Exporting U.S. Criminal Justice

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ABSTRACT

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, carried out through the foreign promotion of U.S. criminal justice techniques, procedures, and transnational crime priorities. Over the course of the 1990s, U.S. foreign criminal justice development initiatives rapidly expanded. This Article seeks to answer two questions, which to date remain largely unaddressed in the relevant scholarly literatures: Why, in the Cold War’s wake, when the U.S. criminal justice system had come to be viewed in significant respects in terms of failure, did U.S. criminal law development programs take shape and proliferate? What have been the associated outcomes? This Article illustrates how U.S.-sponsored foreign criminal justice reform has functioned in the post-Cold War period as a mode of U.S.-dominant “global governance through crime” whereby various global social concerns have come to be regulated in terms of transnational crime control, criminal law, procedure, and punishment. Yet, following two decades of reform, there is no evidence that U.S. criminal justice development assistance has achieved its professed aims of increased stability, efficiency, and prosperity, because, among other limitations, internal evaluative frameworks substitute means for ends, and otherwise neglect to meaningfully explore the impact of ongoing efforts. Competing accounts of project outcomes in Central America, the region most intensively and longest targeted for reform, suggest that at best U.S. criminal justice assistance has been ineffective on its own terms, and that it may have exacerbated inter-personal harms and legal systemic dysfunction (analogous to that of the U.S. criminal justice system) in recipient states. In any case, U.S. foreign criminal justice assistance remains un-transparent, unaccountable, and disconnected from enabling concrete improvements to human welfare. Ultimately, this Article proposes that the lessons learned from this experience ought to attune criminal justice administration to the role of resource distribution and social inequality in constituting crime and

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determining the appropriate scope of legal mechanisms implemented to regulate criminalized conduct.

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**INTRODUCTION**

Speaking before the United Nations General Assembly at its 50th Anniversary...[in] 1995, President Clinton called for the establishment of a network of International Law Enforcement Academies (ILEAs) throughout the world to combat international drug trafficking, criminality, and terrorism through strengthened international
cooperation. 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.... Depending on regional needs and United States national interests, we are prepared to consider establishing similar ILEAs elsewhere.... 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 to 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 and law enforcement; and increase social, political, and economic stability by combating narcotics trafficking and crime.¹

The Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) was established to help harness the Department of Justice’s resources to strengthen foreign criminal justice institutions and enhance the administration of justice abroad.... OPDAT also works closely with the International Criminal Investigative Training Assistance Program (ICITAP), another unit within the Criminal Division of the Department of Justice, which provides assistance to civilian police forces throughout the world. Currently, OPDAT provides justice sector development assistance in practically every region of the world.²

What have we better than a blind guess to show that the criminal law in its present form does more good than harm?³

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,⁴ carried out through a range of programs designed to implement U.S. criminal justice techniques, procedures, and transnational crime control priorities around the world as a form of development assistance.⁵ Over the course of the 1990s, U.S. foreign criminal justice initiatives rapidly expanded.⁶ The ranks of U.S. foreign criminal justice consultants came to include U.S. prosecutors, police officers, and justice sector development aid workers posted to locations across Africa,

¹ International Law Enforcement Academy (ILEA), Statement of Purpose (on file with author).
² Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT), Mission Statement (on file with author).
⁴ See, e.g., ALAN WATSON, LEGAL TRANSPLANTS (2d ed. 1993).
⁵ See, e.g., ILEA, Statement of Purpose, supra note _; OPDAT, Mission Statement, supra note _.
⁶ See id.
Asia, Eastern Europe, Latin America, and the Middle East. The U.S. State Department’s International Law Enforcement Academy, established in 1995, has since trained well over 20,000 foreign law enforcement officers at schools in Botswana, Thailand, Hungary, El Salvador, and Peru. Through the Department of Justice’s Office of Overseas Prosecutorial Development Assistance and Training, founded in 1991, U.S. prosecutorial consultants work in more than thirty countries. The U.S. Agency for International Development (USAID), beginning in the 1980s and with increasing intensity over the 1990s, funded the revision and facilitated the reform of criminal procedure codes throughout Latin America and Eastern Europe to comport more closely to U.S. models.

With this institutional expansion, a puzzle emerged: as the domestic U.S. criminal justice system came increasingly to be viewed in terms of failure—U.S. prison populations increased dramatically and ever-harder sentencing policies proliferated with significantly racially disproportionate effects—the U.S. government began to promote abroad foreign criminal justice reform in accord with U.S. models and to advocate for particular foreign crime control regimes. Why did these criminal law-development programs take shape and proliferate in the Cold War’s wake? What have been the associated criminal justice and development outcomes?

Even in the face of the increasingly prominent role of U.S. foreign criminal justice promotion programs, these initiatives have received relatively scant scholarly attention. To the extent a small corpus 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 and choices with respect to specific criminal procedural decisions in the implementation of reform. While this important body of comparative law

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7 See id.
8 See ILEA, Student Output 1995-2008 (on file with author).
9 See OPDAT Worldwide Activities and Programs (on file with author).
12 The existing literature focused on U.S. consulting programs is composed by and large of descriptive or evaluative counterparts by program advocates tied to particular criminal justice reform projects. See, e.g., Blair & Hansen, supra note (official strategy paper on USAID’s justice reform efforts, many relating to criminal justice); National Center for State Courts, Lessons Learned (1996). Other studies focus on trends in international policing as distinct from the broader project of foreign criminal justice system reform. See, e.g., Ethan A. Nadelmann, Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement (1993).
work has "trained us to understand that transplants of legal institutions are not like export of commodities" in that both "contexts of reception and origin are highly relevant",\(^{14}\) it remains the case that little is understood about the causes or implications of the dedication of significant U.S. foreign assistance to promoting U.S. criminal justice priorities abroad, or about the impact of the numerous U.S. personnel sent (exported?) to foreign locations to advance U.S. transnational crime control priorities, criminal justice institutions, theories, and concerns.\(^{15}\) This Article begins to fill these gaps.

As with the domestic war on crime, the foreign promotion of U.S. transnational crime control priorities and criminal justice practices has not been specific to one administration, or to either of the two major U.S. political parties, but is a project that has occupied a prominent place for both Democrats and Republicans over the course of the 1990s and beyond. Some twenty years after the inception of the first U.S. criminal justice export program, in November 2009, Attorney General Eric Holder addressed the Senate Judiciary Committee, vowing to extend U.S. commitments to foreign criminal law development assistance: "the rule of law is one of the United States’ greatest exports,"\(^{16}\) he explained:

> the safety and future prosperity of the United States, no less than that of foreign countries, depends on the strengthening of the rule of law overseas. To advance this goal, the Justice Department has two offices in the Criminal Division dedicated solely to overseas rule of law development: the International Criminal Investigative Training Assistance Program (known as “ICITAP”) and the Office of Prosecutorial Development, Assistance and Training (known as “OPDAT”). These two offices, with funding support from the State Department, place long-term, in-country Federal prosecutors and

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\(^{14}\) See Ugo Matei, A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance, 10 IND. J. GLOBAL LEGAL STUD. 383, 430 (2003); see also Langer, supra note _.

\(^{15}\) While U.S. criminal justice consultants far outnumber those from other countries, consultants from outside the United States are also engaged in the project of envisioning and promoting an ideal set of rule of law practices, though with less concern for the internal administration of criminal law. See, e.g., James M. Cooper, Competing Legal Cultures and Legal Reform: The Battle of Chile, 29 MICH. L. J. INT’L L. 501 (2008); Bruce Oswald, Model Codes for Criminal Justice and Peace Operations, University of Melbourne, Legal Studies Research Paper, 9 J. CONFLICT AND SECURITY LAW 2 (2004); Honourable Madame Justice Louise Arbour, Exporting Criminal Justice, O.D. Skelton Memorial Lecture, Canadian Department of Foreign Affairs and International Trade, March 1, 2001 (addressing primarily Canada’s leading role in advancing international human rights through war crimes trials and support of the International Criminal Court).

senior law enforcement advisors to provide tailored rule of law assistance on a range of issues from human trafficking to border security in more than 30 countries around the world. . . .

The work of ICITAP and OPDAT, along with other related programs, has consisted of four component parts, which are distinct from one another, but interrelated in their execution and impact:

(1) Definition of “transnational” or “international crime”—terms that for U.S. consultants are interchangeable—in international treaties, domestic statutes, and related foreign assistance mechanisms. Transnational crime is defined in relation to prohibited border-crossing conduct involving narcotics, irregular migration and especially human trafficking, weapons smuggling, terrorism, intellectual property infringement, cyber-crime, money laundering, and increasingly in recent years, environmental crime.

(2) Financial assistance and incentives to poor and middle-income foreign states to address U.S. transnational crime control priorities through the application of particular U.S.-favored crime control strategies.

(3) Criminal procedural reform and institution building to increase purportedly the efficacy and fairness of recipient states’ criminal justice sectors with reference to U.S. models.

(4) An array of U.S.-run training programs dedicated both to advancing procedural and other justice sector reforms and supporting U.S.-promoted transnational crime control concerns.

Through all four of these inter-connected initiatives, U.S. consultants also promote certain animating ideas that constitute the ideology of the U.S. criminal justice system. These ideas include the following: that criminalization and punishment function to maintain social order in an otherwise free society by deterring and incapacitating criminal wrong-doers; likewise, if a particular social phenomenon or problem is identified as harmful or otherwise undesirable, in most instances certain participants’ conduct that contributes to that problem should be criminalized and hence the problem may be effectively regulated through the criminal justice system. More specifically,
"adversarial" criminal proceedings and trials provide the best manner of ensuring the fair and accurate "administration of justice" rather than "inquisitorial" or other processes; and in this regard, the smooth and just functioning of criminal processes is best assured by a robust regime of adversarial criminal procedural protections alongside a series of exceptions or procedural short-cuts (e.g. plea-bargaining) organized to improve efficiency.

The four above noted components—crime definition, criminal justice aid and sanctions, procedural reform assistance, and criminal justice training—working in tandem, operate by stationing U.S. consultants within recipient states’ crime control systems to promote particular transnational crime priorities of interest to the United States; train foreign prosecutors, police, judges, or other law enforcement officials to attend to these priorities; and adapt new criminal procedural models in the process of ongoing domestic justice sector reforms.

In examining the proliferation of what I am calling U.S. criminal justice export over the past two decades, this Article has three aims. First, it offers an explanatory account of the rise of U.S. foreign criminal justice development consulting in the waning and aftermath of the Cold War as a mode of U.S.-dominant "global governance through crime." The Article posits that the internationalization of a U.S. crime-governance regime in the post-Cold War period entails an expansion to the global domain of what within the U.S. context, criminal law scholar Jonathan Simon has termed *Governing Through Crime*. To the extent that post-Cold War political transitions and economic

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24 See infra .

25 The use of the term “export,” though in part intended to be provocative and polemical, seeks to capture several distinctive features of the phenomena examined in the following pages. In contrast to the general consensus in comparative law scholarship that law and legal institutions are never strictly speaking exported but rather function more as transplants or translations adapting to their new contexts, the export terminology, without denying the adaptation of legal institutions in different contexts, draws attention to particular characteristics central to the U.S. promotion of foreign justice sector reform and transnational crime control. Namely, U.S. consultants are involved in an export project insofar as they seek to export a U.S.-favored classification of transnational crime. These initiatives also directly export U.S. criminal justice sector personnel and experts, a category of state actors that international law and international relations scholars concur are indispensable in global governance. See, e.g., David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY LAW REVIEW 5, 6 (2005). These programs seek further to export the work of addressing U.S. transnational crime control concerns to foreign law enforcement institutions. And, in subsidizing criminal justice sector aid, and promoting that migration control, narcotics, or environmental devastation be addressed through criminal models, rather than reform or subsidy of other sectors, U.S. consultants export (or at least strongly encourage) a focus on criminal justice mechanisms to address this range of social problems—an approach especially prevalent in the United States at least since the beginnings of the U.S. “war on crime.”

26 See SIMON, supra note .
development programming spear-headed by the World Bank and International Monetary Fund (IMF) were associated with increased inter-personal violence and theft,27 stimulating interest in affected states in solutions that might ensure social order, the remedy proposed by U.S. foreign criminal justice consultants lay in the reform of recipient state criminal justice processes and transnational crime control regimes. I examine how the U.S.-led international war on crime and the foreign promotion of U.S. criminal justice practices and priorities through both directly coercive measures and independently-conceived reform projects thus came to shape the conceptualization of global concerns—from narcotics dependency and human trafficking, to poverty, environmental devastation, and insecurity—and proposed (criminal justice-oriented) approaches to counteracting these concerns.

Second, this Article reveals that there is no evidence that U.S. foreign criminal justice development consulting has achieved its professed goals of increased stability, efficiency, or prosperity, because, among other limitations, internal evaluative frameworks claim “success” by substituting means for ends, and otherwise neglecting to meaningfully explore the impact of ongoing efforts in a manner similar to the evaluative limitations of certain other rule of law development projects. Other sources independent of U.S. criminal justice development consultants provide competing accounts of project outcomes that suggest that U.S. criminal justice assistance, in Central America at least (the region first and most intensively targeted by U.S. consultants) has been at best ineffective at reducing crime and improving justice sector functioning, and at worse has exacerbated rights abuses, procedural dysfunction, and perpetuated other legal, democratic, and demotic harms in recipient states. In any case, U.S. foreign criminal justice assistance remains un-transparent, unaccountable and disconnected from enabling concrete improvements to human welfare.

Finally, in concluding, this Article proposes that the lessons learned from the U.S. criminal justice export experience ought to attune criminal justice administration to the role of resource distribution and social inequality in constituting crime and determining the appropriate scope of legal mechanisms implemented to regulate criminalized conduct. In order to commence this conceptual re-orientation, the Article concludes by considering institutional alternatives to U.S. criminal justice export and the approaches to criminal justice administration it commends.

Part I offers a brief introduction to global governance and crime-governance theory. Part II examines closely the historical institutional

precursors and component parts of U.S. foreign criminal justice assistance and explores how post-Cold War U.S. criminal justice export came to function as a mode of U.S.-dominant global governance through crime. Part III considers the outcomes associated with U.S. criminal justice export: first, through an analysis of the limitations of foreign criminal justice consultants’ own measures of their claimed successes, and second through an assessment of competing accounts of legal systemic, democratic, and demotic harms associated with U.S. criminal justice export projects in Central America. The conclusion provides a preliminary analysis of alternatives to U.S. criminal justice export and the criminal justice frameworks it commends.

I. THEORETICAL FOUNDATIONS OF GLOBAL GOVERNANCE THROUGH CRIME

The theoretical framework that informs the analysis to follow is located in two literatures that are seldom if ever considered in tandem: crime-governance and global governance theory. In Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear, criminal law scholar Jonathan Simon examines the operation of crime control as a form of U.S. governance during the latter part of the twentieth century and the beginning of the twenty-first. To “govern through crime” is to frame a significant range of social problems in relation to crime control and to approach their resolution through criminalization and punishment: “[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 subject domains as powerful tools with which to interpret and frame all forms of social action as a problem for governance.”

In particular, Simon calls attention to two 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 and social

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28 See id. at 17. Criminal justice scholar David Garland has produced related studies of what he calls the “cultures of crime control” of the United States and United Kingdom. See DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001). In the separate context of feminist human rights advocacy, Janet Halley has noted other 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 Janet Halley, Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict, 9 MELBOURNE J. INT’L L. 78 (2008) (citing Elizabeth Bernstein, The Sexual Politics of the “New Abolitionism”, 18 DIFFERENCES 128, 137 (2007) (“[This feminist] agenda . . . seeks social remedies through criminal justice interventions rather than through a redistributive welfare state. . . .”). Halley refers to this attachment of Western feminist advocacy to criminal law models and ideologies as a “new carceral feminism,” which is “intent on criminalising, indicting, convicting, and punishing perpetrators of sexual violence in numerous domains of domestic law as well as IHL [International Humanitarian Law] and ICL [International Criminal Law].” See id.
order maintenance at a time when the social welfare state has contracted. In this manner, political leaders seize on the public’s fears of inter-personal harm, both real and imagined, to mobilize support for their respective candidacies. Politicians also “define their objectives in prosecutorial terms and … frame other kinds of political issues in the language shaped by public insecurity and outrage about crime.” The political field in which “tough on crime” rhetoric wins votes has led almost ineluctably to more severe punishment and an enormous expansion of crime legislation. The consequences of these trends, apart from the massive expansion of U.S. criminal justice systems, include effects on political discourse and social imagination, both of which then increasingly center on crime control social policy fixes that conceptualize complex social problems in terms of criminally culpable individual bad actors and deserving and aggrieved victims. Accordingly, U.S. crime control models have come to reflect a phenomenon much larger than criminal law and punishment alone—crime control has become a mode of governance itself: a manner of shaping how individuals and collectivities seek to resolve problems (truancy, inter-familial disputes, and workplace conflict are among the examples Simon explores) that might well be approached through other means.

The theoretical rubric of “global governance” developed separately in international relations theory to describe the various modes 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. Beginning in the 1990s, the concept 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. A mode of global governance references a strategy for organizing and exercising power between and within states without a world

30 See SIMON at 23-25, 35.
31 See id. at 35.
32 See id.
33 Mariano-Florentino Cuellar has identified as limitations of Simon’s account that he fails to consider how and why 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 Cuellar, The Political Economies of Criminal Justice, 75 U. CHI. L. REV. 941 (2008). The analysis of global governance through crime presented here responds in part to Cuellar’s concerns as it elucidates how and why global governance through crime came into being, and the specific mechanisms through which it operates and is sustained. See id.
34 See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Robert Latham, Politics in a Floating World, in APPROACHES TO GLOBAL GOVERNANCE THEORY 25 (Martin Hewson & Timothy J. Sinclair, eds.) (1999); JAMES ROSENAU, ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD (1997).
Multiple forms of global governance involving states and networks of international organizations may and do coexist at once.\textsuperscript{36}

So how might governing through crime—mobilizing political action and framing an array of social concerns in terms of crime and punishment—function as a mechanism of global governance? What I refer to as “global governance through crime” describes a form of global social organization that is structured around transnational crime control as both a conceptual and institutional framework that serves to regulate state and non-state actors both within and between states. This is a particular mode of global governance that reflects features of other global governmental networks theorized elsewhere in international relations theory and related literatures, but is unique in other respects, especially in the dominant role of U.S. actors in setting the terms of global governmental conduct through crime control frameworks.\textsuperscript{37}

As the following Part will explore in more detail, building upon a global foreign internal security training architecture that is a legacy of the Cold War, and through a set of threats of sanction or withholding of aid and specific financial incentives, U.S. criminal justice exporters are able to obtain recipient states’ cooperation in establishing U.S.-promoted transnational crime control policies and criminal justice procedures. Once underway, U.S. foreign crime control promotion channels energies directed toward alleviating a particular set of harms accompanying global political and economic processes (conceived as transnational criminal threats) in a manner that directs focus toward crime control, and necessarily toward certain systemic players and their criminal culpability and away from other explanatory accounts or regulatory approaches to these phenomena.

The historical emergence and institutional and legislative architecture of U.S. criminal justice export programs are central to their operation as a mechanism for global governance through crime, so it is to these arrangements that we now turn.

II. U.S. CRIMINAL JUSTICE EXPORT: PRECURSORS AND COMPONENT PARTS
   A. HISTORICAL ANTECEDENTS

The emergence of U.S. criminal justice export in the post-Cold War period as a mechanism of global governance through crime followed decades of U.S. involvement in foreign legal consulting. Historically, imperial powers, including the United States, imposed directly and at times through physical force, particular criminal law regimes upon their territories as a mode of extra-


\textsuperscript{37} See, e.g., SLAUGHTER, supra note ___ at ___.

\textsuperscript{38} Cf. id.
As colonialism gave way to independence movements and the era of development, attempts of the most powerful states to influence other states’ administration of internal security 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. During the post-colonial period, U.S. involvement in promoting law-related development largely unfolded through a contest between these two contrasting approaches. On one approach, certain U.S. agencies engaged in foreign internal security training tied to the Cold War operated to permit U.S. access to foreign states’ internal security systems. A second approach involved separate projects devoted to reforming foreign legal education and re-writing foreign constitutions and other legal frameworks to promote democracy and development. These two trends are captured respectively by two of the primary distinct U.S. foreign internal security and legal development consulting projects of the period—the precursors of post-Cold War U.S. criminal justice export: (1) U.S. Cold War foreign internal security training and assistance, which largely reflected a national self-interest model, and (2) the U.S. legal academy’s “law and development movement,” a distinct project commencing in the late 1950s and continuing to the 1970s, emblematic of a benevolent law-development paradigm and devoted primarily to “improving” foreign legal education and enhancing democracy and development.

1. Foreign Internal Security Training

During the Cold War, and earlier before and throughout World War II, U.S. police and military trainers, operating through various U.S. government offices, provided largely technical instruction to foreign security forces. This training facilitated U.S. exertion of extra-territorial political power on the world stage (a mode of global governance at a time before that theoretical vocabulary

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42 The following sources may be consulted for a more thorough treatment of these projects: Political Policing: The United States and Latin America by Martha Huggins (1998), Ethan A. Nadelmann’s Cops Across Borders: The Internationalization of U.S. Law Enforcement (1993), and Legal Imperialism: American Lawyers and Foreign Aid in Latin America by James A. Gardner (1980).
had emerged as a subject of significant academic interest), providing a manner of regulating conduct within foreign states to advance U.S. interests. Whether this training served as a means to improve foreign internal security capabilities to police dangerous foes, to ensure economic growth, or as a pretext for political policing, the trainings permitted access and influence beyond the immediate technical subject matter transmitted. Through such channels, even in the absence of an explicit territorial occupation of recipient states, the United States wielded considerable influence over foreign internal security administration, as U.S. actors operated within foreign internal security apparatuses to assist the security administration of other states and thereby to enlist those states in the battle against the United States’ ideological and actual enemies.

The centrality of foreign internal security training to U.S. efforts to exert extra-territorial control during the Cold War is pointedly illustrated by the limited efficacy of an amendment to the Foreign Assistance Act, Section 660, enacted in 1974, which in principle banned foreign internal security assistance, but as a practical matter simply underscored its critical role in U.S. foreign policy. To briefly summarize a complicated and disturbing history, over the 1960s and 1970s, U.S. foreign internal security training fell into disrepute: by 1974, U.S.-provided equipment and personnel associated with U.S. training were linked to cases of torture, murder and disappearances in multiple Latin American states as well as in Vietnam. Public sentiment in the United States turned against U.S. support of foreign police and military organizations, and in 1974 the primary U.S. foreign internal security training program was disbanded.

Reflecting the more general rethinking of U.S. foreign policy that occurred in connection with these events, Section 660 of the Foreign Assistance Act 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.

Contrary to its plain language, Section 660 did not, however, result in the

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44 See id.

45 See, e.g., ROBERT M. PERITO, THE AMERICAN EXPERIENCE WITH POLICE IN PEACE OPERATIONS 14 (2002).

46 See HUGGINS, supra note _ at 3.

elimination of U.S. foreign internal security consulting or a subsequent post-
Cold War program of U.S. criminal justice export: the strategy of training
foreign law enforcement and military had become too central to U.S. foreign
policy to be so readily disbanded. Instead, foreign security training was either
provided for through explicit exceptions to Section 660 or took place despite
the law. \(^{48}\) Notwithstanding the sordid events associated with foreign internal
security consulting in previous decades, ranging from human rights violations
attributed to U.S. trainees to the Iran-Contra scandal, such foreign training and
security assistance continued as a critical U.S. foreign policy tool throughout
the 1980s—a vehicle for attempting some semblance of U.S.-dominant global
governance. \(^{49}\) By 1992, the U.S. General Accounting Office (GAO) estimated
that over 125 countries were recipients of U.S. internal security assistance
despite the Section 660 ban. \(^{50}\)

As will be explored in the following Part, the post-Cold War export of
U.S. criminal justice practices and priorities has unfolded in significant part
under the influence of Cold War foreign internal security training and
assistance programs. In fact, post-Cold War U.S. foreign criminal justice
development assistance initiatives came to fill the programmatic aims delimited
by the exemptions to the Section 660 ban on foreign internal security
assistance. The beginnings of the post-Cold War U.S. foreign criminal justice
assistance project can (in this respect at least) be traced to the Cold War foreign
internal security training experience. Subsequent programs evolved in response
to the perceived costs associated with the purely national security-oriented
model of foreign law-related development assistance, but without breaking
completely with earlier institutional forms that permitted a means of attempting
at least a modicum of U.S.-dominant global governance in the absence of world
government during the Cold War through the occupation of foreign internal
security apparatuses by U.S. trainers and the definition of foreign internal
security priorities.

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

A second important yet distinct institutional predecessor to U.S. criminal
justice export is the “law and development movement,” which like the foreign
internal security training experience, implicitly and explicitly informed post-
Cold War foreign criminal justice reform programs. From the late 1950s to the
1970s, the law and development movement sought through legal assistance to

Enforcement Agency or Federal Bureau of Investigation’s interests); see also 22 U.S.C. §
2420(b)(6) (1996) (exempting post-conflict law enforcement assistance to promote “democracy”);
22 U.S.C. § 2420(b)(3) (1985) (exempting foreign security assistance relating to maritime
concerns).

\(^{49}\) See David Bayley, Changing the Guard: Developing Democratic Police
Abroad 27 (2006) [hereinafter Bayley].

\(^{50}\) See id.
bring about social and political change in numerous developing states primarily by revising foreign law school curricula and legal education approaches to correspond more closely to U.S. models. According to James A. Gardner, who has written extensively on the law and development program, 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.” Movement advocates were progressive and humanitarian in their aims, seeking broadly to “strengthen” foreign legal education and promote democratic legal development, clearly adhering to a benevolent consulting model in contrast to the more directly self-interested national security model reflected in U.S. foreign internal security training.

Through their work law and development consultants established channels for the consensual transmission of American legal expertise abroad and the beginnings of a theory of how U.S. law could further stability and economic growth in recipient countries through U.S. legal training. However, these efforts unfolded to little positive effect and were ultimately short-lived. Critics increasingly characterized the law and development movement’s projects as ethnocentric and parochial, and the active involvement of U.S. legal academics in such work subsequently declined. Gardner articulates the criticisms of the various law and development projects in quite direct terms:

American legal assistance was inept, culturally unaware, and sociologically uninformed. It was also ethnocentric, perceiving and assisting the Third World in its own self-image. . . . As the failures of this experience became apparent, American legal missionaries returned home frustrated and chagrined. . . .

In sum, ultimately, the law and development movement’s proponents realized that the progressive functioning of a “rule of law” is a complex cultural, political, and socio-economic phenomenon, which requires local knowledge and a fortuitous alignment of political and popular will—not things that can be

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52 JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 8 (1980).
53 See id. at 7.
54 See id.
55 See id. at 9, 11-12.
56 See id.
57 See id.
engineered from afar by foreigners despite what they may have perceived to be their best intentions. Further, estranged law and development movement 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 that had been promoted by U.S. consultants.

The consequent diminution of legal academic interest in the law and development program over the 1970s occasioned by these acknowledgments by no means signaled the end of U.S. foreign rule of law consulting. 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 . . . ." 58

Then, in the mid-1980s, beginning in El Salvador, the benevolent law-development consulting model was taken up by USAID under the Reagan administration as a form of foreign criminal justice assistance to respond to criticism within the United States of subsidy of the Salvadoran security forces in their war against the leftist Farabundo Martí National Liberation Front (FMLN). 59 The focus on justice sector assistance came about because the high profile killing of four U.S. citizen churchwomen by members of the Salvadoran military in December 1980, along with the murder of Archbishop Romero and two AFL-CIO officials, drew considerable critical attention in the United States to ongoing human rights violations in El Salvador and elsewhere in Latin America. 60 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. 61 To address the concerns of different constituencies, Reagan appointed a National Bipartisan Commission on Central America. 62 The product of the Commission’s work ultimately laid the ground for post-Cold War U.S. criminal justice export and its peculiar melding of the Cold War internal security training and law and development models just described.

The Commission ultimately recommended a combination of increased military assistance, economic assistance, and support for "democratization," including criminal justice reform that would seek to improve the investigation and prosecution of human rights violations and other high profile cases. 63 In effect, U.S.-sponsored foreign criminal justice administration reform emerged initially in El Salvador as a means of negotiating a continuation of Cold War

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60 See id.
61 See id.
63 See id.
foreign internal security training and assistance through exemption to the Section 660 ban, on the one hand, and placating those concerned about human rights protection, on the other. Human rights concerns would purportedly be met by rendering Salvadoran criminal justice administration more effective.  

USAID became the implementing agency, and its “Administration of Justice” program began gradually to provide assistance to various other states in Latin America, with the aim that criminal justice sector reform would help facilitate political stabilization and other development advances. As the next section explores, this project then took on new life and a somewhat different orientation in the wake of the Cold War, when the animating anti-communist logic for U.S. foreign internal security operations ceased to obtain.

Still, the underlying agenda of infusing U.S. legal approaches into foreign legal systems has remained relatively consistent. And, despite the fact that certain U.S. government consultants have reportedly taken seriously criticisms articulated against earlier reform programs such as the law and development movement, and staff have been required to read those criticisms, comparative law scholar Máximo Langer relates anonymous interviewees’ remarks in his study of U.S.-sponsored Latin American justice sector reforms that, for example, “it was very difficult to imbue the DOJ [Department of Justice] 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. The DOJ officials were explicitly exporting the U.S. criminal procedure code.”

The law and development movement thus provided both a model for benevolent foreign rule of law consulting through foreign legal re-training and reform, and a critique of the most overt forms of paternalistic condescension, each of which contributed in varying degrees to subsequent U.S. efforts in foreign criminal justice promotion. The next section examines the emergence in the post-Cold War period of an international war on crime that would heavily influence the course of U.S. criminal justice export initiatives and their institutionalization of a mode of U.S.-dominant global crime-governance through a particular synthesis of the foreign internal security training and law and development strategies just examined.

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64 See id.
65 See id. at 649.
66 See, e.g., Langer, supra note _ at 648 (2007) (explaining that some U.S. government consultants took criticisms articulated against U.S. legal reforms programs in Latin America during the 1960s and 1970s seriously and required staff to read those criticisms). But cf. id n.226 (recounting anonymous interviewees remarks regarding U.S. government criminal justice consultants). Langer claims that DOJ officials have since responded “to the criticism that they have been imposing U.S. models.” See id. Nevertheless, as will be explored more fully in the following pages, the explicit program of U.S. criminal justice consultants is oriented toward a U.S. transnational crime control agenda rather than serving as a sounding board and resource for countries interested in initiating their own distinct criminal justice reform processes. See infra _.
B. A NEW WAR AFTER THE COLD WAR

In the waning and aftermath of the Cold War, a pressing concern with international crime or transnational crime emerged; and alongside an expanding domestic criminal justice regime, foreign criminal justice assistance grew rapidly as a component of a U.S. “international war on crime” to target U.S. transnational crime control concerns. The Cold War had ensured logistical supremacy for the United States through military and internal security deployments abroad, including foreign internal security training, coupled with a certain ideological apparatus that extolled the promotion of democracy and suppression of communism. In the absence of a unifying logic for continuing U.S. foreign engagement, domestic isolationist pressures presented a fundamental challenge to the then-prevailing model of U.S. internationalism. A Clinton administration official described the situation as follows:

It is a challenge over whether we will be significantly engaged abroad at all. . . . On one side is protectionism and limited foreign engagement; on the other is active American engagement abroad on behalf of democracy and expanded trade. . . . [I]nternationalists 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. Today’s supporters of engagement abroad have neither of those advantages. The threats and opportunities are diffuse, and our people are deeply anxious about their economic fate.

The international war on crime, whether consciously or sub-consciously became a manner of fashioning “a new world order” in which a U.S.-dominant mode of global governance might persist in the post-Cold War period.

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67 See DEREK CHOLLET & JAMES GOLDGEIER, AMERICA BETWEEN THE WARS (2008); BRZEZINSKI, supra note at 184.
68 Anthony Lake, Assistant to the President for National Security Affairs, September 21, 1993, Johns Hopkins University.
69 The international war on crime and the war on terror are distinguishable but interrelated undertakings. The emergence of the U.S. war on international crime preceded the post-September 11, 2001 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 than terrorism-related offenses alone. At the same time, however, the U.S. war on international crime prefigured certain of the war on terror’s central strategies: more widespread international criminalization of inchoate offenses like conspiracy, expanded international rendition practices, and a particular U.S. conception of threats in the international domain oriented around the fusion of foreign crime control and national security. See United National Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000); U.S. International Crime Control Strategy (1998).
The U.S. international war on crime began to take shape under Bush I, when only shortly after he and Mikhail Gorbachev declared the Cold War over in December 1989, U.S. troops invaded Panama, the first U.S. military offensive after the Cold War, to arrest Panama’s leader Manuel Noriega on narcotics conspiracy charges brought in the United States.\(^{70}\) The international war on crime became an ever more prominent part of U.S. foreign policy discourse over the 1990s, avidly promoted by liberal internationalists, including President William Jefferson Clinton and Senator John Kerry.

During the 1990s a succession of U.S. policy papers and directives identified transnational crime—defined as a particular subset of border crossing criminalized conduct—as a primary threat and cause of global instability and a vehicle in opposition to which to organize U.S. global engagement in the post-Cold War period. Senator Kerry repeatedly declared that transnational crime was “the new communism, the new monolithic threat,” and proposed the United States must “lead an international crusade” to defeat it.\(^{71}\) “[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. . . .”\(^{72}\) “America has no choice but to lead the world in the fight against ‘private’ criminal enterprises just as we led the world in the fight against ‘public’ criminal governments.”\(^{73}\) Kerry wrote in his book on the subject, *The New War*:

[T]o deal with transnational criminals, a . . . profound change is needed. We need nothing less than a revolution in the way we conceive of every aspect of the law, from jurisdiction to punishment. More precisely, we find ourselves in a position where we are compelled by the globalization of crime to globalize law and law enforcement.\(^{74}\)

On October 21, 1995, President Clinton signed a Presidential Decision Directive (PDD-42), which addressed the U.S. “international war on crime” as a national security concern and instructed all federal agencies to intensify their efforts to combat transnational criminal activity enabled by processes of

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\(^{73}\) See id. at 32.

\(^{74}\) See id. at 169.
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 warned:

The rapid spread of international crime since the end of the Cold War is unprecedented in scale, facilitated by globalization and technological advances, and poses a significant challenge to the United States and democratic governments and free market economies around the world. The President has identified international crime as a direct and immediate threat to the national security of the United States.

Kerry, along with other liberal internationalists, advocated that the U.S. “international war on crime” should incorporate a strategy of exporting transnational crime control, stationing another 1,000 law enforcement officers around the world to be the “advance guard against transnational crime. Our additional thousand agents must not just be cops. They must include prosecutors, trainers, legal specialists.”

This approach would expand the USAID “Administration of Justice” program begun under the Reagan administration in El Salvador and new programs in the U.S. Departments of State and Justice would direct USAID justice sector reform in accord with transnational crime control concerns. The international war on crime represented a vehicle through which the United States would remain engaged abroad to protect U.S. national security interests against the presumed new transnational threat of border crossing criminalized conduct. And so, along these lines, the international war on crime provided a new manner of framing internationalism in the post-Cold War period that could sustain U.S. engagement abroad despite domestic isolationist criticism.

The international war on crime was rhetorically effective in the U.S.

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75 See PDD 42. 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 of PDD 42, entitled “International Organized Crime,” is available at http://www.fas.org/irp/offdocs/pdd42.htm. See also 21 U.S.C. § 1901(a)(1).

76 See International Crime Threat Assessment (2000). Despite increasing concern about “transnational crime” there was no documented account to suggest increased relative occurrence of such conduct, nor even an agreed-upon conception of what constituted transnational crime. Further, even if anecdote or inference suggested a rise in 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 and transnational crime priorities and techniques—was not an inevitable reaction, but rather constituted a specific strategy adopted over possible alternative approaches. See ANDREAS & NADELMANN, supra note _ at 105-106 (“the internationalization of crime control is substantially a function of domestic politics … rather than simply a response to proliferating transnational criminal activities”).

77 KERRY, supra note _ at 186.
domestic context for at least one additional reason: it offered a means of revitalizing or redeeming the domestic war on crime, which in the view of many experts, had failed in significant respects. The narrative of the "globalization of crime" under-girding U.S. transnational crime control promotion offered an account framed as a domestic crime reduction project of why earlier efforts in the U.S. "war on crime" fell short—namely because they were insufficiently attuned to the international valences of domestic crime and the required reform of foreign criminal justice systems. According to this account, domestic crime is often of foreign origin, precluding resolution of certain domestic crime problems through internal criminal justice strategies.

The international war on crime and the emphasis on U.S. transnational crime priorities provided a means of conceptualizing the most destructive sources of domestic criminality as ultimately foreign in origin, offering an explanation that could garner the support of diverse domestic constituencies against outside threats and explain certain otherwise confounding features of the ever-growing U.S. domestic criminal justice system.

The international war on crime also offered a means of addressing perceived increases in social insecurity and inter-personal harm in developing states in the wake of political transitions and implementation of economic austerity measures advocated by the World Bank and IMF. By the 1990s, it had become apparent that U.S.-favored economic development policies, especially economic austerity requirements that mandated decreased social spending, were associated with increased inter-personal violence and theft in affected states.

Despite reports of a dramatic decline in domestic crime rates for FBI Index crimes over the 1990s (murder, rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft), the U.S. prison population escalated dramatically during this same period amidst wide-ranging criticism of the fairness and expense of U.S. criminal justice institutions. See, e.g., MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); see also William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L. J. 1 (1997). Notwithstanding the decrease in FBI index crimes, drug supply reduction over the 1980s and 1990s had been an unmitigated failure. See, e.g., American Bar Association Report, Criminal Justice in Crisis 6 (1988) (examining "inability of the [U.S.] criminal justice system to control the drug problem in the Nation through the enforcement of the criminal law").

Although the World Bank has officially moved away from structural adjustment and conditionality lending 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.'" See John Pender, From "Structural Adjustment" to "Comprehensive Development Framework": Conditionality Transformed?, 22 THIRD WORLD QUARTERLY 397, 409 (2001).

See, e.g., Maureen Cain, Globality, Glocalization, and Private Policing: A Caribbean Case Study, in THE BLACKWELL COMPANION TO CRIMINOLOGY 420 (Colin Sumner, ed.) (2004) ("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
criminal justice advocated by Senator Kerry and others, offered a solution that involved in substantial part the reform of foreign state criminal justice policies and transnational crime control regimes. These various interests became effective and coalesced as the U.S. war on international crime and U.S. criminal justice export projects offered a means of effectuating a new war after the Cold War, a new mode of U.S.-dominant global governance, in some ways analogous to the Cold War internal security training regime, but also distinct from it.

The State Department’s Bureau for International Narcotics Matters, a relatively small and marginalized unit in the years following its formation in 1978, extended its prestige and size rapidly over the 1990s—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 to target migrant smuggling, money laundering, and other forms of border-crossing criminalized conduct. The Department’s budget for international narcotics control alone increased from $113 million in 1990 to $517 million in 1999. Remarkning on these trends in 1999, international relations scholar Peter Andreas noted:

[T]he post-cold-war U.S. security agenda . . . is increasingly dominated by concerns over crime fighting . . . . The rising prominence of law enforcement concerns is reflected in the transformation of the federal policing apparatus. During a period when most federal agencies are merely surviving, law enforcement is thriving. Budgets are growing, agency missions are expanding, new and tougher laws are being implemented, policing is becoming more federalized and internationalized, national security and law enforcement institutions are integrated. . . .

Over the 1990s, in connection with the war on international crime, U.S. foreign criminal justice assistance expanded dramatically, shaped by a transnational crime control agenda. Through foreign criminal justice reform against the person.”); Joseph Kipkemboi Rono, The Impact of the Structural Adjustment Programmes on Kenyan Society, 17 JOURNAL OF SOCIAL DEVELOPMENT IN AFRICA 81 (2002) (“The comprehensive implementation of the SAPs [structural adjustment programs in Kenya] . . . were immediately followed by a jump in the number of criminals and crime rates . . . .”); Robert L. Ayers, Crime and Violence as Development Issues in Latin America and the Caribbean, WORLD BANK LATIN AMERICAN AND CARIBBEAN STUDIES VIEWPOINTS (1998) (“Urban poverty in Latin America and the Caribbean has increased dramatically over the past decade . . . . During this same period, substantial increases in crime and violence have taken place . . . .”).

83 See ANDREAS & NADELMANN, supra note _ at 171.
84 See id.
85 See id.
and transnational crime control promotion, U.S. consultants ultimately secured a prominent position for U.S. government actors inside the internal security apparatuses of recipient states. U.S. consultants adapted Cold War foreign internal security training and law and development institutional frameworks, defining a set of transnational threats around which to organize U.S. power in the post-Cold War period (i.e. transnational crime), and a particular vision of security and development tied to criminal law and procedures and transnational crime control concerns. The following diagram is intended to provide expositional assistance in capturing the combined influence of the historical institutional precursors to post-Cold War U.S. criminal justice export detailed in the foregoing pages.

**Figure 1. Institutional History of U.S. Criminal Justice Export**

- **Foreign Internal Security Consulting** (Cold War mechanism of U.S.-dominant extraterritorial control)
- **Law and Development Movement** (Cold War mechanism of benevolent law-development consulting)
- **USAID Administration of Justice (AOJ) Program** (provides criminal justice assistance to enable enforcement of human rights in face of ongoing foreign internal security assistance)
- **A New War After the Cold War** (U.S. International War on Crime)
- **Post-Cold War U.S. Criminal Justice Export** (synthesis of foreign internal security consulting & criminal justice reform assistance with aim of strengthening foreign administration of justice)
C. Four Components of Post-Cold War U.S. Criminal Justice Export

The U.S. government’s post-Cold War engagement in criminal justice administration abroad consists of the four aforenoted distinct yet interrelated component parts, each of which play a critical role in effectuating a manner of U.S.-dominant global governance through crime: (1) identification of particular crime priorities, with particular attention to a category understood as transnational crime; (2) foreign financial assistance and threats of sanction to address U.S. transnational crime priorities; (3) criminal procedural reform to promote efficient and fair justice sector functioning; and (4) training programs dedicated to both advancing U.S.-promoted transnational crime control campaigns and criminal procedural reforms. Through each of these four component parts, U.S. consultants are engaged in promoting a particular rationale for crime control and an ideology regarding criminal justice administration as a central mechanism for maintaining social order. This rationale is constituted by a commitment to criminalization and punishment as a preferred regulatory approach to managing global social concerns, especially those conceptualized in terms of transnational crime. Additionally, “adversarial” criminal proceedings and trials are celebrated as the best manner of ensuring fair and accurate results rather than “inquisitorial” or other processes; and the smooth and just functioning of criminal processes is suggested to be best enabled by a robust regime of adversarial criminal procedural protections alongside a series of efficiency-enhancing procedural short-cuts (e.g. plea-bargaining). The following subsections will explore the parameters, interaction, and some of the limitations of each of these four component parts: (1) crime definition, (2) criminal justice aid, (3) procedural reform assistance, and (4) criminal justice training.

1. Defining Transnational Crime

The first component of U.S. criminal justice export involves the definition by U.S. policy elites and development consultants of “transnational crime.” Transnational crime as defined by the U.S. actors differs from other categories of criminal conduct in significant respects. It includes only those categories of conduct enabled by processes of globalization (particularly, by intensified cross-border flows of people, money, goods and information) as distinct from inter-personal harms such as murder, assault, and rape. Specifically, transnational crime in U.S. policy formulations encompasses border-crossing conduct involving narcotics, irregular migration and especially human trafficking, weapons smuggling, terrorism, intellectual property infringement, cyber-crime, money laundering, and increasingly in recent years,
environmental crime. When certain conduct is categorized as transnational criminal conduct, it obtains a heightened significance as the regulation of it becomes eligible for increased U.S. foreign assistance and the approach to its minimization assumes a policing, prosecutorial, and punishment-focused shape. In other words, in defining conduct as transnational and criminal, U.S. consultants increase the salience of a particular range of conduct and simultaneously suggest a manner of addressing the associated social problem in terms of criminalizing and punishing that conduct.

This would be unremarkable if the definition of transnational crime was universally self-evident or at least uncontroversial, and if it adequately addressed the factors contributing to the global social concerns to be regulated through transnational crime control. In fact though, identification of these particular categories of conduct as criminal and transnational is highly contentious and implicates numerous political and cultural concerns. 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. Nonetheless, U.S. foreign transnational crime control promoters have advanced a distinct vision of what counts as transnational crime, one that excludes common categories of domestic interpersonal violence and is concerned instead primarily with international violations of financial regulation, intellectual property protection, migration controls, and drug prohibitions.

89 A full exploration of the reasons why U.S. consultants have settled on this subset of concerns is beyond the scope of this article. However, reasons for identification of these categories of conduct as transnational crime priorities likely reflect a combination of altruistic interest in containing the sinister sides and dangers of specific globalization processes, and in other instances, protecting the interests of U.S. corporations whose profits are limited by intellectual property appropriation, among other crime threats. Compare ROBERT W. WINSLOW & SHELDON X. ZHANG, CRIMINOLOGY: A GLOBAL PERSPECTIVE 482-83 (2008) (chronicling negative effects of drug addiction and trafficking on the life course of an addict turned dealer); id. at 526 (describing vicious abuse of young women trafficked to the U.S. for sexual exploitation); World Health Organization, Counterfeit Medicines Report, available at http://www.who.int/mediacentre/factsheets/fs275/en/ (“Counterfeit medicines range from random mixtures of harmful toxic substances to inactive, useless preparations. Fake drugs can cause harm to patients and sometimes lead to death.”) and ILEA Gift Fund Initiative Overview, http://www.state.gov/p/inl/ilea/c25510.htm (established pursuant to Section 635(d) of the Foreign Assistance Act (FAA) “to provide a mechanism whereby . . . private industry and the Federal Government . . . can team-up in areas of mutual interests. Specifically, 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.”).
Further, it is unclear that transnational crime control appropriately captures the range of underlying concerns at stake in the areas of global social concern defined by U.S. consultants in terms of transnational criminal wrongdoers and deserving and aggrieved victims. Transnational crime concerns—such as human trafficking, environmental crime, or narcotics production—might well be more comprehensively regulated through different conceptual and institutional frameworks than crime control. The phenomenon of trafficking in humans, for example, one of the primary U.S. transnational crime priorities involves not only the highly publicized trafficking of women and children into forced sexual labor (a focus of the international war on crime and the transnational criminalization model more generally), but a whole continuum of migration flows that entail for significant numbers of smuggled migrants dehumanizing labor in conditions not of their choosing, for no or substandard wages, in factories, cocktail bars, agribusiness, and as domestics, as well as in brothels. 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 degraded labor in the destination countries.

The crime control models promoted by U.S. consultants in accord with the U.S. international war on crime focus on a subset of those individuals who opportunistize on conditions of pronounced inequality, specifically, smugglers and pimps who enable the illegal flows of migrants and supervise and profit from migrants’ sexual subjection, rather than on the underlying forces driving the migration flows and fueling the exploitative practices in question across various sectors, in sweatshops and homes, among other locations. In focusing attention on sexualized exploitation, as did the earlier U.S. campaign against the “white slave trade” in the late nineteenth and early twentieth centuries, the international war on crime defines our ability to perceive the range of harms wrought by particular forms of social and resource inequality as attention is concentrated on specific and relatively limited criminalized elements. Accordingly, the large-scale export to foreign locations of U.S. crime control models channels energies toward criminalizing and then prosecuting particular

90 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) (explaining that the focus of anti-trafficking advocacy and legislation has centered on trafficking for sexual purposes and operated through a law enforcement lens).
91 See id.
93 See Bruch, supra note __, at 16.
94 See also 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).
criminal culpable bad actors and diverts global attention from systemic factors driving targeted harms.  

On similar grounds to those just described, some within the U.S. government have opposed adopting (at least primarily) a transnational crime control framework to address human trafficking. Former Assistant Secretary of State for Democracy, Human Rights and Labor (DHRL), international law scholar, and Legal Advisor to the Department of State, Harold Koh, argued against conceptualizing trafficking as primarily “a criminal problem,” preferring instead a human rights focus on trafficking as a “massive and complex global problem.” Koh advocated to keep trafficking initiatives within the mandate of the human rights bureau rather than requiring other states to adopt a prosecutorial and criminal punishment framework as a measure of transnational crime control. But Koh’s approach did not ultimately prevail as the U.S. government in the years that followed established offices, initiatives, and sanctions regimes to require recipients of U.S. aid 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.

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, increasing the U.S. sphere of influence and fashioning a regime of global governance through transnational crime control aid and sanctions. It is this related regime of transnational crime control aid and sanctions that the following section explores.

2. Transnational Crime Control Aid and Sanctions

The second component of the U.S. criminal justice export framework—conceptually distinct from the definition of transnational crime, through practically intertwined—is the provision to foreign states of financial assistance and other incentives to address U.S. transnational crime control priorities. Through a combination of aid and threats of sanction, the U.S. government ensures foreign states attend to U.S. transnational crime concerns—narcotics, irregular migration and especially human trafficking, weapons smuggling, terrorism, intellectual property infringement, cyber-crime, and money laundering.

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95 See also Bernstein, supra note __, at 144 (“[T]he responsibility for slavery is shifted from structural factors and dominant institutions onto individual, deviant men. . . .”).
98 See TVPA, supra note __, § 108(a).
laundring—through the application of particular U.S.-favored crime control strategies.

The U.S. government has provided vast sums of aid for transnational crime control assistance in poor and middle-income countries.\textsuperscript{99} Much foreign crime control assistance has been concentrated on Latin American states, though such assistance is also provided to states in Africa, Asia, Eastern Europe, and the Middle East.\textsuperscript{100}

In the 1990s, the Clinton administration secured major counter-narcotics funding for Plan Colombia, which supports narcotics control in Colombia through aerial eradication, law enforcement, and procedural and related justice sector reform. The Clinton administration’s work negotiating Plan Colombia culminated in 2000, when Congress approved $1.3 billion in support of it.\textsuperscript{101} From 2000-2005, under the George W. Bush administration, the State and Defense Departments together provided $5.4 billion for Andean region counter-narcotics accounts.\textsuperscript{102} To provide a sense of the proportion of these figures relative to other U.S. federal criminal justice spending, these combined amounts for the Andean region alone are greater than the annual budget allocation for the entire U.S. Bureau of Prisons in any given year during the relevant time period.\textsuperscript{103}

The Obama administration has continued the trend of foreign crime control and criminal justice spending by expanding the Merida Initiative, which provides a broad range of criminal justice assistance to Mexico, Central America, Haiti, and the Dominican Republic, and in 2008, Congress approved an initial $400 million for Mexico, and $65 million for Central America, the Dominican Republic and Haiti.\textsuperscript{104} The Merida Initiative funding requests for 2010 include $450 million for Mexico and $100 million for Central America.\textsuperscript{105}

For the Latin American and Caribbean region, from 1997-2006, policing and military aid has constituted almost half of U.S. foreign assistance, not substantially less than economic and social assistance to the region as a whole over the same period.\textsuperscript{106} These funds are to be allocated to transnational crime control and the expansion of prisons and other criminal justice institutions that

\textsuperscript{99} See, e.g., Plan Colombia; Merida Initiative.
\textsuperscript{100} See, e.g., FUKUMI, supra note _ ; ANDREAS & NADELMANN, supra note _.
\textsuperscript{102} See id. at CRS 5.
\textsuperscript{103} U.S. Dep’t of Justice, Budget Fact Sheet, Judicial System Support and Incarceration, Enhancements, Bureau of Prisons 1 (2008)/(FY 2001 BOP budget was $ 4.3 billion; FY 2008 BOP budget request was $5.4 billion).
\textsuperscript{104} U.S. Dep’t of State, Merida Initiative Fact Sheet (2009).
\textsuperscript{105} See id.
\textsuperscript{106} See, e.g., United States, Department of State, Bureau of International Narcotics and Law Enforcement Affairs, Fiscal Years 1997-2006, Budget Congressional Presentations; see also Center for International Policy, U.S. Aid to Latin America and the Caribbean, 1997-2006.
are necessary to support enhanced criminal justice enforcement. As part of the
Merida Initiative, the U.S. Department of State promotes training of Mexican
and Central American prison staff, some of whom will serve as instructors at
Mexico’s first corrections academy in Xalapa, Veracruz, which has been
established with U.S. aid. Under the Merida Initiative, the U.S. State
Department will also work to “activate several new penitentiaries” in Mexico,
create a prisoner transport service, and implement a prisoner classification
system.\(^{107}\) Earlier, in the 1990s, the U.S. government assisted Panama to
devote over $2.5 million to new prison construction.\(^{108}\)

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. Once in place, U.S.-promoted
institutions require some contribution of recipient states’ own funds so that they
are able to operate on an ongoing basis. When local police and conventional
criminal justice system resources are inadequate, recipient states turn to
military officers to fill in the gaps. The significant funds available for foreign
assistance in crime control and criminal justice administration promotes
attention to these domains as a component of recipient state policy planning,
and subsequently requires allocation of recipient state’s own funds to carry out
such projects to completion.

The design of U.S. transnational crime control and related initiatives also
directly ties compliance to specific financial threats, thereby strongly
encouraging conformity on behalf of recipient states despite any ambivalence
or resistance.\(^ {109}\) Threats are incorporated directly in U.S. statutes: the
Trafficking Victims Protection Act of 2000 (TVPA), U.S. domestic anti-
trafficking legislation, for instance, establishes a sanctions regime authorizing
the President to withdraw U.S. (and some multilateral) non-trade-related, non-
humanitarian financial assistance from countries determined to be insufficiently
compliant with the U.S. government’s “minimum standards for the elimination
of trafficking.”\(^ {110}\) The result of this is that the U.S. government has effectively
required application of a transnational crime control trafficking model in
developing states on a global basis: as a condition for aid, under the Trafficking

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\(^{107}\) See U.S. Dep’t of State, INL Beat, Summer 2009.

\(^{108}\) See U.S. General Accounting Office, Aid to Panama: Improving the Criminal Justice System

\(^{109}\) See Lawrence Malkin, President Urges Nations to Combat Crime and Control Rogue
Weaponry: Clinton Offers New Agenda for UN After the Cold War, INTERNATIONAL HERALD
TRIBUNE, October 23, 1995; see also The UN at 50, NEW YORK TIMES, October 23, 1995.

(2000) [hereinafter TVPA], as supplemented by the Trafficking Victims Protection
439.
Victim Protection Act, states are required to adopt a criminal enforcement regime that criminalizes prostitution. Under the Bush Administration, no funds were to “be awarded to . . . organizations that support legal state-regulated prostitution.”111 As a consequence of a related incentive regime, Brazil was forced to “forgo $40 million in American support” because it wished to pursue harm reduction strategies such as condom distribution as a way to prevent the transmission of HIV by sex workers.112 In response to the TVPA regime and the threat of U.S. sanctions, governments around the world passed anti-trafficking legislation and developed domestic infrastructure that would meet U.S. prosecutorial “minimum standards.”113

Foreign states’ compliance with U.S. narcotics policy is similarly assured through a sanctions regime. Each year the U.S. president reviews “drug source” countries for compliance with U.S. performance benchmarks and determines whether to certify them for funding for the following year.114 The sanctions for decertified states involve 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 loan applications from the multinational development banks and the International Monetary Fund; and removal of any U.S. trade preference.115 Peru and Colombia both suffered from decertification for two years in the 1990s; for a period, Bolivia, which is the second-poorest state in the Western hemisphere and depends heavily on U.S. aid, made execution of U.S. drug control policy its top policy priority out of fear of decertification.116

Related regimes incentivize the adoption of criminal justice frameworks to address intellectual property appropriation. The North American Free Trade Agreement (NAFTA), for example, requires participating states’ intellectual property rules to be re-written to criminalize intellectual property appropriation and the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement similarly mandates the criminalization of intellectual property rights violations.117 Under TRIPS: “Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent . . . .”118

113 See Chuang, supra note _ at 464.
114 See Foreign Assistance Act of 1961 (as amended), Section 490(b), 22 U.S.C. § 2291j (b)(1)(A) (1986); see also FUKUMI, supra note _ at 143.
115 See id.
116 See FUKUMI, supra note _ at 143.
118 See id.
As reflected by the incorporation in TRIPS of intellectual property criminalization measures, international trade organizations and other intergovernmental lenders and aid sources have begun to embrace the U.S. proposed transnational crime control regime and domestic criminal justice reforms as a set of practices crucial to ensuring social order and prosperity.\textsuperscript{119} Even the World Bank explains its post-Cold War development approach as follows: “today the Bank sees law as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and maintaining law and order.”\textsuperscript{120} Accordingly, the World Bank’s comprehensive development framework has come to impliedly promote crime control reforms in accord with U.S. foreign criminal justice assistance frameworks.

In this manner, through foreign criminal justice development assistance and sanctions regimes, proponents of rule-of-law development have offered a particular approach and role for law, not only with regard to law’s relationship to facilitating economic growth, but also with respect to transnational crime control as a means of maintaining social stability and security. The United States is at the forefront of these ongoing international efforts, fashioning a global crime-governance regime that establishes a particular transnational crime control policy on a global scale.

3. Criminal Procedure Reform

The third component of U.S. criminal justice export entails criminal procedural reform and institution building intended to increase the efficacy and fairness of recipient states’ justice sectors. Again, given scarce resources, as with subsidy of transnational crime control, the promotion of criminal procedural reform concentrates recipient state energies on a specific set of U.S.-promoted procedural reforms as opposed to other social or political reform or development strategies. In subsidizing procedural reforms, the United States monitors recipient states’ progress, and makes the achievement of certain reform benchmarks a condition of broader assistance funding.\textsuperscript{121}

USAID has been the leader in this area, beginning with the “Administration of Justice” program under Reagan in El Salvador, subsidized in large part, as described \textsuperscript{supra} at _, to quell U.S. domestic criticism of impunity for human rights violations in the region during the Cold War. USAID’s criminal justice reform projects have sought largely to bring about more humane, transparent, and efficient justice administration in particular

\textsuperscript{121} See, e.g., Linn A. Hammergren, \textit{The Politics of Justice and Justice Reform in Latin America} 216 (1998) [hereinafter Hammergren].
foreign locations, beginning in El Salvador, even if, as will be explored in Part III such projects may have been less effective than anticipated. Foreign criminal procedure reform vastly expanded in the post-Cold War period as these reforms merged with other programs, such as those of ICITAP and OPDAT, engaged in simultaneously promoting transnational crime control.

A primary focus of USAID’s justice sector reform work was to transform inquisitorial systems (modeled 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). Although inquisitorial civil law and accusatorial common law systems represent distinct general types, there are numerous distinctions within both general categories.

Broadly speaking, however, variations of the civil law or inquisitorial system, dominant in continental Europe, are code-based and criminal proceedings are orchestrated by a judge, who is the primary actor seeking evidence from both sides and directing the course of proceedings. Factual findings and legal rulings at all stages occur primarily in writing.

In contrast, and again with significant variation across and within particular adversarial criminal justice systems, under an adversarial common law system, courts fill in the gaps in legislative enactments on a case-by-case basis rather than relying on a code-based system, and the litigants largely assume control for developing cases and presenting evidence, primarily through oral testimony. In the adversary system, the investigatory authority is allocated to the prosecutor rather than the judge. Presented with two opposing sides to a dispute, the judge or jury in an adversarial system weighs conflicting evidence to decide which side should prevail. 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 critically by various criminal procedural pre-trial and trial rights. In the U.S. system, the fairness of proceedings is to be achieved through a variety of procedural mechanisms—right to defense counsel, to trial by jury, to cross-examine witnesses, against self-incrimination, a presumption of innocence—though the full range of these robust procedures are invoked in relatively few cases, and the vast majority of prosecutions end in a plea bargain in which guilt is admitted (or not contested) in exchange for a compromise sentence. To sum up then, the main differences of the adversary from the inquisitorial model involve the elimination of the investigating judge, the

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122 See id.
123 See id.
125 See, e.g., HAMMERGREN, supra note _.
126 See Langer, supra note _ at 55-57 (From Legal Transplants to Legal Translations).
127 See id.
128 See id.
129 See Stuntz, supra note _.
primacy of the oral hearing, and the expansion of the prosecutor’s role as well as that of defense counsel.

Of course, in practice, most criminal justice systems involve both adversary and inquisitorial components, and the reforms encouraged by U.S. consultants, to the extent they claim to represent a “purely” adversary model, idealize the adversary model and elide the multiple complexities of both historically adversarial and historically inquisitorial systems. As a practical matter the U.S. criminal justice system is characterized by the existence of a plethora of exceptions to criminal procedural rights and alternatives intended to improve efficiency or truth-seeking. The many rights, which proponents of the adversary model often extol, are in practice in the vast majority of criminal cases relinquished or waived by criminal suspects and defendants. Several leading commentators have even suggested 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, but also to an excessive ratcheting up of the harshness of substantive criminal law as legislators and the public come (even if likely erroneously) to perceive procedural protections as interfering with the effective regulation of crime.

Nonetheless, despite the limitations and prevailing critiques of the adversary system, a critical mass of legal elites in Latin America believed adversary criminal justice administration would be, if not markedly more efficient and effective than inquisitorial models and dramatically more protective of criminal defendants’ rights, at least an improvement over the severe injustices of the then-existing systems. Driven both by the conviction of local legal elites and U.S. commitments to reform, over the 1990s, U.S. consulting firms, working mainly in conjunction with USAID, developed new adversarial criminal procedure codes and led other related criminal justice reform projects throughout Latin America. The Cold War logic of the initiation of this project in El Salvador in the 1980s was replaced by a post-Cold War framework of promotion of the “rule of law” and transnational crime control. Along with other inquisitorial to adversarial reform initiatives, these efforts concentrated on reducing the time spent by criminal defendants in pre-trial detention, and reforming criminal procedures to more robustly protect the rights of criminal defendants throughout the criminal process alongside expanding mechanisms for plea bargaining to enable efficiency in response to dramatic case back-logs.

130 See also David Alan Sklansky, Anti-Inquisitorialism, 122 HARV. L. REV. 1634, 1640 (2009).
131 See Stuntz, supra note .
132 See id.; see also Charles D. Weisselberg, Mourning Miranda, 96 CAL. L. REV. 1519 (2008).
133 See, e.g., Linn Hamnergren, Fifteen Years of Judicial Reform in Latin America: Where We Got It Right and Where We Didn’t, World Bank Policy Presentation, April 18, 2006.
Beginning in Central and South America, with funding from USAID, DPK Consulting developed the Honduran Criminal Procedure Code, public defense system, and case management protocols, and participated in related projects in Guatemala and El Salvador, among other locations. Checchi and Company Consulting, Inc., also funded in significant part by USAID contracts, conducted trainings throughout Colombia to expand and reform the Colombian criminal justice system, and engaged in similar work in Ecuador, El Salvador, Guatemala, Mexico, and Nicaragua.

Between 1993 and 2003, the Inter-American Development Bank, granted major loan assistance to twenty-one of the Bank’s member countries in Latin America to support criminal procedure reform projects promoted by the United States. Fifteen of these countries borrowed nearly $500 million from the Bank to finance such efforts.

Criminal justice reform in the region produced new prosecutor’s offices, oral hearings, a non-investigative role for judges, and an adversarial relation between prosecutors and criminal defense counsel. In contrast to prior internal security training, USAID’s justice sector reform work was highly publicized, and was intended to inform and involve local publics. Comparative law scholar Máximo Langer has even proposed that Latin Americans elites themselves effectively directed USAID’s projects in significant measure with U.S. assistance.

USAID also sponsored study tours of the U.S. justice system, with the intention that the visitors would put into practice what they learned in their home countries. Subsequent efforts included transfer of this model of criminal justice procedural reform to the former Soviet republics.

\[\text{References:}\]

135 DPK Consulting provides technical, management, and advisory services to develop sustainable government and justice systems. See DPK Consulting Program Overview, www.dpkconsulting.com (discussing criminal justice consulting programs).
139 See, e.g., Langer, supra note 6 at 648 (Revolution).
140 See, e.g., Helping Create a Modern Criminal Justice System, USAID Educates Up to 120 Honduran Students and Faculty Through Study Tour Program, USAID Stories, available at www.usaid.gov/stories/honduras/cs_honduras_justice.html.
contracts with USAID, a number of U.S. legal organizations, including the American Bar Association, organized continuing trainings and participated in revising the criminal codes of the newly formed ex-Soviet nation-states. The effects of these reform initiatives, particularly the most central emphasis on the transition of inquisitorial to adversarial criminal justice administration, will be addressed further in Part III. The significance of USAID’s criminal justice reform programs in the context of this section is in terms of its introduction of a procedural reform component to U.S. criminal justice export in the post-Cold War period. USAID’s programs also paved the way for separate foreign criminal justice reform initiatives housed in the U.S. Departments of State and Justice, by developing close working relationships with foreign criminal justice sector personnel that would subsequently be directed in conjunction with U.S. transnational crime concerns.

The procedural focus of USAID’s criminal justice reform consultants simultaneously advanced a U.S.-dominant global governance agenda by tying recipient state resources to justice sector and rule of law reform goals promoted by U.S. experts, and bringing about deep involvement of U.S. consultants in the internal security and crime control administration of the recipient states through the process of code revision and broader justice sector reforms. As with transnational crime control aid, the commitment of U.S. government agencies to subsidizing criminal procedural reform shaped the conduct of foreign state actors in formulating policy, as procedural reform projects became an available and relatively less costly manner (at least on first appearances) of addressing concerns relating to social disorder. Further, as USAID’s work was increasingly eclipsed by entities within the U.S. Departments of State and Justice, as described in the following section, U.S. priorities in transnational crime control programming began to be integrated with and in significant ways to determine the execution of procedural reforms. This integration of transnational crime control concerns and procedural reform training constitutes the fourth and final component of U.S. criminal justice export, to which we now turn.

4. Transnational Crime Control and Procedural Reform Training

The fourth component of U.S. criminal justice export consists of an array of U.S.-run training programs dedicated to both advancing USAID-initiated criminal procedural reforms and concurrently executing U.S.-promoted transnational crime control campaigns. Starting shortly before the end of the Cold War and with increasing intensity thereafter, USAID’s work was supplemented and in significant part displaced by training consultants from...
separate programs established under the auspices of the U.S. Departments of State and Justice. These programs, introduced supra at page __ include the Office of Overseas Prosecutorial Development Assistance and Training (OPDAT), the International Law Enforcement Academy (ILEA), and the International Criminal Investigative Training Assistance Program (ICITAP). OPDAT, ILEA, and ICITAP have explicitly incorporated in their institutional mandates both procedural reform development projects, spearheaded initially by USAID, and a conceptually distinct agenda reminiscent of Cold War foreign internal security training, focused on transnational crime control. Overall, their work leans sharply toward promoting U.S. national security and economic interests in transnational crime control, even while facilitating ongoing procedural reforms.

While USAID’s criminal justice sector work continues in concert with the work of the State and Justice programs, USAID’s projects are now largely focused on other law reform 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.”

OPDAT, ILEA, and ICITAP have taken up the significant majority of foreign criminal justice aid projects. And while OPDAT, ILEA and ICITAP continue to assist with adversarial to inquisitorial criminal procedure transformations commenced by USAID this work is invariably coordinated in terms of OPDAT, ILEA, and ICITAP’s respective underlying missions to advance a transnational crime control agenda rather than purely for its own sake or to promote more rights-sensitive regimes.

Over the 1990s, the foreign law enforcement training prohibitions established by Section 660 were, for all intents and purposes thoroughly eliminated by an ever-increasing range of exemptions. New sections of the Foreign Assistance Act, Sections 534 and 541 allowed assistance “notwithstanding” the prohibitions of Section 660; and Clinton’s Presidential Decision Directive 71 permitted U.S. government entities to undertake consulting projects to help “rebuild” foreign justice systems as well as conduct international civilian police training. Consequently, OPDAT, ILEA, and ICITAP may intervene openly within the internal security apparatuses of foreign states in a manner that would have been prohibited de jure by Section 660. In accord with their expanded prerogatives, U.S. consultants from the Departments of State and Justice prioritize, first and foremost, implementation of transnational crime control initiatives.

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143 See BAYLEY, supra note _ 41.
144 My own review of USAID-funded justice sector programs revealed that USAID initiatives focused purely on criminal justice reform (as described above) are now greatly outnumbered by more general judicial education and improved business environment offerings.
145 See PDD 71.
a. Office of Overseas Prosecutorial Development Assistance Training

Since its founding in 1991, the U.S. Department of Justice’s OPDAT has encouraged “legislative and justice sector reform” and worked to “improv[e] the skills of foreign prosecutors, investigators, and judges”146 with emphasis on seven substantive areas of crime that OPDAT identifies as major transnational crime threats affecting U.S. interests: (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.147 In determining in what states to locate OPDAT projects, while the prospect of “lasting and fundamental criminal justice reform” in the host country is to be considered, along with the adequacy of funding and host government support, these goals are subordinated to advancing the U.S. war on international crime.148 Before undertaking a project, OPDAT’s “Criteria for Project Involvement” explain, OPDAT will survey “relevant Department components . . . Narcotic and Dangerous Drug Section, Organized Crime and Racketeering Section, Asset Forfeiture and Money Laundering Section, and the Counterterrorism Section.”149 And OPDAT makes clear: the “Department’s interests are primary in this process.”150 The local manifestations of crime in recipient countries are not among the criteria considered in determining candidates for OPDAT’s justice sector reform programming. Consequently, while references to “human rights” and other development objectives reminiscent of the law and development movement and USAID’s initiatives abound in OPDAT’s promotional materials, its fundamental agenda is plainly determined by U.S. transnational crime priorities as the Department of Justice’s transnational crime concerns dictate the scope and shape of OPDAT’s work.151

From OPDAT’s headquarters, located in Washington, D.C., supervisory staff develop and oversee OPDAT foreign criminal justice consulting programs that span an expansive geographical territory, though at far less cost than Cold War era foreign internal security training deployments, leading Ethan A. Nadelmann to refer to such foreign law enforcement consulting as “a form of [U.S.] hegemony on the cheap.”152 Supervisory personnel include a Director, who is responsible for defining and implementing OPDAT’s Mission, consistent with Justice Department policy, and a Deputy Director, who is also responsible for implementing OPDAT’s Mission, in addition to handling the

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146 See OPDAT Mission.
147 See OPDAT Strategic Plan 4.
148 See id.
149 See id.
150 See id.
151 See id.
152 See NADELMANN, COPS ACROSS BORDERS 476.
delegation and supervision of managerial assignments to OPDAT program staff.\textsuperscript{153} A Strategic Planner and five Regional Directors assist the Director and Deputy Director and manage the day-to-day implementation of the office’s criminal justice sector development projects.\textsuperscript{154} Finally, a team of U.S. prosecutors is stationed by OPDAT in numerous foreign locations to implement OPDAT’s projects. Such field positions are advertised as open only to current Department of Justice Trial Attorneys or Assistant U.S. Attorneys, and in some instances to other experienced U.S. prosecutors.\textsuperscript{155}

These 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 reform efforts.\textsuperscript{156} When a RLA leaves a foreign deployment, he or she is replaced by another prosecutor from the United States. OPDAT also deploys Intermittent Legal Advisors (ILAs). ILAs, like the RLAs, are criminal prosecutors, often already employed by the Department of Justice.\textsuperscript{157} ILAs conduct discrete assistance programs ranging from a few days to six months, and focus upon specific criminal justice reforms tethered to transnational crime control.\textsuperscript{158}

OPDAT conducts justice sector consulting work in Africa and the Middle East, Asia and the Pacific, Central and Eastern Europe, Latin America and the Caribbean, and consistent with the Cold War U.S. foreign internal security trainers’ strategy of literally working within foreign justice sector institutions, OPDAT works inside foreign prosecutors’ headquarters, and advises and observes case strategies in ongoing matters of interest to the United States.\textsuperscript{159} All of OPDAT’s programs involve in varying degrees judicial and prosecutorial skills development, advice and commentary on criminal justice legislation, and technical assistance in areas such as prosecution guidelines, mentoring, security, and case management, merging procedural training and transnational crime control promotion.\textsuperscript{160}

Along these lines, among other projects, OPDAT has established, equipped, and trained an anti-money laundering task force in Nicaragua comprised of Nicaraguan federal prosecutors and investigators;\textsuperscript{161} conducted

\textsuperscript{153} See OPDAT Program Overview.
\textsuperscript{154} See id.
\textsuperscript{155} See, e.g., Job Posting, OPDAT RLA for Kenya.
\textsuperscript{156} See OPDAT Mission.
\textsuperscript{157} See, e.g., Job Posting, OPDAT ILA for Indonesia.
\textsuperscript{158} See id.
\textsuperscript{159} See DOJ/OPDAT, Africa and the Middle East Programs (In South Africa, U.S. and South African prosecutors share offices and work together to combat financial crimes and to divest the proceeds of criminal organizations and individuals); see also OPDAT Recent Achievements, January 23-24, 2008 (In Colombia, also in line with earlier Cold War strategies, OPDAT trains prosecutors and then monitors their performance in matters of U.S. interest.).
\textsuperscript{160} See OPDAT Strategic Plan at 5.
\textsuperscript{161} See DOJ/OPDAT, Latin America and Caribbean Programs.
ongoing criminal trial advocacy assistance programs in the Dominican Republic and Argentina in jurisdictions that have transitioned from inquisitorial to adversarial systems, emphasizing DOJ’s transnational crime priorities,\textsuperscript{162} conducted trial advocacy programs in Baku, Azerbaijan to support implementation of a new criminal procedure code, with attention to transnational crimes of money laundering and human trafficking;\textsuperscript{163} and provided legislative and policy advice in Indonesia on intellectual property rights protection through criminal justice enforcement.\textsuperscript{164}

While USAID’s justice sector reform projects, in Latin America particularly, enjoyed the initial support of local legal advocates, who frequently were substantive contributors to such reforms,\textsuperscript{165} OPDAT, ILEA, 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. OPDAT carries out its work in close coordination with ICITAP and seeks to bring about overseas criminal justice reform as an integrated project, focusing on transforming the judiciary, prosecutorial offices, and police.\textsuperscript{166} Resident Legal Advisors are also made available to participate in other U.S. foreign law enforcement training efforts, such as those organized by the International Law Enforcement Academy.\textsuperscript{167}

b. International Law Enforcement Academy

Like OPDAT, the International Law Enforcement Academy (ILEA) also combines earlier competing models of law reform development in its foreign law enforcement training, and as with OPDAT, U.S. transnational crime concerns dominate ILEA’s criminal justice reform work. ILEA promotes a U.S. transnational crime control agenda as a means of development assistance: “to buttress democratic governance through the rule of law; enhance the functioning of free markets through improved legislation and law enforcement;
and increase social, political, and economic stability by combating narcotics trafficking and crime.\textsuperscript{168} ILEA, in its institutional structure, perhaps more strikingly than OPDAT, operates within the institutional forms and strategies provided by its Cold War institutional antecedents. Whereas OPDAT concentrates on prosecutorial development and legislative reform, ILEA emphasizes law enforcement training, particularly of police officers, though prosecutors and judges may also be included in ILEA programs.

ILEA opened its doors in 1995 with a training institute in Budapest, Hungary and subsequently developed additional training schools in Thailand, Botswana, El Salvador, Peru, and Roswell, New Mexico.\textsuperscript{169} In line with the transnational crime emphasis of other State and Justice Department programs, ILEA Budapest offers an eight-week program of instruction in narcotics, counter-terrorism, corruption, money laundering, counterfeit investigations, organized crime, nuclear smuggling, community policing, and lastly human rights, among other topics. Separate regional seminars focus on alien smuggling, weapons of mass destruction, and the more general category of transnational crime.\textsuperscript{170} Despite the expression of a broader mandate in its mission statement and elsewhere, ILEA Budapest’s training and curriculum, along with the other ILEA programs, focus prominently if not exclusively on transnational crime control.\textsuperscript{171}

ILEA’s international consortium of facilities literally operate within foreign internal security structures.\textsuperscript{172} The Budapest ILEA sits within the Hungarian National Police compound, integrating U.S. trainers and Hungarian domestic security forces. After establishing the Budapest site, ILEA set about establishing a training facility in Southeast Asia. In 1998, the Royal Thai Government agreed to co-sponsor the Southeast Asian ILEA and host it in Thailand on Royal Thai Police property about fifteen miles north of Bangkok. As with the Budapest ILEA, the Bangkok ILEA’s program also heavily emphasizes U.S. transnational crime priorities, offering specialized courses on counter-narcotics, computer crimes, facility security, and intellectual property. ILEA Bangkok has provided training to commissioned law enforcement officers, as well as prosecutors and members of the judiciary from countries throughout Southeast Asia.\textsuperscript{173}

In July 2000, the United States and the government of Botswana signed a Bilateral Agreement to establish an ILEA in Gaborone. The African ILEA follows the model of the existing regional ILEAs already in existence in Hungary and Thailand, locating its program in a building constructed by the

\textsuperscript{168} International Law Enforcement Academy (ILEA), Statement of Purpose.

\textsuperscript{169} ILEA Program Overview (on file with author).

\textsuperscript{170} ILEA Budapest, Program Description (on file with author).

\textsuperscript{171} ILEA, Program Overview: Focus, Strategy, and Agenda (on file with author).

\textsuperscript{172} See id.

\textsuperscript{173} See ILEA Bangkok, Program Overview (on file with author).
government of Botswana for the U.S. academy and “collocated with the Botswana National Police College.”  Also reflecting the general transnational crime emphasis of the Department of State and Justice’s projects, the ILEA Gaborone’s curriculum emphasizes drug enforcement, border security, counter-terrorism, anti-corruption, financial crimes, cyber crime, and firearms.

ILEA operates a graduate facility in Roswell, New Mexico for law enforcement personnel who have completed a course at one of the regional ILEAs.  The Roswell ILEA similarly emphasizes U.S. transnational crime control priorities.  In addition, ILEA has established two schools in Latin America: one in El Salvador and another in Peru.  Both are housed within national police facilities.

The program at the El Salvador ILEA concentrates on drug trafficking, terrorism, financial crimes, alien smuggling, and corruption.  As at the other ILEAs, the student bodies are regional.  The Peruvian Center’s courses are similarly concentrated on narcotics trafficking, human trafficking, intellectual property rights, terrorism, and financial crime.

According to the U.S. Department of State’s International Narcotics and Law Enforcement Program and Budget Guide for 2008, the five ILEAs in Hungary, Thailand, Botswana, New Mexico, and El Salvador “have trained over 28,000 officials from over 75 countries. . . .”  The Guide advises that the ILEA curricula will continue to focus on “emerging transnational criminal trends in terrorism, terrorist financing, organized crime, cyber crimes, and human trafficking.”

Through ILEA courses, law enforcement officials learn to define transnational crimes in terms provided by U.S. instructors and are trained in crime control techniques to address these problems.  ILEA training thereby seeks to ensure that law enforcement officers working on the ground in particular foreign states internalize U.S. transnational crime control conceptual frameworks and that their training as to how to contain these problems focuses on the application of U.S.-promoted law enforcement techniques, crime scene investigations, arrest policies, and so forth.  Thus, adapting certain of the institutional strategies of their Cold War predecessors, the ILEAs physically

174 ILEA Gaborone, Program Overview (on file with author).
175 See ILEA Roswell, program overview.
176 See ILEA Latin America, project description.
177 Those eligible to become students at the ILEA El Salvador 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.  See id.
180 See id.
occupy the internal security apparatuses of recipient states—locating themselves within national police facilities—and promoting a transnational crime control agenda as a means to improve social, economic and political stability in recipient locations.

c. International Criminal Investigative Training Assistance Program

ICITAP, in contrast to OPDAT and ILEA, 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. The Department of Justice then directed ICITAP in 1986 to focus on foreign law enforcement reform, with an initial mission to train police forces in Latin America, as a mode of response to multiple crises in the region described briefly supra at page __, in which allegedly U.S.-trained security forces had become the subject of international condemnation in ongoing conflicts. ICITAP’s stated goals are to “serve as the source of support for U.S. criminal justice and foreign policy goals by assisting foreign government[s] in developing the capacity to provide professional law enforcement services based on democratic principles and respect for human rights.” Yet, ICITAP also claims that “[o]ne of [its] primary goals is to foster international and regional cooperation on transnational crime strategies. . . .” And, indeed, its programs primarily emphasize narcotics, money laundering, cybercrime, human trafficking, and intellectual property concerns.

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 organizations. ICITAP frequently works in cooperation with OPDAT and conducts law enforcement trainings throughout Africa, Asia, Eastern Europe, and Latin America. Unlike OPDAT and ILEA, ICITAP also concentrates its consulting projects on prison administration,

In fiscal year 2007, ICITAP carried out 1,500 training programs for more than 76,000 law enforcement professionals around the world, and was involved in more than 100 technical assistance and training partnership activities with U.S. government agencies. Some of ICITAP’s programs include the creation in Bosnia-Herzegovinia of a law enforcement task force to target narcotics, sex trafficking, terrorism and money laundering, and in Indonesia of a cybercrime law enforcement unit and a special force focused on optical disk regulations and criminal enforcement of intellectual property rights. In

181 See ICITAP Mission.
182 See ICITAP Program Overview.
183 See BAYLEY, supra note at 39.
184 See ICITAP, Europe and Eurasia Programs.
185 See ICITAP Asia and Pacific Programs.
addition, ICITAP often subcontracts its work to specialist law-enforcement organizations within the U.S. government and to private contractors.\textsuperscript{186}

Perhaps reflecting the eclipse of ICITAP’s initial Cold War human rights mandate by transnational crime control and other prerogatives, ICITAP was implicated, albeit indirectly, in the scandal of the tortures of prisoners in Abu Ghraib prison in Iraq.\textsuperscript{187} ICITAP had earlier been the subject of a corruption investigation in which high-ranking officials were charged with various forms of misconduct, including immigration document fraud on behalf of their foreign associates, leaks of classified information, and misappropriation of public funds.\textsuperscript{188}

In summary then, the scope of the foreign criminal justice export work of OPDAT, ILEA, and ICITAP has surpassed that of USAID’s criminal justice consultants, covering an ever more expansive geographic territory, and heavily emphasizing U.S. transnational crime control strategies. OPDAT conducts training for foreign prosecutors through U.S. Department of Justice employees stationed in countries worldwide. The Department of State runs ILEAs in almost every major region.\textsuperscript{189} ICITAP collaborates with both OPDAT and the ILEA in all regions in restructuring foreign criminal justice administration in line with U.S. transnational crime priorities. U.S. foreign criminal justice reform training has accordingly merged the work of criminal justice procedural reform and transnational crime control, and preserved yet transformed the models of Cold War foreign internal security training as a mode of global governance through crime. U.S. criminal justice consultants inhabit foreign internal security structures, define global social concerns in terms of transnational crime control, and provide direct financial motivation to foreign states to address transnational crime priorities through U.S.-preferred criminal

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\textsuperscript{186} See id. at 39.
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\textsuperscript{187} See U.S. Department of Justice, Office of the Inspector General, A Review of ICITAP’s Screening Procedures for Contractors Sent to Iraq as Correctional Advisors, Draft, 2005 (“Following public reports of allegations 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.).
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\textsuperscript{188} See Investigation of Misconduct and Mismanagement at ICITAP, OPDAT, and Criminal Division’s Office of Administration. Hearing before the Committee on the Judiciary, House of Representatives, 106th Congress, 2nd Session, September 21, 2000 (“Senior managers at the Department … engaged in potentially criminal misconduct and serious mismanagement, and other senior managers paid no attention to the problems. According to this report, security 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].”).
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\textsuperscript{189} See ILEA Program Overview.
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justice frameworks, leaving to criminal procedural reform more general concerns about the efficacy and fairness of the criminal justice system.

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

What outcomes have accompanied the global expansion of U.S. foreign criminal justice assistance and the fusion of transnational crime control and criminal procedural reform in the relevant programs? The architects of foreign crime control promotion programs have sought to structure internal evaluative measures in such a way as to ensure “success,” resulting in the design of evaluative measures that attend to readily achievable but ultimately relatively preliminary training or structural reform targets, or posit a relationship between particular criminal justice reforms and lofty goals such as increased stability or security where no such empirical connections are required by the evaluative measures, let alone established. Accordingly, although U.S. consultants’ evaluative approaches routinely reflect at least short-term corroboration of self-defined goals, the actual outcomes associated with U.S. projects on the ground in affected states remain little understood.

Other independent sources present a quite different and somewhat more revealing story of the local crime landscapes associated with U.S.-promoted criminal justice reforms in Central America, the region most heavily and longest targeted for U.S. foreign crime consulting initiatives. These latter sources include independent case study reports on the most vexing crime problems in Central America; the immediately perceived effects related to U.S.-promoted Latin American justice sector reform projects; and local activists’, NGO researchers’, and scholars’ concerns about illiberal and anti-democratic developments accompanying U.S.-sponsored criminal justice assistance and training. On these latter accounts, U.S.-promoted initiatives have at best co-existed with a mounting crime control crisis, one that U.S. programs have been unable to counter and that is left largely unaddressed by U.S. transnational crime control priorities. At worse, such programs may have exacerbated pre-existing problems by diverting scarce resources to U.S.-promoted criminal procedural regimes (that are dysfunctional in significant respects both in the U.S. context and when transplanted) and to transnational crime priorities at odds with local concerns, and by enabling anti-democratic and illiberal justice sector practices. In Central America at least, U.S. criminal justice export programs may undermine recipient states’ capacities to address their most pressing social and crime control problems (primarily related to domestic interpersonal violence, not unlike the violence that afflicts many “under-developed” parts of the United States). These pressing crime control problems are far removed from the primary U.S. transnational crime concerns such as money laundering and intellectual property appropriation. This story is, as distinct from the impression conveyed by the relevant programs’ internal
The import of the analysis in this Part is that (at least in reference to Central America), U.S. criminal justice export models have encountered serious difficulties, and have proven ill-suited to addressing the forms of criminal harms (i.e. interpersonal violence) most disruptive to recipient locations.

The following sub-sections will consider first, U.S. consultants’ unrevealing reports of success, and then competing accounts of criminal justice landscapes associated with U.S. projects in Central America, with particular attention to the most heavily targeted states of Guatemala, Honduras, and El Salvador.

A. U.S. CONSULTANTS’ UNREVEALING MEASURES

While the internal evaluations of U.S. criminal justice consultants abroad routinely result in reported “successes,” these are not in reference to the sort of criteria that one might imagine would indicate achievement of relevant goals. Reported successes do not involve generally reduced interpersonal violence, improved prosperity tied to increased investment in light of greater stability, or more efficient and humane operation of affected criminal justice systems. Rather, two misleading descriptive and evaluative strategies predominate. On the one hand, U.S. foreign criminal justice promotion programs routinely limit the ends to be achieved to narrow, but realizable training targets, which effectively serve as both the means and ends of the proposed criminal justice 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 effectively substituted for ends, program advocates identify grandiose aspirations for their projects, but provide no empirical or other persuasive account of how or why the specific recommended reforms relate to achieving the desired goals, and instead equate any potentially positive event remotely associated with their work, no matter how speculative, as caused by U.S. initiatives. Of course, if all that is demanded of U.S. criminal justice export is that it is a stop-gap measure of global governance,
then these misleading evaluative trends may be beside the point in the short-
term, or conducive even to global governance in their confirmation of
“success.” But if the legitimacy of the relevant crime control programs is of
interest or if the achievement of the purported crime-reducing and stability-
enhancing outcomes matter, then these evaluative limitations are immediately
significant.

1. Substituting Means for Ends

The first of the misleading evaluative trends that characterize U.S.
criminal justice exporters’ accounts of their programs’ successes originates in a
specific institutional assessment model associated with corporate management
theory and described in that literature as “managing for results.” Managing for
results was designed to be a comprehensive entrepreneurial 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. federal
and state governmental bodies.  

As explained by the U.S. Government
Accounting Standards Board, 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. It 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 has in
accomplishing its mission, goals, and objectives.

This framework generally has three levels: at level one are several
“strategic objectives,” each of which connects downward to several
“intermediate results,” which in turn correspond to several “performance indicators.”

These objectives are to be selected in a manner that can produce
regularly measured results, and in particular, outcomes that satisfy the
objectives, thereby creating strong incentives to conceptualize and define
limited, readily achievable goals.

Legislation enacted by the U.S. Congress in the early 1990s effectively
mandated that federal government agencies adapt a managing for results

192 See Government Accounting Standards Board, Performance Reporting for Government, What
is Managing for Results?, available at
http://www.seagov.org/aboutpgm/managing_for_results.shtml; see also PETER F. DRUCKER,
MANAGING FOR RESULTS: ECONOMIC TASKS AND RISK TAKING DECISIONS (1964).

193 Government Accounting Standards Board, Performance Reporting for Government, What
is Managing for Results?; see also DAVID OSBORNE AND TED GAEBLER, REINVENTING
GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR
(1993).

194 See Government Accounting Standards Board, Performance Reporting for Government, What
is Managing for Results? (on file with author).
framework, requiring that all such agencies devise a mission statement and a set of achievable objectives against which to regularly assess and report performance.\textsuperscript{195} This move toward a managing for results approach in public as well as private sector governance can be explained by the push in the face of increased privatization to develop accessible success stories for skeptical legislators and evaluation methods that will establish (at least superficially) that government programming is making a difference.

Foreign aid programs are particularly subject to these demands due to perceptions of stalled progress and a lack of results despite considerable passage of time. As development expert Thomas Carothers has explained:

Inevitably, when faced with strict, narrow criteria for success, aid officers begin to design projects that will produce quantifiable results rather than ones that are actually needed. As the indicators become established and are taken to constitute the set of accepted outcomes of democracy projects the universe of program design shrinks to match the indicators. The evaluation tail begins to wag the program dog.\textsuperscript{196}

The managing for results approach itself almost irrespective of individual consultants’ intentions conduces to a limited institutional vision that assesses organizational performance without regard for the broader range of programs’ possible effects.

Not surprisingly then, in response to these pressures and in compliance with the relevant federal legislation, the evaluative structure and method most foreign criminal justice aid programs, including OPDAT, ILEA, and ICITAP, have settled on is just such a managing for results approach. OPDAT, ILEA, and ICITAP’s managing for results evaluation models all illustrate the tendency of this framework to produce a limited institutional vision, with precise and narrow definitions of strategic objectives, intended results, and indicators of success in reference to these objectives.

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


\textsuperscript{196} CAROTHERS, AIDING DEMOCRACY ABROAD 294.
improve the effectiveness of their justice sector in a manner consistent with the rule of law. To assess whether OPDAT is meeting these four goals, OPDAT relies upon eight factors to develop “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.

OPDAT’s selection of these factors to measure the organization’s progress towards its goals in recipient countries reflects, predictably, in part, a means-ends substitution, because to begin most simply, several of OPDAT’s “measures” are properly considered “means” rather than “measures” of performance. For instance, Measure 1 above, “structural reform,” which OPDAT defines as the development and implementation in the recipient country of standards of conduct for justice sector workers and disciplinary mechanisms, is a central part of the means by which OPDAT intends to bring about its ultimate criminal justice goals (e.g. Goal 4, increasing fairness, transparency, and efficiency of recipient justice systems). Structural reform itself cannot measure the capacity “to combat terrorism” or to “control . . . crime problems” or the embrace of the “rule of law” (OPDAT’s above cited goals), particularly without some account of the causal relationship between the particular structural reforms (existence of a prosecutorial code of conduct and disciplinary mechanism) and the desired outcomes (presumably internalization or compliance with the code). In this respect, OPDAT’s substitution of a means—structural reform—as a goal achieved reflects the problem identified by international law scholar David Kennedy, who has elucidated in a separate context how: “[t]oo often . . . humanitarians get sidetracked in debate over . . . structural issues—and treat structural outcomes as guarantors and substitutes for humanitarian results.” In this manner as well, OPDAT’s Measure 8, “tools for criminal justice reform,” which OPDAT defines as “penal codes, codes of procedure and investigative techniques,” similarly identifies means used to bring about OPDAT’s desired goals and cannot meaningfully function at one and the same time as a reliable factor with which to measure performance. 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, though in so doing ensuring at least partially favorable program assessment on the terms of the managing for results model since such measurement factors are necessarily

197 See OPDAT Strategic Plan 2.
198 See id. at 2-3.
Others of OPDAT’s so-called measures would more appropriately be classified as predicate factors that are assessed (and assured) prior to even beginning to undertake foreign criminal justice reform. Measure 2, host government commitment, for instance, is simultaneously noted by OPDAT as a criterion that must be in place prior to undertaking a reform 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 in any level of assistance.”

Similarly, Measure 3, positive impact on operational interests of DOJ is also a predicate for OPDAT involvement. OPDAT will not even undertake a project unless it will have a “positive impact on the operational interests of DOJ.” Predicate factors substitute for ends in this manner as achievement of goals is measured by reference to conditions that are ensured before OPDAT begins its work in a particular recipient country.

OPDAT’s reliance on measuring success in misleading terms is further confirmed by OPDAT’s reported “recent achievements,” virtually all of which define success in reference to trainings conducted. OPDAT notes among its “recent achievements,” an Anti-Gangs training workshop in El Salvador for officials from El Salvador, Guatemala, Honduras, and Mexico to teach them how to “effectively manage gang members in prison.” Another celebrated “recent achievement” for OPDAT was a briefing by the Resident Legal Advisor to Colombia to the U.S. Trade Representative; the presentation concerned cases of concern for the passage of a Free Trade Agreement between the U.S. and Colombia. It is entirely unclear how and why these trainings conducted result in (1) developing anti-terrorism task force capacity abroad, (2) halting the export of violent crime and organized crime to the United States, (3) combating human trafficking, or (4) improving the fairness and efficacy of criminal justice systems worldwide (OPDAT’s afore-noted goals). In noting its achievements (e.g. trainings conducted) ODPAT does not once offer any account of how or why OPDAT’s trainings brought host governments any closer to even one of these stated goals relating to crime reduction or capacity building. Still, “success” according to four of OPDAT’s factors for establishing performance measures (1, 2, 3, and 8) are assured simply in virtue of OPDAT undertaking a training project, because means are literally substituted by OPDAT as factors indicative of success, or are otherwise

200 See OPDAT’s Strategic Plan 10.
201 See id. (Criteria for OPDAT Project Involvement) (“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.”).
202 See OPDAT Recent Achievements, June 6-13, 2008 (on file with author).
203 See OPDAT Recent Achievements, April 7, 2008 (on file with author).
ensured prior to OPDAT even commencing a given project. OPDAT’s
indicia of success therefore reflect virtually nothing about the actual impacts of
its programs on the ground in reducing the most disruptive forms of crime in
recipient locations, or with regard to other factors for that matter.

The ILEA likewise identify a set of ambitious crime control aspirations,
but then measure success in reference to the number of trainings administered
and students graduated rather than in accord with crime reduction or other
related goals. The ILEA’s goals include: “helping to protect American citizens
and businesses through strengthened international cooperation against crime .
. buttress[ing] democratic governance through the rule of law; enhanc[ing] the
functioning of free markets through improved legislation and law enforcement;
and increas[ing] social, political, and economic stability by combating narcotics
trafficking and crime.” To reach these goals, in accord with the managing
for results framework, ILEA develops various objectives related almost entirely
to training foreign law enforcement officers, judges, and prosecutors. The
ILEA then assess achievement of the before-mentioned goals (e.g. increased
social, political, and economic stability or buttressed democratic governance
and rule of law) in terms of students’ “critiques and end-of-session reports by
instructors and program coordinators” following trainings. Again, no
explanation is provided as to how or why ILEA training will promote any of
the broader rule of law enhancing or crime reduction goals: “success” is
predicated instead on measuring the “professional development of graduates”
which has yielded, according to ILEA “very positive results.”

If students and instructors favorably review trainings in which they participated, then the

204 There remain four additional OPDAT Measures that are not either predicate factors for
involvement or 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 sub-section will demonstrate how these latter four measurement factors are
invoked in a manner that confuses loose correlations with causation.
205 See ILEA Statement of Purpose (on file with author).
206 See id. (“To reach these goals, the ILEAs conduct [training] activities designed to realize the
following objectives: Support regional and local criminal justice institution building and law
enforcement; Facilitate strengthened partnerships among countries in regions served by the ILEAs
aimed at addressing problems of drugs and crime; Provide high quality training and technical
assistance in formulating strategies and tactics for foreign law enforcement personnel; Improve
coordination, foster cooperation, and, as appropriate, facilitate harmonization of law enforcement
activities within regions, in a manner compatible with U.S. interests; Foster cooperation by law
enforcement entities engaged in organized crime and other criminal investigations; Assist foreign
law enforcement entities in the professionalization of their forces in a cost-effective manner; Build
linkages between U.S. law enforcement entities and future criminal justice leadership in
participating countries, and among regional participants with one another.”).
207 See ILEA Program Overview, Development and Evaluation (“Student’s critiques and end-of-
session reports by instructors and program coordinators measure the effectiveness of the
instruction at all the ILEAs.”) (Attention is also devoted to the “professional development of the
graduates and the extent to which this [ILEA] training has influenced their individual
organizations.”).
208 See ILEA Program Overview, Development and Evaluation (explaining that comprehensive
study of professional development of graduates yielded very positive results) (on file with author).
ILEA claim success vis-à-vis their goals. As long as students learn the material conveyed in ILEA’s trainings, the success of ILEA’s programs is assumed in reference to its ultimate ends of promoting stability and prosperity, even if, as will be suggested in the sections to follow, trainings and transnational crime control promotion do not impact or may even undermine social stability and prosperity.

For each of the specific consulting services ICITAP provides, ICITAP too, like OPDAT and ILEA, operates in reference to a managing for results framework that similarly reflects a limited institutional evaluative horizon designed to ensure “success.” ICITAP indicates that its 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.”

Central to the realization of these goals is building or “improving” foreign Law Enforcement Training Academies. No objectives for the establishment of ICITAP’s Law Enforcement Training Academies are indicated that do not involve the means of administering training or planning to administer training.

No account is provided of how or why ICITAP’s training will improve the ethics or human rights practices of the host countries’ law enforcement personnel. Similarly, with regard to ICITAP’s Organizational Management and Leadership program, which ICITAP refers to as “Phase II” of its consulting program, objectives refer to trainings of various kinds without noting any independent positive outcomes the programs seek to bring about.

Where ICITAP develops projects that involve evaluation in relation to independent rule of law promotion goals, no account is provided to explain how trainings implemented or technology donated will lead to ICITAP’s claimed ability to “reduce or eliminate human rights violations by the police” or “better coordinate with the community to create a sense of security, trust, and partnership.” It is this latter unquestioned adherence to and promotion of U.S. criminal justice export’s possibilities that will be examined next.

2. Confusing Weak Correlation for Causation

Where meaningful independent goals are attended to by U.S. foreign criminal justice promotion programs, that is, when means—for example, training targets—are not substituted for ends, OPDAT, ILEA and ICITAP’s claims regarding their success in reference to these goals take for granted the value of U.S. crime control models and confuse weak correlations associated with their work with causation. More specifically, U.S. foreign criminal justice

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210 See ICITAP, Building Law Enforcement Institutions Worldwide, Law Enforcement Training Academy, Objectives.
211 See ICITAP Phase II: Development of Procedures, Curriculum, and Management Training.
212 See ICITAP, Transition to Democratic Policing Development Program Impact Measures.
promoters recommend a set of practices and concerns: robust prosecutor
discretion and particular prosecutorial techniques, adversarial processes,
lengthy prison-based punishment, plea bargaining as a tool to reduce system
backlogs, and perhaps above all, specific transnational crime priorities. Yet,
foreign adoption of these particular crime control practices and transnational
crime priorities is not justified in reference to a specific reasoned theory of how
such practices are beneficial, individually or collectively. Instead, foreign
criminal justice promoters assume the ultimate possibilities of such practices to
bring about stability, reduced crime, and economic growth.

In some contexts, this adherence to U.S. criminal justice export
manifests simply as an unwavering allegiance to particular U.S. crime control
models and concerns without consideration of their actual effects on the
ground, and without any attempt to construct an empirically or theoretically
substantiated causal story that connects U.S.-promoted reforms to favored
outcomes. In other instances, the confusion of weak correlation with causation
functions as a mechanism in support of such uncritical attribution of success to
U.S. criminal justice promoters’ work.

To return to OPDAT’s “performance measures” not already analyzed in
terms of the limited institutional vision engendered by the managing for results
framework—decrease in reported human rights violations, quantitative and
qualitative improvements in the administration of justice, judicial
independence, and integration and balance—each of these four evaluative
categories is defined by OPDAT so broadly as to permit any positive justice
sector development within the recipient country to fall within one or the other
evaluative category. As an example of a “decrease in reported human rights
violations” (performance Measure 4) OPDAT indicates that a “reduction in the
average length of time arrestees spend in pretrial detention” over a particular
period would suffice to confirm OPDAT’s success in accord with this factor.
On these quite general terms, a decrease in human rights violations could also
include a shortening in the length of time between the issuance of criminal
charges and conviction (which might reflect the shortcutting of criminal
procedural protections quite apart from OPDAT’s work), reduced reports over
a particular period of spousal abuse (which could be attributable to
underreporting or another factor as easily as to OPDAT’s work), or a reduction
in any other category of crime or time related to the administration of criminal
justice. Similarly, 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
encouraging change in the recipient country, ranging from reduced duplication
of functions and reflection of separation of powers, to increased prosecutions or
And no explanation is provided as to why any such indicator, for example a decrease in human rights violations or quantitative improvements in the administration of justice should be attributed to OPDAT’s trainings for prosecutors, draft codes, or other projects. No theoretical or empirical account is provided either as to why an increase in prosecutions or incarceration would be a positive outcome attributable to OPDAT.

Nonetheless, in its reports of “Recent Achievements” OPDAT routinely takes credit for what it construes to be improvements along these very broad lines, resulting from its programs. One “recent achievement” for OPDAT in this vein involved the sentencing of a Colombian military Colonel Byron Carvajal who had been found guilty of “aggravated homicide” to a term of fifty-four years for the killing of ten members and an informant of an “elite anti-narcotics police unit.” OPDAT credits this lengthy sentence to its own work in Colombia because “[t]hroughout the trial, which began on December 18, 2006 and concluded with closing arguments on January 29, 2008, at least one of the trial team members has been a Colombian prosecutor who participated in a number of OPDAT trial advocacy and human rights courses . . . and has served as a trainer of other local prosecutors.”

In attributing this “success” in Colombia to its work, OPDAT neglects to mention that a member of this same prosecutorial team was removed because of an offer he had made to the defense to assist them in exchange for $400,000. Further reflective of this trend of reinforcing unreasoned adherence to U.S. criminal justice export by mistaking weak correlation for causation, in noting that on January 18, 2008, a three-judge panel of the Serbian Belgrade District Court convicted and sentenced 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.” Again, while there may be a weak correlation between OPDAT’s presence in the country and an enhanced sentence, no causal account is offered that would lead one to reasonably attribute such sentences to OPDAT’s projects or even necessarily to overall justice sector improvements. Yet, OPDAT operates on this presumption, and confuses imprecise correlations of this sort with causal connections to reinforce this assumption.

213 See OPDAT’s Strategic Plan, Measures of Performance (factors to be taken into account in developing performance indicators for specific Program Proposals and Work Plans).
214 See OPDAT Recent Achievements, Colombia, April 21, 2008 (on file with author).
215 See AP Cali, Colombia, Colombian Soldiers Found Guilty, TAPEI TIMES, February 20, 2008 at 7 (“The convictions came despite numerous attempts to subvert the trial, including a prosecutor's offer to help the defense in exchange for more than US$400,000, senior police officials and prosecutors familiar with the case said.”).
216 See OPDAT Recent Achievements, Serbia, January 18, 2008 (emphasis added).
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 general correlations with causation in the context of USAID democracy promotion programming. “[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.”\textsuperscript{217} U.S. foreign criminal justice promoters similarly exhort the success of their programs in relation to any decrease in particular categories of crime or time for case processing (for example, OPDAT’s use of broadly-defined decreased human rights violations as a measure of its own performance), which is then attributed uncritically to program trainings.

Additionally reflecting an unreasoned attribution of success to its programs, the ILEA claim to be helping to achieve the “very important policy objective of the Department of State” of enabling foreign law enforcement “to efficiently combat crime in their respective countries, and at the same time, prevent the movement of transnational criminal elements into the United States and throughout the world.”\textsuperscript{218} As previously noted, the ILEAs even propose their trainings work to “buttress democratic governance through the rule of law; enhance the functioning of free markets through improved legislation and law enforcement; and increase social, political, and economic stability by combating narcotics trafficking and crime.”\textsuperscript{219} In reporting ILEA’s “key successes” in reference to these goals, the Bureau of International Narcotics and Law Enforcement Affairs notes that as of September 2007, over the previous twelve years of its existence, the ILEA trained over 28,000 officials from more than 75 countries, including over 2,700 officials trained in 2006.\textsuperscript{220} The Department of Justice reports, however, that transnational crime is increasing rather than decreasing in the face of widespread U.S. interventions, but concludes that further ILEA trainings will continue to respond to and repel “transnational criminal trends.”\textsuperscript{221} Again, such claims of success are not accompanied by any account of how ILEA’s training will bring about these outcomes. In this manner, similarly to OPDAT, the ILEAs’ convictions about the capacities of U.S. crime control trainings to bring about fundamental social and economic transformation and crime reduction is taken for granted, in the absence of any robust empirical or theoretical account of the benefits associated with such trainings.

\textsuperscript{217} Carothers, Aiding Democracy Abroad 295.
\textsuperscript{218} See ILEA Roswell Report (on file with author).
\textsuperscript{219} See ILEA Statement of Purpose (on file with author).
\textsuperscript{221} See United States Department of Justice, Criminal Division, Office of Overseas Prosecutorial Development Assistance and Training, General Projects Description (“With transnational crime increasing at exponential rates, the challenge of providing such assistance becomes an ever greater component of DOJ’s international obligations.”).
ICITAP’s accounts of success are also susceptible to a similar pattern. ICITAP promises that its foreign interventions can have a major role in promoting democracy and controlling international crime, yet as explained above, ICITAP’s “accomplishments” reports are almost exclusively focused on trainings conducted and plans provided to host governments.\(^222\) No systematic study has attempted to track the effects of ICITAP’s trainings; still, any concurrent positive transformations in host countries, ICITAP credits to its work, confusing the weak correlation between ICITAP presence and all in-country developments as a causal connection. ICITAP’s Project Overview for El Salvador, for instance, claims that the performance of El Salvador’s police forces has “improved dramatically since the initiation of ICITAP’s efforts.”\(^223\) ICITAP notes the “steady reduction of crime in most categories and the striking reduction in the number of kidnappings, armed robberies and truck hijackings.”\(^224\) Once again, no causal explanation is provided to link truck hijacking or robbery reduction to the reforms and trainings implemented by ICITAP. And the reduction in crime reported by ICITAP bolsters ICITAP’s credibility by excluding categories in which crime actually increased: e.g. gang violence. Program advocates note separately that there have been “increasing incidents of violent crime and homicide related to street (youth) gang violence.” Consequent to the increase in gang violence, ICITAP has developed and completed a “long-term, agency approach to gang prevention, gang interdiction, and gang suppression.” Still, no causal account of the anticipated connection between such trainings and gang crime reduction is offered; instead, it is assumed, reinforced by correlations such as those between ICITAP’s in-country presence and the potentially entirely unrelated reduction in truck hijackings.

The work of U.S. criminal justice promoters abroad thus fluctuates between substituting training targets for independent goals, and un-reasoned attribution of any positive developments in recipient locations to U.S. consultants’ work. When U.S.-promoted reforms are recognized to have fallen short, advocates request that efforts persist, with conviction the situation will improve. John Jay Coleman of the DEA testified before the Senate as to the disappointments associated with Colombia’s criminal procedural reforms: “[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


\(^{223}\) See ICITAP Project Overviews, El Salvador (on file with author).

\(^{224}\) See id.
Any shortcoming or persistent problem indicates the need for further U.S. work in that domain, and the suspension of disbelief that additional attention will bring about necessary change. U.S. consultants invoke vague correlations, which are confused as causal explanations, to support this faith, and rely upon the achievement of training targets as a proxy for meaningful transformative social change.

As a consequence of these misleading evaluative trends, U.S. criminal justice exporters have put in place a set of reforms the actual effects of which are little considered or understood by program advocates or by the public, perhaps bolstering in the short term the self-perceived successes of their work, though revealing almost nothing about the possible effects of such programs on crime and development in affected regions. Therefore, in order to begin to make sense of associated outcomes, we now turn to competing independent accounts of the successes or failures, as some indeed claim, of U.S. criminal justice export.

B. COMPETING ACCOUNTS OF HARMS ASSOCIATED WITH U.S. INITIATIVES

Other independent sources suggest most optimistically, that in Latin America and Central America specifically, the region longest and most heavily targeted for U.S. criminal justice export, U.S.-led trainings and reforms have had little effect on local crime control landscapes. More critical accounts indicate that such programs have diverted much-needed resources from pressing social problems to U.S. transnational crime and procedural priorities. Some even propose that U.S. programs have functioned to refine abuses perpetrated by members of recipient countries’ justice sectors. These competing accounts do not claim that presently existing foreign crime control landscapes in Latin America have necessarily arisen because of U.S. consultants’ presence, though U.S. involvement may be a contributing factor in some instances. Regardless, quite debilitating foreign crime predicaments persist despite two decades of U.S. criminal justice assistance. Moreover, U.S. programs fixate on U.S. transnational crime control concerns with little attention to other causes and consequences associated with crime control problems most devastating to recipient states. A full ethnographic examination or detailed case study assessment of any particular reform program and its associated crime control context, though much needed, is beyond the scope of this Article, and will be developed in future work; the remainder of this section will survey some of the available evidence concerning a series of criminal justice and crime control developments associated with U.S. initiatives, with

particular emphasis on the Central American states of Honduras, El Salvador and Guatemala.

1. Incongruous Crime Control Concerns

Over the post-Cold War period of intensive U.S. criminal justice assistance to Central America, interpersonal violence, (not a particular focus of U.S. assistance), has become an ever more severe source of harm and instability. Rising crime has rendered murder, theft, and rape increasingly commonplace.\(^\text{226}\) In Central America, poverty and joblessness are rampant: the United Nations Development Program’s 1999 State of the Region Project Report related, following ten years of concentrated U.S. assistance, that in postwar Central America, “the economic and political achievements won are precarious and, in terms of social equity and environmental sustainability, negative for the region.”\(^\text{227}\) Further, according to the Report, “widespread poverty persists”\(^\text{228}\) and the “end of military conflicts, democratization of the political regimes, and modernization of economies has not managed to alleviate . . . historical social inequalities . . . .”\(^\text{229}\) Since 1999, migration flows and market restructuring have decreased opportunities for rural relative to urban employment; slums in cities around outsourced manufacturing zones have metastasized and crime and gang activity are often most severe in these locations.\(^\text{230}\) Economic instability and extensive unemployment have led many


\(^{227}\) See United Nations Development Program, State of the Region Project, First Report Summary 14 (1999). Honduras is one of the most violent countries in Latin America. In 1999, the homicide rate reached 154 per 100,000 inhabitants. Harold Sibaja, et al, Central America and Mexico Gang Assessment: Honduras Profile 4 (USAID Apr 2006) (“USAID Report on Honduras”); United Nations Development Programme, Democracy in Latin America: Towards a Citizens’ Democracy 112 (UN Dev Program 2004). More recent levels are lower, but still higher than other countries in the region. This high homicide rate is coupled with high rates of other violent crime and property crime. USAID Report on Honduras at 4. Guatemala also faces serious problems. The homicide rate in Guatemala in 2004 was 35 homicides per 100,000 people, compared with 5.7 per 100,000 in the United States. Richard Loudis, et al, Central American and Mexico Gang Assessment: Guatemala Profile 1 (USAID Apr 2006) (“USAID Report on Guatemala”); see also Ginger Thompson, Guatemala Bleeds in Vise of Gangs and Vengeance, NY TIMES A10 (Jan 1, 2006) (“Nearly a decade after the end of a civil war left 200,000 people dead or missing in this country of 14 million people, a new wave of violence has hit Guatemala and it looks a lot like the old one—some say worse.”). El Salvador suffers from a homicide rate of approximately 40 per 100,000. USAID Report on El Salvador at 4.


\(^{229}\) See id. at 32.

\(^{230}\) Migration flows from Central America have also led to increased reliance on remittances from the United States and other rich Northern countries, driving ever greater numbers of people to hinge their hopes for a better economic future on immigration to the United States. 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, e.g.,
men in particular to turn to black market economies and gangs to support themselves and their families. The associated violence has had a devastating effect, disproportionately harming the poor. Each year twenty-eight million Latin American families are victims of robbery and theft;\(^{231}\) for poor families the loss of personal property is particularly debilitating as it cannot be cushioned by recourse to other assets. Murders and the fear they generate in witnesses and others undermine the capacity of citizens of certain Central American countries to lead a minimally secure existence. In Guatemala in 2005, interpersonal violence resulted in the deaths of over 5,500 people.\(^{232}\) In El Salvador in 2005, not an atypical year, an average of fifteen people were murdered each day, in a population of roughly six million; in 2006 an average of approximately ten people were murdered per day.\(^{233}\) For purposes of comparison, in Los Angeles, California, with a significantly larger urban population, between 2005-2006, approximately one person was murdered per day; even at the height of L.A.’s crime waves in the early 1990s, no more than an average of three murders occurred each day over the course of any particular year.\(^{234}\) These forms of interpersonal violence—theft and assault—are not among the transnational crime priorities emphasized by U.S. criminal justice exporters in their work in Central American states.

As inter-personal violence and theft plague at least certain recipient states, what have been U.S. program participants’ reactions to the notable incongruities between U.S. transnational crime control priorities and local criminal justice landscapes? In one case, Francisco Gómez, a midlevel Salvadoran police officer who attended the ILEA “Law Enforcement Management Development Program” in early 2007, reported that though his experience at the ILEA San Salvador was a positive one for him, it focused in significant part on counter-terrorism: “[t]his [terrorism] isn’t a problem in El

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\(^{231}\) See Alessandra Heinemann & Dorte Verner, Crime and Violence in Development: A Literature Review of Latin America and the Caribbean Region, World Bank Policy Research Working Paper, October 2006, 7 (“[T]he more assets an individual or household can acquire and the better they manage them, the less vulnerable they are. Violence . . . severely hampers the poor’s ability to accumulate assets.”).


\(^{234}\) See Los Angeles Police Department Crime Statistics Summaries Archive available at http://www.lapdonline.org/crime_maps_and_compsstat/content_basic_view/9098 (statistical analysis may be downloaded as PDF for each year from 1997-2007).
Salvador,” Gómez explained, “but I suppose it could be.”

Cyber crime is yet another U.S. transnational crime priority emphasized in foreign training curricula, though it is not among the most pressing forms of criminal disruption (e.g. murder, rape, and robbery) plaguing many recipient countries. In his speech at an ILEA Roswell graduation, the ambassador of Botswana, his Excellency Lapologang Caesar Lekoa, implicitly drew attention to this incongruity, joking that he did not know what “cyber crime” really was. Still, his country hosts an ILEA, one of the purposes of which is to train African states’ internal security forces to direct their attentions to cyber crime. U.S. consultants continue to direct recipient states’ attention and resources to developing anti-terrorism and cyber crime capacities despite the fact that this realm of conduct “isn’t a problem” in many recipient locations, especially relative to the arguably crisis-level proportions of common murder, rape, and robbery.

In some instances, the focus on certain categories of “transnational” crime may direct recipient states’ resources to “crime” problems that actually improve (as in the case of intellectual property appropriation) or at least do not negatively impact their citizens’ lives, and that will deflect resources from addressing street violence and other forms of conduct that create great social instability. 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, though the U.S. transnational crime control model views this as intellectual property crime. Criminalizing the livelihood of street vendors imposes a significant hardship upon affected persons in recipient states. A similar case might be made for the violation of certain pharmaceutical patents, at least where such violation is controlled and regulated.

235 See Wes Enzinna, Another SOA? A Police Academy in El Salvador Worries Critics, 41 NACLA REPORT ON THE AMERICAS 2 (March/April 2008).
236 See ILEA Roswell, Graduation Speech by Lapologang Caesar Lekoa (on file with author).
237 See also Home Review: Thailand to Train the World’s Software Police, BANGKOK POST (Thailand), FINANCIAL TIMES, August 4, 1999 (“Washington dropped the other shoe; after selling and building its International Law Enforcement Academy in Thailand for anti-drug and anti-mafia training, the US Justice Department finally announced it will be used mostly to train copyright police; the FBI and US Customs Service said it will bring Thais, Americans and others to Bangkok for more and more specialised training courses in detecting intellectual property crimes including stealing technology from US companies and how to find fake watches in the Patpong market.”).
Even the case of narcotics crime, though undoubtedly an area of criminal conduct that is disruptive of social stability in many if not all places where it occurs in an organized criminalized form, might generate quite different policing, regulatory, and prosecutorial strategies were developing (and underdeveloped regions of rich) states’ interests rather than U.S. transnational crime control priorities and approaches to take center stage. Despite the harms caused by narco-trafficking in much of the world, the illegal drug industry also provides a significant source of funding for numerous developing world economies. 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 activities are an important source of foreign exchange, income and employment in the affected states.” Consequently, the particular U.S. approach to confronting narcotics may not be the one best suited to the circumstances of recipient states.

Significantly, once anti-terrorism or intellectual property legislation is adopted by recipient states, when incongruities between recipient states’ crime problems and such transnational crime initiatives present themselves, the U.S.-promoted laws may be enforced against vulnerable and non-threatening targets. Following the implementation of U.S.-promoted intellectual property criminal measures, Salvadoran street vendors selling pirated goods were identified by former Salvadoran President Saca as criminals and he proclaimed that “[the vendors] are terrorists—the correct work is ‘terrorist’... Anyone who sells something illegal on the streets must go to prison.” The impact of the associated increase in incarceration rates will further burden the country’s crisis-stricken prisons, which are designed for 7,000 inmates but as of September 2007 held 17,000 inmates.

While no causal connection should be assumed between the proliferation of U.S. transnational crime control and reform programs and rising theft and inter-personal violence in recipient states, the presence of U.S. programs has not led to considerably reduced violence or increased stability, in Central America at least. Rather, over the period of intensifying U.S. crime control assistance oriented toward controlling transnational crime, interpersonal violence and destabilizing street crime have consistently plagued the region. The law enforcement landscape in El Salvador, Honduras, and Guatemala thus reflects pervasive murder, robbery, and rape, despite continuous U.S.-sponsored transnational crime trainings, procedural reform, subsidy of enhanced technology, and funding for intellectual property, migration, financial...

Import Generic Drugs from India, THIRD WORLD NETWORK, February 22, 2001; see also David Batty, Clinton Backs Violation of AIDS Drugs Patents, THE GUARDIAN, May 9, 2007.


See Wes Enzinna, Global War on Terrorism: El Salvador, Committee in Solidarity with the People of El Salvador Press Release (December 17, 2007) (quoting President Saca’s remarks at a press conference at which Enzinna was present).

See Will Grant, El Salvador Addresses Jail Crisis, BBC NEWS, September 14, 2007.
crime, cybercrime, and narco-trafficking crime control initiatives. In fact, substantial criminal justice assistance provided over a span of more than twenty years has not been able to quell substantially the ongoing violence and may have exacerbated persistent interpersonal harms by diverting resources from exploring context-sensitive approaches to containing violence, to transnational crime control and procedural reform.

2. The Costs of New Criminal Procedures

In the face of rising crime waves in Latin America, a central component of U.S.-sponsored criminal justice reforms, particularly those organized by USAID and now implemented with the assistance of OPDAT, ILEA, and ICITAP with attention to U.S. transnational crime priorities, has been the transformation of previously inquisitorial justice systems, similar to those of former European colonizers, to an accusatorial or adversarial model based on that of the United States. As explained supra at page _, many Latin American states carried out such inquisitorial to adversarial criminal procedural reforms with support from USAID over the course of the 1990s. With the increasing occupation of the field of U.S. criminal justice export by OPDAT, ILEA, and ICITAP, the procedural reform project continues to be a key part, although a lesser proportional focus of U.S. foreign crime control consulting. But despite OPDAT, ILEA, and ICITAP’s relative emphasis on transnational crime control as compared to that of earlier consultants who primarily emphasized procedural transformations, the resulting procedural reforms continue to affect the administration of justice in the region in significant respects.

Although local reform advocates occupied a significant place in initiating reforms, foreign experts and funders came to dominate the process: “This development did not dilute the reform goals, which retained much of their initial focus on human rights, due process and depoliticization. It did, however, eliminate the only individuals with sufficient knowledge of the target institutions to detect emerging problems as reform proposals . . . clashed with local reality.”

A study, co-authored by Christian Riego and Juan Enrique Vargas, attorneys and reform specialists at the Justice Studies Center of the Americas in Santiago, Chile, describes the outcomes of U.S.-sponsored procedural reforms in terms of: “overall ineffectiveness” “delays” “loss of prestige of the systems vis-à-vis its users, misuse of resources, and deterioration of public relations and transparency.” The Justice Studies Center of the Americas (CEJA), an

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243 See also Langer, supra note _ (Revolution)
245 See Christian Riego & Juan Enrique Vargas, Criminal Justice Reform in Latin America: Successes and Difficulties, June 2003, 18; see also id. at 22 [hereinafter Riego & Vargas] (“These
international agency created in 1999 by the institutions of the Inter-American System, was established to provide empirical research and information to assist in remedying what are widely perceived to be the failures of U.S.-sponsored justice sector reforms in states across Latin America. 246

A report published in the Inter-American Development Bank journal assessing the progress of criminal procedure reform efforts in Latin America in 2003 related that as “the dust from this tumultuous first wave of reforms is beginning to clear . . . a very uneven panorama” emerges. 247 The article goes on to describe the “uneven panorama” in terms that are worth quoting at length:

[T]he implementation of the new criminal procedures has often generated confusion and additional delays. In some cases, after a failed attempt to adopt new procedures, the courts have simply reverted back to the old ways. 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 when 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. . . . 248

problems . . . also have a tremendous impact on the other entities involved in the process, particularly on . . . the defense, the police, prison services, and expert witnesses, among others. The lack of certainty and effectiveness of the courts generates for these entities excessive time demands, dead time, and difficulty in coordination, all of which cause a distortion of their performance.”).
CEJA’s headquarters are located in Santiago, Chile and its members are the active member states of the Organization of American States. CEJA describes its purpose as follows: “Over the past twenty years, nearly every country in the region has promoted wide-reaching judicial reform programs. The main areas that have been addressed are criminal justice, government, access to justice, and management. 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.” See What is the Justice Studies Center of the Americas?, http://www.cejamericas.org.

See Constance, supra note __.

See id. This pattern of criminal procedural regimes overburdened by frequent recourse to criminal prosecution to maintain social order, prompting in turn a popular perception that procedural protections are too expansive (even though rarely enjoyed by suspects or defendants), and a subsequent ratcheting up of the harshness of substantive criminal law reflects a parallel process to that of the U.S. criminal justice system during the same time period. See Stuntz, supra note __.
Overall, Riego and Vargas describe in reference to U.S.-sponsored justice sector reforms a “generally bleak scenario in the region.” One extreme problem noted by Riego and Vargas in El Salvador and Guatemala involves the failure of state officials to bring detained criminal defendants to trial; individuals who are deprived of their freedom awaiting determination of their respective cases are detained further due to their “failure to appear” caused by the state’s inability to administrate competently the new procedures (which reconfigure the process to require the physical presence of the accused). Riego and Vargas explain: “This represents an extreme situation in that deprivation of freedom of the prosecuted person is only justified as a guarantee that he or she will appear in court; if it does not function as such a guarantee, this measure loses its legitimacy.”

Another related problem area is the lack of available funding in recipient states to support the inquisitorial to adversarial reforms promoted by U.S. consultants. Under an inquisitorial system, which existed prior to U.S.-promoted reforms and as explained already is derived from the model of former European colonizers, investigative and much prosecutorial authority rested with the judge who was also responsible for securing compliance with prescribed criminal procedures. Under an adversarial justice system, the judge in a criminal trial acts as neutral arbiter, in principle moderating the vigorous contest 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 responsibility for procedural compliance without defense objection, public defender offices require additional funding and staff under an adversarial system or else the reforms will result in serious potential unfairness for those facing criminal charges. As a consequence, as judges relinquish their previous procedural enforcement responsibility to defense counsel, defense counsel is likely to be sufficiently over-burdened as to be unable to completely fulfill its new tasks without further support in terms of financial resources and personnel. Examination of the relevant reforms reflects pervasive obstacles to minimally adequate implementation of defense systems, the resolution of which will require devotion of substantial additional and scarce resources. According to research undertaken by the Justice Studies Center of the Americas:

> defense systems still lack development on the formal level . . . .
> [Defense lawyers] have not received the necessary training to carry out effective questioning of the evidence presented by the prosecution, nor have they had access to successful methods for

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249 See Riego & Vargas, supra note _ at 22.
250 See id. at 22.
defining defense strategies. The second problem that defense lawyers face is related to the resources they have at their disposal, including their own time. They spend most of their time in court, and thus have limited opportunities to prepare cases, which strongly influences their ability to question evidence. In relation to case preparation activities, there are few opportunities to develop autonomous investigations. This problem has not been treated in depth as part of the reform process.

Comparative law scholar Esquirol similarly relates: “the accusatorial model assumes that the sides be evenly matched. The change thus requires creating or strengthening public defenders, not only prosecutors. Support for the former has been limited—despite the human rights rationale for reforms.”

Even in terms of actual personnel capacity, defense counsel is significantly outnumbered. In El Salvador as of 2003, there were 278 defense lawyers, or .3 defense lawyers per 100,000 inhabitants, as compared with 9.9 prosecutors per 100,000 inhabitants. This situation of under-funding indigent criminal defense systems is also characteristic of U.S. criminal justice administration, but the relative poverty of most recipient states and the unfamiliarity of new procedural configurations renders the inadequacy of representation arrangements for criminal defendants particularly severe in Central America and other recipient regions in the wake of U.S.-promoted procedural reforms.

Other reported problems arise with the expanded purview of prosecutors, who must now conduct investigations, which previously were facilitated by the judge, but prosecutors are under-funded and under-staffed to assume this additional responsibility and are thus unable to devote energies to learning how best to navigate the new adversarial system. Some studies suggest further that police resent the change in their status under the adversarial system as subordinate to prosecutorial demands, when previously police investigators had interacted directly in the inquisitorial system with the investigating judge. Police resentment has reportedly resulted in officers’ non-compliance in some cases with demands imposed by the adversarial system, producing significant systemic dysfunction.

251 See Riego & Vargas, supra note at 17.
252 See Esquirol, supra note , at 108.
253 See Riego & Juan Enrique Vargas, supra note , at 16.
While there are certainly inefficiencies and fairness problems inherent in inquisitorial criminal procedures as well as adversarial reforms, the U.S.-sponsored criminal procedural changes have not rendered recipient country justice sectors in much of Latin America better able to manage problems associated with interpersonal violence and related crime. Further, although there may be certain salutary qualities associated with U.S.-sponsored criminal procedural reforms, the new problems introduced by these reforms are crippling when scarce funds must be devoted to systems that work quite imperfectly. So while pre-existing prosecutorial approaches have been partially dismantled as a result of U.S.-promoted reforms, the new structures are unable to function as intended. Consequently, recipient state criminal justice sectors are further encumbered and unable to perform effectively, as they attempt to confront rising street crime and interpersonal violence, the unrest wrought in Central America by large-scale deportations from and migrations to the United States, and crime problems related to significant resource deprivation.

3. Democratic and Demotic Harms

In this context of often dysfunctional procedural reforms and increasingly devastating interpersonal violence in multiple states in Central America (as well as elsewhere in Latin America), the concentration of foreign financial assistance and OPDAT, ILEA, and ICITAP’s training on intellectual property crime, financial crime, and terror related offenses, among other transnational crime categories, exposes a deep 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 ILEA in Central America prompted significant public anger and resistance, indicating that whatever other effects may be associated with the Central American ILEA, it is viewed by at least some vocal citizens as unwelcome there.\(^{255}\)

Plans to establish an ILEA in Central America began to take shape on May 8, 1997 at a Summit in San Jose, Costa Rica, where President Clinton and the presidents of five Central American countries and the Dominican Republic agreed to develop an ILEA for Latin America and the Caribbean. Although the U.S. academy was to be located in Costa Rica, plans to establish the academy there encountered public opposition by a coalition of Costa Rican labor, human rights, and other citizen advocacy organizations.\(^{256}\) Eventually, the Costa Rican government acceded to the citizens’ coalition, leading the United States to look elsewhere in Central America for a host country for the ILEA.\(^{257}\)

\(^{255}\) See Wes Enzinna, Another SOA? A Police Academy in El Salvador Worries Critics, 41 NORTH AMERICAN CONGRESS ON LATIN AMERICA (NACLA) MAGAZINE 2 (2008).

\(^{256}\) See Legislative Right Wing Approves Funding for Installation of the ILEA, DIARIO CO LATINO, March 9, 2007.

\(^{257}\) See Council on Hemispheric Affairs, supra note _.
government officials then turned to El Salvador as a proposed location. The early negotiations concerning the ILEA San Salvador were not made public, perhaps to avoid the widespread opposition that had, from the U.S. perspective, derailed the ILEA in Costa Rica. At the time of the first public announcement of the ILEA San Salvador at the Organization of American States 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. Within a short time the ILEA in El Salvador began to generate organized opposition.

Salvadoran anti-ILEA advocates express three primary misgivings about the ILEA. First, anti-ILEA advocates point to the lack of transparency and accountability associated with the ILEA program, reflected in the ILEA’s refusal to release complete course materials, only permitting general public information regarding course topics and certain lesson plans, such as for the ILEA’s courses on transnational crime, intellectual property appropriation, illegal drugs, and terrorism. The ILEA’s administrators also refuse to release lists of police, prosecutors, and judges who have attended trainings to facilitate human rights monitoring.

The second grounds of opposition to the ILEA relates to feared continuity between U.S. Cold War counter-insurgency training in Latin America and the ILEA’s trainings. This potential continuity is particularly disturbing to Salvadorans in light of the history of U.S. implication in training death squads that devastated El Salvador during the civil war of 1980-1992. Despite efforts of ILEA administrators to alleviate these concerns by hiring human rights instructors to provide two days of human rights instruction over the six-week course term, anti-ILEA advocates remain unconvinced that the risks of law enforcement excesses are sufficiently contained.

The third basis of opposition to the ILEA in fact relates to the incorporation of human rights instruction: advocates object that it risks legitimizing the anti-democratic and violent abuses of law enforcement in the region. According to Latin Americanist 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

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258 See ILEA El Salvador, overview: history.
259 See Council on Hemispheric Affairs, supra note __.
260 See id.
262 See Getting Personal: Cuéllar and the ILEA—Letters, Response from Wes Enzinna, 41 NACLA REPORT ON THE AMERICAS 4 (2008); see also DAVID KENNEDY, THE DARK SIDES OF VIRTUE 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. This is particularly likely where human rights discourse has been absorbed into the foreign policy process.”).
263 See Enzinna, supra note __.
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.\(^{264}\) 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 the ILEA’s Salvadoran students are drawn, more “professional and elegant in its use of violence.”\(^{265}\) These concerns find initial support in a Report published in June 2006 authored by Human Rights Ombudswoman Carrillo that relates that forty percent of abuse complaints submitted to the Office involved the National Civilian Police, the primary student body at the ILEA in El Salvador. The Report also confirms various specific instances of egregious abuses: for example, that National Civilian Police officers, one year following the ILEA San Salvador’s first graduation, forcibly entered the home of brothers Carlos and Wilfredo Sánchez, suspected members of the Mara Salvatrucha gang who were sleeping in bed, and pulled them into the road, killing them with gunfire at close range; that same night a similar fate befell another suspected Mara Salvatrucha member who lived nearby.\(^{266}\) A Report by the Salvadoran Archbishop’s Legal Aid and Human Rights Defense Office (Tutela Legal) recounts that ten murders were allegedly perpetrated by National Civilian Police officers in 2006 and includes reports of tortures.\(^{267}\)

Ultimately, in their attention to the lack of transparency and accountability of the ILEA, the anti-ILEA advocates in El Salvador make apparent that U.S. criminal justice export may be experienced as the foreign imposition of a transnational crime control program opposed by local publics that resonates for them with prior catastrophic forms of U.S. intervention in previous decades, 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 this conjures.\(^{268}\) Reinforcing some of the anti-ILEA advocates concerns are broader trends relating to increasing harshness of crime control policies in much of Central America over the period of U.S. engagement in law enforcement training, along with related law enforcement excesses, and even vigilantism. During the time frame of intensified U.S. criminal justice assistance, between 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-

\(^{264}\) See id
\(^{265}\) See id.
\(^{266}\) See id.
\(^{268}\) See supra note __.
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.

Much of the ire about rising crime is directed against suspected gang members, who are not infrequently deportees from the United States. Arrest sweeps of numerous young men with tattoos have saturated domestic criminal justice systems in multiple Central American states. Between 1998 and 2004, nearly 12,000 Salvadorans with criminal records were deported to El Salvador from the United States. Many of these individuals in addition to working in the United States and bolstering El Salvador’s GDP had been associated with Salvadoran-American gangs. 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 other options 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 most 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. You can die of hunger here. So you look for any network you can find.” Salvadoran Security Minister Rodrigo Avila reports that the “deportations are at the core of the [gang] problem.” Some of the support for mano dura policies comes from the top levels of recipient countries’ governments with the tacit if not direct backing of the United States, but local communities and citizens’ groups whose well-being is severely undermined by street crime have also at times advocated military involvement in law enforcement and other heavy-handed crime control tactics.

In the Guatemalan town, Palín, which has been hard-hit by street crime, locals who are furious about the devastating effects of crime on their quality of life have taken the law into their own hands, trying to burn gang members alive.

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270 See Chris Kraul, El Salvador Comes to Grips with Gangs, LOS ANGELES TIMES, December 17, 2004.

271 See id.

272 See id.

in their homes, and demanding military intervention.\textsuperscript{274} 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: “[w]hat we really need are jobs, the local textile factories have closed down because they are considered less competitive than other Central American nations.”\textsuperscript{275} Marcela Smutt, program coordinator and gang expert at the United Nations 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, that’s to say, a future, to youth.”\textsuperscript{276}

Further, though much of the frustration embodied by “mano dura” policies has been directed against those who are dubbed criminal deportees and/or are associated with gangs, independent reports indicate that youth gangs are responsible for less of the interpersonal violence in the region than is frequently suggested to be the case. A 2007 report by the UN Office on Drugs and Crime addressing the crime crisis in Central America likewise suggests that “gangs are responsible for a much smaller share of the total crime problem than is generally thought.”\textsuperscript{277} The report concludes that “[g]ang culture is a symptom of a deeper social malaise that cannot be solved by putting all disaffected street kids behind bars.”\textsuperscript{278}

Nonetheless, the Washington Office on Latin America relates that in 2004, one year after the first Salvadoran “mano dura” law was passed that permitted 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.”\textsuperscript{279} A report by the Harvard Law School International Human Rights Clinic found too 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.\textsuperscript{280}

\begin{footnotes}
\item[275] See id.
\item[276] See Chris Kraul, El Salvador Comes to Grips with Gangs, LOS ANGELES TIMES, December 17, 2004.
\item[278] See id.
\end{footnotes}
The Harvard study even suggests that “these repressive 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’ . . . .

Despite this shift away from an overtly political logic, however, death squads that engage[] in social cleansing involve[] many of the individuals and institutional actors linked to death squads during the civil war.”\textsuperscript{281}

Over the twenty-year period of U.S. criminal justice assistance in El Salvador, “mano dura” policies and associated arrest sweeps of young men with tattoos believed to be gang members have not been effective in improving public perceptions of security and safety. Nor have U.S. transnational crime control policies. A poll of Salvadorans conducted by the Universidad Centroamericana found that a significant majority of the population “identify as the principal failures of the present administration the battle against criminality. . . .”\textsuperscript{282} This result is consistent with studies of other states in Latin America: a 2004 Latinobarometro poll reported that only one of every three Latin Americans had confidence in their state’s police; and a study by the Mexican Center for Research for Development found that most Mexicans do not report crimes, 96% of crimes went unpunished from 1996-2003, with officials estimating that 75% of crimes are not recorded.\textsuperscript{283}

The problems with U.S. criminal justice export outlined in this Part—the cycles of violence fueled by unequal resource distribution and social inequality, resulting 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.-promoted reforms—ought to be sufficient at a minimum to provoke serious reconsideration of the advisability of the fusion of U.S. transnational crime control initiatives and criminal procedural reform programming absent any additional persuasive contrary evidence from criminal justice exporters themselves.

\textsuperscript{281} See Jeanette Aguilar and Leissette Miranda, \textit{Entre la articulación y la competencia: las respuestas de la sociedad civil organizada a las pandillas en El Salvador}, IV MARAS Y PANDILLAS EN CENTROAMÉRICA: LAS RESPUESTAS DE LA SOCIEDAD CIVIL ORGANIZADA 43-44 (José Miguel Cruz ed., 2006).


\textsuperscript{283} See Jannet Aguilar, Director, Instituto Universitario de Opinion Puplica, Universidad Centroamericana, \textit{quoted in NotiCen: Central American and Caribbean Affairs} (June 14, 2007).

\textsuperscript{284} See, e.g., \textit{The Americas: The Battle for Safer Streets; Crime and Policing in Latin America}, THE ECONOMIST 53 (October 2, 2004).
CONCLUSION: IMAGINING ALTERNATIVE LIVELIHOODS

This Article has examined how U.S. foreign criminal justice development assistance took shape in the post-Cold War period through the deployment of U.S. prosecutors, police officers, and other criminal justice sector personnel across the globe. Merging advocacy on behalf of a U.S.-designated global regime of transnational crime control with U.S.-promoted criminal procedural reform, U.S. criminal justice export came to serve as a mode of global governance through crime. U.S. consultants directed less powerful states’ attention to U.S. transnational crime control priorities; occupied foreign internal security apparatuses; framed global social concerns in terms of particular morally culpable perpetrators and aggrieved victims rather than in reference to resource inequality or other explanatory frameworks; relegated to the realm of criminal procedure questions of fairness and efficacy; and diverted scarce resources to criminal justice as a proposed remedy for a variety of social ills.

Even as U.S. foreign criminal justice assistance proliferated rapidly, the associated outcomes in recipient locations remained mostly unknown. U.S. consultants’ reports of “success” failed to account for actual effects on the ground as means are substituted for ends and weak associations confused for causation. In contrast, the existing evidence regarding the aftermath of reform in Central America, a region heavily targeted by U.S. criminal justice exporters over two decades, suggests that U.S. transnational crime control and U.S.-sponsored justice sector reforms have not noticeably mitigated the harms of interpersonal violence or enhanced stability. Instead, U.S. programs allocate scarce resources to transnational crime concerns incongruous with local interpersonal harms and to criminal procedure reforms that have proven largely dysfunctional as a consequence of resource deficits, among other reasons. And, there is every reason to believe that the global social concerns conceived of by U.S. actors in terms of transnational crime control are symptomatic of, and cannot by mitigated without, first confronting more profound and systemic problems relating to resource distribution and social inequality.

Yet, given these concrete limitations of U.S. criminal justice export, what are the available institutional alternatives? One recourse would be to dismantle the institutional architecture of U.S. criminal justice export and to re-direct the associated funds to projects that are better able to contain interpersonal violence, promote human welfare in affected regions, and enable licit life paths. It may be the case, however, that the existing frameworks are too deeply entrenched to be so readily abandoned and that U.S. transnational crime priorities remain of concern to U.S. and foreign state actors. Insofar as these latter conditions hold true: if black market economies involving narcotics, appropriated intellectual property, and irregular migration (primary transnational crime concerns) are indeed driven by context-specific inter-
relationships between poverty, social inequality, and lack of licit opportunities for improvement of individuals’ life chances in affected regions (as the foregoing analysis strongly suggests), then criminal justice alternatives ought to focus on mitigating these conditions.284

One criminal justice alternative, “alternative livelihoods” or “alternative development” programming, focuses precisely on alleviating the harms produced by the inter-relationships between poverty, inequality, lack of licit opportunities for remuneration, and criminalized conduct, and thereby works to reduce participation in criminalized black markets by facilitating and supporting licit life paths. Alternative livelihood programs seek to motivate and enable individuals’ interests in non-criminalized sources of revenue or courses of conduct through external funding and assistance with obtaining access to licit markets. For example, U.N. alternative development programming has presented an opportunity to drug 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; simultaneously, the U.N. crime and drugs program has subsidized and facilitated access to local, national, and international markets until such time as the alternative livelihood project is self-sustaining. 285 These programs simultaneously work against the tendency of conventional criminal justice frameworks currently promoted through U.S. criminal justice export, to conceive of complex social problems in terms of morally culpable bad actors and aggrieved deserving victims. Instead, alternative livelihoods initiatives re-cast criminal justice concerns so as to enable alternative licit life paths.

Through this approach, alternative livelihood programming seeks to respond to the series of problems associated with current models of U.S. foreign crime control promotion illuminated in Part III, namely: the imposition of a totalizing account of pre-defined (transnational crime and criminal procedural) concerns on local contexts without careful attention to associated costs and consequences; the focus on conventional crime control approaches to the exclusion of non-punitive, non-arrest and prosecution-oriented social order maintenance strategies that might better limit particular criminal harms by providing alternative options to those participating in criminal black markets and/or perpetrating interpersonal violence; and the lack of democratic accountability, above all with regard to inattention to persistent local interpersonal harms, inequitable development, and law enforcement excesses.

The lack of democratic accountability on the part of U.S. criminal justice


export programs in particular, is almost inherent in their top-down imposition of a specific U.S.-determined transnational crime control agenda. This flaw thus cannot be eliminated by simply inserting into the U.S. criminal justice export project a different set of concerns or evaluative practices determined by other U.S. experts to be more amenable to developing and politically transitioning states and less wed to U.S. transnational crime control priorities.

Instead, alternative livelihoods programs must offer sustainable and ideally locally-innovated means of reducing inter-personal harms that are context-sensitive, dialogic, and democratically accountable. Such criminal justice alternatives would emphasize concrete improvements to the quality of life of affected populations. These projects would not necessarily be directly replicable elsewhere, but reflect the scale and conceptual orientation of projects that may be better able to address criminalized harms in locations that have become recipients of U.S. criminal justice export as well as in other places, including areas of the United States that have been subject to under- or uneven development and pervasive intervention by the U.S. criminal justice systems. My claim, in other words, is not that there is another criminal justice reform solution that ought to be exported by U.S. consultants in lieu of current models, but that alternative livelihoods programs represent an innovation that may be indicative of some of the ways local and transnational publics might imagine criminal justice alternatives in a manner that both departs and learns from the limitations of existing models.

Alternative livelihoods also do not presume to eliminate, or even necessarily to drastically and immediately reduce all crime. Rather, these programs promise to contribute to what Lawrence Friedman characterizes as “what people really want” from criminal justice administration, that is, “some way to contain crime, to reduce crime, especially violent crime, to more manageable proportions.”

A study on alternative development by the U.N. Office on Drugs and Crime found that alternative development projects can succeed if they are able “to identify reliable markets at the local, national and/or international levels and to link the products or services to be promoted by alternative development activities to those markets.” 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 into the production of legal alternative crops or products without having first to destroy or abandon their existing means of subsistence. Under such circumstances, many ultimately move entirely to the licit option if legal alternatives have the potential to better provide for families

and facilitate greater safety and security. Success in these terms is defined both by transitioning particular individuals from criminalized livelihoods to legal ones, and by improving their quality of life in relative terms.

Although the most obvious application of alternative livelihood initiatives is to the regulation of criminal black markets and, in particular, 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.” The alternative livelihoods model may also be employed to facilitate alternative life paths for other at-risk populations in high-violence areas, populations that are involved in or at-risk of being harmed by human trafficking, or those who are already members of violent gangs or criminalized networks, among others.

Alessandra Heinemann and Dorte Verner explain in Crime and Violence in Development that there is an emerging consensus on the nexus of violence and inequality that “has important implications for . . . [how] to achieve a reduction in crime and violence levels. Promoting pro-poor growth and equitable development to reduce the stark levels of inequality is key to curbing the violence pandemic.”

Interventions should be geared towards the bottom quintile of the income distribution, attempting to reduce income inequality, ensure better access to education, jobs and justice, and build social capital. These preventive measures and innovative social polices are efficient and under-utilized strategies to address this problem. Violence prevention is inseparable from equitable development and social action.

In light of the limitations of U.S. criminal justice export described in the foregoing pages, and the suggested connections between crime, resource deprivation, and social inequality, the best that foreign legal assistance can

288 The U.S. does not allow use of funds for alternative development unlinked to eradication, but European donors do not necessarily place such restrictions on their alternative livelihood programs. See United Nations Office on Drugs and Crime, Alternative Development: A Global Thematic Evaluation Final Synthesis Report, Conclusions and Lessons Learned (2005).

289 See supra notes __ & __.

290 See United Nations Office on Drugs and Crime, Alternative Development, supra note __.


292 See id.
offer if it seeks to promote greater stability, equality, and prosperity (that is, if it is not a means and end unto itself), is to work in the service of local populations who have already developed or who wish to develop small-scale, context-sensitive mechanisms that will mollify the most undemocratic, destabilizing and harmful forces in their lives. Criminal justice reforms may perhaps contribute to some of these objectives in certain locations by crafting measures to render law enforcement responsive to local needs, in some cases initially by facilitating specific alternative livelihoods for those individuals participating in criminal black markets and potentially also certain forms of violence; and by supporting attempts to counter violence through 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 global social orders and criminal justice policies.