

REMAKING MEXICO: LAW REFORM AS FOREIGN POLICY

Deborah M. Weissman[†]

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INTRODUCTION

The practice of promoting rule of law programs in foreign countries has developed as a foreign policy subgenre.¹ These programs generally pass for seemingly neutral, if not positive, endeavors, “packaged” in the form of disinterested intent, as a matter of selfless purport. Rule of law programs implicate members of the legal academy and profession to cooperate with U.S. government agencies in an effort to make global judicial systems conform to the precepts of American legal values. That is, these programs propound the U.S. legal system as a model for the world, or at least that part of the world deemed to be of U.S. national interest.

This Article challenges the practice and practicability of these programs. It argues that U.S. law reform projects, as conditions of foreign aid, often serve to preempt the political discourse from substantive debates about justice systems, frequently oversimplify the problems that laws are intended to mediate, and, almost always, are selective about the beneficiaries of legal reform. It argues that rule of law programs are intended to influence the character of global governance complementary to counter-insurgency operations, and designed to promote U.S. interests often obtainable only by the very violation of the notion of justice.²

¹ The phrase “rule of law programs” refers to efforts by U.S. entities, most often the U.S. Department of State, USAID, and its contractors, to bring about institutional reforms in the judiciaries and ministries of justice in foreign countries. *See, e.g., Rule of Law Stabilization Program – Formal Justice Sector Component*, USAID, <http://www.usaid.gov/news-information/factsheets/rule-law-stabilization-program-%E2%80%93-formal-justice-sector-component> (last updated Oct. 1, 2013); *USAID Rule of Law Program, Jordan 2008–2013*, TETRA TECH DPK, <http://www.tetrachdpk.com/component/content/article/64-jordan/121-usaid-rule-of-law-program-.html> (last visited Feb. 19, 2014); *see also* Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 13 (Carnegie Endowment for Int’l Peace, Democracy & Rule of Law Project, Working Paper No. 34, 2003), *available at* <http://www.carnegieendowment.org/files/wp34.pdf>.

² *See* Andrew Bacevich, *Social Work with Guns*, 31 LONDON REV. BOOKS 7, 7 (2009) (describing the strategies of the war in Afghanistan); John L. Comaroff & Jean Comaroff, *Law and Disorder in the Postcolony: An Introduction*, in *LAW AND DISORDER IN THE POSTCOLONY* 1, 25, 31 (John L. Comaroff & Jean Comaroff eds., 2006) (describing law as fetishism in response to growing anxiety about increasing lawlessness in developing countries); *see also* Michelle D. Bonner, *Critical Debates, Law and Injustice in Latin America*, 50 LATIN AM. POL. & SOC’Y 169

These arguments are developed through an examination of the current Mérida Initiative (also known as *Plan México*), a product of U.S. policy efforts to shape the legal systems of select foreign countries. This Article seeks to provide an alternative perspective to the way rule of law programs have been depicted by the dominant rule of law policy discourse. It also argues these programs cannot be assessed by measuring the benefits of the accusatorial system against those of the inquisitorial system, or whether oral trials are superior to written trials, or even by considering whether the promotion of the presumption of innocence is sufficient to validate such projects. Moreover, the manner by which the United States has attempted to dominate legal reform efforts has produced distrust and compromised the Mexican sense of national sovereignty.³

This is not to argue that rule of law programs lack the potential to improve justice outcomes, of course. Under optimum circumstances, rule of law programs can serve to inspire citizens to claim their legal rights and protections, articulate their demands, and advance their goals for an improved justice system.⁴ But, it is also true that such efforts must originate within the polity for whom judicial processes are designed to serve. In order for legal rights to inspire confidence and obtain credibility, citizens must determine the means and develop the substance of systems of law in a manner consistent with their history and political institutions.

This Article proceeds by examining the circumstances in Mexico as they relate to U.S. efforts to export law and legal systems. Part I describes the phenomenon of escalating drug-related violence in Mexico, including the “hyperstigious”⁵ narrative that characterizes the media coverage of crime and victimization in Mexico. It reviews the inability of the Mexican legal system to respond adequately to crime, a concern that has been documented by Mexican and U.S. scholars and jurists and, perhaps most notably, by social movements that have long demanded accountability for crime and violence in Mexico.⁶ Part I concludes by chronicling the U.S. response to drug-related violence in Mexico, and specifically its foreign aid plan known as the Mérida

(2008) (noting a focus on the rule of law as a means of addressing persistent violence in Latin America).

³ See *infra* Part IV.

⁴ See Deborah M. Weissman, *Gender and Human Rights: Between Morals and Politics*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 409, 409–10 (Linda C. McClain & Joanna L. Grossman eds., 2009).

⁵ See Richard Seymour, *The Uses of al-Qaida*, in 34 *LONDON REV. BOOKS* 25, 25 (2012) (using the term to describe a discursive quality of hype and over-reaching to justify U.S. intervention throughout the Middle East).

⁶ See generally *MAKING A KILLING: FEMICIDE, FREE TRADE, AND LA FRONTERA* (Alicia Gaspar de Alba & Georgina Guzmán eds., 2010); *TERRORIZING WOMEN: FEMINICIDE IN THE AMERICAS* (Rosa-Linda Fregoso & Cynthia Bejarano eds., 2010).

Initiative which, in addition to financing the militarization of the war on drugs, serves to fund and direct the overhaul of Mexico's legal system.

The Article next formulates a critical theoretical and pragmatic framework within which to examine U.S. rule of law programs as a foreign policy template. Part II considers the use of law as a political instrument in a historical context with a focus on long-standing U.S. efforts to reform legal systems, and specifically, the persistence of flawed practices that appear to have little effect on current initiatives. It reviews the flawed efforts to transplant programs in Latin America that have nonetheless failed to inform current initiatives.

Part III builds upon long-standing questions concerning the efficacy of exporting legal systems.⁷ It then considers foundational differences between U.S. and Mexican legal systems and argues that the Mérida Initiative rule of law program is ill-matched with Mexico's legal culture, if not in conflict with many of Mexico's current reform efforts.⁸

Part IV examines the relationship between rule of law programs and national sovereignty. Efforts to transplant legal systems that impinge on the prerogative of the nation have been viewed with suspicion and may well undermine Mexican law reform efforts and produce baneful outcomes. Part V appraises the Mérida rule of law program as a technocratic undertaking that acts to reduce the formulation of justice to bureaucratic procedures and lawyers as technicians. What appears to the casual observer to be an ideology-free commitment is, in fact, driven by a normative system that in a Mexican context may well serve to stifle public debate about the merits and motivation of rule of law programs. Obscured too are the social consequences of misguided efforts to remake the Mexican judicial system serve in function of U.S. national interests.

I. DRUG VIOLENCE, IMPUNITY, AND THE MÉRIDA INITIATIVE'S RULE OF LAW PROGRAM: CREATING A "CULTURE OF LAWFULNESS" IN MEXICO⁹

Violence in Mexico has become an issue of global concern. Newspapers offer daily descriptions of horrific crimes that have been committed: decapitations, charred bodies, and corpses in barrels of lye.¹⁰

⁷ The word "transplant" is used to reflect the imposition of legal changes and is distinguished from the term "legal translation." Holning Lau, *The Language of Westernization in Legal Commentary*, 61 AM. J. COMP. L. 507, 523 (2013); see Jorge L. Esquirol, *The Turn to Legal Interpretation in Latin America*, 26 AM. U. INT'L L. REV. 1031, 1035 (2011) (describing a transnational legal discourse in Latin America).

⁸ See *infra* Part III.

⁹ EMBASSY OF THE U.S. IN MEX., FACT SHEET: CULTURE OF LAWFULNESS (2013), available at <http://photos.state.gov/libraries/mexico/310329/nov-2013/COL-factsheet-Nov-2013-eng.pdf>.

¹⁰ Marc Lacey, *With Deadly Persistence, Mexican Drug Cartels Get Their Way*, N.Y. TIMES, Mar. 1, 2009, at A1; Richard Marosi, *Mexico Under Siege: A City Goes Silent at His Name*, L.A.

These gruesome acts have been attributed to a war between different drug cartels, the government's response to drug cartel violence, and a consequence of government corruption and impunity. Drug trafficking, which generates billions of dollars annually, comprises an increasingly significant part of the Mexican economy upon which many farmers depend for their livelihood and is a source of employment in transportation, banking, and security.¹¹

An analysis of the drug war dynamics raises a number of concerns, both historical and current, from the local to the transnational, some overlapping and others seemingly unrelated. Drug trafficking is a function of agricultural shifts, geography, proximity to the United States, and the increasing ease with which transnational crime is facilitated in an era of globalization.¹² Without an understanding of the political economic determinants of Mexico's drug-related violence, it is unlikely that prevailing commentary can provide meaningful information or that law-related reform initiatives can improve the circumstances.

A. *Drug Violence in Context*

It would be impractical to attempt to review the multiple and multivariable determinants that give rise to Mexico's violence. The following discussion offers a summary of the dynamics most frequently identified as contributors to Mexico's drug cartel violence.

1. NAFTA and Free Trade: Easy Recruits for Drug Cartels

Much has been written on the adverse effect of the North American Free Trade Agreement (NAFTA)¹³ upon Mexico's domestic economy.¹⁴

TIMES, Dec. 18, 2008, at 1; James C. McKinley, Jr., *Mexican Investigator of American's Killing Is Beheaded*, N.Y. TIMES, Oct. 14, 2010, at A29.

¹¹ See Charles Bowden on Mexico's Dirty War Against Drugs, DEMOCRACY NOW (Aug. 11, 2009), http://www.democracynow.org/2009/8/11/charles_bowden_on_mexicos_dirty_war (estimating that Mexico earns \$30 billion to \$50 billion a year from selling drugs); Ami C. Carpenter, *Beyond Drug Wars: Transforming Factional Conflict in Mexico*, 27 CONFLICT RESOL. Q. 401, 407 (2010) (stating that the drug trade brings in \$23 billion in revenue annually or twenty percent of Mexico's GDP).

¹² See Betty Horwitz, *The Role of the Inter-American Drug Abuse Control Commission (CICAD): Confronting the Problem of Illegal Drugs in the Americas*, 52 LATIN AM. POL. & SOC'Y 139, 140 (2010).

¹³ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993), available at <https://www.nafta-sec-alena.org/Default.aspx?tabid=97&language=en-US>.

¹⁴ KEVIN P. GALLAGHER ET AL., BOSTON UNIV., THE FUTURE OF NORTH AMERICAN TRADE POLICY: LESSONS FROM NAFTA 3 (2009), available at <http://www.bu.edu/pardee/files/2009/11/>

The enactment of NAFTA slowed the Mexican economy, caused wages to remain low and real wages to decline, and has harmed the environment—all measures that demonstrate, with regard to basic human needs, Mexicans may well be worse off now than before the treaty.¹⁵ Mexico has had the slowest growth rate of any Latin American country.¹⁶ Subsidized and tax-free products flooding Mexican markets from the United States have caused the “hollow[ing] out” of Mexico’s domestic economy.¹⁷ Funding for infrastructure, services, and schools diminished.¹⁸ Staple items in the Mexican diet have quadrupled in price.¹⁹

NAFTA also contributed to rising inequality and extreme poverty, and drug cartels exploit these circumstances.²⁰ As one study has noted, “[f]or the cartels, this huge pool of the poor serves as a recruiting ground for foot soldiers in a war that’s growing more deadly every month.”²¹ Further:

[w]hile the *narcotraficantes* use violence to silence those who oppose them, they also use the proceeds from the drug trade to cultivate a loyal following among the poor and disaffected. The Gulf Cartel donates food, bicycles, clothing, and toys to Nuevo Laredo residents, and drug kingpins throw festivals for the residents of their strongholds. In many cases, these overtures find a receptive audience.²²

Pardee-Report-NAFTA.pdf (NAFTA “decimat[ed] many existing sources of livelihood” in Mexico.); Jeff Faux, *NAFTA at 10*, ECON. POL’Y INST. (Feb. 9, 2004), http://www.epi.org/publication/webfeatures_viewpoints_nafta_legacy_at10/ (describing across the board economic hardship in Mexico as a consequence of NAFTA).

¹⁵ JOHN J. AUDLEY ET AL., CARNEGIE ENDOWMENT FOR INT’L PEACE, *NAFTA’S PROMISE AND REALITY* 6 (2004), available at <http://www.carnegieendowment.org/files/nafta1.pdf>; EDUARDO ZEPEDA ET AL., CARNEGIE ENDOWMENT FOR INT’L PEACE, *RETHINKING TRADE POLICY FOR DEVELOPMENT: LESSONS FROM MEXICO UNDER NAFTA* 5 (2009), available at <http://carnegieendowment.org/2009/12/07/rethinking-trade-policy-for-development-lessons-from-mexico-under-nafta/2uli>.

¹⁶ ZEPEDA ET AL., *supra* note 15, at 1.

¹⁷ GALLAGHER ET AL., *supra* note 14, at 30; ZEPEDA ET AL., *supra* note 15, at 10 (noting that the Mexican economy shrunk by about seven percent); see also Alejandro Nadal, *Macroeconomic Challenges for Mexico’s Development Strategy*, in *CONFRONTING DEVELOPMENT: ASSESSING MEXICO’S ECONOMIC AND SOCIAL POLICY CHALLENGES* 62 (Kevin J. Middlebrook & Eduardo Zepeda eds., 2003).

¹⁸ ZEPEDA ET AL., *supra* note 15, at 15.

¹⁹ See Gary Prevost & Robert Weber, *The Prospects for the Free Trade Area of the Americas in the Bush Administration*, in *NEOLIBERALISM AND NEOPANAMERICANISM: THE VIEW FROM LATIN AMERICA* 67, 71 (Gary Prevost & Carlos Oliva Campos eds., 2002).

²⁰ ZEPEDA ET AL., *supra* note 15, at 15.

²¹ Jason Beaubien, *As Drug War Turns into Quagmire, Fear Rules Mexico*, NPR (Aug. 2, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=128804488>.

²² HAL BRANDS, *MEXICO’S NARCO-INSURGENCY AND U.S. COUNTERDRUG POLICY* 19 (2009), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a499142.pdf>.

To complicate matters further, over two million people have lost the ability to survive through traditional farming and agriculture; many have turned to drug crops in order to survive.²³ The weakening of Mexico's economy has diminished the capacity of the state to respond to its current crisis. Privatization of once state-owned businesses and the deregulation of the banking system have made it easier for drug cartels to launder their drug profits.²⁴ As one priest working in Mexico's prisons noted while referring to one of the most notorious drug cartels, "[i]f the economy worked for the common good, there would be no Zetas."²⁵

While some studies show the Mexican export economy is rebounding, it has far to go before Mexicans experience relief.²⁶ Mexico suffered the worst economic recession of all of Latin America following the global economic crisis of 2009.²⁷ According to the Organization for Economic Cooperation and Development (OECD), it had one of the highest levels of inequality and poverty of any OECD evaluated nation.²⁸ These conditions suggest ongoing difficulties in the effort to eradicate drug violence.

2. Guns Go South, Drugs Go North

Drug violence in Mexico is not entirely homegrown. U.S. policies with regard to gun sales and drugs are inextricably linked with cartel violence and contribute to the difficulty in bringing about an end to lawlessness and corruption. U.N. reports, investigations by the U.S. government agencies, and media inquiries have determined many of the weapons used by cartels originated in the United States, especially in border states such as Arizona, said to have "weakest gun violence prevention laws."²⁹ According to the U.S. Bureau of Alcohol Tobacco

²³ GALLAGHER ET AL., *supra* note 14, at 35–36; J. Patrick Larue, *The "ILL-ICIT" Effects of NAFTA: Increased Drug Trafficking into the United States Through the Southwest Border*, 9 CURRENTS: INT'L TRADE L.J. 38, 45 n.144 (2000) (noting that farmers have resorted to growing illicit cannabis and poppy crops).

²⁴ PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* 23 (2000).

²⁵ Damien Cave, *Salvation Army of One*, N.Y. TIMES, Apr. 21, 2013, at MM30 (internal quotation marks omitted).

²⁶ M. ANGELES VILLARREAL, CONG. RESEARCH SERV., U.S.-MEXICO ECONOMIC RELATIONS: TRENDS, ISSUES, AND IMPLICATIONS 13 (2012), available at <http://www.fas.org/sgp/crs/row/RL32934.pdf>.

²⁷ *Id.*

²⁸ OECD *Environmental Performance Reviews: Mexico 2013*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/env/country-reviews/mexico2013.htm> (last visited Mar. 11, 2014).

²⁹ Katherine Eban, *The Truth About Fast and Furious*, CNNMONEY (June 27, 2012, 5:00 AM), <http://features.blogs.fortune.cnn.com/2012/06/27/fast-and-furious-truth> (internal quotation marks omitted); see also UNITED NATIONS OFFICE ON DRUGS & CRIME, THE

and Firearms and Explosives (ATF), “[b]y 2009 the Sinaloa drug cartel had made Phoenix its gun supermarket and recruited young Americans as its designated shoppers or straw purchasers.”³⁰ Some not old enough to buy alcohol “were plunking down as much as \$20,000 in cash to purchase up to 20 semiautomatics at a time, and then delivering the weapons to others.”³¹

Since 2006, Mexican authorities have confiscated over 60,000 weapons from drug cartels purchased from U.S. gun dealers.³² The Inspector General’s investigation of the ATF scandal known as “Operation Fast and Furious” revealed, as a result of “a dysfunctional and poorly supervised group of Arizona-based federal prosecutors and [ATF] agents,” hundreds of U.S. weapons passed into the hands of Mexican drug gangs.³³ Operation Fast and Furious was not the first ill-fated program designed to traffic weapons into Mexico as a sting operation. In 2006 and 2007, a program called “Wide Receiver” similarly failed to track weapons and resulted in an unknown number of guns falling into the hands of Mexican cartels,³⁴ some of which emerged from a group of elite U.S. trained Mexican soldiers to fight insurgents in Latin America.³⁵ In addition, U.S. Border Patrol and a mayor of a town in New Mexico have been implicated in smuggling illegal guns to Mexican cartels.³⁶

GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT 133–39 (2010), available at <http://www.unodc.org/unodc/en/data-and-analysis/tocta-2010.html> (reporting that about 20,000 firearms enter Mexico from the United States every year); Ed Payne, *Many Weapons Used by Mexican Drug Gangs Originate in U.S.*, CNN (June 14, 2011, 1:32 PM), <http://www.cnn.com/2011/US/06/14/mexico.guns/index.html> (describing a report that found that more than seventy percent of firearms submitted to the ATF from Mexico for tracing originated in the United States); Richard A. Serrano, *Fast and Furious Gun Found After Cartel Shootout*, L.A. TIMES, Dec. 20, 2012, at 14 (reporting that about 2000 weapons lost under the U.S. gun program known as “Fast and Furious” now flow freely across the U.S.-Mexico border); Pete Yost, *ATF Says 68,000 Guns Seized in Mexico Traced Back to U.S.*, WASH. POST, Apr. 27, 2012, at A14 (stating that at least 68,000 guns in the past five years have been traced back to the United States).

³⁰ Eban, *supra* note 29.

³¹ *Id.*

³² James V. Grimaldi & Sari Horwitz, *Mexican Cartels Wielding American Weapons*, WASH. POST, Dec. 13, 2010, at A01. See generally Eban, *supra* note 29; Katie Soltis, *Mexican Drug Violence Fueled by U.S. Guns*, COUNCIL ON HEMISPHERIC AFF. (June 27, 2011), <http://www.coha.org/mexican-drug-violence-fueled-by-u-s-guns/#more-13110>.

³³ Charlie Savage, *Justice Inquiry Faults Its Own in Gun Fiasco*, N.Y. TIMES, Sept. 20, 2012, at A1.

³⁴ Serrano, *supra* note 29.

³⁵ Enrique Krauze, *Mexico at War*, N.Y. REV. BOOKS, Sept. 27, 2012, at 66, 68 (describing the origins of the Zetas, known to be one of the most vicious cartels of all); Serrano, *supra* note 29.

³⁶ Aaron Bracamontes, *Ex-Border Patrol Agent Gets 4 Years in Gun Smuggling Case*, EL PASO TIMES (Nov. 30, 2012, 12:00 AM), http://www.elpasotimes.com/tablehome/ci_22089977/former-border-patrol-agent-gets-4-years-gun; *Mayor of N.M. Town Pleads Guilty to Gun Smuggling*, USA TODAY (July 13, 2011, 11:47 PM), http://usatoday30.usatoday.com/news/nation/2011-07-13-new-mexico-town-mayor-gun-smuggling-mexico_n.htm.

U.S. drug policies further contribute to drug violence in Mexico. Demand in the United States provides much of the stimulus for Mexico's drug wars. As one noted journalist has explained:

Drugs are an old business in Mexico. Farmers in the remote high sierra of the western state of Sinaloa have been growing opium poppies since the late 19th century—and marijuana long before that—but smuggling did not become a viable enterprise until the US created an illicit market by regulating the use of opiates in 1914. Then, as now, drugs flowed one way: north.³⁷

Mexicans also use illicit drugs, and more so in recent years.³⁸ However, illegal drug use in Latin America, including those countries that produce drugs, is notably less than in the United States.³⁹ Mexico's response to drug use is largely a function of the heavy hand of U.S. drug policy, particularly since the 1970s when President Richard Nixon first declared the "War on Drugs"—a declaration with extraterritorial reach.⁴⁰ The U.S. government succeeded in pressuring Mexico to rely on its military apparatus to curtail drug trafficking notwithstanding the widespread knowledge that Mexico's federal troops were guilty of committing heinous human rights abuses.⁴¹

The United States persists in imposing its supply-side interdiction policies through a combination of aid conditions and other certification and assistance programs, notwithstanding the demonstrable ineffectiveness of such an approach.⁴² At the same time, U.S. authorities have been lax in programs designed to reduce domestic drug demand which experts have noted to be "a far more effective and humane strategy than any supply-reduction approach."⁴³ In sum, the U.S. prohibitionist approach to drugs contributes to violence in Mexico

³⁷ Ben Ehrenreich, *A Lucrative War*, 32 LONDON REV. BOOKS 15 (2010); see also Pamela F. Izaguirre, *Narco-Politics: How Mexico Got There and How It Can Get Out*, COUNCIL ON HEMISPHERIC AFF. (Aug. 22, 2013), <http://www.coha.org/narco-politics-how-mexico-got-there-and-how-it-can-get-out> (describing the history of the production of illicit cash crops in Mexico as a function of U.S. demand after World War II).

³⁸ HOWARD CAMPBELL, *DRUG WAR ZONE: FRONTLINE DISPATCHES FROM THE STREETS OF EL PASO AND JUÁREZ* 97 (2009).

³⁹ Horace A. Bartilow & Kihong Eom, *Free Traders and Drug Smugglers: The Effects of Trade Openness on States' Ability to Combat Drug Trafficking*, 51 LATIN AM. POL. & SOC'Y 117, 123–24 (2008) (citing the UN World Drug Report 2006).

⁴⁰ Ehrenreich, *supra* note 37, at 15. For a discussion of Mexico's efforts to change course and consider legalization and public health approaches to illicit drugs, see *infra* Part III.B.4.

⁴¹ Ehrenreich, *supra* note 37, at 15. The United States declined to cooperate in a hemispheric coalition-building approach to address drug trafficking in order to avoid providing a platform for leaders like Hugo Chavez. See Horwitz, *supra* note 12, at 140.

⁴² Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 N.Y.U. J. INT'L L. & POL. 89, 142 (1999).

⁴³ LISA HAUGAARD ET AL., *A CAUTIONARY TALE: PLAN COLOMBIA'S LESSONS FOR U.S. POLICY TOWARD MEXICO AND BEYOND* 2, 14 (2011), available at http://www.wola.org/sites/default/files/downloadable/Cautionary_Tale.pdf.

while failing to curb the demand for the trafficking of illicit substances across the border.

3. Mexico's Contemporary Political History

A number of scholars have argued that the escalation in violence is a consequence of the waning of the power of the Partido Revolucionario Institucional (PRI), the Mexican political party that ruled between 1929 and 2000.⁴⁴ During its reign, the PRI leadership entered into negotiations with cartels and permitted them to conduct their illegal activities in exchange for a share of profits and assurances from the cartels to limit the violence committed in the course of their transactions.⁴⁵ Because of these arrangements, the PRI maintained a type of *quid pro quo* arrangement that accepted violence as long as it was largely contained among the cartels.⁴⁶ As a result, law enforcement agencies were weakened as corruption spread into all levels of institutional operations.⁴⁷ At the end of the PRI's rule, no mechanisms existed to curb the violence and maintain "equilibrium."

President Felipe Calderón, the candidate of the Partido Acción Nacional (PAN), assumed office in 2006 after a close and hotly contested election.⁴⁸ He immediately launched a war on the cartels upon taking office.⁴⁹ Critics charged that Calderón's initiative against the cartels was an effort to gain "a legitimacy that he did not receive in the voting booth" and demonstrate the ability of his government to lead.⁵⁰ The declaration of war against the cartels transformed the character of

⁴⁴ CAMPBELL, *supra* note 38, at 24; GEORGE W. GRAYSON, MEXICO: NARCO-VIOLENCE AND A FAILED STATE? 2 (2010) (providing PRI's English translation as the "Institutional Revolutionary Party"); Carpenter, *supra* note 11, at 407, 410; John L. Garcia, *PRI Begins Its Ascent to Power as a Perplexed U.S. Looks for Formula to Bring Down Mexican Drug Syndicates*, COUNCIL ON HEMISPHERIC AFF. (Aug. 13, 2010), <http://www.coha.org/pri-began-its-ascent-to-power-as-u-s-looks-for-formula-to-bring-down-mexican-drug-syndicates>. Most recently, Enrique Peña Nieto, a PRI candidate was successful in his bid for the presidency of Mexico and the PRI assumed political leadership of the executive as of 2013. Damien Cave, *Narrow Victory for Mexico's New Leader Signals Bigger Challenges Ahead*, N.Y. TIMES, July 4, 2012, at A4.

⁴⁵ Garcia, *supra* note 44.

⁴⁶ CAMPBELL, *supra* note 38, at 24; GRAYSON, *supra* note 44, at 2.

⁴⁷ Carpenter, *supra* note 11, at 404 (noting that the cartels were dependent on government officials and police for protection); Garcia, *supra* note 44.

⁴⁸ Miguel Tinker Salas, *Mexico Drug War Losing Proposition for All of Us*, PROGRESSIVE MEDIA PROJECT (Apr. 1, 2010), <http://progressivemediaproject.org/mplove1040110.html>.

⁴⁹ Ronald F. Wright, *Mexican Drug Violence and Adversarial Experiments*, 35 N.C. J. INT'L L. & COM. REG. 363, 365–66 (2010) (commenting on reports of voter irregularities); Dan Boscov-Ellen, *La Pesadilla de Prohibición—Drug Policy and Violence in Mexico*, COUNCIL ON HEMISPHERIC AFF. (June 23, 2010), <http://www.coha.org/la-pesadilla-de-prohibicion-%E2%80%93drug-policy-and-violence-in-mexico>.

⁵⁰ Luis Hernandez Navarro, *A War on Drugs? No, It Is a War on the Mexican People*, THE GUARDIAN, Aug. 13, 2010, at 26.

the drug trade in Mexico. Cartels moved from engaged battle with each other for territory and control of a lucrative and illicit transnational enterprise to a war to destabilize a government that had changed the rules of the relationship.⁵¹

With the election of Enrique Peña Nieto in 2012, the PRI has once again assumed political leadership, although by a smaller margin than previous elections.⁵² While disavowing the PRI's historic pacts with the cartels, Peña Nieto has committed to continuing Calderón's military approach against drug cartels—an approach which is likely to continue to produce violence.⁵³

B. *The Mexican Legal System's Failure to Respond*

During the last two decades, the Mexican judicial system has come under domestic and international scrutiny and criticism for its inability to adequately respond to crime and violence.⁵⁴ The absence of legal rights and accountability has been identified as a fundamental cause of the murders and has resulted in a climate of impunity.⁵⁵ Crime victims have little trust in law enforcement agencies and are reluctant to report crime.⁵⁶ Human rights groups have criticized Mexico's failure to provide justice to victims of violent crimes and human rights violations.⁵⁷ Defendants, too, suffer the denial of any semblance of due process; they are snatched off the streets by police without warrants and are subsequently subjected to a variety of abuses.⁵⁸ Mexican courts have been described as weak, and malfeasance has plagued judicial

⁵¹ Carpenter, *supra* note 11, at 411 (noting the use of “shock and awe” tactics used to undermine confidence in the government).

⁵² Cave, *supra* note 44.

⁵³ *Id.* But see Randal C. Archibold et al., *New Friction as Mexico Curbs U.S. Cooperation in Drug Wars*, N.Y. TIMES, May 1, 2013, at A1 (describing the message sent by Mexico's President Peña Nieto about changes to the nature of the relationship between the United States and Mexico regarding the war on drugs).

⁵⁴ Deborah M. Weissman, *The Political Economy of Violence: Toward an Understanding of the Gender-Based Murders of Ciudad Juárez*, 30 N.C. J. INT'L L. & COM. REG. 795, 808 (2005) (reviewing the failure of the Mexican legal system to respond to the murders of women in Ciudad Juárez). The Mexican judiciary is deemed to be far weaker than the other branches of government. See MATTHEW C. INGRAM ET AL., ASSESSING MEXICO'S JUDICIAL REFORM 4 (2012), available at <http://justiceinmexico.files.wordpress.com/2010/07/tbi-assessing-judicial-reform1.pdf>.

⁵⁵ AMNESTY INT'L, MEXICO: INTOLERABLE KILLINGS: 10 YEARS OF ABDUCTIONS AND MURDERS OF WOMEN IN CIUDAD JUÁREZ AND CHIHUAHUA: SUMMARY REPORT AND APPEALS CASES (2003), available at <http://www.amnesty.org/en/library/asset/AMR41/027/2003/en/e81827cb-d6b3-11dd-ab95-a13b602c0642/amr410272003en.pdf>.

⁵⁶ JO TUCKMAN, MEXICO: DEMOCRACY INTERRUPTED 108 (2012) (Over eighty percent of crime victims consider it a “waste of time” to report the crime to authorities.).

⁵⁷ HUMAN RIGHTS WATCH, *Mexico*, in WORLD REPORT 191 (2009), available at http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf.

⁵⁸ TUCKMAN, *supra* note 56, at 109 (noting concerns about incarceration of the innocent).

processes.⁵⁹ The presumption of innocence exists in theory but is given little practical consideration.⁶⁰ Judges accept as evidence confessions elicited through torture and other mistreatment.⁶¹ Courts often function as “rubber-stamp[s]” for prosecutors who routinely abuse their authority.⁶²

The Mexican judicial system suffers from corruption and insufficient resources.⁶³ Human rights activists have demonstrated impunity reigns; military officers often are accused of human rights violations.⁶⁴ Penitentiaries have been described as “the true universities of crime.”⁶⁵ Indeed, as the Mexican documentary, *Presumed Guilty* (*Presunto Culpable*), filmed by two Mexican lawyers, has chronicled, many Mexicans are more fearful of the criminal justice system than crime itself.⁶⁶

C. *The United States’ Response: Exporting Law*

Accounts of the threats posed by drug cartel violence, fear of the loss of control of the U.S.-Mexico border, and the inability of the Mexican judicial system to respond have developed into the dominant narrative of Mexico, and have resulted in a number of responses from the United States.⁶⁷ Primary among them has been the Mérida Initiative, a legislative plan designed to develop a heightened military response to Mexico’s drug wars.⁶⁸ The State Department initially identified the

⁵⁹ Weissman, *supra* note 54, at 848.

⁶⁰ EMILY EDMONDS-POLI & DAVID A. SHIRK, CONTEMPORARY MEXICAN POLITICS 269 (2d ed. 2012); TUCKMAN, *supra* note 56, at 109.

⁶¹ HUMAN RIGHTS WATCH, *supra* note 57, at 191 (noting that when torture is revealed, the justice system has systematically failed to investigate or prosecute such acts); Elisabeth Malkin, *Mexico: Torture Reports Triple, Group Finds*, N.Y. TIMES (Oct. 11, 2012), <http://www.nytimes.com/2012/10/12/world/americas/mexico-torture-reports-triple-group-finds.html?ref=world>.

⁶² Julio Ríos-Figueroa, *Sociolegal Studies on Mexico*, 8 ANN. REV. L. & SOC. SCI. 307, 312 (2012).

⁶³ See HUMAN RIGHTS WATCH, *supra* note 57, at 191.

⁶⁴ *Human Rights in Mexico: Hearing Before the H. Comm. on Foreign Affairs, Tom Lantos Human Rights Commission*, 112th Cong. 9 (2012) (statement of Santiago Aguirre, Att’y, Tlachinollan Human Rights Center), available at http://tlhrc.house.gov/docs/transcripts/2012_5_10_Human_Rights_In_Mexico/Santiago_Aguirre_Testimony.pdf (testifying that impunity results because the army investigates itself and military courts maintain jurisdiction over these claims).

⁶⁵ Krauze, *supra* note 35, at 69.

⁶⁶ PRESUMED GUILTY (Lawyers with Camera 2010).

⁶⁷ Ginger Thompson, *U.S. Bolsters Security at Mexican Border*, N.Y. TIMES, Mar. 25, 2009, at A10 (noting that according to a government spokesman, the relationship between the United States and Mexico has received “sustained, high-level, comprehensive attention” related to fears of an explosion of crime across the border).

⁶⁸ Military Construction, Veterans Affairs, and Related Agencies Appropriation Bill of 2008, Pub. L. No. 110-252, § 1406, 122 Stat. 2323, 2339–40.

plan's four primary goals: 1) break the power and impunity of criminal organizations; 2) assist in strengthening border, air, and maritime controls; 3) improve the capacity of justice systems; and 4) curtail gang activity and diminish the demand for drugs in the region.⁶⁹ In 2009, after front-loading most of the funds to pay for military equipment to intensify the war on drugs cartels, the Obama administration issued a revised set of goals that attempted to de-emphasize the escalation of a military response and instead draw attention to U.S. plans to help Mexico build civil society institutions and judicial systems. Phase II, known as *Beyond Mérida*, called for developing a "culture of lawfulness" by focusing greater attention to the task of reforming Mexico's legal system.⁷⁰ In 2010, the United States reaffirmed its intention to institutionalize the rule of law in Mexico by strengthening Mexican law enforcement capabilities and judicial institutions.⁷¹ Some have welcomed the discursive shift from a policy that emphasized military escalation as the priority for Mérida funding to "building the rule of law" as a positive change in the approach to the problem of drug-related violence.⁷² Others have been skeptical.⁷³

The Mérida Initiative rule of law program has been administered primarily by the United States Agency for International Development (USAID) and the Department of Justice as part of a larger ongoing plan

⁶⁹ BUREAU OF INT'L NARCOTICS & LAW ENFORCEMENT AFFAIRS, *Counternarcotics and Law Enforcement Country Program: Mexico*, U.S. DEP'T STATE (Jan. 20, 2009), <http://www.state.gov/j/inl/rls/fs/114078.htm>. Although this Article focuses on the Mérida Initiative's rule of law program, it is important to note the criticisms of the U.S. decision to fund the Mexican military. See, e.g., Boscov-Ellen, *supra* note 49.

⁷⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, MÉRIDA INITIATIVE: THE UNITED STATES HAS PROVIDED COUNTERNARCOTICS AND ANTICRIME SUPPORT BUT NEEDS BETTER PERFORMANCE MEASURES 6 (2010), available at <http://www.gao.gov/new.items/d10837.pdf>.

⁷¹ CLARE RIBANDO SEELKE & KRISTIN M. FINKLEA, CONGRESSIONAL RES. SERV., U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND 2, 21 (2011), available at <http://fpc.state.gov/documents/organization/171385.pdf>.

⁷² *Human Rights in Mexico: Hearing Before the H. Comm. on Foreign Affairs, Tom Lantos Human Rights Commission*, 112th Cong. 9 (2012) (statement of Maureen Meyer, Senior Assoc., Wash. Office on Latin Am. on Human Rights in Mexico), available at <http://www.wola.org/sites/default/files/downloadable/Mexico/2012/MMeyer%20testimony%20TLHRC.pdf> (urging continued U.S. support for the rule of project).

⁷³ Isaac Campos, *In Search of Real Reform: Lessons from Mexico's Long History of Drug Prohibition*, NACLA REP. AM., May/June 2011, at 14 (referring to drug violence as "drug-policy related violence" due to the evidence that criminalization policies and enhanced law enforcement strategies have contributed to escalating violence); see GLOBAL COMM'N ON DRUG POL'Y, WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY 5, 15 (2011), available at http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf (reviewing evidence indicating that criminalization strategies to respond to drug violence often exacerbate the problem). But see Damien Cave & Michael S. Schmidt, *Rise in Pill Abuse Forces New Look at U.S. Drug Fight*, N.Y. TIMES, July 17, 2012, at A1 (noting, however, that a shift from funding for military equipment to "institution-building" was not likely to change soon).

related to reforming Mexico's legal system.⁷⁴ In collaboration with the State Department, USAID has contracted with private firms, most notably Management Information Systems (MSI) and Management Sciences for Development, Inc. (MSD), both international development firms based in Washington, D.C.⁷⁵ These firms have drafted, promoted, and managed the processes for comprehensive revisions of Mexico's constitution specifically as it relates to criminal justice, seizure laws, as well as federal and state criminal procedure codes.⁷⁶

The Mérida plan authorizes USAID to recruit and train members of the federal police, judges, prosecutors, and public defenders at both the federal and state levels.⁷⁷ The plan also directs the U.S. Department of Justice to administer millions of dollars of State Department and USAID funding to improve prosecutorial capacity, increase the internal control systems within the Mexican federal police and the Mexican

⁷⁴ MGMT. SYS. INT'L, MEXICO RULE OF LAW STRENGTHENING: FINAL REPORT TO USAID JULY 6, 2004 TO SEPTEMBER 30, 2007, at 4 (2007), available at http://pdf.usaid.gov/pdf_docs/PDACO092.pdf (noting that in 2003, "USAID decided to implement its Rule of Law Project in Mexico"). USAID has described the work it undertook with MSI/Proderecho including the drafting of the revised criminal code and constitutional amendments. USAID with MSI/Proderecho also created a network to support constitutional reforms, helped to draft and pay for television scripts to promote the amendments, and made press statements on behalf of the network. *Id.* at 8, 28, 31, 48, 154; see MGMT. SCIS. FOR DEV., INC., RULE OF LAW PROJECT: MEXICO 2ND QUARTER REPORT FY 2009 JANUARY 1ST-MARCH 31ST, 2009, at 2 (2009), available at http://pdf.usaid.gov/pdf_docs/PDACO420.pdf (noting that reform efforts are focused on Mexico's criminal justice system); Letter from Jess. T. Ford, Assoc. Dir., Int'l Relations & Trade Issues, U.S. Gen. Accounting Office, to Cong. Requesters on Foreign Assistance: Status of Rule of Law Program Coordination 3 (Oct. 13, 1999), available at <http://www.gao.gov/assets/90/89353.pdf>; Weissman, *supra* note 54, at 849-56 (reviewing U.S. directed changes to Mexican national law primarily as a function of global economics and NAFTA); see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 70, at 13; *Rule of Law*, U.S. AGENCY FOR INT'L DEV. (Jan. 10, 2014), <http://transition.usaid.gov/mx/ruleoflaweng.html>.

⁷⁵ *About MSI*, MGMT. SYS. INT'L, http://www.msiworldwide.com/wp-content/uploads/MSI_one_page_eng.pdf (last visited Mar. 22, 2014); Brigitte Claney, *Coffey International Limited Awarded USD \$66.3 Million USAID Rule of Law Project in Mexico*, COFFEY (July 3, 2009), <http://www.coffey.com/our-news/media-releases/coffey-international-limited-awarded-usd-66-3-million-usaid-rule-of-law-project-in-mexico> (noting in a press release that MSI/Proderecho first worked on the passage of Mexican judicial reforms, and was now awarded a contract to implement these judicial reforms under the Mérida Initiative); MGMT. SCI. FOR DEV., <http://www.msdcglobal.com> (last visited Mar. 22, 2014); *Strengthening Justice Systems in Mexico*, MGMT. SYS. INT'L, <http://www.msiworldwide.com/project/strengthening-justice-systems-in-mexico> (last visited Mar. 22, 2014). MSD was also responsible for USAID Rule of Law programs as part of *Plan Colombia*. NANCY GARCÍA TAFOYA, MGMT. SCIS. FOR DEV., INC., PRODERECHO END OF YEAR REPORT FY 2008 (2008), available at http://pdf.usaid.gov/pdf_docs/PDACM744.pdf.

⁷⁶ See MGMT. SYS. INT'L, *supra* note 74 and accompanying text; see also MSD/PRODERECHO, QUARTERLY REPORT JANUARY 1-MARCH 31, 2008, at 1 (2008), available at http://pdf.usaid.gov/pdf_docs/PDACO077.pdf; SEELKE & FINKLEA, *supra* note 71, at 21; WILSON CTR., MEXICO INST., GROUP III—INSTITUTION BUILDING AND RULE OF LAW (2008), available at <http://mexicoinstitute.files.wordpress.com/2012/08/merida-initiative-part2.pdf>.

⁷⁷ SEELKE & FINKLEA, *supra* note 71, at 22, 24; U.S. GOV'T ACCOUNTABILITY OFFICE, STATUS OF FUNDS FOR THE MÉRIDA INITIATIVE 5, 14, 22, 24 (2009), available at <http://www.gao.gov/new.items/d10253r.pdf>.

Attorney General's Office, improve extradition processes, enhance sentencing and other related criminal penalties, and assure Mexico's ability to securely detain criminals.⁷⁸ The International Narcotics and Law Enforcement Affairs Agency has also been allocated Mérida funds to develop a "culture of lawfulness" in Mexico.⁷⁹

As an integral part of the Mérida Initiative, U.S. prosecutors, as well as U.S. law schools, have developed programs to instruct their Mexican counterparts to conduct "American-style" criminal trials.⁸⁰ Funds have been allocated to develop mock courtrooms, virtual classrooms, and courseware development.⁸¹ Curiously, the U.S. project has not attempted to reintroduce jury trials although Mexican citizens have a history of participation in the legal system via juries.⁸² The plan also calls for the training of non-government organizations and civil society groups about criminal procedures, protection of rights, and alternative case resolution programs.⁸³ In a statement before a Congressional subcommittee, the Director of the USAID Mission to Mexico described the Mérida Initiative rule of law program as a way to assist Mexicans to "fundamentally change their entire justice system."⁸⁴

⁷⁸ SEELKE & FINKLEA, *supra* note 71, at 24; David T. Johnson, *The Mérida Initiative: A New Security Cooperation Partnership*, 18 NAT'L STRATEGY FORUM REV. (2009), available at <http://www.nationalstrategy.com/NSFReview/Fall2009Vol18Issue3USMexico/LeadArticle3.aspx>.

⁷⁹ EMBASSY OF THE U.S. IN MEXICO, *supra* note 9.

⁸⁰ Wright, *supra* note 49, at 363, 381 (noting that a shift to an "accusatorial" system in Mexico was deemed appropriate by U.S. funders); see, e.g., Jerry Crimmins, *School Helps Mexico Change Trial Process*, CHI. DAILY L. BULL. (Aug. 14, 2009), <http://www.globaltort.com/2009/08/differences-in-legal-systems-mexico-and-the-us-on-criminal-law> (describing Chicago-Kent Law School's involvement in reforming Mexico's "ancient" criminal trial processes); see also HIGHER EDUC. FOR DEV., U.S.-MEXICO TRAINING, INTERNSHIPS, EXCHANGES, AND SCHOLARSHIP INITIATIVES (TIES): A MODEL FOR SUCCESS (2009), available at <http://www.hedprogram.org/resources/loader.cfm?csModule=security/getfile&pageid=3309>; James E. Moliterno, *Exporting American Legal Ethics*, 43 AKRON L. REV. 769 (2010) (describing USAID funded ABA law school programs); Randal C. Archibold, *Mexican Prosecutors Train in U.S. for Changes in Their Legal System*, N.Y. TIMES, Apr. 25, 2009, at A12.

⁸¹ See U.S. EMBASSY IN MEXICO, FACT SHEET: THE MÉRIDA INITIATIVE-MAJOR DELIVERIES IN 2011 (2012), available at http://photos.state.gov/libraries/mexico/310329/23jan12/2011%20Major%20Deliveries_2012.pdf; Karla Zabludovsky, *In Mexico, Rehearsing to Inject Drama into the Courtroom*, N.Y. TIMES, Aug. 28, 2012, at A7.

⁸² See Hiroshi Fukurai & Richard Krooth, *The Establishment of All-Citizen Juries as a Key Component of Mexico's Judicial Reform: Cross-National Analyses of Lay Judge Participation and the Search for Mexico's Judicial Sovereignty*, 16 TEX. HISP. J.L. & POL'Y 37, 40 (2010). The author's review of all USAID reports, USAID statements, contractor reports, and GAO and Office of Inspector General reports on the Mérida Initiative Rule of Law project finds that they omit any reference to training or otherwise introducing anything related to jury trials.

⁸³ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 77, at 22.

⁸⁴ USAID/Mexico's Role in the Mérida Initiative: Hearing Before H. Comm. on Appropriations, S. Comm. on State, Foreign Operations, and Related Programs, 111th Cong. (2009) (statement of Roger D. Garner, USAID Mission Dir. to Mexico), available at <http://www.usaid.gov/news-information/congressional-testimony/statement-usaid-mission-director-mexico-rodger-d-garner>.

To that end, the Mérida Initiative seeks to redesign the very infrastructure of the administration of justice. Funds have been appropriated for case-tracking software, forensic laboratories, and related training for court system personnel and law enforcement.⁸⁵ Appropriations have been made, in the words of the Department of State, to “activate” new prisons; U.S. funds have been earmarked to increase the number of federal correctional facilities in Mexico from six to twenty-two and to improve the ability of the prison system to “manage violent, disruptive offenders.”⁸⁶ Funds have also been allocated to enhance monitoring and interdiction activities, to revamp crime scene management, and to purchase and administer drug test kits.⁸⁷ USAID appropriations have been used to acquire biometric equipment in order to “capture and store the identification of criminal offenders,” for the creation of new units to track gang activities, and to develop classification systems of inmates.⁸⁸ Additional rule of law monies have been designated to the Mexican Intelligence Service for the purpose of investigation, surveillance, and counter-terrorism.⁸⁹ The largest allocations have gone to International Narcotics Control and Law Enforcement and Foreign Military Financing.⁹⁰ Other than General Accounting Office (GAO) and Inspector General Reports, overall monitoring and evaluation of the rule of law funding is controlled by USAID.⁹¹

II. LAW AS A POLITICAL INSTRUMENT: THEN AND NOW

For more than four decades, legal scholars have been analyzing the relationship between rule of law programs such as the Mérida Initiative

⁸⁵ ERIC OLSON, WILSON CTR., SIX KEY ISSUES IN U.S.-MEXICO SECURITY COOPERATION (2008), available at http://www.wilsoncenter.org/sites/default/files/six_issues_usmex_security_coop.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 77, at 22.

⁸⁶ *Mérida Initiative at a Glance: Law Enforcement Achievements*, U.S. EMBASSY IN MEXICO, http://www.usembassy-mexico.gov/eng/merida/emerida_factsheet_lawenforcement.html (last visited Mar. 12, 2014).

⁸⁷ *Id.*

⁸⁸ U.S. EMBASSY IN MEXICO, *supra* note 81.

⁸⁹ Laura Carlsen, *A Primer on Plan Mexico*, AMS. PROGRAM (May 5, 2008), <http://www.cipamericas.org/archives/1474>.

⁹⁰ THOMAS H. ISOM, PRI AND THE BEYOND MÉRIDA INITIATIVE 2 (2011), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA555293> (report submitted by student, a Colonel in the U.S. Navy, at the Naval War College).

⁹¹ See HUGO CONCHA, WHERE THINGS STAND IN THE CRIMINAL JUSTICE REFORM IN MEXICO 11 (2012), available at http://www.wilsoncenter.org/sites/default/files/hugo_concha_justice_reform.pdf (noting the need for qualitative evaluation beyond numbers); *Database Administrator, Mexico Rule of Law III, Mexico in Mérida*, MEXICOJOBS77 (May 1, 2012), http://www.mexicojobs77.com/Database_Administrator_Mexico_Rule_of_Law_III_Mexico_in_Merida-8299232.html.

and political economic concerns.⁹² John and Jean Comaroff have warned of a growing fetishism with the law, which has displaced politics as a means to address social disorder.⁹³ They describe a “preoccupation with legalities, and with the legal subject” as a result of growing concerns with lawlessness and “post-colonial dis/order and its mass-mediated representation.”⁹⁴ Other scholars have suggested ways the demands for U.S.-style legal reform have served as a means to assure a particular type of economic development, one conducive to an expansion of U.S.-dominated corporate interests and global economic integration.⁹⁵ The impetus behind rule of law projects has often been the belief that markets require predictable legal structures to protect property rights, facilitate foreign direct investments, and contract enforcement—that is, to establish U.S. law as the “lingua franca for business and politics.”⁹⁶ Still others have referred to the unvaried exportation of the U.S. criminal justice system as an effort to achieve global governance through crime.⁹⁷ Indeed, the very agencies funded to export the rule of law have been transformed into global intelligence agencies with purposes that transcend issues related to transnational crime.⁹⁸

⁹² See generally David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 74 (David M. Trubek & Alvaro Santos eds., 2006); Kerry Rittich, *Who’s Afraid of the Critique of Adjudication?: Tracing the Discourse of Law in Development*, 22 *CARDOZO L. REV.* 929 (2001) (describing the historical development of the law and development movement as a means to strengthen market economies); Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 *YALE HUM. RTS. & DEV. L.J.* 185 (2010).

⁹³ Comaroff & Comaroff, *supra* note 2, at 31.

⁹⁴ *Id.* at 21; Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 1 (Carnegie Endowment for Int’l Peace, Democracy & Rule of Law Project, Working Paper No. 30, 2002), available at <http://carnegieendowment.org/files/wp30.pdf> (describing rule of law projects as a favorite item on donor laundry list of “good governance reforms”).

⁹⁵ Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 *THEORETICAL INQUIRIES L.* 441 (2010) (noting both U.S. governmental and nongovernmental initiatives to promote the rule of law in developing countries); see also MARIA DAKOLIAS, *THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM* 3 (World Bank Technical Paper No. 319, 1996), available at http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/20pub_br214.pdf; Roger C. Riddell, *Is Aid Working? Is This the Right Question to be Asking?*, *OPEN DEMOCRACY* (Nov. 20, 2009), <http://www.opendemocracy.net/roger-c-riddell/is-aid-working-is-this-right-question-to-be-asking>.

⁹⁶ Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* 306, 307 (Yves Dezalay & Bryant G. Garth eds., 2002) [hereinafter *GLOBAL PRESCRIPTIONS*]; Gordon, *supra* note 95, at 443.

⁹⁷ Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 *YALE L. & POL’Y REV.* 83, 91–96 (2010) (reviewing the literature on this point).

⁹⁸ Ginger Thompson & Scott Shane, *Cables Portray Expanded Reach of Drug Agency*, *N.Y. TIMES*, Dec. 26, 2010, at A1.

In the context of Latin America, the Mérida Initiative rule of law program may be best understood as a political instrument designed to accomplish the varied goals described above, particularly when considered through a historical lens. The United States has long imposed its will in order to influence the passage of legislation within the boundaries of sovereign states or has otherwise enacted domestic laws with extraterritorial reach—all in defense of national interests—and nowhere more so than in Latin America.⁹⁹ As historian Greg Grandin has written, Latin America “has long served as a workshop of empire” in ways that are critical to the expansive global power of the United States.¹⁰⁰ Many U.S. multinational corporations originated in Latin America, and much of the region’s economic growth was financed by U.S. banks and investors.¹⁰¹ In addition, nation building through legal reforms has almost always accompanied military intervention and has functioned as a means through which to expand and protect U.S. security, economic, and domestic political interests.¹⁰² An examination of the history of such programs illustrates that despite the discursive shift from an emphasis on militarization to institution-building, the Mérida Initiative rule of law program may best be understood as “a political weapon to achieve American goals.”¹⁰³

A. *The Mérida Initiative’s Rule of Law Program: Template Redux*

The Mérida Initiative reflects long-established practices by which the United States has engaged in directing the legal affairs of other countries, including preparing new constitutions, organizing legislative bodies, codifying laws, and establishing judicial systems.¹⁰⁴ The United States significantly increased funding for judicial reform projects in Latin America in the last fifty years.¹⁰⁵ U.S. law reform efforts embedded

⁹⁹ CRAIG ARCENEUX & DAVID PION-BERLIN, *TRANSFORMING LATIN AMERICA: THE INTERNATIONAL AND DOMESTIC ORIGINS OF CHANGE* 52 (2005).

¹⁰⁰ GREG GRANDIN, *EMPIRE’S WORKSHOP: LATIN AMERICA, THE U.S. AND THE RISE OF NEW IMPERIALISM* 1–2 (Henry Holt and Company 2006).

¹⁰¹ *Id.* at 17.

¹⁰² *Id.* at 26, 87–120 (describing U.S. initiatives to organize paramilitary insurrections or facilitate military coups throughout Latin America in order to suppress leftist political movements and maintain interests and power tied to authoritarian and free market governments).

¹⁰³ Gian Carlo Delgado-Ramos & Silvina Maria Romano, *Political-Economic Factors in U.S. Foreign Policy: The Colombia Plan, the Mérida Initiative, and the Obama Administration*, 38 *LATIN AM. PERSP.* 93, 95 (2011) (internal quotation marks omitted).

¹⁰⁴ See Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 *COLUM. HUM. RTS. L. REV.* 259, 279 (2004); see also Bryant G. Garth, *Exporting and Importing Democracy, Law and Human Rights*, *NACLA REP. AM.*, Jan./Feb. 2007, at 29, 30.

¹⁰⁵ Bonner, *supra* note 2, at 169. In 1961, the United States established the Alliance for Progress for the purpose of establishing U.S.-style legal systems. McLeod, *supra* note 97, at 84;

in the Alliance for Progress, a Cold War project designed to counteract revolutionary movements, employed a comprehensive set of strategies throughout the region to shift the methods and structure of legal education to a U.S. model, to fashion the legal profession and retrain attorneys to fit the prototype of a U.S. lawyer, and to reshape jurisprudential philosophy.¹⁰⁶ As a foreign aid/foreign policy strategy, the United States sought to “ensure that Latin America developed in ways that strengthened pro-U.S. politicians and created economic conditions that would limit the appeal of anti-U.S. or pro Communist forces.”¹⁰⁷

The United States has promoted judicial reform strategies as a form of development assistance and, as with the Mérida Initiative, has often linked military aid with funding for rule of law programs. The exporting of criminal law American-style was part of the U.S. counter-insurgency measures in El Salvador during the 1980s in function of U.S. “domestic politics, and the geopolitical needs and agenda of the Reagan administration.”¹⁰⁸ The Mérida Initiative shares much in common with Plan Colombia: a counter-insurgency and counter-narcotics policy designed to strengthen judicial institutions, enhance criminal prosecution, and simultaneously shape military strategies.¹⁰⁹

So too with Ecuador. In the late 1990s, the United States increased foreign aid to Ecuador, including counter-drug funds. In exchange for the aid, Ecuador was obligated to allow the United States to host an expanded U.S. military presence within its territory and enact new penal laws that included mandatory minimum sentences based on U.S. guidelines that violated Ecuador’s long-held legal norms and constitutional protections.¹¹⁰ Ecuador was also required to document a rise in the rates of persons detained for drug offenses regardless of

see MARTHA L. COTTAM, *IMAGES AND INTERVENTION: U.S. POLICIES IN LATIN AMERICA* 83 (2009).

¹⁰⁶ JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 4 (1980); see also Garth, *supra* note 104, at 29–30.

¹⁰⁷ JEFFREY F. TAFFET, *FOREIGN AID AS FOREIGN POLICY: THE ALLIANCE FOR PROGRESS IN LATIN AMERICA* 2 (2007).

¹⁰⁸ Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 649 (2007); see also MARGARET POPKIN, *PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR* 71 (2000) (noting the failure of such efforts).

¹⁰⁹ HAUGAARD ET AL., *supra* note 43, at 7 (noting the protection of a pipeline as motivation for Plan Colombia); John Lindsay-Poland, *Retreat to Colombia: The Pentagon Adapts its Latin American Strategy*, NACLA REP. AM., Jan./Feb. 2010, at 22, 23 (noting how such efforts then facilitated the moving of other civilian functions into the hands of the military).

¹¹⁰ SANDRA G. EDWARDS & COLETTA A. YOUNGERS, *DRUG LAW REFORM IN ECUADOR: BUILDING MOMENTUM FOR A MORE EFFECTIVE, BALANCED AND REALISTIC APPROACH* 4, 5 (2010), available at <http://www.wola.org/sites/default/files/downloadable/Drug%20Policy/2011/Spanish/joint%20pubs/ecuador%20memo.pdf>.

whether the numbers of individuals involved in trafficking illegal drugs had also risen.¹¹¹

Judicial reform in Latin America was also mandated by the Washington Consensus institutions and funded by loans that required structural adjustment programs, the downsizing of government, and the privatization of state functions.¹¹² Mexico was a particular focus of World Bank directives to assure the responsiveness of Mexico's judicial system to economic liberalization strategies.¹¹³ While efforts have focused on forging a judicial system disposed to ratify economic liberalization strategies and enhancing the capacity of the criminal justice and penal systems, social justice issues have been ignored. Protections of the rights of labor or improvements to family law, for example, have not been a priority of the funding entities.¹¹⁴

B. *Assessment of Mérida's Rule of Law Program's Antecedents*

The outcomes of the various rule of law programs in Latin America have been assessed by a number of scholars. James A. Gardner closely examined U.S. legal assistance programs associated with the Alliance for Progress.¹¹⁵ Gardner served as a Ford Foundation official and participated in the funding of many of these projects. He determined that such efforts were routinely rejected by Latin Americans as U.S.-ethnocentric and were inapplicable to the circumstances where they were being implemented ("not a cure but a disease").¹¹⁶ Gardner found U.S. lawyers were unprepared and unfamiliar with the language,

¹¹¹ *Id.*

¹¹² LEGAL VICE PRESIDENCY, WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM 3, 28–34 (2002), available at <http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/18initiativesFinal.pdf> (documenting judicial reform efforts by the World Bank and the Inter-American Development Bank).

¹¹³ Weissman, *supra* note 54, at 849.

¹¹⁴ See DAKOLIAS, *supra* note 95, at 3; KIRSTI SAMUELS, RULE OF LAW REFORM IN POST-CONFLICT COUNTRIES: OPERATIONAL INITIATIVES AND LESSONS LEARNT 33 (World Bank, Soc. Dev. Paper No. 37, 2006), available at http://siteresources.worldbank.org/INTCPR/Resources/WP37_web.pdf; Peter DeShazo & Juan Enrique Vargas, *Judicial Reform in Latin America: An Assessment*, 17 POL'Y PAPERS AM. 8, 14 (2006), available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/0609_latin_judicial_reform.pdf; Alexis James Gilman, *Making Amends with the Mexican Constitution: Reassessing the 1995 Judicial Reforms and Considering Prospects for Further Reform*, 35 GEO. WASH. INT'L L. REV. 947, 956 (2003); Thomas W. Slover, *Tequila Sunrise: Has Mexico Emerged from the Darkness of Financial Crisis?*, 5 NAFTA: L. & BUS. REV. AM. 91, 99, 117–18 (1999); Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 SAN DIEGO L. REV. 1337, 1339 (2004); Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401, 419–20 (1995).

¹¹⁵ See generally GARDNER, *supra* note 106.

¹¹⁶ *Id.* at 11, 233, 241, 245 (noting the expectation that Latin American lawyers would have to "know and have the very feel of the American concept of law if peace through law is to be achieved" (internal quotation marks omitted)).

economics, politics, culture, and legal structures.¹¹⁷ U.S.-style rule of law programs, he noted, failed to produce reforms, contribute to political democracy, or economic development, but instead fostered the perception that law functioned as a repressive mechanism.¹¹⁸

Researchers have also criticized Plan Colombia's "judicialization" efforts for encouraging "overzealous mass arrests" of civilians and harming community relations.¹¹⁹ U.S. funds were used for smear campaigns against Colombian Supreme Court justices as well as labor organizations and civil society groups.¹²⁰ One scholar who helped to direct a human rights project in Colombia has observed that Colombia's "Justice and Peace Law" program, funded by the U.S. Department of Justice, contributed to the remobilization of paramilitary forces.¹²¹ Others have suggested that Colombia's rule of law program served to provide a rationale for military funding, and diminished respect for the rule of law while contributing to a humanitarian disaster.¹²²

Ecuadorean compliance with U.S.-imposed rule of law conditions requiring increased numbers of arrests resulted in an unprecedented rise in the imprisonment of the most vulnerable sectors of society and violated long-held legal precepts about crime and punishment.¹²³ Evaluations of efforts in El Salvador and Guatemala have reached similar conclusions: Where U.S. rule of law programs have been introduced to protect U.S. national interests, they have been largely inimical to the interests of the people living in these countries.¹²⁴

¹¹⁷ *Id.* at 4–5.

¹¹⁸ *Id.* at 4–6, 105–06, 280, 283; *see also* Moliterno, *supra* note 80, at 769, 771 (noting how a rule of law project to export the ABA Model Code of Judicial Ethics became the means to subvert the independence of the judiciary in Georgia).

¹¹⁹ ADAM ISACSON & ABIGAIL POE, CTR. FOR INT'L POL'Y, AFTER PLAN COLOMBIA: EVALUATING "INTEGRATED ACTION," THE NEXT PHASE OF U.S. ASSISTANCE 17 (2009), *available at* http://justf.org/files/pubs/091203_col.pdf.

¹²⁰ Karen DeYoung & Claudia J. Duque, *A Case of Aid Gone Bad in Colombia*, WASH. POST, Aug. 21, 2011, at A01.

¹²¹ Milburn Line, *Retooling U.S. Policy for Peace in Colombia*, PEACE & JUST. POL'Y BRIEF, Feb. 2011, at 1, 2, *available at* http://www.sandiego.edu/peacestudies/documents/ipj/Policy_Brief_Colombia_2011.pdf (describing the failure of efforts to prosecute paramilitaries for atrocities committed against civilians and their eventual release and return to criminal activities).

¹²² HAUGAARD ET AL., *supra* note 43, at 26; María Clemencia Ramírez Lemus et al., *Colombia: A Vicious Circle of Drugs and War*, in *DRUGS AND DEMOCRACY IN LATIN AMERICA: THE IMPACT OF U.S. POLICY* 99, 132–33 (Coletta A. Youngers & Eileen Rosen eds., 2005). Colombia now has the greatest number of displaced persons of any other country in the world except Sudan. Forrest Hylton, *Plan Colombia: The Measure of Success*, 17 BROWN J. OF WORLD AFF. 99, 108 (2010); Line, *supra* note 121, at 1.

¹²³ EDWARDS & YOUNGERS, *supra* note 110, at 5. In 2009, as a result of these conditions and their consequences, Ecuador terminated the foreign aid arrangement. *Id.* at 4.

¹²⁴ *See* ANTHONY K. STAPLETON, THE RULE OF LAW AND THE U.S. QUEST FOR SECURITY IN EL SALVADOR 9, 77 (2007), *available at* <http://www.dtic.mil/dtic/tr/fulltext/u2/a468788.pdf> (report submitted by student at the Joint Forces Staff College noting the misplaced efforts to protect U.S. national security interests from threats of transnational organized crime).

Moreover, the conditions attached to Washington Consensus funds allocated to Mexico that required cuts in public spending and the privatization of public functions could not have helped but to undermine the capacity of the Mexican government to carry out its law and order responsibilities.¹²⁵

C. *Rule of Law Programs: "The New Moral Imperative"*

Despite critical assessments of past efforts, the United States continues to endeavor to remake the legal systems in other parts of the world. Recently, the specter of transnational crime has become the "new moral imperative[]" for extraterritorial intervention in the form of rule of law programs.¹²⁶ U.S. politicians have described foreign drug trafficking and organized crime as "the new communism, the new monolithic threat" requiring a heightened criminal justice response.¹²⁷ USAID's assistant administrator for Latin America and the Caribbean declared that crime was now considered "the leading threat in some countries to economic growth and the leading threat to democracy."¹²⁸ The United States has established the Office of Overseas Prosecutorial Development, Assistance and Training to "assist prosecutors and judicial personnel in other countries develop and sustain effective criminal justice institutions" and boasts that it "provides justice sector development assistance in practically every region of the world."¹²⁹ International criminal drug-related cases have developed into a

Salvadorans understood that the U.S. rule of law program was a counterinsurgency mechanism and "political tool" and thus not trusted. *Id.* at 9, 47; Rachel Sider, *Renegotiating "Law and Order": Judicial Reform and Citizen Responses in Post War Guatemala*, 10 *DEMOCRATIZATION* 137, 145, 151-53 (2003) (observing that nearly all Guatemalans have no trust in the very institutions that USAID partnered with and instead have resorted to alternative forms of justice); see also SAMUELS, *supra* note 114, at 14 (noting studies that demonstrated no real evidence of improvement).

¹²⁵ ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* 89 (2003) (describing the conditions attached to IMF and World Bank funding including privatization, cuts to public funding, and deregulation); see MICHEL CHOSSUDOVSKY, *THE GLOBALISATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS* 15 (1997) (describing structural adjustment policies that require the dismantling of state institutions).

¹²⁶ Peter Andreas, *The Rise of the American Crimefare State*, 14 *WORLD POL'Y J.* 37, 40 (1997) (quoting ETHAN NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT* 475 (1993)) (internal quotation marks omitted).

¹²⁷ *Id.* at 37 (internal quotation marks omitted).

¹²⁸ Cave & Schmidt, *supra* note 73 (quoting Mark Feierstein, Asst. Admin. for Latin Am. & the Caribbean, U.S. Agency for Int'l Dev.) (internal quotation marks omitted).

¹²⁹ *Our Mission, Office of Overseas Prosecutorial Development, Assistance & Training*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/opdat> (last visited Mar. 12, 2014); see *Mission Statement, Strategic Plan, Office of Overseas Prosecutorial Development, Assistance & Training*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/opdat/about/strategic-plan.html> (last visited Mar. 12, 2014).

significant part of the caseload of local U.S. federal prosecutors' offices that pursue these matters even in the absence of proof that drugs have entered the United States and that defendants have posed national security threats.¹³⁰

Perhaps most notably, rule of law programs are concomitant aspects of a larger military strategy. In its field manual on counterinsurgency, the Department of Defense has identified rule of law campaigns as critical measures to establish the legitimacy of U.S. intervention and efforts to influence political power.¹³¹ Rule of law programs that focus on strengthening the criminal justice system ("courts, cops, and corrections") have been a key intervention strategy in Iraq and Afghanistan.¹³² In Pakistan, U.S. intelligence agencies plan and assist with local criminal prosecution to control public opinion about alleged insurgents.¹³³ Moreover, U.S. military forces, as opposed to civilian agencies, lead such programs relying on their ability to "command and control."¹³⁴ Military equipment and technology have been adapted as extensions of law-related functions.¹³⁵

¹³⁰ Benjamin Weiser, *For Prosecutor in New York*, *A Global Beat*, N.Y. TIMES, Mar. 28, 2011, at A1 (describing "the expanded global reach of" the U.S. Attorney's Office in the Southern District of New York).

¹³¹ David P. Fidler, *Counterinsurgency, Rule Of Law Operations, and International Law*, ASIL INSIGHTS, Sept. 2007, available at <http://www.asil.org/insights070919.cfm> (noting that rule of law campaigns as have been central to counterinsurgency efforts in Iraq and Afghanistan); see David H. Petraeus & James F. Amos, *Foreword: Counterinsurgency*, FIELD MANUAL NO. 3-24/MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5 (2006), available at http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_24.pdf (asserting that counterinsurgency strategies must include the establishment of the rule of law); Bonner, *supra* note 2, at 169; Jim Michaels, *U.S. Military Works with Mexico's: Passes on Skills to Help Fight Drug Traffickers*, USA TODAY, Apr. 6, 2010, at 7A (reporting on comments of military commanders on the similarities between intervention strategies among Iraq, Afghanistan, and Mexico); *US Military Chief Backs Counter-Insurgency for Mexico*, REUTERS (Mar. 6, 2009, 9:47 PM), <http://www.reuters.com/article/idUSN06397194>; see also Bacevich, *supra* note 2, at 7; John Lindsay-Poland, *Beyond the Drug War: The Pentagon's Other Operations in Latin America*, NACLA REP. AM., May/June 2011, at 8, 11 (noting that various humanitarian projects, including medical and veterinary services, are linked to U.S. military missions as public relations ploys, according to military spokespersons, to "show[] the military in a different light" (internal quotation marks omitted)).

¹³² Ronald T.P. Alcalá, *Vanquishing Paper Tigers: Applying Comparative Law Methodology to Enhance Rule of Law Development*, ARMY LAW., Mar. 2011, at 5, 8 (internal quotation marks omitted).

¹³³ James J. Saulino, *Strategic Choices: Four Legal Models for Counterterrorism in Pakistan*, 2 HARV. NAT'L SEC. J. 247, 252 n.16 (2011).

¹³⁴ Alcalá, *supra* note 132, at 8 (internal quotation marks omitted).

¹³⁵ Andreas, *supra* note 126, at 41-42. These developments suggest that the field of law may rival the field of anthropology in service of military counterinsurgency efforts. See generally CATHERINE BESTEMAN ET AL., THE COUNTER-COUNTERINSURGENCY MANUAL: OR, NOTES ON DEMILITARIZING AMERICAN SOCIETY (2009) (critiquing the role of anthropology in counterinsurgency strategies); John D. Kelly et al., *Introduction: Culture, Counterinsurgency, Conscience*, in ANTHROPOLOGY AND GLOBAL COUNTERINSURGENCY 1 (John D. Kelly et al. eds., 2010).

These efforts have spawned what some have called a “[r]ule of Law industry” dominated by “rule doctors” that has yielded vast profits to U.S. contractors.¹³⁶ National and local bar organizations, law schools, private foundations, together with USAID, the DOJ, and other federal entities have invested in exporting U.S. legal principles in support of democracy and free market economies throughout the world.¹³⁷ The United States serves as a ready and willing donor to continue to fund rule of law projects to Americanize other judicial systems.¹³⁸ These programs tend to ignore local initiatives for legal change.¹³⁹ That the decisions about the nature of the aid are determined more by the political and economic interests of the U.S. donors than the needs of the recipient nation reflects the use of law as a political instrument, notwithstanding a record of having failed to produce meaningful justice systems.¹⁴⁰

III. TRANSPLANTING THE RULE OF LAW: CONTEXT AND DIFFERENCES

Legal systems develop and function within a historical context. They evolve from, and are embedded in, cultural systems and socioeconomic structures. They transform and are transformed continually within real-life in which they are to be implemented. Laws do not merely function as a body of rules to be enforced by a judicial system, but rather both produce, and are products of, a legal value system that is itself a distillation of moral order of society and that go

¹³⁶ Yves Dezalay & Bryant G. Garth, *Introduction to GLOBAL PRESCRIPTIONS*, *supra* note 96, at 1; Jean MacKenzie, *Afghan Women and the Rule of Law Conundrum*, GLOBAL POST (Mar. 7, 2012, 6:14 AM), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/afghanistan/120306/afghan-women-and-the-rule-law-conundrum>.

¹³⁷ Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 743–44 (1999); see Fionnuala Ní Aoláin & Michael Hamilton, *Gender and The Rule of Law in Transitional Societies*, 18 MINN. J. INT’L L. 380, 382–83 (2009) (arguing that rule of law programs “represent[] merely the ego-image of its most ardent proponents”).

¹³⁸ Dezalay & Garth, *supra* note 96, at 306. The North American Consortium for Legal Education was originally established to focus on NAFTA related subject matters. See N. AM. CONSORTIUM FOR LEGAL EDUC., OPERATING AGREEMENT 3 (1999), available at http://www.nacle.org/sites/default/files/525_Operating_agreement.pdf.

¹³⁹ Craig Segal, Note, *The Forestry Crisis as a Crisis of the Rule of Law*, 58 STAN. L. REV. 1539, 1561 (2006); see *infra* Part III.B.

¹⁴⁰ Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 104 (1998) (stating that it is donors who often determine the rule of law reform priorities); Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. TORONTO L.J. 341, 347 (2009) (noting the commonplace failure of rule of law programs); Upham, *supra* note 94, at 1.

beyond conflict resolution.¹⁴¹ They reflect ideological principles and emanate from the political and economic institutions of place.¹⁴²

Efforts to transfer legal standards from developed countries to less developed countries have been the subject of long-standing critique, particularly given the ubiquity with which legal transplantation now occurs under circumstances of globalization.¹⁴³ The Global Legal Standards Research Group determined that the United States has continued to replicate its systems based on belief of its inherent superiority, regardless of whether the normative frameworks inextricably associated with particular legal codes are suitable for transport.¹⁴⁴ A comparative study of the transplantation of criminal codes from one country (or international institution) to another country found that the introduction of new laws by outsiders were always accompanied by a set of assumptions from the exporting country with questionable relevance to the recipient country.¹⁴⁵ Michael Walzer has urged that different goods, including justice have different social meanings which shape their value: “[j]ustice is rooted in the distinct understanding of places, honors, jobs, things of all sorts, that constitute a shared way of life. To override those understandings is (always) to act unjustly.”¹⁴⁶

These critiques point to the flaws inherent in the Mérida Initiative. The Mexico rule of law program seeks to transplant a system that by its very nature is foundational to nationhood and cannot readily take root except through the efforts of the local polity according to its history and traditions.¹⁴⁷ Laws must emanate from local social and political

¹⁴¹ Rogelio Pérez-Perdomo & Lawrence Friedman, *Latin Legal Cultures in the Age of Globalization*, in *LEGAL CULTURE IN THE AGE OF GLOBALIZATION* 1, 2 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003).

¹⁴² See David Kennedy, *Law and the Political Economy of the World*, 26 *LEIDEN J. INT’L L.* 7, 9, 12 (2013).

¹⁴³ John L. Comaroff, *Colonialism, Culture, and the Law: A Foreward*, 26 *LAW & SOC. INQUIRY* 305, 306 (2001) (referring to the colonial rationale, in the name of “progress” to impose a “civilized” judicial system (internal quotation marks omitted)); Gordon, *supra* note 95, at 444; Ildir Peçi & Evert Stamhuis, *Judicial Interpretation and Substantive Legality in Criminal Law: A Comparative Study on Distribution of Power in Albania and The Netherlands*, 17 *EUR. J. CRIME, CRIM. L. & CRIM. JUST.* 113, 114 (2009).

¹⁴⁴ See *The Global Legal Standards Report, At the End of the End of History—Global Legal Standards: Part of the Solution or Part of the Problem?*, 9 *GLOBAL JURIST* 5 (2009) [hereinafter *Global Legal Standards Report*], available at <http://www.bepress.com/gj/vol9/iss3/art2> (noting the local nature of justice that shapes local identities); Dezalay & Garth, *supra* note 96, at 307 (noting that the United States is “the leading exporter of rules”).

¹⁴⁵ Peçi & Stamhuis, *supra* note 143, at 114; see Alex de Waal, *Protecting Civilians in Fragile States*, Presentation to Oxfam-Novib, The Hague (Sept. 21, 2009), available at https://groups.google.com/forum/?hl=en&fromgroups#!topic/sudan-john-ashworth/pZFFACXMP_A (noting that countries cannot be made to work “from the inside with an outside template” (internal quotation marks omitted)).

¹⁴⁶ MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 7, 314 (1983).

¹⁴⁷ See *supra* note 7 and accompanying text.

circumstances, even as Mexicans may choose to adopt and borrow from external systems as their circumstances may require.¹⁴⁸

A. *The United States and Mexico: Legal Systems and Differences that Matter*

An assessment of the U.S. law reform project in Mexico requires an appreciation of the historical and political differences in legal systems and legal cultures.¹⁴⁹ Mexican legal traditions include ongoing attention to indigenous rights, constitutionally designed cooperative land use, corporative models of labor relations, and legal pluralism.¹⁵⁰ The Mexican Constitution of 1917, the conceptual political and judicial foundation for the nation, is formulated upon a commitment to social rights more so than most constitutions.¹⁵¹ The Mexican Constitution was a product of the revolution of 1910 from which it gained its “[r]evolutionary legitimacy.”¹⁵² It created social property rights (*ejidos*) and included laws designed to guarantee a form of collective title held by those who worked the land.¹⁵³ A textual reading reveals broad protections of civil rights and prohibitions on discrimination against “human dignity or individual rights or liberties,” which include gender, civil status, or ethnic origin.¹⁵⁴ The Mexican Constitution commits to a right to education and health care.¹⁵⁵ As a foundational document, the

¹⁴⁸ Pilar Domingo, *Novel Appropriations of the Law in the Pursuit of Political and Social Change in Latin America*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 254, 255 (Javier A. Couso et al. eds., 2010) [hereinafter CULTURES OF LEGALITY] (changes in laws are “historically, culturally and politically situated”); Alexandra Huneus et al., *Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America*, in CULTURES OF LEGALITY 3 (noting the ever shifting and contentious nature of legal culture); *Global Legal Standards Report*, *supra* note 144, at 5 (noting the local nature of justice that shapes local identities).

¹⁴⁹ SAMUELS, *supra* note 114, at 15 (noting that a review of rule of law programs conducted in 2006 revealed few lasting changes and few improvements from the earlier efforts to bring about legal system changes).

¹⁵⁰ See Domingo, *supra* note 148, at 263.

¹⁵¹ ARIADNA ESTÉVEZ, HUMAN RIGHTS AND FREE TRADE IN MEXICO: A DISCURSIVE SOCIOLOGICAL PERSPECTIVE 61 (2008).

¹⁵² Sergio López-Ayllón & Héctor Fix-Fierro, “Faraway, So Close!” *The Rule of Law and Legal Change in Mexico, 1970–2000*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION *supra* note 141, at 285, 293.

¹⁵³ *Id.* at 288–89 (noting that the 1917 Mexican Constitution incorporated liberal legal traditions); Judith Schacherreiter, *Un Mundo Donde Quepan Muchos Mundos: A Postcolonial Legal Perspective Inspired by the Zapatistas*, 9 GLOBAL JURIST 1, 13–14 (2009). *But see* DAVID BACON, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS 58 (2008) (noting that as a function of NAFTA-related requirements, Article 27 of the Mexican Constitution was amended and *ejidos* may now be sold).

¹⁵⁴ Constitución Política de los Estados Unidos Mexicanos [C.P.] (Mex.).

¹⁵⁵ *Children’s Rights: Mexico*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/child-rights/mexico.php#executive> (last updated Feb. 28, 2014).

constitution functions as a signpost of safeguards and rights that gives rise to unique expectations derived from the text.

Scholars have explored the fundamental philosophical differences related to legal culture that distinguish Mexico and the United States.¹⁵⁶ Mexico has implemented a civil law system based on an inquisitorial model, an approach that creates different expectations about justice. The inquisitorial system has as its theoretical basis the premise that outcomes will be determined with “little distortion by partisan legal representatives.”¹⁵⁷ Judges are considered “career civil servants” rather than “independent political forces.”¹⁵⁸ The historical preference for written trials has been based on concern that oral trials would allow a more accomplished or powerful lawyer to overcome a less competent advocate notwithstanding principles of justice at hand.¹⁵⁹

Mexico has ratified and, at times, has been far more influenced by human rights norms than the United States.¹⁶⁰ Along with much of Latin America, it has contributed to the development of regional and international human rights treaties, many of which the United States has eschewed.¹⁶¹ In 1990, it created a national commission on human rights with the highest annual budget of any ombudsman’s office in the Americas.¹⁶² Mexican legal values have been further influenced by liberation theology, concerns wholly absent from U.S. legal culture.¹⁶³

Other differences mark variance in legal culture between the United States and Mexico. The Mexican judicial system has no death

¹⁵⁶ See Paul J. Zwier & Alexander Barney, *Moving to an Oral-Adversarial System in Mexico: Jurisprudential, Criminal Procedure, Evidence Law, and Trial Advocacy Implications*, 26 EMORY INT’L L. REV. 189, 194–96, 200–02 (2012) (comparing Mexico’s legal culture of legal positivism with philosophical principles that underlie oral trials practiced in the United States).

¹⁵⁷ John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1281 (1974); Wright, *supra* note 49, at 369.

¹⁵⁸ Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT’L & COMP. L. 715, 765 (2004) (internal quotation marks omitted).

¹⁵⁹ Zwier & Barney, *supra* note 156, at 203.

¹⁶⁰ See U.S. DEP’T OF STATE, MEXICO–MÉRIDA INITIATIVE REPORT 15, available at <http://www.hsdl.org/?view&did=33501> (noting that Mexico has taken steps to implement the Istanbul Protocol, is a party to the Optional Protocol to the Convention Against Torture, and has established National Mechanisms to Prevent Torture).

¹⁶¹ Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27, 29–31, 38 (2003). The United States has refused to ratify the American Declaration on the Rights and Duties of Man, and denies the jurisdiction of the Inter-American Commission or Court of Human Rights. See *American Convention on Human Rights, Signatures and Current Ratification*, ORG. AM. STATES, <http://www.oas.org/en/iachr/mandate/Basics/4.RATIFICATIONS%20AMERICAN%20CONVENTION.pdf> (last visited Mar. 23, 2014).

¹⁶² HUMAN RTS. WATCH, MEXICO’S HUMAN RIGHTS COMMISSION: A CRITICAL ASSESSMENT 10–12 (2008), available at <http://www.hrw.org/sites/default/files/reports/mexico0208webwcover.pdf>. Human Rights Watch, while criticizing the Commission for certain weaknesses, notes its contributions, including raising public awareness about human rights violations in Mexico. *Id.* at 16.

¹⁶³ ESTÉVEZ, *supra* note 151, at 61.

penalty.¹⁶⁴ Mexico has strict gun control laws, although they have been eroded by the ease with which the United States sells weapons that find their way into the hands of drug-cartel members.¹⁶⁵ The country has historically been associated with pro-labor legislation.¹⁶⁶ Long-standing values about communitarian obligations to help offset personal losses have shaped Mexican tort law where tort victims look to be made whole through social and governmental supports that do not depend on adversarial litigation.¹⁶⁷ Much of what might otherwise be consigned to the legal system for resolution in the United States functions differently within or is often resolved through normative transformations wholly outside of the law.¹⁶⁸ Where formal legal processes are required, a significant number of Mexicans have indicated a preference for greater lay participation in the legal system.¹⁶⁹ Legal education differs in most respects from U.S. pedagogical approaches; most recent reforms have encouraged an interdisciplinary and problem-solving approach to curricular innovations.¹⁷⁰

Legal cultural differences are as relevant to the Mérida Initiative's purported plan to improve access to justice and protect rights as they

¹⁶⁴ Prisoners are generally allowed greater freedoms within penitentiaries when compared with prison life in the United States, including same-sex conjugal visits. *Mexico Allows Gay Conjugal Visits*, BBC NEWS (July 30, 2007, 11:08 AM), <http://news.bbc.co.uk/2/low/americas/6922140.stm>; see Symposia, *The Role of Legal Institutions in the Economic Development of the Americas*, 30 LAW & POL'Y INT'L BUS. 16 (1999) (remarks from U.S. Ambassador to Mexico, Jeffrey Davidow, noting that Mexico has undergone significant legal reforms with regard to improving human rights for prisoners); *Mexican Prisons*, FOREIGN PRISONER SUPPORT SERVICE, <http://www.phaseloop.com/foreignprisoners/prison-mexico.html> (last visited Mar. 23, 2014) (noting the rights to conjugal visits for men and women, and an inmate's right in some instances to have his entire family reside with him).

¹⁶⁵ See Laura Mehalko, Note, *This Is Gun Country: The International Implications of U.S. Gun Control Policy*, 35 B.C. INT'L & COMP. L. REV. 297, 301 (2012).

¹⁶⁶ Jeremy Adelman & Miguel Angel Centeno, *Between Liberalism and Neoliberalism: Law's Dilemma in Latin America*, in GLOBAL PRESCRIPTIONS, *supra* note 96, at 139, 151; Weissman, *supra* note 54, at 851.

¹⁶⁷ STEPHEN ZAMORA ET AL., MEXICAN LAW 527–28 (2004).

¹⁶⁸ ESTÉVEZ, *supra* note 151, at 70 (suggesting that core human rights work defined within the realm of structural causes tends to take place outside of the courts due to the difficulty of litigating economic, social, and cultural rights).

¹⁶⁹ Hiroshi Fukurai et al., *Is Mexico Ready for a Jury Trial? Comparative Analysis of Lay Justice Systems in Mexico, the United States, Japan, New Zealand, South Korea, and Ireland*, 2 MEX. L. REV. 3, 5 (2011).

¹⁷⁰ Kossick, *supra* note 158, at 731–36. Mexico's law schools require students to contribute a prescribed number of pro bono hours in order to graduate in contrast with U.S. law schools where such requirement exists on an *ad hoc* basis. Larissa Adler Lomnitz & Rodrigo Salazar, *Cultural Elements in the Practice of Law in Mexico: Informal Networks in a Formal System*, in GLOBAL PRESCRIPTIONS, *supra* note 96, at 209, 225 (describing six months of required unpaid work for students to “give back”); James F. Smith et al., *Why Mexico? Why Mexico Law? Why Now?*, 24 PENN ST. INT'L L. REV. 373, 380–81 (2005).

are to the efforts to redesign Mexico's criminal justice system.¹⁷¹ Public interest law (PIL) in Latin America generally follows a "socialized" practice tradition that differs from PIL in the United States.¹⁷² Empirical studies demonstrate that in contrast with U.S. lawyers, Latin American lawyers prefer "empowering social action that challenges the existing arrangements of power" and "associate PIL practice with forms of collective and social mobilization more than with legal mobilization" of the type associated with U.S. lawyers.¹⁷³ Legal activists throughout Latin America are more likely to successfully pursue the adjudication of socioeconomic rights than their counterparts in the United States.¹⁷⁴

Mexican human rights groups have contextualized torture and extrajudicial execution within the context of economic, cultural, and social rights as opposed to most U.S. human rights groups who approach such crimes as civil and political violations.¹⁷⁵ They often seek to address violations of civil and political rights through the improvement of worker rights and the strengthening of labor unions.¹⁷⁶ Mexican scholars have urged the construction of law-related human rights norms as a process of "epistemological decolonization" based on concepts developed through "the region's social reality, more specifically, in the lessons of its major revolutions: the populist movements of Perón and Cárdenas; the Cuban socialist revolution; the Chilean democratic revolution for human rights; the Sandinista revolution for democratic socialism; the Zapatista movement for indigenous rights and democracy . . ."¹⁷⁷

To acknowledge the progressive facets of Mexican legal culture does not mitigate the current deficiencies and the ways in which the Mexican legal system fails to fulfill its promise.¹⁷⁸ The Mexican constitution has functioned more as a matter of principle rather than a

¹⁷¹ Although suffering from serious deficiencies, public defenders are assigned to represent individuals who cannot afford private counsel in both criminal *and* civil matters. Kossick, *supra* note 158, at 791–92.

¹⁷² Fabio de Sa e Silva, *Professional Ideology and the Global Journey of Public Interest Law: Variations in the Meaning of Advocacy Among PIL Practitioners in the US and Latin America* 17 (2010) (unpublished working paper) (on file with author).

¹⁷³ *Id.* at 9.

¹⁷⁴ César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1671 (2011).

¹⁷⁵ ESTÉVEZ, *supra* note 151, at 66–67, 69. Although there are a growing number of U.S. lawyers who have sought to frame domestic and poverty related legal issues as human rights issues, Mexican judicial activists likely have greater experience in this realm than their U.S. counterparts. See Rodríguez-Garavito, *supra* note 174, at 1674.

¹⁷⁶ ESTÉVEZ, *supra* note 151, at 67 (noting that Mexican human rights groups identified human rights issues in Mexico in the context of a workers' movement).

¹⁷⁷ *Id.* at 15.

¹⁷⁸ See *supra* Part I.B.

matter of practice.¹⁷⁹ It has failed to sustain the expectations of the revolution that inspired its original articles. Recent legislative proposals would diminish the rights of unions, which have never fully benefited from historical progressive labor laws.¹⁸⁰ The Mexican criminal justice system suffers from many deficiencies: public defenders with less political power compared with prosecuting attorneys and case overloads, inadequate interpretation services, abusive detention practices, and corruption, just to name a few.¹⁸¹

But the differences matter. Just as the U.S. rule of law model is a unique “historical product embedded in U.S. politics and the U.S. social structure,” so too does Mexico’s legal culture reflect a unique history and tradition.¹⁸² Given these differences, and the political, economic, and military motivations associated with the rule of law project, the Mérida Initiative’s rule of law program may contribute to undermining the legitimacy of the law itself.¹⁸³ Moreover, as next described, U.S. efforts to direct the reform of the Mexican legal system run counter to current efforts by the Mexican polity to address issues pertaining to crime, justice, and law.¹⁸⁴

¹⁷⁹ Domingo, *supra* note 148, at 259 (noting that it represents “the first truly social constitution of the twentieth century” and well ahead of European nations).

¹⁸⁰ Dan La Botz & Robin Alexander, *Unions Oppose Labor Law Reform: For Quite Different Reasons*, 17 MEX. LAB. NEWS & ANALYSIS, (2012), available at http://www.ueinternational.org/MLNA/mlna_articles.php?id=205#1498.

¹⁸¹ INGRAM ET AL., *supra* note 54, at 8, 10; Alicia Ely Yarmin & Pilar Noriega Garcia, *Absence of the Rule of Law Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L.A. INT’L & COMP. L. REV. 467, 483 (1999). Of course, many of these deficiencies are the same as those in the United States. See Monica Davey, *In Missouri, State Budget Problems Take Toll on Lawyers for the Indigent*, N.Y. TIMES, Sept. 10, 2010, at A15 (describing declining resources for public defenders causing their offices to refuse cases, and suffers from such overwhelming caseloads that provide “nothing more than the illusion of a lawyer”); Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22 (describing two judges who sentenced juveniles without counsel or due process to privately owned detention centers in exchange for payment of money); see also CLIVE STAFFORD SMITH, *INJUSTICE: LIFE AND DEATH IN THE COURTROOMS OF AMERICA* (2012) (detailing corruption and bribery involving a capital case).

¹⁸² Yves Dezalay & Bryant G. Garth, *Corporate Law Firms, NGOs, and Issues of Legitimacy for a Global Legal Order*, 80 FORDHAM L. REV. 2309, 2316 (2012). Moreover, notwithstanding the deficiencies in the legal system, studies demonstrate that among some sectors of Mexican society, support for the traditional Mexican legal system remains firm. INGRAM ET AL., *supra* note 54, at 3, 13.

¹⁸³ Dezalay & Garth, *supra* note 182, at 2345.

¹⁸⁴ Boaventura De Sousa Santos, *The World Social Forum and the Global Left*, 36 POL. & SOC’Y 247, 252 (2008) (noting that even the “conventional left” would be wanting both theoretically and analytically to interpret the needs of the social movements in Latin American and the Global South generally).

B. *The Mérida Initiative Versus Mexican Reforms: Trending Differences*

To be sure, the Mexican judicial system needs fixing. The question is how and who is best fitted to enact legal reforms to address the dynamic context within which the rise in crime and drug cartels has occurred.¹⁸⁵ Mexican legal experts, human rights activists, and citizens have not ignored the structural deficiencies of the criminal justice system. On the contrary, scholars and human rights activists have consistently raised the need for legal reform and called for a strengthened judiciary as fundamental to the elimination of drug-cartel violence and the improvement of the social fabric of society.¹⁸⁶ In fact, as this Part demonstrates, actual or proposed legal reforms are underway that are not only independent of, but are at variance with, the Mérida Initiative rule of law program.

1. United States Funded Reforms: Power to the Prosecutor

The Mérida Initiative's funding of institution-building focuses primarily on strengthening Mexico's justice system.¹⁸⁷ Reports that analyze the Mérida Initiative reveal that "rule of law" funds have been allocated principally to enhance criminal prosecutorial functions through training and technical support.¹⁸⁸ In fact, USAID and its rule of law collaborators have concentrated almost entirely on the training of prosecutors.¹⁸⁹ Congressional reports that track Department of Justice funding disclose that \$19 million has been allocated to prosecutorial functions; additional funding for USAID since the inception of Phase II has been reserved for the training of prosecutors.¹⁹⁰ State Department "fact sheets" that feature Mérida Initiative achievements itemize such

¹⁸⁵ See *supra* Part I.A–B.

¹⁸⁶ Stephanie Erin Brewer, *Structural Human Rights Violations: The True Face of Mexico's War on Crime*, 16 HUM. RTS. BRIEF 7, 10 (2009).

¹⁸⁷ OLSON, *supra* note 85, at 2 (identifying funding allocation for information technology, the improvement of court management and prosecutorial capacity, victim and witness protection and restitution programs, and forensics); see also WILSON CTR., *supra* note 76.

¹⁸⁸ OLSON, *supra* note 85; SEELKE & FINKLEA, *supra* note 71, at 24 (describing U.S. State Department and USAID funding focused on increasing prosecutorial capacity building and other law enforcement mechanisms); see also WILSON CTR., *supra* note 76.

¹⁸⁹ See, e.g., U.S.-MEX. STATE ALLIANCE P'SHIP, QUARTERLY REPORT OF ACTIVITIES, APRIL 1, 2011–JUNE 30, 2011, 3D QUARTER REPORT 6–18, 21 (2011), available at http://www.statealliancepartnership.org/activities_files/3_quarter_report_FY201011.pdf (detailing almost exclusively trainings for prosecutors); see also William Hine-Ramsberger, Note, *Drug Violence and Constitutional Revisions: Mexico's 2008 Criminal Justice Reform and the Formation of Rule of Law*, 37 BROOK. J. INT'L L. 291, 315 (2011) (noting that the reforms "perpetuate the expansive power of the public prosecutor").

¹⁹⁰ SEELKE & FINKLEA, *supra* note 71, at 25 n.131.

accomplishments all in the realm of prosecution and punishment.¹⁹¹ The Assistant Secretary for the Bureau of International Narcotics and Law Enforcement Affairs described rule of law efforts in Mexico as synonymous with enhancing the ability to prosecute, convict, and incarcerate.¹⁹²

The U.S. focus on strengthening prosecutorial efforts reveals both an ignorance and arrogance about the desires of the Mexican polity.¹⁹³ Mexicans have long expressed concerns regarding the excessive power of police and prosecutors.¹⁹⁴ Comparative legal studies have demonstrated that Mexicans have a high rate of distrust for the office of the prosecutor when compared with other nations.¹⁹⁵ Notwithstanding these findings, the United States has funded the Mexican Attorney General's office and has done so in the face of ongoing scandals related to corruption, bribery, and other crimes that have plagued the bureaucracy. In July 2011, some four years after the inception of the Mérida Initiative, 111 prosecutors were charged with bribery and corruption, abuse of power and "botched investigations," causing the Attorney General's resignation even while U.S. rule of law funds have bolstered the office.¹⁹⁶ More recently, in September 2012, the Attorney General's office has come under investigation for collaboration in the transport of drugs leading to the resignation of the top organized crime prosecutor.¹⁹⁷ USAID rule of law funds have been allocated to police departments implicated in complicity with drug cartels and some of the worst human rights violations.¹⁹⁸ All said, USAID and its contractors are implicated in the very system in which Mexicans have the least trust.

¹⁹¹ U.S. EMBASSY IN MEXICO, *supra* note 81.

¹⁹² Johnson, *supra* note 78.

¹⁹³ See *supra* Part III.A.

¹⁹⁴ See *Justice Reform Season Opens*, CABLE REFERENCE ID: #07MEXICO4881 (Sept. 10, 2007, 11:03 PM), <http://cablegatesearch.net/cable.php?id=07MEXICO4881&q=07mexico4881>.

¹⁹⁵ Fukurai & Krooth, *supra* note 82, at 65.

¹⁹⁶ Assoc. Press, *Mexican Prosecutors Face Charges*, N.Y. TIMES, July 22, 2011, at A6 (noting that over 100 prosecutors in the Attorney General's office faced charges for crimes including abuse of power); Tony Nelson, *News and Analysis March 21–April 3, 2011*, MEXICO SOLIDARITY NETWORK (Apr. 4, 2011, 1:39 PM), <http://mexicosolidarity.org/post/2011/april/newsandanalysismarch21april32011>; see also Elisabeth Malkin, *Mexico: Woman Picked to Fight Cartels*, N.Y. TIMES, Apr. 1, 2011, at A6 (noting the ineffectiveness of the Office of the Prosecutor).

¹⁹⁷ Randal C. Archibold, *Top Mob Prosecutor Resigns*, N.Y. TIMES, Nov. 17, 2012, at A8; *Mexico's Federal Attorney General Investigates Its Own Air Fleet for Drug Trafficking*, THE FULANO FILES (Sept. 8, 2012), <http://fulano.info/wordpress/?p=1379>.

¹⁹⁸ *Human Rights in Mexico: Hearing Before the H. Comm. On Foreign Affairs, Tom Lantos Human Rights Commission*, 112th Cong. 9 (2012) (statement of Nik Steinberg, Mexico Researcher for Human Rights Watch), available at http://tlhrc.house.gov/docs/transcripts/2012_5_10_Human_Rights_In_Mexico/Santiago_Aguirre_Testimony.pdf (noting that the U.S. is aiding in some of the worst human rights abuses); see Randal C. Archibold, *Mexican Agencies Clash Publicly Over Shooting of C.I.A. Employees*, N.Y. TIMES, Nov. 21, 2012, at A24 (reporting on charges that the federal police tried to kill U.S. CIA employees); Randal C. Archibold & Eric Schmitt, *Americans Shot in Mexico Were C.I.A. Operatives in Fight Against Drugs*, N.Y. TIMES,

Mérida's emphasis on strengthening formal prosecutorial powers appears to be oblivious to the fact that the balance of power in the Mexican judiciary favors prosecutors.¹⁹⁹ To further exacerbate the preponderance of prosecutorial power, the rule of law program has introduced the use of the plea bargain (*juicio abreviado*).²⁰⁰ As the office of the prosecutor has greater resources than the defendant, plea bargaining processes make it more likely that it will be easier to induce defendants to give up their rights and plead guilty.²⁰¹ Indeed, the introduction of plea-bargaining has created additional fear among Mexicans that unethical prosecutors may coerce innocent persons into inculcating themselves.²⁰²

The expansion of the powers of prosecutor's office similarly undermines the desires of Mexicans to have greater lay presence and control of the criminal justice system.²⁰³ Comparative legal studies demonstrate that an overwhelming number of Mexicans—more so than other countries that were included in the studies—have faith in the abilities of their fellow citizens to sit as jurors and to make fair and just decisions in the criminal justice process through a jury system.²⁰⁴ Mexican citizens are also ranked high in terms of willingness to serve as jurors, even after they were asked to evaluate the dangers associated with adjudicating a defendant with gang affiliations whose members might be present and observing courtroom processes.²⁰⁵ Moreover, the majority of Mexicans expressed the view that lay presence through the jury system would lessen crime in their communities.²⁰⁶ Nonetheless, notably absent from the Mérida Initiative is any proposal to reintroduce

Aug. 29, 2012, at A4; Ginger Thompson et al., *Hand of U.S. Is Seen in Halting General's Rise*, N.Y. TIMES, Feb. 5, 2013, at A1 (noting concerns that high ranking officials in the Mexican military were misusing U.S. funds and were involved with drug trafficking).

¹⁹⁹ David A. Shirk & Alejandra Rios Cázares, *Introduction: Reforming the Administration of Justice in Mexico*, in REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 1, 19–20 (Wayne A. Cornelius & David A. Shirk eds., 2007) (noting that this is the case more so than elsewhere in the hemisphere); Guillermo Zepeda Lecuona, *Criminal Investigation and the Subversion of the Principles of the Justice System in Mexico*, in REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 133, 134, 139–40; Rios-Figueroa, *supra* note 62, at 313; Wright, *supra* note 49, at 369–70 (characterizing Mexico as having a unique form of a civil law model due to the expansive role of the prosecutor).

²⁰⁰ MATT INGRAM & DAVID A. SHIRK, TRANS-BORDER INST., JUDICIAL REFORM IN MEXICO: TOWARD A NEW CRIMINAL JUSTICE SYSTEM 20 (2010), available at <http://catcher.sandiego.edu/items/peacestudies/2010-IngraShirk-JRM%20%282%29.pdf>.

²⁰¹ Craig M. Bradley, *Overview*, in CRIMINAL PROCEDURE A WORLDWIDE STUDY xv, xvii (Craig M. Bradley ed., 2d ed. 1999) (observing that prosecutors with weak cases against defendants are more likely to offer plea arrangements).

²⁰² INGRAM & SHIRK, *supra* note 200, at 20.

²⁰³ See Fukurai et al., *supra* note 169, at 22 (noting willingness of Mexicans to participate in a jury system).

²⁰⁴ *Id.* at 3, 5 (noting that of the six nations that were part of a comparative study, including the United States, Mexico had the highest expression of confidence in the jury system).

²⁰⁵ *Id.* at 27.

²⁰⁶ *Id.*

jury trials, “a most effective means of inducting people into a culture of rights and responsibilities.”²⁰⁷ Nor is there any reference to training with regard to the jury system, despite calls for oral trials in Mexico.²⁰⁸ This omission, too, suggests indifference for context and conditions in Mexico and undermines those factors that serve as the foundation for improved outcomes in the criminal justice system.

It is often difficult for Mexican authorities to resist U.S. pressures for legal reform, for the law project is part of an extensive network of conditionalities and *quid pro quos*, of trade-offs and reciprocities: Acquiescence on one issue obtains concessions on another.²⁰⁹ As one scholar has observed: “The fundamental asymmetry of the relationship between external and local actors, evident from the start both in who takes the initiative in judicial reform and who has the money (whether requested or not) affects all aspects of the reform process as it has unfolded in Latin America.”²¹⁰ Such “passive acceptance,” however, “does not indicate a genuine commitment to reform or to a particular reform strategy.”²¹¹ Indeed, Mexican jurists and human rights groups have denounced these and other reforms that strengthen the hand of prosecutors, especially laws that authorize the holding of organized crime suspects for up to eighty days without charges.²¹² The president of the Inter-American Court of Human Rights and former Mexican Federal Attorney General Sergio García Ramírez has decried search and seizure reforms advocated by the United States as attacks on protected rights.²¹³ Other critics have charged that the reforms are unconstitutional, undermine traditional habeas corpus rights, and result in a two-tiered system of justice—one for “ordinary crime” and the other for individuals accused of organized crime.²¹⁴

²⁰⁷ Bill Keller, *A Jury of Whose Peers?*, N.Y. TIMES, Sept. 22, 2013, at A23 (describing the importance of the jury system according to Tocqueville); Adam Liptak, *Cases Keep Flowing In, But the Jury Pool is Idle*, N.Y. TIMES, Apr. 30, 2007, at A14.

²⁰⁸ See *supra* note 82 and accompanying text.

²⁰⁹ LUIS PÁSARA, LATIN AM. PROGRAM, WOODROW WILSON INT’L CTR. FOR SCHOLARS, INTERNATIONAL SUPPORT FOR JUSTICE REFORM IN LATIN AMERICA: WORTHWHILE OR WORTHLESS? 6–8 (2012), available at <http://www.wilsoncenter.org/sites/default/files/Jutice%20Reform%20in%20LATAM.pdf>.

²¹⁰ *Id.* at 8.

²¹¹ *Id.* at 7.

²¹² GRAYSON, *supra* note 44, at 147; Carlsen, *supra* note 89 (noting that Mexican judges from the Supreme Court to the lower courts have objected to U.S. reform initiatives); see *supra* note 194 and accompanying text.

²¹³ Jorge Carrasco Araizaga & Gloria Leticia Diaz, *Judicial Reform Marked “Made in America,”* PROCESO 1633, Feb. 17, 2008, at 2 (on file with author). U.S. initiated reforms included authorizing prosecutors to hold organized crime suspects for up to eighty days without charges. GRAYSON, *supra* note 44, at 147; Jorge Alonso, *A Thousand and One Demonstrations: For Life, Petroleum and Rights*, REVISTA ENVIO (Apr. 2008), <http://www.envio.org.ni/articulo/3750>.

²¹⁴ INGRAM & SHIRK, *supra* note 200, at 20; Carlsen, *supra* note 89; Laura Carlsen, *On Eve of Summit, Mexico’s Human Rights Record Comes Under Fire in U.S. Congress*, AMERICAS

The same criticisms were lodged by both the members of the Mexican congress and a human rights group, Miguel Agustín Pro Juárez Center.²¹⁵ Activists have condemned the replication of U.S. counter-terrorism style reforms and have warned that the Mérida Initiative will result in violations of the rights of Mexican union leaders and migrants.²¹⁶ Their warnings have not remained in the realm of the speculative: Soldiers unlawfully broke into the homes of at least a dozen homes in one community in the state of Jalisco on authority claimed as part of the fight against drug trafficking.²¹⁷

The Mérida Initiative's pronouncements about protecting the rights of Mexicans have been criticized as "a grotesque and absurd pretension."²¹⁸ The Archdiocese of Mexico City denounced the plan, urged its rejection, and called it "offensive charity."²¹⁹ Still others suggest that the reforms amount to nothing more than window dressing and observe that confessions obtained through torture remain admissible in courts of law.²²⁰ Scholars who have surveyed the result of legal reforms have found little change and few incentives for prosecutors to abandon abusive practices.²²¹ They also note that changes are not likely to materialize without local political, economic, and social commitment.²²² Despite these critiques, U.S. officials and their contractors have continued with their efforts. They have attempted to deflect the criticisms, insisting that proposed reforms create efficiency and have

PROGRAM (Aug. 10, 2009), <http://www.cipamericas.org/archives/1801>; see Navarro, *supra* note 50.

²¹⁵ Victor Ballinas, *CNDH: La Reforma Judicial de Felipe Calderón, Revés a Derechos Humanos*, LA JORNADA (Mexico City, Mex.), Sept. 28, 2007, available at <http://www.jornada.unam.mx/2007/09/28/index.php?section=politica&article=012n1p01> (noting criticisms by the president of the CNDH that the reforms were a grave setback to fundamental human rights); Centro Nacional de Comunicación Social AC, *Reforma Judicial, Lesiva de los Derechos Humanos*, CENCOS (Feb. 25, 2008); see Araizaga & Diaz, *supra* note 213, at 3 (noting a number of groups expressing concerns for the new warrantless search laws); Carlsen, *supra* note 214 (reviewing concerns of Senator Ramón Galindo and other supporters of President Calderón); see also Elisabeth Malkin & Randal C. Archibold, *U.S. Withholds Millions in Mexico Antidrug Aid*, N.Y. TIMES, Sept. 4, 2010, at A7 (noting that the Mexican government called the U.S. State Department's call for Mexican legislation to strengthen its human rights commission an affront to its sovereignty).

²¹⁶ Carlsen, *supra* note 89; Carlsen, *supra* note 214; Navarro, *supra* note 50.

²¹⁷ Vania Citlalli de Dios & Rebeca Herrejón, *Denuncian Abusos de Ejército*, MURAL (Guadalajara, Mex.), Dec. 10, 2009, at 2.

²¹⁸ Marc Lacey, *Congress Trims Bush's Mexico Drug Plan*, N.Y. TIMES, May 23, 2008, at A6 (quoting from an editorial in the Mexican newspaper, *La Jornada*) (internal quotation marks omitted).

²¹⁹ GRAYSON, *supra* note 44, at 237 (internal quotation marks omitted).

²²⁰ *Id.* at 146–47 (noting that some reforms would not take full effect until 2016 during which time torture-coerced confessions will be allowed into evidence); Paco Rodriguez, *Justicia Colonizada*, NOTICIAS (Oaxaca, Mex.) (Jan. 28, 2011), <http://www.noticiasnet.mx/portal/principal/justicia-colonizada> (noting that in some states, the judicial system is in a state of collapse because of efforts to implement the USAID reforms).

²²¹ Ríos-Figueroa, *supra* note 62, at 313.

²²² *Id.* at 315.

readily pressed the Mexican legislature for their passage.²²³ The efforts to give more power and authority to an office in which the vast majority of Mexican citizens lack confidence will deny the Mérida Initiative the support and acceptance given to those developed from within communities affected by crime and impunity.²²⁴

2. Mexican Reforms: Law, Order, and New Governance Strategies

The Mérida Initiative has ignored capacity of Mexican lawyers and citizens to develop their own “[l]egal nationalism.”²²⁵ Mexico is situated in a region where legal systems are undergoing rapid transformations. Countries throughout the hemisphere chose to appropriate from one another, often in an attempt to harmonize each other’s laws.²²⁶ More particularly, and motivated by the challenges of addressing the complex determinants of crime and the threat to social coherence as a consequence of a drug-related violence and related economic dislocation, communities throughout Mexico have developed methods of new governance to address law and order concerns.²²⁷ In these places, populist reforms have supplanted traditional legal responses that have failed to address the rising violence. Social groups engaging in bottom-up lawmaking have “become practical lawmakers, accountable to each other for their choices.”²²⁸

²²³ See TAFOYA, *supra* note 75, at 9–10 (noting USAID/Proderecho’s lobbying assistance with Mexican legislators); *Justice Reform Season Opens*, *supra* note 194; *Strengthening Justice Systems in Mexico*, *supra* note 75 (noting lobbying efforts throughout).

²²⁴ A close analysis of the motivation of the Mexican Attorney General’s office in receiving USAID funding and support is beyond the scope of this Article, except to point to the reasoning of Bryant Garth who noted that political elites who enter into these types of import-export arrangements often do so to enhance their own power. Garth, *supra* note 104, at 30.

²²⁵ López-Ayllón & Fix-Fierro, *supra* note 152, at 294; see Lau, *supra* note 7 (arguing relatedly that a focus on westernization as the impetus for legal change denies the domestic forces that bring about change).

²²⁶ Huneeus et al., *supra* note 148, at 7 (“Latin America is a region of multiple legal orders that overlap and coexist.”); Esquirol, *supra* note 7, at 1035; Langer, *supra* note 108, at 618–19 (describing the mushrooming of criminal codes as part of a regional phenomenon).

²²⁷ Gráinne de Búrca & Joanne Scott, *Introduction to LAW AND NEW GOVERNANCE IN THE EU AND THE US* 1, 2 (Gráinne de Búrca & Joanne Scott eds., 2006) (defining new governance as “a shift away from the monopoly of traditional politico-legal institutions, and implies either the involvement of actors other than classically governmental actors, or indeed the absence of any traditional framework of government”).

²²⁸ Charles F. Sabel, *Design, Deliberation, and Democracy: On the New Pragmatism of Firms and Public Institutions* (paper presented to the Conference on Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations, European Univ. Inst., Dec. 15–16, 1995), in *LIBERAL INSTITUTIONS, ECONOMIC CONSTITUTIONAL RIGHTS, AND THE ROLE OF ORGANIZATIONS* 101 (Karl-Heinz Ladeur ed., 1997), available at <http://www2.law.columbia.edu/sabel/papers/Design.html>; see also Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 379 (describing a new governance view of bottom-up lawmaking as “self-reflexive, transparent, and dialogically reasoned”).

In the state of Chiapas, autonomous indigenous communities together with the Zapatistas have developed legal structures to address public health issues, mediate conflict, confront crime, and engage human rights concerns.²²⁹ Operating under a system of Good Governance Councils (*Juntas de Buen Gobierno*), they have taken a novel approach to crime based on community governance and consensus that includes “forgiveness and goodness,” which, for example, require a murderer to support a victim’s widow in an effort to avoid creating “two widows.”²³⁰ Relying on strategies that seek to address the determinants of crime and conflict, the Zapatista Good Government Councils have achieved a reduction in crime and impunity, precisely the stated goal of the Mérida Initiative.²³¹

Similarly, three municipalities in the state of Guerrero have developed a justice system, in response to an increase in violence, which later expanded into a regional justice system.²³² The Guerrero regional justice system combines indigenous laws with Mexico’s statutory laws as well as newly developed legal norms, some of which are based on international human rights principles.²³³ Much of it rests on principles of restorative justice.²³⁴ Criminality in Guerrero is reported to have been reduced by ninety-two percent.²³⁵

²²⁹ Schacherreiter, *supra* note 153, at 27, 34 (describing various autonomous law-related structures as part of the Zapatista Juntas of Good Government); see Karina Ansolabehere, *More Power, More Rights? The Supreme Court and Society in Mexico*, in *CULTURES OF LEGALITY*, *supra* note 148, at 78, 99 (noting the constitutionalization of indigenous rights was a function of the Zapatista movement).

²³⁰ Andrew Woolford & R.S. Ratner, *Disrupting the Informal-Formal Justice Complex: On the Transformative Potential of Civil Mediation, Restorative Justice and Reparations Politics*, 13 *CONTEMP. JUST. REV.* 5, 14 (2010) (describing the commutation of a life sentence of an army General who had kidnaped, raped, and tortured indigenous residents of Chiapas); see Paul Clark, *Restorative Justice and ADR: Opportunities and Challenges*, 44 *ADVOCATE (IDAHO)* 13 (2001).

²³¹ Jorge Alonso, *The President and the EZLN Issue Their Reports*, *REVISTA ENVÍO* (Managua, Nicar.) (Oct. 2004), <http://www.envio.org.ni/articulo/2682>; Fred Rosen, *Interview with Javier Sicilia Part II: Reweaving Mexico’s Social Fabric*, *NACLA* (N.Y.C., N.Y.) (Feb. 14, 2012), <https://nacla.org/blog/2012/2/14/interview-javier-sicilia-part-ii-reweaving-mexico%E2%80%99s-social-fabric> (observing that in the Zapatista areas, there is almost no crime because of the focus on strengthening the social fabric).

²³² María Teresa Sierra, *Indigenous Justice Faces the State: The Community Police Force in Guerrero Mexico*, *NACLA REP. AM.*, Sept./Oct. 2010, at 34. The civilian monitoring system in Guerrero was created because the official actors in the criminal justice system were found to be corrupt and responsible for many human rights violations suffered by the people in the region. See *HUMAN RIGHTS WATCH*, *supra* note 57.

²³³ Sierra, *supra* note 232, at 35; see also Ann Gurucharri & Anthony Saudek, *Mexican Justice*, 8 *HARV. KENNEDY SCH. REV.* 83, 89 (2008).

²³⁴ Sierra, *supra* note 232, at 35 (noting, for example, that the Guerrero regional criminal justice system seeks to re-educate and rehabilitate defendants and to return them to their communities); see also Gurucharri & Saudek, *supra* note 233.

²³⁵ Maria Teresa Sierra, *The Revival of Indigenous Justice in Mexico: Challenges for Human Rights and the State*, 28 *POL. & LEGAL ANTHROPOLOGY REV.* 52, 58 (2005).

In the state of Puebla, mechanisms for dispensing “indigenous justice” have emerged as a result of the activism of local residents and human rights groups who select their own judges and oversee local courts.²³⁶ These newly developed courts have significantly altered the ways in which crime and violence are addressed. As one scholar has observed, local courts are designed to “respect[] the human rights of people who are arrested. They do not want to reproduce people’s usual experiences with state justice based on corruption and impunity.”²³⁷ These courts have also fostered the growth of women’s leadership and greater attention to gender concerns in matters of justice.²³⁸ Similarly, the Cherán Indian community in Michoacán, determined to develop its own legal structures, expelled the police force, and patrols its neighborhoods while eschewing any effort to militarize the region.²³⁹ These new governance judicial mechanisms are being promoted in other localities throughout Mexico.²⁴⁰

Other initiatives provide examples of efforts by Mexican activists to expand and defend their rights, reduce violence, and demand an end to impunity.²⁴¹ Civic organizations and nonprofit groups have created networks and coalitions through which they gain rights in a broad spectrum of concerns, including citizen security, police corruption, labor, trade-related issues, voting rights, housing, and environmental matters.²⁴² “Superbarrio” Gómez, a folk hero hailed by scholars of Mexico, serves as the spokesperson for the *Asamblea de Barrios* (Assembly of Neighborhoods), and advocates for the poor in various legal disputes.²⁴³

While recognizing that there is danger in overstating the achievements of non-state efforts in Mexico, new governance initiatives and popular reforms have garnered the support of the residents in the communities in which they are taking place. They function in contentious relationship to existing formal laws and create the possibility of transforming Mexico’s response to crime, drug cartels, and violence.²⁴⁴ These new governance strategies tack in the opposite

²³⁶ *Id.* at 55–58.

²³⁷ *Id.* at 60–61.

²³⁸ *Id.* at 61–62.

²³⁹ *Indigenous Communities Rise Up Against Crime*, AMERICA, Aug. 15, 2011, at 6–7, available at <http://americamagazine.org/issue/784/signs/indigenous-community-rises-against-crime>; Krauze, *supra* note 35, at 69.

²⁴⁰ Sierra, *supra* note 232, at 13.

²⁴¹ ESTÉVEZ, *supra* note 151, at 49, 66.

²⁴² *Id.* at 49–50; Diane E. Davis, *From Democracy to Rule of Law? Police Impunity in Contemporary Latin America*, REVISTA: HARV. REV. LATIN AM., Fall 2002, at 21, 23.

²⁴³ THOMAS E. SKIDMORE & PETER H. SMITH, MODERN LATIN AMERICA 252 (2001).

²⁴⁴ David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 547–48 (2007) (describing the ways new governance may act as rival to and/or transform existing legal regulation).

direction of the Mérida Initiative rule of law program, which focuses on enhancing traditional criminal justice processes of prosecution and punishment.

3. Mexican Reforms: Law, Order, and International Human Rights Perspectives

Many of the reform efforts proposed by Mexican legal and human rights activists seek to incorporate international human rights concepts to protect citizens against crime and impunity in lieu of the Mérida-style emphasis on criminal enforcement.²⁴⁵ A coalition of nongovernmental organizations and academics have proposed constitutional reforms to enhance human rights protections including those found in the International Covenant on Economic, Social, and Cultural Rights, as well as immigrant and refugee protections.²⁴⁶ They have advocated the explicit protection of rights that may not be suspended under any circumstances.²⁴⁷ These proposals, moreover, seek to direct attention to the impact of global economics on socio-economic rights in addition to civil and political rights as a means of addressing the determinants of crime and insecurity.²⁴⁸ They reflect the belief, as expressed by Javier Sicilia, the leader of Mexico's Movement for Peace with Justice and Dignity, that the critical legal reforms required to address drug-related violence would, of necessity, address the paradigmatic neoliberal economic developments that he describes as constituting "the legal form of criminality."²⁴⁹

Other community groups have organized to implement human rights treaties to assist victims of torture, wrongful arrests, and those crimes where no relief could be found in the Mexican criminal justice system.²⁵⁰ For example, in Ciudad Juárez, where the numbers of women murdered has soared, families of victims in collaboration with local grassroots organizations invoked the Istanbul Protocol, which governs the processes for the documentation of torture, and thereby forced the Mexican government to allow outside forensic experts to investigate the

²⁴⁵ Laura Carlsen, *Mexico's False Dilemma: Human Rights or Security*, 10 NW. J. INT'L HUM. RTS. 146, 151–52 (2012).

²⁴⁶ Press Release, Instituto Mexicano de Derechos Humanos y Democracia, Organizaciones de la Sociedad Civil y Miembros de la Academia Exhortan a la Cámara de Diputados a Aprobar la Reforma Constitucional en Materia de Derechos Humanos (Apr. 21, 2010), available at http://imdh.org/boletines_detalle.php?id=9976.

²⁴⁷ *Id.*

²⁴⁸ Carlsen, *supra* note 245.

²⁴⁹ Rosen, *supra* note 231.

²⁵⁰ Marc Lacey, *Human Rights Defenders Seek Protection in Mexico*, N.Y. TIMES, June 20, 2010, at A14.

murders of their loved ones.²⁵¹ They succeeded in implementing international standards in order to obtain an independent investigation by an entity of their own choosing—the Argentine Forensic Anthropology Team—notwithstanding the Mexican government’s initial refusal to allow them into the country.²⁵² Murdered victims’ families similarly invoked the very same protocol to investigate the torture of those accused of having committed the crimes.²⁵³

These campaigns reflect Mexican efforts to respond to the challenges of crime and impunity while insisting upon fairness and justice for the accused. Social movement activists have employed the framework of international human rights norms in support of their calls to modify laws that have been promoted by the U.S. rule of law program.²⁵⁴ Indeed, legal activism in the name of human rights has gained popular support, particularly those that seek to develop collective social benefits as opposed to notions of individualism based on liberal thought.²⁵⁵ As a means of defending alternative forms of seeking justice, civil society groups have emerged calling for the protection of human rights defenders.²⁵⁶ In fact, the recent focus on a human rights framework has been described as one of the most important reforms, having “the potential to considerably expand access to justice for ordinary people.”²⁵⁷ These developments suggest that the capacity for developing a “culture of legality” is well developed within Mexico.²⁵⁸

4. Mexican/Regional Reforms: Rethinking the War on Drugs

Perhaps the most significant reforms at odds with the Mérida rule of law program relate to the very heart of the U.S. approach to drug trafficking and drug violence, that is, the “war on drugs.” As noted above, the Mérida Initiative’s rule of law program calls for an expanded

²⁵¹ See Weissman, *supra* note 4, at 415–17.

²⁵² *Id.*

²⁵³ *Id.* at 417–19.

²⁵⁴ Enrique Krauze, *Can This Poet Save Mexico?*, N.Y. TIMES, Oct. 2, 2011, at SR6.

²⁵⁵ See Analiese M. Richard, *Mediating Dilemmas: Local NGOs and Rural Development in Neoliberal Mexico*, 32 POL. & LEGAL ANTHROPOLOGY REV. 166 (2009); Alberto Morales, *Excelente y Buena, Atención en CNDH: Encuesta*, EL UNIVERSAL (Mexico City, Mex.) (Dec. 26, 2009), <http://www.eluniversal.com.mx/notas/648081.html> (noting a 2009 survey demonstrating that Mexicans readily make use of the National Commission on Human Rights for reporting human rights abuses).

²⁵⁶ See ASOCIACIÓN POLÍTICA NACIONAL PROPUESTA CIVICA, AYUDÁNOS A SALVAR LAS VIDAS DE LOS LUCHADORES POR LOS DERECHOS HUMANOS, *available at* <http://www.propuestacivica.org.mx/derechos-humanos.html>.

²⁵⁷ Ríos-Figueroa, *supra* note 62, at 317–18.

²⁵⁸ Sierra, *supra* note 232, at 35 (noting that due to the strength of community support, the alternative system has gained de facto recognition from the state).

criminalized response to drug-related crime.²⁵⁹ Many Mexicans, however, have rejected this approach as having failed to end the drug-related violence.²⁶⁰ Mexican human rights activists have expressed strong support for the consideration of decriminalization strategies as a means to address the crisis in Mexico. They have made the link between drug prohibition and human rights violations and urged the “rethinking the criminalization of drug use would be a very important long-term strategy to improving the serious human-rights situation that Mexico is facing today.”²⁶¹ Mexican grassroots movements against the militarization of the drug war have also called for a legalization approach.²⁶² Public opinion surveys have indicated that Mexicans reject U.S. crime and imprisonment requirements as useless dogma, and further, Mexicans believe that U.S. strategies have exacerbated their problems.²⁶³ Public discourses call for solutions more consistent with Mexican history and culture.²⁶⁴

These popular sentiments are reflected within findings issued in a report by the 2009 Latin American Commission on Drugs and Democracy (the Commission), headed by Ernesto Zedillo, the former president of Mexico, and the former presidents of Brazil and Colombia—all countries with a history of problems with drug cartels.²⁶⁵ The report calls for a new paradigm to address drug-related problems.²⁶⁶ More specifically, it calls for an end to the U.S. model of war on drugs policies and punitive drug laws after concluding that such strategies have done little to diminish drug-related crime or improve public health outcomes.²⁶⁷ The report emphasizes public health and social policy strategies instead of reliance on harsh criminal penalties, and garnered significant popular support.²⁶⁸

²⁵⁹ See *supra* Part I.C.

²⁶⁰ Maria de las Heras, 63%: “La Vía Policial y Militar Contra el Narco, un Fracaso en América Latina,” MILENIO (Mexico City, Mex.) (Feb. 16, 2009), <http://www.milenio.com/cdb/doc/impreso/8533187>.

²⁶¹ Christopher Moraff, *Latin America’s Legalization Push*, AM. PROSPECT, June 2009, available at <http://prospect.org/article/latin-americas-legalization-push> (quoting a Mexico City-based human-rights activist and political consultant) (internal quotation marks omitted).

²⁶² Randal C. Archibold, *Violence Suffocated a Father’s Poetry, But Not His Voice*, N.Y. TIMES, May 14, 2011, at A6; Elisabeth Malkin, *Thousands in Mexico City March Against Drug War*, N.Y. TIMES, May 9, 2011, at A8.

²⁶³ de las Heras, *supra* note 260.

²⁶⁴ *Id.*

²⁶⁵ LATIN AM. COMM’N ON DRUGS & DEMOCRACY, DRUGS AND DEMOCRACY: TOWARD A PARADIGM SHIFT (2009), available at http://www.drogasedemocracia.org/Arquivos/declaracao_ingles_site.pdf [hereinafter LATIN AM. COMM’N]; see EDWARDS & YOUNGERS, *supra* note 110, at 1 (also observing changes to Argentina’s criminal laws relating to drug possession).

²⁶⁶ LATIN AM. COMM’N, *supra* note 265.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

The Latin American Commission was followed by the formation of a Global Commission on Drug Policy, which also included notable Mexican politicians and scholars.²⁶⁹ It issued similar findings that criticized U.S. drug policies for failing to resolve drug violence while noting the horrific consequences of U.S. strategies.²⁷⁰ The report identified Mexico as an example of drug law enforcement practices that served to increase the violence and corruption associated with the drug trade:

The available scientific evidence suggests that increasing the intensity of law enforcement interventions to disrupt drug markets is unlikely to reduce drug gang violence. Instead, the existing evidence suggests that drug-related violence and high homicide rates are likely a natural consequence of drug prohibition and that increasingly sophisticated and well-resourced methods of disrupting drug distribution networks may unintentionally increase violence.²⁷¹

And in May 2013, the Organization of American States released its comprehensive report on drug polices, “express[ing] their frustration with the limits and exorbitant costs of current policies and their hunger for a fuller, more creative debate.”²⁷²

Ernesto Zedillo has called for an end to the “war on drugs model” describing such an approach as “nothing short of devastating.”²⁷³ The former president of Colombia, César Gaviria, who held office during the worst of that country’s drug wars, called U.S. war on drugs and its drug polices a “crashing failure [*fracaso*].”²⁷⁴ Costa Rica’s president Laura Chinchilla stated:

because we have no army and we are not willing to be hooked onto that convoy of destruction, of militarism, of exorbitant expenditure, that distracts states from their efforts toward social investment . . . Costa Rica has already made progress in decriminalizing drug consumption, [because] we believe it’s a question of public health, and not of criminal law.²⁷⁵

²⁶⁹ See GLOBAL COMM’N ON DRUG POL’Y, *supra* note 73.

²⁷⁰ *Id.* at 9.

²⁷¹ *Id.* at 15 (quoting INT’L CENTRE FOR SCI. DRUG POL’Y, EFFECT OF DRUG LAW ENFORCEMENT ON DRUG-RELATED VIOLENCE: EVIDENCE FROM A SCIENTIFIC REVIEW 5 (2010), available at http://www.icsdp.org/Libraries/doc1/ICSDP-1_-_FINAL_1.sflb.ashx) (internal quotation marks omitted).

²⁷² Randal C. Archibold, *Americas Coalition Suggests Marijuana Laws Be Relaxed*, N.Y. TIMES, May 18, 2013, at A7 (internal quotation marks omitted).

²⁷³ Ernesto Zedillo, *Rethinking the ‘War on Drugs’: Insights from the US and Mexico*, VOX (London) (May 22, 2012), <http://www.voxeu.org/article/rethinking-war-drugs-insights-us-and-mexico>.

²⁷⁴ Alma Guillermoprieto, *Drugs: The Rebellion in Cartagena*, N.Y. REV. BOOKS, June 2012, at 39 (alteration in original) (internal quotation marks omitted).

²⁷⁵ *Id.* at 40 (alterations in original) (internal quotation marks omitted).

The government of Uruguay recently announced that it was not only considering regulating and decriminalizing marijuana as part of its own security plan but also creating a legal state-managed monopoly for the transport of drugs as part of what has been described as “a rising movement in this region to create alternatives to the United States-led war on drugs.”²⁷⁶ A Brazilian congressman stated plainly: “[w]e are trying to distance ourselves from the U.S. model.”²⁷⁷ Bolivia successfully demanded amendments to the UN Antidrug Convention because of its prohibition on the use of the coca plant notwithstanding U.S. objections to the change.²⁷⁸ These national leaders have not only expressed opposition to the U.S. criminalization-style response to drug trafficking, but some have suggested that they are owed compensation for the tremendous amount of resources required to invest in such a response.²⁷⁹

Notwithstanding the emergence of popular sentiment in favor of an end to the prototype war on drugs criminalization strategies, the United States has persisted with its own version of law and order reforms.²⁸⁰ U.S. drug law policies have insinuated themselves over the border by way of trade conditionalities imposed on Mexico that require it to certify its drug control efforts according to terms defined by the United States.²⁸¹ U.S. officials continue to pressure Mexican and other Latin American leaders who have proposed an ordered scheme of

²⁷⁶ Damien Cave, *South America Sees Drug Path to Legalization*, N.Y. TIMES, July 30, 2012, at A1.

²⁷⁷ Damien Cave, *Ask a Question on Drug Policy in Latin America*, N.Y. TIMES (July 29, 2012, 10:24 PM), <http://thelede.blogs.nytimes.com/2012/07/29/damien-cave-is-taking-questions-on-drug-policy-in-latin-america/?ref=world> (internal quotation marks omitted).

²⁷⁸ William Neuman, *Bolivia: Morales Wins Victory as U.N. Agrees to Define Some Coca Use as Legal*, N.Y. TIMES, Jan. 12, 2013, at A7 (noting that Bolivia, which had withdrawn from the Convention in protest, rejoined after an agreement that allows Bolivians to use the leaves as a mild stimulant and in various cultural rituals).

²⁷⁹ Guillermprieto, *supra* note 274, at 40.

²⁸⁰ LUIS ASTORGA, DRUG TRAFFICKING IN MEXICO: A FIRST GENERAL ASSESSMENT 20 (Mgmt. of Soc. Transformations, Disc. Paper No. 36, 1999), available at <http://unesdoc.unesco.org/images/0011/001176/117644Eo.pdf> (noting that “[t]he only political force the Mexican government has ever listened to, in drug matters, is the U.S.A. government”); Wright, *supra* note 49, at 368; Boscov-Ellen, *supra* note 49; Garcia, *supra* note 44 (noting that the United States has set the agenda for Mexico’s drug policy); see Oscar Avila, *Mexico Weighs a Change of Focus on Drugs*, CHI. TRIB., Oct. 19, 2008, at 7 (noting pressure from the United States on then President Vicente Fox in 2006 while he was considering a proposal to decriminalize small amounts of drug possession).

²⁸¹ Jan Rus & Miguel Tinker Salas, *Introduction: Mexico 2006-2012: High Stakes, Daunting Challenges*, 33 LATIN AM. PERSP. 5, 14 (2006). But, note that the United States tolerated Mexico’s drug activity and certified Mexico’s efforts through the 1980s and 1990s for strategic reasons relating to the need to pass NAFTA. See JORGE HERNÁNDEZ TINAJERO & LEOPOLDO RIVERA RIVERA, INT’L DRUG POL’Y CONSORTIUM, CANNABIS IN MEXICO, AN OPEN DEBATE (2010), available at <http://idpc.net/sites/default/files/library/Cannabis%20in%20Mexico.pdf>; JOSE LUIS VELASCO, INSURGENCY, AUTHORITARIANISM, AND DRUG TRAFFICKING IN MEXICO’S “DEMOCRATIZATION” 102–03 (2005).

legalization of drugs to abandon such pursuits.²⁸² The United States rejected plans to debate an alternative to criminalization strategies at the 2012 Summit of the Americas and issued an “official response” signaling that any effort to decriminalize drugs was “unthinkable.”²⁸³ President Obama is reported to have “flatly ruled out legalizing drugs” in response to the debate about the Commission’s recommendations despite the forceful and open positions articulated by Latin American leaders, and their unprecedented willingness to confront the United States on its failed criminalization policies.²⁸⁴ Surveys on the issue suggest that most interviewees believed that the United States has attempted to prevent Mexicans from fully debating the subject.²⁸⁵

U.S. efforts to diminish the influence of these reports notwithstanding, proposals to end the U.S.-style war on drugs continue to gain ground in Mexico and throughout much of Latin America. Mexicans are rethinking the legal strategies based on criminalization of drug use, drug possession, and drug transport. They, with their Latin American counterparts, have declared that “[t]he foundations of the U.S.-led war on drugs—eradication of production, interdiction of traffic, and criminalization of consumption—have not succeeded and never will.”²⁸⁶ Surveys demonstrate that Mexican citizens strongly desire

²⁸² Shortly after the release of the Commission’s report, the Mexican Congress enacted modest legal reforms that legalized the possession of certain drugs in small quantities. Wright, *supra* note 49, at 368. President Calderón called for a national debate on the issue of legalization, but subsequently curtailed his willingness to move forward with such agenda—a reluctance widely understood as a function of his concern that the United States disapproves of such a shift. Juan Carlos Hidalgo, *Calderón Hints at Drug Legalization Again*, CATO INST. (Sept. 20, 2011, 12:49 PM), <http://www.cato-at-liberty.org/calderon-hints-at-drug-legalization-again/>; Tim Johnson, *In Mexico, Biden Shoots Down Talk of Drug Legalization*, MCCLATCHYDC (Mar. 5, 2012), <http://www.mcclatchydc.com/2012/03/05/140884/in-central-america-biden-shoots.html>; see Randal C. Archibold, *U.S. Remains Opposed to Drug Legalization, Biden Tells Region*, N.Y. TIMES, Mar. 6, 2012, at A6 (describing Vice President Biden as issuing a blunt message); Cave, *supra* note 44; Garcia, *supra* note 44 (noting that a move toward legalization would be an affront to U.S. policy makers that neither Calderón nor his successor, Enrique Peña Nieto, could afford to make); Guillermprieto, *supra* note 274, at 39; Moraff, *supra* note 261; Mark Stevenson, *Amid U.S. Pressure, Mexican President Backs Off Drug Decriminalization Bill*, POLICEONE (May 4, 2006), <http://www.policeone.com/drug-interdiction-narcotics/articles/132451-Amid-U-S-pressure-Mexican-president-backs-off-drug-decriminalization-bill>.

²⁸³ Guillermprieto, *supra* note 274, at 39 (noting that meetings were called in advance of the Summit and that statements in strong terms were issued by Secretary of Homeland Security Janet Napolitano, Vice President Joseph Biden, and President Obama).

²⁸⁴ Matea Gold, *Obama Says No to Legalizing Drugs: Leaders at the Summit of the Americas Want to Discuss What They Consider a Failed War*, L.A. TIMES, Apr. 15, 2012, at 6; Garcia, *supra* note 44; see, e.g., Nicholas D. Kristof, *End the War on Pot*, N.Y. TIMES, Oct. 28, 2010, at A33. The literature of the war on drugs in the United States is not reviewed in this Article.

²⁸⁵ de las Heras, *supra* note 260.

²⁸⁶ César Gaviria, Fernando Henrique Cardoso & Ernesto Zedillo, *Drugs: The Debate Goes Mainstream*, LATIN AM. BUREAU (May 10, 2012), http://www.lab.org.uk/index.php?option=com_content&view=article&id=1371:drugs-the-debate-goesmainstream&catid=66:analysis&Itemid=39; see Randal C. Archibold, *Mexico Closely Watches California’s Vote on Legalizing Marijuana*, N.Y. TIMES, Oct. 18, 2010, at A6.

to be more closely involved in the decisions for their country with regard to changes to its legal system.²⁸⁷ They have begun to rethink alternatives that differ from the prototypical U.S. response that emphasizes punishment and reconsider responses to drug-related violence.²⁸⁸

5. Rule of Law Programs and Sovereignty

While much of the Mérida Initiative's rule of law program conflicts with reform efforts initiated by Mexicans themselves, there are some program provisions that have been promoted by Mexican legal reformers independent of the U.S. funded project.²⁸⁹ Indeed, in the past twenty years, a number of Mexican efforts to improve its legal system have been comparable to the U.S. rule of law model.²⁹⁰ Yet even where there may be concurrence on the substance of particular reforms, many Mexicans have objected to the Mérida rule of law program.²⁹¹ As an initiative driven by U.S. foreign policy considerations, the rule of law program threatens to subordinate Mexico's development of internal legal norms and structures and thus compromises Mexican sovereignty.

The Mérida Initiative follows an established practice: law reform efforts that originate from outside the countries where legal changes are sought.²⁹² Substantive reforms were directed and coordinated through an MSI-created entity in Mexico known as Proderecho, whose director had previously led one of the largest U.S. public relations and lobbying firms to promote support for NAFTA.²⁹³ USAID has also partnered with

²⁸⁷ Catalina Pérez Correa, *Distrust and Disobedience: Discourse and Practice of Law in México*, 77 REV. JUR. U.P.R. 345, 361 (2008).

²⁸⁸ LATIN AM. COMM'N, *supra* note 265.

²⁸⁹ Langer, *supra* note 108, at 618.

²⁹⁰ Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, in CULTURES OF LEGALITY, *supra* note 148, at 141–42 (noting this is true for much of Latin America); see Kossick, *supra* note 158, at 725–27, 778. It should be noted, however, that many of these reforms were undertaken in large part as a result of pressure from international financial institutions upon which Mexico has been dependent and the globalized “free market” economy. *Id.* at 725–26.

²⁹¹ INGRAM ET AL., *supra* note 54, at 12 (noting skepticism about judicial reform as a product of outside forces, especially the United States); see also COLLEEN W. COOK ET AL., CONG. RES. SERV., MÉRIDA INITIATIVE: PROPOSED U.S. ANTICRIME AND COUNTERDRUG ASSISTANCE FOR MEXICO AND CENTRAL AMERICA 6 (2008), available at <http://fpc.state.gov/documents/organization/103694.pdf>.

²⁹² BILL ONG HING, ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION 56 (2010); PÁSARA, *supra* note 209, at 7.

²⁹³ Rodriguez, *supra* note 220 (describing Proderecho as a USAID funded, MSI-operated organization); see MATTHEW C. INGRAM ET AL., TRANS-BORDER INST., JUSTICIABARÓMETRO: SURVEY OF JUDGES, PROSECUTORS, AND PUBLIC DEFENDERS IN NINE MEXICAN STATES 2011, at 99 (2011), available at <http://justiceinmexico.files.wordpress.com/2010/07/justiciabarometro-judicial-survey.pdf> (noting that Proderecho was created and funded by USAID and then contracted out to MSI); TAFOYA, *supra* note 75, at 1 n.1 (noting that Proderecho is the name

the National Democratic Institute, a U.S.-based entity comprised of U.S. politicians and political figures, in its endeavor to change Mexico's legal system.²⁹⁴ Casals & Associates, a subsidiary of DynCorp, a Virginia-based entity has lobbied Mexican legislators for constitutional amendments.²⁹⁵

Mexican legal professionals, human rights activists, and the media have protested the USAID's rule of law program as "made in America."²⁹⁶ In a letter to the U.S. State Department, human rights organizations admonished the United States for having failed to establish any meaningful opportunity for citizen participation.²⁹⁷ They have criticized USAID's "Mechanism for Dialogue with Civil Society Organizations" as a meaningless structure that provides little opportunity for citizens to contribute to reform initiatives or to evaluate outcomes.²⁹⁸ Jurists have complained that the U.S.-initiated reforms were enacted in a top-down manner without sufficient debate.²⁹⁹ Local officials decried the lack of Mérida's benefits and castigated U.S. efforts for proposing reforms without a sufficient understanding of the circumstances.³⁰⁰ Concern for national sovereignty has driven much of the criticism of U.S efforts to impose legal reform in Mexico.³⁰¹

that the USAID's Rule of Law project has used since 2004); Araizaga & Diaz, *supra* note 213, at 2 (describing Lucy Tacher who formerly worked for Burson Marsteller, as "one of the world's leading lobbying firms"); Matthew C. Ingram, Trans-Border Inst., *State-Level Judicial Reform in Mexico: The Local Progress of Criminal Justice Reforms* (Working Paper, 2010), available at <http://catcher.sandiego.edu/items/peacestudies/Ingram-State%20Level%20Reform.pdf>.

²⁹⁴ MGMT. SCIS. FOR DEV., INC., *supra* note 74, at 13; see *NDI Board of Directors*, NAT'L DEMOCRATIC INST., http://www.ndi.org/board_of_directors (last visited Mar. 14, 2014).

²⁹⁵ MGMT. SYS. INT'L, *supra* note 74, at 36-37.

²⁹⁶ Araizaga & Diaz, *supra* note 213, at 2-3.

²⁹⁷ *Conditioned Funds for Mexico Under the Mérida Initiative Should Not Be Released Unless Concrete Progress Is Made on Human Rights Requirements*, WASH. OFF. ON LATIN AM. (May 26, 2010), http://www.wola.org/news/conditioned_funds_for_mexico_under_the_merida_initiative_should_not_be_released_unless_concrete [hereinafter *Conditioned Funds*]; see Ginger Thompson & Mark Mazzetti, *U.S. Drones Fly Deep in Mexico to Fight Drugs*, N.Y. TIMES, Mar. 16, 2011, at A1.

²⁹⁸ *Conditioned Funds*, *supra* note 297.

²⁹⁹ *Reforma Judicial Con Sello Gringo*, PROCESO (Mexico City, Mex.) (Feb. 17, 2008), <http://www.proceso.com.mx/?p=196798>; Patrick Corcoran, *Mexico Judicial Reforms Go Easy on Corrupt Judges*, INSIGHTCRIME (Feb. 16, 2012), <http://www.insightcrime.org/news-analysis/mexico-judicial-reforms-go-easy-on-corrupt-judges>.

³⁰⁰ Joseph Kolb, *Ciudad Juarez Mayor Says US Drug War Aid Package Failed His City*, FOX NEWS LATINO (May 24, 2012), <http://latino.foxnews.com/latino/politics/2012/05/24/ciudad-juarez-mayor-says-us-drug-war-aid-package-failed-his-city>.

³⁰¹ Tracy Wilkinson, *Mexico Has a New Attitude on U.S.: Obama Will Visit a Nation Said to Have Grown Far More Wary of American Involvement in its Security Affairs*, L.A. TIMES, Apr. 29, 2013, at 1 (noting a new wariness on the part of the Mexican government toward U.S. involvement in Mexico's security affairs).

IV. LAWYERS AS TECHNICIANS, LAW AS TECHNICALITIES

As Thomas Carothers has observed, “[t]he rapidly growing field of rule-of-law assistance is operating from a disturbingly thin base of knowledge at every level.”³⁰² USAID and affiliate private contractors who function as something of a “[r]ule of [l]aw industry” to effect reforms do so with little regard to past or present except as it infringes on American needs.³⁰³ “[W]e don’t really know what we are doing,” rule of law promoters have admitted.³⁰⁴ Law reform programs generally do not deviate from a predetermined template driven by what one USAID Fellow called “extraneous or counterproductive criteria.”³⁰⁵ Mistakes are repeated and recycled from one project to another, from one country to another.³⁰⁶ USAID contractors boast of numerous contracts with USAID on rule of law projects throughout the world.³⁰⁷ Their one-size-fits all model “provides a . . . system of widely accepted rules” and “a scheme of ordered liberty.”³⁰⁸ USAID and its contractors

tend to go into the field with a preset number of “deliverables.” Rather than study the problems in the context of the culture, the assistance experts arrive with a formula that they are expected to implement and then are expected to write reports showing that the deliverables were achieved regardless of whether those accomplishments furthered the objectives of helping individuals.³⁰⁹

³⁰² Carothers, *supra* note 1, at 13

³⁰³ Mackenzie, *supra* note 136 (internal quotation marks omitted); see PÁSARA, *supra* note 209, at 1; *Economics and the Rule of Law: Order in the Jungle*, THE ECONOMIST, Mar. 15, 2008, at 12.

³⁰⁴ *Economics and the Rule of Law: Order in the Jungle*, *supra* note 303 (internal quotation marks omitted).

³⁰⁵ LINN HAMMERGREN, USAID GLOBAL CTR. FOR DEMOCRACY & GOVERNANCE, FIFTEEN YEARS OF JUDICIAL REFORM IN LATIN AMERICA: WHERE WE ARE AND WHY WE HAVEN’T MADE MORE PROGRESS 14 (2002), available at <ftp://pogar.org/LocalUser/pogarp/judiciary/linn2/latin.pdf>; see KENNETH M. DAVIDSON, AM. ANTITRUST INST., THE PROFESSIONALS’ CRITIQUES, A COMMENTARY ON PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 4 (2006), available at <http://www.antitrustinstitute.org/files/494.pdf> (noting that programs are offered on a take it or leave it basis with little training value); Moliterno, *supra* note 80, at 770 (describing the negative outcomes from exporting rules of ethics that assume the U.S. approach fits all).

³⁰⁶ HAMMERGREN, *supra* note 305.

³⁰⁷ TETRA TECH DPT, NAVIGATING CHANGE IN THE PUBLIC SECTOR 2, 8 (2011), available at http://www.tetratedhdpk.com/images/stories/Tetra_Tech_DPK_Firm_Capabilities_March_2011.pdf. DPK is now a division of Tetra Tech ARD and was one of USAID’s top ten contractors in 2008. See CTR. FOR EFFECTIVE GOV’T, *Contracts from U.S. Agency for International Development (FY 2008)*, FEDSPENDING.ORG, http://www.fedspending.org/fpds/fpds.php?sortp=r&maj_agency_cat=72&detail=-1&datatype=T&reptype=r&database=fpds&fiscal_year=2008&submit=GO&sum_expand=PAS (last updated July 17, 2012).

³⁰⁸ TETRA TECH DPT, *supra* note 307, at 2 (internal quotation marks omitted).

³⁰⁹ DAVIDSON, *supra* note 305, at 5.

The Mérida initiative project replicates the dominant model. It attempts to dissociate law from social and historical context, and instead markets technical and formalistic assistance in accordance with its “rule of law orthodoxy.”³¹⁰ MSI boasts of projects throughout the globe and describes training templates that offer the same set of skills without regard to place or purpose.³¹¹ Checchi Consulting, an MSI subcontractor on the Mexico rule of law project, similarly advertises a formulaic global training program for judges and lawyers that appear oblivious to the possibilities that differences may exist between Afghanistan and Mexico.³¹²

An examination of the Mérida Initiative rule of law project sets in relief the approach of law-as-technicalities. USAID reports set forth conclusions without evidence, listing the number of individuals trained, the number of meetings held, name courses and events, and identify justice reforms without indicating the substance or outcomes of these activities.³¹³ Charts lack context and substance; photographs of professionals at meetings fill the pages of quarterly reports.³¹⁴ USAID proclaims the success of its rule of law project based on numbers of training events and declares, “[t]he number of events reported above enumerates the work of USAID/Mexico . . . and demonstrate the successes of the project in its different phases of moving toward criminal justice reform in Mexico.”³¹⁵ The lack of precise definitions of terms and the absence of means of measuring outcomes serves to conceal in technocratic-management language the central premise: the United States’ determination to remake Mexico’s judicial system to resemble “our (often fantastical) ideas of our own society.”³¹⁶

³¹⁰ USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK: A GUIDE FOR USAID DEMOCRACY AND GOVERNANCE OFFICERS 5–15 (2010), available at http://pdf.usaid.gov/pdf_docs/pnadt593.pdf (generic framework for USAID rule of law strategies); Upham, *supra* note 94, at 1 (criticizing rule of law projects that establish “a set of uniformly enforced, established legal regimes that clearly lays out the rules of the game”); see Gordon, *supra* note 95, at 466 (noting that law is a form of political and cultural expression).

³¹¹ *About Us*, MGMT. SYSTEMS INT’L, <http://www.msiworldwide.com/about-us> (last visited Mar. 14, 2014) (describing projects in Iraq, Afghanistan, Pakistan, Sudan, and the Democratic Republic of Congo). In particular, MSI boasts of rule of law projects in Eastern Europe, the former Soviet Union, Latin America, the Middle East, Afghanistan, Iraq, and Sri Lanka. *Practice Areas*, MGMT. SYSTEMS INT’L, <http://www.msiworldwide.com/our-work/practice-areas> (last visited Mar. 14, 2014) (click on “Rule of Law”).

³¹² *Access to Justice*, CHECCHI & CO. CONSULTING, http://www.chechiconsulting.com/index.php?option=com_projects&ae_id=1&Itemid=8#66 (last visited Mar. 14, 2014); *Mexico*, CHECCHI & CO. CONSULTING, http://www.chechiconsulting.com/index.php?option=com_projects&country_id=9&Itemid=8. (last visited Mar. 14, 2014); see Mackenzie, *supra* note 136.

³¹³ See generally MGMT. SCIS. FOR DEV., *supra* note 74; see also PÁSARA, *supra* note 209, at 1 (noting lack of proper evaluations).

³¹⁴ MGMT. SCIS. FOR DEV., INC., *supra* note 74, at 8–12.

³¹⁵ *Id.* at 17.

³¹⁶ Rory Stewart, *The Irresistible Illusion*, 31 LONDON REV. BOOKS 3 (2009) (critiquing U.S. efforts to create a world view); see also Alvaro Santos, *The World Bank’s Uses of the “Rule of*

USAID's efforts to evaluate its program have not been successful, even by the superficial standards to which it purports to abide. The Office of the Inspector General (OIG) determined that USAID/Mexico failed to provide accurate numbers of individuals it claimed to train; performance indicators were found "[in]appropriate for measuring progress."³¹⁷ The OIG noted that USAID did not succeed in delivering the program specifications: "USAID/Mexico's technical officers responsible for the rule of law projects have not effectively carried out all their responsibilities," and failed to establish a system for evaluation.³¹⁸ The GAO similarly reported that USAID failed to develop adequate performance measures, and noted too that it has been difficult to track the use of funds.³¹⁹ USAID was also found to have violated procurement regulations in its award of the contract to MSI.³²⁰

These types of findings are not new. For the last two decades, USAID has failed to provide meaningful evaluations of its rule of law initiatives.³²¹ Incomplete and incorrect program assessments as a chronic condition cannot but invite the inference of deliberate efforts to conceal failure, and thereby stifle public debate about the efficacy of the rule of law initiative.³²² Indeed, such strategies rely on a preordained agenda that fails to produce a coherent set of laws or legal systems and "insist[s] on the fiction of apolitical" in the realm of the development of laws.³²³

Legal professionals who engage in these projects perform as technicians and function within what C. Wright Mills called the "bureaucratic ethos."³²⁴ They tend to lack connection with or

Law" Promise in Economic Development, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 92, at 253, 282 (describing related phenomena as "justification for opportunistic behavior").

³¹⁷ OFFICE OF THE U.S. INSPECTOR GEN., REP. NO. 1-523-11-001-P, AUDIT OF USAID/MEXICO'S RULE OF LAW AND HUMAN RIGHTS PROGRAM 2, 8, 23 (2012), available at <http://oig.usaid.gov/sites/default/files/audit-reports/1-523-11-001-p.pdf> [hereinafter OIG REPORT].

³¹⁸ *Id.* at 2, 11.

³¹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 70, at 9–10; see also PÁSARA, *supra* note 209, at 3–4 (describing the difficulty in tracking USAID funds).

³²⁰ OIG REPORT, *supra* note 317, at 2; see H.R. REP. NO. 112-223, at 29 (2011), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt223/pdf/CRPT-112hrpt223.pdf>.

³²¹ PÁSARA, *supra* note 209, at 19 (reviewing the U.S. GAO reports' finding that USAID has consistently failed to evaluate its rule of law programs throughout Latin America).

³²² Riddell, *supra* note 95.

³²³ Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. INT'L L. 51, 96 (2009) (internal quotation marks omitted); see PÁSARA, *supra* note 209, at 10 (describing legal transplant efforts as "highly standardized"); Roesler, *supra* note 92, at 212 (observing that "rule-of-law practitioners" equate the rule of law with institutional checklists).

³²⁴ Roberto González, *Embedded*, in BESTEMAN, *supra* note 135, at 97, 113; see Yves Dezalay & Bryant G. Garth, *Law, Lawyers and Social Capital: "Rule of Law" Versus Relational Capitalism*, 6 SOC. & LEGAL STUD. 109, 132 (1997) (describing the transformation of lawyers into technocrats as the equivalent of U.S. lawyers).

responsibility for the social consequences of their efforts to remake the Mexican judicial system. Legal academics often suspend their critical analytical abilities. Instead, as Yves Dezalay and Bryant Garth have suggested, they “mobilize on behalf of specific objectives consistent with their accepted universals” and “rely less on their scientific tools and more on the authority of the professional expertise or discipline they represent.”³²⁵ They forge ahead with their projects, often oblivious to the consequences of their lack of knowledge and frequently ignorant of their contributions to the problems they presume to remedy.³²⁶ There is little evidence of thoughtful reflection within the State Department and USAID, or among U.S. lawyers who participate in this endeavor.³²⁷

CONCLUSION

As Thomas Carothers has observed, “hardly anyone these days will admit to being against the idea of law.”³²⁸ Without a coherent and credible system of justice, efforts to establish order, control crime, and protect human rights are compromised. The rule of law serves as a means to protect citizens against rights violations and promote orderly due process. The exchange of legal values among nations may be beneficial in their own right, but a U.S. rule of law agenda as a (coercive) foreign policy initiative offers few benefits. Offered in the guise of promoting democratic changes abroad, rule of law programs are often little more than a means of political intervention to advance U.S. interests.³²⁹ These initiatives have been designed to expand the extraterritorial reach of the United States in the internal affairs of other countries, promote a neoliberal agenda, and maintain U.S. hegemony in the hemisphere.³³⁰

³²⁵ Dezalay & Garth, *supra* note 96, at 310. Indeed, law professors may ignore questions and concerns about the hierarchical construction of law. *Id.* at 312.

³²⁶ DAVIDSON, *supra* note 305, at 2 (describing the rule of law doctors as promoting “bureaucratic incompetence and empire building, personal spite and egotistical blindness”); see Smith, *supra* note 170, at 387 (describing an exchange between a U.S. lawyer studying Mexican constitutional law in Mexico, who when criticizing the lack of implementation of individual protections as demonstrated by the use of torture was reminded that at least Mexicans did not “fry people in electric chairs” (internal quotation marks omitted)).

³²⁷ Smith, *supra* note 170, at 387.

³²⁸ See Carothers, *supra* note 140, at 99.

³²⁹ ARCENEUX & PION-BERLIN, *supra* note 99, at 86–87 (reviewing the settled pronouncements by Latin American historians).

³³⁰ Santos, *supra* note 316, at 255–56; see Boaventura de Sousa Santos, *Globalizations*, 23 THEORY, CULTURE & SOC’Y 393, 394 (2006) (noting the need for new legal frameworks to accommodate globalization, liberalization, and market relations); Kathryn Tarker, *Too Close for Comfort: El Salvador Ratchets Up Its U.S. Ties*, COUNCIL ON HEMISPHERIC AFF. (July 20, 2005, 2:36 PM), <http://www.coha.org/too-close-for-comfort-el-salvador-ratchets-up-its-us-ties> (describing the statement of purpose for the development of the International Law

The Mérida Initiative rule of law program continues a long history of U.S. efforts to export law. As with other foreign aid programs that link the export of institution-building programs and “humanitarian interventions” with military initiatives, the Mérida Initiative blurs the distinction between compassion and combat.³³¹ It subsidizes legal trainings simultaneously with funding of weapon systems and surveillance technology. Often well-meaning lawyers arrive to Mexico with Drug Enforcement Administration agents, CIA officials, and military personnel from the Pentagon’s Northern Command.³³² On the one hand, the Mérida Initiative has legitimized violence by financing the escalation of a militarized response to the war on drugs while, on the other, it purports to mitigate violence by heightened criminalization strategies—a conceptual contradiction rejected by most Mexican human rights advocates.³³³

It is difficult, moreover, to justify exporting a system of law that shares many of the very flaws that the Mérida Initiative rule of law program claims it seeks to improve. The U.S. criminal justice system hardly constitutes an ideal model to export—a concern expressed by Mexicans.³³⁴ They have criticized the Mérida Initiative as a hypocritical endeavor imposed by a government whose police officials kill Mexican immigrants and enjoy total impunity (*éstos gozan de total libertad*).³³⁵ The U.S. legal system suffers from corruption that can hardly be described as isolated or random.³³⁶

Enforcement Academy by which the United States has sought to assure the functioning of free markets through rule of law projects).

³³¹ Christopher Caldwell, *Communiste et Rastignac*, 31 LONDON REV. BOOKS 7 (2009).

³³² Ginger Thompson, *U.S. Widens Its Role in Battle Against Mexico’s Drug Cartels*, N.Y. TIMES, Aug. 7, 2011, at A1.

³³³ See, e.g., WASH. OFF. ON LATIN AM., MEXICAN AND U.S. HUMAN RIGHTS ORGANIZATIONS CALL ON THE U.S. GOVERNMENT TO WITHHOLD MÉRIDA INITIATIVE FUNDING FOR MEXICO (2009), available at http://www.wola.org/sites/default/files/downloadable/Mexico/past/July%2016%20PublicStatement_USA_Mexico_NGOS_Merida.pdf.

³³⁴ Lacey, *supra* note 218 (reprinting the language of an editorial in *La Jornada* describing U.S. effort to scrutinize Mexico’s armed forces as “a grotesque and absurd pretension” in light of the United States’ own human rights issues in its detention facility in Guantanamo Bay).

³³⁵ *Critica CNDH Condiciones de Iniciativa Mérida*, TERRA (Mex.) (May 26, 2008, 3:43 PM), <http://www.terra.com.mx/articulo.aspx?articuloId=669198>.

³³⁶ See, e.g., Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES, Feb. 3, 2013, at SR4 (describing police culture and practices creating incentives for law enforcement to lie under oath); Assoc. Press, *Pennsylvania: Mixed Verdict for Disgraced Judge*, N.Y. TIMES, Feb. 19, 2011, at A16 (describing the scandal whereby judges sentenced youth offenders to for-profit detention centers in exchange for cash payments of millions of dollars); *Fair Courts at Risk*, N.Y. TIMES, Sept. 10, 2010, at A28 (citing to a report with a forward written by retired U.S. Supreme Court Justice Sandra Day O’Conner noting that influence peddling in the judiciary has impaired impartiality); Mandy Locke et al., *Scathing SBI Audit Says 230 Cases Tainted by Shoddy Investigations*, NEWS & OBSERVER (Raleigh, N.C.) (Aug. 19, 2010), <http://www.newsobserver.com/2010/08/19/635632/scathing-sbi-audit-says-230-cases.html#storylink=cpy> (reporting on the N.C. State Bureau of Investigation which deliberately withheld or distorted evidence in hundreds of cases involving potentially innocent men and women); see

There is little evidence that the rule of law program has produced the desired outcomes and no basis upon which to assume that it will enhance Mexico's judicial system.³³⁷ Nonetheless, Congressional support is mounting for continued funding of the Mérida Initiative with a focus on the expansion of the rule of law program.³³⁸ A report prepared for the Committee on Foreign Relations claims that "greater trust" has developed between U.S. and Mexican officials, even while acknowledging that the effort thus far has been ineffective and that the day-to-day lives of Mexicans have suffered as a result of an increase in violence.³³⁹ The report urges U.S. officials to "impress[] upon [Mexicans officials] the high priority that the U.S. Government assigns to the reform efforts" and recommends even greater attention to enhancing the prosecutorial powers of the Mexican Attorney General's office.³⁴⁰ The report suggests that the U.S. government take on an active role in policing ("cooperative law enforcement relationship") at both the state and local level that would go beyond training to include the establishment of task forces.³⁴¹

As Dani Rodrik has observed, "[c]ountries have the right to protect their own social arrangements, regulations, and institutions," and further, that "[c]ountries do not have the right to impose their institutions on others."³⁴² Human rights activists in Mexico have pursued a different rule of law agenda. They have focused on social inequalities, poverty, and health care as opposed to the war on crime/drugs motif.³⁴³ Grassroots movements have articulated their demands: Stop the criminalization model and support locally controlled community safety programs.³⁴⁴ Most notably, Mexican citizens have stated their desire for autonomy in determining the means to end the drug violence and improve the social fabric of their country:

Matt Smith & Emma Lacey-Bordeaux, *U.S. Judge Bought Drugs for Stripper, Feds Say*, CNN (Oct. 4, 2010, 5:45 PM), http://articles.cnn.com/2010-10-04/justice/georgia.judge.arrested_1_drug-and-weapons-charges-undercover-agent-federal-agents?_s=PM:CRIME.

³³⁷ GUILLERMO ZEPEDA LECUONA, *MONITORING THE IMPLEMENTATION OF THE CRIMINAL JUSTICE REFORM IN MEXICO* 6 (2012), available at http://www.wilsoncenter.org/sites/default/files/guillermo_zepeda_lecuona.pdf (USAID sponsored evaluation noting that fewer people are now held in pre-trial detention).

³³⁸ STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., *JUDICIAL AND POLICE REFORMS IN MEXICO: ESSENTIAL BUILDING BLOCKS FOR A LAWFUL SOCIETY* 1 (Comm. Print 2012).

³³⁹ *Id.* at 2.

³⁴⁰ *Id.* at 3–4.

³⁴¹ *Id.* at 8 (suggesting that questions pertaining to Mexican sovereignty have been resolved).

³⁴² DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* 239–42 (2011).

³⁴³ ESTÉVEZ, *supra* note 151, at 62.

³⁴⁴ *Documents of the Movement in Translation: Manifesto the #I Am 132 to the People of Mexico*, UEINTERNATIONAL (July 27, 2012), http://ueinternational.org/MLNA/mlna_articles.php?id=203#1477 (demanding a change to media, education, the neoliberal economic model, and the fulfillment of health rights).

Change in the neoliberal economic model. Experience and history have convinced us that the market is not a panacea that can solve the problems of society and government. Society should play a fundamental role in resolving the economic problems the country endures. That is why we will fight for a human, just, sovereign, sustainable and peaceful economy.

Change in the model of national security. In order to restore peace, it is imperative to withdraw the armed forces from their role as police; as well as to stop the criminalization, repression and harassment of social protest and the population in general. . . . At the same time, we support autonomous community safety programs and organization against mega-projects. . . .

We embrace the voice of social organizations and movements, connecting ourselves in solidarity in the search of alliances that are based on respect for autonomy, the construction of a horizontal relationship, and we recognize ourselves with humility as one of many social actors expressing social discontent.³⁴⁵

These demands do not resemble the elements of USAID's rule of law program.

³⁴⁵ *Id.*