

**PROMOTING THE "RULE OF LAW" IN LATIN
AMERICA: PROBLEMS AND PROSPECTS**

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I. INTRODUCTION

In 1985, as part of an overall foreign policy effort intended to "promote democracy,"¹ the U.S. Government revived its efforts to assist Latin American, particularly Central American, judicial systems. This essay outlines the origins and development of these little known efforts, known as the Administration of Justice Program (AOJ Program). It attempts to put these recent efforts

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1. For a searching examination of the "democratization" rhetoric of the U.S. Government during the 1980s and its impact on Latin American countries' moves toward freely elected governments, see THOMAS CAROTHERS, *IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS* (1991).

in the broader context of the "law and development" projects of the 1960s which have been the subject of considerable critical comment.² It also provides examples of some of the difficulties with U.S. assistance and hazards some tentative generalizations about continuing dilemmas for the future operation of the AOJ Program. This essay focuses on Latin America, where most U.S. Government programs providing assistance to legal systems have concentrated over the last thirty years.³ These efforts are part of broader political demands for greater U.S. leadership in the promulgation of the "rule of law" around the world in the wake of the end of the Cold War and the rise in the number of democratically elected governments.⁴ Issues raised here may also be of concern to other regions, such as Africa and Eastern Europe, which are likely to receive or are already receiving assistance directed at legal institutions.⁵

2. See, e.g., JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); Beverly M. Carl, *Peanuts, Law Professors and Third World Lawyers*, *THIRD WORLD LEGAL STUD.*, 1986, at 1; David F. Greenberg, *Law and Development in Light of Dependency Theory*, 3 *RES. L. & SOC.* 129 (1980); Gridley Hall & Burton Fretz, *Legal Services in the Third World*, 24 *CLEARINGHOUSE REV.* 783 (1990); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 *WIS. L. REV.* 1062 (1974). See generally *LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES* (C.J. Dias et al. eds., 1981) [hereinafter *LAWYERS IN THE THIRD WORLD*].

3. Johanna S.R. Mendelson, *Promoting Democracy Through Administration of Justice* (unpublished manuscript commissioned by U.S. AID, on file with *The George Washington Journal of International Law and Economics*). Although the AOJ Program also extends to the English-speaking Caribbean, see *infra* text accompanying notes 110-112, this essay concentrates on U.S. assistance to the Spanish-speaking countries in Central and South America.

4. See generally CAROTHERS, *supra* note 1 (discussing U.S. efforts to promote democracy in Latin America); John N. Moore, *The Rule of Law: An Overview* (Mar. 19-23, 1990) (unpublished manuscript, on file with *The George Washington Journal of International Law and Economics*) (proclaiming the need for, *inter alia*, an independent judiciary, the essential components of "limited government," protection of individual freedoms, and "a robust legal profession").

5. See, e.g., *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE)*, (June 29, 1990) [hereinafter *Copenhagen Document*], reprinted in 29 *I.L.M.* 1306, 1307 (stating that participating states "recognize[d] that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms, the development of human contacts and the resolution of other issues of a related humanitarian character" and pledging "to build democratic societies based on free elections and the rule of law"). Chapter I of the *Copenhagen Document* gives greater specificity to the concept of the "rule of law," in particular proclaiming as "inalienable" human rights "the independence of judges and the impartial operation of the public judicial service." *Id.* at 1308. The *Copenhagen Document* also emphasizes the "independence of practitioners"; clear rules of criminal procedure; "fair and public hearing[s] by competent, independent and impartial tribunal[s];" prompt and, if a person has insufficient means, free legal assistance; and a pre-

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II. BACKGROUND

A. Origins of the AOJ Program

The origins of the AOJ Program can be briefly summarized.⁶ Congressional pressure on the Reagan Administration in the wake of prominent politically motivated killings in El Salvador⁷ led the U.S. Department of State to form an interagency working group in 1983 to examine the inadequacies of the judicial systems of El Salvador and other Central American countries.⁸ In April 1983, a team of State Department and AID officials briefly visited El Salvador; a year later, the El Salvador Judicial Reform Project was "hurriedly launched."⁹ Initially, the El Salvador project focused on the establishment of the Revisory Commission for Salvadoran Legislation (CORELESAL), charged with developing and presenting to the El Salvadoran Congress new draft legislation; the development of training and materials to improve judicial administration; establishment of a Judicial Protection Unit (JPU) to protect witnesses, judges, and other participants in high profile cases; and the establishment of a civilian-controlled

sumption of innocence. The CSCE participants also pledged "direct contacts and cooperation" for purposes of creating, *inter alia*, the "establishment and management of courts and legal systems." *Id.* at 1309, 1317. For a description of the process leading to the *Copenhagen Document* and an analysis of its significance, see Thomas Buergenthal, *The Copenhagen CSCE Meeting: A New Public Order for Europe*, 11 HUM. RTS. L.J. 217 (1990) [hereinafter *New Public Order*]; Thomas Buergenthal, *CSCE Human Dimension: The Birth of a System*, 1 COLLECTED COURSES ACAD. EUR. L. (forthcoming 1992) [hereinafter *CSCE Human Dimension*].

See also *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* 1, 10 (Oct. 3, 1991) [hereinafter *Moscow Document*] (photocopy on file with *The George Washington Journal of International Law and Economics*) (detailing with even greater specificity the "internationally recognized standards" for the independence of the judiciary). For further discussion of the *Moscow Document*, see *infra* note 225 and accompanying text.

A description of U.S. assistance directed at legal systems throughout the world was presented at a conference conducted by the American Bar Association Standing Committee on Law and National Security, the Center for National Security Law, and the University of Virginia School of Law. William W. Schwarzer, Director of the Federal Judicial Center, *The Rule of Law in United States Foreign Policy and the New World Order*, Address at a National Security Conference, American Bar Association (Oct. 10, 1991).

6. Due in part to its technical nature and the relatively small amounts of foreign assistance involved, the AOJ Program has not been the subject of much published commentary or critical attention. One of the few published overviews is a brief summary in CAROTHERS, *supra* note 1, at 210-15. See also *infra* notes 7, 20 and accompanying text.

7. For a summary of some of these political killings, see LAWYERS COMMITTEE FOR HUMAN RIGHTS, *UNDERWRITING INJUSTICE: AID AND EL SALVADOR'S JUDICIAL REFORM PROGRAM* 1, 17-36 (1989) [hereinafter *LAWYERS COMMITTEE*].

8. CAROTHERS, *supra* note 1, at 211.

9. *Id.*

Commission on Investigation to assist the Salvadoran police in obtaining evidence and to supervise a Special Investigations Unit (SIU) consisting of a force of detectives drawn from the Security Forces.¹⁰

Concurrent with the U.S. project in El Salvador and the ongoing efforts of the interagency group, impetus for a broader AOJ initiative developed from another source. In January 1984, the National Bipartisan Commission (Central America Commission), formed by President Reagan to consider "elements of a long-term United States policy that will best respond to the challenges of social, economic, and democratic development in the [Central American] region,"¹¹ released its report.¹² Significantly, the Central America Commission recommended that the United States "help strengthen Central American judicial systems."¹³ Focusing especially on the situation in El Salvador, the Central America Commission argued that the virtual collapse of that nation's criminal justice system reflected and exacerbated the inability of that government to control a destructive cycle of violence which further undermined other political and legal institutions and magnified economic and security crises.¹⁴ The report therefore recommended expanded U.S. aid programs expressly directed at the training of judges, judicial staff, and public prosecutors; support for modern criminal investigative techniques; and the increased availability of legal materials, including assistance to law faculties and local bar associations.¹⁵ According to the report, U.S. universities would be the "best" suppliers of much of this aid; in addition, the report suggested that assistance should also include cultural and educational exchange activities designed to "bridge the gap between the U.S. and Latin Ameri-

10. The El Salvador Project, as well as the other projects discussed here, are summarized in CHECCHI AND CO. CONSULTING, PROJECT CATALOG, ADMINISTRATION OF JUSTICE ACTIVITIES (1991) [hereinafter PROJECT CATALOG]. See also LAWYERS COMMITTEE, *supra* note 7, at 38-76 (giving an overview of the El Salvador Judicial Reform Project). At the present time, the project has discontinued the JPU and added components to provide training for the public ministry, the public defender's office, and law professors. PROJECT CATALOG, *supra*. Through 1992, expenses for the eight year project should total over \$13 million. *Id.*

11. Exec. Order No. 12,433, 3 C.F.R. 199 (1983).

12. NATIONAL BIPARTISAN COMM'N ON CENTRAL AMERICA, THE REPORT OF THE PRESIDENT'S NATIONAL BIPARTISAN COMMISSION ON CENTRAL AMERICA (1984) [hereinafter CENTRAL AMERICA REPORT]. Henry Kissinger chaired the Central America Commission. *Id.*

13. *Id.* at 88.

14. *Id.*

15. *Id.*

can cultures."¹⁶

This part of the report coincided with long-standing congressional and Reagan Administration initiatives directed at the "promotion" of democracy, especially to encourage respect for human rights in the region.¹⁷ In the wake of the Central America Commission's report, Congress opted for a broad program "to strengthen the administration of justice in countries in Latin America and the Caribbean."¹⁸ The legislation permitted assistance including:

- (1) support for specialized professional training, scholarships, and exchanges for continuing legal education;
- (2) programs to enhance prosecutorial and judicial capabilities and protection for participants in judicial cases;
- (3) . . . programs to enhance investigative capabilities, conducted under judicial or prosecutorial control;
- (4) strengthening professional organizations in order to promote services to members and the role of the bar in judicial selection, enforcement of ethical standards, and legal reform;
- (5) increasing the availability of legal materials and publications;
- (6) seminars, conferences, and training and educational programs to improve the administration of justice and to strengthen respect for the rule of law and internationally recognized human rights; and
- (7) revision and modernization of legal codes and procedures.¹⁹

With this action Congress initiated the AOJ Program which continues today with annual U.S. expenditures of at least \$20

16. *Id.* at 89.

17. *See, e.g.*, Act for International Development of 1961, Pub. L. No. 87-195, § 102, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151-1 (1988)) (declaring U.S. policy to provide assistance to developing democracies). *See generally* CAROTHERS, *supra* note 1, at 196-236 (discussing recent U.S. efforts to expand democracy assistance programs).

18. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 712, 99 Stat. 190, 244 (codified as amended at 22 U.S.C. § 2346c (1988)) (authorizing the use of up to \$20 million in economic support funds in each fiscal year through September 30, 1987 "to countries and organizations, including national and regional institutions").

19. *Id.* The legislation also authorized criminal investigative training within AOJ programs. *Id.* In addition, the legislation permitted such training in El Salvador and Honduras so long as there was a presidential determination of an improved human rights record in those countries, and permitted such training for any country in the region having no standing army, a long tradition of democratic rule, and a good human rights record. *Id.* § 711. Congress also earmarked \$1 million for administration of justice for Peru. *Id.* § 707.

million.²⁰

United States Government efforts in this area developed, however, under a cloud: the perceived failure of prior legal assistance efforts in the 1960s, namely law and development programs conducted by private foundations and AID. Law and development programs, created in the wake of "post-Marshall Plan confidence that American foreign aid could further developmental change,"²¹ and part of the first international "development decade,"²² had been aimed to a considerable degree at the transformation of Latin American legal education by importing U.S. legal education models.²³ These efforts, along with exchanges of law professors and lawyers between the United States and Latin America, were supposed to create a generation of activist lawyers who would reform Latin American law and, in the process, assist economic development.²⁴ The humanitarian goals of these efforts echoed international human rights norms; the aim was to use the rule of law to "protect individual freedom, expand citizen participation in decisionmaking, enhance social equality, and

20. Direct Congressional appropriations for the AOJ program ended in 1990. Since that time, AID has allocated at least \$20 million in economic support funds to the AOJ program in Latin America. THE WASHINGTON OFFICE ON LATIN AMERICA, *ELUSIVE JUSTICE: THE U.S. ADMINISTRATION OF JUSTICE PROGRAM IN LATIN AMERICA* 1, 16 (1990) [hereinafter *WOLA REPORT*]. In addition, specific countries in the region, such as Columbia and Peru, have been the subject of specific Congressional allocations of additional resources, and some of those resources have been allocated to AOJ projects in those countries. See BUREAU OF LATIN AMERICA AND THE CARIBBEAN, AGENCY FOR INT'L DEV., *ACTION PLAN FOR ADMINISTRATION OF JUSTICE AND DEMOCRATIC DEVELOPMENT* 1, 48-51 (1986) [hereinafter *ACTION PLAN*]; *WOLA REPORT*, *supra*, at 7-13.

21. GARDNER, *supra* note 2, at 6.

22. Trubek & Galanter, *supra* note 2, at 1065; *LAWYERS IN THE THIRD WORLD*, *supra* note 2, at 12-13.

23. GARDNER, *supra* note 2; Trubek & Galanter, *supra* note 2, at 1065-69, 1075; *ACTION PLAN*, *supra* note 20, at 14-15. See generally Carl, *supra* note 2 (discussing various approaches to legal education in the Third World).

The efforts by AID or private U.S. foundations included the formation of the Center for Study and Research in Legal Education (CEPED), which was started in 1966 and contemplated reform of Brazilian legal education. Similar education reform efforts were initiated in Costa Rica in 1965, in Chile in 1967, and in Colombia in 1969. Trubek & Galanter, *supra* note 2, at 1066 n.13. See also *LAWYERS IN THE THIRD WORLD*, *supra* note 2, at 11-15 (reviewing the role of lawyers in the Third World); Greenberg, *supra* note 2, at 131 (discussing the educational reform proposals of legal diffusionists for application to lesser developed countries); Hall & Fretz, *supra* note 2, at 783-84 (noting exportation of U.S. legal education to Latin America).

24. Reform of legal education was seen as "the most effective way to further the 'development' of legal professions" since "by training lawyers to think more instrumentally, the schools could initiate change that would narrow the gap between the present performance of the legal profession and its developmental possibilities." Trubek & Galanter, *supra* note 2, at 1075.

increase the capacity of all citizens rationally to control events and shape social life."²⁵ The programs reflected faith in the transformative potential of law.²⁶

These law and development assistance efforts had disappointed many of those involved. As is demonstrated by the critical scholarly literature which it ultimately produced, those involved had gradually come to realize that their efforts had not led to transformation of Latin American legal education and did not have a serious impact on economic revitalization.²⁷ According to one principal critic, the efforts were characterized by "a rather awkward mixture of goodwill, optimism, self-interest, arrogance, ethnocentricity, and simple lack of understanding"²⁸ and the entire approach had been "overconfident, overambitious, and ultimately interventionist."²⁹ Misdirected U.S. lawyers unfamiliar with the local language, law, polity, economy, or culture, and ostensibly sent to build the rule of law, were actually servants of U.S. foreign policy, serving to facilitate "stable and predictable commercial transactions within an implicit liberal

25. *Id.* at 1063.

26. As two participants in these prior efforts have described it, there was faith that: impersonal governance through universal rules, and governance through law would lead to more inclusive and more equal treatment of all citizens. Accordingly, the development of legal institutions was seen as a way of increasing equality and widening participation. Law was seen as a technique for curbing arbitrary government action, and as means of both protecting individual freedom and ensuring greater governmental responsiveness. Legal development would enlarge the sphere of liberty and simultaneously guarantee that governments would act in accordance with the wishes of the citizens. Moreover, law was also associated with rational, instrumental action to secure greater material well-being and other developmental goals. Law was one of the tools that could be used by planners consciously seeking to enhance human welfare.

Id. at 1074 (footnotes omitted).

27. *E.g.*, GARDNER, *supra* note 2, at 247-81 (reviewing the flaws in the application of certain U.S. legal methods during the law and development efforts). For similarly gloomy assessments and a review of how this disillusionment affected those who participated in the law and development programs, see Trubek & Galanter, *supra* note 2. Many participants in these programs concluded that, contrary to what had been assumed, the law in many of these countries was a hindrance to economic, social, and political development, and was a tool used by the elite to maintain their current privileged position and existing patterns of social stratification. *See, e.g.*, LAWYERS IN THE THIRD WORLD, *supra* note 2, at 21, 48, 55, 337 (finding that "the organization of legal services [in Latin American countries] tends to reinforce the existing economic system and class structure"); Greenberg, *supra* note 2, at 133 (maintaining that legal change is not the critical variable in political and economic development in the Third World); David M. Trubek, *Thoughts on Legal Services, Social Welfare, and Income Distribution in Latin America*, 13 TEX. INT'L L.J. 243 (1978) (concluding that public legal services in Latin America needed revision in order to have an impact on social welfare programs). *But see infra* note 181.

28. GARDNER, *supra* note 2, at 4.

29. *Id.* at 243.

capitalist economy."³⁰ Not surprisingly, Latin American Government officials and lawyers became either openly hostile to U.S. aid efforts or cynically accepted the financial assistance offered without serious commitment to legal reform.³¹

These criticisms deeply influenced the interagency group which launched the El Salvador project and began implementing Congress's 1985 authorization for the AOJ Program.³² Their eagerness to avoid replicating the law and development mistakes carried over into the newly created office for AOJ activities within the Latin American and Caribbean Bureau (LAC Bureau).³³ Thus, in that office's first Action Plan, AID officials quickly drew explicit "lessons" from the law and development years and evolved an entirely different strategy for the new AOJ Program.³⁴ That strategy was at least partially designed to avoid the pitfalls of the law and development programs.³⁵

The strategy consisted of various elements. First, from the criticism that prior law and development efforts were successful only where they reflected real indigenous desires for judicial and other legal reforms,³⁶ AID drew the lesson that the AOJ Program was "strictly for democratic governments" in which elected officials were truly committed to the improvement of the administration of justice.³⁷ "Firm political commitment" was the *sine qua non* of AOJ efforts; if this commitment was "tenuous, AID should not proceed."³⁸ AID's strategy was "to support local initiatives, not to create demand for assistance where none exists."³⁹ Unlike prior law and development efforts, the AOJ Program would not force legal reform on those who were either unwilling or reluctant. Second, again in response to the criticism of ethnocentricity, AID's strategy anticipated more limited, less grandiose efforts involving Latin Americans themselves, instead of U.S. nationals. The efforts were intended to encourage reforms sought by bene-

30. *Id.* at 6, 9.

31. *Id.* at 9.

32. Indeed, according to one commentator, the interagency working group used Gardner's text, see GARDNER, *supra* note 2, "as its main source of historical analysis." CAROTHERS, *supra* note 1, at 211 n.25.

33. CAROTHERS, *supra* note 1, at 212; see also WOLA REPORT, *supra* note 20, at 10-11 (stating the primary goals of the AOJ Program in Latin America and the Caribbean).

34. ACTION PLAN, *supra* note 20, at 14-15.

35. See *id.* at 15.

36. See, e.g., GARDNER, *supra* note 2, at 245-46.

37. ACTION PLAN, *supra* note 20, at 15.

38. *Id.*

39. *Id.* at 16.

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ficiary countries, “not to transform their judicial systems in the image of the US [sic] system.”⁴⁰

Third, given the commonality of judicial sector problems, AID anticipated a need to share information and resources among countries in the region both to take advantage of economies of scale, as well as to demonstrate to governments in the region that this was a truly hemispheric, not merely a U.S., effort.⁴¹ Fourth, the AOJ Program would primarily emphasize improvement in the administration of criminal cases because inefficiency in this area has the “harshest consequences” in terms of human rights; the program would focus only secondarily on improvement of the judicial sector to encourage greater economic and social development.⁴² Fifth, AID readily acknowledged the complexity of AOJ reform efforts and stressed the need for a “contextual approach” sensitive to the need to relate judicial reforms “to the society generally.”⁴³ AID also recognized that given the complexity of the problems, aid should be provided on a long-term basis to facilitate real structural change; reasonable expectations, not exaggerated hopes of “quick fixes” would gauge progress.⁴⁴ AOJ programs would also adhere to “AID’s general approach to development:” programs would promote “institutional development” capable of withstanding withdrawal of U.S. support in the future; be grounded in “policy dialogue” with local government officials to assure their support for AOJ programs; respond to the need to transfer needed technology and the necessary research; and attempt to involve, to the extent possible, the private sector (such as local bar associations).⁴⁵ Finally, sensitive to criticism that the prior law and development programs never articulated their goals adequately, AID officials outlined the goals of the AOJ Program at the outset. The AOJ Program intended:

40. *Id.*

41. It was assumed that this would help to “overcome the hesitancy of some governments in the region” to participate. *Id.*

42. *Id.* at 16-17. This also responds to the criticism that prior U.S. efforts were perceived as yet another attempt by the United States to promote its economic self-interest without regard to issues of more immediate concern to Latin America. *See supra* text accompanying note 30.

43. ACTION PLAN, *supra* note 20, at 17.

44. *Id.* at 17-18.

45. *Id.* at 18-19. According to the Action Plan, “policy” dialogue is essential since the “success of the program in any particular country depends on the government of that country committing itself to concrete steps such as reforming legislation, increasing the judiciary’s budget, encouraging judicial personnel to attend whatever training opportunities present themselves, and undertaking whatever reforms are appropriate.” *Id.* at 18.

to increase judicial personnel training, to improve court administration, to modernize legal codes, to bolster local institutional support, to carry out sector assessments, to upgrade local law libraries, to develop country-specific plans for administration of justice reforms, to increase judicial sector budgets, to ameliorate judicial career standards, to help local bar associations increase their activities in the area of administration of justice reforms, and to improve criminal investigative capacities of governments in the region.⁴⁶

AID's strategy resulted in three general types of AOJ activities: sector assessments, bilateral programs, and regional projects.

B. *The Sector Assessments*

Early in the AOJ Program, AID officials began to conduct judicial sector assessments to help assure that assistance projects would be responsive to local conditions. By June 1988, assessments had been completed for Panama, Costa Rica, Honduras, El Salvador, Guatemala, and the Dominican Republic.⁴⁷ These assessments seek to provide a benchmark as well as to appraise a particular country's judicial system either as part of, or preferably prior to, the initiation of a bilateral AOJ project.⁴⁸ More particularly, the assessments are designed to illuminate specific problems of a particular country's judicial system. These problems are identified by those who live within that system such as local lawyers, judges, court administrators, criminal defendants, and other participants in the judicial process.⁴⁹ The assessments completed to date have attempted to identify problems through research, opinion surveys, and data gathering, and have been undertaken by locally hired teams from the particular country under study.⁵⁰ Assessment teams have consisted of lawyers, librarians, educators, systems analysts, statisticians, criminologists, researchers, and law students who have taken anywhere from six to nine months to complete their task.⁵¹

46. *Id.* at 14.

47. See CENTER FOR THE ADMIN. OF JUSTICE, FLORIDA INT'L UNIV., EXECUTIVE SUMMARY, PANAMA SECTOR ASSESSMENT 1 (1986) [hereinafter PANAMA EXECUTIVE SUMMARY]. At this time, assessments are either on-going or contemplated for newer South American beneficiary countries, such as Bolivia and Ecuador. PROJECT CATALOG, *supra* note 10.

48. See *e.g.*, PANAMA EXECUTIVE SUMMARY, *supra* note 47, at 1.

49. See *id.* at 3.

50. See *id.* at 2-3.

51. See *id.* at 2; Center for the Admin. of Justice, Florida Int'l Univ., Executive Summary, Honduras Justice Sector Assignment 1, 2 (1987) [hereinafter Honduras Executive Summary] (unpublished manuscript, on file with *The George Washington Journal of International Law and Economics*).

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The lengthy sector assessments done in Central America suggest grave problems with respect to both judicial independence and competence, although the problems vary from country to country.⁵² The Honduran Sector Assessment is representative. That assessment begins with a background explanation of methodology.⁵³ As with most sector assessments, the Honduran assessment was one of a number of initial activities in Honduras created prior to completion of the design of that country's bilateral AOJ project.⁵⁴ The assessment was intended to provide "the basis for more focused and integrated projects" in Honduras and was conducted with the knowledge of the Honduran National Commission.⁵⁵ The study coordinator for the Honduran assessment was a former Minister of Foreign Relations and a well-known local attorney, who was assisted by an interdisciplinary staff of fourteen professionals and twenty-five law students who participated during different stages.⁵⁶ A report on the assessment was reviewed by Honduran officials and was the subject of a workshop in Honduras.⁵⁷ The assessment itself traces the historical development of the judicial sector in Honduras.⁵⁸ The assessment also includes background on government institutions and agencies participating in the judicial system, at times harshly

52. The final report emerging from the Panamanian assessment was 293 pages in length, and included an annotated bibliography reviewing 2100 Panamanian publications on the administration of justice, a methodological annex, and an evaluation of the economics of the justice sector. PANAMA EXECUTIVE SUMMARY, *supra* note 47, at 1.

53. Honduras Executive Summary, *supra* note 50, at 1-4. The methodology for the assessments was developed with the assistance of Professor Joseph Thome, a Costa Rican law professor at the University of Wisconsin. PANAMA EXECUTIVE SUMMARY, *supra* note 47, at 1.

54. Honduras Executive Summary, *supra* note 51, at 1.

55. *Id.* The Honduran National Commission, established by executive decree in late 1985 and created at AID's encouragement, consists of a group of individuals who oversee AOJ activities regarding the Administration of Justice. *Id.* Not all bilateral AOJ projects have included National Commissions. For example, bilateral AOJ projects in El Salvador and Bolivia did not include such commissions. Mendelson, *supra* note 3, at 35, 45.

56. Honduras Executive Summary, *supra* note 51, at 2.

57. *Id.* at 3-4. Although such reviews were contemplated in connection with all sector assessments, local officials have paid varying degrees of attention to their sector assessments. For example, the review of the Panamanian Sector Assessment did not take place as originally scheduled due to the deterioration and eventual termination of the Panamanian Bilateral AOJ Project. PANAMA EXECUTIVE SUMMARY, *supra* note 47, at 1, 3.

58. Honduras Executive Summary, *supra* note 51, at 4-7. That section of the assessment relates, for example, the judiciary's political struggle to secure funds for completion of a new Honduran Supreme Court building in 1986, based on the Honduran constitutional guarantee that its Supreme Court should receive an annual budget equivalent to three percent of the national budget. *Id.* at 7.

criticizing the ways these institutions operate.⁵⁹The assessment also relates criticisms of the Fuerza de Seguridad Publica (FUSEP) which regulates the activities of other law enforcement forces and investigates serious common and political crimes.⁶⁰ The assessment also discusses discontent with the public ministry whose prosecutorial function is carried out by two different groups: the "fiscales" of the judiciary and the "procuradores" who investigate and prosecute crimes arising as a result of investigations conducted by the "contratoria," the Honduran equivalent of the General Accounting Office (GAO).⁶¹ The assessment details the lack of support staff, professional training, and other operational problems with the fiscales.⁶² It also records the negative perception of local lawyers that the bar association functions more as a social club and only weakly as a disciplinary organization,⁶³ and criticizes Honduran legal education for inadequate funding and library resources, as well as reliance on a lecture method of teaching and the use of part-time faculty.⁶⁴

Another part of the assessment is devoted to a review of the inadequacies of the Honduran courts in general.⁶⁵ This part of the assessment discusses the delays and lengthy travel which litigants face, attributing such problems to the "haphazard" location of courts which are situated "without regard to caseloads."⁶⁶ The assessment also addresses the Judicial Career Law which was designed to remove political criteria from the selection and removal of judges.⁶⁷ According to the assessment, lawyers

59. *Id.* at 7-9. For example, the assessment surveys "inadequacies" in the manner in which the Congress of Honduras considers and tracks legislation, concluding that: [m]uch of the current Honduran legislation is outdated and there is a need for major legislative revision in many areas. Our survey results indicated that the laws passed by the Congress, with regard to the administration of justice, are felt to be unrealistic and that there is little knowledge or understanding of the laws in effect in this area, making adequate use of the system by the affected population difficult. *Id.* at 8.

60. *Id.* at 10. For example, the assessment notes the perception that this agency, part of the Honduran armed forces, is not subject to civilian control and is "corrupt and apathetic to popular interests." *Id.*

61. *Id.*

62. *Id.* at 11.

63. *Id.* at 12.

64. *Id.*

65. *Id.* at 13-15.

66. *Id.* at 13.

67. *Id.* at 13-14. At the time of the assessment, the law was only technically in effect because no administrative rules were in place to make this law effective, and many judges were unaware of the existence of the law. *Id.* at 14.

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reported that their top priority would be successful implementation of the Judicial Career Law because they regarded politicization of judicial selection, and the high turnover in the judiciary, as such serious issues.⁶⁸ The assessment identifies improvement of the administration of the courts, including its budgetary, planning, and personnel management systems, as another serious problem.⁶⁹ The assessment also cites to the “dire need” to create a program to train judges and provide them with manuals about laws, procedures, forms to be used in cases, and basic bibliographic resources.⁷⁰ Not surprisingly, the assessment finds that judicial budgets have “not kept pace with the needs of the judicial system”⁷¹ and have fallen far short of the mandatory three percent specified in the Constitution.⁷²

The assessment also examines the correctional system, concluding that it is one of the “weakest links” in the entire system due to prison overcrowding and the failure to meet prisoners’ “basic needs.”⁷³ The assessment concludes that the “worst case of human rights violations occur [sic] in the correctional system where, due to its draconic conditions, not even the most basic UN [sic] rules regarding the treatment of prisoners are met.”⁷⁴

The assessment is also harsh on the Honduran criminal process, concluding that it “is not characterized by strong adherence to ‘due process’ requirements such as the privilege against self-incrimination, the prohibition of defendants being held incommunicado, the right to counsel, the right to a public trial, and fixed periods for the completion of the different procedural stages.”⁷⁵ The assessment also notes that because Honduran law allows only for the use of monetary bail, large numbers of persons are incarcerated for failure to raise the requisite amount.⁷⁶ In addition, the investigatory stage, which should conclude within one month, takes on average “eight months for those persons with a private attorney and 22.6 months for those persons

68. *Id.* at 14.

69. *Id.*

70. *Id.* at 14-15.

71. *Id.* at 15-16.

72. *Id.* at 14-15.

73. *Id.* at 15-16.

74. *Id.* at 21. The assessment states that of the prison population of 3635, only 20.6% were convicted offenders while 77.4% were pretrial detainees. *Id.* at 15. The remaining 1.4% had committed no crimes, but were being held “because of the influence of a family member or enemy without any recourse to release.” *Id.*

75. *Id.* at 16.

76. *Id.*

without a lawyer."⁷⁷ Moreover, under Honduran law, the right to counsel only attaches at the end of the investigatory stage and the beginning of trial.⁷⁸ Given the importance of the investigatory stage, this suggests "an effective denial of this right."⁷⁹

The assessment concludes with a summary of priorities for action: suggestions for developing a "modern system of legislative tracking;"⁸⁰ a proposal to develop a "national criminal policy" which would include the "gradual transfer" to civilian control of FUSEP;⁸¹ and mechanisms to clarify, simplify, and make the legal system more accessible to the general population, including making free legal services more readily available for defendants.⁸² It also emphasizes the need to implement the Judicial Career Laws and systems of administration and management for the judiciary, encourage coordination between the various institutional components of the legal system, and provide judges with the materials and training they need.⁸³

Many of the problems identified in the Honduran Sector Assessment are echoed in other sector assessments.⁸⁴ Often, judges are not free to decide cases without political influence, are subject to conflicts of interest, and are denied the basic requisites of a stable career path.⁸⁵ Judges are also denied basic resources—including training, staffs, and basic legal materials—which enable them to process cases regularly and efficiently.⁸⁶ Horror stories abound concerning outdated codes, backlogged dockets, extremely antiquated record-keeping, rudimentary or

77. *Id.* at 16-17.

78. *Id.* at 11, 17.

79. *Id.* at 17.

80. *Id.* at 17-18.

81. *Id.* at 19.

82. *Id.* at 20.

83. *Id.* at 22-25.

84. See PANAMA EXECUTIVE SUMMARY, *supra* note 47, at 7-27. See also ACTION PLAN, *supra* note 20, 9-13 (summarizing the shortcomings of the justice systems in Latin America and the Caribbean based on a review of assessments).

85. See, e.g., PANAMA EXECUTIVE SUMMARY, *supra* note 47, at 14 (discussing "corregidores," similar to justices of the peace, who are responsible to the Executive and are outside the supervision of the judiciary); see also JOSÉ MA. RICO Y LUIS SALAS, INDEPENDENCIA JUDICIAL EN AMERICA LATINA: REPLANTEAMIENTO DE UN TEMA TRADICIONAL I (1990) (drawing from the sector assessments and other available literature the various ways in which the independence of the Latin American judiciary is threatened); Mendelson, *supra* note 3, at 7-12 (outlining the ineffective efforts of the Latin American judiciary to counter executive authority); The result of the assessments confirm what others had long suggested. See, e.g., Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 INTER-AM. L. REV. 1, 32 (1987).

86. See PANAMA EXECUTIVE SUMMARY, *supra* note 47, at 18.

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nonexistent continuing education, poor salaries, and corruption. According to the assessments, historical, financial, and political factors contribute to the problems.⁸⁷

C. The AOJ Projects

Bilateral AOJ projects, involving the United States and a particular Latin American or Caribbean nation, attempt to address at least some of the priorities identified in the particular country's sector assessment.⁸⁸ Thus the Honduras five-year AOJ bilateral project, commenced in August 1987, is one component of a broader \$16 million project entitled "Strengthening Democratic Institutions."⁸⁹ The broad purposes of that project are to "improve the effectiveness of key democratic institutions (the judiciary, the Congress, and the National Election Tribunal/National Registry), to improve the quality of local leadership, and to increase the knowledge and participation of the Honduran populace in the democratic process."⁹⁰ The specific assistance to be provided under the AOJ component parallels many of the priorities identified in the sector assessment. The AOJ project focuses on: (1) judicial administration, including assistance to reform the judicial career system, to design and organize a public defender system, and to provide organizational and managerial assistance on budgeting and planning; (2) training, including in-service administrative training to judges, observational visits for court employees and law professors to the United States and other countries, and technical training for support staff to the judiciary; (3) administrative support, including support for a pilot justice of the peace and public defender programs; (4) public information, consisting of "mass media campaigns to increase the public understanding of laws and the court system"; and (5)

87. ACTION PLAN, *supra* note 20, at 11. The reasons for the breakdown in the administration of justice include the failure to modernize Spanish and French codes of the 18th and 19th centuries, the inevitable problems of inadequate resources in developing economies, and political unwillingness to grant the judiciary real independence. *Id.* at 11-12.

88. One obvious exception to this approach was the El Salvador Judicial Reform Project, initially designed without benefit of a prior sector assessment. A sector assessment was later conducted in that country. PANAMA EXECUTIVE SUMMARY, *supra* note 47, at 1.

89. PROJECT CATALOG, *supra* note 10. Other components are "legislative enhancement," "voter registration and elections improvement," and "democratic leadership training." *Id.*

90. *Id.* However, despite the emphasis on the problems with the correctional system, no assistance is apparently allocated to that issue as such. *Id.*

commodity procurement, such as computers, office equipment, furniture, and supplies.⁹¹

Other major bilateral AOJ projects, totalling from just over \$2 million to more than \$16 million are now underway in Bolivia, Colombia, Costa Rica, Guatemala, Honduras, and Peru.⁹² Many of the components of the El Salvador and Honduras projects are replicated in these projects as adapted to local realities; however, few are as elaborate.⁹³ In addition, Argentina, Chile, Ecuador, and Panama have already taken steps toward bilateral AOJ projects, often including modest grants to local institutions.⁹⁴ In nearly all countries, establishment of a bilateral AOJ project involves the creation of a "national commission" of high government officials representing the various interested governmental units, such as the Office of the Ministry of Justice and the Supreme Court.⁹⁵ These National Commissions are supposed to approve bilateral projects and supervise their execution.⁹⁶ In addition, bilateral projects or components of such projects are sometimes implemented by locally based institutions.⁹⁷ These institutions usually have been active in judicial or legally related activities prior to the creation of the AOJ project and provide an alternative to implementation by the AID Mission or a U.S.-based entity.

Two "regional" AOJ projects are intended to complement

91. *Id.*

92. *Id.* See also AGENCY FOR INT'L DEV., REQUEST FOR PROPOSALS, REGIONAL ADMIN. OF JUSTICE PROJECT, BUREAU FOR LATIN AMERICA AND THE CARIBBEAN C-1 to C-8 (1991) [hereinafter RFP] (describing the objectives and scope of the bilateral AOJ projects with several Latin American and Caribbean countries).

93. See PROJECT CATALOG, *supra* note 10. Although the components of particular bilateral projects vary from country to country in response to varying needs, assistance typically includes projects to improve court administration through training programs for court administrators, the drafting of personnel regulations, development of computerized systems for case tracking or data and accounting functions, or improvements to the judicial financial systems. They often include legal assistance for indigents; establishment of judicial training programs for in-service continuing education for sitting judges; the design or implementation of computerized data bases of jurisprudence; publishing or distribution of legal materials or law libraries; and the conducting of diagnostic studies. *Id.*

94. *Id.*

95. See CHECCHI AND CO. CONSULTING, FINAL REPORT, INTERIM EVALUATION OF THE REGIONAL ADMINISTRATION OF JUSTICE REPORT 1, 8 (1988) [hereinafter INTERIM EVALUATION]; see also *supra* note 55.

96. *See id.*

97. PROJECT CATALOG, *supra* note 10. These institutions include the Fundacion de Educacion Superior (FES) in Colombia, the Fundacion La Ley in Argentina, and the Corporacion de Promocion Universitaria (CPU) in Chile. *Id.*

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bilateral activities and facilitate cooperation between participating countries. The Regional AOJ Project for Central America, created in March 1985, has as its centerpiece a \$10 million project with the United Nations Institute for the Prevention of Crime and Treatment of the Offender (ILANUD), located in San Jose, Costa Rica.⁹⁸ The initial five year grant to ILANUD primarily encompassed regional assistance to Panama, Costa Rica, Honduras, El Salvador, the Dominican Republic and later, in 1986, Guatemala.⁹⁹ The grant also provided for less extensive training activities for judicial personnel in Venezuela, Colombia, Ecuador, Bolivia, Peru, and Uruguay.¹⁰⁰ Under the terms of the grant, ILANUD was required to implement a multi-component project and receive institutional support.¹⁰¹ The long-term goal was to make ILANUD a regional center for AOJ activities.¹⁰²

Two principal components of assistance to ILANUD, training activities and advisory services, are similar to those in bilateral projects. As with bilateral AOJ projects, ILANUD's training component has included courses to establish systems of judicial accountability, focusing on such areas as court planning, case processing, statistical systems, budgeting, and paperflow management.¹⁰³ The training programs have also had the more missionary goal of furthering the acceptance of the notion that in-service training is necessary and appropriate, even for sitting judges.¹⁰⁴ In addition, the training component has sought to further certain separation of powers values, namely to:

reinforce the progressive elements in national justice systems and the national bar associations in furthering reforms of their justice systems, particularly in the areas of judicial independence and career stability[;] . . . increase popular awareness of the human and legal rights guaranteed under their constitutions and laws[; and] . . . encourage public recourse to courts

98. CAROTHERS, *supra* note 1, at 212-13; INTERIM EVALUATION, *supra* note 95, at 1. ILANUD is an international nongovernmental organization formed in 1975 by an agreement between the Government of Costa Rica and the United Nations. AGENCY FOR INT'L DEV., PROJECT PAPER SUPPLEMENT, REGIONAL ADMIN. OF JUSTICE PROJECT, BUREAU FOR LATIN AMERICA AND THE CARIBBEAN 1, 3 (1988) [hereinafter PP AMENDMENT].

99. INTERIM EVALUATION, *supra* note 95, at 1.

100. *Id.*

101. *Id.* at 7-12.

102. *See id.*; PP AMENDMENT, *supra* note 98, at 3.

103. INTERIM EVALUATION, *supra* note 95, at 47-54; PP AMENDMENT, *supra* note 98, at 16; PROJECT CATALOG, *supra* note 10.

104. PP AMENDMENT, *supra* note 98, at 9-15. To this end, other bilateral projects in the region have sought to establish "judicial schools" for the in-service training of judges. PROJECT CATALOG, *supra* note 10.

for vindication of such rights.¹⁰⁵

The advisory services component has included pilot projects on case tracking and management, systems for collecting and reporting on legislation and jurisprudence, dissemination of basic legal materials and bibliographic assistance, and study tours by Latin American court administrators at U.S. and Puerto Rican sites.¹⁰⁶ The project has also included some activities such as regional seminars on the functioning and institutionalization of agrarian justice as well as the enforcement of environmental protection laws.¹⁰⁷ Today, the Regional AOJ Project includes activities in both Central and South America, and is authorized through 1992 at funding slightly exceeding \$25 million.¹⁰⁸

Finally, this regional AOJ project funds a variety of smaller AOJ programs which correspond to other aspects of AID's overall strategy. These have included grants to the U.S. Information Agency (USIA) to establish an international visitors program; to the Inter-American Bar Association for a conference for bar associations of the Central American region; to the American Bar Association (ABA) to conduct seminars in various Central American countries on arbitration and other alternatives for dispute settlement; and to the Inter-American Bar Foundation for a program designed to "strengthen Central American bar associations."¹⁰⁹

A second regional project has focused on the Caribbean. The Caribbean Justice Improvement Project (Caribbean Project), initiated in 1985, is quite separate from the other bilateral and regional AOJ activities. It is designed to strengthen the common law systems in Belize, Jamaica, and the small island states of the Eastern Caribbean.¹¹⁰ The separate track for AOJ assistance to these countries responds to the perception that the needs of these countries, most of which achieved independence from the United Kingdom relatively recently, differ from the needs of Central American countries and owe much to problems arising from the small size of these states' judicial systems.¹¹¹ This project, with total current funding through 1990 of \$13 million, consists of a grant to the University of West Indies for supplies, technical

105. PP AMENDMENT, *supra* note 98, at 9.

106. *Id.* at 16-21; PROJECT CATALOG, *supra* note 10.

107. PP AMENDMENT, *supra* note 98, at 21-24.

108. PROJECT CATALOG, *supra* note 10.

109. ACTION PLAN, *supra* note 20, at 8; Mendelson, *supra* note 3, at 20, 29-30.

110. See CAROTHERS, *supra* note 1, at 213; PROJECT CATALOG, *supra* note 10.

111. See ACTION PLAN, *supra* note 20, at 31-32; PROJECT CATALOG, *supra* note 10.

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assistance, training, and maintenance of a central law library, and funding to the Jamaican Government for assistance to its Supreme Court and its Civil Registry.¹¹² With bilateral projects or regional activities in seventeen principal beneficiary countries in the hemisphere, the AOJ Program extends widely despite the relatively small amounts of annual U.S. appropriations.

D. Lessons Learned

The AOJ Program differs from the law and development efforts in several tangible respects. Most notably, the AOJ Program has generally adhered to assistance for the *administration* of justice, rather than the reform of substantive legal codes or attempts to reform legal education as such. The focus has been on training and material assistance directed at the needs of the judiciary, such as improved access to libraries, sophisticated methods of court administration and personnel management, and improved methods of case-tracking. The AOJ Program has focused on practical assistance to those involved in the actual day-to-day administration of justice, such as court administrators and judges, as opposed to assistance by or for law professors. This emphasis responds to charges that common law lawyers have little to offer their civil law counterparts in terms of substantive law but may be of greater assistance in terms of providing technical assistance on court administration and criminal investigation.¹¹³ The focus on improving court administration has also addressed, to some extent and indirectly, problems of improving access to the justice system through, for example, assistance to legal services serving the poor.¹¹⁴

112. See ACTION PLAN, *supra* note 20, at 29-32; PROJECT CATALOG, *supra* note 10. Quite apart from these AOJ projects, Congress's annual \$20 million appropriation has also funded the International Criminal Investigative Training Assistance Program (ICITAP). See PROJECT CATALOG, *supra* note 10. In 1985, due to AID's reluctance to become involved in the police assistance business and, given the Department of Justice's obvious expertise, AID transferred an initial \$160,000 to the Department of Justice. Under the guidance of the Department of State, the Department of Justice was charged with developing programs to improve criminal investigative capabilities under judicial or prosecutorial control. *Id.* Although the scope of the ICITAP program has grown in size since then, receiving assistance of almost \$7 million in 1990, it remains under the jurisdiction of the Departments of State and Justice. *Id.* ICITAP programs, generally directed at law enforcement personnel and not the judiciary, are outside the scope of this essay. For critical views of ICITAP and the investigative skills of law enforcement, see CAROTHERS, *supra* note 1, at 213-15; LAWYERS COMMITTEE, *supra* note 7, at 177-87; WOLA REPORT, *supra* note 20, at 4, 26, 28.

113. See CAROTHERS, *supra* note 1, at 211.

114. Cf. LAWYERS IN THE THIRD WORLD, *supra* note 2, at 21 (criticizing the law and

The 1980s AOJ efforts deemphasized the involvement of U.S. lawyers, and AID has not followed the Central America Commission's recommendations to highlight involvement by U.S. law schools or to focus on exchange programs.¹¹⁵ Instead of sending U.S. lawyers to Latin America, the program has emphasized training among Latin Americans. When the program has used foreign trainers, they have tended to be from other civil law countries, usually within Latin America or from Europe.¹¹⁶ The AOJ Program has not attempted to export U.S. legal codes to the region.¹¹⁷ With rare exceptions such as the CORELESAL component in the El Salvador project,¹¹⁸ and technical assistance to aid in the implementation of laws or regulations directly related to judicial administration, such as those concerning the judicial career and its protection, AID has avoided assistance directed at the creation of new legislation.

AOJ efforts have also attempted to elicit and respond to indigenous support. Components of AOJ projects, particularly bilateral projects, usually correspond to local needs as articulated by the beneficiaries.¹¹⁹ These efforts are clearest in the extensive and costly sector assessments, the reliance on National Commissions and local organizations to implement at least some projects, as well as the preferred intermediaries for the regional projects: ILANUD and the University of the West Indies.¹²⁰

More generally, the AOJ Program appears to reject the assumption which some believe held sway during the law and development period, that there is a "science" of legal development and that legal reform, in and of itself, promotes social, eco-

development program and urging a different "access approach" which "examines the social impact of the professionalization of legal and administrative structures on the capacity of people who are poor and 'peripheralized' to gain access to resources essential to the satisfaction of their basic needs").

115. See *supra* text accompanying note 16.

116. See WOLA REPORT, *supra* note 20, at 30.

117. Cf. Greenberg, *supra* note 2, at 131 (charging that exporting U.S. legal codes was one goal of the law and development programs). But see Mendelson, *supra* note 3, at 55 (stating that "law and development advocates eschewed the direct export of legal institutions").

118. See *supra* text accompanying note 10.

119. Cf. David J. Dodd et al., *The Inter-American Legal Services Association: Promoting the Role of Law in Social Change in Latin America and the Caribbean*, LAW. AM., Fall 1980, 533, 546 (urging indigenous input on project design and management).

120. As one commentator has suggested, AID strategy reflects the assumption that "[a] project will work only if the local partner is committed to change, assumes ownership, and is made to feel empowered by the program." Mendelson, *supra* note 3, at 16.

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conomic, and political development.¹²¹ The AOJ Program does not seek to demonstrate a "systematic and universally valid set of propositions about the relations between law and society in the Third World."¹²² Nor are AOJ projects designed to produce pure empirical research devoid of any practical application. Bilateral projects, as well as their separate components, are country-specific and sometimes dependent on prior proposals articulated by local programs or institutions with prior experience in efforts to reform the legal sector. To the extent that components of bilateral projects in different countries are similar, this is the product of the "pragmatic problem solving" approach which underlies AID's new strategy rather than any grand intellectual design.¹²³ Further, the AOJ Program no longer appears to harbor illusions about the superiority of U.S. lawyers or U.S. law.¹²⁴ Indeed, much of the program does not concern lawyers at all but rather focuses on developing the skills of other professionals, such as law librarians, court administrators, and financial and personnel managers.¹²⁵ As is suggested by the Honduras Project, participants are more aware of the need to coordinate activities involving interested government agencies other than the judiciary within beneficiary countries.¹²⁶ Involvement of other agencies and considerations of alternatives to courts for remedies, such as alternative dispute resolution, respond somewhat to criticisms that the old law and development programs focused unduly on the courts, ignoring other governmental actors whose cooperation was necessary to deal effectively with underlying problems.¹²⁷

121. Cf. Trubek & Galanter, *supra* note 2, at 1065, 1094-95.

122. *Id.* at 1094.

123. *See id.* at 1097-98. Cf. Carl, *supra* note 2, at 3 (urging modest assistance responsive to indigenous desires).

124. Cf. GARDNER, *supra* note 2, at 3-26.

125. Cf. critiques of Trubek & Galanter, *supra* note 2, at 1067, 1073-75; LAWYERS IN THE THIRD WORLD, *supra* note 2, at 46-47, 64, 346, and 356.

126. *See supra* text accompanying note 91. Honduras is not the only bilateral project that includes broader assistance to legislatures, electoral systems, and the executive. *See, e.g.,* PROJECT CATALOG, *supra* note 10 (indicating the assistance to Bolivia would encompass legislative and judicial needs); Mendelson, *supra* note 3, at 26 (describing the variety of Guatemalan projects covering the legislature, election process, and operation of the office of the procurator of human rights). In addition, some AOJ beneficiaries have received political development assistance from sources other than the AOJ Program. *See, e.g.,* CAROTHERS, *supra* note 1, at 196-236 (reviewing the various assistance programs expressly directed at Latin American nations).

127. *See generally* ROBERT B. SEIDMAN, THE STATE, LAW AND DEVELOPMENT 1, 214 (1978) (critiquing the role of Western courts for failing to resolve disputes but instead creating winners and losers); Trubek & Galanter, *supra* note 2, at 1077, 1078 (discussing

Finally, some AOJ projects, such as in Honduras, also attempt to address the problem that widespread ignorance, historical distrust, and fear of courts, lawyers, and the law make equal access to legal remedies illusory. Thus, the projects sometimes include information efforts intended to educate the general public about existing laws and procedures and to increase the level of public participation in making and applying the law.¹²⁸

III. CRITICISMS OF THE AOJ PROGRAM

Despite the many ostensible differences between the old and new U.S. programs for assistance to the Third World legal sector, the criticisms that have been leveled to date against the AOJ Program may prompt feelings of *déjà vu* in those who were involved in prior law and development efforts. Thus, at a conference conducted by the Washington Office on Latin America (WOLA) in 1990, AOJ bilateral projects in El Salvador, Guatemala, and Colombia came under a barrage of criticism. In a report issued after the conference, WOLA participants suggested that there was, at best, "meager" empirical evidence that any of these projects had demonstrably improved the technical capacities of the judicial systems in any of the three countries.¹²⁹ Especially in the cases of courts in Guatemala and El Salvador, this report alleged that there was a demonstrable and continuing failure to successfully prosecute allegations of human rights abuses by governmental forces.¹³⁰ Many participants at the WOLA conference found U.S. assistance to police forces in Guatemala and El Salvador particularly problematic.¹³¹ They also criticized three of the four components of the El Salvador project, suggesting that both the SIU and the Commission on Investigation had failed to investigate human rights cases;¹³² that the JPU, involved in only two cases concerning the murder of U.S. citizens, had been a similar failure and is now "practically defunct;"¹³³ and that CORELESAL had also largely failed to

the need for "inter-locked" approaches and the need for use of non-lawyers in the dispute settlement process).

128. Cf. *LAWYERS IN THE THIRD WORLD*, *supra* note 2, at 53, 372-73 (suggesting that ignorance and suspicion of the law by the general public inhibits progress); Hall & Fretz, *supra* note 2, at 792-93 (maintaining that legal services programs in developing countries must expend resources to educate the general public to overcome suspicion of the law).

129. WOLA REPORT, *supra* note 20, at 2.

130. *Id.* at 3-4.

131. *Id.* at 4-5.

132. *Id.* at 4-5, 20.

133. *Id.* at 19-20.

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More generally, participants criticized the El Salvador project for having a "divided soul" because the SIU and JPU were directed at short-term goals of securing justice in prominent human rights cases, while the components for judicial training and CORELESAL sought long-term systematic change.¹³⁵ Participants at the WOLA conference also raised serious questions about the viability of assistance to politically unstable regimes. Some contended that neither the El Salvadoran Government¹³⁶ nor the Guatemalan regime¹³⁷ was seriously committed to democratic reform.

At the conference, participants questioned AID efforts in Colombia on several grounds. For example, participants suggested that the private, nongovernmental entity responsible for implementing the Colombia project was outside the "realm of public debate and accountability,"¹³⁸ that the Colombian President "could enact decrees pursuant to AOJ recommendations, without the benefit of public debate and support,"¹³⁹ and that AOJ assistance lent "legitimacy to the judicial system . . . without addressing the underlying problems of land distribution and social justice."¹⁴⁰ In addition, participants were concerned about the relationship and possible conflicts between the "long-term institution-building" goals of the AOJ project and the short-term goals of the United States to fight drug trafficking in Colombia, because "[p]resent U.S. policy often seems contradictory, supporting institution-building within the judicial system through the AOJ Program while at the same time encouraging efforts to combat drug trafficking even when that means circumventing the judicial system."¹⁴¹

The review by the Lawyers Committee for Human Rights of

134. *Id.* at 20.

135. *Id.* at 34. For a more positive, though still critical view of the El Salvador project, see Mendelson, *supra* note 3, at 33-35 (discussing a U.S. General Accounting Office report which noted technical problems regarding implementation of judicial reform yet praised certain aspects of the El Salvador system, such as the SIU).

136. *See, e.g.*, WOLA REPORT, *supra* note 20, at 27-28 (suggesting that El Salvador was not serious about strengthening its democratic institutions following ARENA's victory in the 1989 presidential elections).

137. *See, e.g., id.* at 39-40 (summarizing inconsistent Guatemalan Government actions regarding reform and failures to prosecute human rights cases following a 1988 coup attempt).

138. *Id.* at 31.

139. *Id.* at 32.

140. *Id.*

141. *Id.* at 33.

the El Salvadoran project took a similar tack. That review summarized specific human rights cases that the El Salvadoran authorities had failed to prosecute, and recommended suspension of assistance on the ground that U.S. aid was merely serving as an instrument of state repression.¹⁴²

Criticisms of existing AOJ projects have not come solely from sources outside the U.S. Government. AID's own evaluations of some projects, such as the Regional AOJ Project, suggest grave operational difficulties. ILANUD is a case in point. Prior to the influx of U.S. funding in the 1980s, ILANUD was a small research organization with an annual budget of about \$150,000.¹⁴³ Its research was often directed at penology and correctional institutions. From 1985 through 1992, ILANUD will have received nearly \$15 million of U.S. aid.¹⁴⁴

AID had two goals with respect to ILANUD. First, assistance to ILANUD would make it the principal entity responsible for implementing regional AOJ activities.¹⁴⁵ From AID's perspective, such activities would be conducted best by an institution with an established Latin American presence and a connection with a respected universalist institution. ILANUD, and not a U.S. entity, could more credibly conduct regional training for judges and court administrators, help establish law libraries and disseminate related materials, and implement computer programs.¹⁴⁶ Second, such assistance would further the general AID objective of institutionalization; U.S. assistance to ILANUD has been directed at the institutional development of ILANUD so that the region would eventually have its own permanent, independent institution capable of continuing needed legal assistance long after the termination of the U.S. AOJ Program.¹⁴⁷

Yet, years after AID established these objectives, its most extensive evaluation of its assistance to ILANUD casts doubt on whether U.S. assistance has furthered these objectives. This evaluation suggests that while most of the planned programmatic activities have progressed—for example, training sessions have been conducted, law library resources distributed, and sector

142. LAWYERS COMMITTEE, *supra* note 7, at 12-15.

143. EDUCATION DEV. CENTER, OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS RELATING ILANUD'S ORGANIZATIONAL STRATEGY, STRUCTURE AND MANAGEMENT PROCESSES, FINAL REPORT 1, 2 (1990) [hereinafter FINAL EVALUATION].

144. *Id.* at 2 app. D.

145. See PP AMENDMENT, *supra* note 98, at 3-4; Mendelson, *supra* note 3, at 20-21.

146. See INTERIM EVALUATION, *supra* note 95, at 6-7.

147. See PP AMENDMENT, *supra* note 98, at 3; Mendelson, *supra* note 3, at 20.

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assessments completed—it is not clear that ILANUD is behind these activities in more than name.¹⁴⁸ Thus, the recent evaluation of ILANUD concluded that despite a large increase in staff, ILANUD's "organizational structures . . . are as simple today as they were during its incipient years."¹⁴⁹ The evaluation concluded that ILANUD was top-heavy with highly salaried personnel;¹⁵⁰ possessed limited knowledge of planning, fund-raising, or processes of management and control;¹⁵¹ and that without continued U.S. support at high levels, the organization was not competitive economically.¹⁵² It therefore recommended dramatic organizational changes, including instituting a Board of Directors, processes for internal and external audits, and a process to track operating costs.¹⁵³ Without such changes, the report stated that U.S. Government assistance to ILANUD would be "wasted."¹⁵⁴ Whether such changes will occur is unclear at this writing, but in the meantime it is hard to escape the conclusion that ILANUD represents a classic case of an organization suffocated with too much money too soon.¹⁵⁵

Delay has also been another perennial characteristic of AOJ projects. Beginning with the sector assessments which have generally taken longer than contemplated, and continuing into the initiation of bilateral projects, which suffered extensive delays in Guatemala,¹⁵⁶ Bolivia,¹⁵⁷ Honduras,¹⁵⁸ and the Dominican Republic,¹⁵⁹ U.S. AOJ efforts have encountered a range of polit-

148. See FINAL EVALUATION, *supra* note 143, at 3.

149. *Id.* AID's previous evaluation had also cast doubt on ILANUD's managerial abilities. See INTERIM EVALUATION, *supra* note 95, at 21.

150. FINAL EVALUATION, *supra* note 143, at 7.

151. *Id.*

152. *Id.* at 8.

153. *Id.* at 8-9.

154. *Id.* at 9.

155. See Mendelson, *supra* note 3, at 23-24 (discussing ILANUD's institutional weaknesses and how AID's multimillion dollar funding "contradicts the teachings of many development experts, who recommend that local implementing agencies be provided with initial small grants and that these be successively incremented as the institution acquires capacity to manage increased funds and expanded project activities adequately"); *id.* at 56 (quoting a 1990 AID strategy paper which admitted that some AOJ projects had difficulties because of "high initial levels of funding" or "too much too soon").

156. See Mendelson, *supra* note 3, at 28.

157. See RFP, *supra* note 92, at C-6.

158. See Mendelson, *supra* note 3, at 41-42.

159. *Id.* at 43-44.

ical and operational difficulties.¹⁶⁰ Some of the reasons for these delays—such as political sensitivities, institutional rigidities on the part of both the United States and recipient states, and cultural and economic barriers—should be familiar to anyone who has been exposed to AID efforts in other contexts. Nonetheless, six general underlying reasons for operational difficulties in the AOJ Program suggest the ways the AOJ effort is similar to as well as different from other types of development aid.

First, the AOJ Program has not escaped familiar suspicions of recipients that the efforts are U.S.-dictated and done because of U.S. self-interest.¹⁶¹ Some delays are attributed to the reluctance of Latin American government officials to accept proffered assistance because, notwithstanding AID's efforts to counter ethnocentricity and other law and development criticisms, they believe such aid is another form of U.S. political interference in a sensitive area of national sovereignty.¹⁶² Despite AID's express policy that assistance would only respond to indigenous requests, AOJ assistance to some countries, such as El Salvador, has been dictated by U.S. concerns and has been responsive to U.S. ideas. This helps to explain the failed JPU in the El Salvador project.¹⁶³ Assistance for such purposes apparently was only reluctantly (or perhaps cynically) accepted by the El Salvadoran authorities as part of the price for more desired forms of U.S. assistance or private investments.

A second difficulty relates to the first. AID has failed to institutionalize assistance by creating viable, self-sustaining locally-based institutions to carry on the activities even in the absence of U.S. aid. ILANUD is the paradigm, but, except in those bilateral projects in South America where already established entities have

160. See generally PP AMENDMENT, *supra* note 98, at 5-7 (outlining the major constraints encountered in the AOJ Program).

161. One commentator has ably put this issue into a broader context of suspicions that the U.S. Government's "recurring bouts" of encouraging prodemocratic policies in Latin America have been the U.S. Government's means "of advancing [its] underlying economic or security interests in the region." CAROTHERS, *supra* note 1, at 1.

162. See, e.g., PP AMENDMENT, *supra* note 98, at 5 (recognizing that Latin American governments may view AOJ projects as U.S. political interference).

163. See WOLA REPORT, *supra* note 20, at 19-20. Certainly the notion that a group of Salvadoran prison guards, most of whom were prison guards only because they could not be accepted as members of the regular armed forces in that country, trained for a few short weeks in essentially fire-arms training by the F.B.I., would be able to keep order in politically charged courtrooms such as the trial of those accused of murdering U.S. nuns, reflects little understanding of local realities and suggests a "quick fix" to a public relations problem for the U.S. Government.

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implemented aid,¹⁶⁴ few bilateral projects appear to have been any more successful than ILANUD in fulfilling AID's institutionalization goal.

Third, AID has underestimated the complexity of the AOJ problems facing the region and the need for coordinated efforts on behalf of all government agencies in beneficiary countries.¹⁶⁵ Only slowly, particularly as delays have emerged, have AID project managers realized that removal of one bottleneck in the system—for example, expediting the processing of cases through installation of case-tracking systems—may create another, as where the combination of lack of economic resources, lack of on-the-job training, or poor law schools may result in an inadequate number of lawyers to handle the greater number of cases. In addition, relatively "simple" technical tasks, such as installation of computer equipment, may require sensitive coordination with existing bureaucracies and may involve far more complex overhauls in the administrative apparatus which oversees court administration. Such tasks may include the establishment of an on-the-job training program for those who will operate and maintain the system and assurances from the government that it will contribute financially to future maintenance. At the same time, installation of such a system may cause bureaucratic resentments which may sabotage future success as there is usually some party with an interest in the prior inefficient system. Even establishing judicial or court administration training may conflict with cultural constraints, such as the perception that it is beneath the dignity of judges to take classes, resentment that Costa Rica is always the site of regional training, or reluctance to accept advice from nationals from certain countries because of differing national prejudices.¹⁶⁶

A fourth area of difficulty has been the lack of continuity and consistency in personnel and policies, particularly on the part of beneficiary countries. This problem has been especially evident within rapidly changing governments over the period, such as Panama and El Salvador, but extends to "stable" governments with changing priorities, such as South American governments with new or greater concerns about environmental issues or

164. See *supra* note 97 and accompanying text.

165. See PP AMENDMENT, *supra* note 98, at 5-7.

166. Some of these difficulties may explain AID's need to include "redesign" efforts in some bilateral projects. See, e.g., RFP, *supra* note 92, at C-6 (noting that the Peru project may require technical assistance for redesign work).

narco-terrorism, or where the turnover in government officials undermines the efficacy of the National Commissions which are supposed to guide national AOJ projects.¹⁶⁷

There has also been inconsistency in U.S. Government goals. Notwithstanding AID's repeated attempts to articulate specific AOJ program goals, U.S. personnel responsible for implementation of the program at AID and members of Congress responsible for continued funding have not always agreed on the criteria for success or for termination of a project. For some AID personnel, success and continued assistance is premised primarily or even exclusively on improvements in the way beneficiary courts deal with ordinary civil and criminal cases.¹⁶⁸ For others, including members of Congress, the key questions are whether there is a perceptible improvement in the handling of highly publicized cases implicating human rights concerns; whether there are fewer allegations of human rights abuses by government agents, including the police; and whether such cases are seriously investigated and prosecuted.¹⁶⁹ These differences in perspective raise the risk that funding may be terminated for the AOJ Program as a whole, or for particular recipients, notwithstanding general agreement that this type of assistance requires a long-term, stable commitment.¹⁷⁰ However, others contend that, quite apart from these differences on criteria for success, these type of long-term development programs are ill-suited to the U.S. approach to appropriations, which is based on an annual reconsiderations in which AID's funds are dependent on changing government priorities and the vicissitudes of power politics between a Congress and an Executive of opposing parties.¹⁷¹

A fifth factor has been the relative novelty of AOJ assistance within AID, a U.S. Agency which, notwithstanding its own mod-

167. The turnover rate of Latin American government officials is one reason why National Commissions have sometimes met infrequently or have been staffed by lower-level officials. See, e.g., Honduras Executive Summary, *supra* note 51, at 1 (stating that the Honduran National Commission has met infrequently and has been attended by lower-level officials).

168. See generally WOLA REPORT, *supra* note 20, at 43-44 (contrasting the short and long-term goals of the AOJ Program).

169. *Id.* at 3, 46.

170. See Mendelson, *supra* note 3, at 57, 60 (criticizing AOJ projects for adhering to unrealistic five year plans because "significant institutional changes needed to create an independent judiciary in the host countries require structural reforms possible only with long-term support and commitment").

171. See, e.g., CAROTHERS, *supra* note 1, at 258-59 (contending that steady funding to promote democratic reform in Latin America would be more successful than the U.S. annual appropriation process).

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est involvement in the earlier law and development period, remains more familiar with the problems of health or economic development than the problems of political or judicial development.¹⁷² For the AID bureaucracy, the initial 1985 to 1990 Congressional appropriations for the AOJ Program were a mixed blessing; though AID was hardly inclined to turn down funds in an age of tight budgets, it was not well-equipped to deal with such projects. Although AID responded by creating a "Democratic Initiatives" office, the AID bureaucracy has regarded these political assistance efforts as outside the mainstream of traditional AID development work.¹⁷³ Even today, six years after the AOJ Program started, these efforts have not generated a distinctive AOJ career path within the AID bureaucracy. AID efforts now proceed without the presence of a lawyer in the AID office responsible for AOJ efforts; this helps to explain that office's heavy reliance on outside consultants for basic tasks.¹⁷⁴ Indeed, AID's basic catalog of existing AOJ efforts was produced by one such consultant.¹⁷⁵ Thus, AID readily admits that the institutionalization of AOJ assistance within the United States is an ongoing task; the U.S. Government still perceives a need to create a network of experts and organizations with relevant expertise.¹⁷⁶ Moreover, the minimal amount of resources that other donor countries devote to this effort makes the task of the United States more difficult.¹⁷⁷

A final difficulty results from deteriorating economic and social conditions in many recipient states. These difficulties have made it nearly impossible to secure additional funds for the judiciary because it is difficult to convince a government strapped for cash to devote new resources to a sector which seems to have man-

172. *See id.* at 221-22.

173. *See id.* For hints within AID at some of these problems, see INTERIM EVALUATION, *supra* note 95, at 92-95 (criticizing AID's "lean" staffing and inadequate supervisory role).

174. *See RFP, supra* note 92, at C-1 to C-8 (describing AID's process by which it seeks a contractor to undertake the continuous networking task among various professional skill groups).

175. The PROJECT CATALOG, *supra* note 10, was written by Checchi and Company Consulting, Inc.

176. INTERIM EVALUATION, *supra* note 95, at 98.

177. Only a handful of European countries is regularly involved in political development assistance in Latin America and such assistance usually involves aid programs directed at human rights or other community-based institutions, and not the judiciary. *See Mendelson, supra* note 3, at 15-16.

aged with meager resources in the past.¹⁷⁸

The problems with AOJ efforts would not appear as serious if responsible officials could point to significant tangible achievements or at least some amelioration, attributable to U.S. Government efforts, in the underlying problems identified in the sector assessments. Unfortunately, that is not the case. Although AID's interim evaluation identifies and quantifies at great length the number of training hours and material or books supplied,¹⁷⁹ there is little to suggest that either bilateral or regional AOJ projects are having a demonstrable impact on the overall competence or efficiency of the judiciary. Part of the problem lies in finding "coherent, measurable," and undebatable indicators of success.¹⁸⁰ Expedited case-processing or increased material support for the judiciary are not necessarily indicators of an "improved" or more independent judiciary.

On the other hand, if the impact of AOJ projects is more intangible and long-term, so that, for example, assistance results in heightening awareness of issues which have been ignored and inspires solutions to these over the long term, how can one measure this type of impact?¹⁸¹ In addition, there is the problem of "isolating the causal efforts of such assistance programs from the thicket of factors"¹⁸² relevant to the overall goals for the AOJ Program. Even if measurable improvements in public perception of the judiciary occurred in some beneficiary countries, it would be difficult to determine to what extent such improvement could

178. See, e.g., *id.* at 28 (noting the difficulty in persuading the Guatemalan Government to provide revenue).

179. See, e.g., *id.* at 40, 49 (enumerating the persons receiving ILANUD training); INTERIM EVALUATION, *supra* note 95, at 17-19 (discussing ILANUD training activities and recommending certain improvements in that area).

180. CAROTHERS, *supra* note 1, at 217. Other types of political assistance share this problem. *Id.* See also Mendelson, *supra* note 3, at 58 (stating that it is difficult to "measure the success of AOJ programs because they do not fall into the easily quantifiable categories").

181. See CAROTHERS, *supra* note 1, at 217 (suggesting that the AOJ Program constitutes a "positive set of initiatives" and generally heightens "attention to what are traditionally badly ignored judicial systems"). See also Mendelson, *supra* note 3, at 53 (arguing that "[i]n the short run, these programs cannot be expected to create change. What short-term programs do create are [sic] a sense of professionalism among those who receive training, and a greater recognition of other methods of operation that might improve the entire system").

Even some critics of the prior law and development efforts readily admit that those efforts, however misguided, probably had some beneficial long-term impacts by directing resources and attention at a neglected sector. See GARDNER, *supra* note 2, at 245; Hall and Fretz, *supra* note 2, at 785.

182. CAROTHERS, *supra* note 1, at 217.

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be attributed to AOJ efforts as opposed to, for example, internal political, economic, and social factors accompanying the change toward a more democratic regime. Moreover, although at least one of AID's interim evaluations has confirmed that AOJ projects have "not resulted in any significant changes in the operation of key institutions or in any procedures being followed in the justice sectors,"¹⁸³ that evaluation has also stressed that it is really premature to expect any tangible improvements.¹⁸⁴ Nonetheless, at a minimum, future qualified judgments of success or failure could be made through a second series of judicial sector assessments which, provided that these follow the same methodology as the first, should at least attempt to gauge changes in public perceptions.

IV. CONTINUING DILEMMAS

A. *Obstacles to Implementation of AID's Strategy*

Although the problems with the AOJ Program surveyed above¹⁸⁵ present serious operational difficulties, they do not necessarily suggest that the entire AOJ Program is unworthy of further support. Rather, the existing problems illustrate the need to adhere closely to AID's enunciated, revamped AOJ strategy. The criticisms of the El Salvadoran and Guatemalan projects merely demonstrate that the United States should not violate its own first rule for AOJ funding: assist only democratic governments truly committed to improvements in the administration of justice. Such ostensible fiascos as the JPU in El Salvador illustrate the risks attendant to U.S., as opposed to local, initiatives; they illustrate the flaws of attempts to foist U.S. ideas onto foreign cultures.¹⁸⁶

Similarly, those who criticized the Colombian project for

183. INTERIM EVALUATION, *supra* note 95, at 96. This 1988 evaluation of the Regional Administration of Justice Project also concluded that

the general public in both core [Central American beneficiary countries] and South American countries is not aware of the Project, and that there is no evidence that any activities under the Project have had an impact on the perceptions of the public concerning the fairness or efficiency of the operation of the justice systems.

Id. at 96.

184. *Id.* at 97.

185. See *supra* text accompanying notes 129-184.

186. Indeed, the hurried design of the El Salvador Judicial Reform Project, largely in response to Congressional calls for a "quick fix," suggests a violation of virtually every tenet of AID's AOJ strategy. See *supra* text accompanying notes 34-46 (outlining the express strategy of the AOJ Program).

addressing only some of the issues impacting legal services in that country serve as a reminder of the need to adhere to AID's "contextual" approach¹⁸⁷ and truly respond to the complexity of AOJ reform. The criticisms implicitly warn that AOJ efforts, targeted at a politically sensitive sector, are likely to fail if they are *perceived* as predominantly oriented to further U.S. goals, such as improved prosecution of drug trafficking, instead of promoting the goals of the countries that sought the assistance. The lessons flowing from ILANUD's troubles are similar. Throwing money at a local institution and asking it to do the U.S. Government's bidding will not fulfill AID's goal of institutionalization.¹⁸⁸ In short, these difficulties suggest that problems emerge when any part of AID's announced strategy is ignored but that none of the existing problems necessarily suggests fundamental difficulty with AID's AOJ strategy or with the concept of this type of assistance generally.

These problems might suggest, however, that from a real politik perspective, AID's strategy is naive and unimplementable. Whether or not this proves to be the case, clearly there are grave obstacles in the way of successful implementation of AID's strategy. It is one thing to declare that U.S. assistance will be available in response to local initiatives by well-meaning governments truly desiring legal reforms; it is quite another thing to implement reform in the face of the varying pressures of a U.S. Congress anxious to remedy injustices committed on U.S. nationals abroad, a U.S. Executive anxious to respond to perceived threats to a friendly government by narco-terrorists, and a potential beneficiary government anxious to please the U.S. Government for the sake of other perceived benefits. It is one thing to promise a patient, long-term effort to institutionalize desired reforms; another to adhere to that commitment in the face of U.S. budgetary concerns, changing foreign policy priorities, and political pressure for quick results on high profile issues such as drug trafficking or human rights prosecutions. It is one thing to promise sensitivity to the complexities of legal reform and establish a strategy designed to take into account the varying roles of different governmental entities and the general public within beneficiary countries, and to stay attuned to the differing realities of

187. See *supra* text accompanying note 43.

188. Cf. Mendelson, *supra* note 3, at 59 (suggesting that the success of an AOJ project may turn on whether there is a local institution in the host country willing to serve as a liaison).

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particular countries; quite another to expect such implementa-
tion by a U.S. Agency which is uncomfortable and unfamiliar with
political development assistance and has been described as
"incomprehensibly bureaucratic."¹⁸⁹

Such implementation concerns are not necessarily fatal. Con-
ceivably, a confluence of political factors and the heroic efforts of
those responsible for implementing a particular project or com-
ponent may lead to a situation in which AOJ assistance truly
responds to AID's strategy. But the operational difficulties of
some existing AOJ projects and general concerns with the imple-
mentation of AID's strategy do not exhaust the possibilities for
criticism. More fundamentally troublesome than either of these
is the proposition that AID's strategy is premised on a flawed set
of normative assumptions and therefore is doomed to the same
failure as prior law and development efforts. The next section
deals with this issue.

B. Questioning the AOJ Assumptions

Prior law and development efforts were based on a paradigm
of normative concerns. According to this paradigm, designated
as "liberal legalism,"¹⁹⁰ the State, which is the primary locus of
control of individuals, is also the means by which individuals
"formulate rules for mutual self-governance."¹⁹¹ These rules,
the product of a pluralist process, address individuals universally,
apply equally to all persons similarly situated, and "are con-
sciously designed to achieve social purposes or effectuate basic
social principles."¹⁹² According to this paradigm, because
"courts have the principal responsibility for defining the effect of
legal rules," they are "the central institutions of the legal
order."¹⁹³ Adjudication, the "decisive mode of legal action,"¹⁹⁴
proceeds from and produces rules which are imposed on those
individuals, including government officials, who have not inter-
nalized them.¹⁹⁵ In short, the liberal legalism paradigm sees the
legal system as "an integrated purposive entity"¹⁹⁶ which guides

189. CAROTHERS, *supra* note 1, at 220-22.

190. Trubek & Galanter, *supra* note 2, at 1069-70.

191. *Id.* at 1071.

192. *Id.* (footnote omitted).

193. *Id.* at 1072 (footnote omitted).

194. *Id.*

195. *Id.*

196. *Id.*

social behavior and modifies it through changes in legal rules.¹⁹⁷

Despite operational differences between the law and development efforts and the AOJ Program, both approaches share the premises and values of the liberal legalist paradigm. The AOJ Program unabashedly assumes a central role for the judiciary; in fact, the contention that the judiciary in Latin American nations is often the weakest branch of government in terms of attention and resources, was ignored by prior U.S. aid efforts, and merits attention and resources, provided the original justification for the AOJ Program.¹⁹⁸ Today's assistance efforts aspire to more direct effects on the function of courts than the previous law and development efforts. Rather than targeting assistance at law students, today's projects go directly to court administrators and judges. The AOJ Program explicitly assumes that strengthening the judicial function by enhancing its ability to protect the rights of individuals promotes the enforcement of laws generally and "increase[s] public confidence in both democracy as a system and in the specific democratic governments of the country reached, fostering increased social-political stability."¹⁹⁹ The AOJ Program assumes that expediting the settlement of all legal disputes benefits economic and social development generally because this makes possible the more "predictable and efficient . . . enforcement of contracts, the organization of business relations, and the day-to-day workings of the infrastructural aspects of a successful, liberal economic system."²⁰⁰

The more specific normative assumptions of the AOJ Program are also reasonably clear. AOJ projects seek to institutionalize separation of governmental powers and corresponding checks and balances among the judiciary and other government branches; establish procedural and substantive limits on governmental action in furtherance of human rights, including protections for civil rights, religious liberty, the rights of workers, economic rights and entitlements, and free expression; promote judicial review by an independent judiciary; and ensure fairness

197. *Id.*

198. ACTION PLAN, *supra* note 20, at 9-13.

199. *Id.* at 13.

200. *Id.* at 13-14. As one commentator has noted, AID's view is based on seeing democratization as a process, grounded in "the ability of civilian governments to consolidate representative institutions." Mendelson, *supra* note 3, at 12. This consolidation requires the military to relinquish "the internal security function to an independent judiciary and a civilian police force." *Id.*

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in criminal process and civilian control over the military.²⁰¹ AOJ projects also attempt to encourage fidelity to the principle that no criminal penalty be imposed without prior, publicly known, and reasonably specific law; encourage that "like cases be treated alike"; and the need for reasoned opinions by professional, career judiciary.²⁰² Moreover, AID officials decided early in the process that despite the differences among countries within the region, the underlying causes and systemic problems were "similar enough to permit a comprehensive account and methodology."²⁰³ AID viewed the twin problems of the lack of judicial independence and competence as "inextricably interrelated":

[w]hen the executive branch of a government systematically interferes with or controls the country's judicial system, the chances of attracting high quality judges and staff, encouraging innovative or consistent decision-making, and managing court administration efficiently, are all reduced. Conversely, a justice system of low competence, one which unevenly applies its laws and its caseload, is much easier to dominate politically than a system which is highly efficient and capable. Thus, an integrated approach to justice reform, one that tackles problems both of independence and competence, is likely to be the most effective.²⁰⁴

The U.S. Government's confidence that AOJ assistance promotes judicial independence also underlies the AOJ Program's grandiose affirmation that it is part and parcel of a broader foreign policy agenda to "promote democracy" in the hemisphere. Project documents repeatedly stress that the AOJ Program is part of a U.S. Government effort to "promote democracy." As discussed, AOJ efforts are frequently, as suits AID's broad "contextual approach," a part of other types of political assistance, including projects to improve legislative capacities, promote leadership training and civic education, and improve electoral processes.²⁰⁵

In the past, critics of law and development efforts have challenged all of these premises. Influenced by the critique to the

201. INTERIM EVALUATION, *supra* note 95, at 6; PP AMENDMENT, *supra* note 98, at 1. See also CAROTHERS, *supra* note 1, at 7-8 (listing common criteria making up a democracy).

202. See, e.g., PANAMA EXECUTIVE SUMMARY, *supra* note 47, at 2 (outlining the measures used to evaluate the Panamanian justice system).

203. ACTION PLAN, *supra* note 20, at 11.

204. *Id.* at 10.

205. E.g., *id.* at 62-74 (reviewing the progress of projects developed to strengthen "democratic institutions" in Latin America and the Caribbean). See *supra* text accompanying note 43.

liberal legalism model posed by critical legal studies that contest the accuracy of this model even within the United States, they have argued that this ethnocentric model is all the more inappropriate in the context of third world countries characterized by "social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems."²⁰⁶ Critics of the law and development period scoffed at the premise that changes in legal rules or their effective implementation can serve as instruments of social change, contending that "change may have little or no effect on social economic conditions in Third World societies and, conversely, that many legal 'reforms' can deepen inequality, curb participation, restrict individual freedom, and hamper efforts to increase material well-being."²⁰⁷ From the critics' perspective, the liberal legalist model only hinders understanding of the social role of law and conceals that the law's formal neutrality makes it a more effective tool to further domination by elite groups.²⁰⁸ To the critics, the "instrumental rationality in legal processes together with governmental regulation of economic life" may economically benefit the elite at the expense of the masses.²⁰⁹ Therefore, the liberal legalist model presents a "false utopia" which diverts attention from the reality that deeply rooted social and legal structures of society "will not be transformed by surface reforms such as changing law school teaching or creating an occasional legal aid clinic."²¹⁰

The law and development critics would also find the AOJ Program's present affiliation with democratization goals of U.S. foreign policy ironic and misguided. In the 1970s, by the end of the law and development period, critics had come to see the U.S. for-

206. Trubek & Galanter, *supra* note 2, at 1080 (footnote omitted); see also *LAWYERS IN THE THIRD WORLD*, *supra* note 2, at 21, 48, 55, 337, and 373 (reflecting various commentators' conclusions that the existing organization of Third World legal services perpetuates existing class structure).

207. Trubek & Galanter, *supra* note 2, at 1080.

208. *Id.* at 1083.

209. *Id.* at 1084. Egalitarian critics ridiculed claims that law and development assistance was conducive to economic development. On the contrary, one such critic argued, absent a massive effort to redirect the legal system to servicing the legal needs of the rural poor, for example, these efforts were not the "handmaidens of democracy" but the "handmaidens of dictatorship." GARDNER, *supra* note 2, at 281. From this perspective programs which improve the status of judges and lawyers merely perpetuate the elite status of an already wealthy class. Such programs only promote economic development on the dubious view that economic development relies on the continued accumulation of wealth by the few and is correspondingly undermined when income is more equitably disbursed. Trubek, *supra* note 27, at 245.

210. Trubek & Galanter, *supra* note 2, at 1084.

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mal commitment to the "rule of law" as "mere rhetoric"²¹¹ and peripheral to its real goals of maintaining military security and preserving the economic status quo.²¹² Thus, Trubek and Galanter argued that:

[t]o the extent that legal development assistance, whether supported by the government or privately funded, contributes to foreign policy goals it becomes suspect. And to the extent that future law and development research depends on support from governmental source or sources that are sympathetic to government policy, serious problems are created.²¹³

Moreover, there is the criticism that the U.S. Government's entire approach to democratization, articulated at the highest levels in "loud, even triumphal fashion,"²¹⁴ is self-defeating because such an approach creates inordinately confident and "extremely high expectations" that cannot possibly be fulfilled.²¹⁵

While the law and development critics have not yet addressed the AOJ Program,²¹⁶ their critique above strikes at the heart of the AOJ Program and presents continuing dilemmas for U.S. policy makers as well as scholars interested in the field of law and development. That these arguments perhaps run counter to existing political sentiments in the United States is, of course, no barrier to consideration of the merits. Taken seriously, the criti-

211. *Id.* at 1092.

212. *Id.*

213. *Id.*

214. CAROTHERS, *supra* note 1, at 259.

215. *Id.*

216. However, criticism of the law and development efforts is perhaps a more targeted version of the criticism others have made generally of the prodemocratic political development assistance of the United States. For example, one commentator has argued that exogenous efforts are incapable of influencing the political evolution of a country; that, in any case, U.S. efforts pursue a "top-down" "institution-oriented" view of democracy which provides assistance to government actors without addressing "bottom-up" efforts to increase political participation; and that U.S. efforts fail to address the real underlying obstacles to democracy in Latin America such as "the extreme concentration of economic and political power in the hands of undemocratic elites, the sociopolitical marginalization of whole classes of citizens, and the lack of any underlying national consensus on basic democratic values." CAROTHERS, *supra* note 1, at 257-58. This commentator also argues that the Reagan Administration took a particularly narrow view of the conventional, Western liberal or pluralist democratic model, artificially focusing only on whether a government has come to power through free elections. *Id.* at 245-49. Further, he contends that the U.S. efforts in the 1980s contributed only marginally, if at all, to the much heralded trend toward democracy in the Latin American region, concluding that "[i]n almost all cases the democratic or civilianizing trend was the result of internal factors; it was not the result of external factors such as U.S. policy." *Id.* at 249-50.

cism implies that those who become involved in current AOJ efforts are, at best, foolish dupes and, at worst, conspirators in a plan to keep Latin American countries economically underdeveloped and their peoples politically repressed.²¹⁷

One crude variant of the criticism is that the U.S. model of constitutionalism, including its separation of powers and attendant normative values, is illegitimate for Latin America. This variant is perhaps the easiest to dismiss. It may have been true that the original exportation of U.S. and European constitutional models to cultures which did not give rise to such documents, constituted legal imperialism. However, cultures change over time, and today, years after Latin American states have inherited these constitutional models and their underlying Western values, it is too late to argue that either the models or the values are alien to Latin Americans or inappropriate to Latin American realities. Historically, the Latin American experience demonstrates a "weak tradition of constitutional government under civilian rule."²¹⁸ This tradition means that Latin American constitutions typically assign more power to the Executive than to any other government branch.²¹⁹ Consequently, the constitutional guarantee of an independent judiciary is often undermined by the establishment of special courts not accountable to the rest of the judiciary.²²⁰ Furthermore, national judiciaries typically have been weak and "dominated by local caudillos, military juntas, and single party rule."²²¹ Nonetheless, for many if not most Latin Americans and especially legal scholars, these constitute problems to confront rather than desirable attributes.²²²

Indeed, it may even be plausibly argued that the general underlying normative values drawn from the concept of separation of powers and an independent judiciary are approaching nearly universal acceptance.²²³ Thus, a recent product of the

217. Cf. Trubek & Galanter, *supra* note 2, at 1088 (suggesting that liberal legalism was a sincere, but misguided model as applied to law and development efforts).

218. Mendelson, *supra* note 3, at 3.

219. *See id.* at 3-7.

220. *See id.* at 7.

221. *See id.* at 5.

222. *See* LUIS SALAS Y JOSÉ MA. RICO, *CARRERA JUDICIAL EN AMERICA LATINA* 1 (1990).

223. *See, e.g.*, Stanley Anderson, *Judicial Accountability: Scandinavia, California and the U.S.A.*, 28 AM. J. COMP. L. 393 (1980) (arguing that "there is a worldwide trend toward subjecting judges to scrutiny to improve judicial conduct and performance"); Mario Cappelletti, "Who Watches the Watchmen?": *A Comparative Study on Judicial Responsibility*, 31 AM. J. COMP. L. 1, 2 (1983) (suggesting a means of creating "categories of judicial accountability").

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CSCE process, involving all European countries, the United States, and the former Soviet Union, contains a political commitment by the participating States to "respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service."²²⁴ This commitment encompasses implementation of the "Basic Principles on the Independence of the Judiciary," including:

- (i) prohibiting improper influence on judges;
- (ii) preventing revision of judicial decisions by administrative authorities, except for the rights of the competent authorities to mitigate or commute sentences imposed by judges, in conformity with the law;
- (iii) protecting the judiciary's freedom of expression and association, subject only to such restrictions as are consistent with its functions;
- (iv) ensuring that judges are properly qualified, trained and selected on a non-discriminatory basis;
- (v) guaranteeing tenure and appropriate conditions of service, including the matter of promotion of judges, where applicable;
- (vi) respecting conditions of immunity; [and]
- (vii) ensuring that the disciplining, suspension and removal of judges are determined according to law.²²⁵

Whatever the status of these norms as a matter of universally accepted human rights law,²²⁶ it is impossible to contend that these values have not been long desired by Latin Americans. As the President of Argentina, Raúl R. Alfonsín, has suggested, the modern history of Latin America presents a constant effort to "build democracy out of political cultures and civic habits under-

224. *Moscow Document*, *supra* note 5, at 10.

225. *Id.* CSCE States also pledged to cooperate in:

- providing education and training on the role of the judiciary and the legal profession in society; [and to]
- promote and facilitate dialogue, exchanges and co-operation among national associations and other groups interested in ensuring respect for the independence of the judiciary and the protection of lawyers;
- co-operate among themselves through, *inter alia*, dialogue, contacts and exchanges in order to identify where problem areas exist concerning the protection of the independence of judges and legal practitioners and to develop ways and means to address and resolve such problems; [and]
- co-operate on an ongoing basis in such areas as the education and training of judges and legal practitioners, as well as the preparation and enactment of legislation intended to strengthen respect for their independence and the impartial operation of the public judicial service.

Id. at 11.

226. See generally *CSCE Human Dimension*, *supra* note 5 (summarizing the evolution of the human rights aspect of the CSCE).

mined by decades of authoritarianism."²²⁷ This aspiration, while frequently interrupted by dictatorship, has remained such a significant Latin American ideal, that it has "forced even authoritarian regimes to invoke democracy for the sake of legitimacy."²²⁸ From this perspective, the specific normative values underlying the AOJ Program respond to what President Alfonsín has called:

a need for substantial transformation to consolidate, once and for all, the basic values of the West. . . . Western civilization cannot be considered merely as a geographical entity. Rather, it is an historical configuration, a certain way of thinking and of organizing society both socially and politically. We do not just belong to this civilization; we have *chosen* to adopt its central values: respect for humanity, tolerance of diversity, freedom of opinions and beliefs, and equality of access to civil and social rights. Within this framework, we have also incorporated for ourselves Western civilization's greatest contribution to humanity—the embodiment of individual and collective autonomy in democracy as a system of organization, choice, and government at the political level, and as a form of relations among people at the social level.²²⁹

The criticism that exportation of the U.S. model of liberal legalism is ethnocentric and condescending is academic and unrealistic. Those who would, under AID's strategy, respond positively to a government's request for assistance to its judiciary,²³⁰ appear less condescending than those who would criticize the appropriateness of U.S. assistance designed to perfect the independence of the judiciary on the grounds that Latin American history suggests such goals are inappropriate to Latin culture.²³¹ Even if the normative values of the AOJ Program were not universal, this revelation would hardly prevent an AID official from adhering to the Agency's announced strategy to respond with assistance *upon request* and to the extent local initiatives support such assistance.²³²

The more appropriate inquiry is to ask how best to adapt the normative values of the liberal legalist model to differing realities abroad in accord with AID's strategy. Moreover, it is important to consider the questions raised by law and development critics

227. Raúl R. Alfonsín, *Building Democracy*, 12 YALE J. INT'L L. 121 (1987).

228. *Id.* at 127. See also CAROTHERS, *supra* note 1, at 2 (stating that "[d]emocracy has long been the formal organizing principle of Latin American political systems and the genuine aspiration of many Latin Americans").

229. Alfonsín, *supra* note 227, at 126 (emphasis in original).

230. See *supra* text accompanying notes 36-40.

231. See *supra* text accompanying notes 218-222.

232. See *supra* text accompanying notes 36-40.

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concerning the correlation between the ends sought and the means used. This inquiry includes the fundamental question of whether exogenous assistance can have *any* impact on indigenous legal structures.²³³ At a minimum, the law and development experience suggests that in both the decision to render aid and in decisions concerning where that aid is allocated, AID should consider whether technical or financial assistance will promote or hinder the normative ends sought. In its evaluations and dialogue with beneficiary governments, the U.S. Government cannot ignore consideration of the probable impact on economic equity, public participation in decision making, protections for individual rights, and economic and social development.²³⁴

C. Prospects for the AOJ Program

Although there is little empirical evidence to date concerning the impact of AOJ projects,²³⁵ the AOJ Program is better suited to promote such healthy skepticism and has better prospects for a more sophisticated, case-by-case consideration of these factors than the prior law and development efforts for various reasons. First, the pragmatic problem-solving nature of the new AOJ efforts separates, at least in terms of strategy, the normative values sought from the specific ways the United States has institutionalized these standards. In principle, the AOJ Program does not attempt to export U.S. models for substantive laws or institutions. One such example is AOJ technical assistance for implementation of judicial career laws. These laws, which in civil law fashion codify judicial salary, benefits, and job security, as well as establish special qualifications, methods of selection and promotion, and professional rules of conduct, respond to the hopes of Latin American scholars, judges, and lawyers and not to U.S., U.K. or Canadian models for judicial independence.²³⁶ U.S. AID efforts are not attempting to export, for example, ABA rules of conduct for judges, federal sentencing guidelines, or the concept of life tenure for federal judges.²³⁷ The *idea* that judges should

233. See Greenberg, *supra* note 2, at 131-32 (noting that the "need for an externally sponsored program of legal reform may be limited"); see also CAROTHERS, *supra* note 1, at 2 (discussing the premise that U.S. methods to promote Latin American democracy bear "uncertain" relation to the actual achievement of democracy in that region).

234. See Trubek & Galanter, *supra* note 2, at 1076.

235. See *supra* text accompanying notes 129-141, 179-184.

236. See SALAS Y MA. RICO, *supra* note 222.

237. Indeed, as one commentator suggested with respect to Eastern Europe, life tenure for civil law judges who receive specialized judicial training in law school and assume

be independent of other political branches, not a specific model for pursuing this goal—such as reform of legal education—has inspired AOJ efforts. AID's faith in the interrelationship of judicial independence and competence, while perhaps misplaced, is a far cry from the quasi-scientific model of legal development arguably contained in prior law and development efforts.²³⁸ Moreover, the AOJ approach, grounded in those country-specific problems identified by the sector assessments,²³⁹ is more open to experimentation and development over time than reform efforts based on any one model for legal assistance.

Second, the relatively insecure status of the AOJ Program within the AID bureaucracy,²⁴⁰ and continuing scrutiny of foreign assistance budgetary requests by a skeptical Congress, while perhaps risky to the long-term stability of assistance, provide the benefit of keeping the AOJ Program continuously subject to evaluations which present opportunities for empirical confirmation of impact. In addition, given the relatively little U.S. Government monies devoted to the AOJ Program, the relatively small bureaucratic stake in the program on the part of AID officials who rely on outside consultants or contractors, and the changing nature of those outside consultants, today's AOJ Program continues in the mode of the prior law and development programs in the positive sense of giving few groups a vested interest in the program.²⁴¹ For this reason, critics will probably remain visible and influential—just as they ultimately were with respect to the law and development efforts.²⁴²

Third, foreign policy realities of the 1990s are such that the current AOJ Program is less likely to be directed by ideological or security concerns; the "rule of law" direction of foreign policy is less likely to be merely rhetoric in a post-Cold War world.²⁴³ Finally, the prior law and development experience and the changing perspectives in the U.S. legal community have affected those who implement the AOJ Program. Few of the U.S. lawyers or law professors involved in current efforts are likely to share

their positions while still in their twenties may create problems of accountability and may not be the best or most appropriate solution to the problem of judicial independence. Schwarzer, *supra* note 5.

238. See *supra* text accompanying notes 21-26.

239. See *supra* text accompanying note 49.

240. See *supra* text accompanying notes 173-174.

241. See Trubek & Galanter, *supra* note 2, at 1089.

242. *Id.*

243. See *supra* note 5 and accompanying text.

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the rosy picture of the role of law which pervaded earlier law and development crusades. Lawyers today, imbued with the criticisms of the social role of law contained in critical, law and economics, and feminist critiques, are less likely to give naive, uncritical acceptance to any untested premise, and are more likely to demand empirical results.

On the other hand, each one of the reasons for optimism has a darker side. Pragmatic problem solvers who operate without benefit of an overarching theory and without awareness of the broader sociological factors may never seek to answer broader questions. A decrease in involvement by U.S. lawyers or law professors is not necessarily an advantage if those persons who replace them are no more sensitive to the complexities of legal reform and are insufficiently curious to question the value of assistance.²⁴⁴ An insecure AID bureaucracy or anxious contractor may seek to protect its status through "diplomatic" evaluations which conceal rather than illuminate failure, especially in the face of Congressional or human rights organizations' demands for quick results.²⁴⁵ New U.S. foreign policy concerns, such as drug trafficking, may replace the old ideological concerns to the detriment of the AOJ Program's "rule of law" aims.²⁴⁶

D. Two Serious Dilemmas

In the face of these tensions, the law and development critique suggests at least two serious and continuing dilemmas for U.S.

244. One commentator's draft paper surveying the AOJ Program suggests that these projects have focused on

managing information, cataloging case law, and organizing dockets, . . . [and make] no attempt . . . to address the question of changing legal culture. Instead emphasis is given to short-term strategies, the analysis of goals and objectives that use such broad-brush terms as "promoting the rule of law." The matter of legal culture is brushed aside, although it is at the core of what is being engineered. It seems implausible to effectively design, let alone implement, programs without considering cultural context.

Mendelson, *supra* note 3, at 52.

245. In fact, the frankness of the ILANUD evaluation, see FINAL EVALUATION, *supra* note 143, is a rarity. See also CAROTHERS, *supra* note 1, at 221 (noting that interim AOJ evaluations have "functioned more to validate existing approaches than genuinely to examine what had been tried and to find more effective alternatives").

246. See, e.g., Gustavo Gorriti, *Misadventures in Cocaland*, N.Y. TIMES, Sept. 8, 1991, at E19 (deriding the United States' \$250,000 judicial assistance program to prosecute narcotics crimes in Peru as compared to the \$34.9 million provided to support U.S. military assistance to fight drug trafficking in Peru). But see, e.g., Clifford Kraus, *White House Accepts Conditions to Peru Aid*, N.Y. TIMES, Oct. 6, 1991, at A8 (reporting the Bush administration's reluctant accession to a Congressional request to cut Peruvian military aid by \$10 million and to tie such aid to improvements in the human rights record of the Peruvian military).

policy makers. The first concerns the relationship between AOJ assistance and economic development.

Although AID strategy, perhaps wisely, has elevated the protection of human rights to the status of the primary goal of the program and has relegated economic development to secondary status, the AOJ Program implicitly assumes that an independent and efficient judiciary is conducive to economic development. Yet the new AOJ projects, no less than the prior law and development efforts, may be exporting *sub rosa* a litigation-oriented model that unduly elevates the role of the professional lawyer at the expense of less confrontational and less expensive alternatives to the resolution of disputes.²⁴⁷ Although the AOJ Program has met some of these concerns through, for example, ABA-sponsored conferences on arbitration, these efforts have been minor. Generally the AOJ Program has attempted to ignore the issue of economic development by, for example, focusing primarily on criminal case processing. Whether the program can maintain such a narrow focus over the long term, given the difficult economic prospects faced by these countries, is questionable. However, U.S. policy makers have faced a dilemma; if AOJ projects had addressed, for example, the need to expedite the resolution of business disputes, the projects could have been perceived as yet another attempt by the United States to further the economic interests of its investors.²⁴⁸ Nonetheless, the sustainability of present AOJ efforts—including computerized systems of legal research, personnel management, and case tracking—may turn on improved economic conditions.

Particularly as beneficiary countries gain confidence in AOJ efforts, there may be greater room for consideration of the economic impact of contemplated reforms. Such reforms may include modifications to the more established AOJ projects to deal with the underlying causes of crowded court dockets—including greater consideration of nonlitigative alternatives for dispute settlement—and not just its after effects through computerized case tracking. Economic concerns may also be the pre-

247. See generally GARDNER, *supra* note 2, at 256-59 (critiquing the law and development movement's "model of omnicompetence"); Trubek & Galanter, *supra* note 2, at 1078 (maintaining that liberal legalism's "law-in-society" model would perpetuate the inadequacies of the legal system).

248. Efforts by the United States to promote arbitration, for example, are invariably tainted by the perception that the United States has steadfastly promoted international arbitration in place of resolution of disputes in local courts pursuant to the Latin American Calvo Doctrine.

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dominant cause of some of the public frustrations with the legal system demonstrated in the sector assessments.²⁴⁹ Thus, future AOJ assistance might be usefully directed, for example, at reform of administrative regulations which now discourage entrepreneurship.²⁵⁰

The contention that these programs, directed at an elite class of professionals, judges, and lawyers, only perpetuate the oligarchical social structure and inequitable income distribution of these societies is a more difficult issue. A partial response to this problem is to direct assistance whenever possible to those types of subsidized legal assistance programs for the poor that show the best prospects for improving the circumstances of the poor and which might promote a more equitable pattern of income distribution. As some commentators have suggested, if it is true that legal aid programs that take a proactive stance, focus on collective actions in a variety of forums, including legislative arenas and the media, and encourage full client participation have a greater prospect of promoting such redistribution of income,²⁵¹ there is room within the pragmatic AOJ projects either to fund such existing programs or to provide help to local groups interested in promoting such programs. Legal services programs may also foster economic development, for example, by contributing to the elimination on restrictions on the alienation of land, making effective protective labor legislation or agrarian reform laws, or facilitating credit availability.²⁵² Certainly many current AOJ Programs, by including components to inform the public of their legal rights, have taken at least the first step towards ensuring such potential programs.²⁵³ Such components of AOJ projects also help counter the "top-down" institutional-bias which has arguably characterized U.S. political development assistance.²⁵⁴ To some extent these efforts address the "bottom-up" needs of a

249. See *supra* text accompanying notes 59-87.

250. See generally G.A. Res. 188, U.N. GAOR 2d Comm., 45th Sess., 71st mtg., at 206-07, U.N. Doc. A/45/188 (1990) (endorsing "entrepreneurship" and advocating enhancement of States' "institutional, legal and regulatory frameworks to ensure greater consistency with market approaches"). Every Latin American country voted in favor of this resolution except Cuba. *Id.* at 208.

251. See Dodd et al., *supra* note 119, at 547-49; Hall & Fretz, *supra* note 2, at 786-87; Trubek, *supra* note 27, at 252-56.

252. Dodd et al., *supra* note 119, at 548-49.

253. Cf. Trubek, *supra* note 27, at 260. But see RFP, *supra* note 92, at C-6 (noting that only in 1991, years after commencement of the El Salvador Judicial Reform Project, is AID contemplating a "public awareness campaign" in El Salvador).

254. See CAROTHERS, *supra* note 1, at 222-26.

truly democratic society; they encourage a "process involving the uninhibited formation and mobilization of interest groups, the free expression by groups and individuals of their political interests and attitudes, and a process of day-to-day interaction and responsiveness between the government and the citizens of the country."²⁵⁵

U.S. policy makers face a second dilemma concerning the central goal of the AOJ Program: the protection of human rights. Critics of the El Salvador and Guatemala projects, as well as of the prior law and development efforts, have all pointed to the central issue: assistance to judges, court personnel, and lawyers may benefit groups which use their power to repress dissent and in fact violate the human rights which the AOJ Program seeks to protect. This type of assistance—even to ostensibly "freely elected" or "democratic" governments in the region—may make repression more efficient and provide legitimacy to repressive political structures which have not vanished in the wake of one or two presidential elections.²⁵⁶

A central question concerns the human rights-related criteria that U.S. policy makers should use either to initiate or to terminate AOJ assistance.²⁵⁷ Both WOLA and the Lawyers Committee for Human Rights suggest that assistance should turn on whether the existing regime successfully investigates and prosecutes highly visible "political" crimes or other crimes involving the alleged participation of government authorities in human rights abuses.²⁵⁸ Accordingly, the Lawyers Committee for Human Rights has recommended suspension of AOJ assistance to El Salvador on this basis,²⁵⁹ and some participants at the WOLA conference reached similar conclusions with respect to Guatemala.²⁶⁰ The rationale for such conclusions is that the "very foundation of the rule of law" is threatened by the failure to prosecute political crimes because such failure "indicates that the framework for justice more generally is fundamentally flawed."²⁶¹

255. *Id.* at 246.

256. *See, e.g.*, WOLA REPORT, *supra* note 20, at 26 (stating that "aid which strengthens and legitimizes the apparatus of the state without altering its political intent can provide a cover for state repression").

257. *See id.* at 5.

258. *See id.*; LAWYERS COMMITTEE, *supra* note 7, at 12-16.

259. LAWYERS COMMITTEE, *supra* note 7, at 14-16.

260. WOLA REPORT, *supra* note 20, at 39-42.

261. *Id.* at 3.

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262. *Id.*

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There are at least two interrelated issues which should be differentiated. The first concerns the difference between short-term and long-term results. Even participants of the WOLA conference acknowledge that to link AOJ projects to short-term results on highly visible, political violence cases of interest to the United States dooms AOJ projects and exposes the AOJ Program to the accusation of opportunism.²⁶² To judge the success of AOJ assistance on the basis of how a country's judiciary deals with the political murder of a prominent official three to five years after the AOJ project has begun vastly exaggerates the potential short-term impact of exogenous aid.²⁶³ No judiciary, however independent, functions best in highly charged political cases. The relevant inquiry is whether the judiciary is capable of handling such highly charged cases generally—as opposed to the results in any single case—as well as whether there are prospects for improvement in the handling of such cases.

A second, more difficult issue is whether success in prosecuting highly publicized "political" cases should be the sole or even primary criterion for judging the success of projects over the long term. At times, AID officials have suggested that their preferred criterion is whether improvements occur in the "normal" operation of the judiciary—in how it handles everyday civil and criminal cases.²⁶⁴ It can be argued that this criterion is no less legitimate and sensitive to human rights. Seeking to assure that the alleged common criminal has the right to counsel, to a fair trial, to reasonable equality of opportunity to present his or her case, and to have prompt justice appears, in itself, worthwhile. Improvements in the civil courts may also protect social and economic rights, such as the right to government benefits or protection of personal property. When such improvements are empirically demonstrable, continuation of an AOJ project may be justified. Suspension of an AOJ program because highly publicized cases are not adequately prosecuted may forestall improvements of the entire system for the rest of the population on the

262. *Id.* at 43.

263. This would be roughly akin to judging the entire U.S. judiciary on the basis of how two particular judges appointed by President Reagan to the Court of Appeals for the District of Columbia handled the recent appeal of Oliver North. Such a perspective risks a seriously distorted perspective of a country's legal system. See *United States v. North*, 910 F.2d 843 (vacating in part and reversing in part the defendant's conviction in the district court), *modified*, 920 F.2d 740 (D.C. Cir. 1990), and *cert. denied*, 111 S.Ct. 2235 (1991).

264. See WOLA REPORT, *supra* note 20, at 3, 25.

uncertain grounds that withdrawal of U.S. Government support will make a regime illegitimate and cause a change.

For perhaps these reasons, a Harvard Law School professor, when asked to explain why Harvard was walking away from an AID-financed project in Guatemala in 1989,²⁶⁵ proposed more subtle criteria to determine whether AOJ efforts should continue.²⁶⁶ In that professor's view, the minimum conditions for initiation or continuation of an AOJ project in a country are whether improvements are likely to or actually occur anywhere in the judicial system and whether the government shows a serious commitment to improve, over the long term, its treatment of "political" or highly publicized cases involving the abuse of human rights.²⁶⁷ Even if that test is accepted, the obvious problem comes in its application. In the case of Guatemala, Harvard and AID disagreed over the good faith of the Guatemalan Government authorities.²⁶⁸ AID was clearly of the view that AOJ efforts had not yet been given a fair chance of success and

265. The Harvard Law School project in Guatemala consisted of analysis of technical and administrative problems within the Guatemalan criminal justice system, a Fellowship program for Guatemalan judges to study at Harvard and corresponding seminars in Guatemala, and creation of model offices for the courts in the Ministerio Publico. Mendelson, *supra* note 3, at 30-31.

266. The United States should not deny AOJ assistance to a country simply because there is extensive political violence. That would be like denying medicine because the patient was ill. The United States should not expect the relatively rudimentary criminal justice system of a developing country consistently to handle effectively what are surely some of the most difficult crimes for any country to investigate, crimes of political violence by well-organized groups. I also think it is a mistake to deny Administration of Justice funds whenever there is reason to suspect the involvement of some security forces in terrorist killings. There are circumstances in which the criminal justice system can be a very important factor in ending these abuses. . . . [But] it is not a useful expenditure of United States money to provide training or advice to the police, prosecutors, or judges of any country whose political and military leaders are unwilling to support law enforcement efforts against every form of political violence, including that initiated by security forces or political/economic groups to which the government leaders may be sympathetic. . . . In any country where the President, the Minister of Defense, and the Minister of the Interior are unwilling to create the conditions for a vigorous investigation of terrorist crimes, the United States should not be providing support for improvements in the more politically harmless areas of criminal justice. It will not work, for the people of the country . . . will come to hold the criminal justice system in contempt, leaving it deprived of the most valuable resource of any criminal justice system, citizen cooperation. And even if it did work, it would create a stunted, morally corrupted system of social control, not the rule of law.

Options for United States Policy Toward Guatemala: Hearing Before the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs, 101st Cong., 2d Sess. 27 (1990) (statement of Philip B. Heymann, Professor of Law, Harvard Law School).

267. *Id.*

268. See Mendelson, *supra* note 3, at 31.

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required greater time to take hold. Despite the views of Harvard, the bilateral Guatemalan project was not suspended. Given the operational difficulties with AOJ projects, this may be a plausible response—particularly when addressing technical assistance to judiciaries such as computerization and training and not direct assistance to the police alleged to be involved in human rights abuses. An obvious problem for the U.S. Government is how to exert pressure on beneficiary governments with respect to certain cases while remaining consistent with AID's overall strategy for the AOJ Program, especially in the context of projects designed to protect judicial independence from both the rest of the judges' own government and from the United States itself.²⁶⁹

Periodic human rights or other political concerns with particular regimes thus present a continuing dilemma. The primary goal of the AOJ Program is to promote the protection of human rights in all instances, in common or "political" crimes, through an effective, independent judiciary, and through a long-term process of attitudinal, gradual change. This requires stable assistance despite erratic political winds in both the United States and in recipient countries. However, the moral legitimacy of the AOJ Program is directly related to the perception that it furthers normative values which both the U.S. and Latin American governments ostensibly share. Primary among those values is protection of the basic rights of the individual. A danger exists that, by tying AOJ assistance so closely to broader U.S. foreign policy goals of democratization, termination of assistance becomes impossible because such termination is tantamount to a statement at the highest political level that the regime is illegitimate or "undemocratic." Such a result would be unfortunate. When either the United States or the beneficiary country loses sight of the central human rights goal, the AOJ Program or the particular project should be terminated. The courage to terminate AOJ projects in such cases or to refuse to funnel all available monies until established goals are achieved is central to the continued health of the AOJ Program.

269. The dilemma is clear from the defense arguments presented at the jury trial of Salvadoran army personnel tried for the 1989 murders of six Jesuit priests at the Central American University. Although that trial resulted in the unprecedented conviction of an army colonel, the highest ranking officer ever to face trial for a human rights crime in El Salvador, the defense attorneys portrayed the case as "an affront to national dignity cooked up under pressure by the United States." Lee Hockstader, *Army Colonel Convicted in Murder of Jesuit Priests*, WASH. POST, Sept. 29, 1991, at A1.

V. CONCLUSION

The AOJ Program of the 1980s differs from prior law and development efforts in operation as well as in terms of strategy. AID's sector assessments and bilateral and regional projects usually address the administration of justice rather than substantive legal reform or changes to legal education. Today's AOJ Program is more likely to involve the efforts of specialists in judicial administration rather than U.S. law professors or lawyers. AID's new strategy and at least some of the resulting AOJ projects are humbler in conception, recognizing the limited assistance that the U.S. legal profession can usefully provide.

Nonetheless, the AOJ Program and law and development efforts share certain fundamental assumptions and values—as well as similar risks of exaggerated expectations for success, and of faulty implementation of strategy. Indeed, problems and delays already have emerged in the implementation of AID's strategy which would not have surprised experienced law and development alumni. Even more troubling is the possibility that the AOJ Program, like its predecessor, will be unable to successfully confront long unresolved dilemmas concerning the relationship between the rule of law and root causes for public dissatisfaction with that rule, especially the problems of economic deprivation and abuse of human rights.

If the AOJ Program begins to address these issues, there is hope, however fragile and frayed, that AOJ efforts may yet exorcise ghosts hovering from the law and development days, and usefully promote the strengthening and independence of Latin American nations' judiciaries. This goal, long desired by many Latin Americans as well as East Europeans, may yet be incorporated into the international bill of human rights²⁷⁰ and should not be disparaged as a mere creature of U.S. foreign policy. In the meantime, the AOJ Program may also have a second, unintended benefit: continuing contact with the legal systems of these countries educates U.S. lawyers about the role of law in society, providing valuable insights for use within the United States.

Consideration of the AOJ Program in light of the flawed law and development legacy also poses issues for those U.S. lawyers and law professors now involved in highly publicized assistance to Eastern Europe. Funded by private organizations or grants

270. See *CSCE Human Dimension*, *supra* note 5, at 42-45.

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from USIA and encouraged by the CSCE process, groups like the ABA and the U.S. Institute for Peace have undertaken exchange programs and other technical assistance designed, among other things, to help draft substantive constitutional provisions and legal codes and to encourage Eastern Europeans to "learn from" U.S. approaches to legal education.²⁷¹ Many of these efforts, implicitly or explicitly based on the relevance of specific U.S. substantive legal models and legal institutions to societies with a civil law tradition emerging from authoritarian rule, resemble prior law and development efforts in Latin America. Because those unaware of prior history may be doomed to repeat it, study of the law and development and AOJ programs may prove rewarding to those now emboldened to promote the "rule of law" in other parts of the world.

271. See *Moscow Document*, *supra* note 5, at 4-8; Schwarzer, *supra* note 5.