



2010

## Exporting U.S. Criminal Justice

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29 Yale L. & Pol'y Rev. 83-164 (2010)

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# YALE LAW & POLICY REVIEW

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*Allegra M. McLeod\**

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\* Law Research Fellow, Georgetown University Law Center. J.D., Yale Law School, 2006; Ph.D., Stanford University, 2009. For generous encouragement and valuable feedback on earlier drafts, I am grateful to Bruce Ackerman, Wendy Brown, Joshua Cohen, Dyan Ferraris, Richard Ford, Ruth Kricheli, Everaldo Lamprea, Derin McLeod, Kieran Oberman, Rob Reich, Judith Resnik, Alvaro Santos, Beth Van Schaack, Anjali Srinivasan, Andrew Sternlight, Whitney Cloud, Yves Winter, workshop participants at Stanford and Berkeley, and especially to Robert Weisberg. For research support, I owe thanks to Stanford University's Programs on Global Justice, Modern Thought and Literature, Ethics in Society, and Center on Democracy, Development, and the Rule of Law.

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## INTRODUCTION

*[T]he rule of law is one of the United States' greatest exports . . . .*

- U.S. Attorney General Eric Holder<sup>1</sup>

In the years leading up to and following the end of the Cold War, the U.S. government embarked on a new legal transplant project,<sup>2</sup> carried out through the foreign promotion of U.S. criminal justice techniques, criminal procedures, and transnational crime priorities.<sup>3</sup> U.S. prosecutors and police—posted across Africa, Asia, Eastern Europe, Latin America, and the Middle East—have sought to advance democracy and development, as well as to control crime, by reforming foreign criminal justice institutions with reference to U.S. models.<sup>4</sup> In the view of some, this amounts to legal imperialism: an “open and declared imposition on the part of foreign powers.”<sup>5</sup> Others maintain that “the core of democracy is the Rule of Law, and the [U.S. Justice Department’s] Criminal Division is its greatest ambassador.”<sup>6</sup> Alternately celebrated and condemned, U.S. efforts

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1. *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 6 (2009) (statement of Eric H. Holder, Jr., Att’y Gen of the United States).
  2. See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (discussing the concept of legal transplants in terms of inter-societal legal borrowing).
  3. See, e.g., *International Law Enforcement Academies (ILEA) Statement of Purpose*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c11242.htm> (last visited Sept. 22, 2010) [hereinafter *ILEA Statement of Purpose*]; *Office of Overseas Prosecutorial Development Assistance and Training*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/> (last visited Dec. 7, 2010) [hereinafter *OPDAT*].
  4. See *ILEA Statement of Purpose*, *supra* note 3; *OPDAT*, *supra* note 3.
  5. FERNANDO VELÁSQUEZ, *COLEGIO DE JUECES Y FISCALES DE ANTIOQUIA, ¡COLOMBIA: HACIA UN DERECHO PENAL EXPANSIONISTA!* 1 (2005), translated in Luz E. Nagle, *Process Issues of Colombia’s New Accusatory System*, 14 SW. J.L. & TRADE AMERICAS 223, 246 n.98 (2008); see also Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 431 (2003).
  6. Lanny A. Breuer, Ass’t Att’y Gen., Dep’t of Justice, Criminal Div., Remarks at Columbia Law School (Oct. 7, 2009).

are associated with a “revolution in Latin American criminal procedure,”<sup>7</sup> the introduction of plea bargaining in Russia,<sup>8</sup> a new rights-protective criminal procedure code in Indonesia,<sup>9</sup> prison construction in Mexico,<sup>10</sup> and new transnational crime statutes in states across the globe.<sup>11</sup> This Article explores the complex implications of this emerging field of transnational criminal law.

Over the course of the 1990s, what I will call “U.S. criminal justice export” rapidly expanded.<sup>12</sup> Through the Justice Department’s Office of Overseas Prosecutorial Development Assistance and Training (OPDAT), founded in 1991, U.S. prosecutors work in more than thirty countries to reshape foreign states’ criminal laws, criminal procedures, and crime control concerns.<sup>13</sup> The State Department’s International Law Enforcement Academies, established in 1995, have since trained well over twenty thousand foreign law enforcement officers at schools in the United States, Botswana, Thailand, Hungary, El Salvador, and

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7. See, e.g., Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas From the Periphery*, 55 AM. J. COMP. L. 617 (2007).
  8. See Matthew J. Spence, *The Complexity of Success in Russia*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 217, 232 (Thomas Carothers ed. 2006).
  9. See Robert R. Strang, “More Adversarial, But Not Completely Adversarial”: *Reformasi of the Indonesian Criminal Procedure Code*, 32 FORDHAM INT’L L.J. 188, 210-11 (2008).
  10. See *Guns, Drugs and Violence: The Merida Initiative and the Challenge in Mexico: Hearing Before the Subcomm. on State, Foreign Operations, Related Programs of the H. Comm. on Appropriations*, 111th Cong. (2009) (statement of David T. Johnson, Assistant Secretary, Bureau of International Narcotics & Law Enforcement Affairs).
  11. See *infra* Subsections II.C.1-2.
  12. The use of the term “export” stands in contrast to a dominant approach in comparative law scholarship that understands legal institutions as never, strictly speaking, “exported,” but rather as transplanted or translated. See, e.g., Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 3 (2004). My use of this term, albeit in part intended to be provocative and polemical, seeks to capture four distinctive features of the programs examined in this Article. U.S. officials seek to export a U.S.-favored classification of transnational crime. See *infra* Subsection II.C.1. U.S. programs export U.S. experts. See *infra* Subsection II.C.4. The work of addressing U.S. transnational crime concerns is exported to foreign law enforcement institutions. See *infra* Subsection II.C.2. And, in providing criminal justice sector aid and advocating that shared global challenges be addressed through criminal law, U.S. officials export (or at least strongly encourage) a focus on criminal justice to address this range of problems—an approach especially prevalent in the United States since the onset of the U.S. “war on crime.” See *infra* Part I, Section II.B.
  13. See OPDAT, *supra* note 3.

Peru.<sup>14</sup> As with the domestic war on crime, U.S. criminal justice export has not been specific to one administration or political party, but has occupied a prominent place for both Democrats and Republicans since the early 1990s and through the first decade of the twenty-first century.<sup>15</sup>

With the burgeoning of U.S. criminal justice export, a curious puzzle emerged: Although many had come to view domestic U.S. criminal justice systems in terms of failure,<sup>16</sup> the U.S. government set to work to bring about U.S.-style criminal justice reform around the world. As the American Bar Associa-

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14. See *International Law Enforcement Academies (ILEA) Student Output*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c11287.htm> (last visited Sept. 22, 2010) [hereinafter *ILEA Student Output*].
  15. Leading proponents of U.S. criminal justice export have included Democratic Senator John Kerry, who called for the globalization of U.S. criminal justice in his book *The New War*, and Republican former Secretary of State Condoleezza Rice, who worked to establish two Latin American International Law Enforcement Academies. See JOHN KERRY, *THE NEW WAR: THE WEB OF CRIME THAT THREATENS AMERICA'S SECURITY* 169 (1997); *ILEA Regional Training Center Lima, Peru*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c25459.htm> (last visited Sept. 22, 2010).
  16. See, e.g., AM. BAR ASS'N, *CRIMINAL JUSTICE IN CRISIS* 44 (1988) (“[T]he drug problem in this country is severe, growing worse . . . and [] law enforcement has been unable to control the problem.”); EDWARD CONNORS ET AL., *DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* (1996) (reporting on convicted persons later exonerated through DNA testing); JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000) (exploring prevalence of wrongful convictions and DNA exonerations); MICHAEL J. LYNCH, *BIG PRISONS, BIG DREAMS: CRIME AND THE FAILURE OF AMERICA'S PENAL SYSTEM* ix-x (2007) (“[T]he rate of imprisonment in the United States has expanded exponentially since 1973. . . . [O]ur prison system is the biggest in the world. . . . Not only is this system of punishment repressive, but it fails at its mission of reducing crime.”); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *TASK FORCE REPORT ON CORRECTIONS* 597 (1973) (“The prison, the reformatory, and the jail have achieved only a shocking record of failure.”); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995) (examining striking racial disproportion in U.S. criminal justice systems); Caleb Foote, Faculty Address to the Graduating Class of 1978, Boalt Hall (May 20, 1978) (“But will our descendants judge us any less harshly . . . for a criminal law administration that would be a disgrace to any society and a substantive criminal law that is permeated with class bias . . . ?”), quoted in Carol S. Steiker, *Promoting Criminal Justice Reform Through Legal Scholarship: Toward a Taxonomy*, 12 BERKELEY J. CRIM. L. 161, 161 (2007); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) (“As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs. . . . Predictably, underfunding, overcriminalization, and oversentencing have increased . . .”).

tion,<sup>17</sup> legal academic commentators,<sup>18</sup> and others<sup>19</sup> called into question the fairness, accuracy, and expense of U.S. criminal procedures, the U.S. Agency for International Development (USAID) facilitated transitions throughout Latin America and Eastern Europe from an “inquisitorial” procedure to a U.S.-style “adversarial” or “accusatorial” criminal procedure.<sup>20</sup> Subsequent efforts coordinated by the U.S. Departments of Justice and State integrated U.S. criminal procedure reform initiatives, commenced by USAID, with training emphasizing U.S. substantive crime control priorities.<sup>21</sup>

Despite the veritable explosion of U.S. criminal justice export programs, these initiatives have received scant attention.<sup>22</sup> To the extent that a small cor-

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17. See, e.g., RICHARD KLEIN & ROBERT SPANGENBERG, AM. BAR ASS’N, *THE INDIGENT DEFENSE CRISIS* 8 (1993) (reporting on severe under-funding of U.S. public criminal defense).
  18. See, e.g., John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL’Y 119, 120 (1992) (“[O]ur guarantee of routine criminal jury trial is a fraud.”); John H. Langbein & Lloyd Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 YALE L.J. 1549, 1550 (1978) (“[D]eep dissatisfaction with criminal justice in this country has led many people to wonder whether we might not learn a good deal from practices elsewhere.”); *id.* at 1569 (“[D]issatisfaction with criminal justice is greater and deeper at all levels, professional and public, in this country, than it is in Western Europe.”).
  19. See, e.g., Kathryn Casa, *Prisons: The New Growth Industry-Booming Population Highlights Racism and other Failures of the Justice System*, NAT’L CATH. REP., July 2, 1999, at 15.
  20. See *infra* Subsections II.C.3, III.B.2. A brief terminological note is required regarding the usage of “adversarial” and “accusatorial” (as distinct from “inquisitorial”) criminal procedures. In general, the terms “adversarial” and “accusatorial” describe certain models of historically Anglo-American criminal procedure examined in more detail *infra* at Subsections II.C.3 and III.B.2. In the scholarly literature referenced herein, some commentators use the term “accusatorial” and others refer to “adversarial” criminal procedures. Compare Langer, *supra* note 7, at 621 (examining “accusatorial” procedures), with David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1679 (2009) (considering the “adversary” system). For purposes of consistency, I will use the term “adversarial” rather than “accusatorial.”
  21. See, e.g., ILEA *Statement of Purpose*, *supra* note 3; OPDAT, *supra* note 3.
  22. The existing literature is composed by and large of descriptions by program advocates of particular reform projects. See, e.g., HARRY BLAIR & GARY HANSEN, USAID, *WEIGHING IN ON THE SCALES OF JUSTICE: STRATEGIC APPROACHES FOR DONOR-SUPPORTED RULE OF LAW PROGRAMS*, ASSESSMENT REPORT 7 (1994); LINN HAMMERGREN, UNITED NATIONS DEV. PROGRAMME, *FIFTEEN YEARS OF JUDICIAL REFORM IN LATIN AMERICA: WHERE WE ARE AND WHY WE HAVEN’T MADE PROGRESS* (2002) (citing NAT’L CTR. FOR STATE COURTS, *LESSONS LEARNED* (1996)). Other studies focus on international policing rather than broader foreign criminal justice reform. See, e.g., ETHAN A. NADELMANN, COPS

pus of comparative law scholarship addresses U.S.-sponsored foreign criminal justice reform, it focuses almost entirely on non-U.S. actors within recipient countries and their roles in implementing reform.<sup>23</sup> While this important body of comparative law work has “trained us to understand that transplants of legal institutions are not like exports of commodities” in that both “contexts of reception and origin are highly relevant,”<sup>24</sup> it remains the case that little is understood about the significant U.S. foreign assistance dedicated to promoting U.S. criminal justice models abroad. Even less is known about the impact of the numerous U.S. criminal law specialists sent to foreign locations to advance a U.S. criminal justice agenda.<sup>25</sup>

This Article begins to fill these gaps, addressing four questions that to date remain largely unresolved: (1) What are the key components of U.S. criminal justice export? (2) How did U.S. criminal justice export take shape in the wake of the Cold War? (3) Why did U.S. criminal justice export programs proliferate in the face of pervasive doubts as to the merits of domestic U.S. criminal justice systems? And, (4) what is known about the resulting outcomes?

In this Article, my central thesis is that U.S. criminal justice export has played a critical role in shaping how states and non-state actors respond to a range of global challenges—namely with reference to U.S.-style criminal justice frameworks—but that this approach suffers from a deep democratic deficit. With little regard for the concerns of citizens of foreign states, U.S. criminal justice export incentivizes foreign adoption of U.S. crime control priorities, perpetuates U.S.-style legal institutional idolatry (which is often tied to systemic dysfunction), and impoverishes our collective capacity to imagine alternative, more effective, and more humane avenues of responding to shared problems. My hope is that the critical account I provide in this Article will lay some of the groundwork for re-thinking the appropriate scope of criminal law and the possibilities for rule of law and other development strategies.

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ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT (1993).

23. See, e.g., Langer, *supra* note 7.
24. Mattei, *supra* note 5, at 430; see also Langer, *supra* note 7 (discussing the significant contributions of Latin American legal elites to a regional wave of criminal procedure reforms).
25. While U.S. officials far outnumber those from other countries, non-U.S. consultants also engage in rule of law promotion, though with less concern for domestic criminal justice administration. See, e.g., Hon. Madame J. Louise Arbour, O.D. Skelton Memorial Lecture at the Canadian Department of Foreign Affairs & International Trade: Exporting Criminal Justice (Mar. 1, 2001) (addressing Canada’s role in advancing international human rights through international criminal tribunals). But see James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INT’L L. 501, 527-36 (2008) (examining German legal assistance to Chile in areas of criminal procedure and civil code reform).

The first premise of the analysis to follow, related to the “why” question posed above, is that U.S. criminal justice export entails an expansion to the global domain of what, within the U.S. context, criminal law scholar Jonathan Simon has termed “governing through crime.”<sup>26</sup> This global expansion occurred in reaction to both domestic and foreign factors. On the domestic front, in the waning and aftermath of the Cold War, U.S. criminal justice export offered a manner of reorganizing U.S. foreign policy around transnational crime control, and promised to aid crime reduction at home by stopping crime before it reached U.S. shores.<sup>27</sup> Some in the United States also believed (and continue to believe) that U.S.-style reform abroad might improve foreign systems, despite any imperfections in domestic U.S. criminal justice administration.<sup>28</sup> In developing and politically transitioning states, as increased interpersonal violence and theft accompanied political transitions and neoliberal economic restructuring, state actors and citizens alike became interested in policy fixes that might improve social order.<sup>29</sup> Simultaneously, legal elites in certain developing countries advocated criminal procedure reform in order to improve fairness and efficacy in their states’ criminal justice systems.<sup>30</sup> Various addressing the concerns of these different constituencies, alongside other development projects, U.S. criminal justice exporters promoted a range of reforms for recipient states’ criminal law regimes. As the influence of U.S. criminal justice export grew, through directly coercive measures and independently embraced reform projects, U.S. criminal justice approaches came to shape the conceptualization of global problems—from narcotics and human trafficking, to poverty and insecurity—and informed the proposed models for governing these phenomena.<sup>31</sup>

Yet, as I argue in the second half of this Article, significant problems regarding the efficacy and normative justification of U.S. criminal justice export belie its dramatic influence. From the standpoint of efficacy, there is little reliably established evidence that the proposed reforms have achieved their purported goals of increased effectiveness, stability, fairness, and reduced crime.

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26. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); *see also infra* Section I.A.

27. *See infra* Section II.B.

28. *See infra* Subsection II.A.2, Section II.B, Subsections II.C.3 & 4.

29. *See, e.g.*, ROBERT L. AYRES, *WORLD BANK LATIN AM. & CARIBBEAN STUDIES VIEWPOINTS, CRIME AND VIOLENCE AS DEVELOPMENT ISSUES IN LATIN AMERICA AND THE CARIBBEAN* (1998); Maureen Cain, *Globality, Glocalization, and Private Policing: A Caribbean Case Study*, in *THE BLACKWELL COMPANION TO CRIMINOLOGY* 417, 420 (Colin Sumner ed., 2004); Joseph Kipkemboi Rono, *The Impact of the Structural Adjustment Programmes on Kenyan Society*, 17 *J. SOC. DEV. AFRICA* 81 (2002).

30. *See infra* Subsection II.C.3.

31. *See infra* Parts I & II.



Internal evaluative frameworks claim “success” by substituting means for ends, and otherwise neglect to meaningfully explore the impact of ongoing efforts, in a manner reflective of evaluative limitations of other rule of law development projects.<sup>32</sup>

Case studies conducted by independent researchers provide competing accounts of U.S. criminal justice export project outcomes. These studies suggest that U.S. programs, at least in Central America—the region longest and most intensively targeted for reform—have fallen short in significant respects.<sup>33</sup> Shortcomings, though, do not reflect problems altogether unique to the reformed systems; rather, the limitations noted abroad parallel widely decried failings in U.S. criminal justice systems.<sup>34</sup> To the extent that U.S. programs promote resource-intensive, U.S.-style, adversarial criminal procedure, these efforts neglect the costs of implementing robust procedures with scarce resources. These efforts similarly ignore the accumulated wisdom of leading criminal and comparative law scholars, who reject in significant part the romanticized preference for U.S.-style adversarial criminal procedure over other models.<sup>35</sup> Whatever problems might otherwise inhere in U.S.-style procedure reform are exacerbated by a diluted focus on effectively implementing new procedures in favor of advancing U.S. transnational crime priorities.

Moreover, the transnational crime priorities to which U.S. programs direct recipient states’ attention—including intellectual property infringement, migration regulation, money laundering, and terrorism—are in many instances incongruous with those states’ self-perceived concerns. Incongruous priorities leave fewer resources available to target other more pressing problems, and have resulted in the arrest and prosecution of vulnerable and non-threatening persons, sometimes for politically repressive ends.<sup>36</sup> More generally, U.S. criminal justice export remains unaccountable, untransparent, and disconnected from enabling concrete improvements to human welfare, despite its self-avowed aspiration to function as a vehicle for promoting democracy and development through criminal law reform.<sup>37</sup>

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32. See *infra* Section III.A.

33. See *infra* Section III.B.

34. See *infra* Subsections II.C.3, III.B.2; see also Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 85-86 (2008) (discussing the mythology of “failure” of Latin American law when in fact many identified shortcomings are more universally shared across legal systems).

35. See, e.g., Langbein, *supra* note 18, at 120-22 (examining the profound dysfunction of U.S.-style adversarial criminal procedure); Stuntz, *supra* note 16 (analyzing critically pathologies associated with U.S. criminal procedure); see also MIRJAN A. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986) (rejecting a simple adversarial and inquisitorial dichotomy in favor of a more nuanced framework).

36. See *infra* Section III.B.

37. See *infra* Section III.B.

Still, notwithstanding these limitations, close examination of the U.S. criminal justice export experience has the potential to refocus both criminal law administration and rule of law development on the complex interrelationships between uneven development, social inequality, and criminal justice. In order to commence this conceptual reorientation, this Article concludes with a preliminary exploration of alternatives to U.S. criminal justice export and the approaches to criminal law administration and rule of law development it commends.<sup>38</sup>

The Article unfolds in three parts. Part I offers a brief introduction to crime-governance and global governance theory, and defines the parameters of U.S. criminal justice export as a mechanism of global governance through crime. Part II examines the institutional precursors and component parts of U.S. criminal justice export in more detail, exploring how these initiatives came to function as a form of U.S.-dominant global crime-governance. Part III considers the outcomes associated with U.S. criminal justice export: first, through a close reading of U.S. criminal justice exporters' own accounts of claimed successes; and second, through an examination of competing analyses of systemic legal, democratic, and demotic harms accompanying U.S. projects. Part III's analysis focuses particularly on several heavily targeted states in Central America. The Article concludes with a preliminary account of alternatives to U.S. criminal justice export and associated criminal justice frameworks.

## I. GLOBAL GOVERNANCE THROUGH CRIME

### A. *Crime-Governance and Global Governance Theory*

The theoretical framework of global crime-governance that informs the analysis to follow draws upon two literatures that are seldom considered in tandem: crime-governance and global governance theory.<sup>39</sup> In *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, Jonathan Simon examines the operation of crime control as a form of U.S. domestic governance during the latter part of the twentieth century and the beginning of the twenty-first. To “govern through crime” is to

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38. See *infra* notes 354-65 and accompanying text.

39. One notable exception is the Australian criminologist Mark Findlay's work on the intersections of crime-governance and global governance through international institutions such as the International Criminal Court. See MARK FINDLAY, *GOVERNING THROUGH GLOBALISED CRIME: FUTURES FOR INTERNATIONAL CRIMINAL JUSTICE* (2008). However, Findlay's focus is primarily on transitional justice institutions and conceptions of risk, rather than as here, on global governance through domestic criminal justice administration and criminal rule of law promotion. Also, for a critical examination of the possibilities for global convergence on U.S.-style constitutional criminal procedure, see Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 *IND. L.J.* 809 (2000).

frame a significant range of social problems in relation to crime control and to approach their resolution through criminalization and punishment. According to Simon, “[w]hen we govern through crime, we make crime and the forms of knowledge historically associated with it—criminal law, popular crime narrative, and criminology—available outside their limited original . . . domains as powerful tools with which to . . . frame all forms of social action as a problem for governance.”<sup>40</sup>

In particular, Simon calls attention to a series of ways in which crime control and U.S. governance practices have merged. Public officials invoke the “war on crime” as a justification for the expansion of government power at a time when the social welfare state has contracted.<sup>41</sup> Politicians “define their objectives in prosecutorial terms and . . . frame other kinds of political issues in the language shaped by public insecurity and outrage about crime.”<sup>42</sup> Political leaders also seize on the public’s fears of interpersonal harm, both real and imagined, to mobilize support for their respective candidacies.<sup>43</sup> As political actors perceive that “tough on crime” rhetoric wins votes, almost ineluctably, more severe punishment and an enormous expansion of crime legislation result.<sup>44</sup>

The consequences of these trends, apart from the massive expansion of U.S. criminal justice institutions and a pervasive fear of crime, include a reorientation of political discourse and social imagination toward social policy fixes that conceptualize complex social problems in terms of criminally culpable bad actors and aggrieved victims. Accordingly, U.S. crime control models have come to involve much more than criminal law and punishment alone. Crime control has become a form of governance itself, a manner of shaping how individuals

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40. SIMON, *supra* note 26, at 17. Simon’s work builds on theoretical foundations of crime-governance developed by French social theorist, Michel Foucault. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). Other scholars that have addressed intersections of crime and governance include sociologist David Garland and legal scholar Janet Halley. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELBOURNE J. INT’L L. 78, 79 (2008) (noting in the context of feminist human rights advocacy manifestations of crime-governance in the “turn of Western feminism to criminal law as its preferred mode of deploying . . . power in policy- and law-making”); see also Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 DIFFERENCES: J. FEMINIST CULT. STUDS. 128, 137 (2007) (“[This feminist] agenda . . . seeks social remedies through criminal justice . . . rather than through a redistributive welfare state.”).

41. See SIMON, *supra* note 26, at 33-74; see also Bernard E. Harcourt, *Neoliberal Penalty: A Brief Genealogy* 10 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Workshop, Working Paper No. 268, 2009).

42. SIMON, *supra* note 26, at 35.

43. See *id.* at 23-25, 35.

44. See *id.* at 35.

and collectivities seek to resolve problems that might well be approached through other means.<sup>45</sup>

The theoretical rubric of “global governance” developed separately in international relations theory. “Global governance” refers to the various forms of regulation of interdependent nation-states and state and non-state actors in the international system in the absence of a formal overarching global political authority.<sup>46</sup> Beginning in the 1990s, the concept of global governance was increasingly deployed to describe a shift from government to governance, denoting increasing fragmentation and re-integration of political authority across the international domain.<sup>47</sup>

Whereas government is defined by the institutional embodiment of a ruling body ordinarily within a territorially bounded state, global governance came to refer to a broader range of strategies for exercising governmental power, often outside the framework of a traditional state. In other words, global governance functions as a strategy for organizing and deploying power among and within states without a formal world government.<sup>48</sup> Of course, it should be noted that multiple forms of global governance involving states and networks of international organizations may and do operate at once.<sup>49</sup>

So how might U.S. criminal justice export function as a mechanism of “global governance through crime”? U.S. criminal justice export effectively extends U.S. crime-governance on a global scale. What I refer to as “global governance through crime” or “global crime-governance” describes a form of global social organization that is conceptually and institutionally structured around crime control. Global crime-governance directs the conduct of state and non-

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45. Simon examines truancy, inter-familial disputes, and workplace conflict as examples of problems governed by a focus on crime control. See SIMON, *supra* note 26, at 177-259. Mariano-Florentino Cuéllar argues that Simon fails to fully consider how governing through crime became so rhetorically contagious in the U.S. context, and why crime-governance is worse than alternative regulatory approaches. See Mariano-Florentino Cuéllar, *The Political Economies of Criminal Justice*, 75 U. CHI. L. REV. 941, 952 (2008). The analysis of global governance through crime presented in this Article takes into account Cuéllar’s concerns; the Article elucidates how and why global governance through crime came into being, and the specific mechanisms through which it operates and is sustained.

46. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Robert Latham, *Politics in a Floating World: Toward a Critique of Global Governance*, in *APPROACHES TO GLOBAL GOVERNANCE THEORY* 23, 25 (Martin Hewson & Timothy J. Sinclair eds., 1999); JAMES N. ROSENAU, *ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD* (1997).

47. See, e.g., Elke Krahnemann, *American Hegemony or Global Governance? Competing Visions of International Security*, 7 INT’L STUD. REV. 531 (2005).

48. See, e.g., Joshua Cohen & Charles Sabel, *Global Democracy?*, 37 N.Y.U. J. INT’L L. & POL. 763, 768-70 (2005) (examining varying conceptions of global governance in international relations scholarship).

49. See, e.g., SLAUGHTER, *supra* note 46.

state actors within and between states, mobilizing political action and framing an array of social concerns in terms of crime, prosecution, and punishment. This particular form of global governance reflects features of global governmental networks theorized elsewhere in the international relations literature, but is unique in enabling U.S. actors to influence the terms of global conduct through criminal justice frameworks.<sup>50</sup>

*B. U.S. Criminal Justice Export and Global Crime-Governance*

Before exploring in more detail the precise ways in which U.S. criminal justice export operates as a form of global crime-governance, it is necessary to clarify what U.S. criminal justice export entails. U.S. criminal justice export consists of four component parts, each part distinct but closely related to the others. These four components (explored in greater depth in Part II.C) involve the following:

(1) *Categorize*. U.S. legislation and policy papers define “transnational” or “international” crime—terms used interchangeably—to include prohibited border-crossing criminalized conduct, with an emphasis on narcotics, irregular migration and especially human trafficking, weapons smuggling, terrorism, intellectual property infringement, cybercrime, money laundering, and increasingly, environmental crime.<sup>51</sup>

(2) *Incentivize*. U.S. foreign aid and threatened penalties encourage poor and middle-income states to address U.S. transnational crime priorities through the application of particular U.S.-favored crime control approaches.<sup>52</sup>

(3) *Proceduralize*. U.S.-style adversarial criminal procedure reform seeks to improve efficacy and fairness in recipient states’ criminal justice sectors with reference to U.S. models.<sup>53</sup>

(4) *Institutionalize*. U.S.-run training programs work to advance both U.S.-style adversarial procedure reform and U.S. transnational crime priorities.<sup>54</sup>

Through these four interconnected initiatives, U.S. criminal justice export promotes certain ideas that animate U.S. criminal justice systems. First and foremost, is the idea that criminalization, prosecution, and punishment function to maintain social order in an otherwise free society by deterring and inca-

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50. *Cf. id.* (examining how global governance unfolds through inter-governmental networks of state and non-state actors).

51. *See infra* Subsection II.C.1; *see also* THE WHITE HOUSE, INTERNATIONAL CRIME CONTROL STRATEGY (1998) [hereinafter INTERNATIONAL CRIME CONTROL STRATEGY].

52. *See infra* Subsection II.C.2.

53. *See infra* Subsection II.C.3.

54. *See infra* Subsection II.C.4.

pacitating criminal wrongdoers.<sup>55</sup> Likewise, if a particular social phenomenon is identified as harmful or otherwise undesirable, certain conduct should be criminalized and thus regulated through criminal justice administration, namely through policing, arrest, prosecution, and, in many instances, lengthy prison-based punishment.<sup>56</sup> Also, “adversarial” criminal proceedings provide the best manner of ensuring the fair and accurate “administration of justice” rather than “inquisitorial” or other processes.<sup>57</sup> In this regard, the smooth and just functioning of criminal processes is best assured by a robust regime of adversarial procedural protections alongside a series of exceptions or procedural shortcuts (e.g., plea bargaining) organized to improve efficiency.<sup>58</sup>

The first three components noted above—which work in concert to *categorize*, *incentivize*, and *proceduralize* U.S. criminal justice export—operate through the fourth, which consists of an array of U.S. training programs that *institutionalize* criminal justice export. Institutionalization involves stationing U.S. criminal justice personnel within recipient states’ crime control systems to promote transnational crime priorities of interest to the United States and guide implementation of new criminal procedures. Through such programs, U.S. officials train foreign prosecutors, police, judges, and other law enforcement officials to attend to U.S. priorities.<sup>59</sup>

As the following Part will explore in more detail, building upon Cold War institutions and ideologies, and operating through specific economic incentives, U.S. criminal justice export induces recipient states to implement U.S.-promoted policies. Once underway, U.S. programs channel energies toward combating certain phenomena accompanying global economic processes, such as unauthorized migration, unauthorized cross-border transport of goods, unauthorized financial transactions, and unauthorized appropriation of intellec-

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55. See, e.g., MODEL PENAL CODE § 1.02(2) (1962) (noting the purposes of sentencing following criminal prosecution include to prevent commission of offenses, give forewarning, individualize, and harmonize); DEAN J. CHAMPION, CRIMINAL JUSTICE IN THE UNITED STATES 8-9, 47-51 (2d ed. 1998) (explaining the role of U.S. criminal law in regulating social conduct).

56. See generally SIMON, *supra* note 26 (discussing U.S. domestic crime-governance); see also Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 237-41 (2009).

57. See, e.g., COMPARATIVE CRIMINAL PROCEDURE 1 (John Hatchard, Barbara Huber, & Richard Vogler eds., 1996) (describing emphasis of U.S. criminal justice on adversariality); see also Langbein, *supra* note 18.

58. See, e.g., Margaret K. Lewis, *Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT’L L. 651, 663 (2009) (noting “large [U.S.] investment in the myth of the adversarial system” coupled with a commitment to efficiency-enabling procedural shortcuts in relation to criminal justice rule of law reform in Taiwan (quoting Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2135 (1998))).

59. See *infra* Section II.C.

tual property. In focusing attention on these concerns, the programs direct focus toward crime control and toward certain systemic players and their criminal culpability, and thereby shift energies away from alternative regulatory approaches, such as infrastructure development, public health interventions, or economic re-structuring. These and other alternative regulatory possibilities will be further explored preliminarily in the Article's Conclusion.

It is this ambition to global-scale convergence on U.S.-style criminal justice regulatory approaches, and the coercive and surveillant role for U.S. officials this convergence enables, that defines U.S. criminal justice export as a form of U.S.-dominant global governance through crime. Because the historical emergence and institutional architecture of U.S. criminal justice export are central to its operation as a mechanism of global governance, it is to these arrangements that we now turn.

## II. U.S. CRIMINAL JUSTICE EXPORT: PRECURSORS AND COMPONENT PARTS

### A. *Historical Antecedents*

Decades of U.S. involvement in foreign criminal law reform preceded the proliferation of U.S. criminal justice export programs in the post-Cold War period, and past projects significantly determined the shape of the subsequent programs. Historically, imperial powers, including the United States, directly imposed criminal law regimes upon foreign territories, at times with physical force.<sup>60</sup> With the advent of independence movements and post-colonial development projects, powerful states' attempts to influence other states' internal criminal justice administration assumed a somewhat different form, characterized by two competing institutional impulses distinct from, but not entirely unlike those at play in historical colonial and imperial experiences.<sup>61</sup> On one

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60. To provide only a few examples: When U.S. military forces occupied Cuba from 1898 to 1902, U.S. Marines established, organized, and outfitted Cuban police forces, explicitly facilitating criminal law enforcement within the occupied territory. *See, e.g.*, NADELMANN, *supra* note 22, at 111-12. U.S. forces also played a central role in criminal justice administration while occupying the Panama Canal Zone and the Dominican Republic. *See generally* WHITNEY T. PERKINS, *CONSTRAINT OF EMPIRE: THE UNITED STATES AND CARIBBEAN INTERVENTIONS* (1981).

61. *See, e.g.*, MARÍA JOSEFINA SALDAÑA-PORTILLO, *THE REVOLUTIONARY IMAGINATION IN THE AMERICAS AND THE AGE OF DEVELOPMENT 18-21* (2003) (providing a historical account of the relationship between development programming and the advent of a postcolonial era); *see also* YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 6* (2002) ("This colonial relationship continues to exist. . . . Law is now involved in a competition . . . with the United States gaining influence. As in the past, furthermore, leading global powers, including the United States, tend to export not just specific approaches or products but also their internal fights and the strategies used to fight those fights.").

approach, through U.S. Cold War foreign internal security assistance, U.S. officers trained foreign militaries and police. Foreign military and police training provided the United States continued access to foreign internal security systems in the absence of explicit occupation.<sup>62</sup> A second approach, involving benevolently intended rule of law development consulting, was embodied by the “Law and Development Movement” and the subsequent “Administration of Justice Program.” These separate projects focused on “improving” foreign legal education and enabling democratic development through law reform.<sup>63</sup>

These two approaches—(1) foreign internal security training and (2) benevolently intended law and development consulting—are the precursors of U.S. criminal justice export. Together, they fundamentally defined the shape of post-Cold War U.S. criminal justice export as a form of global governance through crime. After the Cold War ended, these two previously distinct approaches merged, combining U.S. transnational crime control promotion and more altruistic rule of law development projects. As I will demonstrate, this integration of internal security and law and development consulting led to often unintended and undesired consequences. In order to appreciate how post-Cold War U.S. criminal justice export effected a synthesis of previous models, it is critical first to examine more closely the relevant historical institutions.

### 1. Foreign Internal Security Training

From World War II through the Cold War, U.S. police and military trainers, operating through various government offices, provided technical instruction to foreign internal security forces.<sup>64</sup> This training enabled the United States to exert extra-territorial control on the world stage and advanced U.S. interests by regulating conduct within foreign states (a form of “global governance” before that theoretical vocabulary had emerged as a subject of significant academic interest).<sup>65</sup> Between 1962 and 1974, the U.S. Office of Public Safety allocated approximately \$337 million in training and equipment to internal security forces in developing states in Asia, Africa, and Latin America, seeking to ensure support of U.S. policy during the Cold War.<sup>66</sup> Even without explicitly occupying the recipient states, U.S. actors wielded considerable influence by assisting

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62. The following sources may be consulted for a more thorough treatment of these projects: MARTHA K. HUGGINS, *POLITICAL POLICING: THE UNITED STATES AND LATIN AMERICA* (1998); and NADELMANN, *supra* note 22.

63. *See, e.g.*, JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

64. *See* HUGGINS, *supra* note 62, at 58-196.

65. The U.S. Office of Public Safety offered instruction to 100,000 Brazilian security forces from 1959 to 1972; similar assistance flowed to law enforcement agencies in Guatemala and the Dominican Republic. *See id.* at 190-91.

66. *Id.*



the internal security administration of other states and thereby enlisting those states in the battle against the United States' ideological and actual enemies.<sup>67</sup>

Over the 1960s and 1970s, U.S. foreign internal security training fell into disrepute: By 1974, U.S.-provided equipment and personnel were associated with cases of torture, murder, and disappearances in multiple Latin American states as well as in Vietnam.<sup>68</sup> In response, the U.S. Congress passed section 660 of the Foreign Assistance Act, effective as of July 1975. In principle, section 660 banned foreign internal security assistance, but as a practical matter it accomplished nothing of the sort.<sup>69</sup> Reflecting the more general rethinking of U.S. foreign policy that occurred in connection with these events, section 660 stipulates:

[N]one of the funds made available to carry out this Act and none of the local currencies generated under this Act, shall be used to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government or any program of internal intelligence or surveillance on behalf of any foreign government within the United States or abroad.<sup>70</sup>

Contrary to its plain language, however, section 660 did not bring about the end of U.S. foreign internal security consulting, as the strategy of training foreign internal security forces had become too central to U.S. foreign policy to be so readily disbanded. Instead, foreign security assistance either took place despite the law, or was provided for through explicit exceptions to section 660, some enacted simultaneously to the prohibition.<sup>71</sup>

Post-Cold War U.S. criminal justice export was authorized through this series of statutory exceptions to the section 660 ban, a fact that is significant because it underscores the peculiar status of U.S.-sponsored foreign criminal law reform. Though pervasive, U.S. criminal justice export is a seldom-acknowledged dimension of U.S. foreign relations, and one that has emerged from a past about which many in the United States are deeply ambivalent.

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67. See *id.* at 2-4.

68. *Id.* at 190-91.

69. See, e.g., ROBERT M. PERITO, *THE AMERICAN EXPERIENCE WITH POLICE IN PEACE OPERATIONS 18-19* (2002).

70. 22 U.S.C. § 2420(a) (2006).

71. See *id.* § 2420(b)(1) (exempting foreign security assistance related to Drug Enforcement Agency or Federal Bureau of Investigation's interests); *id.* § 2420(b)(3) (exempting foreign security assistance relating to maritime concerns when enacted in 1985); *id.* § 2420(b)(6) (exempting post-conflict law enforcement assistance to promote "democracy" when enacted in 1996); see also CHAIRMAN DANIEL K. INOUE & CHAIRMAN LEE H. HAMILTON, *HOUSE SELECT & SENATE SELECT COMMITTEES, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR*, H.R. REP. NO. 100-143, S. REP. NO. 100-216, at 139-239 (1987) (examining covert funding streams for U.S. counter-insurgency support to Nicaragua).

Through section 660 exceptions, foreign internal security training and assistance continued as a critical U.S. foreign policy tool into the post-Cold War period.<sup>72</sup> By 1992, over 125 countries were recipients of U.S. internal security assistance despite the section 660 ban.<sup>73</sup>

As will be explored in the following Sections, the post-Cold War export of U.S. criminal justice unfolded under the influence of Cold War foreign internal security training programs. Subsequent programs evolved with more sensitivity to the past harms associated with foreign internal security training, but they would not break completely with the earlier institutional forms that permitted U.S. access to foreign internal security apparatuses and influence over foreign internal security priorities.

## 2. From Law and Development to the Administration of Justice Program

Benevolently intended law and development consulting, embodied most prominently first by the Law and Development Movement and subsequently by USAID's Administration of Justice Program, is a second important yet distinct institutional predecessor to U.S. criminal justice export. Like the foreign internal security training experience, these projects significantly informed post-Cold War U.S. criminal justice export.

From the late 1950s to the 1970s, the Law and Development Movement sought to bring about social and political change in developing states primarily by revising foreign legal education and rules to correspond to U.S. models.<sup>74</sup> The movement "attracted and was advanced by a highly regarded group of American lawyers, usually drawn from leading American law schools. Over the years perhaps fifty such 'legal missionaries' went to Asia, one hundred fifty to Africa, and another fifty to Latin America."<sup>75</sup> Movement advocates were progressive and humanitarian in their aims, seeking to "strengthen" foreign legal education and thereby to promote democratic legal development.<sup>76</sup> Through their work, participants established channels for the transmission of U.S. legal expertise abroad and the beginnings of a law-based development approach emphasizing U.S.-style legal training.<sup>77</sup> These efforts, though, unfolded to little

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72. See DAVID BAYLEY, *CHANGING THE GUARD: DEVELOPING DEMOCRATIC POLICE ABROAD* 26-27 (2005).

73. See *id.* at 27.

74. 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, 1079-80 (1974).

75. GARDNER, *supra* note 63, at 8.

76. See *id.* at 7.

77. See *id.*

positive effect and were ultimately short-lived.<sup>78</sup> Critics increasingly characterized the projects as ethnocentric and parochial, and the active involvement of U.S. legal academics in such work subsequently declined.<sup>79</sup>

Ultimately, the Law and Development Movement's proponents realized that the progressive functioning of a "rule of law" is a complex cultural, political, and socioeconomic process. It requires local knowledge and a fortuitous alignment of political and popular will—not things that can be engineered from afar by foreigners despite their best intentions. Further, estranged law and development advocates came to recognize that the idealized vision of a "rule of law," even in states celebrated as "rule of law" models, often fell short of the unblemished mythology they had promoted abroad.<sup>80</sup>

The consequent diminution of legal academic interest in law and development over the 1970s by no means signaled the end of U.S. foreign rule of law consulting.<sup>81</sup> To the contrary, "state agencies, multinational corporations and international economic institutions, controlled by Western state interests through the system of weighted voting [continued] to insist upon a type of legal regulation of north-south relations . . . ."<sup>82</sup>

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78. See *id.* at 9, 11-12; Trubek & Galanter, *supra* note 74, at 1095 n.91.

79. See GARDNER, *supra* note 63, at 9, 11-12 ("American legal assistance was inept, culturally unaware, and sociologically uninformed. . . . As the failures of this experience became apparent, American legal missionaries returned home frustrated and chagrined. . . .").

80. See Trubek & Galanter, *supra* note 74, at 1095-99.

81. See THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 5-18 (David M. Trubek & Alvaro Santos eds., 2006) (analyzing three "moments" of law and development efforts, of which the Law and Development Movement is one).

82. See LAW AND DEVELOPMENT, at xiv (Anthony Carty ed., 1992). Despite waning legal academic support, rule of law development projects likely persisted because these projects promised marked development advances without requiring fundamental changes in global economic policies. Further, the Law and Development Movement's auto-critique largely remained of academic interest, rather than carrying over in any fundamental sense to inform the work of governmental agencies or international economic institutions. See also DEZALAY & GARTH, *supra* note 61, at 3 ("In Africa, Asia, Eastern Europe, and Latin America, a burgeoning group of consultants, think tanks, philanthropic foundations, and national and transnational agencies has come to the conclusion that, whatever the problem, an essential part of the solution is an independent and relatively powerful judicial branch. . . . Law is once again, as in the 1960s and 1970s, central to the development agenda."). In recent years there has even been a minor resurgence of interest in U.S. law schools in foreign curricular law and development projects, seeking to reform legal education in Afghanistan, for example. See, e.g., Adam Gorlick, *Teaching Law in Afghanistan and other Developing Nations, Stanford Law School Makes Legal Education a Global Goal*, STAN. REP., June 28, 2010, available at <http://news.stanford.edu/news/2010/june/teaching-afghanistan-law-0628110.html>.

Then, in the 1980s, the law-development consulting model was once more taken up by USAID under the Reagan administration, and was applied to bring about foreign criminal justice reform. This investment in criminal justice reform abroad occurred in response to domestic criticism of the U.S. government's subsidies to Salvadoran security forces in their war against the leftist Farabundo Martí National Liberation Front (FMLN).<sup>83</sup> USAID came to focus in particular on criminal justice sector assistance because high profile killings by U.S.-subsidized security forces in El Salvador drew considerable critical attention in the United States to ongoing human rights violations there and elsewhere in Latin America.<sup>84</sup> The Reagan administration wanted to provide military aid to the Salvadoran government to fight the FMLN, again notwithstanding the section 660 ban, but members of Congress raised vocal opposition.<sup>85</sup> To address the concerns of different constituencies, Reagan appointed a National Bipartisan Commission on Central America.<sup>86</sup> The product of the Commission's work ultimately laid a foundation for post-Cold War U.S. criminal justice export and its particular melding of the Cold War internal security training and the law and development models just described.

The Commission recommended a combination of increased military and economic assistance and support for "democratization." Democratization would include criminal justice reform seeking to improve the investigation and prosecution of human rights violations and other high profile cases.<sup>87</sup> In effect, U.S.-sponsored foreign criminal justice reform emerged initially as a means of negotiating a compromise: to continue Cold War foreign internal security training despite the section 660 ban, and to placate those concerned about human rights protection. Human rights concerns would purportedly be met by rendering Salvadoran criminal justice administration—its police, prosecutors, and criminal courts—more effective and concerned with rights protection.<sup>88</sup>

This model of criminal law development assistance attained increasing influence at the same time that certain legal elites in Latin America sought to reform their respective countries' criminal procedure regimes. The result was an institutional alliance between U.S. rule of law development workers and foreign legal elites.<sup>89</sup>

USAID became the implementing agency for these reforms, and USAID's Administration of Justice Program began to provide assistance to El Salvador,

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83. See, e.g., THOMAS CAROTHERS, *IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS 14-28* (1991).

84. See *id.*

85. See *id.* at 28.

86. Langer, *supra* note 7, at 648.

87. See *id.*

88. See *id.*

89. See *id.* at 651.

Guatemala, and Colombia (and eventually to other Latin American states), with the aim that criminal justice sector reform would help facilitate political stability, justice sector fairness, and other development advances.<sup>90</sup> As the next Section explores, foreign criminal law development consulting took on new life and a somewhat different orientation in the wake of the Cold War when the prior anti-communist logic for U.S. foreign internal security operations ceased to obtain.<sup>91</sup> U.S. criminal justice export then came to consist of a lopsided synthesis of prior models of Cold War era foreign internal security training and benevolently intended rule of law development consulting. As we soon shall see, this lopsided synthesis heavily emphasizes transnational crime control in order to afford the United States pervasive surveillant and coercive influence within foreign internal security administration.

### B. *A New War After the Cold War*

In the waning years and aftermath of the Cold War, international crime or transnational crime—terms used interchangeably in the relevant institutional discourses to describe border-crossing criminalized conduct—became a dominant concern in U.S. foreign policy circles. Alongside an expanding domestic criminal justice regime, foreign criminal justice assistance grew rapidly as a component of a U.S.-led war on international crime. This U.S.-led war on international crime would be largely a metaphorical war, though it would frame in significant respects U.S. political discourse during the post-Cold War period.<sup>92</sup> U.S. criminal justice export became a means of carrying out the U.S. war on crime abroad. As the promotion of transnational crime control merged with U.S.-style criminal procedure reform initiatives, these two projects became interconnected components of a campaign aimed at the “development of effective foreign law enforcement partners and effective justice sectors around the world . . . .”<sup>93</sup>

Why did transnational crime control come to so fundamentally influence U.S. criminal justice export in the post-Cold War period? The war on international crime responded to a set of prevailing anxieties and political obstacles at a critical moment of global role definition for the United States. Preliminarily, the international war on crime represented a vehicle through which the United States could remain engaged abroad to protect its security interests against the presumed new transnational threat of border-crossing criminalized conduct.

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90. *See id.* at 649.

91. *See infra* Sections II.B-C.

92. *See* KERRY, *supra* note 15.

93. *Office of Overseas Prosecutorial Development, Assistance and Training Strategic Plan*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/about/strategic-plan.html> (last visited Sept. 22, 2010) [hereinafter *OPDAT Strategic Plan*].

Cold War policies, such as the foreign internal security training programs discussed in the preceding section, had ensured logistical supremacy for the United States through military and internal security training deployments abroad. These policies were coupled with the propagation of an ideology that extolled the promotion of democracy and suppression of communism.<sup>94</sup> In the absence of a unifying logic for continuing U.S. foreign engagement after the Cold War, domestic isolationist pressures presented a fundamental challenge to the then-prevailing model of U.S. internationalism. Anthony Lake, President Clinton's Assistant for National Security Affairs, described the situation as "a challenge over whether we will be significantly engaged abroad at all."<sup>95</sup> Protectionists sought limited foreign engagement; internationalists promoted "active American engagement abroad on behalf of democracy and expanded trade."<sup>96</sup> While "internationalists won . . . [past] debates, in part because they could point to a unitary threat to America's interests and because the nation was entering a period of economic security," post-Cold War internationalists possessed "neither of those advantages."<sup>97</sup> As Lake explained: "[t]he threats . . . are diffuse and our people are deeply anxious about their economic fate."<sup>98</sup> The international war on crime, whether consciously or subconsciously, became a manner of fashioning "a new world order" in which a U.S.-dominant form of global governance might persist in the post-Cold War period. The international war on crime thus provided a new manner of framing internationalism in the

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94. See, e.g., DEREK CHOLLET & JAMES GOLDGEIER, *AMERICA BETWEEN THE WARS* (2008).

95. Anthony Lake, Assistant to the President for Nat'l Sec. Affairs, Address at Johns Hopkins University (Sept. 21, 1993).

96. *Id.*

97. *Id.*

98. *Id.*

post-Cold War period that could sustain U.S. engagement abroad despite domestic isolationist criticism.<sup>99</sup>

An international war on crime resonated with Cold War rhetoric, rendering it a powerful framework for justifying a persistent global U.S. presence. The U.S. international war on crime began to shape a post-Cold War foreign policy agenda under President George H.W. Bush, when in the first U.S. military offensive after the Cold War was declared over in December 1989, U.S. troops invaded Panama to arrest then reigning political leader Manuel Noriega on narcotics conspiracy charges brought in the United States.<sup>100</sup> The international war on crime became an ever more prominent part of U.S. foreign policy in the post-Cold War period, avidly promoted by liberal internationalists, including President Clinton and Senator John Kerry, and widely embraced in the popular imagination.<sup>101</sup>

During the 1990s, a series of U.S. policy papers identified transnational crime—again, defined as the aforementioned subset of border-crossing criminalized conduct—as a primary threat and cause of global instability. Battling transnational crime became a vehicle to organize U.S. global engagement in the post-Cold War period.<sup>102</sup> Senator Kerry repeatedly declared that transnational crime

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99. The international war on crime and the war on terror are distinguishable but related undertakings. The emergence of the U.S. war on international crime preceded the post-9/11 war on terror. Whereas the war on terror has consisted primarily of targeted military interventions and terror-related investigations and detentions, the war on international crime, as this Section describes, has focused on a wider range of criminalized conduct. At the same time, the U.S. war on international crime refigured two of the war on terror's central strategies: more widespread international criminalization of inchoate offenses and expanded international rendition practices. See, e.g., United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000); INTERNATIONAL CRIME CONTROL STRATEGY, *supra* note 51; see also James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331 (2009) (examining connections between the U.S. war on crime and the subsequent war on terror).

100. See CURTIS MAREZ, *DRUG WARS: THE POLITICAL ECONOMY OF NARCOTICS* 1-2 (2004); Richard Lacayo, *Noriega on Ice*, TIME, Jan. 15, 1990, at 24; Larry Rohter, *The Noriega Verdict; U.S. Jury Convicts Noriega of Drug-Trafficking Role as the Leader of Panama*, N.Y. TIMES, Apr. 10, 1992, at A1; Philip Shenon, *Noriega Indicted by U.S. for Links to Illegal Drugs*, N.Y. TIMES, Feb. 6, 1988, at A5.

101. See *supra* Section I.B; see also Kerry, *supra* note 15.

102. See *supra* Section I.B. On October 21, 1995, President Clinton signed a Presidential Decision Directive addressing the U.S. "international war on crime" as a national security concern and instructing all federal agencies to intensify their efforts to combat transnational crime. Between 1993 and 2000, the Clinton administration used presidential decision directives as a mechanism to carry out executive decisions on national security matters. These directives are classified, but a declassified summary, PDD42: *International Organized Crime*, is available at

was “the new communism, the new monolithic threat,” and proposed that the United States must “lead an international crusade” to defeat it<sup>103</sup>: “[O]nly America has the power and prestige to champion [the] cause, forge the alliances, lead the crusade. We’ve done it twice before—in World War II and in the fifty-year struggle against communism. And we must do it a third time, and for the same reasons as before . . .”<sup>104</sup>

Mainstream media outlets sounded similar calls of alarm. A *Newsweek* editorial in 1993 reported that “[a]round the globe, intelligence agencies are re-focusing their operations from spies to criminals. . . . [T]he threat is real.”<sup>105</sup>

Along with other liberal internationalists, Senator Kerry advocated a strategy of exporting crime control, stationing another thousand U.S. law enforcement officers around the world to be the “advance guard against transnational crime. Our additional thousand agents must not be just cops. They must include prosecutors, trainers, [and] legal specialists.”<sup>106</sup> The approach outlined by Senator Kerry would ultimately expand the Administration of Justice Program begun under the Reagan administration in El Salvador. New programs in the U.S. Departments of State and Justice would direct USAID-initiated justice sector reform in accordance with U.S. transnational crime concerns. In connection with this war on international crime, U.S. foreign criminal justice assistance expanded dramatically, shaped by a transnational crime control agenda.<sup>107</sup>

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<http://www.fas.org/irp/offdocs/pdd42.htm>. In 2000, the Clinton administration issued a detailed *International Crime Threat Assessment*, the first of its kind, developing further the already extensive *International Crime Control Strategy of 1998*. The *International Crime Threat Assessment* “identified international crime as a direct and immediate threat to the national security of the United States.” U.S. GOV’T INTERAGENCY WORKING GROUP, U.S. INTERNATIONAL CRIME THREAT ASSESSMENT (2000).

103. See, e.g., PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS*, at v (2006); see also Editorial, *Global Mafia*, *NEWSWEEK*, Dec. 13, 1993, at 22 (quoting Senator John Kerry).

104. See KERRY, *supra* note 15, at 193.

105. See *Global Mafia*, *supra* note 103, at 22.

106. See KERRY, *supra* note 15, at 186.

107. See ANDREAS & NADELMANN, *supra* note 103, at 171. The State Department’s Bureau for International Narcotics Matters, a relatively small and marginalized unit in the years following its formation in 1978, grew rapidly from 1991 onward. In 1995 it was renamed the Bureau for International Narcotics and Law Enforcement Affairs, also known as the “drugs-and-thugs” section, to signify its increasing field of operations. The Bureau was simultaneously reorganized and received increased funding to target migrant smuggling, money laundering, and other transnational crime. See *id.*; see also Peter Andreas, *Smuggling Wars: Law Enforcement and Law Evasion in a Changing World*, in *TRANSNATIONAL CRIME IN THE AMERICAS* 85 (Tom J. Farer ed., 1999) (“[T]he post-cold-war U.S. security agenda . . . is increasingly dominated by concerns over crime fighting . . . . The rising prominence of



Despite this increasing concern about transnational crime, no empirically documented account suggested that the targeted conduct had increased. Nor was there even an agreed-upon conception of what constituted transnational crime in the first instance.<sup>108</sup> A spokesperson for the National Strategy Information Center referred to the scope of the threat as “an iceberg; nobody knows the size of it.”<sup>109</sup> To the extent anecdotes or inferences indicated a rise in the conduct identified by U.S. actors as transnational and criminal, the particular U.S. response—launching a metaphorical war waged primarily through the export of U.S. criminal justice priorities, techniques, and personnel—was not an inevitable reaction. Rather, this response constituted a specific strategy adopted over possible alternative approaches.

So what can explain the dramatic growth of U.S. criminal justice export programs tied to a metaphorical war on transnational crime *beyond* the perceived need for a new manner of framing U.S. internationalism in the post-Cold War period? And, why did U.S. criminal justice export proliferate given widespread doubt as to the merits of domestic U.S. criminal justice systems? U.S. criminal justice export tied to an international war on crime was rhetorically effective for at least two additional reasons: It promised to revive the domestic war on crime, and it sought to address perceived social insecurity in developing states.

In the domestic context, U.S. criminal justice export offered a manner of revitalizing the war on crime at home, which in the view of many experts had fallen short in significant respects.<sup>110</sup> The narrative of the “globalization of

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law enforcement . . . is reflected in the transformation of the federal policing apparatus. During a period when most federal agencies are merely surviving, law enforcement is thriving.”)

108. See, e.g., ANDREAS & NADELMANN, *supra* note 103, at 105-106 (“[T]he internationalization of crime control is substantially a function of domestic politics . . . rather than simply a response to proliferating transnational criminal activities.”); see also MATHIEU DEFLEM, *POLICING WORLD SOCIETY: HISTORICAL FOUNDATIONS OF INTERNATIONAL POLICE COOPERATION* (2002) (proposing a theory of the factors involved in international police cooperation).

109. See *Global Mafia*, *supra* note 103, at 22.

110. Even in the face of reports of a decline in domestic crime rates for Federal Bureau of Investigation Index crimes over the 1990s (murder, rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft), drug crime increased and the U.S. prison population escalated dramatically amidst wide-ranging criticism of the fairness and expense of U.S. criminal justice institutions. See, e.g., TONRY, *supra* note 16 *passim*; see also Stuntz, *supra* note 16 *passim*; AM. BAR ASS’N, *supra* note 16, at 6 (examining the “inability of the [U.S.] criminal justice system to control the drug problem in the Nation through the enforcement of the criminal law”). Additionally, as suggested in the Introduction, during this same time period, high profile exonerations of U.S. criminal defendants sentenced to death or to lengthy prison terms further impugned the fairness and accuracy of U.S. criminal justice administration. See DWYER, NEUFELD & SCHECK, *supra* note 16

crime” undergirding U.S. transnational crime control promotion posited that domestic crime was ultimately of foreign origin, and thus tied domestic crime reduction to reform of foreign criminal justice systems.<sup>111</sup> Indeed, the puzzle as to why U.S. criminal justice export programs proliferated in the face of deepening skepticism about U.S. domestic criminal justice institutions was addressed head-on by proponents of export programming: Foreign promotion of crime control could render the war on crime at home more effective by stopping criminals abroad before they could reach U.S. shores.<sup>112</sup>

The international war on crime and the accompanying export of U.S. criminal justice personnel also offered a means of addressing perceived increases in social insecurity in developing states in the wake of political transitions and implementation of economic austerity measures. By the 1990s, it had become apparent that U.S.-favored economic development policies, especially economic austerity requirements that mandated decreased social spending in developing states,<sup>113</sup> were associated with increased interpersonal violence and theft.<sup>114</sup> The international war on crime and the accompanying export of U.S. criminal justice offered a solution that involved the reform of foreign state criminal justice and transnational crime control regimes, and avoided changing course with respect to the development policies. Foreign legal elites interested in criminal procedure reform for its rights-enhancing possibilities served as additional allies for certain procedurally focused U.S. criminal justice export programs.<sup>115</sup>

These various interests coalesced as a U.S. war on international crime (carried out in part through U.S. criminal justice export programming) offered a means of organizing a new war after the Cold War, and a new form of U.S.-dominant global governance. This global crime-governance regime was in some

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*passim* (exploring prevalence of wrongful convictions and DNA exonerations in the U.S. criminal justice system).

111. See, e.g., KERRY, *supra* note 15, at 24-27.

112. See *id.*

113. See generally JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (assessing critically International Monetary Fund policies). Although the World Bank has officially moved away from structural adjustment and conditionality in favor of a “Comprehensive Development Framework,” this framework still entails a broader yet more amorphous conditionality, limiting aid to those countries that “have adequately pursued ‘good policy environments.’” John Pender, *From “Structural Adjustment” to “Comprehensive Development Framework”: Conditionality Transformed?*, 22 *THIRD WORLD Q.* 397, 409 (2001).

114. See, e.g., Cain, *supra* note 29, at 420 (“Trinidad and Tobago took its first IMF loan in 1988 . . . . In the same year, offenses against property increased dramatically, to be followed in subsequent years by increases in offenses against the person.”); Rono, *supra* note 29, at 90 (“The . . . implementation of the [structural adjustment programs in Kenya] . . . [was] immediately followed by a jump in the number of criminals and crime rates.”).

115. See *infra* Subsections II.C.3, III.B.2.

ways analogous to the Cold War internal security training experience, but also distinct from it. The United States ultimately retained a significant position inside the internal security apparatuses of recipient states: adapting Cold War internal security training and rule of law development frameworks, defining a set of transnational crime threats around which to organize U.S. power in the post-Cold War period, and articulating a particular vision of security and development tied to criminal law, criminal procedure, and transnational crime control.

The next Section will explore in more detail the institutional architecture through which post-Cold War U.S. criminal justice export has unfolded as a form of global governance through crime: promoting U.S.-style criminal justice models and transnational crime concerns abroad.

### C. *Four Components of Post-Cold War U.S. Criminal Justice Export*

Post-Cold War U.S. criminal justice export has consisted of four aforementioned and interrelated component parts, each of which plays a critical role in effectuating a manner of U.S.-dominant global governance through crime. U.S. criminal justice exporters: (1) *categorize* certain global challenges as transnational crime priorities; (2) *incentivize* adoption of U.S.-style criminal justice policies through foreign aid and penalties; (3) *proceduralize* reform; and (4) *institutionalize* both procedural and substantive criminal law reform through U.S.-run training programs. These four initiatives simultaneously promote a set of ideas about criminal justice administration and its role in securing social order within a polity, in particular, that criminalization and punishment best manage a targeted range of social concerns. Additionally, adversarial criminal proceedings and trials are celebrated as ensuring fairer and more accurate results than inquisitorial proceedings or other processes.<sup>116</sup> The following Subsections will explore the parameters, interactions, and limitations of each of these four components in promoting a form of U.S.-dominant global governance through crime.

#### 1. Categorize: Defining Transnational Crime

The first component of U.S. criminal justice export defines “transnational crime” and categorizes particular social concerns as transnational crime priorities.<sup>117</sup> U.S. criminal justice export programs have settled on a definition of

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116. See, e.g., Sklansky, *supra* note 20, at 1640.

117. See Gerhard O.W. Mueller, *Transnational Crime: Definitions and Concepts*, in *COMBATING TRANSNATIONAL CRIME: CONCEPTS, ACTIVITIES AND RESPONSES* 13 (Phil Williams & Dimitri Vlassis eds., 2001) (examining the emergence of the definition of transnational crime in terms of the following eighteen categories: (1) money laundering; (2) illicit drug trafficking; (3) corruption; (4) infiltration of legal business; (5) fraudulent bankruptcy; (6) insurance fraud; (7) computer crime; (8) theft of intellectual property; (9) illicit trafficking in arms; (10) terrorist activities; (11) aircraft hijacking; (12) sea piracy; (13) hijacking on land; (14) trafficking in persons; (15) trade in human body parts; (16) theft of art and cultural

transnational crime that includes only those categories of conduct enabled by processes of globalization and particularly by intensified cross-border flows of people, money, goods, and information.<sup>118</sup> These cross-border crimes are distinct from domestic interpersonal harms such as murder, assault, and rape. More specifically, transnational crime as invoked in U.S. criminal justice export programs encompasses border-crossing conduct involving narcotics, irregular migration, human trafficking, weapons smuggling, terrorism, cybercrime, money laundering, intellectual property infringement, and environmental degradation pertaining to endangered species.<sup>119</sup>

The categorization of these particular types of conduct as transnational crime and the omission of other conduct elicits a set of specific effects. One immediate consequence of defining conduct as transnational crime is that the underlying social concern is recast as a phenomenon driven by certain bad actors, rather than as a complex or cumulative outcome caused by other underlying factors, such as poverty or the demand for illicit goods in international markets. The approach to minimizing such conduct then assumes a policing, prosecutorial, and punishment-focused form. In addition, the now prohibited conduct achieves heightened significance as its regulation becomes eligible for increased U.S. foreign assistance.<sup>120</sup>

Categorizing such conduct as transnational crime might be unremarkable if the definition of transnational crime was universally self-evident or uncontroversial, and if the crime control approach adequately addressed the factors contributing to global concerns. In fact though, delimiting transnational crime to these particular categories of conduct is highly contentious. As a telling example of this, when the United Nations attempted to conduct an international survey on transnational crime, it received such disparate responses from contributing countries as to what constituted transnational crime that it canceled the study.<sup>121</sup> Even so, U.S. criminal justice exporters have advanced a distinct vision of what

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objects; (17) environmental crime; and (18) other offenses committed by organized criminal groups).

118. See, e.g., INTERNATIONAL CRIME CONTROL STRATEGY, *supra* note 51; *International Law Enforcement Academies (ILEA): List of Courses*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c30083.htm> (last visited Sept. 22, 2010) [hereinafter *ILEA List of Courses*].

119. See *ILEA List of Courses*, *supra* note 118.

120. See INTERNATIONAL CRIME CONTROL STRATEGY, *supra* note 51.

121. William F. McDonald, *Crime and Justice in the Global Village: Towards Global Criminology*, in CRIME AND LAW ENFORCEMENT IN THE GLOBAL VILLAGE 14 (William F. McDonald ed., 1997) (citing Ugljesa Zvekic, Research Coordinator, United Nations Interregional Crime and Justice Research Institute). The later-adopted U.N. Convention against Transnational Organized Crime (2000) relies upon a relatively generic and open-ended definition of transnational crime. See United Nations Convention Against Transnational Organized Crime, *supra* note 99, at art. 3.

counts as transnational crime. This vision excludes common categories of interpersonal violence and is concerned instead with international violations of drug prohibitions, migration controls, environmental regulations, financial regulation, cyberspace regulations, or intellectual property protection. These matters provoke anxiety for certain U.S. interests, but are not necessarily of equally high priority in developing states.<sup>122</sup>

The definitional schema advanced by U.S. criminal justice export programs additionally overlooks numerous categories of interpersonal harm that might otherwise be understood as transnational in scope and arising from morally reprehensible cross-border interactions.<sup>123</sup> Globalization produces at least two types of harms or crimes that are meaningfully transnational: harms of which the victims are largely the citizens of developing states, and harms of which the victims are primarily citizens of developed countries. U.S. criminal justice export programming draws attention to transnational crimes of which the victims are, more often than not, relatively wealthy Americans. Young Nigerian men engaged in internet-based fraud (cybercrime) primarily harm wealthy Americans or citizens of other rich states. Street vendors of bootleg CDs and DVDs, who appropriate intellectual property, harm U.S. and other rich states' companies. In contrast, human rights abuses of immigrants—which might also be understood as transnational and criminal, but which primarily harm citizens of developing states—are not among the transnational crime priorities emphasized in U.S. criminal justice export programs. In a different vein, murder, assault, and rape are often inherent in sex or drug trafficking, which are U.S. transnational crime priorities, but the emphasized trafficking activities in U.S. criminal justice export programming are those that most directly register effects in developed states.

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122. A full exploration of the reasons why U.S. officials settled on this subset of concerns is beyond the scope of this Article. Reasons for identification of these particular transnational crime priorities likely reflect a combination of altruistic interest in containing the dangers of specific globalization processes, and in other instances protection for U.S. corporations whose profits are limited by intellectual property appropriation and other threats. Compare ROBERT W. WINSLOW & SHELDON X. ZHANG, *CRIMINOLOGY: A GLOBAL PERSPECTIVE* 482-83, 526 (2008) (describing harms associated with drug addiction and sex trafficking), with *ILEA Gift Fund Initiative*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c25510.htm> (last visited Sept. 22, 2010) (noting that the Gift Fund Initiative was established pursuant to section 635(d) of the Foreign Assistance Act “to provide a mechanism whereby . . . private industry and the Federal Government . . . [can] team-up in areas of mutual interests,” and “law enforcement training funded by private entities is designed to assist corporations in reducing financial losses that occur as the result of criminal activity outside the United States”).

123. The U.N. Convention against Transnational Organized Crime, for example, defines transnational organized crime to include any organized crime activity with a maximum sentence of at least four years that was either planned, registered effects, or otherwise occurred across international borders. See U.N. Convention against Transnational Organized Crime, *supra* note 99, at arts. 2-3.

It is also unclear that transnational crime control appropriately addresses even the limited range of conduct at stake in the areas defined as transnational crime by U.S. criminal justice exporters. Transnational crime concerns might be more comprehensively regulated through different conceptual and institutional frameworks, including public health programs, alternative employment opportunities, civil regulation, or infrastructure development.

The phenomenon of trafficking in humans, for example—one of the primary U.S. transnational crime priorities—implicates many issues beyond the highly publicized trafficking of women and children into forced sexual labor (a focus of the U.S. international war on crime and the transnational criminalization model more generally). Human trafficking entails a whole continuum of migration flows that places smuggled migrants in dehumanizing labor conditions earning substandard wages, in factories, cocktail bars, homes, and agribusinesses, as well as in brothels.<sup>124</sup> As numerous commentators have illuminated, these flows are fueled not primarily by criminally deviant bad actors, but by conditions of extreme poverty in the source countries and by demand for cheap, and often degrading, labor in the destination countries.<sup>125</sup> The crime control model promoted by U.S. consultants focuses on a subset of those individuals who exploit conditions of pronounced inequality<sup>126</sup>—smugglers who enable the illegal flows of migrants and profit from migrants’ sexual subjection—rather than on the underlying forces driving migration flows and fueling the abusive practices in question across multiple sectors. In focusing attention on sexual exploitation, as did earlier campaigns against the “white slave” trade in the late nineteenth and early twentieth centuries,<sup>127</sup> transnational crime control narrows the perceived range of harms wrought by resource inequalities. It concentrates instead on relatively limited criminalized elements.<sup>128</sup> The large-scale export of U.S. crime control models then channels energies toward criminalizing and prosecuting particular criminally culpable bad actors and diverts global attention from systemic factors driving targeted harms, as well as from

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124. See e.g., Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 20-21 (2004).

125. See *id.*; Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, IND. J. GLOBAL LEGAL STUD. 137 (2006) (examining how prosecutorial approaches to human trafficking tend to “overlook the broader socioeconomic reality that drives trafficking in human beings”). See generally Jayashri Srikanthiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 160, 187 (2007).

126. See, e.g., SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY*, at xxv, 137 (1998).

127. See Bruch, *supra* note 124, at 8-9.

128. See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 388-92 (2006).

regulatory and preventative approaches that might counteract those systemic factors.<sup>129</sup>

On similar grounds to those just described, some within the U.S. government opposed adopting (at least primarily) a transnational crime control framework to address human trafficking. In his former capacity at the State Department, international law scholar and Department of State Legal Adviser Harold Koh argued against conceptualizing trafficking as fundamentally “a criminal problem,”<sup>130</sup> preferring instead a human rights focus that treats trafficking as a “massive and complex global problem.”<sup>131</sup> A human rights approach would emphasize prevention and care for those at risk of, or victim to, trafficking; it would not rely primarily on criminal law paradigms of innocent, “iconic” victims, and individual, culpable trafficker defendants.<sup>132</sup> A human rights emphasis on trafficking would not necessarily obviate criminal prosecutions. It would, however, prioritize allocation of resources to humanitarian prevention and reparation over prosecution, and would not require other states to adopt a criminal regulatory framework. But Koh’s approach did not ultimately prevail as the U.S. government established offices and initiatives requiring foreign states to define transnational crime so as to “prescribe punishment [for trafficking] commensurate with that for grave crimes” and to devote resources to “prosecution efforts” resulting in the conviction and criminal sentencing of traffickers.<sup>133</sup> The definition of transnational crime has thus come to play a critical role in directing conduct within foreign states in a manner that might not otherwise have come to pass, shaping a regime of global governance through transnational crime control aid and penalties.

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129. See Bernstein, *supra* note 40, at 144 (“[T]he responsibility for slavery is shifted from structural factors and dominant institutions onto individual, deviant men . . . .”); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts To Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3030 (2006).

130. *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Int’l Operations and Human Rights. of the H. Comm. on Int’l Relations*, 106th Cong. 9 (1999) (testimony of Harold Hongju Koh, Assistant Secretary of State, Bureau of Democracy, Human Rights & Labor, Department of State).

131. *Id.*

132. See Srikantiah, *supra* note 125, at 160, 187 (discussing problems associated with a criminal law paradigm of the iconic trafficking victim).

133. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 108(a), 114 Stat. 1464 (2000). The Act was supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, 3558, and the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (codified at 22 U.S.C. § 7101 (2006)).

## 2. Incentivize: Transnational Crime Control Aid and Penalties

The second component of U.S. criminal justice export—related to the definition of transnational crime—is the provision of aid and threats of penalties to foreign states in order to encourage attention to U.S.-promoted policies. The U.S. government has provided vast sums of aid for transnational crime control to poor and middle-income states.<sup>134</sup> Much of this assistance has been concentrated in Latin America, though assistance is also provided to states in Africa, Asia, Eastern Europe, and the Middle East.<sup>135</sup>

From 1997 to 2006, in the Latin American and Caribbean region, police and military aid constituted almost half of U.S. foreign assistance.<sup>136</sup> These funds were allocated for transnational crime control and the expansion of prisons and other criminal justice institutions necessary to support increased criminal law enforcement.<sup>137</sup>

In the 1990s, negotiations began for Plan Colombia, a major counter-narcotics and criminal justice reform aid package, which culminated in 2000, when Congress approved \$1.3 billion in support of the plan.<sup>138</sup> The reform package supports drug control in Colombia through aerial eradication, law enforcement, and procedural and related justice sector reform. From 2000 to 2005, under the Bush administration, the State and Defense Departments together provided \$5.4 billion for Andean region counter-narcotics efforts.<sup>139</sup> The Obama administration has continued the trend of foreign crime control spend-

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134. See, e.g., *The Mérida Initiative, Assessing Plans to Step Up Our Security Cooperation with Mexico and Central America: Hearing before the H. Comm. on Foreign Affairs, 110th Cong. 11-14 (2007)* (statement of Thomas A. Shannon, Assistant Secretary, Bureau of Western Hemisphere Affairs, Department of State) (describing major financial assistance to Mexico and Central America for crime control and criminal justice reform projects); see also SAYAKA FUKUMI, COCAINE TRAFFICKING IN LATIN AMERICA: EU AND US POLICY RESPONSES 177-214 (2008) (providing an overview of Plan Colombia and the United States' substantial contributions to it).

135. See, e.g., ANDREAS & NADELMANN, *supra* note 103; FUKUMI, *supra* note 134, at 177-214.

136. See, e.g., U.S. Dep't of State, Bureau of Int'l Narcotics & Law Enforcement Affairs, Fiscal Years 2002-2007 Congressional Budget Justifications, <http://www.state.gov/p/inl/rls/rpt/cbj/> (last visited Sept. 22, 2010) (specify year to view individual allocations); see also Ctr. for Int'l Pol'y, U.S. Aid to Latin America and the Caribbean, 1997-2006, JUSTTHEFACTS.ORG, <http://justf.org> (follow "Data" hyperlink; follow "Aid" hyperlink; follow "Aid by Program" hyperlink; then select years 1997 through 2006) (last visited Sept. 22, 2010).

137. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSIAD-92-147, AID TO PANAMA: IMPROVING THE CRIMINAL JUSTICE SYSTEM (1992).

138. CONNIE VEILLETTE ET AL., CONG. RESEARCH SERV., RL 32487, U.S. FOREIGN ASSISTANCE TO LATIN AMERICA AND THE CARIBBEAN 4 (2006).

139. *Id.* at 5.



ing by expanding the Mérida Initiative, which provides a broad range of criminal justice assistance to Mexico, Central America, Haiti, and the Dominican Republic.<sup>140</sup>

In a world of limited resources, U.S. subsidies direct recipient states' attention to U.S. transnational crime priorities and criminal justice administration rather than to other sectors. The significant funds available for foreign criminal justice assistance orient recipient states' energies to this domain of policy planning, and subsequently require recipient states to allocate their own funds (and often military reinforcements) to carry out projects to completion.<sup>141</sup>

The design of U.S. transnational crime control initiatives also directly ties compliance to specific financial threats, thereby strongly encouraging recipient states to conform despite their possible ambivalence or resistance.<sup>142</sup> Threats are incorporated directly in U.S. statutes: The Trafficking Victims Protection Act of 2000 (TVPA) establishes a penalty regime authorizing the President to withdraw U.S. (and some multilateral) non-trade-related, non-humanitarian financial assistance from countries that insufficiently comply with U.S. government "minimum standards for the elimination of trafficking."<sup>143</sup> As a result, the U.S. government has effectively required developing states to apply a transnational crime control trafficking model. In response to the TVPA regime and threats of U.S. withholding, governments around the world have passed anti-trafficking legislation and developed domestic infrastructure to meet U.S. prosecutorial "minimum standards."<sup>144</sup>

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140. Like Plan Colombia, the Mérida Initiative emerged from international agreements between the United States and recipient states, and through U.S. domestic legislation. As part of the Mérida Initiative, the 110th Congress appropriated \$465 million in supplemental assistance for Mexico and Central America in the Fiscal Year 2008 Supplemental Appropriations Act, Pub. L. No. 110-252, for fiscal years 2008 and 2009. The 111th Congress provided an additional \$110 million for Central America, Haiti and the Dominican Republic, and \$300 million for Mexico in the 2009 Omnibus Appropriations Act, Pub. L. No. 111-8. In total, under the Mérida Initiative, approximately \$875 million has been allocated. The Obama administration for fiscal year 2010 sought \$450 million for Mexico and \$100 million for Central America. CLARE RIBANDO SEELKE & JUNE S. BEITTEL, CONG. RESEARCH SERV., R 40135, MÉRIDA INITIATIVE FOR MEXICO AND CENTRAL AMERICA: FUNDING AND POLICY ISSUES 1 (2009).

141. See FUKUMI, *supra* note 134, at 200.

142. See Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions To Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 439 (2006); see also Press Release, White House, Progress in Efforts to Combat International Crime (Dec. 15, 2000).

143. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 108(a), 114 Stat. 1464; Chuang, *supra* note 142, at 439.

144. Chuang, *supra* note 142, at 464; see also Larry Rohter, *Prostitution Puts U.S. and Brazil at Odds on AIDS Policy*, N.Y. TIMES, July 24, 2005, at A3 (reporting that, as a consequence of a related incentive regime, Brazil was forced to "forgo \$40 million

The United States assures foreign states' compliance with its preferred narcotics crime policy through a similar incentive regime. Each year the President reviews "drug source" countries for compliance with U.S. benchmarks and determines whether to certify them for funding during the following year.<sup>145</sup> The penalties for decertified states entail 50% suspension of all U.S. assistance for the current fiscal year; 100% of all U.S. assistance for the following fiscal year, unless the state is re-certified; a vote against the state's loan applications to the multinational development banks and International Monetary Fund; and removal of any U.S. trade preference.<sup>146</sup> Peru and Colombia both suffered decertification for two years in the 1990s. For a period, Bolivia, which is among the poorest states in the Western hemisphere and depends heavily on U.S. aid, made execution of U.S. drug control policy its top priority out of fear of decertification.<sup>147</sup>

Similar regimes incentivize foreign states to adopt criminal justice frameworks to address intellectual property appropriation. The North American Free Trade Agreement requires that participating states' intellectual property rules criminalize certain forms of intellectual property appropriation, and the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement similarly promotes the criminalization of intellectual property rights violations.<sup>148</sup>

As perhaps reflected by the incorporation in TRIPS of criminalization measures, international trade organizations, as well as other inter-governmental organizations, have begun to embrace the U.S.-promoted transnational crime control regime and domestic criminal justice reforms as a set of practices crucial to ensuring social order and prosperity. The World Bank explains its post-Cold War development approach as follows: "[T]oday the Bank sees law as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and *maintaining law and order*."<sup>149</sup> Accordingly, the World

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in American support" because it wished to pursue harm reduction strategies such as condom distribution to prevent the transmission of HIV by sex workers).

145. See 22 U.S.C. § 2291j(b)(1)(A) (2006)); see also FUKUMI, *supra* note 134, at 143 ("The annual narcotics certification process has been a tool to secure cooperation from the Andean states . . . with the US drug control policy since the early 1980s.").

146. FUKUMI, *supra* note 134, at 143.

147. *Id.*

148. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 61, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197; Marrakesh Agreement Establishing the World Trade Organization annex 1C, Apr. 15, 1994, 1867 U.N.T.S. 3 (1994) ("Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent . . ."); North American Free Trade Agreement art. 1717, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 678 (1993).

149. See *Law and Development Movement*, THE WORLD BANK, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LawandDevelopmentMovement.pdf> (last visited Oct. 31, 2010) (emphasis added).

Bank's comprehensive development framework has come to implicitly promote crime control reforms in line with U.S. criminal justice export initiatives.

Through criminal justice aid and threatened penalties, proponents of rule of law development have advanced a particular approach, not only with regard to legal mechanisms for facilitating economic growth, but also with respect to criminal justice. The United States is at the forefront of these ongoing efforts, fashioning a global crime-governance regime that seeks to establish transnational crime control policy on a global scale to advance U.S. crime control priorities.

### 3. Proceduralize: U.S.-Style Criminal Procedure Reform

The third component of U.S. criminal justice export involves criminal procedure reform intended to increase the efficacy and fairness of recipient states' justice sectors. By offering assistance to foreign states to undertake criminal procedure reform, the United States encourages recipient states to devote energies to U.S.-style criminal procedure reforms over and above other unsubsidized development priorities. To ensure compliance, the United States monitors recipient states' progress, and makes the achievement of "certain reform benchmarks a condition of broader assistance funding."<sup>150</sup>

USAID was the initial leader in this area, beginning with the Administration of Justice Program under President Reagan in El Salvador described in Subsection II.A.2 above. USAID's criminal justice reform projects have sought to bring about more humane, transparent, and efficient justice administration abroad, even if, as Part III will explore, such projects have been less effective than anticipated.<sup>151</sup> Foreign criminal procedure reform vastly expanded in the post-Cold War period when these reforms merged with Departments of Justice and State programs simultaneously engaged in promoting U.S. transnational crime priorities.<sup>152</sup>

A primary focus of USAID's initial justice sector reform work was to transform inquisitorial systems (modeled generally on the civil law systems of former European colonizers) to accusatory or adversarial ones (modeled generally on the common law U.S. and U.K. systems).<sup>153</sup> To be clear, the terms inquisitorial and adversarial refer to two general types of criminal procedure systems, and there are numerous distinctions within these two categories.<sup>154</sup> Broadly speaking, variations of the inquisitorial system are code-based, and criminal proceedings are orchestrated by a judge or judges, who are the primary actors seeking

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150. LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA* 216 (1998).

151. *See id.* at 158-60.

152. *See Langer, supra* note 7, at 648, 657.

153. *See HAMMERGREN, supra* note 150, at 159.

154. *See DAMAŠKA, supra* note 35, at 4-6.

evidence from both sides and directing the course of proceedings.<sup>155</sup> Factual determinations and legal rulings at all stages occur principally in writing, with significant importance placed on a written dossier of evidence.<sup>156</sup>

In contrast, under an adversarial common law system, courts fill in the gaps in legislative enactments on a case-by-case basis, and the litigants largely assume control for developing cases and presenting evidence, primarily through oral testimony.<sup>157</sup> In the adversarial system, the investigative authority is allocated to the prosecutor rather than to the judge. Presented with two opposing sides to a dispute, the judge or jury weighs conflicting evidence to decide which side should prevail.<sup>158</sup> The rights of the defendant are protected, in principle, by a vigorous contest of the evidence by the defendant and his or her counsel, and by various criminal procedural pre-trial and trial rights. Protections for the defendant include rights to trial by jury, to cross-examine witnesses, against self-incrimination, to defense counsel, and to a presumption of innocence until proven guilty beyond a reasonable doubt.<sup>159</sup>

In practice, most criminal justice systems involve both adversarial and inquisitorial elements.<sup>160</sup> The reforms encouraged by U.S. consultants, to the extent that they claim to represent a “purely” adversarial model, idealize the adversarial model and elide the multiple complexities and limits of both adversarial and inquisitorial systems in practice.<sup>161</sup> The U.S. criminal justice system itself is characterized by the existence of a plethora of exceptions to criminal procedural rights as well as procedural alternatives or shortcuts intended to improve efficiency. The defendant’s many rights, extolled by proponents of the adversarial model, are in the vast majority of criminal cases relinquished, violated, or waived by criminal suspects and defendants.<sup>162</sup> Despite the celebration by U.S. criminal justice export programs of oral, adversarial, and jury trial

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155. See, e.g., HAMMERGREN, *supra* note 150, at 14-21.

156. See Langer, *supra* note 12, at 20-26.

157. See *id.*

158. See *id.*

159. See Stuntz, *supra* note 16, at 12-19.

160. See, e.g., Mathias Reimann, Book Review, 82 AM. J. INT’L L. 203, 203 (1988) (reviewing DAMAŠKA, *supra* note 35 (“Comparative scholarship has increasingly distinguished different kinds of procedure (e.g., criminal and civil), its phases and its forms in individual countries. As a result, a more refined and accurate picture has gradually emerged.”)).

161. See Sklansky, *supra* note 20, at 1640; see also Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 851-52 (1997).

162. See Stuntz, *supra* note 16, at 45-52.

proceedings, roughly 1% of U.S. criminal prosecutions are resolved by jury trial.<sup>163</sup>

Criminal and comparative law scholars have also illuminated several inherent problems with U.S.-style adversarial criminal procedures. Criminal law scholar William Stuntz argues that the combination of robust procedural protections and a political commitment to social regulation through crime control has led not only to pervasive exceptions to procedural safeguards in the United States, but also to an excessive ratcheting up of the harshness of substantive criminal law. The one-way ratchet occurs in part because legislators and the public come to perceive procedural protections as interfering with the effective regulation of crime, regardless of whether or not this is actually the case.<sup>164</sup>

According to legal historian John H. Langbein, another result of U.S. adversarial trial and robust criminal procedure models is an over-reliance on plea bargaining that is both morally and politically unjust.<sup>165</sup> The over-reliance on procedural shortcuts, and in particular on plea bargaining, arises because a full exercise of jury trial rights would be extremely inefficient. An increase in jury trials would grind the wheels of justice to a halt, unless the number of criminal prosecutions markedly decreased or resources allocated to criminal justice administration radically increased.<sup>166</sup> Langbein makes a compelling case that the widespread reliance on plea bargaining, given current case pressures and resource allocation, is morally wrong because it is coercive.<sup>167</sup> The reliance operates to coerce people to waive their rights, and as the inducement to confess becomes more intense, criminal defendants may be persuaded to confess to conduct of which they are innocent, even if this only happens in practice in the occasional case.<sup>168</sup> The dependence on plea bargaining in the U.S. adversarial system also undermines the important civic interest in public inquiry in cases of serious crime.<sup>169</sup> Langbein concludes that a hybrid inquisitorial system that combines laypersons with professional judges is preferable to a U.S.-style “sys-

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163. Marc Galanter, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459, 512 (2004).

164. See Stuntz, *supra* note 16, at 55-59; see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 7-15 (1996); Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1594 (2008) (examining the elimination for all practical purposes of the safeguards promised by the *Miranda* warning).

165. See Langbein, *supra* note 18, at 126-27.

166. *Id.* at 123.

167. *Id.* at 124.

168. *Id.* (“As a practical matter, plea bargaining concentrates both the power to adjudicate and the power to sentence in the hands of the prosecutor.”).

169. *Id.*

tem of adversary jury trial so complex we must deny it to almost all defendants.”<sup>170</sup>

On the other hand, a range of serious ills afflicted (and continues to afflict) inquisitorial systems in recipient states. Prior to the onset of procedure reforms, inquisitorial criminal procedure regimes in Latin America were characterized by very limited due process protections for criminal defendants and prolonged periods of detention in deplorable prison conditions pending adjudication.<sup>171</sup> Recipient states’ justice sectors also suffered from general arbitrariness, inefficiency, unreliability, and a lack of transparency.<sup>172</sup>

Certain Latin American legal elites believed the solution for their states’ justice sectors lay in an array of criminal procedure code reforms. Though not necessarily modeled on the U.S. code, these code reforms were adversarial rather than inquisitorial in nature, and in particular, organized around oral, public trials.<sup>173</sup> Notwithstanding the limitations and prevailing critiques of the adversary system, a critical mass of legal elites thought accusatorial or adversarial models would be, if not markedly more effective than inquisitorial models or dramatically more rights-protective, at least an improvement over the injustices of the then-existing systems.<sup>174</sup>

Driven both by the interest and support of Latin American legal elites and U.S. criminal justice exporters’ commitment to adversarial criminal procedure reform, over the 1990s, U.S. consulting firms working in conjunction with USAID supported new adversarial criminal procedure code reforms and other related projects in countries throughout the Latin American region.<sup>175</sup> Between 1993 and 2003, twenty-one countries in Latin America received major loan assistance to support criminal procedure reform projects promoted by the United States. Fifteen of these countries borrowed nearly \$500 million from the Inter-American Development Bank to finance such efforts.<sup>176</sup> Fourteen Latin American countries adopted new criminal procedure codes based on an adversarial, U.S.-style model (though reflecting considerable national nuances and drawing on diverse sources) between 1991 and 2006, including Guatemala in 1992, Costa Rica in 1996, El Salvador in 1997, the federal system and certain provinces of Ar-

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170. *Id.* at 126-27.

171. *See* Langer, *supra* note 7, at 663-64.

172. *Id.* at 637-40 (citing PROYECTO DE CÓDIGO PROCESAL PENAL DE LA NACIÓN, EXPOSICIÓN DE MOTIVOS 651-55 (1988)).

173. *See id.* at 632, 638-45 (explaining that local actors hoped that the reforms would render Latin American states’ criminal justice systems more humane in their treatment of criminal defendants and more effective at punishing the misconduct of the powerful, among other salutary outcomes).

174. *See id.*

175. *Id.* at 663-64.

176. Paul Constance, *Verdict Pending*, IDB AMÉRICA, Aug. 2003, <http://www.iadb.org/idbamerica/index.cfm?thisid=2361>.

gentina between 1991-1997, Honduras and Bolivia in 1999, Chile in 2000, Nicaragua in 2001, the Dominican Republic in 2002, Peru and Colombia in 2004, and the Mexican states of Oaxaca and Chihuahua in 2006.<sup>177</sup>

Following the initial criminal procedure reforms in Guatemala and El Salvador, U.S.-promoted criminal procedure reform expanded to the former Soviet republics.<sup>178</sup> Under contracts with USAID, U.S. legal organizations facilitated trainings of prosecutors, police, and judges, and participated in revising the criminal codes of the newly formed ex-Soviet states.<sup>179</sup> In the years to follow, U.S. programs began similar initiatives in other regions.<sup>180</sup> Along with adversarial reform, these efforts concentrated on reducing the time spent by criminal defendants in pre-trial (or preventive) detention, reforming criminal procedure codes to better protect the rights of criminal defendants, and expanding mechanisms for plea bargaining to increase efficiency in response to dramatic case backlogs.<sup>181</sup>

In contrast to prior internal security training, USAID highly publicized their justice sector reform efforts seeking to inform and involve local publics. Comparative law scholar Máximo Langer proposes that Latin American legal elites themselves played a major role in directing USAID's criminal procedure reform projects in many countries,<sup>182</sup> and that, as a consequence, the revolution in Latin American criminal procedure represents a new model of "diffusion from the periphery" rather than influence from hegemonic world powers, like the United States.<sup>183</sup> Still, even Langer notes the extensive U.S. influence in the reform processes.<sup>184</sup> In any event, without at all diminishing the important con-

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177. See Langer, *supra* note 7, at 631.

178. In 1994, the U.S. Congress recommended expenditure of up to \$30 million in the Freedom for Russia and Emerging Eurasian Democracies and Open Markets (FREEDOM) Support Act and Support for European Democracy (SEED) funds for crime control in Eastern Europe. Law enforcement aid programs in Russia received \$12 million. Participating U.S. agencies included the Federal Bureau of Investigation and the Secret Service. See Press Release, White House Office of the Press Sec'y, Crime Assistance Package for the Russian Federation (Sept. 28, 1994).

179. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-058, U.S. DEMOCRACY PROGRAMS IN SIX LATIN AMERICAN COUNTRIES HAVE YIELDED MODEST RESULTS 127 (2003).

180. See Strang, *supra* note 9, at 210-11.

181. See, e.g., *Latin America and the Caribbean: Criminal Justice and Legal Reform*, USAID (Mar. 31, 2010, 11:42 AM), [http://www.usaid.gov/locations/latin\\_america\\_caribbean/democracy/rule/dg\\_rule4.html](http://www.usaid.gov/locations/latin_america_caribbean/democracy/rule/dg_rule4.html).

182. See, e.g., Langer, *supra* note 7, at 645-56.

183. *Id.*

184. See *id.* at 646 ("[A] number of actors from the United States also started working in the criminal justice area in Latin America and played a crucial role in the spread of these reforms."); *id.* at 664 n.248 (noting extensive U.S. influence in reformed codes); *id.* at 667 (Latin American legal elites admired "the American idea

tributions of local legal elites and the innovations represented in the specific code reforms enacted, it is clear that the U.S. subsidies of, and involvement in, the procedural reform process played an indispensable role in pushing many of the Latin American reform projects forward.<sup>185</sup>

Perhaps most critically for the purposes of the present analysis, USAID's programs paved the way for separate foreign criminal justice reform initiatives housed in the U.S. Departments of State and Justice. These initiatives merged procedure reform training with U.S. transnational crime control promotion, heavily emphasizing U.S. transnational crime priorities. Over the course of the 1990s, what had begun as a procedurally focused USAID-sponsored reform program in Central America in the 1980s, was taken up by a set of Justice and State Department programs that fused promotion of transnational crime control and procedure reform initiatives. Through this merger of U.S. transnational crime control promotion efforts with procedure reform initiatives, the State and Justice Departments came to wield an increased influence over the shape of the reforms, a shift of authority to which I will return in Subsection II.C.4 immediately below. Part III will further address the outcomes of these procedure reform efforts, particularly their combined emphasis on the transition of inquisitorial to adversarial criminal justice administration, and the promotion of U.S. transnational crime priorities.

As with transnational crime control, the U.S. commitment to subsidizing criminal procedure reform shaped domestic policy in foreign states. It also brought about deep involvement of U.S. consultants in foreign internal security and justice sector administration, enabling a form of U.S.-dominant global governance through crime. U.S. subsidies additionally rendered criminal procedure reform an available and relatively less costly manner (at least on first appearances) of addressing concerns with social disorder, and limits to crime control regulatory approaches—by presumably making recipient states' justice sectors more effective.

The following section explores how USAID's work was increasingly eclipsed by U.S. State and Justice Department entities. U.S. transnational crime control programming came to be integrated with—and in significant ways determined the course of—criminal procedure reform training and implementation. This institutional integration of transnational crime control programming and criminal procedure reform training constitutes the fourth and final component of U.S. criminal justice export.

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of having oral public hearings . . . for the potential democratizing aspects of having such hearings, not . . . [so that] Latin American hearings [are] . . . just like U.S. American ones.”).

185. See *id.* at 646; see also Linn Hammergren, *International Assistance to Latin American Justice Programs: Toward an Agenda for Reforming the Reformers*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 309 (Erik G. Jensen & Thomas C. Heller eds., 2003) (“The donors, in a sense, created and directed the demand for their programs . . .”).



#### 4. Institutionalize: Transnational Crime and Procedure Reform Training

Central to U.S. criminal justice export is an array of U.S. training programs aimed at institutionalizing U.S.-promoted reform. These training programs are dedicated concurrently to advancing criminal procedure reform (implementing U.S.-style adversarial criminal procedure codes) and executing U.S. transnational crime control campaigns (focusing attention on U.S. transnational crime priorities).<sup>186</sup>

Beginning shortly before the end of the Cold War and with increasing intensity thereafter, USAID's work was supplemented and in significant part displaced by that of officials from separate programs established under the auspices of the U.S. Departments of State and Justice. These programs included the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT), the International Law Enforcement Academies (ILEAs), and the International Criminal Investigative Training Assistance Program (ICITAP). While USAID's criminal justice sector work continues in concert with the State and Justice Departments' programs, USAID's projects now principally focus on other areas. As criminologist David H. Bayley has documented, much development assistance for criminal justice reform "has shifted from USAID . . . to the Department of State . . . which sub-contracts the work to specialist law enforcement organizations within the government and to private contractors."<sup>187</sup> Though OPDAT, the ILEAs and ICITAP continue to assist with adversarial criminal procedure reform commenced by USAID, this work is coordinated to advance OPDAT, the ILEAs, and ICITAP's respective missions to promote

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186. See, e.g., *Drug Enforcement and the Rule of Law: Mexico and Colombia: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. (May 18, 2010) (statement of Lanny A. Breuer, Assistant Att'y Gen., Department of Justice, Criminal Division, Drug Enforcement and the Rule of Law: Mexico and Colombia) (describing the joint focus of Department of Justice criminal law development programs on implementing adversarial procedure reforms and advancing U.S. transnational crime control policy).

187. See BAYLEY, *supra* note 72, at 41. My own review of USAID justice sector programs revealed that USAID initiatives focused purely on criminal justice reform are now greatly outnumbered by more general judicial education and improved business environment offerings. In addition to U.S. State and Justice Departments programs, a large number of other organizations work on U.S. criminal justice export projects, including U.S. government contractors Management Systems International and Checchi and Company Consulting, as well as the American Bar Association. See *Rule of Law Initiative*, ABA, <http://www.abanet.org/rol/about.shtml> (last visited Nov. 15, 2010); *Judicial System Strengthening*, CHECCHI AND COMPANY CONSULTING, INC., <http://www.checchiconsulting.com> (follow "Projects" hyperlink) (last visited Nov. 15, 2010); MANAGEMENT SYSTEMS INTERNATIONAL, <http://www.msiworldwide.com> (last visited Nov. 15, 2010). These separate projects are not the subject of my analysis in this Article.

transnational crime control and prosecutorial efficacy, rather than purely for its own sake.<sup>188</sup>

In the remainder of this Section, I will specifically consider the work of the three primary U.S. government entities—OPDAT, the ILEAs, and ICITAP—involved in institutionalizing U.S. criminal justice export and fashioning a form of U.S.-dominant global governance through crime.

Since its founding in 1991, OPDAT has encouraged “legislative and justice sector reform” and worked to “improv[e] the skills of foreign prosecutors, investigators, and judges.”<sup>189</sup> OPDAT emphasizes seven substantive areas of crime as major transnational crime threats: (1) terrorism; (2) organized crime; (3) money laundering and asset forfeiture; (4) corruption; (5) narcotics trafficking; (6) trafficking in persons; and (7) cybercrime and intellectual property appropriation.<sup>190</sup> With attention to these transnational crime priorities, OPDAT consultants—largely U.S. federal prosecutors—train recipient states’ prosecutors, police investigators, and judges.

From OPDAT’s headquarters in Washington, D.C., a relatively small supervisory staff develops and oversees OPDAT foreign criminal justice consulting programs that span an expansive geographical territory. OPDAT stations teams of U.S. prosecutors, under the supervision of the directorial staff, in numerous foreign locations to implement OPDAT’s projects. OPDAT advertises that the field positions are open to current Department of Justice Trial Attor-

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188. During the 1990s and into 2000, the foreign law enforcement training prohibitions established by section 660 of the Foreign Assistance Act were for all intents and purposes eliminated by an increasing range of exceptions. New provisions, sections 534 and 541, allowed assistance “notwithstanding” the section 660 prohibitions; and President Clinton’s Presidential Decision Directive 71 permitted consulting projects to “rebuild” foreign justice systems as well as to conduct international civilian police training. In accordance with their expanded prerogatives, U.S. State and Justice Departments’ consultants prioritize promotion of transnational crime control. A declassified summary of Presidential Decision Directive 71 is available at <http://www.fas.org/irp/offdocs/pdd/pdd-71-1.htm>; see also *supra* note 102 for an explanation of presidential decision directives.

189. See *OPDAT*, *supra* note 3. The “Mission” of OPDAT reads as follows:

OPDAT was created in the Criminal Division of the Department of Justice in 1991 in response to the growing threat of international crime. OPDAT’s mission is to assist prosecutors and judicial personnel in other countries develop and sustain effective criminal justice institutions. OPDAT recognizes that international cooperation in the investigation and prosecution of criminals and organized crime groups is central to countering international crime at its source; and that the efficient and fair administration of justice offers the greatest protection from lawlessness and support for basic human rights.

190. See *OPDAT Strategic Plan*, *supra* note 93.

neys or other Assistant U.S. Attorneys, and in some instances to other experienced U.S. prosecutors.<sup>191</sup>

It is significant in considering the sort of reformed justice system that may emerge as a result of U.S. criminal justice export programming that prosecutorial perspectives are heavily emphasized, even though concerns about defendants' rights initially inspired many of the reforms. Internationally deployed U.S. prosecutors, referred to by OPDAT as Resident Legal Advisors (RLAs), live abroad for at least one year and provide "full-time advice and technical assistance" in ongoing criminal justice reforms.<sup>192</sup> When an RLA leaves a foreign deployment, he or she is replaced by another U.S. prosecutor. OPDAT also deploys Intermittent Legal Advisors (ILAs). ILAs, like RLAs, are prosecutors often already employed by the Department of Justice.<sup>193</sup> ILAs conduct discrete assistance programs ranging from a few days to six months, focused upon specific criminal justice reforms tethered to transnational crime control.<sup>194</sup> OPDAT prosecutors not only train other prosecutors but also judges, further extending a prosecutorial emphasis in judicial education. OPDAT does not, however, provide support to public defenders, and relatively little other assistance is provided to assist the public defense bar, where one meaningfully exists.<sup>195</sup>

Also significant is OPDAT's emphasis on U.S. transnational crime priorities over whatever may be a recipient state's most pressing crime problems at the time an OPDAT program commences. In determining where to locate OPDAT projects, issues such as the prospect of "lasting and fundamental criminal justice reform" in the host country or the adequacy of funding and host government support are subordinated to advancing U.S. transnational crime control priorities.<sup>196</sup> Before undertaking a project, as OPDAT's "Criteria for Project Involvement" explains, OPDAT will survey "relevant Department components . . . Narcotic and Dangerous Drug Section, Organized Crime and Racketeering Section, Asset Forfeiture and Money Laundering Section, and the Counterterror-

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191. See, e.g., *Resident Legal Advisor for Kenya, Employment and Internship Opportunities*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/emp-ops/> (last visited Sept. 22, 2010).

192. See OPDAT, *supra* note 3.

193. See, e.g., *Intermittent Legal Advisor for Malaysia, Employment and Internship Opportunities*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/emp-ops/> (last visited Sept. 22, 2010).

194. See *id.*

195. One notable exception to this general trend is a public defender training program sponsored by USAID in Colombia, the Roberto Camacho Weverberg School of Public Defenders, which opened in February 2010 with \$165,000 in USAID funds. See Press Release, U.S. Embassy, Bogota, U.S. Supports Strengthening of Public Defender System in Colombia (Feb. 3, 2010).

196. See OPDAT *Strategic Plan*, *supra* note 93.

ism Section.”<sup>197</sup> OPDAT makes clear: The “Department’s interests are primary in this process.”<sup>198</sup> According to its published internal criteria, the local manifestations of crime in recipient countries are not among the criteria considered in determining candidates for OPDAT’s justice sector reform programming.<sup>199</sup>

In carrying out transnational crime control projects, OPDAT’s work requires expensive financing and enables pervasive surveillant and coercive influence. As reflected in Figure 1, OPDAT operates field offices in locations across Africa, the Middle East, Asia, Central and Eastern Europe, as well as Latin America.<sup>200</sup>

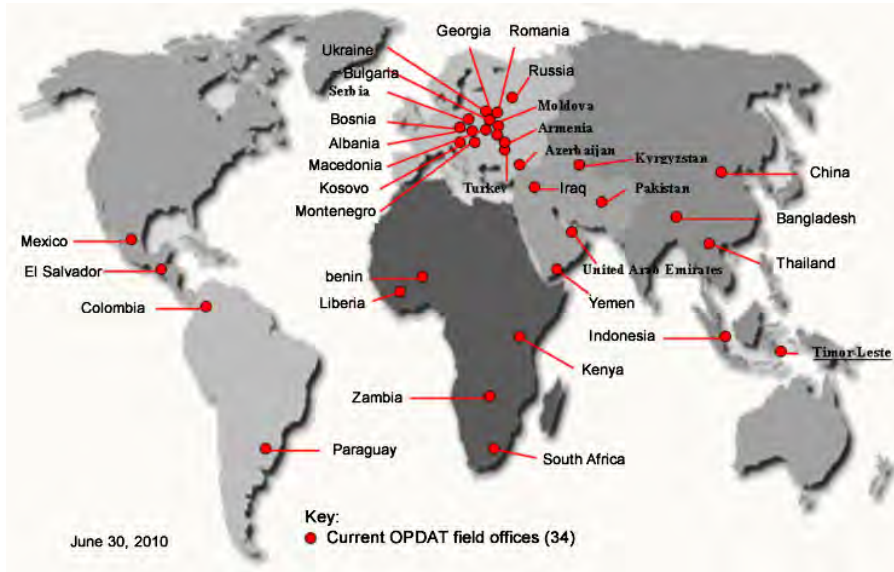


Figure 1: OPDAT Field Offices<sup>201</sup>

197. *See id.*

198. *See id.*

199. *See id.* Consequently, while references to “human rights” and other development objectives reminiscent of the Law and Development Movement and USAID initiatives abound in OPDAT’s promotional materials, its fundamental agenda is plainly determined by U.S. transnational crime priorities.

200. Even in light of their remarkable geographic reach, OPDAT and related U.S. criminal justice export programs operate at far less cost than do Cold War era foreign internal security training deployments, leading Ethan A. Nadelmann to refer provocatively to such foreign law enforcement consulting as “a form of [U.S.] hegemony on the cheap.” *See NADELMANN, supra* note 22, at 476.

201. *OPDAT Worldwide Activities & Programs-World Map*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/worldact-programs/> (last visited Sept. 22, 2010).

Consistent with the Cold War U.S. foreign internal security training model, OPDAT works inside foreign prosecutors' headquarters, and advises and observes case strategies in ongoing matters of U.S. interest.<sup>202</sup> OPDAT's programs involve judicial and prosecutorial skills development, advice on criminal justice legislation, and technical assistance in areas such as prosecution guidelines, mentoring, and case management—merging procedural training and transnational crime control promotion.<sup>203</sup> Among other projects, OPDAT has established, equipped, and trained an anti-money laundering task force in Nicaragua comprised of Nicaraguan federal prosecutors and investigators;<sup>204</sup> conducted criminal trial advocacy assistance programs in the Dominican Republic while emphasizing U.S. transnational crime priorities;<sup>205</sup> conducted trial advocacy programs in Baku, Azerbaijan to support implementation of new criminal procedures, with attention to prosecuting money laundering and human trafficking;<sup>206</sup> and provided policy advice in Indonesia on intellectual property protection through criminal justice enforcement.<sup>207</sup>

While USAID's justice sector reform projects enjoyed the initial support and input of local legal advocates, particularly in Latin America,<sup>208</sup> OPDAT, the ILEAs, and ICITAP operate through a more formal training model, analogous to that of Cold War foreign internal security training programs, and similarly dominated by U.S. law enforcement officers, particularly federal prosecutors. In his study of the Latin American procedure reforms, Professor Langer relates anonymous interviewees' comments that Department of Justice officials were

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202. *Africa and the Middle East Programs, OPDAT Worldwide Activities & Programs-World Map*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/worldact-programs/> (last visited Sept. 22, 2010) (in South Africa, U.S. and South African prosecutors share offices and work together to combat financial crimes); see also *OPDAT Achievements*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/acheive/> (last visited Sept. 22, 2010) (in Colombia, OPDAT trains prosecutors and then monitors their performance in matters of U.S. interest).

203. See *OPDAT Strategic Plan*, *supra* note 93.

204. *Latin America and Caribbean Programs, OPDAT Worldwide Activities & Programs-World Map*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/worldact-programs/> (last visited Sept. 22, 2010).

205. See *id.*

206. *DOJ/OPDAT Eurasia Programs, OPDAT Worldwide Activities & Programs-World Map*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/worldact-programs/> (last visited Sept. 22, 2010).

207. See *DOJ/OPDAT Asia and Pacific Programs, OPDAT Worldwide Activities & Programs-World Map*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/opdat/worldact-programs/> (last visited Sept. 22, 2010).

208. See generally Langer, *supra* note 7.

“explicitly exporting the U.S. criminal procedure code.”<sup>209</sup> Interviewees related that it “was very difficult to imbue the DOJ officials with the vision that the reason they were going overseas was not to export the U.S. model, but rather to let the country decide the type of justice they wanted to have.”<sup>210</sup> Even DOJ officials themselves apparently conceded that “DOJ pushed the U.S. model on everybody and was very insensitive culturally”; but these same officials indicated “this has changed and international standards are now the opening bid.”<sup>211</sup> Still, the underlying agenda of infusing U.S. legal approaches into foreign legal systems so as to control transnational crime has remained relatively consistent in OPDAT’s agenda. The persistence of this agenda is evidenced by high-ranking Department of Justice officials’ more recent celebration of OPDAT’s work as a great U.S. “export.”<sup>212</sup> Serving as a sounding board and resource for countries interested in self-initiating distinct criminal justice reforms has elicited less enthusiasm.

OPDAT often works with ICITAP and the ILEAs, focusing on transforming foreign criminal justice systems in an integrated process involving the judiciary, prosecutors and police.<sup>213</sup> The ILEAs opened their first school in 1995 in Budapest, Hungary, and subsequently developed additional training schools in Thailand, Botswana, El Salvador, Peru, and Roswell, New Mexico.<sup>214</sup> The ILEAs’ Statement of Purpose relates the origin of the schools’ programs and the scope of their ambitions:

Speaking before the United Nations General Assembly at its 50th Anniversary . . . [in] 1995, then-President Clinton called for the establishment of a network of International Law Enforcement Academies (ILEAs) throughout the world . . . Now, years later, the United States and participating nations have moved ahead with the establishment of ILEAs to serve four regions: Europe, Africa, South America, and Asia . . . The ILEAs serve a broad range of foreign policy and law enforcement purposes for the United States and for the world. In addition to helping protect American citizens and businesses through strengthened international cooperation against crime, the ILEAs’ mission is to buttress democratic governance through the rule of law; enhance the functioning of free markets through improved legislation

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209. *Id.* at 658 n.226.

210. *Id.*

211. *Id.*

212. *See, e.g.,* Breuer, *supra* note 6.

213. *See OPDAT Strategic Plan, supra* note 93.

214. *ILEA Program Overview*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c11243.htm> (last visited Sept. 22, 2010) [hereinafter *ILEA Program Overview*].

and law enforcement; and increase social, political, and economic stability by combating narcotics trafficking and crime.<sup>215</sup>

Despite the expression of a broader mandate in its Statement of Purpose and elsewhere, the curriculum in Budapest—the first ILEA—focuses primarily on transnational crime control.<sup>216</sup> ILEA Budapest offers instruction in narcotics, counter-terrorism, corruption, money laundering, counterfeit investigations, organized crime, nuclear smuggling, community policing, and lastly human rights. Separate regional seminars focus on alien smuggling, weapons of mass destruction, and the more general category of transnational crime.<sup>217</sup>

Again, reflecting deep U.S. involvement in foreign security administration, the ILEAs' international consortium of facilities literally operates within foreign internal security structures. For example, the Budapest ILEA sits within the Hungarian National Police compound.<sup>218</sup> After establishing the Budapest site, the ILEAs established a training facility in Southeast Asia, co-sponsored by the Royal Thai Government since 1998 and located on Royal Thai Police property outside Bangkok. The Bangkok ILEA's program also heavily emphasizes U.S. transnational crime priorities, offering courses on counter-narcotics, computer crimes, facility security, and intellectual property.<sup>219</sup>

In July 2000, the United States and the government of Botswana signed a bilateral agreement to establish an ILEA in Gaborone. The African ILEA is located in a building constructed by the government of Botswana for the U.S. program "on the grounds of the Botswana National Police College."<sup>220</sup> Also reflecting a transnational crime emphasis, the ILEA Gaborone's curriculum focuses on drug enforcement, border security, counter-terrorism, anti-corruption, and financial crimes.<sup>221</sup>

The ILEAs operate a graduate facility in Roswell, New Mexico for law enforcement personnel who have completed a course at one of the regional ILEAs, and two schools in Latin America: one in El Salvador and another in Peru.<sup>222</sup>

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215. *ILEA Statement of Purpose*, *supra* note 3.

216. *ILEA Budapest*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c11279.htm> (last visited Sept. 22, 2010); *ILEA Program Overview*, *supra* note 214.

217. *ILEA Budapest*, *supra* note 216.

218. *Id.*

219. ILEA Bangkok has trained commissioned law enforcement officers, as well as prosecutors and members of the judiciary from countries throughout Southeast Asia. *ILEA Bangkok*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c11280.htm> (last visited Sept. 22, 2010).

220. *ILEA Gaborone*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c11283.htm> (last visited Sept. 22, 2010).

221. *See id.*

222. *See ILEA Roswell*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/p/inl/c/crime/ilea/c11285.htm> (last visited Sept. 22, 2010).

Both Latin American programs are housed within national police facilities, and as with the Roswell ILEA, they emphasize terrorism, intellectual property rights, financial crimes, environmental crime, human trafficking, and the broader category of transnational crime.<sup>223</sup>

Thus adapting certain of the institutional strategies of their Cold War institutional predecessors, the ILEAs physically inhabit the internal security apparatuses of recipient states, locating themselves within national police facilities. They also promote transnational crime control as a means to improve social, economic, and political stability in recipient locations. According to the U.S. Department of State's International Narcotics and Law Enforcement Program and Budget Guide for 2008, the five ILEAs "have trained over 28,000 officials from over 75 countries . . ." <sup>224</sup> These classes of law enforcement officials learn to define transnational crime in terms provided by U.S. instructors and to apply crime control techniques to address those particular transnational concerns.

The ILEAs work alongside the Department of Justice's International Criminal Investigative Training Assistance Program (ICITAP). ICITAP has nineteen field offices, the largest of which employs sixty-one persons. The offices focus on a range of issues including cybercrime, intellectual property crime, human trafficking, and counter-terrorism.<sup>225</sup> Figure 2 below reflects the global scope of ICITAP's programs.

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223. See *ILEA List of Courses*, *supra* note 118. Those eligible to become students at the ILEAs in Latin America include police, prosecutors, and judicial officials from Costa Rica, Honduras, Guatemala, El Salvador, Nicaragua, Panama, Belize, the Dominican Republic, Colombia, Venezuela, Ecuador, Peru, Bolivia, and Brazil.

224. U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS & LAW ENFORCEMENT: FY 2008 PROGRAM & BUDGET GUIDE 13 (2007).

225. INTERNATIONAL CRIMINAL INVESTIGATIVE TRAINING PROGRAM (ICITAP), ABOUT ICITAP (2010) [hereinafter ABOUT ICITAP].



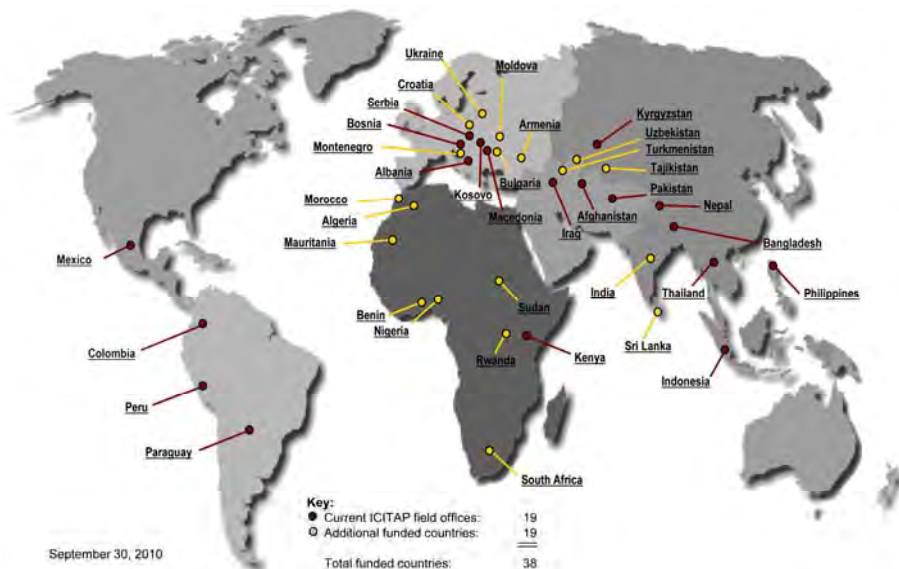


Figure 2: ICITAP Program Locations<sup>226</sup>

ICITAP, in contrast to OPDAT and the ILEAs, was established before the end of the Cold War. The U.S. Congress created ICITAP in 1985 as an explicit exception, section 534(b)(3), to the section 660 prohibition on foreign internal security assistance.<sup>227</sup> The Department of Justice then directed ICITAP to focus on foreign law enforcement reform, with an initial mission to train police forces in Latin America, as a response to multiple crises in the region involving human rights abuses by security forces, discussed briefly in Subsection II.A.1. ICITAP aims to foster international and regional cooperation on transnational crime, “in support of U.S. foreign policy and national security objectives.”<sup>228</sup> And, indeed, its programs primarily emphasize narcotics, money laundering, cyber-crime, human trafficking, and intellectual property appropriation.<sup>229</sup>

ICITAP too exercises pervasive influence, commands expensive financing, and is significantly involved in foreign internal security administration, but unlike OPDAT and the ILEAs, ICITAP also concentrates its consulting projects on prison administration, among other projects.<sup>230</sup> In fiscal year 2010, ICITAP

226. U.S. DEP’T OF JUSTICE, ICITAP FIELD OFFICES & FUNDED COUNTRIES (2010), available at <http://www.justice.gov/criminal/icitap/programs/icitap-world-map.pdf>.

227. BAYLEY, *supra* note 72, at 39.

228. See ABOUT ICITAP, *supra* note 225.

229. See *id.*

230. Perhaps reflecting the eclipse of ICITAP’s initial Cold War human rights mandate by transnational crime control and other prerogatives, ICITAP was implicated,

trained over 29,000 foreign participants, in over 1,000 training events, in its thirty-eight country programs worldwide.<sup>231</sup> Through these initiatives, ICITAP provides technical advice, training, mentoring, and equipment donation to foreign law enforcement agencies, and establishes internships for foreign officers with U.S. criminal justice offices.<sup>232</sup> ICITAP's programs have included the creation of a law enforcement task force in Bosnia-Herzegovina to target narcotics, human trafficking, terrorism, and money laundering.<sup>233</sup> In Indonesia, ICITAP helped develop criminal investigative capacity in cybercrime and intellectual property rights violations.<sup>234</sup>

In summary, the scope of the criminal justice export work of OPDAT, the ILEAs, and ICITAP has surpassed that of USAID's criminal justice consultants, covering an ever more expansive geographic territory. OPDAT, the ILEAs, and ICITAP work in every major region, merging the work of criminal procedure reform and transnational crime control, emphasizing U.S. transnational crime priorities.<sup>235</sup> U.S. criminal justice export draws upon models of Cold War for-

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albeit indirectly, in the scandal of the tortures in Abu Ghraib prison in Iraq. See U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF ICITAP'S SCREENING PROCEDURES FOR CONTRACTORS SENT TO IRAQ AS CORRECTIONAL ADVISORS 1 (2005) ("Following public reports of . . . prisoner abuse by military personnel at the Abu Ghraib prison in Iraq, Senator Charles Schumer wrote a letter to the Office of the Inspector General (OIG), dated June 2, 2004, in which he raised concerns that four of the corrections advisors ICITAP had sent to Iraq . . . were unqualified because of allegations of serious misconduct when they served as high-level, state corrections officials in the United States."). The resulting investigation did not find evidence that the advisers from ICITAP were directly connected to prisoner abuse. *But see Investigation of Misconduct and Mismanagement at ICITAP, OPDAT, and Criminal Division's Office of Administration: Hearing before the H. Comm. on the Judiciary*, 106th Cong. 6 (2000) (statement of Rep. Henry J. Hyde, Chairman, House Committee on the Judiciary) ("Senior managers at the Department . . . engaged in potentially criminal misconduct and serious mismanagement, and other senior managers paid no attention to the problems. . . [S]ecurity violations, visa fraud, financial mismanagement, abuse of the travel rules and regulations for self-aggrandizement, preselection and favoritism for some employees, were the norm in . . . [ICITAP and OPDAT].").

231. See ABOUT ICITAP, *supra* note 225.
232. See *id.* ICITAP often subcontracts its work to specialist law-enforcement organizations within the U.S. government and to private contractors. BAYLEY, *supra* note 72, at 39.
233. See *ICITAP Europe and Eurasia*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/icitap/> (follow "Our Programs" hyperlink) (last visited Sept. 22, 2010).
234. See *ICITAP Asia and Pacific*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/icitap/programs/asia-pacific.html> (follow "Our Programs" hyperlink) (last visited Sept. 22, 2010).
235. See *ILEA Program Overview*, *supra* note 214.

eign internal security training to facilitate a post-Cold War regime of global governance through crime: inhabiting foreign internal security structures, framing global social concerns in terms of transnational crime, and providing incentives to foreign states to address U.S. priorities through criminal justice frameworks. The following Part will explore the range of other effects associated with U.S. criminal justice export and with this regime of U.S.-dominant global crime-governance, paying particular attention to the most heavily targeted states in Central America.

### III. U.S. CRIMINAL JUSTICE EXPORT ON THE GROUND

What outcomes has U.S. criminal justice export—through the fusion of transnational crime control and criminal procedure reform—generated in recipient states? There are at least four sources that may offer insight into this question: (1) internal U.S. program reports; (2) performance of reformed criminal justice mechanisms; (3) documented public perceptions in recipient states; and (4) comparative results with respect to particular measures (e.g., interpersonal violence) in similarly situated locations, some of which have been recipients of U.S. criminal justice export and others of which have not. In this Part, I will begin to consider three of these sources, leaving the last approach to this inquiry for future work.<sup>236</sup>

First, as to the internal evaluative reports of U.S. criminal justice export programs themselves: These accounts do not illuminate much regarding the actual effects associated with U.S. criminal justice export projects, as will be demonstrated in the following Section. The authors of these reports have sought to structure evaluative measures so as to ensure “success,” setting readily achievable but ultimately superficial training or legal reform targets. Internal evaluators also purport to tie particular criminal justice reforms to lofty goals such as increased stability or security, where no persuasive empirical connections are established. So although programs’ self-evaluations routinely reflect at least short-term achievement of self-defined goals, they illuminate little regarding the actual outcomes in affected states.

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236. In order to reach further definitive conclusions about the outcomes generated by U.S. criminal justice export, both within the United States and abroad, the fourth noted evaluative approach might also assess the impact of U.S. criminal justice export programs as against the counterfactual scenario in which such programs did not exist. An inquiry along these lines might commence with a comparative empirical analysis of relevantly similar locations, some of which had been recipients of particular forms of U.S. criminal justice aid and others of which had not. Given the numerous and complex variables involved, it would not be easy to carry out an analysis of this kind, and a systematic comparative inquiry of this sort is beyond the scope of this Article. However, the preceding analysis has contributed an account of the relevant processes and reforms to which to attend in any such subsequent studies.

A second source that may elucidate the effects of U.S. criminal justice export on the ground is the performance of the reformed criminal justice mechanisms. The question in this context is whether the reformed mechanisms are functioning as intended. Do these mechanisms—reformed adversarial criminal procedures, for example—function such that they actually have the potential to generate the intended results: improved fairness, efficiency, or social stability? On this point, independent case studies reveal that in Central America, the region most intensively targeted for U.S. criminal justice export, U.S.-promoted reforms have had decidedly mixed effects. While prosecutors' offices and budgets have dramatically increased, the relevant procedural mechanisms are often sufficiently dysfunctional as to be unable to generate many of the anticipated positive outcomes. These accounts also suggest that U.S.-promoted initiatives may in fact exacerbate pre-existing problems by diverting scarce resources to criminal procedure reforms that fail to function as promised. These failings occur both in the U.S. context—as elaborated by criminal law scholar William Stuntz and legal historian John Langbein—and abroad. This may in turn suggest that there is no procedural quick fix, whether adversarial, inquisitorial, or otherwise, for profound social problems that manifest in the criminal justice context.

A third point of interest in evaluating U.S. criminal justice export is the documented public perception of U.S. criminal justice export in recipient states. Public perceptions reflect whether the relevant programs have succeeded politically, through democratic indigenization of the proposed reforms or otherwise. On this point, research institutes, scholars, activists, and investigative journalists in recipient states have drawn public attention to illiberal and anti-democratic law enforcement activity and a mounting crime control crisis, left largely unaddressed by U.S. transnational crime and procedure reform initiatives. U.S. criminal justice export has directed recipient state attention to U.S. transnational crime priorities—intellectual property appropriation, terrorism, and cybercrime, among them—that are orthogonal to local concerns in many recipient locations. In certain recipient states there is acute awareness and even outrage about the ways in which U.S. criminal justice export violates principles of self-determination and democracy; it induces foreign states, along the lines examined in Part II, to attend to U.S. priorities at the possible expense of the domestic public interest.<sup>237</sup> Distinct from the impression conveyed by the relevant programs' internal evaluative reports, the court of public opinion largely tells a story of failure.<sup>238</sup>

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237. See, e.g., VELÁSQUEZ, *supra* note 5, at 246 (“[T]his reform [in Colombia] was not the product of free debate of ideas or criminal-political discussion on the part of academics and legislators, instead it emerged as a product of the open and declared imposition on the part of foreign powers that, in the middle of a modern crusade that they have put on the scene, now they also determine when, how, and on what subjects we should legislate in our countries.”).

238. See *infra* Section III.B. To claim that U.S.-promoted reforms have failed in certain ways is not to mark their failure against “success” in other locations. As compara-

In the remaining pages of this Part, I will consider the first three of the four above-noted sources of evidence regarding the outcomes generated by U.S. criminal justice export. The following Subsections will first address U.S. programs' unrevealing reports of success, and then discuss competing accounts of criminal justice landscapes associated with U.S. projects in Central America, with particular attention to El Salvador, Guatemala, and Honduras. The analysis in this Part demonstrates that U.S. criminal justice export has encountered serious difficulties (parallel in several respects to problems prevalent in U.S. criminal justice systems), and remains disconnected from addressing the harms most disruptive to recipient locations.

### A. *Unrevealing Measures*

While internal evaluations of U.S. criminal justice export routinely result in reported "successes," these do not reference the sort of criteria that one might imagine would indicate achievement of relevant goals, such as reduced violence, improved prosperity, increased investment in light of greater stability, or an overall more efficient and humane operation of criminal justice systems. Rather, two misleading evaluative strategies predominate. On the one hand, U.S. programs routinely limit the ends to be achieved to narrow but realizable training targets; targets that effectively serve as both the means and ends of the proposed reforms. This ensures that the limited targets identified will be achieved, and hence the programs are deemed "successful," even if such "success" comes irrespective of articulating or striving to achieve independent goals. On the other hand, where means are not substituted for ends, program advocates identify grandiose aspirations, but provide no account of how the specific recommended reforms relate to the desired goals. Instead, they equate any potentially positive step toward these goals, no matter how speculative, as caused by U.S. initiatives.<sup>239</sup>

If all that is demanded of U.S. criminal justice export is that it is a stop-gap measure of U.S.-dominant global governance, then misleading evaluations may be beside the point in the short-term, or even conducive to global governance in their confirmation of "success" (since the evaluations will always be positive

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tive law scholar Jorge L. Esquirol demonstrates in his analysis of the fiction of "failure" of law reform in Latin America, the so-called failures attributed as peculiar to Latin America by many are in fact "characteristic weaknesses of liberal law." See Esquirol, *supra* note 34, at 82-83. The question is not whether recipient states are uniquely prone to legal institutional disappointment, but whether U.S.-promoted criminal justice and transnational crime control models constitute the approaches best suited to addressing the particular harms most devastating to recipient locations (as well as to parts of the United States).

239. See generally Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners* (Carnegie Papers Rule of Law Series, Paper No. 55, 2005) (discussing the broader problem of means-ends substitutions in rule of law promotion).

as they will always meet the means-end test). However, if the achievement of purported crime-reducing and stability-enhancing outcomes matter, and if the legitimacy of the relevant programs is of interest, then these evaluative limitations are immediately significant.

### 1. Substituting Means for Ends

The first of these misleading evaluative trends originates in a specific institutional assessment model associated with corporate management theory, described in that literature as “Managing for Results.” Managing for results was designed to be a comprehensive management method of focusing “missions, goals, and objectives” in the private sector to improve efficiency, but increasingly this model has been applied to U.S. government bodies.<sup>240</sup> Managing for results “establishes the *accomplishment* of . . . goals and objectives as the primary endeavor for the organization, and provides a systematic method for carrying out that endeavor.”<sup>241</sup> This framework generally has three levels: strategic “objectives,” each of which connects downward to several “intermediate outcomes,” which in turn correspond to several “performance indicators.”<sup>242</sup> Objectives are to be selected in a manner that generates regularly measured results and outcomes that satisfy the objectives, creating strong incentives to conceptualize and define limited, readily achievable objectives.<sup>243</sup> The managing for results approach tends to encourage organizations to adopt a limited institutional vision and to assess organizational performance without regard for the broader range of programs’ possible effects. This trend is reflected in the work of a range of rule of law development projects, and as leading democracy promotion expert Thomas Carothers reveals: “[W]hen faced with strict, narrow criteria for success, aid officers . . . design projects that will produce quantifiable results ra-

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240. See Service Efforts and Accomplishments Reporting for Governments, *About SEA Reporting: Performance Management*, GOVERNMENT ACCOUNTING STANDARDS BOARD (Oct. 7, 2010 1:50 AM) [http://www.seagov.org/aboutpmg/managing\\_for\\_results.shtml](http://www.seagov.org/aboutpmg/managing_for_results.shtml); see also PETER F. DRUCKER, *MANAGING FOR RESULTS: ECONOMIC TASKS AND RISK TAKING DECISIONS* (1964) (discussing the implementation of results-based management).

241. Service Efforts and Accomplishments Reporting, *supra* note 240 (“[Managing for results] requires the (1) establishment of performance measures, (2) use, and (3) reporting of those measures; so that management, elected officials and the public can assess the degree of success the organization had in accomplishing its mission, goals, and objectives.”).

242. See *id.*

243. Legislation enacted by the U.S. Congress in the early 1990s effectively mandated that federal government agencies adopt a managing for results framework, requiring that all such agencies devise a mission statement and a set of achievable objectives against which to regularly assess and report performance. See, e.g., Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified as amended in scattered sections of 5 U.S.C., 31 U.S.C., and 39 U.S.C.).

ther than ones that are actually needed. . . [T]he indicators become established and are taken to constitute the set of accepted outcomes . . . . The evaluation tail begins to wag the program dog.”<sup>244</sup>

Perhaps not surprisingly then, the managing for results evaluative method adopted by most U.S. criminal justice export programs, including OPDAT, the ILEAs, and ICITAP, reflects precise and narrow definitions of strategic objectives, intended results, and limited indicators of success. These indicators are largely disconnected from broader goals.

OPDAT, for example, has identified the following four “International Justice Sector Development Goals:”

GOAL 1: Develop the capacity of partner nations to combat terrorism and terrorist financing;

GOAL 2: Assist partner countries to control their domestic violent crime problems, including organized crime, before they are exported to the United States;

GOAL 3: Assist countries with inadequate laws to address trafficking in persons, especially women and children; and

GOAL 4: Provide development assistance to countries seeking to improve the effectiveness of their justice sector in a manner consistent with the rule of law.<sup>245</sup>

To assess whether OPDAT is meeting these four goals, OPDAT relies upon eight factors as “Measures of Performance:”

- (1) Structural Reform;
- (2) Host Government Commitment;
- (3) Positive Impact on Operational Interests of the Justice Department;
- (4) Decrease in Reported Human Rights Violations;
- (5) Quantitative and Qualitative Improvements in the Administration of Justice;
- (6) Judicial Independence;
- (7) Integration and Balance; and
- (8) Tools for Criminal Justice Reform.<sup>246</sup>

OPDAT’s selection of these factors to measure progress toward its goals entails, predictably, a means-ends substitution because several of OPDAT’s “measures” are properly considered “means” rather than “measures” of performance. For instance, OPDAT defines Measure 1—“Structural Reform”—as

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244. THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 294 (1999).

245. See *OPDAT Strategic Plan*, *supra* note 93.

246. See *id.*

the development and implementation in the recipient country of standards of conduct for justice sector workers and disciplinary mechanisms. OPDAT defines Measure 8—“Tools for Criminal Justice Reform”—as “penal codes, codes of procedure and investigative techniques.” These same codes and standards of conduct are central *means* by which OPDAT intends to achieve its ultimate goals (e.g., Goal 4—improve the effectiveness of recipient states’ respective justice sectors).

Structural reform itself cannot measure the embrace of the “rule of law” or capacity “to combat terrorism” or to “control . . . crime problems.” Instead, to function as a persuasive measure, there must be some account of a causal relationship that connects any particular structural reform (existence of a prosecutorial code of conduct or disciplinary mechanism) and the desired outcome (presumably internalization of or compliance with the code). In relying upon these means of reform—basically, revised codes—as measures of performance with respect to broader goals of crime reduction, OPDAT substitutes means for ultimate ends. In so doing, OPDAT ensures at least partially favorable program assessment on the terms of the managing for results model since success is guaranteed merely by OPDAT’s promotion of revised codes (among the core means by which OPDAT aims to accomplish its work).

Some of OPDAT’s other measures would more appropriately be classified as predicate factors ensured prior to even beginning a project. Measure 2—Host Government Commitment—is simultaneously noted by OPDAT as a criterion that must be in place before undertaking a project. According to OPDAT’s Strategic Plan, the “concrete assurances of support and ‘buy-in’” of recipient country officials “are a condition precedent to OPDAT participation at any level of assistance.”<sup>247</sup> Similarly, Measure 3—Positive Impact on Operational Interests of the Department of Justice—is a prerequisite for OPDAT involvement. OPDAT will not even undertake a project unless it will have a “positive impact on [the] operational interests of [the Department of Justice].”<sup>248</sup>

Virtually all of OPDAT’s reported “achievements” define success in reference to trainings conducted,<sup>249</sup> though it is entirely unclear how these trainings resulted in achievement of any of OPDAT’s afore-noted goals. Further, “success” according to four of OPDAT’s performance measures (1, 2, 3, and 8) is as-

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247. *See id.*

248. *See OPDAT Strategic Plan, supra* note 93. (“OPDAT must be prepared to articulate the reasons why it is in the interest of the Department to undertake a criminal justice assistance project in a particular country.”).

249. *See OPDAT Achievements, supra* note 202 (noting among its “achievements” an Anti-Gangs training workshop in El Salvador for officials from El Salvador, Guatemala, Chile and Mexico to teach them how to manage gang violence within the criminal justice sector).



sured simply by virtue of OPDAT undertaking a training or code promotion project.<sup>250</sup>

The ILEAs likewise identify a set of ambitious goals—“enhanc[ing] the functioning of free markets through improved . . . law enforcement,” and “increas[ing] social, political, and economic stability by combating narcotics trafficking and crime.”<sup>251</sup> But the ILEAs then measure success in reference to the number of trainings administered and students graduated rather than in terms of other more substantive criteria such as crime reduction, improved police-civilian relationships, quality of life improvements in neighborhoods to which officers return, or even measurable changes in officers’ attitudes regarding corruption. Specifically, the ILEAs use students’ “critiques and end-of-session reports by instructors and program coordinators” following trainings as assessment tools.<sup>252</sup> No explanation is provided as to how the ILEAs’ training will promote rule of law or crime reduction: Success is predicated instead on measuring the “professional development of graduates” which has yielded, according to the ILEAs, “very positive results.”<sup>253</sup> If students and instructors favorably review trainings in which they participated, then the ILEAs claim success vis-à-vis their goals, even if, as may be the case, the trainings do not even impact, or may in fact undermine, social stability.

ICITAP’s evaluative framework similarly reflects a limited set of objectives designed to ensure “success.” ICITAP’s goals are to “develop professional and transparent law enforcement institutions that protect human rights, combat corruption, and reduce the threat of transnational crime and terrorism.”<sup>254</sup> Central to the realization of these goals is building or “improving” foreign Law Enforcement Training Academies. Yet, the indicated objectives for Law Enforcement Training Academies involve only the means of administering or planning to administer training.<sup>255</sup> Similarly, with regard to ICITAP’s Organizational Management and Leadership program, which ICITAP refers to as “Phase II” of its program, objectives refer to various trainings without noting any inde-

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250. There remain four additional OPDAT measures that are neither predicate factors for involvement nor means substituted as ends: decrease in rights violations, quantitative and qualitative improvements to the administration of justice, judicial independence, and integration and balance. The next Subsection will demonstrate how these latter four measurement factors are invoked in a distinct, yet still misleading manner.

251. See *ILEA Statement of Purpose*, *supra* note 3.

252. See *ILEA Program Overview*, *supra* note 214 (discussing ILEA Development and Evaluation).

253. See *id.*

254. See *ABOUT ICITAP*, *supra* note 225.

255. See *Our Expertise*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/icitap/expertise/> (last visited Sept. 22, 2010).

pendent outcomes the programs seek to bring about.<sup>256</sup> Where ICITAP articulates independent rule of law promotion goals, no explanation is provided of how trainings or donated technology facilitate ICITAP's claims to "eliminate human rights violations by the police" or "better coordinate with the community to create a sense of security, trust, and partnership."<sup>257</sup>

It is not merely that measures of success are inadequate because they indicate that a sub-goal is achieved without reference to whether larger goals have been achieved. Larger goals, of course, are often difficult to measure, and sub-goal measurement may be the only way to glean whether the larger goal has been advanced. The chief flaw in U.S. criminal justice export's internal evaluations is that the relevant sub-goals and measures—such as quantity of trainings conducted and student end-of-session teaching evaluations—bear no meaningful relationship whatsoever to the larger, less readily measurable goals of increased stability and security. The sub-goals are not defensible proxies for the larger, less measurable goals (or at least have not yet been so defended), but instead reflect a convenient substitution of means for ends.

## 2. Demanding Leaps of Faith

Where meaningful independent goals are established by U.S. criminal justice export programs, that is, when means such as training targets are not substituted for ends, the programs' claims regarding their success in meeting these goals are unduly optimistic: Claims of success take for granted the value of U.S. efforts and confuse weak associations of any *possibly* positive developments with their work as generated by U.S. programs. U.S. criminal justice export programs recommend a set of practices: adversarial procedures, lengthy prison-based punishment, plea bargaining as a tool to reduce system backlogs, and above all, specific transnational crime priorities. Nevertheless, no reasoned theory explains how these practices will concretely benefit recipient states or other interests. Rather, U.S. criminal justice export programs merely *assume* these practices will bring about stability, reduced crime, and economic growth. In some contexts, this adherence to U.S. priorities manifests as an unwavering allegiance without consideration of actual effects on the ground, and wholly lacks any empirically or theoretically substantiated causal story connecting U.S.-promoted reforms to pledged outcomes. In other instances, the confusion of weak association with causation functions as support for uncritical attributions of success to U.S. projects—demanding, in effect, leaps of faith.

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256. See *Phase II: Development of Procedures, Curriculum, and Management Training*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/icitap/expertise/> (last visited Sept. 22, 2010) (on file with author).

257. See *Transition to Democratic Policing Development Program Impact Measures*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/icitap/expertise/> (last visited Sept. 22, 2010) (on file with author).

OPDAT's "performance measures" not already analyzed in terms of means-ends substitutions serve as a telling example. Once again, these performance measures include: Decrease in Reported Human Rights Violations (Measure 4); Quantitative and Qualitative Improvements in the Administration of Justice (Measure 5); Judicial Independence (Measure 6); and Integration and Balance (Measure 7). OPDAT defines each of these four evaluative categories broadly enough to permit any potentially positive justice sector development within a recipient country to fall within one evaluative category or another. As an example, a "reduction in the average length of time arrestees spend in pretrial detention" over a period would suffice to confirm a "decrease in reported human rights violations," Measure 4. On these terms, a decrease in human rights violations would include a reduction in the length of time between the issuance of criminal charges and conviction, even if the time reduction reflected shortcutting criminal procedure protections rather than administering fair or effective new procedures. Correspondingly, Measure 5—Quantitative and Qualitative Improvements in the Administration of Justice; Measure 6—Judicial Independence; and Measure 7—Integration and Balance, are defined so broadly as to encompass *any* change in the recipient country, ranging from reduced duplication of functions, to increased prosecutions or incarcerations.<sup>258</sup> But increased prosecutions or incarcerations might actually reflect human rights violations through police or prosecutorial overreaching, or increased criminal conduct, rather than the administration of justice gains OPDAT's measure implies.

Of equal significance, no explanation is provided as to why any indicator should be attributed to OPDAT's prosecutor training, its draft model codes, or its other projects. Nonetheless, in its reports of "Achievements," OPDAT routinely takes credit for what it construes to be improvements resulting from its programs. One recent "achievement" for OPDAT involved the sentencing on January 18, 2008, by a three-judge panel of the Serbian Belgrade District Court of four "organized crime gang members" to "more than 460 years imprisonment." OPDAT reports that this "verdict is one of the most important organized crime verdicts rendered in Serbia, and represents how strong both the Organized Crime Prosecutor's Office and the Organized Crime Court have become *with Department of Justice Assistance*."<sup>259</sup> While there may be a weak association between OPDAT's presence in the country and an enhanced sentence, no causal account is offered to attribute such sentences to OPDAT's projects or even to overall justice sector improvements. Still, OPDAT operates on this assumption, and confuses imprecise associations of this sort with causal connections to reinforce its assumption.<sup>260</sup>

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258. See *OPDAT Strategic Plan*, *supra* note 93 (noting factors to be taken into account in developing performance indicators for specific Program Proposals and Work Plans).

259. See *OPDAT Achievements*, *supra* note 202 (emphasis added).

260. U.S. foreign criminal justice consultants are not unlike other rule of law promoters in this regard. Carothers has also drawn attention to this tendency to mistake

ICITAP also claims that its programs have a major role in promoting democracy and controlling transnational crime, but fails to explain why any positive transformations in host countries should be credited to ICITAP's work. ICITAP instead confuses the association between ICITAP presence and all in-country developments as a causal connection and proceeds to label its work successful.<sup>261</sup> ICITAP's Project Overview for El Salvador, for example, claims that the performance of El Salvador's police forces "has improved dramatically since the initiation of ICITAP's efforts."<sup>262</sup> ICITAP notes the "steady reduction of crime in most categories and the striking reduction in the number of kidnappings, armed robberies and truck hijackings."<sup>263</sup> No explanation is provided that links truck hijacking or robbery reduction to ICITAP's trainings. And, critically, the reduction in crime reported by ICITAP bolsters ICITAP's credibility by excluding, as the following Section illustrates, the many categories in which crime actually increased.

The self-evaluation of U.S. criminal justice export thus fluctuates between substituting training targets for independent ends and the unreasoned attribution of any possibly positive development to U.S. projects. Where outcomes are irrefutably disappointing, U.S. criminal justice exporters call for patience, with faith that the tide will turn.<sup>264</sup> More than a decade and a half into a nearly global-scale program of extensive U.S. transnational crime control and procedure reform training, the Department of Justice reports that transnational crime is increasing rather than decreasing (though as discussed in Section II.B, it is unclear whether reliable measures of the incidence of transnational crime even exist). In light of presumed increases in transnational crime, the Department concludes that further trainings will continue to respond to and repel "transnational criminal trends."<sup>265</sup> As a consequence of unjustified faith in U.S.-

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general correlations with causation in the context of USAID democracy promotion work: "[I]f something good happens in the domain in which an aid project is working, the aid provider automatically takes credit for it whether or not there is any plausible causal link." CAROTHERS, *supra* note 244, at 295.

261. See ABOUT ICITAP, *supra* note 225.

262. See ICITAP El Salvador, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal/icitap/expertise/> (last visited Sept. 22, 2010) (on file with author).

263. See *id.*

264. See, e.g., *Hearing Before the Subcomm. on Terrorism, Narcotics, and Int'l Operations of the S. Comm. on Foreign Relations*, 103d Cong. 69 (1994) (statement of John J. Coleman, Assistant Administrator for Operations of the U.S. Drug Enforcement Agency) ("[W]e need to be somewhat patient. . . . [W]e cannot expect miracles overnight. [Colombia has] changed their legal system. They have basically adopted a U.S.-based or U.S. style legal system in Colombia. Despite the great frustrations . . . we are making some progress on some levels from time to time.").

265. See *United States Department of Justice: Criminal Division Office of Overseas Prosecutorial Development Assistance Training*, EMBASSY OF THE UNITED STATES, MOS-

promoted reforms and misleading evaluative approaches, the actual effects of U.S. criminal justice export are little understood by program advocates. These misleading evaluative approaches may bolster self-perceived successes, but they reveal almost nothing about the programs' impact on crime and development in affected regions or in the United States.

*B. Harms Associated With U.S.-Sponsored Reforms*

In contrast to U.S. programs' self-evaluations, case studies conducted by independent researchers suggest that U.S.-sponsored projects divert much-needed resources to U.S. priorities, with little attention to the problems most concerning to recipient states. Once in place, the reforms are believed to be associated with a set of unanticipated adverse consequences, including law enforcement abuses and persistent procedural dysfunction, not entirely unlike the disfunction in the United States noted by legal commentators. A detailed study of the outcome of any particular program, and of the counter-factual scenario in which such a program had not occurred is beyond the scope of this Article and will be reserved for future work. The remainder of this Section will survey the available evidence—from independent research institute case studies, comparative law scholarship, investigative journalists' accounts, and local independent non-governmental organizations' reports—concerning justice sector developments associated with U.S. initiatives. The analysis will focus primarily on U.S. initiatives in El Salvador, Guatemala, and Honduras, states that have been especially heavily targeted by U.S. programs.

1. Incongruous Crime Control Concerns

There is a dramatic incongruity between U.S. transnational crime priorities and the most pressing social and crime problems in recipient states in Central America. Over the post-Cold War period of intensive U.S. criminal justice export (emphasizing transnational crime including intellectual property appropriation, cybercrime, financial crime, unauthorized migration, and terrorism), interpersonal violence has been a severe source of harm and instability in affected states. Murder, theft, and rape are commonplace in the most intensely targeted Central American countries.<sup>266</sup> Poverty and joblessness are also rampant; migration flows and market restructuring have decreased opportunities for rural employment relative to urban employment.<sup>267</sup> Slums in cities around outsourced

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cow, RUSSIA, <http://moscow.usembassy.gov/justice.html> (last visited Oct. 28, 2010) (“With transnational crime increasing at exponential rates, the challenge of providing such assistance becomes an ever greater component of DOJ’s international obligations.”).

266. AYRES, *supra* note 29; U.N. OFFICE ON DRUGS & CRIME, CRIME & INSTABILITY: CASE STUDIES OF TRANSNATIONAL THREATS 24, fig.17 (2010).

267. *See id.* at 12-13.

manufacturing zones have metastasized and crime and gang activity are most severe in these locations.<sup>268</sup> Economic instability and extensive unemployment have led many, men in particular, to turn to criminalized economic activity and gangs to support themselves and their families.<sup>269</sup> The associated violence has had a distressing effect, disproportionately harming the poor.<sup>270</sup> The murder rate per 100,000 inhabitants in El Salvador, Guatemala, and Honduras is persistently high by world standards. According to the U.N. Office on Drugs and Crime, between 2003 and 2008, El Salvador's murder rate ranged from 51 to 64 murders per 100,000 inhabitants.<sup>271</sup> During the same period, Guatemala's murder rate increased from 34 to 61 murders per 100,000 inhabitants.<sup>272</sup> Honduras likewise experienced an increase of 31 to 49 murders per 100,000 inhabitants.<sup>273</sup> By stark contrast, over these same years, the murder and non-negligent manslaughter rate in the United States remained constant at around 5 per 100,000 inhabitants.<sup>274</sup> Despite the gravity and extent of interpersonal violence in these recipient locations, these forms of harm are not among the crime priorities emphasized by U.S. criminal justice exporters in their work in Central American states or elsewhere.

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268. See CLARE RIBANDO, CONG. RESEARCH SERV. RS 22141, GANGS IN CENTRAL AMERICA, CRS-1 (2005); Dennis Rodgers, *Slum Wars of the 21st Century: The New Geography of Conflict in Central America* 7 (Crisis States Research Ctr., Working Paper No. 10, 2007).

269. See Rodgers, *supra* note 268. Migration flows from Central America have also led to increased reliance on remittances from rich northern countries, driving ever greater numbers of people to hinge their hopes for a better economic future on immigration. In El Salvador, for example, remittances from Salvadorans working in the United States to their families in El Salvador are approximately three billion dollars per year, a major proportion of the country's GDP, with 22.3% of families in El Salvador living off of such remittances. See Marcela Sanchez, *Putting Remittances to Work*, WASH. POST, Dec. 9, 2006, at A19; Bureau of Western Hemisphere Affairs, *Background Note: El Salvador*, U.S. DEPARTMENT OF STATE, (July 14, 2010), <http://www.state.gov/r/pa/ei/bgn/2033.htm>.

270. See Alessandra Heinemann & Dorte Verner, *Crime and Violence in Development: A Literature Review of Latin America and the Caribbean* 7 (World Bank Pol'y Research, Working Paper No. 4041, 2006) ("[T]he more assets an individual or household can acquire and the better they manage them, the less vulnerable they are.") (citation omitted); see also *Mano Dura Wave Increases Repression Against Crime in Central America*, COAV NEWSROOM (May 8, 2006), <http://www.comunidadessegura.org/?q=en/node/11786>.

271. See U.N. OFFICE ON DRUGS & CRIME, *supra* note 266, at 24, fig.17.

272. See *id.*

273. See *id.*

274. See U.S. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES BY VOLUME AND RATE PER 100,000 INHABITANTS, 1989-2008, tbl.1 (2008), [http://www2.fbi.gov/ucr/cius2008/data/table\\_01.html](http://www2.fbi.gov/ucr/cius2008/data/table_01.html).

As interpersonal violence plagues recipient states, what have been program participants' reactions to the notable incongruities between U.S. transnational crime priorities and local concerns? In one case, Francisco Gómez, a mid-level Salvadoran police officer who attended the El Salvador ILEA's "Law Enforcement Management Development Program" in early 2007, reported that though his experience at the ILEA was positive, it focused in significant part on counter-terrorism: "This [terrorism] isn't a problem in El Salvador," Gómez explained, "but I suppose it could be."<sup>275</sup>

In other instances, the focus on certain categories of transnational crime may direct recipient states' resources to "crime" problems that are not as obvious candidates for criminalization as U.S. policy would suggest, or for which there is at least reason to believe developing states would weigh the pros and cons differently.<sup>276</sup> As one example, street vending of bootleg CDs, DVDs, cigarettes, and other products constitutes a significant sector of the urban economy in many states and provides employment to thousands of individuals; the U.S. transnational crime control model, though, views this as intellectual property crime.<sup>277</sup> Criminalizing the livelihood of street vendors imposes a significant hardship upon affected persons in recipient states, particularly when underemployment is widespread.<sup>278</sup>

Even narcotics crime, though undoubtedly an area of criminalized market activity disruptive to the social stability of many if not all places where it occurs, might generate quite different policing or regulatory strategies were developing states' (and under-developed regions of rich states') interests to take center stage. Despite the harms caused by narco-trafficking in much of the world, it is widely recognized that "the production, sale, and export of narcotics are closely interwoven with the economies and political systems of many countries. These

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275. Wes Enzinna, *Another SOA? A U.S. Police Academy in El Salvador Worries Critics*, NACLA REP. ON THE AMERICAS, March/April 2008, at 5, 8 (2008).

276. See, e.g., CAROLYN NORDSTROM, *GLOBAL OUTLAWS: CRIME, MONEY, AND POWER IN THE CONTEMPORARY WORLD* 3-24 (2007) (examining the dependence of a subset of citizens in developing countries on criminalized markets for survival).

277. See *Landlords To Face Fines for Ignoring Sales of Fakes*, BANGKOK POST, Sept. 21, 2009; *Piracy Clash in Patpong: Vendors Lash Out with Sticks, Bottles, Stones*, BANGKOK POST (Thailand), May 8, 2009 (reporting organized resistance to intellectual property crime enforcement against street vendors and explaining that Thai officials declared a "crack down on intellectual property piracy after the United States put Thailand on special watchlist of nations that fail to crack down on copyright and patent violations"); Afifah Kusumadara, Faculty of Law, Brawijaya Univ., Indonesia, *Problems of Enforcing Intellectual Property Laws in Indonesia*, Presentation Before the International Association of Law Schools Conference 203 (Apr. 10-12, 2008), available at <http://www.ialsnet.org/meetings/business/MasterBookletHamburg2.pdf>.

278. Cybercrime is another U.S. priority emphasized in foreign training curricula, though it is not among the most pressing forms of social disorder plaguing many recipient countries.

activities are an important source of foreign exchange, income and employment in the affected states.<sup>279</sup> Consequently, the U.S. approach of confronting narcotics—primarily through criminalization, eradication, arrests, prosecutions, and lengthy incarceration—may not be the approach best suited for recipient states in which at least certain narcotics, if regulated otherwise, might provide a vehicle for greater economic and political stability.

Of separate concern, once recipient states adopt anti-terrorism or intellectual property legislation, when recipient states' crime problems and U.S. priorities are incongruous, U.S. transnational crime initiatives may be directed against vulnerable and non-threatening targets, at times to politically repressive ends. For example, among the first defendants charged under El Salvador's new terrorism provisions, adopted at U.S. urging in 2006, were political protestors challenging the privatization of water resources. These protestors faced up to sixty years of imprisonment under the law.<sup>280</sup> Following the implementation of U.S.-promoted intellectual property crime measures in El Salvador, former Salvadoran President Saca identified Salvadoran street vendors selling pirated goods as criminals, and he proclaimed that "[the vendors] are terrorists—the correct word is 'terrorist' . . . . Anyone who sells something illegal on the streets must go to prison."<sup>281</sup>

This trend is not unique to El Salvador or to Central America: In Russia, the government has used intellectual property crime legislation as a means to target civil society advocates.<sup>282</sup> Election monitoring, human rights, environmental, and immigrants' rights groups have been pursued for "software piracy," and even where prosecutions were ultimately dropped, government officials seized organizations' reports and computers.<sup>283</sup>

Although the precise motivations of repressive domestic "tough on crime" policies of this sort may be difficult to disentangle, U.S. criminal justice export has ushered in a new realm of criminality where recipient states may act in ways in excess of, or unintended by, the legislation's architects. The impact of the associated increase in incarceration rates in El Salvador further burdened the

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279. Rensselaer W. Lee, III, *Transnational Organized Crime: An Overview*, in *TRANSNATIONAL CRIME IN THE AMERICAS*, *supra* note 107, at 1, 5.

280. *Salvadorans Face Terror Charges for Opposing Water Privatization*, *DEMOCRACY NOW* (Aug. 1, 2007), [http://www.democracynow.org/2007/8/1/salvadorans\\_face\\_terror\\_charges\\_for\\_opposing](http://www.democracynow.org/2007/8/1/salvadorans_face_terror_charges_for_opposing).

281. Wes Enzinna, *Global War on Terrorism: El Salvador*, *THE NATION*, Dec. 31, 2007 (quoting President Saca's remarks at a press conference at which Enzinna was present).

282. See Clifford J. Levy, *Russia Uses Microsoft To Suppress Dissent*, *N.Y. TIMES*, Sept. 11, 2010, at A1.

283. See *id.*



country's crisis-stricken prisons, which are designed for 7,000 inmates but as of September 2007 held 17,000 inmates.<sup>284</sup>

While no causal connection should be assumed between the proliferation of U.S. criminal justice export programs and regional crime trends, during the relevant period, at least in Central America, interpersonal violence and destabilizing street crime have consistently plagued the region.<sup>285</sup> Further, in El Salvador and elsewhere, U.S.-promoted transnational crime laws have been invoked to repressive ends, rather than to counter threats to citizens' well-being. And, in fact, substantial criminal justice assistance provided over a twenty-year span may have exacerbated persistent interpersonal harms by diverting resources from exploring context-sensitive approaches to containing violence and insecurity to U.S.-promoted transnational crime control and criminal procedure reform.

## 2. The Costs of New Criminal Procedures

In the face of persistent crime waves in states throughout Latin America, a central component of U.S.-sponsored criminal justice reform has been the transformation of previously inquisitorial justice systems to adversarial, U.S.-style models. As explained in Subsection II.C.3, over the course of the 1990s and the beginning of the twenty-first century, many Latin American, ex-Soviet, and other states carried out variations of inquisitorial to adversarial procedure reforms with U.S. support.<sup>286</sup> Roughly one billion dollars from outside the region has been spent to facilitate these reforms, with funds coming from the U.S. government, the World Bank, the Inter-American Development institutions, other

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284. Will Grant, *El Salvador Addresses Jail Crisis*, BBC NEWS, Sept. 14, 2007, <http://news.bbc.co.uk/2/hi/americas/6994399.stm>; see also MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* 175-78 (2008) ("Overcrowding in Latin American prisons has reached unprecedented levels . . . . Peru's new anti-terrorism measures coincided with a 50% increase in prison populations."); Mark Ungar, *Prisons and Politics in Contemporary Latin America*, 24 HUM. RTS. Q. 909, 910 (2003) ("The most obvious cause of Latin America's inhumane prison conditions and violence is an incarceration rate that sharply increased throughout the region in the 1990s.").

285. Lisa Bhansali & Christina Biebesheimer, *Measuring the Impact of Criminal Justice Reform in Latin America*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE*, *supra* note 8, at 301, 309 ("[C]rime and violence rates have not decreased noticeably after reforms were implemented. Crime rates, however, are notoriously volatile according to factors that have little to do with the criminal justice system (the unemployment rate, for example), and so tracing the impact of criminal process reforms on these rates is very difficult.").

286. See Langer, *supra* note 7.

donor nations, and the U.N. Development Program.<sup>287</sup> This procedural reform wave was in part organized by USAID and is now implemented with the assistance of OPDAT, the ILEAs, and ICITAP. With the increased role of OPDAT, the ILEAs, and ICITAP, procedure reform projects continue to be a key part, though a lesser proportional focus of U.S. criminal justice export. But despite OPDAT, the ILEAs, and ICITAP's preferred emphasis on transnational crime control, the procedural reforms continue to impact the administration of justice in Latin America (and other regions) in significant respects, and with emphatically mixed results.

What are the initial indications about the outcomes of the U.S.-sponsored Latin American wave of procedure reforms? While results vary from country to country, there is a general perception that in large part the reforms have fallen short in delivering promised outcomes, and that the procedures are often unable to function as intended.<sup>288</sup> In some states, delays in processing cases persist or have worsened.<sup>289</sup> In others, plea bargaining eclipsed almost entirely the goal

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287. See PETER DESHAZO & JUAN ENRIQUE VARGAS, *JUDICIAL REFORM IN LATIN AMERICA: AN ASSESSMENT* 3 (2006).

288. See MAURICIO DUCE J., *LA ORALIZACIÓN DE LAS ETAPAS PREVIAS AL DEBATE: LA EXPERIENCIA DE LA CIUDAD DE QUETZALTENANGO EN GUATEMALA [MOVEMENT TO ORAL LEGAL PROCEEDINGS: THE EXPERIENCE OF THE CITY OF QUETZALTENANGO IN GUATEMALA]* 2-3 (2006) (author translation) (reporting a general perception that the reform in Guatemala has not been able to bring about the changes and results that were expected); *id.* at 15 (noting that the overall record is disappointing, having failed to meet the high expectations created, largely due to poorly functioning new systems that are slow, lack transparency, pay scant attention to users, and lack independence in decisionmaking); *id.* at 13 (reporting on Hammergren's conclusions that there is general disappointment with the progress of judicial reform in the region; a need for better statistics and empirical evidence to track the issues; and a lingering question about why reform is needed as there seems to be little public demand for it).

289. See CENTRO DE ESTUDIOS PENALES DE EL SALVADOR (CESPES) [CENTER OF PENAL STUDIES OF EL SALVADOR], *SEGUIMIENTO DE LA REFORMA PROCESAL PENAL EN EL SALVADOR [MONITORING REPORT ON THE PENAL REFORM PROCESS OF EL SALVADOR]* 91 (2002-2003) (author translation) (reporting on delays in El Salvador in the face of high caseloads and inadequate models of case processing in the new system on the part of the judiciary, police and prosecutors); EDGARDO AMAYA CÓBAR & RICARDO VLADIMIR MONTOYA, CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS (CEJA) [CENTER FOR JUSTICE STUDIES IN THE AMERICAS], *INFORME DE SEGUIMIENTO DE LA REFORMA PROCESAL PENAL EN HONDURAS [MONITORING REPORT ON THE PENAL REFORM PROCESS IN HONDURAS]* 52 (2004) (author translation) (noting large numbers of open cases in Honduras pending for more than a year in the investigatory and prosecutorial stages, reflecting a tendency for cases to accumulate); DESHAZO & VARGAS, *supra* note 287, at 10-11 (reporting on a case study of the Guatemalan reform presented by Luis R. Ramírez, director of the Instituto de Estudios Comparados en Ciencias Penales de Guatemala: "Only a very small percentage of cases go to trial and even major cases sel-

of promoting oral adversarial trials.<sup>290</sup> While in Guatemala reforms were accompanied by a decrease in pre-trial or preventive detention (one of the inspirations for the reforms), in El Salvador preventive detention increased.<sup>291</sup> A recurring problem across the board is a lack of adequate data and transparent access to information about the reformed systems in order to evaluate in a rigorous manner the specific impacts of reformed procedures.<sup>292</sup>

In Guatemala, El Salvador, Honduras, and elsewhere in Latin America, procedure reforms have been met with hostility as the public perceives robust procedures to be driving crime problems, even though there is no indication that this is the case.<sup>293</sup> As a consequence, there is a “backlash” against the reforms, with recurring attempts to render substantive criminal law more puni-

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dom reach the stage of a verdict. . . . Rising levels of criminal activity . . . put enormous pressure on a legal system that is unprepared to respond.”).

290. See DESHAZO & VARGAS, *supra* note 287, at 9-10 (reporting on case study of Colombian reform presented by Eduardo Bertoni, Director of the Due Process Law Foundation, and Alfredo Fuentes, judicial program director of the Andean Community: “Although the efficiency of [Colombian] prosecutors is unquestionable in terms of resolving criminal cases in a shorter time . . . this has resulted from plea-bargaining agreements or from extracting faster confessions, as well as from receiving the lion’s share of the overall judicial budget”).

291. See MAURICIO DUCE J. ET AL., *THE IMPACT OF CRIMINAL PROCEDURE REFORM ON THE USE OF PRETRIAL DETENTION IN LATIN AMERICA* 27 (2009) (reporting a significant increase in the number of unsentenced inmates per 100,000 inhabitants in El Salvador); Bhansali & Biebesheimer, *supra* note 285, at 313-14.

292. See, e.g., ILEANA ARDUINO, *LA REFORMA PROCESAL PENAL EN NICARAGUA* [THE PENAL REFORM PROCESS IN NICARAGUA] 32 (2006) (author translation) (reporting an absence of adequate data collection to enable measurement, evaluation, and improvement of reformed systems).

293. See DUCE J. ET AL., *supra* note 291, at 31-32 (“The media has encouraged the idea that crime is on the rise . . . . Some have argued that the increase in defendants’ rights has facilitated the commission of crimes. . . . The responses have been stronger in the political arena. . . . In July 2007, a Chilean politician accused supervisory judges of ‘being responsible for the climate of insecurity in which we live.’ Another argued that ‘some judges sentences are making them a danger to society and that is unacceptable.”); see also Constance, *supra* note 176 (“In addition to facing resistance from judicial professionals, in many countries the new criminal procedures have been attacked by the media. The most frequent criticism is that new criminal procedures place too much emphasis on protecting the rights of suspects and not enough on punishing criminals. In countries that have seen a rise in violent crime in recent years, this claim tends to find a receptive audience, even where there is no clear connection between crime rates and the treatment of suspects. . . . [T]his combination of poorly implemented procedural changes and intense public anger over rising crime could have dire consequences. The reform is in danger of failing in several countries . . . .”) (internal quotations omitted).

tive, and to curtail procedural protections, to counter what is perceived as procedural laxity.<sup>294</sup>

Regardless of the inter-state variation with other results, one outcome is constant throughout the region: Pursuant to U.S.-sponsored reforms, criminal justice spending has soared and prosecutors' offices have markedly expanded. Crime-governance is an ever more prevalent feature of public discourse.<sup>295</sup> The use of imprisonment, itself costly, has also increased in the new systems.<sup>296</sup> Development experts indicate that to render procedures fully effective will "cost considerably more everywhere."<sup>297</sup>

Interestingly, the justice sector dysfunction identified in case studies of the most heavily targeted Central American states is roughly analogous in several important respects to the pathologies in U.S. criminal law administration discussed above in Subsection II.C.3, and elaborated by leading criminal and comparative law scholars.<sup>298</sup> As in the United States, recipient state justice sectors are overburdened by frequent recourse to criminal prosecution to maintain social order.<sup>299</sup> Large-scale invocation of criminal procedure protections would result in dramatic backlogs, so procedural shortcuts have become commonplace lest considerable delays occur.<sup>300</sup> Where backlogs remain, there is pressure to resolve more cases through plea bargaining.<sup>301</sup> Because crime-governance do-

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294. See MARGARET POPKIN, *PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR* 241 (2000); Bhansali & Biebesheimer, *supra* note 285, at 305.

295. See DESHAZO & VARGAS, *supra* note 287, at 16 ("Governments in the region have been spending proportionately more on the justice sectors since the reform process began . . . although the quality of services rendered does not always track with increases in budgets."); DUCE J., *supra* note 288, at 3 (noting that the Guatemalan prosecutorial budget increased five-fold between 1995 and 2005 from \$11 million to \$56 million, and that the number of prosecutors increased from 24 in 1991 to 847 in 2004); CRISTIÁN RIEGO & JUAN ENRIQUE VARGAS, *CRIMINAL JUSTICE REFORM IN LATIN AMERICA: SUCCESSES AND DIFFICULTIES* 4 (2003) ("Nowadays, for one reason or another, the political agenda in our countries seems always to be awaiting the most recent decision by some judge in a criminal trial.").

296. DUCE J. ET AL., *supra* note 291, at 30.

297. See LINN A. HAMMERGREN, *ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA* 52 (2007).

298. See Langbein, *supra* note 18; Stuntz, *supra* note 16.

299. See POPKIN, *supra* note 294, at 190; Constance, *supra* note 176.

300. In Colombia, from January 2005 to July 2007, there were 35,124 people sentenced after plea bargaining compared to only 693 sentenced after trial. This suggests that less than 2% of cases went to trial. See FISCALÍA GENERAL DE LA NACIÓN [NATIONAL ATTORNEY GENERAL], *BOLETÍN ESTADÍSTICO NO. 20, SEGUNDO TRIMESTRE 2007* [STATISTICAL NEWSLETTER, SECOND TRIMESTER 2007], at 32 (2007) (author translation).

301. See, e.g., *id.*

minates the political field, procedural protections are decried by politicians and in mainstream media outlets as too expansive. There is substantial public hostility to robust criminal procedure rights, even though these rights are seldom enjoyed in practice, and judicial enforcement of criminal procedure rights has resulted in hostility to the judiciary.<sup>302</sup> The ensuing perception of an overly robust set of criminal procedure protections impeding effective crime control results in a ratcheting up of criminal law enforcement to avoid the mistaken perception that criminal defendants are unduly benefiting from judicially enforced procedural protections.<sup>303</sup> The result, as Langbein pointedly exposes in the U.S. context, is a compromised system where defendants' rights remain severely curtailed, prosecutorial coercion is routine, and the public often suffers from a lack of transparent access to reliable information about serious crime.<sup>304</sup>

Seeking to inform and improve the reform processes, in the late 1990s an international agency staffed largely with Latin American experts, the Justice Studies Center of the Americas (CEJA in Spanish), was created to facilitate empirical research. CEJA's research aims to assist in remedying what have come to be widely perceived failures of U.S.-sponsored justice sector reforms in Latin American states.<sup>305</sup> In concert with local experts, CEJA has subsequently organized a series of careful studies of reforms across the region. The range of worries these analyses reveal again run parallel, at least in part, to defects prevalent in U.S. criminal law administration.

One major problem is the lack of available resources to support the robust and effective functioning of adversarial criminal procedures. This resource deficiency is especially acute when considering the indispensable component of an

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302. See DUCE J. ET AL., *supra* note 291, at 31-32; RIEGO & VARGAS, *supra* note 295, at 18-22; Constance, *supra* note 176.

303. See Constance, *supra* note 176; Stuntz, *supra* note 16, at 4 (noting a similar though not identical dynamic in the U.S.).

304. See Langbein, *supra* note 18, at 124.

305. CEJA's headquarters are located in Santiago, Chile and its members are the active member states of the Organization of American States. CEJA's purpose is described as follows: "Over the past twenty years, nearly every country in the region has promoted wide-reaching judicial reform programs. . . . However, there is a widespread perception that the reforms have not produced all of the desired results. Furthermore, systematic and in-depth evaluations of the changes that have been implemented thus far have not been undertaken, which has caused the strong impulse that originally accompanied the reforms to wane. JSCA [CEJA] was created in order to reverse this process and provide new impetus for the modernization of justice systems in the region." *Justice Studies Center of the Americas (Centro de Estudios de Justicia de las Americas)*, AIDS SECURITY & CONFLICT RESEARCH HUB, [http://asci.researchhub.ssrc.org/justice-studies-center-of-the-americas-centro-de-estudios-de-justicia-de-las-americas/institution\\_view](http://asci.researchhub.ssrc.org/justice-studies-center-of-the-americas-centro-de-estudios-de-justicia-de-las-americas/institution_view) (last visited Nov. 28, 2010).

effective public defender service in an adversarial criminal procedure regime.<sup>306</sup> Under inquisitorial systems, investigative and much prosecutorial authority rests with the judge, who is also responsible for securing compliance with prescribed criminal procedures. Under an adversarial system, the judge in a criminal trial acts as a neutral arbiter, in principle moderating the vigorous challenge by the defense of the case put on by the prosecutor. Because shifting investigative authority from the judge to the prosecutor simultaneously increases the authority and discretion of prosecutors and prompts judges to take less active responsibility for procedural compliance, public defender offices require additional funding and staff under an adversarial system. Otherwise, the reforms will result in serious potential unfairness for those facing criminal charges.<sup>307</sup> Support for public defender programs, however, “has been limited—despite the human rights rationale for reforms.”<sup>308</sup>

Defense lawyers “have not received the necessary training to carry out effective questioning of the evidence . . . nor have they had access to successful methods for defining defense strategies.”<sup>309</sup> Defenders also “spend most of their time in court, and thus have limited opportunities to prepare cases . . . [and to] develop autonomous investigations. This problem has not been treated in depth as part of the reform process.”<sup>310</sup> Even in terms of actual personnel capacity, defense counsel is significantly outnumbered. As of 2003 in El Salvador, there were 0.3 defense lawyers per 100,000 inhabitants, as compared with 9.9 prosecutors per 100,000 inhabitants.<sup>311</sup> In Guatemala in 2004, there were 137 public defenders as compared to 847 prosecutors.<sup>312</sup> Underfunding indigent criminal defense systems is also, of course, characteristic of U.S. criminal justice

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306. TREBILCOCK & DANIELS, *supra* note 284, at 253 (reporting high caseloads and insufficient funding in most Latin American states that undertook procedural reforms with the exception of Costa Rica: “Local officials have been reluctant to pay public defender salaries, leaving USAID to fill this role. When USAID funding has ended, salaries have sometimes not been paid.”); *see id.* at 260 (reporting a similar pattern in Romania and Estonia where defense lawyers only meet clients in the courtroom, may not talk to clients at all, and occasionally state in defense “I leave this decision to the court.” (citing Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, 9 EUR. L.J. 294 (2003))).

307. *See id.* at 260.

308. Esquirol, *supra* note 34, at 108 (“[T]he accusatorial model assumes that the sides be evenly matched. The change thus requires creating or strengthening public defenders, not only prosecutors.”).

309. RIEGO & VARGAS, *supra* note 295, at 17; *see also* CESPES, *supra* note 289, at 55 (reporting on obstacles in El Salvador to the delivery of adequate defense services).

310. *See* RIEGO & VARGAS, *supra* note 295, at 17.

311. *See id.* at 16 tbl.3.

312. DUCE J. ET AL., *supra* note 291, at 3.

administration,<sup>313</sup> but the relative poverty of most recipient states and the unfamiliarity of new procedural configurations render the inadequacy of public criminal defense particularly severe.

Other reported problems arise with the expanded purview of prosecutors, who must now conduct investigations previously facilitated by judges. But prosecutors are too underfunded and understaffed to assume this additional responsibility, even though their offices have swelled. Prosecutorial services are often unable to devote energies to learning how to navigate the new adversarial system and at the same time proficiently manage large caseloads.<sup>314</sup>

A predicament unique to states transitioning from inquisitorial to adversarial systems involves resentment on the part of institutional actors of the change in their role under the adversarial system. This resistance is not entirely surprising. For instance, whereas previously police investigators had interacted directly with the investigating judge, they are now viewed as subordinate to prosecutorial demands.<sup>315</sup> Police resentment has resulted in officers' non-compliance in some cases, producing further systemic dysfunction.<sup>316</sup> In El Salvador and Guatemala, state officials have failed to bring detained criminal defendants to trial. This leads to the further detention of individuals awaiting determination of their respective cases due to their "failure to appear," caused by the state's inability to competently administrate the new procedures (as the new process requires the physical presence of the accused).<sup>317</sup>

While there are certainly inefficiencies and fairness problems inherent in inquisitorial criminal procedures as well as adversary ones, the U.S.-sponsored

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313. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

314. See TREBILCOCK & DANIELS, *supra* note 284, at 157-58 ("Unregulated, outdated legal education produces a weak pool of potential prosecutors, while low salaries and low esteem surrounding the prosecutorial office have made it difficult to attract experienced lawyers . . . . In order to appease demanding private parties, and in the absence of instructions to act otherwise, prosecutors agree to leave open cases that might otherwise have been quickly closed; as a result, resources are wasted and . . . prosecutorial caseloads grow to unmanageable levels."); see also Bhansali & Biebesheimer, *supra* note 285, at 308 (exploring the tremendous challenge of requiring lawyers and judges trained under one procedural system to adjust to another very different one).

315. See TREBILCOCK & DANIELS, *supra* note 284, at 157-58 (describing the frustration of police and prosecutors with changes in their roles and relationships engendered by procedural reforms in El Salvador); see also DESHAZO & VARGAS, *supra* note 287, at 16 ("[R]emnants of the old inquisitorial systems still persist, with considerable recalcitrance on the part of judges, lawyers, law professors, and judicial administrative authorities to give them up . . .").

316. See DESHAZO & VARGAS, *supra* note 287, at 16.

317. TREBILCOCK & DANIELS, *supra* note 284, at 157-58; see also RIEGO & VARGAS, *supra* note 295, at 21-22 (discussing courts' issues with scheduling and failures to appear).

criminal procedural changes have not typically rendered many Latin American recipient countries' justice sectors better able to manage problems associated with interpersonal violence and related crimes. The lack of available data on the performance of reformed systems and barriers to transparent access further hinders monitoring and feedback to improve institutional functioning.<sup>318</sup> Thus while pre-existing prosecutorial approaches have been partially dismantled as a result of U.S.-sponsored reforms, the new structures do not function as intended.

In Chile, one of the few states where U.S.-style adversarial criminal justice reforms are heralded as successful, another peculiar feature (again reminiscent of the U.S. crime governance landscape) has become apparent.<sup>319</sup> Effective implementation of new procedures in Chile has required vast increases in criminal justice spending, which brought about the creation of new jails and more efficient and transparent administration of justice. Yet, alongside enhanced criminal justice spending, and though victimization surveys indicate crime in Chile has remained constant, fear of crime is greater than before. While in 2003, 44.6% of Chileans believed crime had worsened in their neighborhood in the previous twelve months, in 2007 that number increased noticeably to 53.5%.<sup>320</sup> One conclusion that might be drawn from this is that even where sufficiently sizeable resources are devoted to render adversarial criminal procedures "effective," a heavy emphasis on criminal justice institution-building and crime control (or crime governance) still carries certain risks, among them, a citizen body that suffers from an outsized fear of crime.

Comparative law scholar Jorge L. Esquirol suggests further reasons why, even if U.S.-sponsored procedural reforms achieve a certain degree of "success," such procedures may entail policy implications that are open to contestation, though these tradeoffs remain unacknowledged by U.S. criminal justice exporters: "More prosecutions and speedier trials mean a different balance between civil liberties and powers of enforcement," and the reconfigured procedures "may not eliminate any of the problems involving [judicial] discretion, simply shifting it to a different [prosecutorial] office or to officials with different titles."<sup>321</sup> As has been noted in the U.S. context, Esquirol points out that "[p]rosecutorial misconduct is especially problematic because it is difficult to redress."<sup>322</sup> Irrespective of the legal institutional idolatry manifest at times in the

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318. See, e.g., CESPE, *supra* note 289, at 56 (reporting on the refusal of key institutions in El Salvador to provide relevant data on justice sector operations, and lack of transparent access where data does exist).

319. See DESHAZO & VARGAS, *supra* note 287, at 4 ("The Chilean example is broadly viewed as the most successful in the region, given its ambitious scope, the resources dedicated to the task, and the political commitment to see it through.").

320. Gideon Long, *Is Chile Imagining a Crime Wave?*, TIME, Oct. 22, 2008, <http://www.time.com/time/world/article/0,8599,1852730,00.html>.

321. Esquirol, *supra* note 34, at 109.

322. *Id.* at 108.



promotion of adversariality, oral adversarial proceedings do not possess any magical power to quash abuses of power. The first oral trial held in Guatemala in 1994 provides a case in point, as there “were charges of bribes being paid to everyone, from the witnesses, to the judge and the prosecutor.”<sup>323</sup> According to a foreign prosecutor working in Guatemala at the time: “[d]espite the dubious quality of the evidence, the state needed and thus got a conviction to prove the new system worked.”<sup>324</sup> All the same, U.S. criminal justice exporters seize upon particular legal models and assign great hopes to adversarial procedures, excessively relying on particular procedures to bring about change, the precise contours of which remain relatively unexamined.<sup>325</sup>

In the many Latin American states where reformed procedures have proven substantially dysfunctional, vast sums of scarce public funds are devoted to criminal justice sectors that struggle to perform effectively, as those states confront pervasive street crime and widespread resource deprivation. One lesson this ought to drive home is that there may be no procedural quick fix, adversarial or otherwise, to remedy the ills that accompany overreliance on criminal law administration as a proxy for addressing head-on entrenched social concerns.

### 3. Democratic and Demotic Harms

In this context of often-dysfunctional procedural reforms and devastating interpersonal violence in multiple Central American states, U.S. criminal justice export reflects a profound democratic deficit. Although there is no record of organized opposition to the establishment of ILEAs or related U.S. criminal justice programming in many foreign locations, the creation of the Central American ILEA prompted significant public anger and resistance. This resistance suggests that whatever other effects may be associated with the Central American ILEA, it is viewed by at least some vocal citizens as a form of legal imperialism and as unwelcome there.<sup>326</sup>

Plans to establish a Central American ILEA began in 1997 in San Jose, Costa Rica, where President Clinton and the presidents of five Central American countries agreed to develop an ILEA for Latin America and the Caribbean.<sup>327</sup> Although the U.S. academy was to be located in Costa Rica, those plans en-

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323. HAMMERGREN, *supra* note 297, at 36.

324. *Id.* at 36 n.28.

325. *See id.* at 38-53 (discussing two weaknesses in U.S.-sponsored reform projects: excessive faith in the power of legal reform to create positive behavior changes and an excessive reliance on the perceived benefits of adversarial proceedings).

326. *See Enzinna, supra* note 275, at 6.

327. Committee in Solidarity with the People of El Salvador (CISPES), *ILEA Background Information* (June 12, 2006), [http://www.cispes.org/index.php?option=com\\_content&task=view&id=77&Itemid=29](http://www.cispes.org/index.php?option=com_content&task=view&id=77&Itemid=29).

countered public opposition by a coalition of Costa Rican citizen advocacy organizations. Eventually, the Costa Rican government acceded to the citizens' coalition, leading the United States to look elsewhere for a host country.<sup>328</sup> U.S. government officials then chose El Salvador, though at the time of the first public announcement of the ILEA San Salvador in 2005 by U.S. Secretary of State Condoleezza Rice, U.S. instruction of Latin American police, prosecutors and judges was already scheduled to commence.<sup>329</sup> Within a short time, the ILEA El Salvador generated organized opposition.<sup>330</sup>

Opposition to the Central American ILEA rests on three main grounds. First, ILEA opponents point to the lack of transparency and accountability associated with the ILEA program, as reflected in the ILEA's refusal to release complete course materials. The ILEA has only been willing to release general public information regarding course topics and certain lesson plans, such as the ILEA's courses on transnational crime.<sup>331</sup> ILEA administrators also refuse, for unspecified security reasons, to release lists of students who have attended the ILEA to facilitate human rights monitoring.<sup>332</sup>

The second ground of opposition to the Central American ILEA relates to feared continuity between U.S. Cold War internal security training in Latin America and the ILEA's trainings. This potential continuity is particularly disturbing to Salvadorans in light of the training that the United States provided to persons later implicated in the death squads that devastated El Salvador during the civil war of 1980-1992.<sup>333</sup> Despite efforts of ILEA administrators to alleviate these concerns by hiring human rights instructors to provide two days of instruction over the six-week course term, ILEA opponents remain unconvinced that the risks of law enforcement excesses are sufficiently contained.<sup>334</sup> This may be due in part to the aforementioned lack of transparency.

The third basis of opposition relates to the incorporation of human rights instruction: Advocates argue that such incorporation risks legitimizing the violent abuses of law enforcement in the region without fundamentally altering the crime control emphasis of the curriculum.<sup>335</sup> According to Latin Americanist

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328. *See id.*

329. *See id.*

330. Enzinna, *supra* note 275, at 7.

331. *See id.* at 8.

332. *See id.*

333. *See id.*

334. *See, e.g.,* Wes Enzinna, Response to *Getting Personal: Cuéllar and the ILEA*, 41 NACLA REP. ON THE AMERICAS, <https://nacla.org/node/4802> (last visited Oct. 7, 2010).

335. *See* Enzinna, *supra* note 275, at 12; *see also* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING HUMANITARIANISM 25 (2004) (“[Human rights discourse] may, in some contexts, place the human rights movement in the uncomfortable position of legitimating more injustice than it eliminates.”).

Wes Enzinna, who has studied and written about the ILEA in El Salvador, the incorporation of human rights terminology and personnel on the part of the ILEA “exemplifies a new and troubling facet of U.S. intervention in the region: the co-optation of human rights discourse and the paid involvement of local human rights authorities in U.S.-sponsored police and military training programs.”<sup>336</sup> The Salvadoran government’s Human Rights Ombudswoman Beatrice de Carrillo has expressed apprehension along these lines: that the ILEA will render El Salvador’s National Civilian Police force, from which a majority of ILEA’s Salvadoran students are drawn, more “professional and elegant in its use of violence.”<sup>337</sup> These concerns find initial support in a 2006 report authored by de Carrillo that relates that 40% of abuse complaints submitted to the Salvadoran Office of Human Rights involved the National Civilian Police.<sup>338</sup> In short, ILEA opponents fear that a partnership between human rights advocates and law enforcement personnel will result in a form of human rights credentialing that may protect rights violators; that the human rights advocates will subsequently be less vigilant monitors of abuses; and that human rights training will obscure what are presumed, rightly or wrongly, to be repressive features of the ILEA’s agenda.

Ultimately, in their attention to the lack of transparency and accountability of the Central American ILEA, the ILEA opponents in El Salvador make apparent that U.S. criminal justice export may be experienced as the foreign imposition of a transnational crime control program, resonating for local publics with prior catastrophic forms of U.S. intervention. This is a resonance unlikely to subside in light of the similarities in institutional architecture between ILEA and Cold War foreign internal security training, and the profound harms and painful memories the similarities conjure.<sup>339</sup>

Reinforcing some of the ILEA opponents’ concerns are broader trends relating to law enforcement excesses, and even vigilantism, in parts of Central America over the period of active U.S. involvement in law enforcement training. During the time frame of intensified U.S. criminal justice export, between

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336. See Enzinna, *supra* note 334.

337. See Enzinna, *supra* note 275, at 11 (quoting Beatrice de Carrillo).

338. A report by the Salvadoran Archbishop’s Legal Aid and Human Rights Defense Office recounts that ten murders were allegedly perpetrated by National Civilian Police officers in 2006 and includes reports of tortures. See TUTELA LEGAL DEL ARZOBISPADO [LEGAL GUARDIANS OF THE ARCHDIOCESE], LA VIOLENCIA HOMICIDA Y OTROS PATRONES DE GRAVE AFECTACIÓN A LOS DERECHOS HUMANOS EN EL SALVADOR: INFORME DE LAS INVESTIGACIONES Y LUCHA CONTRA LA IMPUNIDAD [HOMICIDAL VIOLENCE AND OTHER PATTERNS GRAVELY AFFECTING HUMAN RIGHTS IN EL SALVADOR, REPORT ON THE INVESTIGATIONS AND STRUGGLE AGAINST IMPUNITY CARRIED OUT] (2007) (translated by Committee in Solidarity with the People of El Salvador (CISPES)), available at [http://www.cispes.org/documents/lobbyingdocs/Tutela Legal reportENGLISH.pdf](http://www.cispes.org/documents/lobbyingdocs/Tutela%20Legal%20reportENGLISH.pdf).

339. See *supra* Sections II.A, II.C.

the mid-1990s to the present, “*mano dura*” (literally “hard hand”) law enforcement policies have swept the region. With an increased emphasis on crime control, under-resourced police forces frequently require military reinforcements—*mano dura* policies then combine military personnel and police officers in joint law enforcement operations, and encourage an array of “tough on crime” measures that can be highly repressive.<sup>340</sup>

Much of the ire about rising crime and law enforcement excesses is directed against suspected gang members. These gang members are frequently deportees from the United States—a demographic outsourced from the U.S. criminal justice system.<sup>341</sup> Salvadoran Deputy Citizens’ Security Minister Rodrigo Ávila reports that “deportations are at the core of the [gang] problem.”<sup>342</sup> Arrest sweeps of young men with tattoos have saturated domestic criminal justice systems in multiple Central American states. According to Eric Henriquez, a former M-18 gang member in East Los Angeles who was deported to El Salvador in 1998, deportees associated with U.S. gangs are often left with few options other than joining a related gang in El Salvador when they are returned. Henriquez, who directs a group called Homies Unidos that provides rehabilitation services to former gang members, explains that many criminal deportees arrive in El Salvador speaking little Spanish and without money, support, or job prospects: “Typically, they’ve spent most of their lives in the States. So they are dumped in a foreign culture and immediately face discrimination . . . . Employers see . . . tattoos and close their doors. . . . So you look for any network you can find.”<sup>343</sup> Some of the support for *mano dura* policies directed against youth gangs comes from the top levels of recipient countries’ governments with the tacit if not direct backing of the United States. However, local communities and citizens’ groups whose well-being is severely undermined by street crime also occasional-

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340. See Ungar, *supra* note 284, at 925 (“Although national and state officials elected recently in Latin America span the political and ideological spectrum, the most common element of electoral success has been an anti-crime stance. In November 2001, Honduras elected as President a businessman who ran on a New York ‘zero tolerance’ anti-crime platform. . . . In 1999, Buenos Aires governor Carlos Ruckauf was elected on the platform of ‘Bullets for Murderers.’”).

341. The increasing incidence of criminal deportations in the 1990s can be traced to major changes to U.S. immigration laws included in two pieces of legislation passed in 1996: the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C.) and the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-32, 110 Stat. 1214 (1996) (codified in scattered sections of 8 U.S.C.). Between 1998 and 2004, nearly 12,000 Salvadorans with criminal records were deported to El Salvador from the United States. Many of these individuals had been associated with Salvadoran-American gangs, and had come to the United States as refugees from the civil war. See Chris Kraul, *El Salvador Comes to Grips with Gangs*, L.A. TIMES, Dec. 13, 2004, at A1.

342. See Kraul, *supra* note 341.

343. See *id.*

ly advocate for military involvement in law enforcement and other heavy-handed crime control tactics.<sup>344</sup>

In the Guatemalan town Palín, which has been hard hit by street crime, some locals who are furious about the devastating effects of crime on their quality of life, and what they perceive to be the ineffectiveness of official criminal proceedings, have taken the law into their own hands. Some have tried to burn gang members alive and demanded military intervention.<sup>345</sup> Yet, according to Palín's Mayor José Enrique López, while the *mano dura* policies may diminish the problem in the short term, they will not solve it: "What we really need are jobs, the local textile factories have closed down because they are considered less competitive than other Central American nations [*sic*]."<sup>346</sup> Marcela Smutt, program coordinator and gang expert at the U.N. Development Program office in San Salvador, similarly concludes that the "problem . . . will not be solved until leaders find a way to deliver education and jobs."<sup>347</sup> A 2007 report by the U.N. Office on Drugs and Crime echoes that "[g]ang culture is a symptom of a deeper social malaise that cannot be solved by putting all disaffected street kids behind bars."<sup>348</sup>

The Washington Office on Latin America relates that in 2004, one year after the first Salvadoran *mano dura* law passed, permitting police to use tattoos as evidence of gang membership to support arrest, "19,275 people were detained by the police on the charge of belonging to a gang. In a striking illustration of what happens when police are allowed to carry out detentions based on such arbitrary criteria, 91% of those detained were released without charge due to lack of evidence."<sup>349</sup> A report by the Harvard Law School International Human Rights Clinic also found that *mano dura* policies characterized by "repressive law enforcement-military tactics, mass arrests, and profiling of youth and alleged gang members, ha[ve] been ineffective and even counter-productive" in addressing crime in the region.<sup>350</sup> The Harvard study even suggests that "these repressive

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344. See WASH. OFFICE ON LATIN AM., *YOUTH GANGS IN CENTRAL AMERICA: ISSUES IN HUMAN RIGHTS, EFFECTIVE POLICING, AND PREVENTION* 5 (2006) (describing repressive nature of *mano dura* policies implemented in El Salvador, Honduras, and Guatemala).

345. See COAV NEWSROOM, *supra* note 270.

346. See *id.*

347. See Kraul, *supra* note 341.

348. See Press Release, U.N. Info. Serv., *Violent Crime and Drug Trafficking Pose Serious Threats to Development in Central America*, UNODC Warns, UNIS/NAR/1003 (May 23, 2007).

349. WASH. OFFICE ON LATIN AM., *supra* note 344, at 10-11.

350. INT'L HUMAN RIGHTS CLINIC, HARV. LAW SCH., *NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR*, at iv (2007), available at [http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport\(3-6-07\).pdf](http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf).

crime fighting plans have provided ideological and rhetorical support for social cleansing groups” who have “targeted alleged criminals for extrajudicial killings,” justifying their actions “with assertions that ‘the laws of the country were not working’ . . . .”<sup>351</sup> In training and subsidizing implicated law enforcement offices, U.S. criminal justice export programs are associated, even if only indirectly, with criminal law enforcement agencies engaged in practices of arbitrary, mass arrests and other repressive tactics.

Over the twenty-year period of U.S. criminal justice assistance in El Salvador, Guatemala, and Honduras, *mano dura* policies, transnational crime control, and arrest sweeps of young men with tattoos have not been effective in improving public perceptions of security and safety. A poll of Salvadorans conducted by the Universidad Centroamericana found that a significant majority of the population “identif[ies] as the principal failures of the present administration the battle against criminality . . . .”<sup>352</sup> This result is consistent with studies of other states in Latin America: A Latinobarometro poll reported that only one of every three Latin Americans had confidence in their state’s police.<sup>353</sup>

The problems facing states that are recipients of U.S. criminal justice export are many: cycles of violence fueled by unequal resource distribution and social inequality, incongruities of transnational crime priorities with recipient country crime landscapes, procedural dysfunction in under-resourced criminal justice systems, and the potentially illiberal and anti-democratic applications of U.S. training and technical assistance. These problems ought to be sufficient to provoke serious reconsideration of fusing U.S. transnational crime control initiatives and criminal procedural reform programming, especially absent any persuasive contrary evidence from criminal justice exporters themselves.

## CONCLUSION

This Article has examined how and why U.S. criminal justice export took shape in the post-Cold War period through the deployment of U.S. prosecutors and police officers across the globe. Merging promotion of criminal procedure reform with transnational crime control initiatives, U.S. criminal justice export came to serve as a form of global governance through crime. U.S. programs focused less powerful states on U.S. transnational crime priorities; worked within foreign internal security apparatuses; framed complex social problems in terms of criminally culpable perpetrators and deserving victims; and directed atten-

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351. *Id.* at 17 (internal quotations omitted); *id.* at 15 (quoting AMNESTY INTERNATIONAL, *EL SALVADOR: THE SPECTRE OF DEATH SQUADS* (1996)).

352. *Mano-Dura Policies and International Community Blamed as El Salvador’s Violence Continues Unabated*, NOTICEN: CENT. AM. & CARIBBEAN AFFAIRS, June 14, 2007 (quoting Jannet Aguilar, Director of Instituto Universitario de Opinión Pública, Universidad Centroamericana).

353. See, e.g., *The Battle for Safer Streets: Crime and Policing in Latin America*, *ECONOMIST*, Oct. 2, 2004, at 53.

tion to criminal law administration as a proposed remedy for a variety of concerns.

However, even as U.S. criminal justice export proliferated rapidly, the associated outcomes in recipient locations remain mostly unknown. U.S. programs' reports of "success" have failed to account for actual effects on the ground as means substitute for ends and weak associations are confused for causation. In contrast, the existing evidence regarding the aftermath of reform in Central America, a region heavily targeted by U.S. consultants for over two decades, suggests that U.S.-sponsored transnational crime and justice sector reforms have not improved public perceptions of security or justice sector administration. Instead, U.S. programs allocate scarce resources to transnational crime concerns often incongruous with local harms and to procedure reforms that have proven largely dysfunctional as a consequence of resource deficits, and in ways that are roughly analogous to forms of criminal procedural dysfunction within the United States. Further, there is every reason to believe that the global concerns framed by U.S. actors in reference to crime control are symptomatic of, and cannot be mitigated without first confronting, more profound problems relating to resource distribution and social inequality.

Given these limitations, the question remains: What institutional alternatives are available? One recourse would be to dismantle the institutional architecture of U.S. criminal justice export and to re-direct associated funds to projects that are better able to contain interpersonal violence and promote human welfare in affected regions.

In Latin America, a number of states have begun to explore such alternatives. Some Latin American states have refused U.S. internal security assistance and are pursuing other internal security approaches. Several member states of the Bolivarian Alternative for the Americas, an alliance of Latin American states identified with a progressive social democratic ethos, withdrew their security forces from U.S. training administered at the Western Hemisphere Institute for National Security Cooperation.<sup>354</sup> Other Latin American states have sought to invest in infrastructure development—for example, public transportation networks and street lighting projects—as a means of improving citizens' security.<sup>355</sup> As described in Subsection III.B.2, the Chile-based CEJA has launched a coordinated effort to carefully monitor the progress of procedure reforms across Latin America, assuming control of this work from foreign consultants. CEJA aims to provide detailed, empirically grounded feedback to the impacted systems in order to facilitate context-sensitive improvements and adjustments. Ra-

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354. See Simon Romero, *Bolivian Is an Uneasy Ally as U.S. Presses Drug War*, N.Y. TIMES, Aug. 28, 2008, at 3 (describing Bolivian President Evo Morales' decision to stop sending officers to receive U.S. combat training).

355. See, e.g., VERA LUCÍA VECENTINI ET AL., INTER-AMERICAN DEV. BANK, PERU: METROPOLITAN LIMA URBAN TRANSPORTATION PROGRAM (PTUL)—NORTH-SOUTH SUBSYSTEM: LOAN PROPOSAL 5, 13, 38 (2004) (proposing that improvements to citizen safety will be associated with improving public transport and street lighting).

ther than focusing on particular crime priorities or implementing specific criminal procedure mechanisms, these alternatives aim more generally toward an autonomous and enhanced security and justice sector climate. This climate would include more empirically informed justice sector administration, better access to jobs in urban areas through accessible public transport, and brighter (and hence more visible and presumably safer) urban streets during nighttime hours. These are relatively small-scale interventions, but ones that may better respond to affected states' needs than the policies promoted by U.S. criminal justice export programs.

To the extent, though, that existing U.S. criminal justice export frameworks are too deeply entrenched to be readily abandoned, and insofar as U.S. transnational crime priorities remain of concern to U.S. and foreign state actors, then criminal justice policies ought to focus on mitigating the context-specific conditions driving particular areas of concern. As the foregoing analysis suggests, these context-specific conditions have much to do with the inter-relationships among poverty, social inequality, and lack of licit opportunities for improvement of individuals' life chances.<sup>356</sup> One criminal justice alternative, "alternative livelihoods" programming, focuses precisely on alleviating the harms produced by these interrelated problems, seeking to facilitate alternative life paths.<sup>357</sup>

Alternative livelihoods programs aim to motivate and enable individuals' interests in alternative conduct through external funding and assistance with accessing relevant markets. For example, U.N. alternative development programming has presented an opportunity to coca crop growers in the Andean region to experiment on a small scale and to transition gradually to growing coffee or oil palm if they so choose. In much of the Andes, the production of coca leaf itself is not understood to be criminal, as opposed to conversion of the raw material into cocaine, and in this context, the alternative livelihoods programs seek to incentivize preferred market activity.<sup>358</sup> Simultaneously, the U.N. program subsidizes and facilitates access to local, national, and international markets until such time as alternative livelihoods projects are self-sustaining.<sup>359</sup>

The Bolivian government has launched a related program seeking to connect coca crop growers with manufacturers who can turn coca leaf into tea, toothpaste, soda, and flour, rather than cocaine.<sup>360</sup> This program takes a similar

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356. See generally PABLO FAJNZYLBER ET AL., WORLD BANK, DETERMINANTS OF CRIME RATES IN LATIN AMERICA AND THE WORLD: AN EMPIRICAL ASSESSMENT, at vii (1998); Morgan Kelly, *Inequality and Crime*, 82 REV. ECON. & STAT. 530 (2000) (exploring the relationship between inequality and crime).

357. See U.N. OFFICE ON DRUGS & CRIME, ALTERNATIVE DEVELOPMENT: A GLOBAL THEMATIC EVALUATION: FINAL SYNTHESIS REPORT (2005).

358. See *id.* at v-vi, 12-13.

359. See *id.* at vii.

360. See *Evo Morales Launches 'Coca Colla'*, TELEGRAPH, Jan. 10, 2010, <http://www.telegraph.co.uk/news/worldnews/southamerica/bolivia/6962746/Evo-Morales-launches-Coca-Colla.html>.



approach to the U.N. initiative in facilitating non-cocaine-linked trade, but the Bolivian project serves to preserve the central place that coca leaf cultivation occupies for many indigenous peoples in the Andes.<sup>361</sup>

There are some initial indications that alternative development programming may be able to improve affected individuals' quality of life and reduce interpersonal violence and criminalized market participation. A study on alternative development programs by the U.N. Office on Drugs and Crime found that alternative development projects can succeed if they "identify reliable markets at the local, national and/or international levels and [] link the products or services to be promoted by alternative development activities to those markets."<sup>362</sup> While alternative livelihood projects are not without their problems, they may provide an effective harm reduction model for narcotics regulation at least where former drug crop growers and drug sellers are assisted in moving to sponsored alternatives *without* having first to destroy or abandon their existing means of subsistence. Under such circumstances, many ultimately move entirely to the alternative option if it better provides for their families and facilitates greater security.<sup>363</sup> Success in these terms is defined both by voluntarily transitioning individuals to alternative livelihoods, and improving their quality of life in relative terms.

Although the most obvious application of alternative livelihoods initiatives is to criminalized markets, and specifically to diminished production of drug crops that fuel narco-trafficking as opposed to crime directly involving interpersonal violence, equitable development-stimulating processes also have the potential to reduce violent crime. The violence-reducing potential of alternative development programming is at least initially reinforced by those farmers in a U.N. Alternative Livelihoods Study who report "better security as the main and most sustainable impact of alternative development."<sup>364</sup> The alternative livelihoods model may also be employed to facilitate alternative life paths for other at-risk populations in high-violence areas, such as those involved in or at risk of being harmed by human trafficking or gangs.<sup>365</sup>

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361. *Id.*

362. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 357, at 13.

363. *See id.* The United States does not allow funds for alternative development unlinked to eradication, but European donors do not place such restrictions. *See id.* at 11.

364. *See id.* at vi.

365. This possibility is consistent with an emerging consensus among development experts on the nexus of violence and inequality. *See, e.g.*, Heinemann & Verner, *supra* note 270, at 16 ("Promoting pro-poor growth and equitable development to reduce the stark levels of inequality is key to curbing the violence pandemic . . . . [P]reventive measures and innovative social policies are efficient and underutilized strategies to address the problem. Violence prevention is inseparable from equitable development and social action.").

These programs simultaneously serve to counter the tendency of conventional criminal justice frameworks to conceive of complex social problems in terms of criminally culpable bad actors and deserving victims. Instead, alternative livelihoods initiatives re-cast criminal justice concerns so as to enable persons to transition to alternative life paths. Through this approach, alternative livelihoods programming seeks to respond to the series of problems associated with current models of U.S. criminal justice export illuminated in Part III, namely: (1) the imposition of pre-defined (transnational crime and criminal procedural) concerns on local contexts without careful attention to associated costs and consequences; (2) the focus on conventional crime control approaches to the exclusion of non-punitive, non-arrest, and extrajudicial strategies that might better limit particular harms; and (3) the lack of democratic accountability, above all with regard to inattention to persistent local needs, inequitable development, and law enforcement excesses.

The lack of democratic accountability of U.S. criminal justice export programs is inherent in their top-down imposition of a specific U.S.-determined transnational crime agenda. This characteristic thus cannot be eliminated simply by inserting a different set of practices determined by other experts to be more amenable to developing states and less wed to U.S. transnational crime concerns. Instead, particular alternative livelihoods programs, though not necessarily directly replicable elsewhere, reflect the scale and conceptual orientation of projects that may better address criminalized harms in locations that have become recipients of U.S. criminal justice export. Such programs may even better serve the needs of areas of the United States that have been subject to uneven development and pervasive intervention by U.S. criminal justice administration. Alternative livelihoods programming, then, is not a criminal justice reform solution that ought to be exported by U.S. consultants in lieu of current models, but rather represents an innovation indicative of ways local and transnational publics might imagine criminal justice alternatives that both depart and learn from the limitations of existing models.

If foreign legal assistance seeks to promote greater stability, equality, and prosperity, and if it is to be more than a means and an end unto itself, it should work in the service of people who have already developed or who wish to develop context-sensitive mechanisms that will mollify the most undemocratic, destabilizing, and harmful forces in their lives. Criminal justice reforms may contribute to some of these objectives by crafting measures to render law enforcement responsive to local needs, in some cases initially by facilitating specific alternative livelihoods for individuals participating in criminal black markets, and by supporting small-scale grassroots initiatives to improve the life chances of young people most at risk of violence. The role for lawyers and legal scholars in this work, and for legal academics in particular, could be to study, theorize, and if normatively or empirically defensible, to defend these possibilities. And, above all to *assist, not lead* (an important difference noted by the Law and Development Movement's auto-critique), in creating legal and other mechanisms abroad and at home to temper the cruelest consequences of uneven development and to make space for alternative development paths. Through

this process, we in the United States especially may be able to learn something about how to begin to resolve some of the crises that pervade our own criminal justice systems, and to fashion more humane criminal justice policies and global social orders.