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# Rule of Law Reform in Transitional States: Bringing Method to the Madness - A Review of Advancing the Rule of Law Abroad: Next Generation Reform by Rachel Kleinfeld

David Pimentel

*University of Idaho College of Law, [dpimentel@uidaho.edu](mailto:dpimentel@uidaho.edu)*

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**Rule of Law Reform in  
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Bringing Method to the  
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*Advancing the Rule of  
Law Abroad: Next  
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Rachel Kleinfeld**

David Pimentel\*

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\* Associate Professor of Law, University of Idaho; BA, Brigham Young University; MA, University of California, Berkeley; JD, Boalt Hall School of Law, University of California, Berkeley. Thank you to Howard Fenton, Geralyn Busnardo, and Karen Hall for comments and insight. Thanks to William Workman, Melissa McCallop, and Jessica Sink for assistance with research and editing. The opinions expressed herein are exclusively those of the author.

## Introduction

Someone once defined “insanity” as doing the same thing over and over again, and expecting different results.<sup>1</sup> The insanity of rule of law reform may not lie in expecting different results, but in expecting any results at all. The idea is simple enough, to help developing and post-conflict countries build the rule of law: supporting legal, judicial, and law enforcement reform efforts, transforming the society into one marked by democratic lawmaking, fair and even-handed law enforcement and adjudication (respecting human rights), and a law-abiding citizenry. But it is easier said than done, and the troubled history with this endeavor is no secret. When it comes to promoting the rule of law abroad, notwithstanding George Santayana’s implication, it may not be enough to merely remember the past.<sup>2</sup> We have been repeating it anyway, which makes the whole situation all the more ridiculous and painful.

The hard part, for those working in rule of law promotion, is not just learning what we have done wrong, but taking it to the next level, and figuring out how to do it right.<sup>3</sup> The rule of law literature has, until now, been unequal to that task, but Rachel Kleinfeld’s new book, *Advancing the Rule of Law Abroad: Next Generation Reform*,<sup>4</sup> is an impressive and emphatic response to the challenge.

### I. History of the Field

The history of rule of law reform is as ancient as it is checkered. Legal reform has, for example, always been part and parcel of colonialism and of military occupations, and this may be where it first surfaced. The clash between the colonial power’s or occupier’s legal regime and the local, indigenous system inevitably created tensions, the resolution of which was often attempted by forcing

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1. Popularly misattributed to Albert Einstein and others, this statement may have its origin in the literature of Narcotics Anonymous (NA). See, e.g., NARCOTICS ANONYMOUS 23 (6th ed. 2008) (“Insanity is repeating the same mistakes and expecting different results”), available at [http://www.coastalcarolinaarea.org/literature/books/b\\_t.pdf](http://www.coastalcarolinaarea.org/literature/books/b_t.pdf). The NA Basic Text was first published in 1983, which appears to be the earliest occurrence of this statement. *Id.* at iv.
  2. 1 GEORGE SANTAYANA, *Reason and Common Sense*, in THE LIFE OF REASON 284 (1905) (“Those who cannot remember the past are condemned to repeat it”), available at <http://www.gutenberg.org/ebooks/15000#download>.
  3. Randy Peerenboom, *The Future of Rule of Law: Challenges and Prospects for the Field*, 1 H.J.R.L. 5, 9 (2009) (“It is now time to shift the focus from prescription of content to process and methodology: from the *what* of reform to the *how*.”) (emphasis in original).
  4. RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM* 33 (2012).

certain changes in the indigenous system to reflect the legal traditions of the occupying force.<sup>5</sup>

Today, a physical occupation is not necessary for tensions to arise. In an increasingly globalized world, the legal regime of another country matters to a wide range of neighbors and trading partners. Issues of security, human rights, environmental protection, product safety, health standards, and working conditions can easily spill over into other countries. Attempts at reform—particularly in developing and post-conflict societies—have come from a startling variety of motivations over the centuries as well. Victors have done legal reform as a part of post-war reconstruction to “help” the vanquished nations, but certainly pressured them to adopt legal reforms favorable to the interests of the victor.<sup>6</sup> Colonial powers intent upon exploiting the resources of their respective colonies needed a certain degree of legal protection for their investment, and understandably could not trust indigenous legal institutions to protect their interests. Much of the rhetoric at the time, about civilizing the savages (*la mission civilisatrice*), purported to be benign, even though such rationalizations are cringe-worthy by today’s standards.

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5. See, e.g., Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 477-78 (2001-2002). See also David Pimentel, *Legal Pluralism in Post-colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 YALE HUM. RTS. & DEV. L.J. 59, 73 (2011) (“The British colonists, for example, took an approach to legal pluralism that assumed the validity of local customary law and the authority of traditional leaders to administer it. To avoid offensive outcomes under the traditional regime, however, they relied on ‘repugnancy clauses,’ which allowed a British Magistrate’s court to overrule customary laws or the local authorities’ judgments if they were ‘repugnant to justice and morality.’” (citing Juma, *supra* note 5, at 477-78)). There are examples as well, depicted in the New Testament, where Roman law superseded Hebrew law during the Roman occupation. See, e.g., *id.* at 67 n.33.
  6. Speaking of the occupation of Japan after World War II, political scientist Robert Ward described it as “[an] occupation [that] ‘was perhaps the single most exhaustively planned operation of massive and externally directed political change in world history.’” DAVID P. CAVALERI, *EASIER SAID THAN DONE: MAKING THE TRANSITION BETWEEN COMBAT OPERATIONS AND STABILITY OPERATIONS* 74 (Global War on Terror Occasional Paper 7, Combat Studies Institute Press 2005), available at <http://books.google.com/books?id=vdwoPbtm24UC&lpg=PP1&pg=PA74#v=onepage&q&f=false>. As for the purposes of the reforms, the U.S. Army Field Manual specifies the aim of these so-called “stability operations: “To deter war, resolve conflict, promote peace, strengthen democratic processes, retain US influence or access abroad, assist US civil authorities, and support legal and moral imperatives,” making clear that such legal reform activities are to be carried out, by the U.S. military at least, in a manner that serves U.S. interests. *Id.* at 10 & 17 n.21 (quoting US Army Field Manual 3-07) (emphasis added).
  7. French statesman Jules Ferry defended colonialism as “a right [for the superior races,] because they have a duty. They have the duty to civilize the inferior races.” Jules François Camille Ferry, *Speech Before the French Chamber of Deputies* (Mar. 28, 1884), in *DISCOURS ET OPINIONS DE JULES FERRY* 199-201, 210-11, 215-18 (Ruth Kleinman trans., Paul Robiquet ed., Paris: Armand Colin & Cie., 1897), available at <http://www.fordham.edu/halsall/mod/1884ferry.asp>.

In the 1960s, the Law and Development Movement emerged, attempting to help developing nations, including the newly independent African states, create legal frameworks that would foster economic development in the region.<sup>8</sup> Not surprisingly, the assistance effort contemplated helping these countries adopt laws, structures, and institutions that mirror those of the donor nation (in this case, the United States).<sup>9</sup> The Movement, unable to answer its critics, foundered after a few short years<sup>10</sup>—indeed, it smacked of the very type of colonialism the African states had just succeeded in shrugging off.<sup>11</sup>

After the demise of the Law and Development Movement, the 1970s and the 1980s were quieter decades on these issues.<sup>12</sup> But the collapse of communism brought the concept back with a vengeance. Western lawyers flooded into Central and Eastern Europe, helping to draft new Western-style constitutions and laws conducive to market economies, in what was again characterized as benign assistance.<sup>13</sup>

At the same time, rule of law reform became a key element of post-conflict rebuilding efforts in a variety of countries recovering from genocide, armed conflict, and/or widespread human rights abuses. Western money and expertise flowed freely into places like Haiti, Kosovo, Timor-Leste, and Bosnia. And a significant portion of the foreign aid came with strings attached, notably some very specific expectations for legal reform.

This type of assistance, much of it designed to help ease security concerns by stabilizing the region as well as to provide humanitarian relief, was complemented by efforts to establish the rule of law as a precondition for economic development.<sup>14</sup>

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8. *Law and Development Movement, Law and Justice Institutions*, THE WORLD BANK (2005), <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:23103515~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last updated June 26, 2007).
  9. Kevin E. Davis & Mariana Mota Prado, *Law, Regulation, and Development*, in INTERNATIONAL DEVELOPMENT: IDEAS, EXPERIENCE, AND PROSPECTS 206 (Bruce Currie-Alder et al. eds., 2014), available at <http://iijl.org/courses/documents/KevinDavisandMarianaPrado.pdf>.
  10. “The law and development movement did not endure, and shortly after its inauguration it was declared dead by two of its key figures, David Trubek and Marc Galanter.” *Id.* (citing David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974)).
  11. *Id.* (referencing “ethnocentrism”).
  12. David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74, 80-81 (David M. Trubek & Alvaro Santos eds., 2006), available at <https://media.law.wisc.edu/m/mg3md/ruleoflaw.pdf>.
  13. *Id.* at 84 (“[A] new set of development policy prescriptions emerged from the Washington-based international financial institutions. This approach stressed export-led growth, free markets, privatization, and foreign investment as the keys to growth. To pursue these goals, it was necessary to create all the institutions of a market economy in former command economies . . .”).
  14. *Economics and the rule of law: Order in the jungle*, THE ECONOMIST (Mar. 13, 2008), <http://www.economist.com/node/10849115>; Moisés Naim, Fads and Fashion in Economic Reforms:

Hernando De Soto established that opportunity and prosperity could not be promoted without certain legal guarantees, including protection of property rights and a market unburdened by inefficient and corrupt government regulation.<sup>15</sup> Only by providing the poor entrepreneur access to justice and to the legitimate (rather than the extra-legal) economy, he argued, could investment and growth occur.<sup>16</sup>

## II. The Literature in the Rule of Law Field

The resurgence of rule of law reform did not, however, carry with it any new understanding of how to do it, or whether any such assistance efforts were effective. De Soto was influential in spurring interest in legal reform, but not in mapping its course. Accordingly, critics began to emerge. Tom Carothers, Wade Channell, Frank Upham, and others effectively exposed the faulty assumptions, the flawed methodology, and the illusory impact of such reform efforts.<sup>17</sup> Carothers's incisive essay *The Problem of Knowledge* lamented the fact that we actually don't know what works and what doesn't, a theme echoed throughout the devastating volume he edited in 2006, *Promoting the Rule of Law Abroad: In Search of Knowledge*,<sup>18</sup> which featured the best literature on the rule of law since De Soto.

Unfortunately, none of these critics had much to offer in terms of a constructive alternative to the conventional approach,<sup>19</sup> which Frank Upham referred to as the "rule of law orthodoxy."<sup>20</sup> Veronica Taylor lamented in 2009 that "[d]espite a voluminous 'lessons learned' literature, there is much that we do not understand about rule of law assistance."<sup>21</sup> Common to much of this literature was the observation that the rule of law reform effort worldwide had little to show for the billions spent on it. More helpful was the work of these critics, whose diagnosis

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Washington Consensus or Washington Confusion? (Oct. 26, 1999) (unpublished working paper) (on file with IMF Conference on Second Generation Reforms, Washington, D.C.), *available at* <https://www.imf.org/external/pubs/ft/seminar/1999/reforms/Naim.HTM>.

15. *See generally* HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (June Abbott trans., 1989).

16. *Id.*

17. *See generally* THOMAS CAROTHERS, *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (2006).

18. *Id.*

19. Kleinfeld labels this conventional approach "first generation reform." KLEINFELD, *supra* note 4, at 33. *See infra* notes 35-38 for further discussion.

20. Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project Working Paper No. 30, Sept. 2002), *available at* <http://carnegieendowment.org/files/wp30.pdf>.

21. Veronica Taylor, *Frequently Asked Questions About Rule of Law Assistance (And Why Better Answers Matter)*, 1 H.J.R.L. 46, 46 (2009).

and analysis helped us understand why the efforts have been so ineffective. Obviously, a corrupt system full of corrupt people is not reformed with a new set of laws on the books, or with improved infrastructure, training, or resources. It is short work for the entrenched elites to corrupt and exploit the new system much as they did the old. For these reasons, the traditional focus on technical assistance to legal institutions—what Kleinfeld calls the “top down” approach—was failing to achieve meaningful reform.

The new critics noted that nothing short of “cultural” change would really transform a society in favor of the rule of law, but few had much to offer on how an outsider, a foreign donor, could effect that type of change. As Randy Peerenboom put it, also in 2009, “[i]t is now time to shift the focus from prescription of content to process and methodology: from the *what* of reform to the *how*.”<sup>22</sup>

While most authors were talking about what *not* to do, Stephen Golub was on a different track altogether, pressing his “legal empowerment alternative” to traditional rule of law reform.<sup>23</sup> He argued that true reform, meaningful change, had to come from within the society, so reformers should focus on the “demand” side of justice, rather than the “supply” side.<sup>24</sup> By working with the disenfranchised, helping them assert themselves to demand a responsive, non-corrupt government and justice system, Golub argued, the fundamental underpinnings of the system would be altered, and elites could not revert to their corrupt and exploitative behaviors with impunity.<sup>25</sup> If civil society is empowered to hold them accountable politically, then sustainable reform may be possible.<sup>26</sup>

Golub’s work was a compelling contribution, and warranted a place in Carothers’s book, but it was not particularly helpful to rule of law practitioners in the field at the time. We were implementing old-school reform projects, reforming laws and legal institutions in cooperation with government ministries—what we were asked, funded, and expected to do. Golub was like a voice in the wilderness. His ideas were so far afield of the prevailing approach that there was no way to incorporate them into contemporary thinking about rule of law promotion, or into

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22. Peerenboom, *supra* note 3, at 9 (emphasis in original).

23. Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (Carnegie Endowment for Int’l Peace, Democracy and Rule of Law Project Working Paper No. 41, Oct. 2003), available at <http://carnegieendowment.org/files/wp41.pdf>. Amartya Sen is also identified as a pioneer in the field of legal empowerment, although Sen is an economist and more interested in economic development than in justice reform *per se*. See LINN A. HAMMERGREN, JUSTICE REFORM AND DEVELOPMENT: RETHINKING DONOR ASSISTANCE TO DEVELOPING AND TRANSITION COUNTRIES 190 (2014).

24. See generally Golub, *supra* note 23.

25. *Id.*

26. *Id.*

the projects underway in the field.<sup>27</sup>

The next compelling contribution to the rule of law literature came from the academic community with the publication of *Can Might Make Rights? Building the Rule of Law After Military Interventions* by law professors Jane Stromseth, David Wippman, and Rosa Brooks.<sup>28</sup> While specifically focused on the problems of societies that have been the subject of international military action—Iraq and Afghanistan being prominent examples at the time, but including Kosovo, Timor-Leste, Bosnia, Haiti, and others—Stromseth and her co-authors’ book quickly filled a void for rule of law practitioners everywhere. It addressed the problem of cultural imperialism and detailed the failures, the problems, and the contradictions inherent in rule of law promotion efforts around the world, drawing upon and citing the existing literature.<sup>29</sup>

Stromseth and her co-authors, then, provided some recommendations for how to conduct rule of law initiatives in the future, learning from past mistakes. It was a valiant effort, and they set forth some useful concepts. But the primary lessons were, as Geoffrey Swenson observed, not particularly practical.<sup>30</sup> Moreover, Stromseth and her co-authors’ book similarly failed to find a place for Stephen Golub’s innovative thinking. The authors cited Golub, but given the radically different approach to the problem that Golub was proposing, his ideas could not be integrated into the rest of the analysis, and were mentioned almost as an afterthought.<sup>31</sup>

### III. Kleinfeld’s Contribution to This Literature

Some other publications came out in the years following, including an impressive succession of articles in the Hague Journal on the Rule of Law (a new

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27. I remember reading Golub when I was doing rule of law work in the field. I was impressed with his ideas, but could find no way to implement them. I had my objectives and deliverables defined for me by those funding my projects, and they were all conceived in terms of first generation, “top down” reform.
28. JANE STROMSETH ET AL., *CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (2006).
29. *See generally id.*
30. Geoffrey Swenson, *Book Notes*, 43 STAN. J. INT’L L. 201, 217-18 (2007) (“The authors’ attempt to offer practical advice on actually promoting the rule of law in post-conflict societies proves less satisfying . . . The ‘synergistic approach’ seems ideal on paper, but it seems unlikely to offer much practical guidance in real world settings . . .”) (commenting on STROMSETH ET AL., *supra* note 28).
31. STROMSETH ET AL., *supra* note 28, at 314 (quoting Golub’s statement that rule of law practitioners “need to think less like lawyers and more like agents of social change” (citing Golub, *supra* note 23, at 3)).



publication that quickly established itself as the leading journal in the field),<sup>32</sup> but no treatise of any significance<sup>33</sup> until Rachel Kleinfeld turned her attention back to this problem in 2012 with *Advancing the Rule of Law Abroad: Next Generation Reform*. Kleinfeld's 2005 article *Competing Definitions of the Rule of Law: Implications for Practitioners*<sup>34</sup> had already assumed an important place in the literature,<sup>35</sup> so this new effort, a far more comprehensive treatment of the field, was eagerly anticipated.

The result is a compelling and trenchant rethinking of goals and methods of rule of law reform into a new theory of the field. She harmonizes the popular criticisms, placing them in context. And unlike any of her predecessors in the field, Kleinfeld develops the theory into a multi-faceted, complete, and coherent approach to the problem. She even incorporates, as a part of her larger vision for the field, Stephen Golub's legal empowerment alternative.<sup>36</sup>

The result is remarkable in its clarity and usefulness, not merely for reconciling the frustrating literature (or the literature of frustration) in the rule of law field, but in giving meaningful guidance to policymakers, planners, and practitioners in the real world.

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32. For example, Volume One of the Hague Journal on the Rule of Law features thoughtful and probing articles by Randy Peerenboom, Veronica Taylor, Stephen Golub, and many others. See Peerenboom, *supra* note 3; Taylor, *supra* note 21; Stephen Golub, *Make Justice the Organizing Principle of the Rule of Law Field*, 1 H.J.R.L. 61 (2009). Volume Three includes some excellent work on the problems and issues associated with Legal Pluralism, e.g., *inter alia*, Julio Faundez, *Legal Pluralism and International Development Agencies: State Building or Legal Reform?*, 3 H.J.R.L. 18 (2011), and on measurement of rule of law, e.g., Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 H.J.R.L. 269 (2011) and Linn Hammergren, *Indices, Indicators and Statistics: A View from the Project Side as to Their Utility and Pitfalls*, 3 H.J.R.L. 305 (2011).
33. The anticipated volume MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (2008) was a bit of a disappointment. There was nothing objectionable in its content, and it contained some good observations and insights, but it proved to be a difficult reading, and far too theoretical to be useful to the practitioner. I, and the other professors teaching Rule of Law Seminars that I consulted, decided to keep using STROMSETH ET AL., *supra* note 28, as our basic text, as it continued to be the most accessible, practical, and useful work for rule of law practitioners. I continue to use Stromseth's book, but in conjunction with Kleinfeld's, as I consider the latter, for reasons set forth in this book review, to be absolutely essential reading now for anyone in the field.
34. Rachel Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners* (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project, Carnegie Paper No. 55, Jan. 2005), available at <http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf>.
35. Tom Carothers had included that article in his collection, and it is widely cited elsewhere in the literature. CAROTHERS, *supra* note 17, at 31-73 (article included in chapter 3). See, e.g., STROMSETH ET AL., *supra* note 28, at 73-74 n.50 & 181-82; Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53, *passim* (2008-2009).
36. Kleinfeld discusses Golub's ideas in her treatment of "bottom up" reform. KLEINFELD, *supra* note 4, at 119-120.

### **A. Why Do We Do It?**

Kleinfeld begins with the inevitable question of “why do we even try?” But, of course, the U.S. cannot help itself—it has always turned to this type of international aid to pursue its objectives, whether they are issues of national security, economic development, or human rights.<sup>37</sup> And because everything the U.S. does in any of these areas affects the countries around it, the question is not whether the U.S. will have an impact, but “whether to be conscious and deliberate about the kind of impact it has.”<sup>38</sup>

Echoing the criticisms of Carothers and others from his 2006 book,<sup>39</sup> as well as her own earlier piece on “ends-based” rule of law reform,<sup>40</sup> Kleinfeld condemns the historical emphasis on institutions. Consigning this approach to yesteryear, she labels these efforts, which emphasized working with existing governments to reform the structure and operation of their legal institutions, as “First Generation” reform. She then charts out the new approach, the “Second Generation” or “Next Generation” of rule of law reform.

### **B. Defining the Rule of Law**

Most writers in this field grapple with the problem of defining “rule of law” and assume a sort of agnosticism, conceding the lack of consensus over what it does or should mean.<sup>41</sup> Kleinfeld, in contrast, had already weighed in on the issue of competing definitions almost a decade ago;<sup>42</sup> she concluded that rule of law should be defined in terms of “ends” and articulates five or six separate ends—some of them potentially contradictory<sup>43</sup>—that may be pursued under the rule of law banner.<sup>44</sup> From this ends-based perspective, she concludes that rule of law is not

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37. *Id.* at 6.

38. *Id.*

39. See generally CAROTHERS, *supra* note 17.

40. Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners*, *supra* note 34.

41. See Trebilcock and Daniels’ discussion of “thin” and “thick” theories, TREBILCOCK & DANIELS, *supra* note 33, at 41-42, and Stromseth’s unwieldy definition that perhaps tries too hard to include everything, STROMSETH ET AL., *supra* note 28, at 78-80.

42. Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners*, *supra* note 34.

43. For example, “Law and Order” may be one end, sought by those pursuing rule of law reform, while “Human Rights” may be another objective; but Law and Order usually comes by empowering police, at the expense of Human Rights. Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners*, *supra* note 34, at 24-25.

44. Kleinfeld’s original paper identified five ends, but when she reprised these ideas in her book, she had altered them slightly to come up with six. Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners*, *supra* note 34, at 3 (identifying these five: (1) a government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient rulings, and (5) human rights); KLEINFELD, *supra* note 4, at 14-15 (identifying these six: (1) government bound by law, (2) equality before the law, (3) judicial and government decisions are regularized, (4) access to justice, (5) human rights, and (6) law and order).

about institutions at all, but about the relationship between the state and society. “Power and culture, not laws and institutions, form the roots of a rule-of-law state. That is the fundamental insight of second-generation rule of law reformers.”<sup>45</sup>

### C. *Objects for Reform*

This insight informs Kleinfeld’s proposed second-generation approach, in which she is explicit in identifying *four* objects of reform, the first two being (1) **Power Structure** and (2) **Culture**, to accompany the familiar stand-bys of (3) **Institutions**, and (4) **Laws**. We cannot hope to effect the rule of law anywhere by changing only the institutions and laws; that was the fallacy of first-generation reformers.<sup>46</sup>

### D. *Methods/Tools of Reform*

New objects require new methods, and Kleinfeld identifies four of them: (a) **Top-Down** reform, the traditional first-generation tool, involving the provision of funding and technical assistance to rule-of-law institutions, (b) **Bottom-up** reform, involving funding and technical assistance to internal civil society organizations, which then can advocate for reform from within, (c) **Diplomacy**, which involves pressure from high levels to institute change, and (d) **Enmeshment**, a term Kleinfeld adopts to describe two distinct approaches, the stronger version of which involves membership in international organizations, and the weaker version which draws upon the socializing influence of exchange programs.<sup>47</sup>

It is not entirely clear why Kleinfeld chooses to associate these last two approaches,—membership in international organizations and exchange programs—linking them under the somewhat cryptic label of “enmeshment,”<sup>48</sup> as they do not, at face value, have much in common. The rationale, it appears, is that both involve reaching beyond one’s own borders to engage with other countries’ cultural norms and rule of law expectations. Strong enmeshment has been a powerful impetus for reform in the last 20 years, as countries eager to join the EU, or NATO, or the WTO have worked hard to qualify by taking the initiative to remedy rule of law deficiencies.<sup>49</sup> Exchange programs, including education and

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45. KLEINFELD, *supra* note 4, at 15.

46. *Id.* at 22.

47. *Id.*

48. *Id.* at 110.

49. There can be little doubt that Croatia and Serbia were most strongly influenced to deal with impunity issues, for the accused war criminals they were harboring from international criminal prosecution, by their desire to satisfy requirements for EU membership. Iavor Rangelov, *EU Conditionality and Transitional Justice in the former Yugoslavia*, 2 CROATIAN Y.B. OF EUR. L. & POL’Y 365 (2006) (noting the effectiveness of conditionality in relation to ICTY cooperation, and

training programs and study tours, have been widely used to help inculcate local leaders (judges, academics, and the next generation of leaders) with vision and values for the rule of law, although the impact of such programs is less clear.<sup>50</sup>

Kleinfeld is unsparing in her criticism of each of these four tools for reform, very much aware of the limitations of each. But unlike so much of the earlier literature, which seems to despair of achieving desired impacts through such methods, she highlights the usefulness of each approach as well, if used at the right time, under the right circumstances, and for the right purposes. And then she offers very useful rubrics for mapping rule of law problems (in terms of their political, institutional/legal, and cultural components), for stakeholder analysis (supporters and detractors of various intensity, as well as the power and resources of each), and for tactical approach (employing the four key tools—top-down, bottom-up, diplomacy, and enmeshment—to address the four key objects of reform: power structure, culture, institutions, and laws).

These rubrics are laid out in a series of tables that help focus attention on each problem and each approach. For example, she illustrates a taxonomy of approaches in the table partially reproduced (and partially redacted) below, helping identify what tactic or method may be effective for achieving different objects of reform.<sup>51</sup>

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lamenting that conditionality was not employed to encourage other aspects of transitional justice in the former Yugoslavia), available at <http://hrcak.srce.hr/file/44724>. This is a clear example of a rule of law deficiency being remedied internally, by the government in power, in response to “enmeshment” incentives.

50. Kleinfeld herself notes that “the development community tends to deride this soft form of enmeshment,” KLEINFELD, *supra* note 4, at 137, and notes that these exchange programs have been abused, for example, by Romania which used such training opportunities as a form of patronage, *id.* at 139 (citing Jeffrey Simon, *NATO’s Membership Action Plan (MAP) and Prospects for the Next Round of Enlargement* 10-11 (Woodrow Wilson Center, Paper No. 58, Nov. 2000), available at [www.wilsoncenter.org/topics/pubs/ACF45B.pdf](http://www.wilsoncenter.org/topics/pubs/ACF45B.pdf)).

51. KLEINFELD, *supra* note 4, at 150-51.

TABLE 6.1		TACTICS, WITH CONCRETE ILLUSTRATIONS OF INTERVENTIONS			
OBJECTS FOR REFORM	METHODS				
	Top-Down	Bottom-Up	Diplomacy	Enmeshment	
Laws	<b>Tactical Examples</b> Foreign lawyers draft laws and provide them to the ministry with a suggestion that they be passed	<b>Tactical Examples</b> Funding to civil society to advocate for new laws; referenda	<b>Tactical Examples</b> Conditionality that requires a country to pass certain laws to receive aid	<b>Tactical Examples</b> Forcing a country to pass intellectual property laws to join the WTO	
Institutions	[redacted]	Sponsoring poll on corruption in the judiciary to spur civil society pressure; training journalists to improve legal reporting . . . .	[redacted]	NATO training mission; U.S. police engagement	
Power Structure	Strengthen alternative power structures (institutions of “horizontal accountability” such as courts, ombudsmen) to rein in government	[redacted]	Rhetoric and pressure for judicial independence, fair trials, and so on	[redacted]	
Culture	[redacted]	Funding for broad popular education on rule of law, local groups training schoolchildren or working with police or judges	[redacted]	Cultural exchange programs	

Elsewhere in the book, Kleinfeld offers matrices and rubrics breaking down the

four methods of rule of law reform,<sup>52</sup> mapping a particular rule of law problem (identifying its political components, its institutional/legal components, and its cultural component),<sup>53</sup> and stakeholder analysis.<sup>54</sup> All of these are useful in prompting the rule of law practitioner to reach beyond the obvious, first-generation approaches to consider what the particular object of reform may be in each case, what methods may be best suited to it, and how stakeholder influence can be leveraged to accomplish it.

#### IV. Criticisms and Weaknesses

Despite the straightforward and logical appeal of Kleinfeld's approach, it has drawn some criticism from those working in the field.

##### A. *Unrealistically Optimistic?*

A colleague of mine, with extensive field experience in rule of law promotion, found Kleinfeld's constructive optimism somewhat off-putting. The field is so fraught with well-recognized minefields these days that it is difficult to imagine rule of law promotion efforts can or will make a significant difference. Another colleague, mired in the Afghanistan situation, confided to me that there was tremendous burnout for rule of law practitioners there, and that their aspirations have been scaled back to such a degree that they speak more of the Hippocratic "do no harm" principle than of effecting real or meaningful reform. It is tempting to label anyone who touts the potential for meaningful reform in such a place, through outside intervention, as either naïve or deluded.<sup>55</sup>

My reaction to Kleinfeld's explication of second-generation reform, however, was precisely the opposite. In a field where the literature details failure after failure—drawing conclusions that are either weak (*e.g.*, make sure the reform efforts are coordinated, and that there is good communication between rule of law actors),<sup>56</sup> or anecdotal (whatever you do, don't repeat the law reform mistakes made in Kosovo,

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52. *Id.* at 112 (Table 5.1).

53. *Id.* at 190-91 (Table 7.1).

54. *Id.* at 196-97 (Table 7.2).

55. Linn Hammergren, for example, doubts that bottom-up reform is a viable or realistic approach: Certainly the call for donors to invest more in civil society engagement as a means of promoting democratic or rule of law values (*e.g.* Kleinfeld 2012) seems unrealistic . . . While sometimes portrayed as a faster, less expensive way for donors to advance their projects, it is unlikely to be either. Moreover, recent experience suggests many countries will not welcome it.

HAMMERGREN, *supra* note 23, at 196.

56. CAROTHERS, *supra* note 17, at 25.

or the police reform mistakes made in Haiti)<sup>57</sup>—Kleinfeld’s approach is a welcome injection of constructive ideas. She, with this next generation reform, translates the lessons learned (or, to a troubling degree, *not* learned)<sup>58</sup> into a comprehensive scheme for diagnosing problems and their causes, and for then prescribing a carefully crafted, multi-faceted strategy that is unique to each situation. Depending on the problems that have been identified, the resources already in place, the political forces at play, and the outcomes desired, the rule of law strategies for two different countries may be radically different from one another. And, the differences are not the result of different philosophies of reform, but they rather flow logically from a comprehensive assessment of the situation and the full range of options. The result is an approach that explicitly accounts for the differences, the sensitivities, and the windows of opportunity that may exist in any given society at any given time.

### ***B. Unfairly Critical?***

Another colleague, a veteran of rule of law projects in difficult places, objected to how harsh Kleinfeld is in her judgments of rule of law practitioners. The book’s sweeping dismissal of first-generation reform as misguided and ineffective certainly ruffled some feathers—those of the well-intentioned and hard-working rule of law reformers who have fought those tough battles against daunting challenges. The perception is, perhaps, that Kleinfeld has not spent enough time working in the field grappling with these realities, and therefore hasn’t earned the right to criticize those who bear the scars of the first-generation work, those who have been doing all the heavy lifting in this field.

In a way, this is the flip side of the first criticism. If she is too optimistic about the future, she may also be too pessimistic about the past. To be fair, however, the criticisms of the past are not primarily hers. As discussed above, the literature is replete with discussions of the problems with first-generation reform, and many of those critics, *e.g.*, Wade Channell, *are* veterans from the trenches. Again, Kleinfeld’s contribution is not the documentation of past failures—that’s been done—but rather her response to “where do we go from here?”

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57. See STROMSETH ET AL., *supra* note 28, at 316-22 (Kosovo) & 214-16 (Haiti). Both are examples of what not to do, yet lack a coherent, useful path forward.

58. See Wade Channell, *Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries* (Carnegie Endowment for Int’l Peace, Democracy and Rule of Law Project, Carnegie Paper No. 57, May 2005), available at <http://carnegieendowment.org/files/CP57.Channell.FINAL.pdf>.

### **C. Tone and Target Audience**

Some would argue that Kleinfeld's work is not sufficiently scholarly to be the ultimate treatise on the subject. Indeed, it has not generated the kind of attention in legal academia that one would expect, perhaps because Kleinfeld is neither a lawyer nor an academic.<sup>59</sup> But that criticism mischaracterizes her purpose and her intended audience. This is a book aimed not so much at the academic community, but at policymakers and practitioners who are active in the field. It is extremely accessible, laying out her ideas simply and tersely in readable prose, understandable to virtually anyone working in the field—even those who are not legally trained or otherwise steeped in the political science or development literature. Indeed, the book is all the more useful because of its readability for non-native English speakers, which includes, notably, many of the political players and rule of law promoters in the countries targeted for reform.<sup>60</sup>

### **D. The Problem of Metrics**

One of the major strengths of Kleinfeld's work is also a weakness. Her insistence on focusing on “ends” or “impacts” rather than “outputs” or “outcomes” keeps the focus of the rule of law discussion where it should be.<sup>61</sup> Otherwise, it is very easy to get distracted by only marginally meaningful measures of success that ultimately drive funding and project management decisions in the field.<sup>62</sup> It is

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59. Until now, only one brief review of Kleinfeld's book has emerged in the law journals, four and a half pages of the *Yale Journal of International Law*. Jasmeet K. Ahuja, *Book Review*, 38 *YALE J. INT'L L.* 253, 264-68 (2013) (review of Kleinfeld's *Advancing the Rule of Law Abroad: Next Generation Reform*). Contrast that with Stromseth et al.'s book from 2006—authored by three law professors—which commanded the attention of the *American Journal of International Law*, the *Stanford Journal of International Law*, the *Harvard International Review*, and the *International Journal on World Peace*. Cao Lan, *Book Reviews: Can Might Make Rights? Building the Rule of Law After Military Interventions*, 101 *AM. J. INT'L L.* 901, 901-07 (2007); Swenson, *supra* note 30; Douglas Rutzen, *Rebuilding Justice*, 29 *HARV. INT'L REV.* 74 (2007); Elizabeth F. Thompson, *Book Reviews: Can Might Make Rights? Building the Rule of Law After Military Interventions*, 25 *INT'L J. WORLD PEACE* 124 (2008).

60. In my years at Ohio Northern University, many of my students—who came primarily from the developing and post-conflict world to study rule of law principles and practice—struggled through traditional legal texts. We had used PER BERGLING, *RULE OF LAW ON THE INTERNATIONAL AGENDA* (2006) as a text for the Rule of Law Seminar, but for all its good content, the students found it very difficult to get through. Kleinfeld's book is far more accessible and therefore all the more effective for engaging students in the subject matter.

61. KLEINFELD, *supra* note 4, at 199-201.

62. Trebilcock and Daniels criticize Kleinfeld's “ends-based” perspective, saying that it “conduces to largely sterile debates over normative abstractions, detached from their institutional instantiations, which, at the end of the day, is what is likely to matter most to a country's citizens.” TREBILCOCK & DANIELS, *supra* note 33, at 42. I would agree that the abstraction inherent in Kleinfeld's approach is a weakness, but not because these abstract concepts don't matter to the country's citizens—the general sense of unequal treatment before the law is



easy to count how many people have received certain training, how many laws have been passed, or how many public information forums have been held. Funding agreements are likely to measure success in terms of these deliverables, rather than the more meaningful, but harder to quantify impacts on society as a whole, in solving the underlying problem.<sup>63</sup> Her suggestion that “[t]rained measurement professionals should be able to create well-conceived metrics to address these gaps” rings a little hollow, given that the trained measurement professionals have played a large role in creating these gaps.<sup>64</sup>

Moreover, the “ends-based” reform approach that Kleinfeld advocates is implementable only to the degree that the funders are willing to define the projects in such terms. As long as funding agencies feel bound to operate in terms of measurable outputs, Kleinfeld’s ideas cannot change the behavior or the focus of the rule of law practitioner. Her arguments will certainly resonate with those in the trenches, but as long as the money is tied to concrete, defined, and measured deliverables, the practitioners will—out of practical necessity and self-preservation—focus on producing precisely that.<sup>65</sup>

Kleinfeld would undoubtedly agree, and would note that her intended audience with such criticisms is the donor community itself. But funders may have their hands tied; they may be beholden to political forces or bureaucratic requirements that they have something to “show” for all the money spent. So although Kleinfeld makes a compelling argument, this problem may not be so easily solved as she implies.

That said, Kleinfeld’s failure to solve this intractable problem should not detract from the range of problems she *does* address more meaningfully in her book. The

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enormously important to citizens—but simply because they cannot be effectively measured; one cannot tell when they have been satisfactorily achieved. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (noting the depth of human feeling about unequal treatment: “Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions—no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.”).

63. See Scalia, *supra* note 62.

64. KLEINFELD, *supra* note 4, at 202. I once sat in an all-day seminar for all USAID contractors in Romania, dedicated to the proposition that we had to make sure *everything* we did on our USAID contracts was measurable. The suggestion was that if it couldn’t be measured, it wasn’t worth doing. It was a very frustrating day, particularly as my project was aimed at, among other things, improving the ethical sensitivity of Romanian judges, through training and awareness enhancement. In fairness, this was more than 10 years ago, so perhaps that emphasis has scaled back in the meantime.

65. Channell argues that this starts at the request for proposal stage by the funding agencies because “they are seeking ‘correct’ answers that meet their expectation,” instead of incentivizing innovation. Wade Channell, *Lessons Not Learned about Legal Reform*, in CAROTHERS, *supra* note 17, at 151-53.

book is so good on so many issues that it fosters expectations that it should be competent to resolve them all; this solution, alas, still eludes us.

### ***E. Focus on Political Forces and Culture***

After arguing that altering power structure and social norms will often be far more important in establishing the rule of law than reforming institutions and laws, Kleinfeld emphasizes the importance of a stakeholder analysis, identifying winners and losers, as well as supporters and spoilers of the desired reforms.<sup>66</sup> Only by pursuing this analysis can tactics be developed that will leverage the political and cultural forces in favor of reform.<sup>67</sup> But breaking down the cultural and political landscape may be a task that lawyers—the typical players in rule of law projects—are ill-equipped to perform, she argues, and that therefore “requires adding anthropologists, sociologists, and political scientists” to the projects.<sup>68</sup> Indeed, it appears obvious that if culture is the object of change, then the effort must be staffed by anthropologists, the experts on culture.

What Kleinfeld overlooks with this suggestion is that when the aim of the project is to alter culture, the whole enterprise threatens to offend the ethics of anthropology.<sup>69</sup> Any anthropologist who employs her training to assist in changing or “improving” the culture of the society she studies—particularly in projects funded by the U.S. government—is likely to attract the suspicion, if not the enmity, of the entire anthropological community. The history of this sensitivity arises from the past use of anthropological expertise for military purposes:

Where the pre-World War II generation of anthropologists had regarded their national military and intelligence services with an ethically neutral (or, in some cases, beneficent) eye, the following generations developed the suspicious and antagonistic view of

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66. See generally KLEINFELD, *supra* note 4, at 181-209 (ch. 7).

67. *Id.*

68. *Id.* at 219. See also *id.* at 195 (“The only way to determine which individuals and institutions support and oppose reform is to invest the time and money in a good stakeholder analysis, conduct by a knowledgeable and experienced sociologist or social scientist trained in interview techniques.”).

69. It should be noted that Kleinfeld is not the first to advocate the use of anthropologists in rule of law reform projects. Shelly Quast, in 2004, insisted that “assessment team[s] must . . . have cultural, regional, and lingual expertise.” Shelly Quast, *Rule of Law in Post-conflict Societies: What is the Role of the International Community?*, 39 NEW ENG. L. REV. 45, 48 (2004-2005). Jane Stromseth et al. emphasized the role of “[a]nthropologists and country experts” in strategic assessments. STROMSETH ET AL., *supra* note 28, at 189. Jane Stromseth repeated the argument in 2009: “Interveners also often do not have a good understanding of local culture, traditions, or language. Often interveners will need to deploy anthropologists as well as lawyers and other country experts if they are genuinely trying to tackle the deeper problems of building the rule of law.” Jane Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, 18 MINN. J. INT’L L. 415, 417 (2009).

Third World leaders. From this perspective, employment with these national agencies was a prostitution of valuable professional talents for monies and prestige; it was a betrayal of the peoples whose welfare anthropology had claimed to cherish. . . . By the time that the United States had become militarily involved in the conflict in Southeast Asia, the pendulum had thus swung far in the direction where "ethics" were defined as a refusal to have any dealings with the military side of government, or with any aspect of government that seemed to sustain an imperialistic orientation.<sup>70</sup>

The revulsion of the anthropological community to the use of their expertise to serve imperialistic ends has not discouraged the military from continuing such efforts.<sup>71</sup> In 2007, the Department of Defense implemented a "Human Terrain System" embedding Human Terrain Teams with combat units in Iraq and Afghanistan.<sup>72</sup> The idea was developed by Montgomery McFate at the U.S. Naval War College<sup>73</sup> in a critical and controversial paper<sup>74</sup> and generated considerable blowback in the anthropological community. "Some of the best potential candidates probably grew leery of the program when the American Anthropological Association (AAA) declared participants would most likely be violating the ethics tenets of their profession if they signed up."<sup>75</sup>

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70. Murray L. Wax, *Some Issues and Sources on Ethics in Anthropology*, in 23 *HANDBOOK ON ETHICAL ISSUES IN ANTHROPOLOGY* para. 7 & 9 (Joan Cassell & Sue-Ellen Jacobs eds., 1987), available at <http://www.aaanet.org/committees/ethics/toc.htm>.

71. In 2005, Major O. Kent Strader of the U.S. Army Command and General Staff College argued that "culture has the potential to be weaponized . . . [which means] employing culture as an instrument of attack or defense in warfare." Kent Strader, *Culture: The New Key Terrain, Integrating Cultural Competence into JIPB 64* (May 25, 2006) (unpublished monograph) (on file with the Defense Technical Information Center), available at <http://handle.dtic.mil/100.2/ADA450632>. He continues, "[t]o operationally weaponize culture, planners must discover using cultural competence the levers or tensions within a culture that can be manipulated." *Id.*

72. *A Gun in One Hand, A Pen in the Other*, NEWSWEEK (Apr. 12, 2008, 10:32 AM), <http://www.newsweek.com/gun-one-hand-pen-other-85485>.

73. Noah Shachtman, *Montgomery McFate: Use Anthropology in Military Planning*, WIRED MAG. (Sept. 22, 2008), [http://archive.wired.com/politics/law/magazine/16-10/sl\\_mcfate](http://archive.wired.com/politics/law/magazine/16-10/sl_mcfate).

74. Montgomery McFate, *Anthropology and Counterinsurgency: The Strange Story of their Curious Relationship*, 85(2) MIL. REV. 24, 37 (2005).

75. *A Gun in One Hand, A Pen in the Other*, *supra* note 72. The AAA later issued a letter responding to the Newsweek article and clarifying its position. The letter cited an AAA Board statement that seemed to emphasize the particular circumstances of the war in Iraq: "In the context of a war that is widely recognized as a denial of human rights and based on faulty intelligence and undemocratic principles, the Executive Board sees the [Human Terrain System] project as a problematic application of anthropological expertise, most specifically on ethical grounds." AAA *Responds to Newsweek Article on HTS*, AM. ANTHROPOLOGICAL ASS'N (2008), <http://www.aaanet.org/issues/AAA-Responds-to-Newsweek-article-on-HTS.cfm>. The letter also cited a subsequent and far more moderate statement from the Board: "The Commission recognizes both opportunities and risk to those anthropologists choosing to engage with the work of the military, security and intelligence arenas. We do not recommend non-engagement, but

While rule of law reform is not always or necessarily a military objective, a large amount of the work today is being done by the military, particularly in Afghanistan.<sup>76</sup> Moreover, as noted above, rule of law reform has a long and troubled association with imperialistic agendas.<sup>77</sup> Accordingly, almost any project funded by the U.S. Government, by other Western powers, or by the international organizations they dominate (e.g., the EU, the World Bank, and the UN), will raise ethical questions for anthropologists.<sup>78</sup> The inherently judgmental and condescending nature of the rule of law intervention—based on a determination that the culture of the target society is somehow flawed and needs to be fixed—is fundamentally at odds with anthropological sensibilities,<sup>79</sup> particularly if anthropology is perceived from within as “the only discipline . . . consistently

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instead emphasize differences in kinds of engagement and accompanying ethical considerations.”  
*Id.*

76. LIANA SUN WYLER & KENNETH KATZMAN, CONG. RESEARCH SERV., R41484, AFGHANISTAN: U.S. RULE OF LAW AND JUSTICE SECTOR ASSISTANCE (2010) (see Summary section identifying the Defense Department’s Rule of Law programs as among the four “major programs” for justice sector reform in Afghanistan), available at <http://fas.org/sgp/crs/row/R41484.pdf>. The Defense Department has now published its own *Rule of Law Handbook*. THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY & CENTER FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES (Katherine Groove et al. eds., 2008), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/rule-of-law\\_2008.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2008.pdf). The Defense Department has “taken a very high-profile role in the development of both the Iraqi and Afghan legal systems.” Thomas B. Nachbar, *The U.S. Military’s Role in Rule of Law Development: From Intervention to Security Assistance* 1 (Univ. of Va. Sch. of L., Pub. L. & Legal Theory Research Paper Ser., Working Draft No. 2013-12, 2012), available at <http://ssrn.com/abstract=2242027>. Exactly how much the U.S. military is spending on rule of law in Afghanistan, however, is difficult to determine. The State Department’s Inspector General noted in 2008, “[t]he OIG team was unable to obtain an estimate of the funds spent by DOD commands on ROL.” U.S. DEP’T OF STATE & BROADCASTING BD. OF GOVERNORS, OFFICE OF INSPECTOR GEN., REP. NO. ISP-I-08-09, REP. OF INSPECTION: RULE-OF-LAW PROGRAMS IN AFGHANISTAN 44 (2008), available at <http://oig.state.gov/system/files/106946.pdf>.

77. See *supra* notes 5-11 and accompanying text.

78. The American Anthropological Association’s Principles of Professional Responsibility are, after all, intended for “use by anthropologists in their everyday professional lives.” *Principles of Professional Responsibility*, AAA ETHICS BLOG (Nov. 1, 2012), <http://ethics.aaanet.org/category/statement/>.

79. The American Anthropological Association’s Principles of Professional Responsibility, *supra* note 78, revised in 2011 after considerable controversy over the idea of anthropologists working for the U.S. Military, is more moderate and allows some room for employment in fields that involve social critique and advocacy. See Scott Jaschik, *Ethics Without ‘Thou Shall Not’*, INSIDE HIGHER ED (Nov. 21, 2011), <http://www.insidehighered.com/news/2011/11/21/anthropologists-consider-new-ethics-code#sthash.aKQMIAcE.dpbs>. It cautions, however, that

[D]eterminations regarding what is in the best interests of others or what kinds of efforts are appropriate to increase well-being are value-laden and should reflect sustained discussion with others concerned. Anthropological work must similarly reflect deliberate and thoughtful consideration of potential unintended consequences and long-term impacts on individuals, communities, identities, tangible intangible heritage and environments.

*Principles of Professional Responsibility*, *supra* note 78.

committed to the idea of moral equality among cultures.”<sup>80</sup>

The upshot is that it may be simply unrealistic to expect anthropologists to join the cause of promoting rule of law reform, or to participate in projects designed to change culture. A more realistic approach may be to train rule of law reformers, unencumbered by anthropologists’ ethical scruples, in ethnography.

## Conclusion

Perhaps, despite the sensitivities urged by Kleinfeld and other recent writers on the subject, rule of law reform can never completely shake the label of “cultural imperialism,” precisely because it presupposes that a society and culture that lacks the rule of law requires change and reform. But rule of law reform need not cede the moral high ground. It is dedicated to making the world a better place, and that necessarily involves that judgments be made—that human rights abuses, corruption, invidious discrimination, impunity, and a range of other societal evils be condemned and ultimately eradicated.

The effort to achieve those ends, particularly through outside influence, however, has proven to be a nettlesome task, and hopes for success in the field have faded substantially in the last decade. To argue that Kleinfeld’s book resolves all issues in rule of law reform would be irresponsible. There are many more problems to be solved and tactics to be questioned. However, Kleinfeld’s book provides novel insight that can propel rule of law reform into a new age of growth, or at least of relevance. Notably, she has made the case for the continued value and vitality of the enterprise, and she charts a course that is far better informed, far more sensitive to cultural and political forces, and far more savvy about using this understanding to bolster prospects for success.

Rule of law reform might have gone the way of the Law and Development Movement, retired after an inauspicious series of misadventures in the post-conflict and developing world. First generation reform was hurtling madly down that track, investing heavily in reform efforts of dubious effectiveness, some of it with track records of futility or worse, but nonetheless hoping for better results this time around. Kleinfeld is now bringing method to this madness. Her second generation rule of law reform, drawing on critiques by a variety of scholars over the past ten years and now consolidated into a clear, cogent, and comprehensive approach, will not just revolutionize the field. It may well save it altogether.

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80. Ken Gewertz, *Anthropology professor wins ASA’s Melville J. Herskovits Prize*, HARVARD GAZETTE (Dec. 7, 2006), <http://www.news.harvard.edu/gazette/2006/12.07/13-herkovits.html> (quoting Harvard Anthropology Professor J. Lorand Motory).