

# WHY NATIONS FAIL: 2012 INTERNATIONAL LAW WEEKEND PANEL ADDRESSES LAW AND DEVELOPMENT MOVEMENT, UNDERLYING ASSUMPTIONS, AND CHALLENGES

*Norman L. Greene, Wade Channell, Terra Lawson-Remer,  
Lara Goldmark, and Eugenia McGill\**

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On October 27, 2012, at International Law Weekend<sup>1</sup> at Fordham Law School, a panel entitled *Rule of Law and Development: Why Nations Fail*

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1. See *International Law Weekend 2012*, AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, [http://ila-americanbranch.org/Intl\\_Law\\_Wknd.aspx](http://ila-americanbranch.org/Intl_Law_Wknd.aspx). Among the sponsoring organizations for International Law Weekend are the American Branch of the International Law

and *What We Can Do About It*<sup>2</sup> was presented before an audience of law students and practitioners. The participants in the panel were Norman L. Greene (program co-chair); Wade Channell (program co-chair)<sup>3</sup>; Terra Lawson-Remer;<sup>4</sup> Lara Goldmark; and Eugenia McGill. The remarks of the speakers are set forth below. The purposes of the panel were to explore past and present efforts to enhance international development, moving from poverty to prosperity, including best (and poor) practices, and challenges and unintended consequences, with the implications for United States foreign policy and development programming.

### I. NORMAN L. GREENE: HISTORICAL PERSPECTIVE ON FOREIGN AID AND AID EFFECTIVENESS

The initial goal underlying U.S. foreign aid, which began through USAID during the Kennedy Administration in 1961 with origins before that time, was enhancing American security.<sup>5</sup> A prevailing notion in the 1960's and beyond was to the effect that if countries were more democratic and not so poor, the result would be less communism, less terrorism, and more security overall for the U.S.<sup>6</sup> Early motivations, however, were joined in part by humanitarian and pro-democratic ones as more human rights activists became involved.<sup>7</sup> Some of the earliest work was famously

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Association, the International Law Students Association, and the Leitner Center for International Law and Justice at Fordham Law School.

2. The title of the panel came from DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012) and was inspired by a host of development literature. For example, see RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM* (2012); and KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006).

3. See, e.g., Wade Channell, *Grammar Lessons Learned: Dependent Clauses, False Cognates, and Other Problems in Rule of Law Programming*, 72 U. PITT. L. REV. 171 (2010).

4. See Terra Lawson-Remer, *Property Insecurity*, 38 BROOK. J. INT'L L. 145 (2012). Professor Lawson-Remer's article was recognized in *Free exchange: Property and the Lady: Property rights and economic growth may not always go together*, THE ECONOMIST, March 30, 2013, available at <http://www.economist.com/news/finance-and-economics/21574465-property-rights-and-economic-growth-may-not-always-go-together-property-and> (last visited July 30, 2013) (which noted, among other things, that her thesis that "[s]ecuring the property rights of minorities seems to have no clear consequences for economic growth . . . has big and uncomfortable implications.").

5. KLEINFELD, *supra* note 2, at 39 *et seq.*

6. KLEINFELD, *supra* note 2, at 40, 43. Terrorism concerns existed prior to 911 as well as after. See *id.* at 41 ("By the mid-1970's, Middle Eastern terrorism had become a serious threat to the United States and Europe . . .").

7. KLEINFELD, *supra* note 2, at 46, 48-49, stating:

critiqued in a law review article from the 1970s still read today and summarized in other work.<sup>8</sup>

Motivations aside, choosing what to spend money on in foreign aid is and remains difficult. One should not spend foreign aid money on what does not work in terms of achieving one's goals; rather, one should spend money on what does work. But sometimes the donor does not know the difference, has limited options, or is operating within constraints that restrict best practices.<sup>9</sup> Assessing what needs to be accomplished and selecting and implementing an effective approach are difficult still, and millions of dollars, if not more, are at stake. Historically much money has been spent by donor agencies and countries in building institutions or providing laws that do not work as intended, are undermined by corruption, are simply not used, or otherwise fail of their purpose.<sup>10</sup> Effective use of foreign assistance funds is not only important for societies around the world which receive them, but it is also important for U.S. taxpayers.<sup>11</sup>

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In the 1960s, the security community was joined by an entirely different set of people interested in rule-of-law reform—human rights activists and development practitioners eager to spread democracy . . . . In the 1990s, as part of a larger expansion of democratization efforts across the U.S. government and in the broader development community, USAID created a Center for Democracy and Governance and rule-of-law reform programs were placed within it. The role of the rule-of-law in ensuring democracy and human rights remained a rather small side project of the larger democratic and human rights agenda, but it was now enshrined in the organizational chart.

8. *Id.*; see David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1065; see also Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53 (2008) [hereinafter *Perspectives*]; KLEINFELD, *supra* note 2.

9. See e.g., WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* 156 (2007):

[T]he official aid agencies simply don't know how to change bad governments into good governments with the apparatus of foreign aid. Bad government has far deeper roots than anything the West can affect. To make things worse, the aid agencies need the poor-country government, even a bad government, to fill the role of aid recipient to keep money flowing.

10. See KLEINFELD, *supra* note 2, at 85:

Countries undertaking rule-of-law reform are notorious for passing laws that they ignore, either by design (as occurred habitually in Romania from 2000 to 2004) or from lack of capacity to ensure enforcement . . . . Changing laws when enforcement and implementation are highly unlikely is, on its face, a rather ineffective way of changing behavior."

11. KLEINFELD, *supra* note 2, at 221 ("Governments . . . owe it to their taxpayers to make rule-of-law programs as effective as possible. And as citizens who share a single planet, the success of

For example, the U.S. government through USAID and the State Department<sup>12</sup> funds contracts which they hire outside contractors to perform.<sup>13</sup> But how does one tell which projects are good (likely to succeed or successful) or which contractors are good (same)? Are sufficient resources expended by the government to ensure project and contractor quality, including realistic project and contractor goals and effectiveness? Are funders posting unrealistic contracts or project proposals for bids, such as those with too short-term goals? Do contractors respond to proposals for projects of questionable effectiveness, in order to obtain the business?

Metrics are a special problem. How effective are the evaluative techniques for assessing development projects? How should they be improved? Does the government appropriate enough money for evaluative purposes upon completion of the project?

In 2012, a panelist attended a discussion where the subject was corruption and a government contractor was explaining that his company usually proposed “trainings” to fight corruption to a particular government agency. The attendee’s question to the contractor was whether he had a view on whether trainings worked to combat corruption, and his answer was that he did not have any such view. “Well, why do you propose trainings?” the attendee asked during the question and answer part of the panel. “Because the agency likes to see them and funds them,” the contractor said.<sup>14</sup>

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these programs is important to our own security, and to the well-being of some of the world’s most vulnerable people . . . .”); *see also* ACEMOGLU & ROBINSON, *supra* note 2, at 454 (despite waste in foreign aid, not suggesting that foreign aid “except the humanitarian kind, should cease. Putting an end to foreign aid is impractical and would likely lead to additional human suffering.”); *see also id.* at 453 (questioning effectiveness of conditional aid or lending, noting “the effectiveness of conditional aid appears no better than the unconditional kind. Countries failing to meet those conditions typically receive as much aid as those that do. There is a simple reason: they have a greater need for aid of either the developmental or humanitarian kind.”).

12. Rule of law reform assistance in terms of development aid flows through multiple U.S. government entities, in addition to USAID and State, including “at least 7 Cabinet-level departments and 28 agencies, bureaus, and offices . . . from the Department of Defense to the Department of the Treasury,” and “assistance may be labeled anything from ‘democracy development’ to ‘civil society reform.’” KLEINFELD, *supra* note 2, at 21–22. In the first post-cold war decade, more than \$1 billion was spent, with about the same amount spent annually since 2004. *Id.* at 22.

13. There may also be grants to NGOs, and to that extent, similar issues may arise.

14. Quotes are approximate. The point is that “output metrics” are insufficient to determine actual program effectiveness. KLEINFELD, *supra* note 2, at 200. Put another way, for instance: “If thousands of judges are trained, but the training is of poor quality, the numbers will hardly affect any real problem . . . . Wherever possible, program designers should not include output metrics—and certainly, they should not start with them.” *Id.* *See also id.* at 200 (referencing “contractors [who] are stuck carrying out ten more rote trainings . . . [who] cannot offer the time to assist with real reform.”).

On the same panel was a member of the agency in question that was involved in such funding. The attendee asked whether the member knew whether such trainings were effective, and he said that he did not or was not sure whether they were or not. The attendee then asked: “So why do you fund them?” The member’s answer was to the effect that the agency is trying to improve its ability to determine and then fund effective projects, but the question was otherwise unanswered.

As lawyers, one must question various assumptions, once prevalent, such as the idea that improving laws and courts will necessarily improve economic development.<sup>15</sup> Ample scholarship today questions the premise, but the premise has long-standing roots, and beliefs to the contrary (and in support of the premise) still persist.<sup>16</sup> In some egregious cases, following this view, laws have been simply transplanted to places where they did not fit.<sup>17</sup>

The belief in better laws yielding better democratic and economic outcomes is inspiring if not magical—how wonderful it is just to be able to change countries by changing laws in those countries, with the stroke of the pen or tap on the keyboard, but the situation is not so simple. At one time, I listened to a legal scholar proclaiming how he had been retained to write the constitution of a Middle-Eastern country. How great a project is that

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Other more relevant measurements are “outcome metrics,” or measurements of “the actual effects of a program,” and “impact metrics,” such as “whether the program itself is having an impact on the actual problem.” *Id.* at 200–01.

15. Greene, *Perspectives*, *supra* note 8, at 70 *et seq.*; see also KLEINFELD, *supra* note 2, at 53 (“the linkage between formal commercial aspects of the rule of law and economic development is mostly based on guesses and assumptions and remains largely unproven.”). Formal legal institutions are not the sole source of “law,” and informal institutions warrant consideration as well. Greene, *Perspectives*, *supra* note 8, at 80; see generally CUSTOMARY JUSTICE AND RULE OF LAW IN WAR-TORN SOCIETIES (Deborah H. Isser ed., 2011).

16. See KLEINFELD, *supra* note 2, at 51 (“[t]he idea that commercial law, contracts, and fair arbitration are necessary for economic growth had roots that stretch back for centuries.” (Referencing Shakespeare, Max Weber, Douglass North, Hernando de Soto, and others)).

17. See *e.g.*, Greene, *Perspectives*, *supra* note 8, at 60–61; Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 39 (Thomas Carothers ed., Carnegie Endowment for Int’l Peace 2006) at 139; Wade Channell, *Grammar Lessons Learned: Dependent Clauses, False Cognates, and Other Problems in Rule of Law Programming*, 72 U. PITT. L. REV. 171, *passim* (2010) (best practices and approaches in rule of law reform); KLEINFELD, *supra* note 2, at 52–53, 84 (providing example of Albania (citing Channell, *supra*, 72 U. PITT. L. REV.)); and Katharina Pistor, Dan Berkowitz, Jean-François Richard, *The Transplant Effect*, 51 (2) AMERICAN JOURNAL OF COMPARATIVE LAW 163, 171 (2003) (“Transplant countries therefore are likely to suffer from the transplant effect, i.e. the mismatch between preexisting conditions and institutions and transplanted law, which weakens the effectiveness of the imported legal order.”).

one, I wondered, and how does one get to work on that?<sup>18</sup> More realistically, development is more than changing constitutions (constitutional engineering<sup>19</sup>) and law reform.

Care is also needed in using ubiquitous concepts such as judicial independence in non-U.S. contexts. In some contexts, judicial independence has been questioned when used by independent but regressive judges to block progressive human rights advances.<sup>20</sup> Specifically, is judicial independence a benefit when judges are regressive and those who attempt to influence them are progressive? In Morocco, for example, some independent-minded but conservative judges have been opposed to women's rights legislation; and judicial independence was hardly progressive in that context.<sup>21</sup>

For lawyers and law students, studying or working in law and development is a humbling experience. Although legal training has historically been important, so are many other fields; and non-legal or multidisciplinary skills are essential as well, for example, in order to understand country contexts for development and power structures. It is no accident that panelists at the conference included a non-lawyer development professional, a lawyer with a master's degree in non-legal study, and a lawyer with a doctorate in economics. In a message to the many law students at the International Law Weekend panel: Your training may need to exceed your law degree.<sup>22</sup>

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18. Many have obtained that work. See, e.g., KLEINFELD, *supra* note 2, at 52 (following the fall of communism, "American lawyers found themselves stepping off airplanes in Poland, Hungary, and other newly liberated countries, redrafting laws and even constitutions alongside counterparts from the EU, OECD, Council of Europe, and a slew of nonprofit organizations.").

19. See John Mukum Mbaku, *Constitutional Engineering and the Transition to Democracy in Post-Cold War Africa*, INDEPENDENT REVIEW, at 501, 502 (Vol. II, No. 4, Spring 1998), available at [http://www.independent.org/pdf/tir/tir\\_02\\_4\\_mbaku.pdf](http://www.independent.org/pdf/tir/tir_02_4_mbaku.pdf) (last visited June 7, 2013).

20. See, e.g., Norman L. Greene, *International Law Weekend Panel Examines Access to Justice in the Middle East and North Africa Before and After the Arab Spring*, 20 ILSA Q. 22, 23 (2011), available at <http://content.yudu.com/Library/A1uzx4/ILSAQuarterly202/resources/29.htm> [hereinafter *International Law Panel*]; see also Norman L. Greene, *Rule of Law in Morocco: A Journey Towards a Better Judiciary Through the Implementation of the 2011 Constitutional Reforms*, 18 ILSA J. INT'L. & COMP. L. 455 (2012) [hereinafter *Rule of Law in Morocco*].

21. See, e.g., Greene, *International Law Panel*, *supra* note 20, at 22, 23; see also Greene, *Rule of Law in Morocco*, *supra* note 20, at 480.

22. See KLEINFELD, *supra* note 2, at 219 ("Altering power structures and social norms requires adding anthropologists, sociologists, and political scientists alongside the lawyers and judges currently involved in rule-of-law efforts. It also requires teaching local political context and incentivizing the learning of such context.") This need not mean that all interested in development work need credentials in non-legal specialties, but rather that a multi-disciplinary approach is needed for

Finally, addressing the book whose title provided a name to the panel, the historical origins of a country may play a role in development success. According to the authors, countries are more likely to fail if their institutions were historically extractive rather than inclusive. In a wide-ranging historical survey and analysis (too vast to dispute historically), the authors (one an economist and the other a political scientist) describe extractive states throughout many regions and eras, such as colonial states. In classic examples like Belgium and the Congo and others, elites do not share power, they dominate the population, and they “plunder” the country. In countries of that sort, economic failure persists even after the colonialists are gone.<sup>23</sup>

Thus, as the authors note, some independence movements rather than instilling democratic institutions, in a vicious circle, installed new “strongmen” who used the same sort of oppressive institutions left behind for their own benefit. Essentially the country exchanged old thugs for new thugs, with similar and predictable results.<sup>24</sup>

Furthermore, the authors noted that the same causes of poverty occur in dictatorships such as Egypt under the former Mubarak regime, which “is poor precisely because it has been ruled by a narrow elite that have organized society for their own benefit at the expense of the vast mass of people. Political power has been narrowly concentrated, and has been used to create great wealth for those who possess it . . . .”<sup>25</sup>

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development work, regardless whether achieved through self-study and travel, formal graduate or even undergraduate work, or a heightened respect and sensitivity for what other disciplines have to offer.

23. ACEMOGLU & ROBINSON, *supra* note 2, at 90–91

The modern Democratic Republic of Congo remains poor because its citizens still lack the economic institutions that create the basic incentives that make a society prosperous . . . . [P]olitical power continues to be narrowly concentrated in the hands of an elite who have little incentive to enforce secure property rights for the people, to provide the basic public services that would improve the quality of life, or to encourage economic progress. Rather, their interests are to extract income and sustain their power.

24. ACEMOGLU & ROBINSON, *supra* note 2, at 366 (“[T]he overthrow of a regime presiding over extractive institutions heralds the arrival of a new set of masters to exploit the same set of pernicious extractive institutions.”).

25. *Id.* at 3.

## II. WADE CHANNELL<sup>26</sup>: RULE OF LAW AND DEVELOPMENT: A BETTER ROLE FOR LAWYERS

Development practice has understandably included an important component of legal reform based on a generally accepted belief that appropriate laws and regulations are needed to structure economic transactions and social relationships. These institutions, as North, Wallis, and Weingast have shown,<sup>27</sup> are critical to the development of nations by creating “open access orders” in which individuals enjoy enforceable rights that allow them to flourish. On the other hand, “limited access orders” restrict the benefits of a stable state to the privileged elites that run the system. This continuum of access—from tightly held privileges to widely enforced rights—greatly defines the level of overall development of countries. Although there are exceptions, there is high correlation between development and access, with privilege-based societies at the bottom of most rankings of human development, and rights-based societies at the top.

Enter the lawyers. Using the simplest logic, it seems quite clear that the difference in countries can also be defined in terms of the laws they adopt and enforce. “Modern” laws structure the economy and social relationships for greater freedoms, resulting in greater growth. Based on this logic, the law and development movements described by Messick,<sup>28</sup> Kleinfeld,<sup>29</sup> and others have sent forth phalanxes of legal professionals from the OECD countries into the less developed world to assist countries in “upgrading” their laws in keeping with “international best practices” so that they could enjoy the benefits of growth and development. Improved laws lead to improved rule of law, which leads to growth and stability. If only it were that easy. It is not.

Rule of law is not about laws, it is about rule. The logic that assumes foreign drafters can solve the problems of failing nations by inserting better-written legislation is a flawed logic. What is needed is systems thinking, something not necessarily taught in law schools, that places the problem of laws and how they are developed into the system of rule.

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26. Wade Channell is a Senior Legal Reform Advisor for the U.S. Agency for International Development (USAID). His remarks are his own, and do not necessarily reflect the opinions or positions of the United States Government or USAID.

27. DOUGLASS C. NORTH, JOHN JOSEPH WALLIS, & BARRY R. WEINGAST, *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING RECORDED HUMAN HISTORY* (2009).

28. Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, *The World Bank Research Observer*, Vol. 14, No. 1 (February 1999).

29. RACHEL KLEINFELD, *supra* note 2.



Rule of law is a system of relationships between the rulers and the ruled in which no individual is above the laws adopted in that system, but rather all are subject to law. Unlike rule by might or rule by divine right, the rulers and their kin are not exempt from the limits placed on the behaviors of others. This is the backbone of the liberal democratic system of government that characterizes European history and the states arising from that history. Through a complex social contract, the state serves the citizens, who limit the powers of the state—and their own powers—through law and its enforcement.<sup>30</sup>

Rule of law is a relational construct that has been developed from the values and balance of powers within the society. Out of these underlying relationships, numerous countries have slowly developed what Acemoglu and Robinson have called “inclusive” systems (similar to North’s “open access” systems), systems that allow for political and economic competition, freedom of the press, and numerous civil liberties. To the contrary, those nations whose states are founded on rule by might, where an empowered elite shapes the institutions to benefit the few at the expense of the many, have developed unequal if not abusive “exclusive” relationships. These systems then produce laws and institutions that maintain the existing relationships. For example, colonial powers created systems based on their superior power to extract wealth from colonies. Unfortunately for many former colonies, new leaders did not dismantle these institutional structures at independence but merely nationalized them, maintaining their extractive, limited-access nature in place.<sup>31</sup>

Most legal reform projects—those in which development programs focus primarily on writing new laws or improving the efficiency of the judiciary at upholding laws—have shown little measurable positive impact. For systems thinkers, this is not surprising. Normally, laws are produced through consensus-building systems of participation that hammer out an agreement, embodied in the law, on how society should function based on values and power dynamics. Inclusive systems produce inclusive laws that strengthen and maintain the system; likewise for exclusive systems. Laws are the mechanical under-workings that undergird the existing structure, they are not the structure itself. Effective reform most frequently flows

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30. See LIVINGSTON ARMYTAGE, *REFORMING JUSTICE: A JOURNEY TO FAIRNESS IN ASIA* 79–87 (Cambridge University Press, 2012).

31. For an extensive historical analysis of this problem in Africa, see MARTIN MEREDITH, *THE FATE OF AFRICA* (2005).

from changes in the system, which produces changes in the law, not *vice versa*.<sup>32</sup>

The problem has been well demonstrated by Hollywood. In the movie, *The King's Speech*,<sup>33</sup> we see the future king of England, George, Prince of York, suffering from a debilitating speech impediment—an overwhelming stutter. To overcome this, the Prince and Princess of York employ a speech therapist, Australian commoner, Lionel Logue. During an early therapy session, Logue, who recognizes the stutter may be the result of emotional or psychological causes, begins to question Prince George about his childhood and family experiences. The princess immediately intervenes and puts a halt to this line of questioning: “We want you to focus on the mechanics [of speech]. Only the mechanics.” She hopes that muscle exercises for the jaw can cure the problem, without the embarrassment of examining the causes of the condition.<sup>34</sup>

Like the prince’s therapy, legal reform assistance that focuses on the mechanics of law rather than its underlying drivers is bound to fail rather than reverse the failure of the nation being assisted. “Mechanical” assistance focuses on laws, rather than rule. While it may seem plausible that foreign experts could catalyze positive changes by drafting laws based on inclusive, open-access values that drive the formation of new, inclusive structures, there is a missing element in this approach. To be effective, legislation must be implemented, not just adopted. A country may adopt various laws recommended (and even drafted) by foreign experts in order to obtain grants, loans, and other foreign assistance, but not to change the behaviors that law is intended to regulate. Or, as an Albanian lawyer once stated ironically regarding foreign reform impact: “We have a lot of great laws, but we haven’t implemented them.” Indeed, the Albanian bankruptcy law adopted in 2002<sup>35</sup> to replace an earlier donor-funded law (used only three times), has resulted in a grand total of one (yes, one), bankruptcy case being brought. This German-inspired law may be technically excellent, but it has yet to connect to the underlying culture and societal relationships that must be incorporated if laws are to be used.

This International Law Students Association conference brings together dozens of future lawyers who hope someday to participate in the field of international legal reform and legal development. We sincerely

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32. Armytage, *op. cit. supra* note 30, at 53–57; KLEINFELD, *supra* note 2, at 73–76.

33. THE KING’S SPEECH (2010). See <http://www.kingsspeech.com/>.

34. Fortunately for the unfortunate prince and future king, the therapist prevails in the end.

35. Albanian Bankruptcy Law (No.8901 of 23 May 2002), as amended by Law No. 9919 of 19 May 2008 and Law No.10137 of 11 May 2009.

hope you will join us in this work. But we are here to keep you from following the footsteps of your forebears, the well-intentioned souls who travel the world re-writing other countries' laws without understanding the underlying relationships. The goal of legal reform—and this is what we want you most to understand—is not to reform laws, but to redefine relationships.

Nations fail when they are based on exclusive relationships that disenfranchise significant sectors of the population. This may take the form of discrimination against women or minorities, or show up as needless regulation that protects vested interests from competition. Either way, the mere passage of laws without social consensus (which is the foundation for implementation), will not lead to inclusion or development.<sup>36</sup>

If rewriting laws is not the answer, what can lawyers do to promote reform? Acemoglu and Robinson find that inclusion increases when broad-

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36. See ACEMOGLU & ROBINSON, *supra* note 2, at 3–4:

In fact, Egypt is poor precisely because it has been ruled by a narrow elite that have organized society for their own benefit at the expense of the vast mass of people. Political power has been narrowly concentrated, and has been used to create great wealth for those who possess it, such as the \$70 billion fortune apparently accumulated by ex-president Mubarak. The losers have been the Egyptian people, as they only too well understand.

We'll show that this interpretation of Egyptian poverty, the people's interpretation, turns out to provide a general explanation for why poor countries are poor. Whether it is North Korea, Sierra Leone, or Zimbabwe, we'll show that poor countries are poor for the same reason that Egypt is poor. Countries such as Great Britain and the United States became rich because their citizens overthrew the elites who controlled power and created a society where political rights were much more broadly distributed, where the government was accountable and responsive to citizens, and where the great mass of people could take advantage of economic opportunities.

*See also id.* at 372:

Extractive economic and political institutions, though their details vary under different circumstances, *are always at the root* of this failure. In many cases, for example, as we will see in Argentina, Colombia, and Egypt, this failure takes the form of lack of sufficient economic activity, because the politicians are just too happy to extract resources or quash any type of independent economic activity that threatens themselves and the economic elites. In some extreme cases, as in Zimbabwe and Sierra Leone, which we discuss next, extractive institutions pave the way for complete state failure, destroying not only law and order but also even the most basic economic incentives. (emphasis added).

based coalitions of the disenfranchised form to challenge<sup>37</sup> the existing power structure and distribution of benefits. Knowing this, it becomes clear that lawyers and other reformers will do well to help countries create participatory forms of legislation and regulation, bringing multiple stakeholders to the table to hammer out needed changes. Where this approach has been adopted, implementation has flowed more effectively from legislation.

This participatory approach has had tremendous positive impact in Vietnam in the past ten years. Rather than simply drafting laws for the Vietnamese government, reformers assisted a multi-ministry working group to engage the private sector and other stakeholders in substantive discussions about proposed reforms. Foreign experts helped to craft the substance of the laws, but in response to changing local relationships, in which local stakeholders negotiated consensus on the direction of change. Although scores of new laws have been drafted, the most important was adopted early in the process: A law on laws, mandating public participation in the lawmaking process. As one Vietnamese legislator noted, this approach “has changed the legislative culture of Vietnam.” Indeed, the local private sector is the first to note this movement from an exclusive system of legislation to a much more inclusive system of participation in policy and lawmaking.<sup>38</sup>

Reform programs that focus on passage of laws have limited impact. The point of laws is to reform behavior. This requires a systemic approach leading to effective implementation. Inclusive systems begin with participatory lawmaking, promulgation of new laws, dissemination of that legislation through public and professional education, and implementation through effective subsystems of courts, watchdog organizations, media, and others who ensure that the laws affect behaviors as intended. Many countries do not have such systems in place.

For example, in the early 2000s, post-Yugoslav, Croatia tended to produce laws without significant private sector input through drafting committees led by academics; in one case, a law was passed after being translated from German and transplanted from Germany. Stakeholder reactions often led to revisions later, but not at inception. (Ironically, anecdotal reports indicate that there was greater stakeholder input under Tito's autocratic Yugoslav regime). Likewise, Vietnam had a very top-

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37. Hopefully through peaceful means: as North, *et al.*, have described in *VIOLENCE AND SOCIAL ORDERS*, *supra*, note 27, changes often entail the threat of violence, if not violence itself. Hopefully, we now have less destructive means of reform.

38. This information is taken from private interviews by Wade Channell in 2011 in Hanoi and Ho Chi Minh City.

down approach until approximately 2004, when outside assistance helped the legislature adopt a more participatory model.

This concept is captured in part by the World Bank Governance indicators under the concept of voice. Low “voice” tends to correspond to low input by broader society into the policy and legislative process.<sup>39</sup>

Lawyers who take a systems approach can have a profound impact on reform initiatives by helping local reformers to change and strengthen systems. They can incorporate participatory methodologies into their projects and assignments, and push back against simplistic, mechanistic designs. But there is more. Lawyers have a role to play working with local experts to redesign curriculum, promote public education, and identify gaps in the enforcement framework. The American Bar Association has used its Rule of Law Initiative (and its predecessors) to introduce clinical education into law schools and promote freedom of information. Donor agencies such as USAID engage dozens of lawyers to assess and analyze gaps in a country’s commercial legal system, utilizing a systems-thinking approach to understand and respond to the drivers of reform as well as the opponents of change. After designing programs based on that analysis, lawyers are employed to assist countries in their efforts to create more inclusive economic institutions, and, sometimes, more inclusive political systems.

As I stated before, we need lawyers in this work; lawyers who understand the substance of laws, but more than that, those who understand the systems that promote or retard inclusive economic and political institutions. Only as we move toward more open access and inclusion can we help nations to succeed rather than fail.

### III. TERRA LAWSON-REMER: PROPERTY INSECURITY

There is a complicated relationship between secure property rights protected by law and overall economic development. Research indicates that overall national economic growth may occur through securing the rights of the elites at the expense of marginalized minorities.<sup>40</sup> Yet some have assumed mistakenly that “if a state is considered to have a high level of property rights security and strong protections for property rights, everyone’s rights are taken as equally secure and the country is categorized as having ‘good institutions.’”<sup>41</sup> That is not the case. To concentrate on

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39. See *The Worldwide Governance Indicators Project*, WORLDWIDE GOVERNANCE INDICATORS, available at <http://info.worldbank.org/governance/wgi/index.asp> (last visited June 7, 2013).

40. Terra Lawson-Remer, *supra* note 4 at 146.

41. *Id.* at 149.

aggregate economic growth exclusively may be to overlook the needs of vulnerable populations.

One example is Brazil's hydroelectric dams encroaching on the property of the indigenous Amazonians, which helped propel Brazil's expanding economy.<sup>42</sup> Expropriation of Native Americans in North America led to the United States' overall growth "through expansion of large plantations and the widespread establishment of small freehold farms for white settlers."<sup>43</sup> When the commons were enclosed in seventeenth century Britain, this, increased property security for the gentry but not the commoners: *Viz.*, "small and medium cottagers who previously had rights to the newly enclosed commons."<sup>44</sup> "Increasing the security of private property rights for the gentry required expropriating the property of small-hold farmers and pastoralists."<sup>45</sup>

If the goal is overall poverty reduction, one needs to pay attention to both overall growth and the need of minorities.<sup>46</sup> Also, law reform is not neutral and there are (or can be) winners and losers wherever there is legal change. Certain legal regimes may adversely affect the rights of some while benefiting others. Thus, "[p]rotecting the property rights entitlement of some inherently requires preventing others from claiming and controlling those same resources."<sup>47</sup>

#### IV. LARA GOLDMARK: INCLUSION, INFORMATION, AND FLEXIBILITY IN DEVELOPMENT

DAI works on all aspects of legal reform—developing the capacity of public and private sector stakeholders to develop proposals, consult with a broader audience, shepherd them through the approval process, and perhaps most importantly—implement them.<sup>48</sup>

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42. *Id.* at 181 ("Belo Monte dam [the world's third largest hydroelectric power plant on the Xingu River, a large tributary of the Amazon] will provide power for Brazil's fast-growing economy while displacing approximately 20,000–40,000 indigenous Amazonian Indians.").

43. *Id.* at 180.

44. *Id.* at 179.

45. Terra Lawson-Remer, *supra* note 4, at 179.

46. *Id.* at 150.

47. *Id.* at 147.

48. See publicly available documentation in the USAID information clearinghouse for reports from the following projects: Improving the Business Climate in Morocco Program; Moldova Business and Tax Administration Reform; Ukraine, Moldova, and Belarus BIZPRO; Bosnia Governance Accountability Program; Cambodia Micro, Small and Medium Enterprise/Business Enabling Environment Component; Vietnam Support for Trade Acceleration and Vietnam Support for Trade

Development firms are hired to deliver results.<sup>49</sup> With policy reform, a development firm gets it right if those results will continue to manifest themselves long after the firm has gone away—because supporting policy reform is not just about getting the right laws on the books. It is about ensuring that local actors have a neutral and safe place to discuss joint and cross-cutting proposals, that proposals get the technical (as opposed to political) attention they need, and that once laws are passed, that a whole series of follow-up activities take place. These may range from drawing up the accompanying regulations, to developing guides for the civil servants responsible for enforcing the law and its associated regulations, and publishing information for the public, about the law, the regulations, and how to use them.

The best projects involve coalitions of stakeholders, leave behind a platform for collaboration, and continue to deliver change long after they have ended.

I am going to tell three stories. Each one illustrates a principle that is key in developing, passing, and implementing laws that contribute to pro-poor development. The principles are inclusion, information, and flexibility.

*(i) Inclusion.*

DAI operates an economic growth project in Somaliland—the Northeastern region which declared independence from Somalia over twenty years ago.<sup>50</sup> In this region there is no “grid”—i.e., no public electric system providing services to citizens. What you have are individual entrepreneurs who operate diesel generators because their enterprise needs electricity—for example, hotel owners. Or entrepreneurs who saw the need and just decided to set up a diesel generator in a certain neighborhood. They are called independent power providers (IPP). The electricity sold in Somaliland is the most expensive in the world (more than a dollar per kilowatt/hour) which makes it possible to imagine renewable energy sources, like wind, being much cheaper.

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Acceleration II; Vietnam Competitiveness Initiative and Vietnam Competitiveness Initiative II; El Salvador Tax Policy and Administration Reform Program; and Jordan Fiscal Reform Project II.

49. Examples of development firms include: DAI, Chemonics, PRAGMA, Nathan Associates, Carana Corporation, Blue Law, DPK Consulting (now owned by Associates in Rural Development which is now owned by Tetra-Tech).

50. See DAI for the United States Agency for International Development (USAID), Report, *Business Enabling Environment Assessment*, in SOMALI-AMERICAN PARTNERSHIP FOR GROWTH: PRIVATE SECTOR ASSESSMENT Chapter 1 (July 2011).

DAI's project has been helping to revise the laws governing the production and distribution of electricity. Originally the expert consultant who has written this kind of law in many countries took a look at the tangled wires running above the city of Hargeisa and said "oh, just grandfather these guys out, they aren't up to standard." "Wait," we said, "isn't it possible to come up with a law that offers incentives for these entrepreneurs to upgrade their services and gives them options to participate in the new investment projects which will be coming in?" Indeed, it seems this is possible and that is just what the project has done. It is important, though, to think proactively about how to include local enterprises in the framework of new laws—if one does not, it is just far too easy for them to be shut out of the next generation of economic activity.

(ii) *Information.*

In the city of Tangiers, DAI worked with the municipal government and a series of other agencies involved in the process of granting construction permits.<sup>51</sup> After a deep look at the data around permit requests,<sup>52</sup> we discovered that while requests made their way relatively quickly to the multi-agency committee, this did not mean that they were any closer to getting approved. The vast majority of the requests, when they went to the committee, were sent back for more information—time and again. So many times that we began to wonder if it would help to place large posters on the wall of the municipal offices, showing applicants what their package needed to contain. For example, if you were building near an airport, or if your building was planning to be used for tourism, or near a religious building, etc., special documents and information were needed. The information needed to pass the safety inspection is not published anywhere, so many buildings failed. Also due to missing information and outdated maps about where the underground water pipes and power lines actually were, plans often could not be approved until someone had actually dug down to identify exactly where the water pipes, power lines, or both were.

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51. See *Breaking the Rules that Bind: Freeing Private Enterprise from the Shackles of Regulation* (Developing Alternatives, Volume 11, Issue 1, Spring 2006); Lara Goldmark, *No More Red Donkeys: Catalyzing Reform in Morocco through a Regional Doing Business Assessment*, in *GROUNDS FOR GROWTH: ENHANCING THE COMPETITIVENESS IMPACTS OF BUSINESS ENVIRONMENT REFORM* (Developing Alternatives, Volume 13, Issue 1, Winter 2009); DAI for the United States Agency for International Development, Report, *Beyond Doing Business: Final Report/Improving Business Climate in Morocco Program* (September 2009) [hereinafter DAI Report].

52. See DAI Report, *supra* note 51, at annexes A11–14.



A set of “if this, then that” questions and a color-coded application form was developed with the municipality to clear up, once and for all, what all of the requirements were to request a construction permit. The system was implemented in Tangiers and is now being rolled out to other cities in Morocco. The story illustrates the key principle that no matter what the law or regulations say, they cannot be used effectively by investors unless they are made clear. In this case, many well-connected investors used to have the involved government agencies hold their hand through the procedures, whereas it was the small, less connected architects and developers that were subject to the “merry-go-round” treatment by the permit committee. Making information publicly available is of greatest benefits to those who would not normally have access.

*(iii) Flexibility.*

This story is relevant to one of the most pressing global issues right now—unemployment in the Middle East and North Africa. The insights come not from a project, but rather from research that I conducted for DAI in anticipation of a project to address issues of urban unemployment in Jordan.<sup>53</sup> I visited the Palestinian refugee camps in and around Amman and asked women and youth about obstacles they faced in obtaining employment. I had been forewarned that, due to cultural issues, women did not want to work. What I found in the course of my research was a bit more nuanced than that.

I discovered that obstacles to women’s participation in the workforce included: lack of childcare options, lack of safe and affordable transport options, and a dearth of flexible scheduling and location options. And the laws were not making it any easier. Until recently (they are working on this law right now in Jordan), it was illegal for women to perform work in their homes—whether for an employer or as a self-employed business owner. For youth, the issues were different, centering around the lack of connection between what they learned at school and what employers were looking for—and what types of jobs were available versus what jobs the youth had been conditioned to seek. DAI’s summer 2012 Developing Alternatives Journal, *The Jobs Challenge: Fresh Perspectives on the Global Employment Crisis*, digs deeper into these issues, concluding that a new definition for “flexibility” and accompanying revisions to labor laws

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53. This research was published in the recent DAI employment journal. See Lara Goldmark and Karen Miller, *Flexibility that Works* in THE JOBS CHALLENGE: FRESH PERSPECTIVES ON THE GLOBAL EMPLOYMENT CRISIS (Developing Alternatives, Volume 15, Issue 1, Summer 2012).

and regulations would be likely to increase employment of women and youth all over the world.

#### V. EUGENIA MCGILL: ENSURING GENDER INCLUSION IN LAW AND POLICY REFORM

The title of Acemoglu and Robinson's book, *Why Nations Fail*,<sup>54</sup> raises questions about how and why nations fail particular groups of citizens, including ethnic, racial, religious and sexual minorities, and women. As Terra Lawson-Remer has found for ethno-cultural minorities, nations can "succeed" in terms of a range of national development indicators,<sup>55</sup> and still "fail" to provide equal opportunities and protect the rights of particular groups.<sup>56</sup> In the case of gender discrimination and inequality, the marginalized group typically represents half the population.

Acemoglu and Robinson link state failure with "extractive" political and economic institutions, and find conversely that "successful states" are those with more "inclusive" political and economic institutions.<sup>57</sup> From a gender perspective, it is important to unpack this concept of "inclusive institutions." In the United States, for example, our collective understanding of "inclusion" and "pluralism" has expanded considerably since the 18<sup>th</sup> century, for example, to include people of color, women, and more recently, people with disabilities, and people with different sexual orientations. However, the project of realizing a more inclusive society is clearly unfinished. With respect to gender inclusion, despite substantial progress, women worldwide still have relatively less access to land, credit, technical assistance, and other resources; women are still underrepresented in key decision-making bodies; and women are still underpaid relative to men in most professions and jobs.<sup>58</sup>

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54. ACEMOGLU & ROBINSON, *supra* note 2.

55. Because of the limitation of metrics such as Gross Domestic Product, virtually all development agencies and developing country governments now use multiple indicators and indices—such as the Human Development Index, Gender Inequality Index and Multidimensional Poverty Index—to measure development trends. *See, e.g.*, UNDP, *Human Development Report 2011: Sustainability and Equity—A Better Future for All*, 133–52.

56. Lawson-Remer, *supra* note 4.

57. ACEMOGLU AND ROBINSON, *supra* note 2, at 429–30.

58. *See, e.g.*, WORLD BANK, WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT; UNITED NATIONS, 2009 WORLD SURVEY ON THE ROLE OF WOMEN IN DEVELOPMENT: WOMEN'S CONTROL OVER ECONOMIC RESOURCES AND ACCESS TO FINANCIAL RESOURCES, INCLUDING MICROFINANCE.

To understand how state institutions become more “inclusive” over time, lawyers and legal scholars typically point to constitutional amendments, law reforms, and judicial decisions. However, it is important to recognize that these legal reforms are often driven by social movements, such as the civil rights movement, the women’s movement, and the gay rights movement in the United States. As Wade Channell noted, equitable laws are important but not sufficient to ensure inclusive institutions, and this certainly applies to gender inclusion. Because efforts to promote gender equality involve changing deeply entrenched social norms, the more successful efforts have involved broad-based coalitions, including civil society advocates and news media together with progressive lawmakers, bureaucrats, and judges. The more successful approaches have also involved multiple strategies—for example, law reforms combined with public awareness campaigns, training of judges and government bureaucrats, and the introduction of accountability mechanisms, all over a period of time. In South Korea, for example, the women’s movement and its allies used a variety of strategies to eventually abolish the discriminatory headship system.<sup>59</sup>

In international development assistance, it is important to recognize that gender equality projects need to be internally defined and driven. However, external actors can provide valuable resources, including information on legal and other approaches that have worked in similarly situated countries, and funding for research, exchanges, consultations, and awareness-raising. For example, several development organizations provided support for the internally-driven process to draft and enact gender equality laws in the Philippines and Viet Nam.<sup>60</sup>

Development organizations also need to scrutinize their own programs to make sure they do not inadvertently reinforce existing inequalities or contribute to new forms of inequality. For example, as early as 1970 the Danish economist Ester Boserup documented the ways in which colonial land administration practices had undermined women’s traditional access to and control over land, with lasting consequences in many developing countries.<sup>61</sup> However, donors have continued to support gender-blind land reform projects in developing countries, resulting in the distribution of new

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59. Doowon Suh, *The Dual Strategy and Gender Policies of the Women’s Movement in Korea: Family Headship System Repeal through Strategic Innovation*, 44 (2) *Sociological Focus* 124 (2011).

60 See, e.g., UNIFEM [now UN Women], *EVALUATION REPORT: UNIFEM PROGRAMME—FACILITATING CEDAW IMPLEMENTATION IN SOUTHEAST ASIA*, 25 (2008).

61. ESTER BOSERUP, *WOMEN’S ROLE IN ECONOMIC DEVELOPMENT* (1970).

land titles or land use certificates primarily to male “heads of households.”<sup>62</sup>

Why do law and policy “experts” and practitioners continue to overlook gender issues in their work, especially in the areas of governance and economic law? Many forms of gender inequality are embedded and normalized in institutions—for example, in the apparently neutral concept of “head of household.” Law and policy practitioners are also influenced by their own assumptions about the roles and capabilities of men and women, which they may apply unconsciously to their work in other countries, thereby missing or misunderstanding local gender issues. However, there are a few practical steps that law and policy advisors can take to promote more gender-equitable institutions:

- 1) Always assume that a proposed law or policy reform *will* have different impacts on men and women, and analyze the potential consequences of the reform on that basis;
- 2) Study the social impact of similar reforms in other countries, and make use of available resources on gender, law and policy to anticipate how the reform could differently affect women and men (or particular groups of women and men),<sup>63</sup>
- 3) Consult with local experts on gender and development and women’s rights; and
- 4) Ensure that women are represented in any consultations with local stakeholders (*e.g.*, local bar associations, business or trade associations, labor unions or other civil society organizations).

## VI. CONCLUSION

This program brought together scholars, writers and practitioners in the field of development aid if not to solve the problems of aid effectiveness at least to ask the right questions and advance the conversation in the field. The program had a subtle recruitment message as

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62. In response to these initial results in Kyrgyzstan and Tajikistan, UNIFEM (now UN Women) and some bilateral donors have been supporting further law reform, training and awareness-raising to try to increase women’s ownership (or joint ownership) of land. UN WOMEN, *UN WOMEN IN EASTERN EUROPE AND CENTRAL ASIA*, 7 (2012).

63. *E.g.*, ASIAN DEVELOPMENT BANK, *GENDER, LAW AND POLICY IN ADB OPERATIONS: A TOOL KIT* (2006); UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME, *DESIGNING AND EVALUATING LAND TOOLS WITH A GENDER PERSPECTIVE: A TRAINING PACKAGE FOR LAND PROFESSIONALS* (2011); WORLD BANK, *GENDER DIMENSIONS OF INVESTMENT CLIMATE REFORM: A GUIDE FOR POLICY MAKERS AND PRACTITIONERS* (2010).

well. There is no more compelling profession today than participating in the effort to alleviate poverty worldwide,<sup>64</sup> an extraordinarily difficult field but one which draws major talents throughout government and other donor agencies, academia, and development practitioners.

Keeping in mind the audience for the panel, in the words of panelist Wade Channell, “we need lawyers in this work: Lawyers who understand the substance of laws, but more than that, those who understand the systems that promote or retard inclusive economic and political institutions.” But not just lawyers can participate. As William Easterly wrote:

There is a role for everyone . . . who cares about the poor.  
If you are an activist, you can change your issue from

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64. The development field also encompasses counter-human trafficking, an effort advanced by USAID through its 2012 policy and otherwise and by other U.S. Government agencies. See USAID, *Counter-Trafficking in Persons Policy*, Feb. 2012 [2012 USAID Policy], available at [http://transition.usaid.gov/our\\_work/democracy\\_and\\_governance/technical\\_areas/trafficking/pubs/C-TIP\\_Policy.pdf](http://transition.usaid.gov/our_work/democracy_and_governance/technical_areas/trafficking/pubs/C-TIP_Policy.pdf) (last visited June 7, 2013); see 2012 USAID Policy, at 1 (“The [USAID] 2012 Counter-Trafficking in Persons Policy is a direct response to the fact that trafficking in persons (TIP) is a massive development problem affecting millions of men, women, and children around the globe.”) and p. 3 (“conditions that allow trafficking to flourish” include “lack of viable economic or educational opportunities, gender and ethnic discrimination, corruption, and weak governance and rule of law.”); and USAID, *Counter-Trafficking in Persons Field Guide*, Apr. 2013, available at [http://www.usaid.gov/sites/default/files/documents/2496/C-TIP\\_Field\\_Guide\\_Final\\_April%205%202013.pdf](http://www.usaid.gov/sites/default/files/documents/2496/C-TIP_Field_Guide_Final_April%205%202013.pdf) (last visited June 7, 2013); see also U.S. Department of State’s *Trafficking in Persons Report* (2012), available at <http://www.state.gov/j/tip/rls/tiprpt/2012/> (last visited June 7, 2013). The *USAID Field Guide* references the President’s Interagency Task Force to Monitor and Combat Trafficking and the multiple federal agencies involved in the effort, including State, Justice, Defense, Health and Human Services, Homeland Security, Labor, Agriculture, Education, and EEOC. See *id.* 34–37 (“Annex B. Roles and Responsibilities of USG Entities in Combatting Trafficking,” listing and describing work of agencies, noted in the publication as being taken from the U.S. Department of State’s website).

USAID recently sponsored a contest to engage university students in developing anti-trafficking solutions and strategies. See USAID, *Challenge Slavery: The Counter-Trafficking in Persons Campus Challenge*, available at <http://www.usaid.gov/traffickinginpersons> (last visited Jan. 22, 2013); see also *id.* (“The challenge, promoted at *ChallengeSlavery.org*, calls on university students, in the United States and around the world, to offer creative ideas and solutions to prevent trafficking and provide assistance to victims and survivors.”). For the selection of winning proposals in March 2013, see USAID Press Release, *USAID Announces Winners of the Campus Challenge to Combat Human Trafficking*, Mar. 22, 2013, <http://www.usaid.gov/news-information/press-releases/usaid-announces-winners-campus-challenge-combat-human-trafficking> (last visited April 20, 2013); see also <https://www.challengeslavery.org/tech-contest> (specifying winning projects) (last visited April 20, 2013). Part of the campus challenge initiative includes research grants to scholars at universities and research institutions worldwide for Counter-Trafficking in Persons (C-TIP) Research Challenge Grants. See <http://www.iie.org/Programs/USAID-Democracy-Fellows-and-Grants-Program/Grant/Current-Opportunities> (last visited May 11, 2013).

raising more aid money to making sure that the aid money reaches the poor. If you are a researcher or student of development, you can search for ways to improve the aid system, or for piecemeal innovations that make poor people better off, or for ways for homegrown development to happen sooner rather than later. If you are an aid worker, you can forget about the utopian goals and draw upon what you do best to help the poor. Even if you don't work in the field of helping the poor, you can still, as a citizen, let your voice be heard for the cause of aid delivering the goods to the poor.<sup>65</sup>

The panelists hope that the panel and this article play a role in encouraging their attendees and readers to ask the right questions, read the leading development literature, learn from local experts, and take up the challenge.

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65. EASTERLY, *supra* note 9, at 383–84.