most of his working life an employee of the British East India Company, a private corporation that from at least 1765 through to 1858 conquered territory and ruled India largely as would a sovereign state (Zastoupil 1994; Stern 2013). As the company's rule faltered in the wake of the great uprising of 1857–1858, Mill drafted in its name a petition to Parliament on the virtues of this form of rule and followed it with a much longer treatise on the improved condition of India under this (private) colonial yoke (Mill 1858).

Mill had in fact followed his father into both employment at the company and an interest in the social ordering of societies. The elder Mill's three-volume *History of British India*, published in 1817, was an influential account of British conquest, partly because of the stark manner in which it laid out a teleology of progress and civilizational hierarchy that came to underwrite colonial domination and remains at the heart of liberalism (see Mehta 1999). Thus, when van Veen, Goff, and van Damme (2015) write of contemporary Malian society as a fractured polity, unable on the one hand to agree on basic norms of justice and on the other to act in a dispassionate fashion when faced with intertribal rivalries, they could as well be echoing the reports of a thousand colonial administrators whose reports and memos lie at the heart of liberal theory and liberalism's vision of the developmental state (see Mill 1861, Ch. 1).

Tensions that today play out across the law and development sector, such as in balancing the authoritarian tendencies of so-called big-man political leaders, their desire to shore up frail systems of political allegiance through networks of patronage, the global normative claims of multilateral actors and international and regional rights-based instruments, and debates over the appropriate extent of invasion by modern norms and economics into traditional communities, all of these were present too within the legal and political spaces of imperial rule. Often, too, they coexisted in a fractious and, as has so often been pointed out, incoherent balance that subscribed to ideas only for them to be overrun or deeply attenuated by the exigencies of rule.

While sailing back to England after his stint as legal member on the Viceroy's Legislative Council, J. F. Stephen penned a kind of manifesto for these bitter lessons of practice. Titled *Liberty, Equality, Fraternity*, it was a thoroughgoing critique of Mill's liberalism as it had been tested in the fire of Indian colonial administration. Stephen, an authoritarian liberal, felt that he must counter that "side of [Mill's] teaching which is as repugnant as the rest of it is attractive to me" (1874, 53). In particular, Stephen argued for a vision of the liberal state built not around individual freedom but resting instead on state authority and stability: "power precedes liberty," he argued. Thus:

liberty, from the very nature of things, is dependent upon power; and it is only under the protection of a powerful, well-organised, and intelligent government that any liberty can exist at all. (Stephen 1874, 166)

Part of the utility of examining colonial history, then, lies in the capacity to examine, across a multitude of varying contexts, social forms, and arrangements, problems of precisely the order van Veen, Goff, and van Damme describe, and the thinking and strategies that that experience produced. Perhaps the most important insight this will provide is the recognition that, notwithstanding instances to the contrary, colonial law making and state building was not *all* lawfare and coercion, and often it was much more. Even for administrators like Stephen, who viewed a powerful government as a precondition to viable statehood, only after which could liberty rights then be extended, law and lawful rule was still a critical ingredient. Providing an alternative inflection on the idea of law and war, Stephen noted that governmental strength often inclined officials toward a kind of petty despotism, to exercise personal and thus arbitrary power in the name of government. This was nowhere more likely than on the frontier, where exigency made powerful demands. Yet the task of governing a "turbulent and primitive district" should, he argued, best be understood as akin to that of a "highly civilised and carefully selected military force on active service." In such a circumstance, laws were like the "orders and articles of war," so "to say that law is out of place in a rough district is the very same absurdity as to say that discipline and distinct and definite orders are out of place on a rough campaign." Recognizing law's role in constraining arbitrary power, Stephen thus concluded that ultimately "law comes to be a rule rather for the ruler himself than for the subject" (Legislative Department 1898, 80).

The remainder of this article attempts to pick out some of the salient features of this other, less seen or understood, side of what colonialism did and to identify insights that seem, *prima facie*, relevant to the present day. While it might be tempting to try to rank these by importance, no ordinal scale could adequately capture the overlapping character of processes and practices of governance to be described. Yet at the same time, it does seem possible to offer a rough categorical schema. So we may begin with some brief notes on the *context and character* of the societies from which our historical observations are drawn. Next we can begin to make some more detailed and apposite observations about *targets and methods* adopted by colonial administrations and what we may draw from that. Finally, there is the matter of what colonial administrators drew from their own *colonial experience*

and digested to form maxims of law and governance that we might profit from understanding better today. Since all this might quickly become quite abstract, the following sections work as far as possible with rule-of-law development in one colonial context, that being India in general and, where possible, its northern province of Punjab in particular.

Context and Character

To begin, we may observe that the context of rule of law's emergence in England and of the colonial experiences discussed by Lauren Benton (2002) and others was of a similar character to that faced today in fragile and postconflict states. Writing of England in the 1720s, Thompson said the country at that moment "had something of the sick quality of a banana republic":

This is a recognized phase of commercial capitalism when predators fight for the spoils of power and have not yet agreed to submit to rational or bureaucratic rules and forms. Every politician by nepotism, interest and purchase, gathered around him a following of loyal dependents. The aim was to reward them by giving them some post in which they could milk some part of the public revenue. . . . Every post carried its perquisites, percentages, commissions, receipts of bribes, its hidden spoils. . . . The great gentry, speculators and politicians were men of huge wealth whose incomes towered like the Andes above the rain-forests of common man's poverty. (Thompson 1975, 197–98)

Many colonial contexts were similar, but perhaps even less stable. Looking back to the development of a functioning state and system of state-centered law in the Indian Punjab following British annexation in 1849, we find a quintessential post-conflict environment. It was characterized by an almost complete absence of state structures, a largely rural, traditional, and poor agrarian society retaining distinctive nomadic elements (both cultural and economic), at least three different religious communities, and a huge variety of customary law norms and presumptive usage rights. British administrators desired to lay at least a basic framework of justice over the whole territory as a first step.

What was done in the Punjab came to be recognized by the British as a model, a template, for how to bring peace, order, law, and a functioning state to a conquered territory (see, generally, Gilmartin 2009) and much of that structure remains today. Understanding better what went on in specific locations like the Punjab would seem, *prima facie*, to be a worthwhile enterprise, since it took in the gamut of state-building and law-making activities from developing methods for the ascertaining and recording of customary law, to determining appropriate, culturally satisfactory forms of property title, to questions of ascertaining *lex loci*, to a complex history of dealing with problems of land alienation, civil rights for women and children, and so on.

Second, as E. P. Thompson described for England and Benton (2002) and others have observed in colonial situations, neither legal plurality nor weak extant

state structures seem themselves to have been a bad thing or indeed to be, in a sense, abnormal, in state and law development. Looking across many colonial contexts, Benton (2002, 258) speaks of “the production of legal legitimacy through legal conflict.” Much more needs to be understood about how that was achieved. Again, the Punjab has intricately detailed records of how formal and customary law were brought together (see Tupper 1881; Government of Punjab 1915), something that the UNDP, for example, in its current work in South Sudan could well benefit from understanding better. Even a brief examination of the Punjab experience brings up insights of relevance to contemporary programming.

The question of timeframes, for example, remains a vexed one: donors frequently expect a three-to-five-year results plan; the OECD has recently made the apparently radical suggestion for six-to-ten-year project durations (OECD 2016); yet research by the World Bank found that a one standard deviation movement in indicators took on average forty-one years to achieve in the twenty *fastest* reforming developing states it measured (World Bank 2011). How long did it take to draw formal state-led and informal customary law together in the Punjab and for a more formal state structure to emerge? Of course, there is no specific number. But what the historical analysis offers is an insight into the contingency of such change, being the sorts of potentially unforeseeable factors that interrupted, shaped, and propelled the development of law and state structures in the Punjab.

Targets and Methods

Contemporary thinking linking rule-of-law development and state building has a kind of tunnel vision on democratization. As Kwasi Kwarteng (2010) and so many others before him have observed, colonial states’ interests lay elsewhere. Where that was, was in the area of revenue. Thus, unlike contemporary state-building approaches that produce aid-dependent zombie states, colonial states or provinces were required to be fiscally self-sufficient. Law, therefore, was closely tied to revenue settlements and those settlements were, certainly in the paradigmatic colonial case of British India, almost always tied to the land. Taxation is only now and very weakly beginning to appear on the radar of development and rule-of-law programmers (Eubank 2012; OECD 2014; Asongu 2015). Yet determining land ownership, ascribing title either individually or in common, and assessing tax obligations were key activities of early colonial state formation. Across the colonial field, administrators drew their subjects in to law by creating justiciable rights: to land, but so, too, to inheritance, to divorce, to widow remarriage, and so on. Thus, property rights and tax obligations emerged, but at the same time important social and civil rights were conferred. This alien, formal law was, to use Thompson’s (1975, 265) phrase, “something a great deal more than a sham.”

So how would rule-of-law and state building look if revenue, property rights, and other forms of justiciable entitlement were placed at the center, rather than the democratic processes that are now widely recognized (Kupferschmidt 2009; Villaveces-Izquierdo and Burcher 2013; Briscoe and Goff 2016) as encouraging graft, rent seeking, and susceptibility to organized crime? Indeed, is it possible, and

if so what form would it take, to have a liberal state that does not have as its first characteristic pure democratic forms? Certainly, all this was not only deeply and thoughtfully considered in the connections between nineteenth-century colonialism and an emerging liberal theory, but many of the precepts of different liberal state forms were tested in practice as well (Brown 2014, Chs. 4, 5).

A second question of targets and methods concerns the now almost forgotten fact that introducing law and making a state is, literally, a creative exercise. Thus, though we are all familiar with theoretical arguments about the way law creates new objects, concepts, rights, and so on, we seem much less easy in practice with the conjuring into existence of legal entitlements, such as property rights, where none have gone before. Part of the difficulty appears to be that in tasks like the ascertainment of customary law (Hinz 2012; UNDP 2012a) it is often less than clear that local, often tribal, interlocutors comprehend exactly what they are being asked to report on. This may reflect a mismatch of concepts or the fact that no definite right, in the sense of a formal legal right, rather than the capacity to exercise power or make moral claim, has previously existed in the domain under investigation.

Further, it is unclear what might happen if such rights are established; what the knock-on and unforeseen impacts might be. In both these cases, the Punjab experience offers insights. It is clear, for example, that bringing some rights into existence involves a degree of creation that goes beyond simple recognition or formalization. In 1867, for example, Punjab administrators faced the problem that, nearly twenty years after the first settlement of property rights and revenue (tax) obligations, it appeared some communities contested the original assessment's veracity. Weighing in on the affair, Henry Maine, the law member of the Governor General's Council, observed that:

[Punjab administrators] of the greatest knowledge of the country and of undoubted earnestness and good faith make positively contradictory statements on what ought to be a matter of fact capable of being established, while enquiries conducted at intervals of fifteen or twenty years appear to give diametrically opposite results ... [in contrast with] the permanent settlement of Bengal proper, which was an avowed imitation of English institutions, [and that] has proved to have more stability and has been less attacked and questioned than systems purporting to be based on the ancient customs and tenures of the people. (Maine 1892, 118)

The indefiniteness of those ancient customs and tenures was central to Maine's assessment of precolonial Indian society and the difficulty of introducing a rights-based order into it. However, as Tim Allen (2010; Allen and Macdonald 2014) has observed of modern-day Uganda, much of what passes for tradition and custom in such communities is not at all traditional but *invented* to suit current needs based on ideas or memories of a supposed traditional past (on invention, see Hobsbawm and Ranger 1983). Despite these sorts of problems, Punjab administrators did manage to fashion and progressively to refine highly localized assessments, often rendered right down to the hamlet level, of a whole host of customary rights and

usages upon which a new society, connected now to the wider Indian and global economy, grew and flourished. The detail and contingency of that development was immense (Robertson 1893; Kaul 1992), pointing to the need for similarly multidimensional thinking and planning in contemporary rule-of-law and development contexts.

Finally, we may ask how the putative lessons of colonial practice could achieve their effects. In other words, does form alone drive function? The question is far from academic. Many postcolonial states have seen established colonial-era legal systems pressed into service by dictators and rapacious elites in a way that questions Thompson's description of law as an "unqualified human good." In an incisive study of Sudan's colonial and postcolonial life, for example, Mark Massoud (2013, 214) concurs with Lauren Benton's conclusions on the constitutive role of law: "law and legal strategies are the building blocks of statehood—even fragile statehood," he says. But at the same time, the Sudanese experience suggests that activities "that reinforce the authority and power of legal institutions are more likely to sustain an authoritarian state than to usher in a new era of democratic rule, at least in the short term" (215). Thus, in the "vexing case" of Sudan, law's capacity to constrain arbitrary power "has surely been overshadowed by the dark times when a ruling despot wielded law like a criminal positions a bullet into his gun" (230).

Nick Cheesman (2015) has made similar observations based on *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order*, focusing on the asymmetry of desires for rule of law versus order. Different but not unrelated questions about the relationship of legal forms to outcomes can be found in the legal transplantation literature (Andrews, Pritchett, and Woolcock 2013). Certainly, the observations made here are important and the impact of them may be to draw our historical gaze outward from the colonial lens and toward a broader one, including examining postcolonial transitions (Sherman, Gould, and Ansari 2014). This would usefully sharpen the focus on legal transformation. It would also direct attention to the success or failure of new citizens in constraining elite power and securing liberty rights in the postcolony (Brown 2016).

Colonial Experience

Thompson's account of England and those of scholars interested in the colonial periphery converge on a conclusion about law that should prompt a radical rethink of the way rule-of-law programs are designed. Current thinking, perhaps influenced by Tom Tyler's (1990) seminal work on procedural justice, *Why People Obey the Law*, seems to imagine formal law as something individuals must deign to accept. The terminology used is one of acquiescence. Caroline Sage and Michael Woolcock (2013, 6), for example, explain that laws are a social invention and as such "draw their salience and strength from the acquiescence of those using them." Similarly, Anna Macdonald and Tim Allen (2015, 305) "point out" that laws are "deeply complex social and political interventions, which rely on the 'acquiescence' and voluntary compliance of those they are designed to benefit." This does not at all capture how law was understood in British India, nor does it chime with

Thompson's account of England. In these cases, people engaged with formal law because it offered at least the hope of best serving their self-interests. Thus, a signal conclusion about colonial uses of law was administrators' recognition of the importance of self-interest as a force *drawing* people toward its formal structures. The vigor of civil litigation among the colonized was often regarded as evidence that social transformation was taking place: "It has been the constant aim of the Punjab Administration," wrote its Judicial Commissioner in 1855, just six years after war ended, "to throw open the Courts of Justice to the mass of the population. Increasing litigation would seem to show, that people are not slow to employ the opportunity thus offered them" (Government of Punjab 1855, v).

Lauren Benton, in her study of 500 years of colonial law, identified this centering of formal law and its forums, the courts of justice, as a significant marker of social transformation in colonial polities. Such centering, she suggests, "shaped a juridical space for the state and brought participants into a single discourse about the law" (2002, 261). What we find in these colonial contexts, then, are important case studies of the way state building is led by an emerging imagination and understanding of formal law and its forums as a shared space of political and legal community: a space, moreover, where self-interest could be pursued and where outcomes, dictated by rules and procedures rather than caste or clan, gender, or age, were at some minimal level perceived to be just and enforceable. Thus, one of the primary lessons of colonial experience is that formal law is important to the creation of political community and what draws people to that law is their perception of it as a site for the exercise of (legal) strategies for the satisfaction of their self-interest. This might be hastened, as the Punjab administrators recognized and as Lauren Benton, too, has observed, by a strategic approach to reform within plural legal orders: "we might unapologetically identify especially active litigation forums," she says, "as places where small reforms can reach large audiences" (2013, 31).

Next, since none of this would seem to square neatly with a reductionist vision of colonial lawfare and coercive oppression, we should begin to search out the other less told but no less important histories of colonial law. Returning to the Punjab once again, one important thread of administrative emphasis stands out. It does so because it lent support to existing social structures and forms of livelihood, while at the same time putting in place mechanisms that changed Punjab from being a backward province to the agrarian powerhouse of India, where it has since remained. Ian Talbot (1991, 210) writes that "[b]y the 1920s [the Punjab district of] Sargodha had grown to one of the largest wheat markets in the world." By then, Punjab was producing "a tenth of British India's total cotton crop and a third of its wheat." By the 1980s, he reports, "[d]espite possessing less than a thirtieth of the total population, it was producing around two thirds of the entire procurement of wheat and over a half that of rice" (216). Quite arguably this was no trick of fate, nor an unintended consequence of totalizing, coercive colonial lawfare upon the Punjab population.

How were such effects brought about? One suggestion is a self-conscious colonial theory of practice. Having learned important lessons from the sometimes ruinous effects of the eighteenth century's Bengal settlement, and now with a better understanding of "native" social and economic structures, Punjab administrators came to view the peasant cultivator as the rock upon which Punjab society rested.

The history of protections extended to this yeoman class—against alienation of land and property by money lenders or urban elites, or against other forces perceived to destabilize rural social structures and community harmony—makes instructive reading.

What the history of colonial management of land tenure in the Punjab illustrates, then, is that much colonial law was in fact not authoritarian, not designed to suppress or oppress but to protect, to promote social stability, and to encourage economic progress (see especially Darling 1928; Islam 1985; Kaul 1992). The rule-of-law literature's tendency to use *colonial* as a grab-all term for oppressive forms of indirect rule associated with late-colonial Africa is thus deeply problematic. It gives effect to what Woolcock, Szreter, and Rao (2011, 87) warn of as a “partial or flawed understanding” of the past, so often “used to suit predetermined purposes, and to be largely unverified” (75). Indeed, *unlike* E. P. Thompson's (1975, 21) metropolitan case study, where property was “trenched around on every side by capital statutes” and where his collaborator Douglas Hay (1975, 35) wrote of “a criminal law that was nine-tenths concerned with upholding a radical division of property,” what we find in colonial Punjab is something quite different.

What emerge there are detailed analyses seeking to tease apart how the creation of property rights in land of previously little value, in combination with the opening up of those communities to wider economic forces, created the paradox of both rising wealth *and* rising indebtedness: hence the title of M. L. Darling's (1928) still widely respected treatise on the subject, *The Punjab Peasant in Prosperity and Debt*. As these very same processes are set in place across the contemporary development sector, careful reflection on a century of Punjab experience would seem likely to repay the effort. What it would also do is provide gamed-out case studies of where such efforts worked, failed, or produced counterintuitive results.

Examples can be found right across the rule-of-law sphere, with many relevant to the contemporary human rights space. One example is the Hindu Widows' Remarriage Act 1856, which, despite reformist and progressive intentions, had the unintended effect of severely reducing the economic chances of lower-caste widows. Similarly, it would be instructive to examine the quite differing effects of approaches to the restriction of so-called immoral practices, such as child marriage. Here the Age of Consent Act 1891 and the Child Marriage Restraint Act of 1929 would provide fruitful perspectives on the way different approaches to apparently progressive legislation can reap different and often unintended consequences.

The contemporary relevance of such comparisons is self-apparent. Often what is at stake is a contest of norms: indigenous or customary or religious on the one hand, often supranational on the other, framed now not so much in the quaint guise of nineteenth-century child-saving movements, but in the language of human rights. Colonial legal scholars have in some senses been in furious disagreement over how to interpret colonial prohibitions on what were viewed as immoral or barbarous practices. Were these something like the first contours of a universal human rights paradigm? Or did they do little more than place a façade of universalism over a fundamentally coercive and authoritarian system (see Martinez 2012; Pitts 2012)? First in India and then, by way of export, in other sites of British colonial rule

(Tupper 1907; Allott 1957), experience was recorded of how traditional justice and customary law mechanisms could be fused with formal, state-centered law and thence to overarching norms believed non-derogable on the basis of custom or culture alone.

One British approach had its origins in Roman law and first appeared in the East India Company's civil law on Bombay Island in the mid-seventeenth century (Derrett 1963). The phrase used was "justice, equity and good conscience," and by the nineteenth century, it had become a device for two linked purposes, both relevant to contemporary rule-of-law programming. In the first case, it was used as a device for importing norms or legal rules in circumstances where statute, custom, or religion were all silent. The second was broadly speaking akin to the modern idea of a human rights norm and in this use took the form of a repugnancy test. The Punjab Laws Act 1872 provides a good example of this form. On the civil side, for example, the Act provided that:

s.5 In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution the rule of decision shall be—
 (a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience . . .

In that last phrase lay an elastic capacity to intervene where higher-level or what were perceived as more progressive norms were at stake, such as the rights of women or children.

Similar formulations were made across the British Empire and there is now an extensive body of case law and a smaller secondary literature on its operation, both historical (Caplan 1964) and contemporary (Akamba and Tufuor 2011; for an early revisionist critique, see Moore 1992). Yet here again, despite what might appear to be an instance of lawfare, doing violence to traditional norms, courts frequently were sensitive to the purposes of custom and the nature of social evolution and its attending forces of social control.

In *Eleko v Government of Nigeria* [1931] AC 662, for example, a case that reached the Judicial Committee of the Privy Council, the court determined that even if a barbarous custom that would otherwise be rejected on the grounds of repugnancy had been transformed under modern influences, it remained to be shown that the amended custom retained a capacity "to regulate the relations of the native community *inter se*." This was important, for a custom could only attain validity and so enter the plural legal landscape through such force upon those "whose conduct it is supposed to regulate." If the community did not accept the modernized version of a barbarous custom, it would be invalid on that head alone. At the same time:

the court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to "natural justice, equity and good conscience".

Thus we see in these circumstances an acceptance that while repugnancy might seem a blunt instrument exercising an external norm, custom was viewed as wholly the province of those who would be ruled by it: it was not for the court to socially engineer a more universally acceptable version of it. As to the question of whether repugnancy clauses constituted early thinking about universal human rights norms, this is something that must be left for another day. It is sufficient here simply to note that colonial and postcolonial jurisdictions provide a rich source for understanding mechanisms that might import external norms as well as experience on how these processes have created social tensions or relieved social ills: better understanding of all this would assist contemporary rule-of-law promotion.

Finally, we must, of course, attend to the sociolegal question of how deeply this colonial rule of law penetrated: Was it simply the preserve of “native” elites, or were these transformations more deeply felt, so that common people engaged with law in some new way? The answer to that question will obviously vary from place to place. However, if we are to remain with our Punjab case, it is possible to make a number of observations that, together, suggest that a vision of law, recognizable as constitutive of colonial rule of law, did indeed become “deeply imbricated” (Thompson 1975, 261) within Punjab society. That rather hedged description of what rule of law might have been in the Punjab is intended to be so, for the British fashioned a complex armature of law and legal forums suitable, it was hoped, to all levels of legal grievance and relationship to customary or formal claim.

At its head was the Punjab Chief Court, which was by no means a simple extension of government authority. Shortly after establishment in 1866, for example, it gave notice of its independence by striking down as unlawful the administrative detention of so-called criminal tribes on the basis of the sanctity of “natives” liberty rights against arbitrary intrusion (Brown 2014). Beneath the Chief Court was a system of six classes of formal courts in which civil and criminal claims and disputes were heard, and in which the putative problem of excessive litigation continually vexed administrators and tested the capacity of court lists. As the *Imperial Gazetteer of India* put it: “Relative to the population, the Punjab may be called the most litigious Province in India” (Government of India 1908, 337).

Part of the volume of litigation was attributable to a high-resolution setting of *lex loci*, the appropriate custom upon which an appellant might call, which often went deeper than tribal affiliation to recognize intratribal variation in traditional norms. Lifting some of this burden on courts was achieved by the Punjab Panchayat Act 1912. The Act provided for the (re)establishment of these allegedly traditional village-level bodies and reflected a British penchant for reinventing old practices to serve modern purposes. At the same time, however, recognition of the potentially troublesome implications of custom, particularly as it affected the transfer of land and assets, resulted in forms of legislative intervention. The Punjab Pre-Emption Act 1905, for example, specifically excluded custom from preemption suits involving agricultural land or village immovable property.

Clearly, this legal architecture was not whole-born. It was pieced together over decades of experiment, advance, and retreat, as various ideas were tested and found either satisfactory or wanting. Investigations of custom, for example, illustrated not only great diversity, but also a sense that there might be in the Punjab what could

be termed a core of customary law common to almost all tribes and classes. Henry Baden-Powell, a Chief Court Judge in the Punjab, wrote of Punjab tribal law that “[t]hrough customs may vary considerably . . . there is nevertheless a thread of principle running through the whole subject of custom to land” (1896, 55). If that was so, could such threads be codified and so relieve courts and tribunals of some of the enormous pressure created by claims to custom, often as specific as family custom, or *kuláchár*? Codification was indeed intensely debated, culminating in the Punjab Codification of Customary Law Conference (Government of Punjab 1915; Prenter 1924). In contemporary South Sudan there is a drive to find just such a customary core and thence to codify it. Understanding better the Punjab’s web of intersecting formal and customary laws, modern and traditional legal forums, and systems of registration, recording, and review would undoubtedly advance contemporary planning and problem identification in South Sudan and other sites of rule-of-law programming.

CONCLUSION

What should be done with the stalled project of developing the rule of law in developing, fragile, and conflict-affected states? This article has sought at least some part of an answer to that question on the fortieth anniversary of E. P. Thompson’s *Whigs and Hunters: The Origins of the Black Act*. It has done so by reviewing Thompson’s influential account of the development of the rule of law in England and by connecting it with a much less noticed literature that considers his work in light of the imperial experience of introducing formal, state-centered law into foreign, often tradition-bound, societies, before looking more deeply into the benefits of studying those colonial histories. In doing so it has answered a call for more reflexive and historically nuanced understandings of the relationship between law and societies at various stages of development.

This examination of law bringing and state making has shown that the abstraction inherent in historical study is a particularly powerful tool for identifying ideas and processes of key importance. The enduring legacy of Thompson’s *Whigs and Hunters* thus lies not in his depiction of the Black Act’s barbarity, but in his identification of two key virtues of an English-style rule-of-law model. The first is that its procedural emphasis and ideal of justice, however rough and ready in practice, provided the magnet that drew plebeian classes toward formal law. The second, that in doing so, this law at once shored up an emerging centralized state and captured the holders of power within a framework that ultimately tamed their capacity to exercise their power arbitrarily. It was these broad achievements that for Thompson characterized the rule of law and that he famously described as “an unqualified human good” (1975, 266). Looking across a wide array of colonial contexts, writers engaging with Thompson’s lessons have found much the same effects for state-led law. Against contemporary conclusions that all is relative and no common principles transcend the particularities of different societies, Thompson’s conclusions and those of colonial legal scholars suggest quite the opposite: there are readily identifiable building blocks of law and state forms.

The question before us now is whether we can reasonably look to this colonial experience for lessons, given the acknowledged history of colonial oppressions. Such oppressions are well documented and must be acknowledged. To say that imperial dominion of one people over another is a bad thing is a truism, but to recognize that colonialism itself was not a universal good does not at all mean that there is nothing to be learned from it, that it left behind nothing of value institutionally, or that there are no lessons to be learned from its legal experiments, successful and unsuccessful. A key argument of this article has been that colonial experience provides a rich and often meticulously documented archive of experience in rule-of-law development, should we care to look.

The most salient conclusion of this article, however, is that these colonial contexts, when examined, in fact share an enormous amount in common with contemporary governance and rule-of-law promotion contexts: the developing, fragile, and postconflict states of the Global South. Thus, contemporary rule-of-law programming, which dates its history back not much more than thirty or forty years, suddenly gains a deep history. Exploration of that history and mining of lessons from its deep historical records would require an engagement between historians, legal scholars, and development practitioners, something of a novel task. Nevertheless, it may be hoped that this article has provided at least a *prima facie* case for testing such an integrative, multidisciplinary approach. Doing so would answer Woolcock, Szreter, and Rao's (2011) demand for a more historically sophisticated and conceptually nuanced account of law's development in foreign parts. It might also go some way to heeding Martin Krygier's (2017, 133) warning that "rule of law promotion is too important to be left to lawyers" alone.

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