

# UW School of Law

## Transcript - Faculty Scholarship Forum

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**Dean Hicks:** And again, a word of welcome, thank you all for coming, taking time out of your busy days to be here. And with that I will turn it over and now I'm louder, I will turn it over to Lisa Kelly, our Associate Dean, who will be moderating the panel and also introducing our speakers. Lisa.

**Lisa Kelly:** All right, as Dean Hicks stated, we're going to be having three excellent presenters today, all talking to us around the theme of global legal challenges in a global community. Our three presenters are going to be: Professor Scott Schumacher, who will be discussing tax havens, their impact on global economy and what to do about them. Professor Joel Ngugi, who will be presenting on disasters brewed in American law, the prospects and challenges using Anglo-American law to promote economic development abroad. And Professor Veronica Taylor, who be joining us as soon as she's finished teaching class, and will be presenting upon -- about global development and post-conflict resolution, is our legal profession ready? Following each presentation, as Dean Hicks suggested, we'll take about 10 minutes for questions and answers on the topic before proceeding to the next topic. And so, I -- it's with pleasure that I move forward to introduce Professor Scott Schumacher. Professor Schumacher received his BA from Loyola Marymount University, his JD from Seattle U and his LLM in Tax from NYU. Professor Schumacher currently teaches courses in the graduate program in taxation, and he is also the Director of the Law School's Federal Tax Clinic. Prior to joining the UWLS faculty full-time in 2001, Schumacher -- Professor Schumacher was an attorney at Chicoine & Hallett, focusing on civil and criminal tax controversies in civil litigation. So without further ado, please let me introduce Professor Schumacher.

[applause]

**Professor Scott Schumacher:** Thank you for coming. I'm going to talk today about tax havens. They're not really anything new, tax havens have been around since the 30s, but if you've been watching the news at all you realize they're very much in the news, specifically the Union Bank of Switzerland or UBS case, and a case involving Liechtenstein. So what I want to do today is kind of go through the current events, what's -- why tax havens are in the news, define what a tax haven is, and then talk about what we can do about it. If you just kind of close your eyes and -- and picture in your mind what a tax haven is, what comes to mind? Usually it's, you know Sandy Beach, right? [laughter]

Or some sort of alpine, right with chalets. And when we -- when we look at the list of what a tax haven is, it's remarkably close to this, right. But, you have to be a little bit more principled in defining what a tax shelter is. Oh I'm sorry, tax haven.

The first thing you have to have for a tax haven is what -- the first indication is either no or a very low tax rate. Now obviously Sweden is not going to be a tax haven because the idea is you put your money offshore, you don't pay US tax, and you're not paying domestic tax

either. So, again, the first thing is a low tax rate but that alone isn't going to define what a tax haven is. And by that definition the United States, and our low tax on dividends would be a tax haven. Ireland used to be -- used to have a very low tax rate and it was -- it enabled them to attract a lot of US business and other businesses into their country where they'd invest, put a plant there. So, an example is Bausch & Lomb used to make their -- or might still make their -- their contact lenses in a factory in Ireland. So it's a way -- low taxes are a way for a country to attract investment. And if you become successful like Ireland does then you can raise your tax rate and then rock stars and want to move their money offshore, if you've been following that Bono and U2 are now putting all the rights to their music in a Dutch tax haven, so they don't have to pay taxes in Ireland on that income.

Second is bank secrecy rules. And this is really the problem. It's not so much that companies and individuals are putting their money in a foreign country, it's that they're putting it in there and it might be US-source income. US taxpayers are taxed on their worldwide income, not just on the US income. So you put it offshore, you don't pay tax in Switzerland or Liechtenstein or wherever, and you don't pay tax in the United States. And because of bank secrecy rules there's no way for the US government or the German government for German citizens to figure out whether that income should have been taxed. Another key element to a tax haven is that you don't have to actually have a substantive presence there. So when we look at Liechtenstein, one-third of the entities located in Liechtenstein hold interest in something else. So they're just foundations and trusts and things like that but their sole purpose is to be located in Liechtenstein to own something else. When I was in practice we represented someone who was under investigation by the IRS and he had a Liechtenstein foundation that owned a Swiss corporation that had a bank account in Cyprus. And not surprisingly, the IRS never found the Cypriot bank account. So this again is one of the indications of a tax haven. You have to have an advanced communication facilities because people want to be able to put their money there and take it out and check on their money. So, that's key.

And the last is that that they -- either the bank or the country markets itself as an offshore financial center. And this is something that you see a lot of. My favorite is this, and this is actually a real ad that I found on the Internet, and for you in the back who can't see it says, "All Jurisdictions, complete offshore bank licenses, only \$9, 500.00. Click here for your own offshore bank formation details". And the tagline, "If you can dream it you can do it with your own offshore account". So, this is kind of going for the highbrow, I think. You get the off-shore, you get secrecy, you get tax savings and you get the checks too. So it's -- it's really kind of a nice way.

But UBS, one of things that that kind of skipping ahead a little bit is he entered into a deferred prosecution agreement. And UB -- the government -- the US government was going after UBS not only for helping to their clients evade taxes but also in violation of US securities law. And one of things they did was come to the United States, put on art shows, polo matches, golf tournaments and they'd invite rich people there and then they'd have the hospitality tent with champagne and things like that, and they would market themselves that way.

So, depending on who you ask, there's anywhere between 34 and 72 tax havens in the world. The OECD, the Organization for Economic Cooperation and Development lists 38 tax havens; The National Bureau of Economic Research lists 40; the IRS has listed in court proceedings, 34 tax havens. Here's kind of an example of those: So we've got the -- the tropical ones, we've got Antigua, the Bahamas, Barbados, Bermuda, the Cayman Islands;

more of your Mediterranean's, we've got Cyprus, Gibraltar, Isle of Man, you've got Monaco there, Malta, then some of the Channel Islands; and then you've got your Alpine ones with Liechtenstein and Switzerland.

I want to focus on a couple of them, specifically Liechtenstein and Switzerland. So I didn't know that much about Liechtenstein other than it's a little country right next to Switzerland, before I started working on this project. It was established in 1719 as part of the Holy Roman Empire and it gained full independence in 1866. It's a constitutional monarchy or actually principality, with Prince Hans-Adam II von und zu Liechtenstein as the ruler -- as the current head of state. And there is Prince Hans-Adam II. It's about nine-tenths the size of the District of Columbia just to give you a sense of how large it is.

Industries: This is from the CIA deskbook in case if you ever want to go back and figure out if I'm right on this so, the first industry is tourism. So this is Vaduz Castle in Liechtenstein, looks like a very scenic place, I've never been.

Agricultural products: Prior to World War II, it was primarily -- primarily an agrarian country. It's also has a large dental products. It's the largest exporter of false teeth, which I thought that was pretty cool. And obviously, why we're here is financial services. And it's -- I think it's about 40 -- 40 percents of their GDP is from financial services. So there's 35, 000 residents -- permanent residents in Liechtenstein, but there are 75, 000 corporations or other entities based in Liechtenstein. As I said earlier, about one-third of those hold controlling interests in other countries. So the idea of -- a lot of what these financial services do is just, are -- are agents for other entities. There is only 81 lawyers in the whole country, so if anyone in this economy is looking, you speak German or willing to learn, you might go, it seems like there is probably work for you there. There's 20 banks and 71 public investment companies, and of course, there are strict bank secrecy laws, essentially similar to the Swiss Bank laws. And this was, you know kind of a little medieval fortress almost in the middle of Europe until recently. And what happened? Well, last year about this time German prosecutors and tax investigators raided the villa and offices of the CEO of Deutsche Post, Klaus Zumwinkel. So, Deutsche Post used to -- was like our -- like our post office, it was a government-run agency. And then in the 90s, it was privatized and Klaus was the President from the first time -- when it was privatized up until he resigned because of this case.

What they alleged and have proved is that he evaded \$1.5 million in taxes using a foundation in Liechtenstein. Well, how did they know this? Strict bank secrecy laws, what happened? Well, they -- the German government purchased a computer disk that had the information of 1,400 individuals who had money on deposit in Liechtenstein. And, they got it from this guy named Heinrich Kieber. And Heinrich Kieber was a Liechtenstein -- he was born in Liechtenstein, computer guy. He'd moved to Barcelona in the 30s -- in his 30s and wanted to buy an apartment in Barcelona. And he wrote it with the 286 -- he bought it with the \$286, 000.00 bad check, he was later arrested for that and -- but then released. And he fled Spain, went back to Liechtenstein, starts working for one of the banks in Liechtenstein, putting, transferring the data that was on the -- just the paper rolls onto a computer. So, after he does that there's an arrest warrant sworn out some years later. He's arrested and thrown in jail. And what does he do? He picks up the phone and he or somehow, contacts Prince Hans-Adam II, the ruler of Liechtenstein and blackmails him. He says you either get me out of this or I'm going to release all this data about all your depositors.

So they -- the Liechtenstein government hired a lawyer, paid for it, got him a very light sentence, all in exchange for receiving this computer disk. Well, since he's not the most

honest guy, he had another copy. And, so he was -- he was happy to be free but he was still poor. So, he sold it to the German government for anywhere between \$6 and \$7.7 million depending on -- on who you believe. So the German government, because of that, obtained data on -- on the deposits of 1,400 persons with accounts in LGT Bank.

What is LGT? CEO of LGT is Prince Max von und zu Liechtenstein, who happens to be the second son of Hans-Adam. It is owned by the Prince of Liechtenstein Foundation. The CEO of the Foundation is the brother of the ruling prince, Prince Philip, His Serene Highness, Prince Philip, and the primary owner of the Foundation is Hans-Adam, II. There he is again. Hans-Adam is worth, according to Forbes, they do, you know the Top 100 Richest Celebrities. They had an issue on the top richest royals, and he's number six at five -- an estimated \$5 billion. So we think about the kind of what we -- what we can do about it. The reason I'm going through this is part of it, if we want to pressure the Liechtenstein government, it's not just the government that's affected, I mean it's going to affect their pocketbook, if we get rid of -- if they get rid of bank secrecy, open up their books, that's going to affect the prince himself and frankly, all of his family. And so, it -- it makes it a little bit more dicey.

The other scandal, which also happened last year was dealt with UBS. So UBS was formerly the Union Bank of Switzerland, merged -- merged with another bank and it's headquartered in Basel and Zurich. It has invested assets or had invested assets of \$2.6 trillion dollars, making it the largest bank in Switzerland. Now what happened to poor UBS? Well, a US citizen, who was a banker for them was arrested in 2008 and ultimately pled guilty last summer to tax evasion. And what he -- he pled to was conspiring with a wealthy US land developer out of Los Angeles to hide \$200 million worth of assets in UBS and to evade the taxes -- to evade \$7.2 million in taxes. More importantly, he sang like a canary and he gave -- he testified everyone before the Senate and testified. He gave all the secrets about UBS and its practices to the IRS, to the Justice Department, to the SEC and to a Senate Committee that's investigating UBS. In fact, the CFO of UBS, one of its subsidiaries is testifying today before the same Senate panel.

So what did they find out? What did Birkenfeld tell them? Well, that UBS maintained 20,000 undeclared accounts, meaning even though they were owned by US taxpayers, US citizens, and they were supposed to be reported to the IRS, no one did including UBS, and UBS had an obligation to do that. There is a John Doe summons, which I will get to in a minute that that's looking at this. And they saw -- say now that there's 52,000 accounts. These accounts contained assets of between \$18 and \$20 billion dollars and a few other violations, including not reporting that to the IRS. The other thing they did, as I -- as I indicated is they, in violation of US securities law, would come over to the US, they were -- actually UBS officers trained their bankers on how to come over and avoid detection. So they had encrypted laptops, they had special credit cards that couldn't be traced, all very CIA, James Bond kind of stuff. So for a tax lawyer, this is about as sexy as it gets, for me. So, what -- what is the reaction from all this information? Well, most of the world is kind of like Captain Renault in Casablanca, you know they were shocked, shocked to find out that people are putting money in tax havens. I mean why do you think they are tax havens, yeah, you put them there, there's bank secrecy. But I think the magnitude of the problem, the mag -- just the sheer amount of the money, the billions, trillions of dollars that is being hid there, has according to the Senate there is a new found international determination to contest tax evasion facilitated by a tax haven bank. And that's true, not only the US is going after them. Germany has now said it's under -- it's investigating Prince Max, who is the CEO of the

LGT Bank, they are investigating him for tax evasion. Norway is starting to question Switzerland and what they are doing.

A little bit ironic about -- oh and -- and the British government after the Guardian have it two weeks of articles everyday about tax havens and how Britain, because of the Channel Islands and Bermuda and the Cayman Islands, Jersey, Isle of Man all that, they have been encouraging and facilitating tax havens. Well, they're kind of been pressured into -- into reforms as well. So now, Gordon Brown, the Prime Minister of England has said he's -- that they're going to start cracking down on tax havens as well. But who cares? Well, part of it, we should all care, especially as there is a \$350 billion tax gap. A hundred -- an estimated \$100 billion a year in taxes -- US taxes is lost to tax havens. So as we're trying to figure out, you know who should pay, should it be the people who are putting money offshore or should it be you and me?

Bank secrecy protects not only legitimate funds of developers from Los Angeles, it also hides money from narcotics trades, arms dealers, money launderers, organized crime, terrorists. And I think more importantly, the developing world, and this is something that Anita Ramasastry is -- is working on now. In the developing world, billions of dollars a year are lost to tax havens. And it's not as if, you know it used to be that people would just, you know the third world dictators or whatever would steal money from their people and they'd keep it or they'd reinvest it and make a big palace or something. But with the rise of tax havens and the easy flow of money, what they're doing is -- is taking it out from their -- from their citizens and putting in offshore and so, it makes that country that much poorer. And a lot of international aid, I've seen an estimate of \$100 billion a year is siphoned out of international, which is basically the -- the international aid. What -- what all the countries in the world give to the developing world is then put off into tax havens. So the best line that I have seen is that this -- the price of this outflow of money is billions of dollars worth of unsurfaced roads, unpurified water and untreated illnesses. Think about all the great work that the Gates Foundation does and other NGOs and organizations. The use of tax havens completely undermines what they do.

So what can be done? Well, I think in my view there has to be a three-part strategy to dealing with this. First, you have to have an enforcement, which I'll get to in a minute and the US can do its part and has. Second, information sharing, a lot of this goes on because no one knows where the money is and so as we try to find -- as the veil of bank secrecy is removed and -- and more and more cooperation by bank -- tax haven countries, the better it will be. And there has to -- this has to be a multinational effort. The US cannot do this on its own. So enforcement, eluded a little bit to this, UBS based on what Bradley Birkenfeld presented, entered just last -- it was in January, last month, in a deferred prosecution agreement. So what that is, they say we've got this -- this information that says that you have defrauded the -- you conspired to defraud the IRS and we will just lodge this in the court, we won't indict you, we'll just have it sit there for 18 months. And we will not prosecute you if you promise to do a number of things, including pay a fine of \$780 million, release to the extent that you can, names of US taxpayers with accounts in UBS. There are some 52, 000, they've agreed to release 300.

And this is because of the -- of the treaty the US has with Switzerland where Switzerland there -- the Switzerland only has to provide the names of the US taxpayers, if they committed tax fraud under Swiss law. And there's an odd definition of tax fraud and -- so tax evasion in Switzerland is not a crime, tax fraud is. Tax fraud is defined as committing fraud and then not reporting the money. It's a very narrow definition that I have yet to find a

decent explanation of, frankly. Most people call it a curious distinction. So they've agreed to provide 300 that they admit committed tax fraud. The IRS is also going after the names using a civil proceeding called a John Doe summons enforcement, they've gone to a federal court here in the United States and said we want the names and -- and make them give it to us.

They've also -- Congress has introduced a bill to make tax fraud, a predicate crime for money laundering, as I'm running out of time, I'll just -- it could be a ten-minute explanation but the explanation is that if you -- if tax becomes money laundering -- a predicate crime for money laundering, then the government can forfeit the profits. So this is why they want to do it. There's limitations on enforcement. As I said that the Swiss -- the US-Swiss Mutual Legal Assistance Treaty or MLAT limits the -- the providing information only if it's a tax crime under Swiss law. And the Swiss are saying well, you agreed to this -- don't ask us for the information, you agreed to this treaty back in '96, we're not going to provide it. In fact, a Swiss court, a couple of weeks ago imposed a preliminary injunction preventing UBS from providing the information. UBS has been ensued by US investors and a criminal complaint was filed against -- in Switzerland against UBS for violation of -- of the US Swiss bank secrecy laws by turning over the mere 300 names.

The other thing we have to remember is that Switzerland is the fourth largest investor in the United States, and we want people to buy our paper. Right Switzerland, we destroy UBS and part of the reason why the -- the fine was only \$780 million even though they could have argued for a lot more as they didn't want to bankrupt UBS. Another thing is that, remember Liechtenstein and Switzerland are only two of the either 34 to 72 depending on who you ask, tax havens. And Singapore is just sitting there, like keep going. Singapore is just there marketing like crazy to get -- to get the money and that that no longer will be housed in either Liechtenstein or Switzerland. Panama is actively marketing itself there. So if you go to Panama legal, there is a website where they can tell you how to put money in a -- in a Panamanian bank using a Guatemalan driver's license that's apparently easy to obtain, and you can just put your money there. And they said we no longer recommend you putting money offshore in Switzerland or Liechtenstein. So again, this has to be a multinational effort.

There's two minutes, OK. The other thing is we have to have information exchange. Right now, most of -- of the treaties we have are what are called mutual legal assistance treaties, which means there has to be an active criminal investigation before another country is obligated to provide that information. The US has, in the last 10 years, really been focusing on what's called Tax Information Exchange Agreements or TIEAs. They just signed one last December with Liechtenstein that that is going to be start to take effect this year except that Liechtenstein has to amend its laws on bank secrecy first. And so that's a big "if". There's other things, which I can skip over, the OECD has recommendations for true transparency and simultaneous exchanges of information and that's the key.

Finally, the effort has to be multinational, it's -- it's shown that it's worked, Anita Ramasastry wrote a great article back in the 90s about the Marcos case and the Nazi Gold and how pressure against Swiss banks at that time cause them to provide some money and some assistance. So pressure has and does work. There's other things that are more outside of my purview as a tax lawyer but there's proposals to amend the UN convention against corruption, to treat capital flight as corruption and to treat grand corruption, the kind of corruption where third world dictators, developing world, dictators will -- will just suck all

the money out and put it offshore to treat that kind of grand corruption as a human rights violation.

That in a nutshell, in 25 minutes, is tax havens, why we care and what to do about them. Tom?

It's a tricky business. You know, there's a big conundrum: What to do? How do you get the money back? How do you come clean? There's something called the Voluntary Disclosure Program that's been around since the 50s that has -- that allows taxpayers, if they've -- if they've suddenly found a religion, if you will, to come clean, one of the requirements is that they can't have already been under investigation. And so this really shuts down the ability of -- of those people but, trying to get, I -- I think the biggest challenge is how do you -- if you're representing one of those 52, 000 people that are trying to get their money back, how to do that legally without getting them into further trouble. For those that help put money offshore, there's -- they can be indicted for conspiracy to defraud the United States as well, and ---

**Man 1:** What if they didn't help them?

**Professor Scott Schumacher:** Well, that's -- you can't advise them to file a return and not report it, if you do, that's aiding and assisting in the filing of a false tax return that can also be conspiracy to commit tax evasion. It's an ethical violation I'm pretty sure to do that. So, yeah, I mean I think that it puts lawyers in a very difficult position.

**Woman 1:** Because to some extent -- maybe if you want to put it that way, so you know.

**Professor Scott Schumacher:** Yeah, I think that's a great question and that's the great unanswered question. I mean, right now if you look at the Stanford case and Bernie Madoff and -- and a lot of what was going on with the hedge -- hedge fund trading, that was all done offshore as well. And so, it used to be that there was the sense that well, that's where you can have more innovative securities and things like that, and it's not quite as regulated and not deterred by regulation, and then they find out, well, actually regulation might be a good thing. Right now, people are looking for money, governments are looking for money, they're looking for more regulation. This has been a steady march, I think. This has moved it a lot farther forward, you know, what do you do about Singapore, Hong Kong, Panama and those countries that don't depend as much on trade with the EU and the United States.

**Professor Scott Schumacher:** It goes on in perpetuity until it's amended. So it could be amended and I know they've been working on it and it goes on all the time. And you know, it's much -- there's one from the 70s, and one -- it actually dates back to the 30s, and the 70s and the 90s, so, but that's something that they're looking at. And, you know there's articles, maybe five articles a day, looking at, you know what kind of pressure Switzerland is coming under and -- and I saw one today actually that where someone in -- one of the officials in -- in Switzerland admitted that, you know, maybe they're going to have to get rid of bank secrecy, it's not something that they really need per se, they provide other services and things like that. So, it's another one of those to be continued questions.

**Man 1:** Yeah, yeah.

**Professor Scott Schumacher:** I'm working on it, I'm working on it.

**Woman 2:** Yeah, but your time.

**Professor Scott Schumacher:** Yes, that is that case and that's part of what the -- the indictment or the information against UBS was about. There's a -- there's a -- a system in place called the Qualified Intermediary System where banks and countries are supposed to look at who the account -- account holder is. And if that's a US person they are required to send a 1099 to the IRS. But what people are doing is just setting up shell corporations. And for money laundering, the banks have been -- and countries have been much more willing to look behind and see, all right, who really owns this, but tax, for as part of the world is -- the tax evasion is still considered to be a gentleman's sport to a certain extent and so they haven't done at least to date, done look behind or the so-called know-your-client rules. And part of what's in the deferred prosecution agreement is that UBS has agreed to implement a very strict know-your-client regime, to be audited by outside people, have someone in the US that will -- will report to the IRS on the progress of it. And, so that's something that's very much in lights of the IRS. Time is up. Thank you.

**Lisa Kelly:** And thank you. [applause]

**Lisa Kelly:** That was great. All right, next we'd like to introduce our second presenter, Professor Ngugi. Professor Ngugi received his LLB from the University of Nairobi, graduated from the Kenya School of Law and received his LLM. and SID -- SJD from Harvard University. Professor Ngugi currently teaches courses in contracts, international law and human rights law. Prior to joining the -- our faculty in 2004, he practiced law in Boston with the firm of Foley & -- Foley Hoag and he also practiced law in Kenya with a Nairobi firm. So please help me welcome Professor Ngugi. [applause]

**Professor Joel Ngugi:** Here we go. Thank you very much, I'm excited to be presenting. So, usually we let the tax guy talk fast because we think that they're going to make a boring, technical presentation, and then when we present we look good. And then we sensed Scott and he presents -- he comes up with sexy things about tax havens and now I'm just feeling like the plan didn't work very well. But, be that as it may, I had actually prepared a presentation of about four hours, I thought we had four hours to speak, but I'm told that I have to do this in 20 minutes so, I'll just give you stories instead. Forget about what we said we were going to talk about. Seriously though, I'm going to talk about -- essentially about what I see as exportation of, basically, American law in aid of economic development abroad. And, just to prevent any anticlimax later, they -- I'm just -- I'm making just two arguments and a synthesis. I'm making the argument that there's been two waves of exportation of American style law in aid of economic development in other parts of the world and especially Africa, I'm going to concentrate on Africa because that's where I do most of my research. First, in the -- in the late 50s and 60s and then secondly in the 80s and 90s. And -- and then I'm going to trace the repercussions of that exportation and maybe what that says for our style of doing comparative law and what we are teaching our students. And that will be a very good place to end because Professor Taylor's presentation is going to really pick it up from there and say what then does this mean about how we -- we train our students?

So before I begin, let me just say that my presentation is not a criticism or critique of anyone in this room that gives money to University of Washington School of Law. And it's also not a critique of any personal employees or our students. So you are exempted from any criticisms that might be implied. I want to tell this story really in -- in four stories and a synthesis. But first of all, just a very brief anecdote: Last year, December to -- December 2007 to March 2008, Kenya was engulfed in civil violence, I -- I happened to come from Kenya. And it was a sad painful moment for me to see sort of the country going up in -- in

flames. But amid the political violence of ethnic -- and ethnic strife that was going on, I noticed something very interesting that was happening there. I was religiously looking at the stock market in Kenya to see what was going on. And, nothing happened to the stock market in Kenya, nothing. Three months of near conflagration, the stock market didn't dip even one percent, I thought that was really curious. And then I looked at what was happening in the tea industry, the coffee industry and the horticulture industry, which are the main foreign exchange on us in Kenya. Again, nothing, in fact, in those areas where those activities go on, life was normal. We could watch on CNN from here that people were killing each other, there was ethnic strife in parts of Kenya and these are the places nothing -- life was completely normalized. And that got me thinking, what really is going on? How could we have two countries and by the way even in part of Nairobi -- there was a part of Nairobi where there was a post-election violence and there was part of Nairobi where there was no post-election violence. You wouldn't even have noticed if you were in Nairobi at that time.

And so, that got me thinking about what was the causes of these -- so to speak, two Kenyas that have a might. And this is a story that is very familiar, whichever African country you go to. And my thesis is that the styles of economy development that have been going on in these two waves are the ones that are really have produced where we are. And the neo-liberalization of economic production and legal thought, that is going on in most of Africa is really responsible for producing this. So, a lot of the efforts that are going on in most of Africa now are under the rubric of rule of law reforms, while very well intended, I conclude can actually be a recipe for chaos. And I -- I think as we saw in Kenya.

So let's begin with -- with our first story. The first story is a familiar story, well, at least for some -- for some people. I called this is the story of really the origins of the law and development movement. And the law and development movement, if we are to -- and what I mean by law and development I mean the movement of mainly American trained lawyers who go abroad to try and help in legal reforms there to bring about economic development. That's essentially what law and development means. And if we are to place above it for the law and development movement it will be with Truman's Inaugural -- Inauguration Address in 1949, which essentially was calling upon Americans with technical advice or technical knowledge to translate the lessons of the New Deal abroad, in essence to export them.

So this is -- this was Truman's word -- words and they are -- we must embark on a bold new program, permitting the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. And it goes on to say what are the bad things that are happening in the rest of the world. He also gives a reason why America needs to do that. It's a fact that the poverty is a handicap and a threat, both to them and to more prosperous areas, that is to us in America. If we don't do something, then it's also going to affect us here. Then question, how are Americans going to help in this endeavor? Answer; that they are not going to help in this endeavor through giving money primarily. They are going to help them through giving technical expertise. But our imponderable resources in technical knowledge are constantly growing and are inexhaustible. I believe we should make available to peace-loving peoples of the benefits of our store of technical knowledge in order to help them realize the aspirations for a better life. Now, he was -- I can assure you Truman did not mean that we should give third world countries intellectual properties. Instead, he meant we should give them the ability to organize the state, to produce economic development in the same way as it happened -- as it happened here. And, in essence that is what created the first law and development movement. A lot of American trained lawyers, law professors especially going to the newly

decolonialized countries in Africa and Latin America and helping them engineer a new kind of state that would usher economy development.

That brings me -- and I will tie this together to a second story. The second story I called is the story of the origins of the gatekeeper state in -- in Africa. Or sometimes I called it, at this part of the story, historians are from Mars and lawyers are from Earth. That is historians and lawyers don't speak because if they spoke then lawyers would be familiar with the gatekeeper state thesis. But lawyers are not familiar with the gatekeeper thesis. And those lawyers are traveled to African and Latin American countries to help them re-imagine a state that would usher economy development did not know about the gatekeeper thesis. The gatekeeper thesis is essentially draws from the idea that Africa was systematically conquered by the colonialists but it was not systematically ruled. The colonialists who formed the first colonial states were not necessarily interested in routinizing and legitimating the colonial states in the eyes of the -- of the national Africans there. Instead, they were interested in mining the gate, in guarding the gate, the interface between the colony and the metropol. Because what interested in only particular things in the colonial state, they were interested in natural resources. They certainly did not need to spend too much of the resources really trying to routinized authority and legitimacy for the state.

This created only a very particular kind of a state. The problem was that state that was created was a state that was -- that was inherited by the post-colonial government at the moment of decolonization. That led to what we called feigned nationalism. Feigned nationalism is an idea that they most Africans during the colonial period had developed a very healthy dose of hatred for the state and the government. They could only deal with the state and the government because there was absolutely no necessary. The state and the government was something that was meant to be avoided, evaded, cheated at all times, and given any opportunities. This was the same kind of state that the post-colonial state adopted, inherited at the time of decolonization. At that time most Africans were thinking, well, now that the colonialists have left we probably will go back to how things were, all those idyllic utopias that we had before the colonization happened. But this is the moment at which the American lawyers are coming in with ideas of reconstructing the New Deal for the African states. If only we made the state a little stronger, if only we created an administrative state that works that can do all these things, then we are going to get economic development. So the economic development path that was chosen at that time is what we called the modernization paradigm. It's based on the idea that the more prosperous that the states of Europe and North American are most modern than the poorer states of Africa. And what you needed was to engineer an imitative process. You did -- you do not need to rediscover fire, which has already been discovered, we know how it is done, let's just re-engineer it. So the economic theories that were in place from Walt Rostow's Stages of Economic Development to the more left leaning similar tradition, import substitution, industrialization, for instance, were all based on the idea that modernization was a good thing. The challenge of modernization; however, was three-fold: First of all, you needed massive resources that were going to be used for industrialization purposes. Then secondly, you had the challenge of traditional society, which -- which was then clamoring to remain traditional without using the commercial or participating in the commercial economy. And then thirdly, you had the problem of feigned nationalism.

At the time you had peasants again whose mode of interaction with the commercial economy was one of avoidance. You only dealt with it whenever it was necessary. The problem for the government was you needed the peasants to deal with the commercial economy because that's the only way you can still raise money through taxes. So you had to

find a way to engage them in the commercial economy and this is where the American lawyer became useful, through the creation of a strong administrative state. So the responses to the challenges was what we called the state-led capitalism. Public resource mobilization, you needed to get the states to be involved in mobilizing the capital. This sounds eerily familiar to what is happening in the US today. It's a very big economic problem, let's get the government to be involved in mobilizing the resources that is required. And then you, the traditional society is presented as a challenge. So you need to smash that traditional -- traditional society.

The role of the American lawyers create a strong administrative state. The problem with creating a strong administrative state was with a strong state comes rent seeking and corruption. That's what we have been saying about Africa for the last, you know so many years. It comes with market and responsiveness and inefficiency, and misuse of power and discretion. And then you also get a weak civil society on the human rights side. So I say a strong state, weak civil society equals the diminution of democracy and human rights. And then in the 70s, you add the sovereign debt crisis that heeds most of these -- most of these countries.

The debt crisis brings us to the third story. The third story actually happens here in America. It's what I called the end of law in America. This is really what Professor Aman calls the end of the New Deal in America that happens in the 80s. What he says is a common response to societal problems in the late 60s and early 70s or so it seemed, was to say there ought to be a law. Especially after 1980; however, our belief in and our use of law to solve societal problems seemed to decline precipitously well beyond the ebb and flow of political trends and this.

Beginning in earnest in the 1980s, law and markets came to be seen in binary terms. You could have one or the other but not both. More law meant less markets and vice versa. When it came to choosing between law or markets, the tide clearly had shifted. There ought to be a law was now replaced with a new refrain there ought to be a market. So this is what happens in America in 1980. This is what the new crop of law students, who will be engaged in the new rule of law programs are being trained in law schools.

Markets good, law regulation bad, brings us to the fourth story, which was in tandem with the third story. I called this the human rights towards discovers Africa. So, in the 80s and 90s, we have a lot of human rights organizations really focused on the predatory nature of the African state, which remember was in part fueled, or at least facilitated by the strong administrative state that was formed as a result of the state-led capitalism, which was chosen as the method of economic development. Now we have human rights organizations saying there are too many human rights violations occurring in -- in Africa. We need to address that. So the solution becomes we need more civil rights, we need more political rights, more democracy. In other words you need to roll back the African state. So, the story that comes from the fourth story is rolling back the fourth state, which works very well with the idea of we want markets, we do not want law. We do not want regulation, which brings in the World Bank's idea. The World Bank in 1997 -- 1996 comes up with its flagship publication from plant to market. It's a hard fact of transition that the features of a market economy that many of these countries need most are the very ones that will take the longest to build. Moving from plant to market requires a new way of thinking about the entire legal system. So what has been happening in most of Africa is moving from plant to market. I do not need to go through this list. Essentially when you are moving from plant to market, you are moving from regulation to deregulation, from a command economy to a price economy.

The role of American lawyers in this context, I think it is -- it recommends itself. It's now to design new rule of law projects, which would install individual rights, make Africa investor friendly, privatize productive sectors and promote private sector actors like the NG -- like the NGOs. But that comes with its own set of challenges, what I called neo-liberalism trail in. The first challenge is the need for regulatory capacity in facilitating the delegation of functions from United States entities. It's OK to say you are going to have deregulation. But who takes over the functions that are being left behind by the state? And, how does the state coordinate those functions? If deregulation means taking away the regulatory capacity of the state then you are truly taking the regulatory capacity of the state that you do need to coordinate the functions of deregulation. And then you are still faced with the social fact of the nationalism, which undermines again even farther deregulatory ability of the state.

And finally, there is the need to simultaneously cultivate a mistrust of the government, which is really what human rights is about. It's about saying, you know, the government is sometimes a predator so you need to bow against the government. But at the same time, you need to cultivate a belief in a market system that is being supported by the state. So you have to get people to have a healthy dose of mistrust for the government, but at the same time they have to believe enough in the government for them to believe in the market system that the government is -- is putting in place.

As a result of what has happened and the failure to manage, so, I'm just winding up here. The failure to manage these trilemma, as I called them, is we are having very serious undermining of self-regulatory capacity, which is affecting the investment of infrastructure development in Africa. So, since the 90s there is virtually no infrastructure development that is going on, even while we expect economy development to go -- to go on. It's undermining the state's legitimacy enhancement of feigned nationalism. But lastly and most importantly in my view right now in the area of research that I am in, it's an exhibition of what I call the gate keeping a syndrome of African states. The African states have almost completely given up on the development agenda instead, they are concentrating on courting the global corporation. They are concentrating on a new breed of investment that are called now executive partnership agreements, which agreement is directly between the state that's in power and specific governments. The Kenyan government has been signing a lot of these with -- with the Libyans, with the Qataris, with -- just last week, with -- with Iranians, where they are taking over specific sectors in the economy as a way of providing more patronage to the governments and their employees.

But lastly, we're seeing a new trend of enhanced regulatory capacity in what I called enclave economies. The enclave economies are like the stock market. So the governments -- the government's regulatory capacity and things like the stock market has really been increased because that's where the government is spending most of -- of its resources. It's also spending a lot of its resources in areas that work than where the market is working. And that's why it's spending its resources in where there's horticultural activity or where tea and coffee is being grown. But this is all working so much to the undermining of all of the other areas of the country. So that you have a big portion of the country that is still sort of left behind. And when it's left behind that's when you get -- a new movement that are cropping up that they feel that the government is no longer taking care of them. So, that enhances the feigned nationalism that we've seen that makes them think -- it's not even a bad idea if the country actually went into conflagration. And this is -- the post-election violence we see in Kenya, I see as a symptom of this. Sorry, I went a little bit overtime, but I'll take one question or two. Yes.

**Professor Joel Ngugi:** Right, excellent question. So that's actually related to the executive partnership agreement. So it's true that the governments have given up that -- sort of that authority to make those decisions, so -- and some of that role is being taken by -- by China and Middle Eastern countries. But that is being done especially through the executive partnership agreements. And this is being done through the executive fiat. The executive governments using -- again, very familiar; U.S. constitutional logic, foreign affairs is within the sole realm of the executive. And so they're signing agreements, giving foreign countries a lot of power to engage in particular activities including infrastructural development. But very little is known about the details of those agreements. We just know that the executive agreements that are taking place, but we do not know the exact details. The Iranian president was in town last week. He signed an agreement giving the Iranian government the right to provide, I don't know how many -- how much oil to the country. But we don't know on what terms but in exchange for that, the Iranian National Oil Corporation takes over 30 percent of the National Oil Corporation.

**Professor Joel Ngugi:** We do not know any other details about that. But apparently, it's going to be good for the country. So that's -- that's what's happening. Yes.

**Professor Joel Ngugi:** Yes, that's an interesting question. Yes, I do see a shift. So, first of all, what is happening in America now with all this talk of stimulus package and stimulus bill and so forth? As I say, it's -- it's interesting because this was the model of economic development was shot down in the '80s, it was said, you cannot do this and I hope to achieve economic development. So, that's exactly what we've gone back to at least in the United States. So, it will be interesting to see whether the rest of the world would fit. Maybe the idea of this being really involved in development is not such a bad idea and that might produce a fifth story. But the second thing is, I do not mean to suggest that the involvement, for example, of American lawyers and American laws in the stories of economic development in Africa, it had to be a negative one. I think the problem is one of transmitting the New Deal to the African soil. How do you do it? If you just think that you're just going to pick up the New Deal as it was in the United States, you know exactly what to do. You know how it functions and then you will just take it back there and you will put it in place and it will work, that creates a problem. You've got to understand the context and if it works. So, the problem is not so much the translation, the problem is finding a functional vernacular analogue that can work in that place and that's what we've not been very good as comparative lawyers in doing it. We produce students that they -- they do know the American system, they know it's good, they know it works and they're interested in exporting it without understanding what the consequences of that exportation is. Luckily for us, we're going to be told right now, what is being done to cull this. So, thank you very much.

[applause]

**Lisa Kelly:** Next up, Professor Taylor, Veronica Taylor, who received her BA and LLB from Monash University in Australia. She received her LLM right here at the University of Washington. Prior to joining the faculty in 2001, Professor Taylor was a consultant, participating in and managing projects for US Agency for International Development, the World Bank, Asian Development Bank and Australia AID. She has designed law reform and legal training projects focused on Afghanistan, Armenia, Australia, Azerbaijan, Bulgaria, Egypt, Indonesia, Japan, Mongolia, Vietnam -- am I leaving anything out -- and the United States. And Professor Taylor is currently the Director of the Asian Law Center

and is responsible for our JD, LLM, PhD, and visiting scholars programs in Asian Comparative and Development Law. So, please, join me [audio fades out]. [applause]

**Professor Veronica Taylor:** Thank you so much for that warm introduction. I apologize for being the third lecturer in a row; we don't even do this to JD students. So, bear with me, I'll try and make it worthwhile. Taking the discussion down to a very prosaic level and that is really to ask what kinds of challenges face our profession as a result of the kinds of global developments we've been discussing this afternoon. The first thing I want to note is the exponential growth in what we called the rule-of-law industry. Rule-of-law activity being legal reform, legal change around the world that is funded by external actors whether they are multilateral institutions, bilateral aid agencies or private actors such as corporations. Some of the actors that you may be familiar with include our own ad agency, USAID, and its activity in democracy in governance, economic growth in trade; but also the newly rebadged ABA Rule of Law Initiative, which is an outgrowth of work done by the ABA in central and eastern Europe in the early 90s, but now expanded to include judicial reform and access to justice activities in more than 40 countries. Alongside that is the new World Justice Project, sponsored by the ABA, which is producing new and important research on rule-of-law programming, and also a new set of rule-of-law indicators, which is rather unique in that it also seeks to measure the spread and depth of rule-of-law in developed as well as developing countries. So it includes the United States as one of its targets. Taken together, what this gives us is a rather dramatic lateral and vertical expansion of the role of lawyers and in particular, the role of US lawyers. But the latest frontier for this kind of rule-of-law work is the post-conflict setting. Unfortunately a lot of these settings tend to be pre post-conflict. But if you think about the kind of legal reforms that have been done in Kosovo, Timor-Leste, Iraq, Afghanistan, Somalia, Sudan, and Gaza; you see that there's a tremendous amount of work and investment of professional legal personnel, and a tremendous amount of money flowing into these regions. And in the future, we can expect this to increase. It's not beyond the realm of possibility that one future target will be North Korea.

Something that you might note in looking at that list is that these are all complex legal systems, they are all highly pluralist legal systems. One scholar has described Afghanistan as being extreme legal pluralism. So in addition to customary law, colonial law, and this latest overlay of donor influenced and drafted law, we also have substantial bodies of the Islamic law and other forms of religious law. These are legal systems that are not your grandmother's comparative law. Civil law, common law, and socialist law are just not going to do it for us in examining these systems carefully.

We also have the added complication of new projects such as the Provincial Reconstruction Teams or PRTs in Iraq and Afghanistan. And what this represents is an experiment in the militarization of rule-of-law, where you take military personnel out to tribal areas and you have them as your first-line implementers and deliverers of ADR, structuring or codification of local law, dispute resolution and training and resourcing of local courts. This experiment has just been driven up a notch under a new administration, with the state department's creation of a civilian response core. And these are going to be government lawyers, private lawyers, prosecutors and judges, who will be recruited as a quick deployment force and trained for conflict situations and then embedded in PRTs in places like Afghanistan to be the civilian face of this militarized rule-of-law outreach. And this idea comes to us from the US Institute for Peace, which is an independent think tank that coincidentally, sits just beside the State Department. We'll wait and see how this experiment

plays out but it does depart very dramatically from the traditional roles for civilian lawyers in rule-of-law work.

Let me take you to an easier example: Here we have the UCC being exported to Rwanda. And UCC experts are Cornell University's Professor Robert Summers, assisted by his colleague Milton Gumar, and the Georgetown's Don Wallace. So I characterize these colleagues as good lawyers doing good deeds. Professor Summers is eminently qualified as one of the nation's leading experts on the UCC, to explain and help implement a UCC for Rwanda. He's also advised on the Russian civil code and on the Egyptian civil code.

What do we know about Rwanda? Well, we know the tragic story of the genocidal war, we also know that the government, the new government of national unity in Rwanda is asking for comprehensive modern commercial law, of the kind that will help drive its economy forward. And the hope is that by adopting a much more detailed UCC style of commercial and civil law that Rwanda will be able to break with its civilian European style past and use this new style of legislation to help grow the economy and perhaps in the future become a model for its neighbors, Uganda and Tanzania. So, this particular project is simply illustrative of what is a rapidly expanding rule-of-law industry, with a lot of new practice opportunities. The World Bank alone is literally pumping billions of dollars into these kinds of projects. Many other lenders, and bilateral and regional donors, are doing the same.

What this has led to is the creation of the rule-of-law industry with multiple players. And those players range from the universities at the bottom, the kinds of professors and colleagues I showed you a moment ago, all the way up to the Beltway defense contracting firms. And in the middle we have corporations, professional interest groups like ABA, military lawyers, international organizations and a lot of NGOs. Everyone, it seems these days, is doing rule-of-law. When we look at the people on the ground we, perhaps at risk of stereotyping, can divide them into three groups: Missionaries, mercenaries, and misfits. And, on a bad day I'd put myself in each of those categories.

So, missionaries are people who are fired with zeal for the good work of bringing better law to the target country, even when they say that they're not. And the reason that I said this is that you're not in these countries by accident. When I traveled to Afghanistan it's for a particular reason, I'm certainly not just finding myself there. One of the things we should also note is that a lot of the missionary zeal comes from the idea that rule-of-law has something to do with development, but in a lot of cases it doesn't. And the provincial reconstruction team example that I just gave you is an example of rule-of-law being used in the service of peacekeeping and security enforcement, if you like, rather than development per se. The PRTs are not helping to plant walnut trees or certainly the rule-of-law personnel and not directly involved in providing clean water or local schools. They're there to expand the realm of influence of the local PRT and also help bring about security or diffuse conflict in that region. I don't say that that's in any way an illegitimate goal, I'm just pointing out that it's a goal that's different from development in the traditional definition. Then we have a fairly -- a fairly large group of mercenaries. Some of my colleagues in Afghanistan would say, I'm not here for the Afghans, I'm here for the money. And in Afghanistan and in Iraq, that money is very significant. And then we have misfits, lawyers who are seeking adventure or trying to escape from boring routine jobs in their home locations, and they land in these dangerous and often stressful locations. You add alcohol, personality disorders, sex, drugs, yeah there's not a lot to do in a lot of these places, and so, it's not -- it's not difficult for people to join this group.

So, what does that present as a serious professional issue for us? One of the questions we might ask is, if this is a new field of practice what are the ground rules? What are the professional expectations and the ethical obligations? And are there any particular challenges in these post-conflict settings like Iraq or Afghanistan or Rwanda? Well, all of us have taken professional responsibility. All of us are licensed in our own jurisdictions. And so it shouldn't come as new information that the fundamental ethical and professional requirement for lawyers in almost all developed jurisdictions is competence. The promise that we make as lawyers is that we're going to provide competent representation for our clients. And that that competence includes legal knowledge, skill, thoroughness and the preparation that's reasonably necessary to protect and represent the client's interests.

This is fine in theory. It's rather difficult to deliver in practice in development settings. One of the challenges is location. Conflict zones in particular are a long way from home, geographically and metaphorically. Most of the foreign lawyers who are working in conflict zones are working in a completely unfamiliar legal system. Most of them are not fluent in any of the local languages. So the international working language here is English, and with the help of local interpreters some percentage of that is being communicated to local counterparts. The structure of the industry is also somewhat different from legal practice at home. You have a revolving population of peers and colleagues, so there's not a lot of peer monitoring because this is a population that's turning over every couple of months. And in many of the international assignments there's actually a requirement that people work in country for six weeks, and then depart for two or three weeks, come back for six weeks, and then depart. This is to protect the mental health of the international worker but it creates enormous dislocation in the professional delivery of service.

You frequently have a situation in which you have multiple clients. You're being paid by the Beltway bandit, which is a prime contractor for USAID or the State Department. But the local counterpart to which the legal services are being delivered is the Ministry of Justice, or the Supreme Court, or the local university, or the local bar association. And within that structure there is a management level. And then there are the actual people with whom you are supposed to be interacting, training, coaching, guiding or sitting with and drafting legislation with. So, multiple clients regardless of how you define those relationships. And all of this is being done while your assignment lasts only a matter of weeks or months. (1:20:00).

In addition to this, the contracts under which legal professionals are working exert their own pressure. So legal professionals in this industry generally are broken out into technical experts who might be well versed in bankruptcy law, and other generalists who perhaps are responsible for lots of aspects of judicial reform. And that might include the processing of cases as diverse as commercial cases, family law matters, bankruptcy matters and criminal matters.

The point here is that, if you're a generalist you're expected to know everything about the law in the reference system. Let's say for argument's sake that's the United States. The expertise that you're being asked for is expertise across a whole range of practice areas that you as a professional in your own jurisdiction wouldn't claim expertise in.

What the donors also require is that this work be done quickly. The money needs to be spent down and we need to generate a fair number of success stories to send through to Congress to get more money to do more work. So there's enormous pressure to work rapidly.

The local counterparts and clients are not really in a strong position to judge the quality of the legal work that's being delivered. And even if they were and had complaints about it, because of the way the industry is structured there's very little recourse for them.

So what this results in is an attitude expressed by one of the people I've interviewed in Afghanistan who says, "I can do anything I want. What are they going to do, send me to Afghanistan?"

[laughter]

Home office is a long way away.

So, my questions here is, should we really be concerned about this? What's the magnitude of the problem? And what we might note is that there are some clear cut cases at the margin but they're very few in number.

So there are cases where legal colleagues in developing situations are simply unprofessional. They do silly things, they break local cultural norms. Unprofessional perhaps, but not unethical.

Then there is the extreme case where the legal professional actually engages in corruption, accepts a bribe, or makes off with part of the budget. Again, not unknown but not very common.

What I'm more concerned about is the intermediate category of competence or performance by the average rule of law practitioner. And so the question that I think the profession is going to have to engage with fairly quickly is, what level of knowledge do you need and of what kind, before you start redesigning someone else's legal system?

Let me give you a couple of short examples. To protect identities I've simply called my first character Bob. He's a real person. One of our colleagues encountered him in a central Asian country at a university.

The university is a typical Soviet, concrete block style architecture. My colleague walked into what she thought was an empty room. But sitting in the corner was this rather large fellow in a striped shirt and braces, tapping away on his laptop.

She said, "Hello."

He said, "Hi, I'm Bob."

She said, "Hello, Bob. What are you doing?"

And he said, "Right now, I'm drafting the company code."

And this struck her as a little bit unusual. It's possible that Bob is truly expert in central Asian law, and in particular in the law of this country. It's possible that he speaks all of the local languages of this central Asian country. It's possible that the drafting he's doing is based on extensive interviews with all of the stakeholders, and he's simply synthesizing political and legal and social input about the desired form of the company code.

It's possible that he's going to hand this off to a government agency that will then pass it to parliament where it will be enacted as part of a democratic process.

But it's also very likely that none of this is the case, and that Bob truly is drafting the code alone. And that this code will be adopted and passed as a matter of executive fiat, as was the case with many statutes in Afghanistan before the formation of the current government.

A different example is part of a USAID project in Afghanistan at the moment where, as part of that project, a fair amount of work is being done with the Supreme Court to set up training mechanisms for trainee judges.

So, this is the induction program after people graduate from the law faculty at the university, but before they actually become sitting judges. A period of twelve months training, which in European systems is often called the stage.

In most European civil law countries that have this kind of training college before appointment to the bench. It's not uncommon for baby judges and baby prosecutors and baby lawyers to all be trained together on the basis that it's a career judiciary and that the three branches of the profession have equal status, and should have the same base level of knowledge.

But in our particular project example, the US judge, who was the adviser to the project, convinced the Supreme Court that judges in Afghanistan were independent. And that what independence means for the purposes of training is that no judge or future judge can be trained in the same room as a lawyer or a prosecutor or a lawyer or prosecutor to be.

The Supreme Court was very pleased to hear this because it enabled them to claim that they would need a lot more resources for their institution in order to create a separate, standalone training facility and that's what, in fact, has happened.

So instead of having a joint training facility where all branches of the profession could be brought together, at least in the induction phase, we now have separate, standalone programs. That would be fine if we had infinite money but Afghanistan, as you know, is one of the poorest countries on the planet and the money will go away at some point fairly soon.

So, query whether that advice was legally accurate or, indeed, helpful for the country. There are many more stories of this kind.

So that the question I'm posing is, do mid-career, U.S. lawyers really have sufficient knowledge to fulfill the competence requirement in rule of law practice?

The most frequently asked question on the U.S. Institute of Peace's discussion list for professionals in the field is, "Does someone know where I can get a nutshell on comparative law, because I have a lot of lawyers that I'm about to deploy to Country X and I don't really understand civil law, can someone bring us up to speed very quickly?" I wish that it was a joke but this is the kind of professional base level that we're dealing with.

Should we be worried about this? Who cares? Is this just an academic concern? What I want to highlight here is that if the situation continues for much longer, it's actually going to impact the legal profession reputationally, because as we're creating this new sub-

specialization, there's a real risk that it will damage the collective prestige by performing legal services that are simply sub-optimal or, indeed, result in damage or loss to the client.

But, going back to Rwanda, our well-intentioned friends in Rwanda. Did they need to know anything else before they left? The one issue is do they know the substantive law of Rwanda? Another issue is do they know the political background? And one of the things that they might have needed to know was that the reason Rwanda is moving to UCC-style common law drafting is as part of a general purge of Francophile elites.

It's part of a national fight with former donor France and it's part of a political repositioning of particular groups in the new government who have a vested interest in promoting English language drafting and common law style statutes. That of itself is not fatal; this is not a reason not to do the project. But it is part of the professional and ethical calibration that you would want to do before you took on the assignment.

But, having set up the problem, let me give you the solution. I want to suggest that these problems are quite practical, particularly for us here in Seattle, because we are a center for NGO and development work. And more and more rule of law work is going to come out of the Seattle legal community. One of the things we're trying to do here at the law school and, also, I should note that colleagues at Seattle moving in the same direction, is to prepare the next generation of students to be better equipped rule of lawyers.

So, we have a new 1L course on international and comparative law; we have JD courses that are specialists and that really force students to focus very much on all of the aspects of professional activity in development settings. And we have a very vibrant LL.M. program in sustainable international development.

So, our hope is that what we're going to do is craft a cohort of practitioners who are better prepared, more self-aware, self-critical and certainly ethically aware of the pitfalls of doing rule of law work.

Thank you.

[applause]

Please.

[inaudible question from audience member]

**Woman 1:** Great question. Yes, confining it to USAID in the interest of time, we just had a terrific student presentation on this very question about an hour ago in the Law Reform in Transition Economies course that Professor and I teach. And what we learned from our student was that the USAID funding priorities right now are clearly very much being driven by security concerns. So, if you look by ranking at the foreign countries that are receiving the bulk of USAID money, they are, without exception, countries that are partnered with the U.S. in the War on Terror, under our former administration, or with whom we're cooperating in ventures like anti-money laundering or counter narcotics. Or are countries like Egypt and Ethiopia which have historically been buffer countries because in an effort to preserve the stability in a region where countries close to them are in conflict. And that explains the big surges of spending in countries like Pakistan.

It's a very common critique and it's a critique that has a fair degree of substance behind it. And that's why I said fairly early in the presentation that it's wrong to conflate rule of law work with development.

Rule of law, like any expenditure of money by a state, has multiple objectives. Some of them are security and strategic; some of them are cultural and diplomatic; some of them are commercial. A lot of rule of law activity is designed to strengthen markets in preparation for more market participation, particularly by U.S. corporations if it's U.S. money or by European corporations if it's European money.

And then, development is one of the objectives, but not these days, the overriding objective. This doesn't make those other objectives illegitimate. What I simply stress and what we discussed with our students is that it's important to simply be clear-eyed about what's going on here.

The ABA, for example, describes itself as the world's biggest NGO and the world's biggest NGO is bringing us the world justice project and the roll out of rule of law in 40 countries. What's not to like? Except for the fact that this is also the world's biggest industry association, with some very clear commercial interests that are also going to be served by this otherwise valuable work, so, multiple objectives.

[inaudible question from audience member]

I think that's absolutely accurate. And this is something I've raised with ABA colleagues and with a number of colleagues in the field. The World Bank has expressed a lot of interest in this research and the research that I'm doing is further advanced than what I've shown you today. I think it's actually imperative to develop a code of conduct for lawyers doing this kind of work.

I think that the ethical problems on the ground are more complex than I've shown you today, I just concentrated on the threshold issue which is, when you helicopter in, that is your level of knowledge. But, I think it is problematic and there is no monitoring, except to the extent that someone who wants to remain in good standing as a licensed professional in their own jurisdiction, needs to be compliant with the regulations and laws of their own jurisdiction. But the chances of someone observing what they're doing on the ground in Uzbekistan are zero.

I don't want to end on a negative note [laughter] but perhaps we'll have to. Thank you.

[applause]