Review of 'Beyond Common Knowledge' edited by Erik J. Jensen & Thomas C. Heller

Jeremy Perelman

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Book Review

BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW. Edited by Erik J. Jensen and Thomas C. Heller. Stanford University Press: Palo Alto, Cal., 2003. Pp. 456. $70.00 (cloth).

Following in the Stanford tradition of socio-legal studies, *Beyond Common Knowledge*[1] brings together an impressive array of international scholars and practitioners for a timely study of judicial reform and "rule-of-law assistance" ("ROLA").[2] Much of rule-of-law literature relies on insufficiently documented and often arid doctrinal approaches to the rule of law.[3] In contrast, *Beyond Common Knowledge* places empiricism at the center of comparative legal scholarship to understand what courts and their alternatives actually do and what is actually happening within ROLA.[4] This collection of studies from around the world successfully engages both scholars and policymakers in an empirically enlightened reassessment of what ROLA actually is and of what it can and therefore should be.[5] While *Beyond Common Knowledge* makes an important contribution to the ROLA debate by introducing an empirical approach, the full value of an empirical inquiry will not be realized unless comple-

1. BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik J. Jensen & Thomas C. Heller eds., 2003). Heller is the Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies and Jensen is Lecturer and Director of the Rule of Law Program at Stanford Law School.

2. I use the phrase "rule-of-law assistance" to refer to the judicial and legal reform programs of multilateral development banks, international development agencies, and private foundations. Examples of each are the World Bank, the United States Agency for International Development (USAID), and the Ford Foundation.

3. Erik G. Jensen & Thomas C. Heller, *Introduction*, *in* BEYOND COMMON KNOWLEDGE, *supra* note 1, at 1–2.

4. *Id*. The rule of law has gained momentum over the last decade in both economic and legal fields. Examples of works within law and development literature that also take a critical approach to the rule-of-law orthodoxy include Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment, Rule of Law Series: Democracy and the Rule of Law Project, Working Paper No. 30, 2002), *available at* http://www.carnegieendowment.org/files/wp30.pdf (last visited Apr. 17, 2006) (questioning, from a socio-legal empirical perspective, the validity of the rule-of-law, governance, and development paradigm); Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (Carnegie Endowment, Rule of Law Series: Democracy and the Rule of Law Project, Working Paper No. 41, 2003), *available at* http://www.carnegieendowment.org/files/wp41.pdf (last visited Apr. 17, 2006) (articulating a "legal empowerment" paradigm based on human capabilities and bottom-up advocacy); and the important forthcoming volume of critical essays in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., forthcoming 2006) [hereinafter Trubek & Santos] (taking a legal realist/post-realist perspective on the current law and development thinking and practice). For more mainstream studies of the rule-of-law revival, see generally Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF., Mar.–Apr. 1998, at 95, and THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (1999).

5. The aim of this enterprise is to suggest "how to diagnose problems, develop baselines of performance, analyze the dynamics of reform, and measure and evaluate the development of legal systems." Jensen & Heller, *supra* note 3, at 2.

mented by a strong normative argument. To deliver tangible outcomes in the area of development, global poverty, and inequality, ROLA should be conceived within a critical pragmatic approach that integrates empirical insights with progressive normative views. In this Book Review, I advocate for an approach that combines empiricism, normative critique, and pragmatic advocacy to articulate and advance a more progressive ROLA framework and agenda.

Beyond Common Knowledge is a collection of essays and case studies analyzing rule-of-law reform and the role of judicial systems and their alternatives across the world. These studies seek to test widespread doctrinal hypotheses about the role of legal and judicial systems in economic growth and democratic politics and assess the current practice of ROLA. What is unique about the book is its openly empirical approach that seeks to move ROLA discourse beyond discussions about the philosophical meaning of access to justice and the rule of law or the political biases of ROLA discourse. In classic law and society fashion, each author in this volume supports his or her analysis with empirical research, country or cross-country case studies of judicial systems, and a strong emphasis on political economy analysis. The various studies offer insightful conclusions, and some provoking thoughts. They include a case and methodology for evaluating systems of justice through public opinion polls (José Juan Toharia, chapter 1); a comparative law and society study of judicial systems in Western Europe (Erhard Blankenburg, chapter 2); empirical assessments of informal justice (Marc Galanter and Jayanth K. Krishnan, chapter 3) and special consumer courts (Robert S. Moog, chapter 4) in India; innovative approaches to empirical research about the Chinese judiciary (Donald C. Clarke, chapter 5 and Hualing Fu, chapter 6); political economy analyses of ROLA (Jensen, chapter 10, and Heller, chapter 11); judicial reform programs in Latin America (Linn Hammergren, chapter 9, on Latin America generally, Carlos Pena Gonzalez, chapter 7, on Chile, and Héctor Fix-Fierro, chapter 8, on Mexico).

Beyond Common Knowledge addresses ROLA's uneven empirical record and calls for its systematic evaluation through new empirical research standards.[6] These standards can examine what courts and their alternatives actually do and monitor and measure the progress of ROLA reforms. Pointing generally to the limited impact of and resources for judicial and legal reforms,[7] the book calls for a more "modest" and "thin" ROLA agenda that would focus on less ambitious intermediate level outcomes, such as improving court transpar-

6. *See* Linn Hammergren, *International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers*, *in* BEYOND COMMON KNOWLEDGE, *supra* note 1, at 290, 290–335.

7. Running through the volume is an important discussion about the absolute value of "governance through law" with regard to alternative and potentially more effective mechanisms for carrying out economic development. *See* Carlos Peña Gonzalez, *Economic and Political Aspects of Judicial Reform: The Chilean Case*, *in* BEYOND COMMON KNOWLEDGE, *supra* note 1, at 220, 222–25 (arguing for cost-benefit analysis of ROLA); Hammergren, *supra* note 6, at 319 (stating that the absence of systematic evaluation of ROLA programs is "an invitation for continued waste").

ency and court management for everyday cases.[8] The book argues for a shift away from ROLA's "judicial centrism" and the doctrinal belief in independent judiciaries,[9] for ROLA actors to recognize informal and alternative dispute resolution ("ADR") processes outside of the formal judicial system, and for a deeper understanding of local legal culture and political economy.[10]

Although the authors in *Beyond Common Knowledge* assess and criticize the gap between articulated ROLA goals and practice,[11] they self-consciously prioritize a "realistic" and improving-the-record approach to meeting modest, intermediate level rule-of-law objectives as the way ahead.[12] Hence, with the notable exception of Heller's postscript chapter, which articulates a paradigm for governance and ROLA within existing institutional "ecologies,"[13] the authors in this volume fall short of articulating a strong normative framework for ROLA.

Part I of this Book Review will discuss the broad outline of a critical pragmatic approach to ROLA that combines the empiricism found in *Beyond Common Knowledge* with a normative vision for attacking global poverty. Part II explores "selling" pro-poor programs within ROLA standard packages. Part III concludes.

I. Poverty Advocacy and ROLA: A Critical Pragmatic Approach

While *Beyond Common Knowledge* sets an agenda for assessing and reforming ROLA practice, it rejects on empirical grounds both the idea of articulating "higher level" normative goals for ROLA and any deeper critical discussion on the theoretical and political biases of rule-of-law and development discourses.

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8. Jensen & Heller, *supra* note 3, at 3.

9. *See* Erik J. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, *in* Beyond Common Knowledge, *supra* note 1, at 336, 336–38; Thomas C. Heller, *An Immodest Postscript*, *in* Beyond Common Knowledge, *supra* note 1, at 382, 401–02 (arguing that although the concept of "autonomy" has insulated judiciaries from political power, it often leads to uncontrolled corruption practices when added to the "local ownership" principle adopted by ROLA agencies).

10. Jensen & Heller, *supra* note 3, at 3. Heller goes even further to suggest that ROLA actors abandon their focus on local ownership by vested legal elites and consider disrupting "the incentives of currently empowered legal actors who have both owned and exhausted the rule of law for decades" by questioning the necessary and absolute public good nature of the judiciary. Heller, *supra* note 9, at 406; *see also* Peña Gonzalez, *supra* note 7, at 222–25 (arguing that analysis of the success of judicial reforms should be based on examinations of the political process involved and of the underlying public policy). For those familiar with the history of law and development, the promotion of a deeper understanding of local legal culture is reminiscent of the sentiments surrounding the "self-estrangement" period in law and development that followed the first U.S.-based law and development movement of the 1960s. *See generally* David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development*, 1974 Wis. L. Rev. 1062.

11. Jensen & Heller, *supra* note 3, at 2–4 (pointing to "the accretion of doctrine-based expectations on the development of legal systems; the weak empirical basis that supports those expectations; and the disconnection between the articulated goals of the projects on the one hand and the reality of the interventions on the other").

12. *See* Heller, *supra* note 9, at 405.

13. *Id*. at 390–94.

The eschewing of such normative positioning risks undermining the value of the empirical, political economy-based analysis of ROLA in *Beyond Common Knowledge*. In other words, there should be a more critically engaged and clearly articulated normative agenda in addition to—and beyond—the invaluable empirical critique provided by *Beyond Common Knowledge*.

Specifically, a case should be made, upon both normative and empirical grounds, for both supporting and critically engaging the current re-focusing of ROLA discourse on poverty and inclusion. Although most multilateral development banks ("MDBs") and development agencies have recently reintroduced a vocabulary of poverty or "extreme" poverty "alleviation," "reduction," or "eradication,"[14] as well as concepts of participation or deliberation into their rhetoric, the practice of ROLA, as highlighted in *Beyond Common Knowledge*, remains relatively unchanged and geared mainly toward market-induced economic growth objectives. Pro-poor programs, such as support to access-to-justice programs and civil society advocacy groups,[15] are still marginalized, even within agencies claiming to have adopted a "human" or "rights-based" version of development.[16] *Beyond Common Knowledge* accurately recounts this reality, as well as the many political-economy obstacles to the realization and sustainability of pro-poor programs in ROLA.[17] However, the lack of such programs in ROLA practice ought to be more forcefully criticized, and a strong case can be made to support the funding and development of the most innovative, experimental, and inclusive of these programs.

The post–Washington Consensus[18] shift from market growth to market failures, local institutional trajectories, poverty, freedom, and capabilities has trans-

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14. *See generally* JEFFREY SACHS, THE END OF POVERTY (2004) (arguing for a big push policy of resource transfers from the developed world to poor countries, a policy, which if informed by economic knowledge and modern science, could achieve the eradication of widespread diseases and extreme poverty in these societies).

15. Examples of pro-poor access-to-justice programs include legal aid programs, legal literacy programs, ADR, support for public interest law, and civil society advocacy organizations. For a discussion of pro-poor access-to-justice programs, see Jeremy Perelman *The Way Ahead? Access-To-Justice, Public Interest Lawyering and the Right to Legal Aid in South Africa: The Nkuzi Case*, 41 STAN. J. INT'L L. (forthcoming 2006).

16. The rights-based approach to development seeks to integrate political freedom and equity concerns both as means to induce economic growth and alleviate poverty, as well as normative objectives on their own. On the rights-based approach to development, see Andre Frankovits, *Rules To Live By: The Human Rights Approach to Development*, PRAXIS: FLETCHER J. DEV. STUD. 9, 9–17 (2002). *See also* PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT, 167–78 (2004) (arguing for and conceptualizing a genuine rights-based approach to development practice, which would go beyond the rhetorical inclusion of human rights norms in development literature and discourse); Peter Uvin, *On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise*, PRAXIS: FLETCHER J. DEV. STUD. 19, 19–26 (2002). For an example of a development agency that has adopted a human development and rights-based approach to development, see UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000: HUMAN RIGHTS AND HUMAN DEVELOPMENT 17 (2000) (discussing the adoption of the human development approach by the UNDP in the 1990s, which redefined development in terms of human development or development measured not only by GDP growth, but also by measures of mortality, health, and education).

17. *See, e.g.*, Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Reverse Institutional Patterns and Reformers' Responses*, *in* BEYOND COMMON KNOWLEDGE, *supra* note 1, at 336, 350–57.

18. The term "Washington Consensus" was coined by John Williamson in 1989 and is generally used

lated into the current ROLA rhetoric.[19] This shift, even if only rhetorical, should be recognized as a progressive doctrinal step away from neoliberalism. Further normative critique as to the distributive underpinnings of the current development and ROLA discourses, combined with empirical research as presented in *Beyond Common Knowledge*, could ultimately alter the mere "lip-service" function of pro-poor programs within the well-endowed[20] ROLA packages.[21] Whether ROLA programs are best suited to eliminate economic and other forms of poverty, invent new forms of inclusive democratic citizen settings, deliver sustainable and inclusive economic growth, or even sustain a liberal formal "rule of law" remains debatable both theoretically and empirically. But by tapping into both the theoretical realm of the normative debate about the nature of "development" and ROLA and into the empirical realm of observed gaps and political economy analysis, a more coherent argument could be articulated to place poverty and inequality at the center of ROLA.[22] Hence, a critical pragmatic approach to poverty advocacy should: (1) acknowledge the current doctrinal and policy shifts in ROLA as liberal but progres-

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to refer to the Bretton Woods institutions' policies after the debt crisis of 1982, when the development community considered that priority should be given to economic growth through export-oriented structural adjustment, which would allow for foreign currency flows and debt reimbursements. John Williamson, *A Short History of the Washington Consensus* 7 (Fundación CIDOB, 2004), *available at* http://www.iie.com/publications/papers/williamson0904-2.pdf (last visited Apr. 17, 2006).

19. David M. Trubek & Alvaro Santos, *An Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, *in* Trubek & Santos, *supra* note 4, at 5–7. The post–Washington Consensus model of development is characterized by sequenced privatization, attention to local ownership and pacing of reform, a renewed focus on domestic markets, safeguards against the negative effects of rushing transition to an open economy, limited state intervention in case of market failure, targeted poverty, health, and education safety nets and the acceptance of local institutional variations. *See* Dani Rodrik, Has Globalization Gone Too Far? 69–85 (1997). The development paradigm has been influenced by the emergence of Amartya Sen's capabilities approach, as presented in Amartya K. Sen, *Development as Capability Expansion*, *in* Human Development and the International Development Strategy for the 1990s 41, 54–56 (K. Griffin & J. Knight eds., 1990) (arguing for a capabilities approach to development that reconciles civil and political rights and socioeconomic rights ("SER") by integrating them as constitutive and interdependent ends and means of development, defined as the enhancement of the freedom and capabilities of individuals to gain control over decisions affecting what they value in life). The rights-based approach to development integrates the rule of law as a tool to achieve human development, rejects the earlier development/rights trade-off paradigm, and integrates formerly neglected SER as official policy goals and benchmarks to measure human development. *See also* Amartya K. Sen, Development as Freedom, 52–57, 128–37 (Oxford Univ. Press, 2001) (Knopf 1999) [hereinafter Sen, Development as Freedom].

20. For diverse political economy-related reasons, such as the relative political neutrality of rule-of-law and good governance discourses, ROLA has attracted important and ongoing financial flows. Jensen, *supra* note 9, at 347; *see also* Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 World Bank Research Observer 117, 117 (1999) (estimating the amount invested by MDBs in judicial reform projects in twenty-six countries during the late 1990s at $500 million, while USAID would have invested $200 million before that). The overall figure for World Bank rule-of-law programs over the last decade is estimated at almost USD $3 billion. David Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, *in* Trubek & Santos, *supra* note 4, at 68.

21. *See* Jensen, *supra* note 9, at 350 ("Lip-service interventions always find their way into donor reports, but they receive very little if any MDB funding.").

22. Imagining a subsequent and complementary volume to the one reviewed, I would modestly suggest the following as a title: *Beyond Uncommon Empiricism: Normative Aspirations for the Rule of Law—Replacing Poverty and Inequality at the Center of Rule-of-Law Assistance*.

sive; (2) point out the remaining theoretical flaws of its doctrine and call for more inclusive, egalitarian values and better critical understanding of the concepts of "rights" and "development"; (3) utilize the empirical political economy analysis presented in *Beyond Common Knowledge* to denounce the lack of genuinely pro-poor programs within ROLA; and (4) advocate funding efforts for experimental, inclusive, and people-based pro-poor ROLA programs.

While the authors in *Beyond Common Knowledge* effectively highlight the gap between articulated ROLA goals and practice, there is little open discussion about the deeper theoretical assumptions and political biases embedded in development discourse and ROLA rhetoric.[23] A critique of the current "Third Moment doctrine"[24] of law and development and its focus on ROLA can and should be made both to enrich the theoretical debate[25] and

23. A notable exception is Heller, *supra* note 9. In his account of the role of law in development theory, Heller suggests that the standard rule-of-law package that emerged from the latest ROLA wave is directed at "building up the capacity of courts and lawyers to substitute adjudication for administration and to manage the increased flows of new economic and constitutional demands expected to arise from privatization, marketization, and democratization." *Id*. at 384. This means that "[t]he rule of law remains principally about improving the quantity (number and productivity) and quality (autonomy, pay scales, and skills) of a largely existing court system under the partially articulated theory that well-functioning legal institutions are essential to markets and democracy, and that these, in turn, define the possibilities of successful development." *Id*. He calls for an "integrated" rule-of-law, development, and democracy theory that would include the latest insights of development economics (coordination between private actors and the shift to poverty alleviation) and democracy theory (deliberative democracy and democratic experimentalism). *Id*. at 390–92, 405.

24. *See* Trubek & Santos, *supra* note 19, at 1–5, pointing to the history of the law and development movement as three "moments"—the "Law and Developmental State" moment of the 1950s–60s, the "Law and the Neoliberal Market" moment of the 1980s and early 1990s, and the current "Third Moment" emerging paradigm. In the neoliberal model, the rule of law was conceived under a conservative and formalist economic constitutionalism scheme focused on the law of the market, where the judicial system was seen as key to facilitating market transactions, private-sector development, and foreign direct investment with "little concern" for law as a guarantor of freedom or as "protector of the weak and disadvantaged." Contrastingly, the "Third Moment" is related to a broader critique and "chastening" of neoliberal models that recognizes market failures and broadens the definition of development from narrow economic growth to include notions of freedom and capabilities. *Id*. at 2. The "Third Moment" doctrine "accepts the use of law not only to create and protect markets, but also to curb market excess, support the social, and provide direct relief to the poor" through targeted programs and safety nets. In this context the judiciary remains important but in a different way: "since the judiciary is now linked to poverty reduction and the social, it is important to provide access to justice to those most in need." *Id*. at 7.

25. *Beyond Common Knowledge* can be viewed as one type of critique pertaining to the "Third Moment" of law and development: an in-house, empirical, political economy, and law and society critique of the current ROLA "standard package." Examples include the contributions of ROLA insiders, such as Hammergren (World Bank) or Jensen (Asia Foundation), and those of famous law and society scholars, such as Blankenburg, Toharia, Fix-Fierro and Galanter. For a more normative critique of the "Third Moment" of law and development, see Trubek & Santos, *supra* note 4, at 6–11 (pointing out the embedded assumptions and political biases of the current law and development movement). Written from a legal realist/post-realist perspective, Trubek & Santos's book points out the distributional consequences of the current rule-of-law orthodoxy, the commonly held assumptions about formalism and law (e.g., its neutrality) that characterize this orthodoxy, and the consequences of the rule of law becoming an objective of development in itself. *See also* David Kennedy, *Laws and Developments*, *in* LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY 17 (Amanda Perry-Kessaris & John Hatchard eds., 2003) (criticizing the latest rule-of-law momentum as being based on the assumption that choosing law could substitute for complex political and economic choices pertaining to development policy). Overall, the legal realist/post-realist position raises important questions about the depth of the shift in law and development thinking away from neoliberalism, questioning whether the current doctrine can move beyond the

to help shape a progressive paradigm for the law and development movement.

Poverty, inequality, and the inclusion of disempowered groups in society and collective decision-making should be pushed to the center of ROLA thinking. In the area of access to justice, for example, the conceptual debate that has been raging for decades ought to be more forcefully transposed to ROLA. Access to justice, a broad label widely used to describe some of the pro-poor programs found within the latest ROLA standard policy packages,[26] is situated at the center of the current law and development doctrine, because it supposedly links economic development, democratic freedom, and inclusion.[27] In *Beyond Common Knowledge*, Heller and Jensen provide revealing political economy analyses suggesting that the financing of pro-poor access-to-justice programs is mostly symbolic[28] (partly due to the incentive structures within donor assistance[29]), which explains the lack of "penetration" of positive ROLA reforms.[30] Although Jensen questions the viability[31] and sustainability of these

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neoliberal tensions between economic constitutionalism and democratic empowerment, objective economic efficiency and distributional implications, and "rule of the law for the market" and "rule of the law for poverty reduction and emancipation." It is argued that the rule of law, conceived within the current paradigm as an end to development in itself, may indeed serve liberal as well as conservative agendas. For a similar analysis on the tensions between economic constitutionalism and poverty alleviation, see Heller, *supra* note 9, at 391.

26. The standard access-to-justice package includes administration of justice, court efficiency, and case management programs (speed of justice), court infrastructure, e-justice programs, legal education as well as publicly funded individual legal aid systems (cost of justice), and ADR or procedural simplification programs. Other access-to-justice labeled activities include legal literacy and support to public interest law and civil society advocacy organizations. On the standard access-to-justice package, see Jensen, *supra* note 9, at 345–52.

27. The official MDB literature of recent years suggests a link between access to justice, democracy, and market-induced economic growth. *See, e.g.*, World Bank, World Development Report 2002: Building Institutions for Markets 131, *available at* http://www.worldbank.org/wdr/2001/fulltext/ch6.pdf (last visited Apr. 17, 2006). For Jensen, the rationale behind the centrality of access to justice to ROLA is an "emerging global consensus that broader citizen participation is integral to stronger democratic practices." Jensen, *supra* note 9, at 354. For a historical approach to the access-to-justice movement and its intersection with the law and development movement, see Perelman, *supra* note 15.

28. Jensen, *supra* note 9, at 349–52 (suggesting that ROLA standard packages even in their latest "holistic" version remain primarily a set of access-to-justice labelled and resource-intensive judicial infrastructure projects aimed at enforcing rights enforcement and predictability).

29. *Id.* at 350–52 (suggesting that one reason for the permanence and preeminence of large loans for judicial infrastructure in ROLA is related to the political economy and institutional incentive structures of donor assistance, which favors the disbursement of big loans rather than small grants to recipient governments; this is particularly true of MDBs but less of development agencies and foundations).

30. Heller, *supra* note 9, at 399–405 (recognizing positive structural changes fostered at the national/capital levels by the emergence of constitutional courts and associated bodies such as ombudsmen, human rights, and electoral commissions, but pointing to the lack of ROLA impact at lower levels partly due to the lack of "penetration"). Heller argues that ROLA has been "unable to extend reforms and incentives that have changed behavior in the upper courts to the lower courts, where the mass of people in developing nations encounter the law." *Id.* at 399.

31. Although Jensen recognizes that well-funded and organized networks of NGOs can sometimes have a positive impact on reform, he sheds doubt on their capacity to mobilize and represent broad consistuencies. Jensen, *supra* note 9, at 354–55. Jensen questions their motivations and points out the recurrent problem of collective action. *Id.* at 354. For an explanation of collective action, see Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965).

pro-poor programs,[32] the authors in *Beyond Common Knowledge* do not directly engage with the normative debate surrounding access to justice and poverty advocacy.

Two types of critiques have been made against the access-to-justice concept. First, the law and economics approach has questioned the cost efficiency of traditional legal aid entitlement systems with regard to other more cost-efficient systems.[33] Second, scholars and activists on the left have criticized traditional access-to-justice programs (such as individualized legal aid, ADR, and court efficiency programs) for being narrowly directed at procedural access rather than substantive justice.[34] Indeed, if justice is to be defined as social change, wealth redistribution, poverty alleviation, or even the enhancement of human capabilities, access to a formal judicial system may not be the best way to achieve it; greater court access will not mitigate poverty in countries where law entrenches social, political, and economic exclusion. From this perspective, access to the market preempts access to justice.[35]

Scholars and practitioners of poverty law in the United States have suggested a shift to more client-centered alternative models which prioritize collaborative lawyering, community action, social movements, and political struggle over formalist access-to-the-courtroom model attempts to induce social change.[36]

This conceptual critique has been echoed in developing countries by alternative law groups and civil society NGOs, which reject traditional legal aid as a "band-aid" and aim for deeper structural change. An example of such NGO-lawyering, which is supported mostly by international funds (private foundations and, increasingly, bilateral agencies), is socioeconomic rights lawyering.[37] Drawing on the mobilizing potential of socioeconomic rights ("SER"),

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32. *See* Jensen, *supra* note 9, at 354–55.

33. *See, e.g.*, Steven Shavell, *The Law and Economics of Judicial Systems*, PREM Note No. 26 (World Bank, Washington, D.C.), July 1999, at 1, *available at* http://www1.worldbank.org/publicsector/legal/PREMnote26.pdf (last visited Apr. 17, 2006) (suggesting that a system of no-fault automobile insurance provides compensation to more accident victims at less cost than permitting each injured individual to bring suit for damages).

34. For a discussion of various concepts and waves of access to justice, see Perelman, *supra* note 15.

35. Trubek & Santos, *supra* note 4, at 180, 192 (showing how access to justice is still conceived in mainstream development thinking as access to efficient courts for purposes of market-induced economic growth).

36. There is vast literature on cause lawyering, progressive lawyering, and collaborative lawyering. *See, e.g.*, PAOLO FREIRE, PEDEGOGY OF THE OPPRESSED (Myra Bergman Ramos trans., 1984) (theorizing popular education); ROBERT MANGABEIRA UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE (1998) (discussing democratic experimentalism); Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000) (discussing regulatory negotiation); Gerald López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Lucie E. White, *Creating Models for Progressive Lawyering in the 21st Century*, 9 J.L. & POL'Y 297, 308 (2001); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994).

37. I use the term "socioeconomic rights lawyering" generally to designate the practice of public interest lawyering organizations that have articulated their action around the concept and norms of SER. SER lawyering practices include targeted or developmental legal aid programs, structural developmental

advocates in developing countries have engaged in constitutional-level impact litigation as well as bottom-up community action.[38]

Although *Beyond Common Knowledge* sheds a realistic light on the political economy obstacles to the development of this type of advocacy and pro-poor programs generally within ROLA,[39] the theoretical critique and political debate surrounding the value of ROLA and access to justice vis-à-vis global poverty alleviation should not be overlooked or abandoned. Rather, the two critiques should complement each other.

As Trubek and Santos suggest, the current doctrine of the "Third Moment" of law and development is not entirely defined yet, and constitutes a mix of many elements along the political spectrum.[40] Critical questioning of both the shift away from a neoliberal paradigm and the liberal assumptions embedded in current rule-of-law thinking is thus important.[41] For example, the currently fashionable rights-based approach to development should be criticized when it becomes a mere formalistic exercise of including a limited set of rights in development rhetoric, or when it does not critically examine the very concepts of development and rights on which it rests.[42] Even the vocabulary of "pro-poor strategies" and poverty "alleviation" or "targeting," increasingly used in the current paradigm, can be criticized for embedding and crystallizing a normative shift from equality to poverty alleviation—i.e., a shift

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rights impact litigation, or critical pragmatic community-based action for SER and legal empowerment approaches. For a discussion on SER lawyering and the debates around SER in rights-based development, see Perelman, *supra* note 15.

38. Examples include the Legal Resources Center's successful engagement in public interest constitutional litigation in South Africa on the rights to housing and health. *See, e.g.*, Government of RSA v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.); Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC) (S. Afr.). On cause lawyering in the Third World, see generally Stephen Ellmann, *Cause Lawyering in the Third World*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 349 (Austin Sarat & Stuart Scheingold eds., 1998).

39. *See* Heller, *supra* note 9, at 397–99 (critiquing court-induced change from a political economy standpoint by pointing to the judiciary's lack of capacity in developing countries to enforce important SER decisions at the level of the poor in the absence of civil society pressure). Heller also argues that the activist attitude of judges in some countries—like South Africa—does not necessarily signal a shift away from the traditional and conservative deference of the judiciary to executive power and the "history of institutional dualism" in most developing countries.

40. Trubek & Santos, *supra* note 4, at 4–7, 10–14. The political right clings to a "chastened" Washington Consensus, focusing on courts as mediators and facilitators of market activity. The political left sees law as a tool to empower the poor, and ROLA as a potential but limited means of doing so. *Id*.

41. *Id*.

42. For a forceful critique of the human rights paradigm and the concept of development from a social movement and Third World perspective, see BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 248 (2003) (suggesting that the rights-based approach to development has failed to provide a transformational potential to Third World societies, because use of "the language of rights is limited within its rationalistic and disciplinary terms, which emphasize individual autonomy over relationships and trust . . . . Rights discourse, with its historical connection to ideas of property and sovereignty, had to be replaced with other strategies or discourses, in order to get over its conservative influence"). *See also* Trubek & Santos, *supra* note 4, at 6 (suggesting that interpretations of "rights in development" will vary, because "[f]or some, human rights might mean limiting state action while others might deploy a more expansive notion. The same terminology of human rights can be used to promote the interests of oppressed minorities and holders of property.").

away from genuine solidarity.[43] Poverty—even redefined as capability deprivation[44]—remains largely conceived as a byproduct of economic growth, while inequality is still often conceived as a necessary step toward development.[45]

As important as it is to complement any empirical approach, this critical theoretical take on ROLA and development ought to be placed in a critical pragmatic perspective, which would recognize the doctrinal and policy shifts of the current moment as progressive steps. The recognition of market failures and the move toward poverty alleviation and capabilities as overarching goals of development represent progressive steps of this last decade, and critical thinking should acknowledge them as such. As *Beyond Common Knowledge* shows, the current focus on poverty-alleviation in ROLA may well be only rhetorical. The shift in discourse, however, should not be entirely discarded. The political economy of ROLA is a complex interaction between donor countries, MDB personnel, recipient governments, and vested legal elites, and the debates at theoretical and political levels can influence the ROLA agenda and consequently its practice. If pro-poor access-to-justice programs are mere lip-service today, they were almost completely absent from MDBs' standard packages a decade ago. In other words, the normative, political, and theoretical debates on capabilities and human development that took place within MDBs and among ROLA players over the last decade *did* have an influence in the inclusion of pro-poor programs in ROLA—even if the programs remain liberally conceived and marginally practiced. No matter how incremental, this shift in the broader development agenda toward a less neoliberal paradigm must be both acknowledged and supported at the policy-making level.[46]

II. "Selling" Pro-Poor Programs

The main problem of how to "sell" specifically pro-poor programs to ROLA constituencies remains. Lawyers have assumed an important place in development agencies and MDBs with high-level decision-making and consulting positions.[47] Lawyers' prominence in development agencies increases the

43. For an excellent critical analysis of the neoliberal ideological biases behind the ideas of market efficiency and neutrality, the structural distributional consequences of property rights-oriented economic policies, and the normative shift from reducing inequality to alleviating poverty in development policy for post-communist transition, see Kerry Rittich, Recharacterizing Restructuring: Gender and Distribution in the Legal Structure of Market Reform (2002).

44. Sen, Development as Freedom, *supra* note 19, at 87.

45. *See generally* Growth, Inequality, and Poverty: Prospects for Pro-Poor Economic Development (Anthony Shorrocks & Rolph van der Hoeven eds., 2004) (presenting the debate regarding the links between inequality, poverty, and growth in development economics).

46. *Compare* The World Bank, World Development Report 2006: Equity and Development (2006), *with* The World Bank, World Development Report 2006: Building Institutions for Markets (2002).

47. This, in addition to the massive financial flow invested in ROLA over the last decade, is due in great part to the importance of ROLA and "good governance" discourses within the development industry. For an excellent analysis of the use of rule of law and good governance discourses by and within the World Bank, see Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*,

importance placed on law-centered programs. Notwithstanding the empirical question raised by *Beyond Common Knowledge* of whether law-centered programs are necessarily relevant to achieve development goals, ROLA programs remain well-endowed. The goal is therefore pragmatic: convince ROLA constituencies to transfer increased funding to pro-poor ROLA programs by showing that these are necessary and even "efficient."

One way to capture the current liberal mainstream constituency in development agencies and MDBs would be to propose original models of access to justice. Traditional legal aid programs, even if questionable in their "band-aid" function, are accepted by this liberal constituency. This conceptual and political support is a first step and should not to be dismissed lightly. However, an additional effort should be made to conceptualize and advocate for original legal-aid schemes that can be geared toward helping poor people directly.

An example of this approach can be found in South Africa, where a mixed model of legal services delivery has been implemented since the end of apartheid. This model, centered on publicly funded "Justice Centers," includes internationally funded civil society and community-based paralegal organizations within the delivery of legal services scheme.[48] Like those in many developing countries, the legal aid scheme in South Africa prioritizes criminal cases.[49] Yet marginalized people also require legal assistance in specific civil matters, such as land titling or land tenure evictions. The South African legal aid community has attempted to deal with this problem by acknowledging the problem of resource scarcity, a constraint familiar to any legal aid scheme. In a recent case before the Land Claims Court, the South African Legal Resources Center ("LRC"), a prominent public interest law firm funded partly by ROLA donors, argued on behalf of a local NGO for a right to legal aid for people whose security of land tenure is threatened or has been infringed. In a concerted strategy with the LRC, the plaintiff suggested to the court an original solution: the funding of a focused (legal aid for land tenants), development (land rights) and context-sensitive (post-apartheid redistribution of land) legal services delivery by a partially private and internationally funded "Rural Legal Trust."[50] Such a nuanced approach allowed the LRC to overcome some of the legitimacy, justiciability, and budgetary arguments generally advanced against the recognition of such a right. Such locally informed and pragmatic approaches, even if highly contextualized and limited in terms of structural change or wider redistributive goals,[51] could be proposed to ROLA programmers and donors more broadly.

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in Trubek & Santos, *supra* note 4, at 216, 254.

48. Perelman, *supra* note 15.

49. *Id*.

50. Nkuzi Dev. Ass'n. v. S. Afr. & Legal Aid Bd., LCC 10/01 (2002), *available at* http://wwwserver.law.wits.ac.za/lcc/files/nkuzi/nkuzi.pdf (last visited Apr. 23, 2006). For commentary on this case, see generally Perelman, *supra* note 15.

51. *Id*. Part IV.

Another interesting concept is Stephen Golub's recently articulated "legal empowerment" paradigm, which reflects a practitioner-academic's critique of ROLA and classic access-to-justice schemes based on both theoretical and empirical insights.[52] Like Jensen and Heller, Golub suggests going beyond the "rule of law orthodoxy," albeit via a normative paradigm shift toward a "legal empowerment alternative,"[53] defined as "the use of legal services and related development activities to increase disadvantaged populations' control over their lives."[54] Situated along the lines of Amartya Sen's capabilities approach and drawing on civil society and community development literature,[55] legal empowerment, "a manifestation of community-driven and rights-based development, is grounded in grassroots needs and activities, but can also translate community-level work into impact on national laws and institutions."[56] The paradigm focuses on civil society as "the best route to strengthening the legal capacities and power of the poor"[57] but aims to work with, or put pressure on, state and local officials. It seeks to address a major failure of ROLA—a lack of enforcement of laws that benefit the poor—and emphasizes a bottom-up, local-needs-based, and multi-level-strategy approach. These strategies include, but are not limited to, legal services, and feature ROLA practitioners

52. Stephen Golub & Kim McQuay, *Legal Empowerment: Advancing Good Governance and Poverty Reduction*, *in* LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK (2001), *available at* http://www.adb.org/Documents/Others/Law_ADB/lpr_2001.asp?p=lawdevt (last visited Apr. 17, 2006).

53. Golub, *supra* note 4, at 5, 11 (referring to "rule-of-law orthodoxy" as coined by Upham, *supra* note 4, at 3, who characterizes rule-of-law orthodoxy as contending "that sustainable growth is impossible without the existence of the rule of law: a set of uniformly enforced, established legal regimes that clearly lay out the rules of the game").

54. *Id*. at 25. Golub's critique of ROLA can be situated somewhere between the in-house, empirical assessment critique represented by *Beyond Common Knowledge* and the legal realist/post-realist literature, as he addresses exclusively neither the problematic political distributional choices of rule-of-law thinking nor a "thinner" rule of law and more modest and empirically assessed goals and programs. Golub suggests that ROLA "focuses too much on law, lawyers, and state institutions, and too little on development, the poor and civil society." *Id*. at 5. He questions the "questionable assumptions, unproven impact, and insufficient attention to the legal needs of the disadvantaged" of the rule-of-law orthodoxy and rejects its "top-down," state-centered approach focused on law reform, the judiciary, and the building of "business-friendly legal systems that presumably spur poverty alleviation." *Id*.

55. *Id*. at 27 n.83 (referring to civil society and development literature, which highlights "the importance of civil society capacity building, organization, or political influence in improving the lives of the disadvantaged"). *See generally* David Brown & Darcy Ashman, *Participation, Social Capital, Intersectoral Problem Solving: African and Asian Cases*, 24 WORLD DEV. 1467 (1996) (analyzing thirteen cases of intersectoral cooperation between NGOs, international donors, and public agencies); Michael Edwards, *NGO Performance—What Breeds Success? New Evidence from South Asia*, 27 WORLD DEV. 361 (1999) (arguing that enhancing the livelihoods of poor people depends on NGO successes in fostering autonomous grassroots institutions and linking them with higher-level markets and political structures); Michael Edwards & David Hulme, *Scaling-up the Development Impact of NGOs: Concepts and Experiences*, *in* MAKING A DIFFERENCE: NGOS AND DEVELOPMENT IN A CHANGING WORLD 13 (Edwards & Hulme eds., 1994) (surveying approaches taken by NGOs to increase their impact in development efforts); Peter Evans, *Development Strategies Across the Public-Private Divide*, 24 WORLD DEV. 1033 (1996) (arguing that shared development projects between state and civil society can promote development); Peter Uvin, Pankaj S. Jain & L. David Brown, *Think Large and Act Small: Toward a New Paradigm for NGO Scaling Up*, 28 WORLD DEV. 1409 (2000) (on the spill-over and scaling-up effects of NGOs and collaboration with government).

56. *Id*. at 5.

57. *Id*.

who act and think in a "development lawyering"[58] perspective, i.e., "less like lawyers and more like agents of social change."[59]

The legal empowerment paradigm can be closely related to the abovementioned U.S.-inspired community action or collaborative poverty lawyering concepts. As such, it becomes subject to criticism and resistance by a large constituency within ROLA: vested legal elites and conservative groups within MDBs. To anticipate such criticism, Golub grounds his conceptual proposal in empirical research that shows legal empowerment's impact on poverty alleviation, good governance, and other development goals. [60]

Indeed, Golub's normative and empirical framework is one example of a critical pragmatic approach to ROLA. It shows the persuasive impact of serious empirical research on any argument for the inclusion and funding of inclusive and pro-poor programs in ROLA. Further qualitative and quantitative impact evaluation research should be undertaken for pro-poor programs supporting similar activities such as SER lawyering, which, when operated by responsible civil society organizations in creative and pragmatic ways, have the potential to contribute positively to the daily lives of poor people in developing countries.[61] As *Beyond Common Knowledge* suggests, this research should provide empirical and political-economy-informed data, which, if conclusive, could convince development agencies and ROLA constituencies to include such programs in the major financial flows of ROLA more regularly. Although there are few impact evaluations that have been carried out so far,[62] they lack sophistication and would benefit from "refinement."[63] The involvement of the World Bank in this field is a signal that MDBs are paying closer attention to access-to-justice and legal empowerment programs.[64]

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58. *Id*. at 38.

59. *Id*. at 3.

60. *Id*. at 41.

61. As Golub notes:

> [I]t is ironic, in fact, that some organizations that fund extensive research on legal systems or human rights conduct virtually none on the impact of their own law-oriented programs. It can be far more rewarding to report anecdotal progress to the higher levels of an institutional hierarchy than it is to undertake the kinds of in-depth quantitative and qualitative inquiries that might contribute to learning and impact but might also yield negative results. Until such research is valued as contributing to progress even if it reveals problems, law-oriented work will lag behind other development fields in terms of both sophistication and impact.

Golub, *supra* note 4, at 33.

62. *See, e.g.*, MANY ROADS TO JUSTICE (Mary McClymont & Stephen Golub eds., 2000) (case study and multicountry empirical documentation/advocative piece); Golub & MacQuay, *supra* note 52 (multicountry impact evaluation/advocacy piece for the Asian Development Bank). Bruce Owen & Jorge Portillo, Legal Reform, Externalities and Economic Development: Measuring the Impact of Legal Aid on Poor Women in Ecuador, Stanford Institute for Economic Policy Research Paper No. 02-032, 2003 (evaluation for the World Bank of Ecuador legal aid program from a law and economics perspective).

63. Golub, *supra* note 4, at 33.

64. Similarly indicative of this trend is the Workshop on Legal Services for the Poor, held on Apr. 4–5, 2003 at the World Bank by Daniel Manning and Stephen Golub, which gathered lawyers involved in socioeconomic lawyering and legal empowerment NGOs. For general information about the workshop, see Legal and Judicial Reform, *available at* http://www4.worldbank.org/legal/leglr/index.html (last visited Apr. 17, 2006).

As these examples attest, poverty lawyers, academics, and activists should embrace the critical pragmatic approach, which grounds their more robust normative framework in empirical research and political economy analysis. It is an approach that acknowledges as progressive the current doctrinal and policy shifts in the development field, describes the theoretical flaws of the current doctrine—particularly its distributive biases, and calls for more inclusive, egalitarian values, for more critical understandings of the rights concept, and for the inclusion of alternative visions of development at both academic and policymaking levels. At the same time, it embraces the political economy analysis presented in *Beyond Common Knowledge* to denounce the gaps between ROLA theory and practice. Such an approach not only provides a progressive normative framework for ROLA, but also the practical grounding to place ROLA advocates in the best position to advocate for, or "sell," the inclusion of more robust, experimental, inclusive and people-based pro-poor programs in the ROLA.

III. Conclusion

Overall, *Beyond Common Knowledge* carries an impressive load of timely and counterintuitive empirical data, ideas, and insights that make an important contribution to ROLA thinking, and should allow for a renewed research agenda on its practice, notwithstanding the fact that a discussion of Africa is sadly absent from this volume.

In re-evaluating the sacred concept of judicial independence, proposing an empirical critique of both formal judicial centrism and the "romantic illusion" of informal justice,[65] and questioning the very relevance of ROLA programs to development generally, this volume makes a valuable contribution to law and development discourse. By highlighting the gap between articulated goals—such as poverty reduction—and the actual practice of ROLA, *Beyond Common Knowledge* represents an important and much-needed wake-up call for ROLA practitioners and law and development thinkers generally.

I have argued for using the empirical insights espoused in *Beyond Common Knowledge* to articulate a more robust normative framework that includes pro-poor programs in ROLA. I call this the critical pragmatic approach to ROLA. The current critique and unfinished reformulation of the Washington Consensus offers a unique opportunity to place social change, emancipation, and poverty concerns at the center of ROLA rhetoric and practice. In-

65. Marc Galanter & Jayanth K. Krishnan, *Debased Informalism:* Lok Adalats *and the Legal Rights in Modern India*, *in* Beyond Common Knowledge, *supra* note 1, at 96, 120 (empirically criticizing the *lok adalats* [people's courts, promoted by the Indian government as "traditional" local dispute resolution mechanisms to ensure broader access to justice in India] as an imperfect substitute solution to reforming formal courts). In their chapter, Galanter and Krishnan warn that informal dispute resolution is not a panacea. *Lok adalats*, they argue, can be highly deficient (*e.g.*, in the hearing process) and can divert much-needed energy from formal judicial mechanims. Without the shadow of law, *lok adalats* become an example of "debased informalism." The authors argue it is a "romantic illusion" to believe that informal justice can replace—rather than complete—a functioning formal legal system. *Id*.

deed, the political economy of donor agencies and MDBs is a complex combination of interests, ideologies, and theoretical debates. Advocacy for programs that could both be accepted by ROLA constituencies and actually help poor and marginalized people in their daily lives should therefore take place pragmatically and at all levels, including in conceptual and political arenas. Such advocacy should be considered as a complement to—and as a foundation for—further empirical approaches to ROLA targeted at pro-poor social and economic rights and legal empowerment programs.

Such programs, when operated by creative and community-based civil society organizations, can have a positive effect on the daily lives and transformative horizons of poor people. However, impact and qualitative evaluation research on these programs is currently insufficiently developed. Such research is crucial to reflect critically on such programs and to convince both development agencies and ROLA constituencies to channel resources toward programs that are proven to benefit people "on the ground," or to redirect resources toward more effective means within, or beyond, ROLA.

—Jeremy Perelman*

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