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Ideals and Practices in the Rule of Law: An Essay on Legal Politics

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This essay responds to the three commentators in the symposium on my book, Law's Fragile State, *by describing the sociolegal study of the rule of law as an investigation into both a set of ideals (the rule of law as a normative question) and a set of practices (the rule of law as an empirical question). Studying the rule of law involves understanding the contingent nature of its ideals as well as investigating the actual work that lawyers, judges, state officials, aid workers, activists, and others have done in specific contexts to promote legal remedies to social or political ills. These overlapping layers of the study of the rule of law—ideals and practices, normative and empirical—provide a sociolegal framework for understanding the successes and failures of legal work and, ultimately, how citizens experience state power in democratic and nondemocratic societies alike.*

> If law is the master of the government and the government is its slave, then [our] situation is full of promise and [we] enjoy all the blessings that the gods shower on a state.
>
> Plato (2000)

INTRODUCTION

I am grateful for and have learned from Rachel Ellett's studies of comparative judicial politics, Martin Krygier's philosophy of ideals in the law, and Sally Engle Merry's ethnographic approaches to international law. I am also humbled by their careful and critical engagement with *Law's Fragile State* (Massoud 2013) and for

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pushing me beyond that book to account for practices associated with the rule-of-law ideal.

This essay responds to these commentators by taking up Krygier's normative provocations and Ellett's and Merry's calls for continued empirical study of courts and the rule of law. Interpreted collectively, their reflections induce in me a desire to describe, as a preliminary matter, the sociolegal study of the rule of law as an investigation into both a set of ideals (a *normative* rule-of-law inquiry) and a set of practices (an *empirical* rule-of-law inquiry). In so doing I illuminate my unease since the publication of my book—a discomfort that Ellett, Krygier, and Merry seem to share—with contemporary practices associated with the rule-of-law ideal (see also Kleinfeld 2012). In this way, ideals in the world matter insofar as they also are grounded in the stories of local institutions and persons promoting or challenging these ideals (Selznick 2008).

THE GENESIS OF *LAW'S FRAGILE STATE*: STUDYING LEGAL POLITICS IN FRAGILE STATES

Merry (2016) and Ellett (2016) discuss the need for sociolegal scholars to understand how people, including political elites with resources and skills, put the law to use. It is through such an investigation in a fragile and conflict-affected state like Sudan that led me to question the moral foundations of the rule of law. That is, living and working in Sudan taught me to see the ideal of the rule of law through an empirically grounded lens, by rooting the rule of law in a specific history, context, and set of practices. My archival research on colonial Sudan and ethnographic observations in contemporary Sudan revealed to me that law's morality may not be inherent and nor should it be taken for granted (see, e.g., Lev 1993; Nietzsche 2007). Rather, any morality associated with the law (and the rule of law) depends on the goals of the actor—whether a lawyer, judge, state official, aid worker, or human rights activist—who uses legal tools to achieve political, social, or economic goals (Massoud 2013, 214-15).

As a graduate student in the early 2000s, I came into contact with a decades-long debate in law and society over whether legal strategies can generate social change (Galanter 1974; Chayes 1976; Glendon 1991; Williams 1991; Feeley 1992; McCann 1994; Epp 1998; Ewick and Silbey 1998; Rosenberg 2008). Sociolegal scholars generally agreed that, under the right conditions, legal institutions, litigation, and rights discourse may be powerful agents of change. Constraints must be overcome but, on balance, the language of rights benefits ethnic minorities and other marginalized persons who are able to access legal resources (Williams 1991). Litigating a dispute, even unsuccessfully, can also be a symbol powerful enough to convince citizens to join social movements (McCann 1994).

While these findings advanced knowledge of law and social change in Western democracies, particularly the United States, I was exposed to little scholarship on rights discourse in non-Western societies (see, e.g., Englund 2004, 2006; Merry 2006), and none on the power of rights for political or ethnic minorities in countries continually torn apart by cycles of political violence. To address this gap, I

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traveled to Sudan in 2005 to begin my fieldwork. At the time, Sudan was labeled as one of the world's most "failed states" (Foreign Policy 2016). An historic peace accord was being finalized between the government in Khartoum and a southern Sudanese militia, signaling the end of Africa's longest civil war (lasting nearly a quarter-century from 1983 until 2005), in which more than 2 million people had died. (Many Sudanese had also fled the country, including my parents, who brought me as a boy to the United States.). But Khartoum's political progress in the mid-2000s came alongside bloodshed and tragedy in the Darfur region of western Sudan—mass killings that observers labeled the first genocide of the twenty-first century (see Hagan and Rymond-Richmond 2008; Medani 2011; Fluehr-Lobban 2012; Kaiser and Hagan 2015; Savelsberg 2015).

What can this harrowing political history, then—and Sudan's legal institutions and actors, their successes and failures—offer to a vast literature in primarily US law and society? To answer this question, I surveyed more than 100 years of Sudan's legal development—from the toils of early colonial and postcolonial state officials (many of whom trained as lawyers) to the struggles of contemporary lawyers, aid workers, and human rights activists.

As Ellett, Merry, and Krygier have discussed, in Sudan over the last century, colonial officials, authoritarian leaders, opposition groups, foreign aid workers, and Sudanese activists have sought to achieve state stability and their political, economic, or social goals. These disparate actors share a common set of legal tools and practices—constructing courts, drafting constitutions, overhauling the legal system's basis (e.g., from common law to civil law to Islamic law), creating and controlling religion and religious law, and encouraging the adoption of international human rights treaties. They seek out these legal changes to realize their own versions of a thick or thin rule-of-law ideal or, more simply, as an expedient strategy when facing trouble or chaos. Sometimes, the same persons act in different capacities at different points in their legal or political careers, as judges, ministers, or legal activists (Massoud 2013, 85–118). The case of Sudan exposes—often sharply and painfully for Sudanese citizens—how law, legal tools, and legal ideals matter and how they fail to matter in state political development.

DEFINING THE LAW

Krygier and Merry have pushed me to define the law—as the foundation of the rule of law—more clearly. Clarifying this concept of law, and the work that law does, involves treading into a thorny and centuries-long debate.

For instance, for British legal philosopher John Austin, law was whatever command a sovereign would make (Campbell 1885, 94–96). Austin's twentieth-century contemporary, H. L. A. Hart, saw law as a set of primary and secondary rules made by human beings, including a fundamental rule of recognition (Hart 1961). For Hart's contemporary, US legal philosopher Ronald Dworkin, law was a matter, and a challenge, best left to judicial interpretation (Dworkin 1986). Lon Fuller, another contemporary of Hart's, described law as having a distinct "internal morality,"

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drawing from natural law and the high-order purposes of "doing justice, settling disputes, maintaining public order, and enhancing prosperity" (Fuller 1964; see also Selznick 1999, 9, as cited in Krygier 2010, 116). In other words, law is not merely "inert matter," it is a "purposeful activity" guiding institutions that have an integrity of their own (Krygier 2010; see also Winston 1999). Continental legal philosopher and legal positivist Hans Kelsen called law, simply, a "specific social means, not an end" (Kelsen 1949, 20; see also Green 2010, 169).

While these authors disagree on the concept of law, they agree that it creates and is an intimate part of "an arena of social struggle" (Blumenthal 2006; as cited in Gordon 2012, 209). This social struggle—and the related philosophical struggle to define law—exists in part because law is often "obscured by a haze of mythology" centered around uncritical enthusiasm for legal solutions, like constitutionalism, to the state's ills (Lev 1993, 139). That is, wherever law is found, so too is conflict found (see, e.g., Tamanaha 2006). As Ellett writes in this symposium, "law is part of the political struggle, not [merely] a rational bureaucratic edifice against political disorder and palace politics" (Ellett 2016, 472). The anthropologist Clifford Geertz similarly embraces the social construction of law, characterizing law as a work of imagination (Geertz 1983; as cited in Munger 2010, 95). The awareness of this intimate relationship between law, conflict, and imagination brings us closer to understanding legal politics—how people use and promote various technologies of law (legal texts, doctrines, arrangements, and resources) to achieve political, social, or economic objectives (Massoud 2013, 24–27).

THE CONTINGENT NATURE OF LEGAL POLITICS AND THE RULE OF LAW

Krygier argues that when robust in its form and function, the rule of law is an ideal incompatible with any arbitrary exercise of state power. He admonishes me to remember this normative good associated with the rule of law, a good in which even the eminent Marxist historian E. P. Thompson believed.

But, taken together, the essays in this symposium reflect an uneasiness and ambivalence about locating law's power and the rule of law's authority. These suspicions may arise from the study of Sudanese and comparative politics. The ambivalence may also come from an awareness that democratic governments do not always behave democratically—by denying human rights or challenging aspects of the rule of law (Merry 2006; Mattei and Nader 2008), or that autocratic governments do not always behave autocratically—by promoting thin conceptions of the rule of law (Meierhenrich 2008). Lawyers and their legal tools help governments traverse the political spectra between democracy and autocracy, peace and violence, and human rights and human wrongs (Abel and Lewis 1996; Dezalay and Garth 2010; Massoud 2012). This reality makes the rule-of-law ideal tricky to place in good governance schemes, in international public policy, or on a scale that measures "good" states versus "bad" states.

The unease in this symposium is hardly new, nor is it even brazen. But it cuts against some cherished beliefs in the rule of law. Building on Plato, Kelsen, and

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Hart, the foundations of the rule-of-law ideal—laws and legal institutions themselves—have great instrumental value and no intrinsic, moral, or immanent value (Kelsen 1949; Plato 1960; Hart 1961). Why? Limiting arbitrary power and promoting injustice are not always mutually exclusive acts. That is to say, imperial objectives and ideals may be injected even into the rule-of-law ideal—as British colonial officials did in Sudan and elsewhere (see Massoud 2013, 44–84)—and it is possible to limit the arbitrary exercise of power while promoting injustices against individual persons or groups within the context of rule-of-law institutions like courts and prisons (see, e.g., Cover 1986).

There is a tendency in legal scholarship and practice to venerate the rule of law and to exalt those who fight for it. And why not? Aside from the politically power hungry, few would disagree with the general maxim that state power ought not be arbitrary and collective freedoms and rights ought to be promoted. But, like any ideal, the rule of law is an ideal that appears in context; it is a contingent feature of domestic or international politics (see, e.g., Munger 2015).

This contingent nature of the rule of law is illustrated in an important example from modern Sudanese history. Chief Justice Babiker Awadalla in 1967 resigned from the Sudan Supreme Court after Parliament called an important Court decision against the majority party an "advisory opinion" that it refused to follow (Massoud 2012, 201–02). Awadalla, who began his training as a lower court judge under the British colonial administration, labeled Parliament's refusal to abide by the Supreme Court ruling as an affront to the rule of law, in a widely distributed letter to the people of Sudan (Khalid 1990; see also Massoud 2012). Awadalla's resignation made him a martyr for the rule-of-law ideal and an overnight national political sensation.

Two years later in 1969, however, Awadalla joined a military coup and helped to overthrow the elected government in which he had served as Chief Justice. Four years later, by 1973, Awadalla—by this time appointed Sudan's Vice President by Sudan's military ruler, Jafaar Nimeiri—overhauled the basis of Sudan's legal system from common law to civil law, thus taking a step toward fulfilling the pan-Arab political goals he shared with Egyptian President Nasser to annex Sudan to Egypt, a civil law country (Massoud 2013, 104–10). While the rule-of-law ideal is not unfamiliar to civil law, Awadalla's rapid and political overhaul signaled a critical point in the disintegration of Sudan's burgeoning postcolonial legal system. One hand venerates the rule-of-law ideal and, seizing political opportunity, the other destroys it.

The rule-of-law ideal certainly is a basis for criticizing Awadalla's flip-flopping between support for and demolition of the rule-of-law ideal in Sudan. But his behavior reveals neither that the rule of law is, on the one hand, an excuse for power nor, on the other hand, that it is a good in itself (Thompson 1975). Awadalla's reverses are a reminder of law's alluring power and that the rule-of-law ideal may be only as distinguished as those who fight for it (Silverstein 2009; see also Comaroff and Comaroff 1997). We may learn about the rule-of-law ideal, then, in those admirable moments when political leaders or activists struggle for it as well as in those lamentable moments when those same persons succumb to more tempting desires. The constellation of practices associated with the rule of law, then, may be

as broken, inconsistent, and discordant as each individual person may be (Nouwen 1979; Hernandez 2006).

All this is to reflect, ultimately, on the rule of law as a construct of desire. But thoughts and desires, however clear or compelling to the mind, are not easily imported or neatly fit into reality. The models must be made real by humans who are themselves imperfect, a point emphasized by legal philosophers and legal historians alike (Hay 1975; Thompson 1975; Horwitz 1977; Levinson and Balkin 2011). Krygier notes these difficulties in achieving the rule-of-law ideal in domestic settings when he writes pointedly: "*You* try instituting useful and sustained changes, likely to hit powerful interests, in societies presently or recently wracked and rocked by despots, war, poverty, pestilence, ethnic and religious divisions, and often perennially weak institutions" (Krygier 2016, 483).

STUDYING RULE-OF-LAW PRACTICES

The normative question considered above, of whether and how the rule-of-law is an ideal worth pursuing, begs the social and historical question of how the rule of law has *already* been pursued—the empirical investigation that Ellett and Merry encourage. That is, what does the rule of law look like, and how has it changed, while it is pursued in action rather than merely in thought? And to what extent does promoting legal solutions to social, economic, or political problems ultimately refashion the rule-of-law ideal?

To address these questions, this section offers an alternative reading of the rule of law as an empirical concern of social science and history, rather than the normative enterprise of legal philosophy. To do so, this section explains how the rule of law may be investigated as an empirical matter—focusing on people, places, and the past—and the panoply of findings that may emerge from studying the rule of law through this interdisciplinary, historical, and empirical lens. This endeavor does not abandon hope in the rule of law nor does it set out to contradict the claim that the rule of law is "worth a great deal" (Krygier 2010, 133). Quite the contrary, studying lived experiences privileges people's stories of legal struggle and those data that illuminate the rule-of-law ideal in context. Here, I echo Ellett's "imperative for multidisciplinary, embedded analysis of" legal politics and Merry's admonishment that the rule of law "varies with the political system in which it is embedded" (Ellett 2016, 476; Merry 2016, 465).

Investigating the rule of law as a set of social and legal practices in context allows scholars to understand the political, social, and economic arrangements coextensive with the pursuit of the rule-of-law ideal. It also allows scholars to study, using the tools of history and social science, the people behind the ideal, how institutions matter in their work, and the obstacles they face (Nonet and Selznick [2001] 2001). In other words, a critical and empirical engagement with the rule of law may refine and paradoxically strengthen our attention to the ideal itself.

As Krygier writes in this symposium, the rule of law has brought about a "hugely fashionable" set of international and transnational practices; indeed, "international development agencies would be lost for words without it . . . billions

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of dollars are spent on it, [and] thousands of intelligent, committed, often brave people are devoted to it" (Krygier 2016, 483). What are these practices that promote the rule of law? The strategies are designed purposefully, as Ellett suggests, such "that more rules, regulations, legal personnel, and courts will be the magic formula in protecting the free market and building and maintaining the liberal democratic state" (Ellett 2016, 471).

How might one investigate the rule of law as an empirical question, then, to bring us toward the deeper ethnography that Merry solicits and the concentration on institutions like courts that Ellett seeks? As with any empirical study, the approach begins with a research question or problem, often located in a particular context or contexts. These questions are as diverse as human experiences are. Consider, for instance, a few of the concerns that have shaped my own awareness of law's power in diverse political contexts: How do minority-rights activists create social change in places where they are not able to call upon civil rights law (Chua 2014)? Why would an authoritarian regime in Egypt empower its courts with independence (Moustafa 2007)? How do human resource managers construct the experience of antidiscrimination legislation in employment contexts in the United States (Edelman et al. 1996)? Why would a dominant state in China allow impact litigation against polluters (Stern 2013)? How do concepts of human rights take shape in the countries in the Global South struggling with extreme poverty (Englund 2006; Mutua 2008)?

These questions, while not entirely focused on the rule of law, impact our knowledge of ideals by adopting a methodological orientation focused on building social theory and improving law and public policy (Feeley 2010; Gómez 2010; Obasogie 2014). A related approach now being labeled "the new legal realism" may be helpful for future efforts in this arena. This emerging paradigm for the sociolegal study of law emphasizes not legal doctrine or legal text but the "empirical study of people's lived experiences of law, politics, and power" (Massoud 2016, 97; Klug and Merry 2016; Mertz, Macaulay, and Mitchell 2016; see also Moore 1978; Engel 1984; Nader 2002). How, then, might one adopt such a locally embedded approach to the rule of law? It means, to start, investigating law's interactions with people, places, and the past.

Investigate People

Law and legal tools are technologies that people use with a specific purpose. Understanding people means asking the straightforward question when encountering a set of political or social circumstances: Who are the personnel who care about law, and why do they care about it? In Sudan, for instance, a range of key actors across distinct historical periods have proposed legal solutions to the state's ills. These include, most notably, colonial administrators, postcolonial authoritarian state leaders, and international aid activists carrying banners of humanitarianism (Massoud 2011, 2013).

The effects of legal strategies are varied. But the process of understanding who the actors are, how their strategies change over time, whom they purport to assist with the rule-of-law ideal, and why they engage in these programs are important

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ethnographic sources of sociolegal scholarship and social policy. Building the rule-of-law ideal, for activists in Sudan and elsewhere, is shaped by daily practices, which may at times be as routine as submitting job applications, signing employment contracts, attending weekly staff meetings, and adding field codes into a spreadsheet (Massoud 2015).

Considering how the rule of law—and rule-of-law promotion—is experienced from the perspective of the most poor is especially valuable. It may reveal how the rule of law augments the power of persons or groups—including lawyers, judges, religious leaders, and foreign aid donors—deemed to be the expositors of the law, and the contests of power between them. Investigating the rule of law from the perspective of the most impoverished or marginalized may also facilitate the study of gaps in the rule of law's reach, and it may reveal both law's ability to coerce and law's *soft* power—its "capacity to reframe political conflict and structure ongoing relationships" (Massoud 2015, 335).

Investigate Places

Human activities, particularly those related to law, depend on and are shaped by a variety of institutional constraints. Here, methods from legal anthropology, legal geography, and comparative politics may be particularly helpful. For instance, a thick description of those legal institutions or of habits that emerge among personnel acting within or upon them may help to trace the boundaries of language in discourses of rights that have become so salient to contemporary formations of the rule of law (Geertz 1973; Schaffer 2006; Kapiszewski, MacLean, and Read 2015).

Understanding place also helps to situate ethnography in context and the "unpredictable turns" that rule-of-law movements take (Munger 2010, 98; see also Ghias 2010; Massoud 2014). As Merry (2016) suggests in this symposium, laying out large-scale or elite political practices and institutional politics associated with the rule of law can carve open space for courtroom ethnography—the study of judges, litigants, and others seeking redress of grievances or legal or social change (see also Feeley 1979; Ewick and Silbey 1998; Scheppele 2004).

Investigate the Past

Studying people and places cannot take place in an historical vacuum. Making an effort to study distinct historical periods—not just the history that shapes the present, but the history that has shaped history—offers sociolegal scholars the opportunity to give attention to the layered processes of state building and activism and their successes and failures (see, e.g., Sharafi 2014). State approaches to the rule of law vary, for instance, by the nature of the state and the electoral and party systems that emerged following decolonization (Ellett 2013) as well as whether a state had been colonized by British forces—as opposed to forces from continental Europe—that encouraged court-centric approaches to the rule of law (Halliday,

Karpik, and Feeley 2012). In addition, legal ideals and practices at one period may be constrained by past decisions, a fear of renewed trauma, or a desire to move out of a period of brutality.

Understanding the past also involves contemplating empire. The rule of law has its own limits and, in practice, every empire (including the rule-of-law empire) engages in behaviors that limit its coercive practices in one way or another (see, e.g., Rana 2010). Thus, examining the rule of law as a descriptive question reveals not just what we hope law to be, but what empires make of the law in practice. Ultimately, investigating people, places, and the past allows writers to document what Krygier in this symposium labels as the "rampant promiscuity of the law," or people's obsessions with using legal tools to achieve their goals (Krygier 2016, 484).

Fighting for law may ultimately help people to cope with life's challenges—soothing democratically elected officials seeking change, autocrats hanging on during times of crisis, and everyday citizens looking for solutions to injustice. To be sure, the empirical study of the rule of law can expose these challenges as much as it can also expose that, "sometimes, even in the midst of bad, doing good just does good" (Krygier 2016, 486). Being open to these paradoxes and to being disenchanted by and critical of our own faith in the rule of law is an important part of strengthening the collective struggle toward justice (McCann 2014).

CONCLUSION: STRENGTHENING AND DISENCHANTING THE RULE OF LAW

As ideals and as practices, the rule of law constitutes the legal field in which sociolegal scholars make sense of law's power, beauty, and terror. I learned over the last decade to see law as an inert tool, neither good nor bad, neither strong nor weak, on its own, and to situate the rule-of-law ideal in specific histories, contexts, and sets of legal practices. My hope is that the reflections in this symposium influence scholars and practitioners to continue to debate the inherent morality of law. In my view, the moral qualities associated with law's power—and the rule of law's claims to authority—in authoritarian regimes, as in democratic countries, reflect the goals (benign or otherwise) of the actor who creates or uses legal tools, strategies, and ideals. Ultimately, this endeavor may involve questioning the meaning of the rule of law and how its meaning is embedded. These issues remain actively under development, including, for me, through ongoing research on the power of Islamic law in society (see, e.g., Massoud and Moore 2015).

Just as a principled understanding of the rule of law helps us understand our values, our hopes, and what we would fight for, an empirical investigation into the rule of law helps us understand what challenges we might face when we join that struggle. Both of these—principles and data—are ultimately essential for a richer understanding of the rule of law's power. Studying legal politics among key actors in a place like Sudan over the *longue durée* is as much an attempt to explain the

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practice of the rule of law in conflict zones as it is to understand, comparatively, the practice of the rule of law in more stable democratic societies. The rule of law is not perfect in either place, but it is more or less robust. Disenchanting the rule of law in both sets of contexts also strengthens the collective pursuit of justice—itself a messy business, and studying it perhaps even messier.

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