

NAFTA: A Criminal Justice Impact Report

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“Put all your eggs in the one basket and — WATCH THAT BASKET.”¹

INTRODUCTION

For economic reasons, the North American Free Trade Agreement (NAFTA)² may very well be in the best interest of the United States.³ Frankly, I am not qualified to say. I am familiar, however,

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¹ LEONARD AND THELMA SPINRAD, *SPEAKER'S LIFETIME LIBRARY* 44 (1987) (quoting MARK TWAIN, *THE TRAGEDY OF PUDD'NHEAD WILSON* (1894)).

² NAFTA is a comprehensive agreement between Canada, Mexico, and the United States the goal of which is “to liberalize trade in goods and services and expand investment opportunities in all three countries.” Ann Low, *Determining NAFTA's Impact on Your Business*, MEX. TRADE & LAW REP. (Oct. 1, 1992), available in LEXIS, World Library, Allwld File. The Agreement phases out, over a period of time, all tariffs on goods originating in Canada, Mexico, and the United States. *Id.* “As envisioned by the United States, NAFTA would create the largest market in the world, consisting of over 360 million consumers and a 6 trillion dollar output.” U.S. DEP'T OF COMMERCE, *NORTH AMERICAN FREE TRADE AGREEMENT: GENERATING JOBS FOR AMERICANS v* (May 1991 update).

The Senate approved NAFTA on November 20, 1993 by a 61-38 margin. H.R. 3450, 103d Cong., 1st Sess., 139 CONG. REC. S16712-13 (1993) (enacted) (indicating that Senate and House of Representatives passed bill in same form). Previously the House had passed NAFTA in a 234-200 vote. H.R. 3450, 103d Cong., 1st Sess., 139 Cong. Rec. H10,048 (1993) (enacted). The pact will become law when all three country members to it formally sign the Agreement and exchange letters. Even after the Agreement is signed, any of the countries may withdraw by giving six months' notice. Helen Dewar, *NAFTA Wins Final Congressional Test*, WASH. POST, Nov. 21, 1993, at A1.

³ For arguments in favor of NAFTA, see generally Sheldon Friedman, *Why a Bad NAFTA is Worse than No NAFTA*, 43 LAB. L.J. 535 (1992); Stephen P. Jacobs,

with issues of criminal justice. My experience in that arena causes me to have serious concerns about NAFTA's potential impact on the U.S. criminal justice system and U.S. law enforcement.⁴

In the volumes of literature being generated on NAFTA and its probable effects, precious little is being written about its effect on the U.S. criminal justice system.⁵ This may be, in part, because it is difficult to predict exactly how NAFTA will affect the U.S., Canadian, and Mexican criminal justice systems. Short-term changes are likely to differ from long-term effects.⁶ Predictions about the effects of changes on criminal justice systems are often wrong even with regard to the most focused of issues.⁷ There is little public

The Nafta: Exports, Jobs, Wages, and Investment, BUS. AM., Oct. 18, 1993, at 3; Low, *supra* note 2, at 10; Merriam Mashatt, *Coast-to-Coast Increases in U.S. Exports and Jobs: Regional Trade with Mexico*, BUS. AM., Oct. 18, 1993, at 6; Sylvia Nasar, *A Primer: Why Economists Favor Free-Trade Agreement*, N.Y. TIMES, Sept. 17, 1993, at A1; Sidney Weintraub, *The Promise of United States - Mexican Free Trade*, 27 TEX. INT'L L.J. 551 (1992). For articles opposed to NAFTA, see generally JEFF FAUX, ECONOMIC POLICY INSTITUTE, BRIEFING PAPER: THE FAILED CASE FOR NAFTA (June 28, 1993); Andrew LePage, *Critics Blast U.S.- Mexico Plan on Environment*, SAN DIEGO BUS. J., Sept. 30, 1991, at 3.

⁴ Prior to joining the Loyola Law School faculty in 1989, I served for eight years as an Assistant United States Attorney for the Central District of California.

⁵ To the extent that there have been writings in the criminal area, they have tended to focus on narrow categories of crimes, such as immigration, drug interdiction, or customs enforcement. See, e.g., Bruce Zagaris & David R. Stepp, *Criminal and Quasi-Criminal Customs Enforcement Among the U.S., Canada and Mexico*, 2 IND. INT'L & COMP. L. REV. 337 (1992) (discussing criminal laws of NAFTA participants with respect to customs enforcement); cf. Leslie S. Potter & Bruce Zagaris, *Toward a Common U.S.- Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT'L LAW. 627, 684-90 (1992) (discussing impact of NAFTA on intellectual crimes and return of stolen cultural property).

Moreover, as noted by Professor Alford, "The debate within the United States about the North American Free Trade Agreement (NAFTA) has been marked by an unfortunate lack of candor, perspective and vision." William P. Alford, *Introduction: The North American Free Trade Agreement and the Need for Candor*, 34 HARV. INT'L L. J. 293, 293 (1992). Ironically, however, even the symposium to which Alford contributes does not address the criminal justice issues that NAFTA raises. *Id.*

⁶ See, e.g., *infra* part II (predicting differences in NAFTA's short-term and long-term effects on immigration and narcotics violations).

⁷ Consider, for example, the predictions about the impact of the federal sentencing guidelines. In passing the Sentencing Reform Act of 1984, Congress and the Sentencing Commission predicted greater uniformity and reduced disparity in the sentencing of federal defendants. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL ch. 1, pt. A3, at 2 (1992)

information as to how U.S., Canadian, and Mexican authorities plan to adapt their enforcement mechanisms to adjust to the increase in trade.

The lack of discussion of NAFTA's effect on the U.S. criminal justice system may stem from political considerations. Currently, the U.S. electorate's two gravest issues are the economy and crime.⁸ Linking reforms in one area to the possibility of an increase in problems in another is likely to be unpopular. Such linkage can expose the hidden costs of NAFTA's reforms.

While unpopular, any comprehensive discussion of NAFTA must address the hidden costs the treaty will impose on the already burdened U.S. criminal justice system. The passage of NAFTA impacts numerous areas of U.S. criminal law enforcement. This Article examines four particular areas.

Part I of this Article examines NAFTA's possible effect on white collar crimes and prosecutions. NAFTA may act as a form of deregulation for U.S. industries, including financial institutions. If so, then the recent savings and loan crisis may provide some warning as to NAFTA's detrimental effect on the enforcement of financial and regulatory laws. Part II of this Article examines NAFTA's likely effect on narcotics and immigration law, two primary areas of criminal violations likely to be impacted by NAFTA's passage. The evidence available suggests that, at the very least in the short range, NAFTA will not reduce these criminal violations. In Part III, this Article addresses the criminal violations discussed within NAFTA itself to ascertain whether there has been sufficient consideration

(providing Basic Approach and Policy Statement); *see also* Peter A. Ozanne, *Judicial Review: A Case for Sentencing Guidelines and Just Deserts*, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 177, 189-90 (Martin L. Forst ed., 1982) (discussing appeals process as part of sentencing guidelines system for reducing sentence disparity). The results, however, have not been true to these predictions. Instead, disparity has continued because Congress failed to consider the prospect of disparity among the appellate courts. *See* Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 626, 656 (1992).

⁸ *See, e.g.*, Reuters, *Congress Returns — Problems Never Left: Battles Ahead on Health Care, Trade, Crime*, S.F. CHRON., Sept. 6, 1993, at A3 (stating that Congress returned from summer recess to "face more fights over trade, health care, crime, and other controversial issues."). In particular, NAFTA was a critical issue for the Clinton Administration. *See* Thomas B. Edsall, *NAFTA Debate Reopens Wounds in the Body of the Democratic Party*, WASH. POST, Oct. 24, 1993, at A4 (stating that Democrats argue that they "can protect the interests of core constituents by providing a base of domestic 'security' programs."); Kim Masters, *Putting NAFTA on the Table*, WASH. POST, Sept. 17, 1993, at D2.

and articulation of those violations. These include laws regulating intellectual property and the environment. Finally, Part IV of this Article considers whether the U.S. criminal justice system may benefit from increased U.S. influence both on Mexico in general, and, perhaps, on the Mexican criminal justice system in particular.

The decision to pass NAFTA was a political and economic one. Its impact, however, will extend beyond these realms. Thus, it would be irresponsible not to anticipate NAFTA's effect on the U.S., Canadian, and Mexican criminal justice systems.⁹ This Article focuses on how the treaty will affect criminal justice issues in Mexico and the United States.¹⁰

I. NAFTA, DEREGULATION, AND ITS IMPACT ON WHITE COLLAR CRIME

In the 1980s, America suffered a widespread collapse of its savings and loan institutions.¹¹ Discovery of criminal activities within these institutions came too late. By the time the Justice Department discovered and prosecuted the frauds, only a small portion of the losses could be recovered.¹²

⁹ Although this Article surveys several key areas of criminal justice that may be affected by NAFTA, it is by no means comprehensive. In addition to the areas addressed, NAFTA raises very important issues in the areas of custom law, labor violations, tax law, and general public safety. For studies of NAFTA's impact on customs enforcement, see *Along the U.S.-Mexico Border: Increased Traffic, Overused Facilities*, MEX. TRADE & LAW REP., Dec. 1, 1991, at 3; Robert T. Givens & Rayburn Berry, *Customs Enforcement and the NAFTA*, 24 ST. MARY'S L.J. 903 (1993); Zagaris & Stepp, *supra* note 5.

¹⁰ Because Canada is also a party to NAFTA, it would be worthwhile for the Department of Justice to conduct a similar review of how, due to the change in the relationship between Canada and the United States, NAFTA affects certain Canadian and U.S. criminal cases.

¹¹ See generally Carl Felsenfeld, *The Savings and Loan Crisis*, 59 FORDHAM L. REV. S7 (1991); Bruce A. Green, *After the Fall: The Criminal Law Enforcement Response to the S & L Crisis*, 59 FORDHAM L. REV. S155 (1991); Richard T. Pratt, *The Thrift Crisis: Discussion and Evaluation of Its Causes and the Proposed Reforms*, 9 ANN. REV. BANKING L. 359 (1990).

¹² See Robert A. Rosenblatt, *U.S. Recoups Only Fraction of Funds From S & L Frauds*, L.A. TIMES, Feb. 7, 1992, at A5 (recounting that by early 1992, U.S. government had collected only \$365,000 of \$83.6 million in court ordered restitution and fines in major fraud cases resulting from savings and loan fraud).

The fundamental cause of the 1980s failure of the savings and loan industry was deregulation.¹³ Like NAFTA, “[d]eregulation was seen as an opportunity for improving the overall national financial system”¹⁴ because the traditional approach to the industry was seen as “passe.”¹⁵ “True to the word of its proponents, deregulation changed the approach of the Savings and Loan industry completely.”¹⁶ The result, however, was that the traditional methods used to prevent financial institutions from engaging in high-risk investments were abandoned. Those inclined to exploit the new system were free to do so.

A more detailed analysis of deregulation’s disastrous effects on the savings and loan industry indicates that deregulation created several particular dangers, some of which may be created by NAFTA’s implementation as well. First, deregulation led to changes in traditional accounting and reporting systems.¹⁷ The old accounting principles were not designed to uncover the high-risk activities that proliferated after deregulation. By the time reporting mechanisms caught up with the new manner in which savings and loans operated, the victims of fraud crimes had lost hundreds of millions of dollars.¹⁸

NAFTA, by design, will increase U.S. companies’ participation in foreign markets. Business abroad is unlikely to be business as usual. For individuals or companies inclined to engage in fraud, the differences in countries’ marketing, accounting, and business practices provide excellent opportunities for concealing assets. As with the savings and loan crisis, by the time U.S. regulators sort out how much the discrepancies are due to differences in business practices versus how much are due to illegal or improper behavior, the fraud may be irremediable.

¹³ See Fred E. Case, *Deregulation: Invitation to Disaster in the S & L Industry*, 59 FORDHAM L. REV. S93, S93 (1991) (“Rather than streamlining the overburdened banking system, deregulation dismantled an effective home lending industry and produced a financial problem of disastrous proportions.”).

¹⁴ *Id.* at S96.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Ponzi Would Love It*, WALL ST. J., Feb. 1, 1989, at A14 (indicating that accounting and reporting practices that followed deregulation were highly unorthodox).

¹⁸ Case, *supra* note 13, at S101. At the institution Case was appointed to manage, application of proper reporting systems showed a reduction of the institution’s assets from \$1.2 billion to \$600 million. *Id.*

U.S. companies may be both perpetrators and victims of fraud. "Mexico's banks, privatized by President Carlos Salinas de Gortari two years ago after a decade of government ownership, have yet to jettison many of the practices that have given them a reputation locally as inefficient and, often, corrupt."¹⁹ Mexican banks lack government oversight and independent auditing.²⁰ Even Mexican officials have recognized that Mexico's system is ripe for fraud. "It is not just a lack of government oversight of banking practices and absence of independent auditing . . . , problems include collusion between bank executives and Mexican businessmen. . . ."²¹ With the influx of U.S. and Canadian banks into Mexico, as well as foreign reliance on business with local Mexican banks, there is a high probability that corruption in financial institutions will increase.²²

A second cause of the savings and loan crisis was law enforcement's inability or lack of inclination to investigate and prosecute wrongdoing by financial institutions and their officers.²³ White collar crime investigations "often involve complicated paper trails leading to highly sophisticated schemes that disguise illegality under the veneer of legitimate business and financial transactions."²⁴ Allocation of resources to prosecute these cases drains resources away from other high priority cases, such as violent crimes and narcotics.²⁵ Furthermore, law enforcement perpetually lacks the resources to investigate such sophisticated crimes. For example, it was not until 1989 that Congress authorized spending \$65 million

¹⁹ Tod Robberson, *Mexico's Banking Afflicts Investors: Corruption Said To Be Compounding Risk*, WASH. POST, Apr. 30, 1993, at A35.

²⁰ *Id.*

²¹ *Id.* In the first quarter of 1993 alone, 83 criminal complaints were filed against Mexican "bank officials accused of fraud, embezzlement or other misuse of funds." *Id.*

²² For prosecutions in the United States, the Foreign Corrupt Practices Act will be a primary tool for enforcement of fair and accurate corporate accounting with respect to payments abroad. See 15 U.S.C. §§ 78a-78ff (1988). This law will also allow prosecution for corporate bribery of foreign officials as proscribed by the Act. 15 U.S.C. §§ 78dd & 78ff (1988).

²³ See generally Green, *supra* note 11, at S155 ("Government estimates of the number of savings and loan failures caused by insider wrongdoing have ranged . . . from 'twenty-five to thirty percent' of the failed thrifts to 'at least one-third' to forty percent to sixty percent to a hundred percent in the cases of 'large failed thrifts.'") (citations omitted).

²⁴ *Banking Fraud: Hearing Before the Senate Judiciary Comm.*, 101st Cong., 2d Sess. (July 24, 1990) (providing statement of Dick Thornburgh, United States Attorney General) available in LEXIS, Nexis Library, Fednews File.

²⁵ Green, *supra* note 11, at S172-73.

for the investigation and prosecution of financial institutions. By that time, corruption in the savings and loan industry had become so widespread that the impact of the new resources was not immediately felt.²⁶

If history is any guide, there will be a similar lack of resources to monitor and check potential criminal behavior in industries and institutions expanding their operations under NAFTA.²⁷ Already, corruption in the Mexican judiciary has seriously impeded efforts to bring corrupt businessmen to justice.²⁸ Despite the high probability of corruption in the 2,000 new foreign banks expected to phase-in operations in Mexico, neither the United States nor Mexico have invested the substantial additional resources that will be needed to assist law enforcement in monitoring these investments.

Moreover, even if such resources are forthcoming, U.S. law enforcement will still be faced with the informational hurdle of deciphering complex foreign business practices. Analysts predict that U.S. companies will invest in Mexican infrastructure, manufacturing, agricultural, computer, automotive, and service areas.²⁹ Many of these investments will take advantage of a variety of intricate and complicated legal associations, including joint ventures.³⁰

²⁶ Bruce A. Baird, *Criminal Investigative Powers Under FIRREA*, 6 REV. BANKING & FIN. SERV., Sept. 12, 1990, at 21 (citing *Oversight Hearing on Prosecuting Fraud in the Thrift Industry: Impact of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 before the Subcomm. on Criminal Justice of the House Judiciary Comm.* (May 11, 1990)).

²⁷ See Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391, 445 (1993) ("The most frequent criticism of the Mexican legal system has to do with inadequacy of law enforcement.").

²⁸ Robberson, *supra* note 19. Some corrupt Mexican officials have avoided prosecution by fleeing to the United States. For example, just recently United States Immigration and Naturalization Officials discovered Fernando Rodolpho Martinez, wanted in Mexico for a massive Mexican land fraud scheme he employed while managing a state-run resort development. Sebastian Rotella, *Fugitive Mexican Official Fighting Extradition*, L.A. TIMES, Feb. 28, 1994, at A3.

²⁹ Phillip E. Koehnke, *North American Free Trade: Mexico, Canada and the United States*, 12 CHICANO-LATINO L. REV. 67, 86 (1992) (citing USITC, REVIEW OF TRADE INVESTMENT LIBERALIZATION MEASURES BY MEXICO AND PROSPECTS FOR FUTURE UNITED STATES MEXICAN RELATIONS, PHASE II: SUMMARY OF VIEWS ON PROSPECTS FOR FUTURE UNITED STATES-MEXICAN RELATIONS, 1-18 (Oct. 1990)).

³⁰ See *id.* (discussing direct investment in form of joint ventures).

U.S. investigators will have to master foreign systems of commerce, banking, and investment in order to detect and apprehend fraud.³¹ Alternatively, they will have to rely on foreign law enforcement to assist in investigations.

In the past few years, U.S. law enforcement has experienced difficulties in investigating and prosecuting criminal violations that occurred in Mexico. Law enforcement relations seemed to hit a low in April 1990 when U.S. officials resorted to kidnapping a suspect because Mexican officials would not assist in formally returning him to the United States for prosecution.³² U.S. officials have repeatedly charged that Mexican authorities are corrupt and disinterested in enforcing the law. The negative relations between U.S. and Mexican law enforcement will make it difficult both to protect U.S. interests and to ensure that U.S. companies do not commit crimes abroad for which they would be apprehended in the United States.³³

³¹ The problems for American law enforcement in apprehending monetary crimes may be particularly acute in the area of money laundering. "Money laundering is like a water balloon, . . . You step on one part of the balloon and it will blow up in another part. And the balloon won't pop." Mark Sell, *Chasing Dirty Money*, LEGAL TIMES, July 19, 1993, at 35 (quoting Michael McDonald of Internal Revenue Service).

³² *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). The trial court found that Drug Enforcement Administration Agents, although not directly involved in the abduction, were responsible for the kidnapping. *See id.* at 2190 (citing *United States v. Caro-Quintero*, 745 F. Supp. 599, 609 (C.D. Cal. 1990)). For a detailed discussion of the case and its implications, see Philip B. Heymann & Ian H. Gershengorn, *A Missed Opportunity*, 4 CRIM. L.F. 155 (1993).

³³ *See, e.g.*, Mike Royko, *Mexico Has Limits on What It Trades*, CHI. TRIB., Oct. 12, 1993, at 3N (quoting Bill Goold, aide to Representative George Brown of California). Bill Goold stated:

There is a 1979 extradition treaty that says both countries are supposed to extradite those accused of 31 different felonies. There was a provision added later, for Mexico, that says either they extradite or prosecute the defendant in Mexican courts.

But they're not doing either. Their position is that their constitution forbids extradition. But it's also a carry-over from the 'anti-gringo' legacy in Mexico. . . .

We have extradited our citizens down there, handed people over to them. They've never given us anybody. The FBI in our region said they have dozens of cases involving Mexican nationals wanted for murder, aggravated assault and rape, and they can't get any help.

While some are pessimistic about NAFTA's effects on aggressive law enforcement, especially of white collar crime, others have suggested that NAFTA may actually decrease the amount of corruption in Mexican institutions by privatizing businesses previously dominated by the government.³⁴ The wave of privatizations began in the early 1980s and has resulted in almost 1,000 public corporations going to the private sector. Those who support NAFTA argue that privatization, together with a 1989 "administrative simplification" law reducing government red tape, will provide less opportunity for corrupt government officials to demand kickbacks.³⁵

Opponents, however, have a response to these optimistic predictions. NAFTA's opponents charge that privatization has only provided more opportunities for kickbacks and that corruption will continue as usual.³⁶ As one political scientist stated, "In theory, it is true that an economic opening should help fight corruption. In practice, it doesn't work that way."³⁷

Part of the problem may be that even when U.S. and Mexican law enforcement agree to investigate and prosecute crimes aggressively, Mexican laws often deny law enforcement those tools that have been most effective in prosecuting white collar crime. For example, in 1992 a Mexican reporter published a story detailing how a Macuspana city councilman had misappropriated municipal funds.³⁸ Not long thereafter the reporter ended up in jail, convicted of defamation under an unusual Mexican law that prohibited him from using evidence of the councilman's guilt in his own defense. In the United States, whistle-blowers are encouraged to come forward with information about corruption;

But if we can't get them to cooperate with us in tracking down murderers and rapists, what confidence should American businesses have in the willingness and ability of Mexican officials to protect our interests?

Id. (emphasis added).

³⁴ See Andres Oppenheimer, *Mexicans Hope Accord Can Help Curb Corruption*, MIAMI HERALD, Oct. 19, 1993, at 13A.

³⁵ See, e.g., *id.* (reporting that Salinas government officials have argued that stricter enforcement of anti-corruption laws and regulations have led to sanctions against 60,000 public employees, including more than 5,500 who face criminal charges).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Ted Bardacke, *Mexico's Application of Defamation Law Blows Away Whistle-Blowers*, WASH. POST, Dec. 30, 1993, at A16.

in Mexico, they are "vilified and prosecuted," under anti-defamation laws.³⁹

Consider the effect of such laws on foreign businessmen who are attempting to help law enforcement curb corruption. Cooperating individuals may be treated like Kaveh Moussavi. Moussavi, a former London-based representative of IBM, was indicted in Mexico City on charges of defamation and "exerting moral pressure," after testifying before U.S. congressional committees regarding extortion by Mexican officials during bidding on a large government contract.⁴⁰ Despite the fact that NAFTA had just passed, Mexican authorities felt free to pursue the charges against Moussavi. Broad Mexican defamation laws, which deter reporting, may therefore serve as a further impediment to aggressive enforcement of laws against white collar crime.

Attorney General Janet Reno has stated that she believes that NAFTA will increase the United States' and Mexico's ability to fight a variety of crimes.⁴¹ She has offered no specifics, however, as to why she believes this. To the contrary, if NAFTA follows the pattern of deregulation in the U.S. savings and loan industry, and law enforcement efforts are hampered by hostile Mexican defamation laws, there should be abundant white collar crime for both U.S. and Mexican officials to address.

II. NAFTA'S EFFECTS ON NARCOTICS AND IMMIGRATION VIOLATIONS

Of prime concern in criminal justice circles is NAFTA's effect on the already overwhelming problems of narcotics and immigration violations in the United States.⁴² Politicians have asserted that

³⁹ *Id.* At least 16 states in Mexico declare in their anti-defamation laws that regardless of whether an allegation is "true or false, proven or unproven," it is defamatory if it "causes dishonor." *Id.* Under such a provision, almost all whistle-blowers would be subject to criminal punishment.

⁴⁰ *Id.*

⁴¹ Paul Anderson, *Reno Pact a Crime-Fighting Tool: She Meets with Salinas on Lobbying Trip for NAFTA*, MIAMI HERALD, Oct. 12, 1993, at 4A.

⁴² For years, narcotics trafficking and illegal immigration have posed significant problems for U.S. law enforcement. An estimated 200,000 to 300,000 illegal immigrants enter the United States each year. Alan C. Miller, *Law Change Produces Big Hike in Legal Immigration*, L.A. TIMES, Dec. 14, 1993, at A3. The drug pipeline to the United States has also increased. From 1991 to 1992, there was a 125% increase in cocaine seized in the United States. Jonathan Gaw, *Border Drug Seizures Setting a Record Pace*, L.A. TIMES, Apr. 17, 1992, at B8. Problems in both of these areas recently prompted five U.S.

NAFTA will stem the tide for both of these crimes.⁴³ However, the evidence is to the contrary.

A. *Narcotics Violations: NAFTA — The North American Drug Trade Agreement*⁴⁴

On July 26, 1989, the United States Department of Customs reported that, "Mexico continues to be a major producer of both opium and marijuana, and the single most active transit country for cocaine from South America" ⁴⁵ U.S. Embassy officials in Mexico estimate that seventy percent of the cocaine coming into the United States enters via the Mexican border.⁴⁶ Thus, Mexico has a critical role to play in limiting the drug trade.

Despite hopes to the contrary, Mexican officials have yet to demonstrate significant enforcement measures to stem the ever-growing tide of drugs to the United States.⁴⁷ In fact, it was recently revealed that 250 of Mexico's 2,200 federal agents collaborate with drug traffickers.⁴⁸ By opening the border, NAFTA will provide increased opportunity to smuggle drugs through additional commerce transports. A former U.S. Customs Commissioner predicts

Senators to identify illegal immigration and drug trafficking as among the most serious problems their citizenry face. Ronald J. Ostrow & Patrick J. McDonnell, *2 Senators Assail Immigration Initiative*, L.A. TIMES, Feb. 4, 1994, at A3.

⁴³ See *NAFTA: Your Representatives Explain Their Votes*, MIAMI HERALD, Nov. 19, 1993, at 27A (recounting several politicians' viewpoints).

⁴⁴ U.S. Customs and Drug Enforcement Agency personnel now openly refer to NAFTA as the "North American Drug Trade Agreement," thereby reflecting their skepticism over the positive impact that the Agreement will have on drug enforcement efforts. William von Raab & F. Andy Messing, Jr., *Will NAFTA Free the Drug Trade? Cocaine Businessmen Too Will Exploit Open Borders*, WASH. POST, Aug. 15, 1993, at C2.

⁴⁵ Frances L. Ansley, *North American Free Trade Agreement: The Public Debate*, 22 GA. J. INT'L & COMP. L. 329, 449 (1992).

⁴⁶ Von Raab & Messing, Jr., *supra* note 44; *see also* Sell, *supra* note 31 ("Mexico is the transfer point for as much as two-thirds of the cocaine consumed in the United States.").

⁴⁷ Von Raab & Messing, Jr., *supra* note 44. A 1993 Congressional mission to Mexico reported that "soft-enforcement" measures, such as seizure and eradication of drugs, were being renewed in Mexico but that "hard-enforcement," such as the arrest of significant drug figures and the crackdown on money-laundering or drug enterprises, were not pursued. *Id.*

⁴⁸ JUAN E. MENDEZ, HUMAN RIGHTS WATCH, HUMAN RIGHTS IN MEXICO 3 (1993) (testimony before the House Comm. on Small Bus., June 29, 1993).

that "NAFTA . . . is likely to promote a quantum increase in drug availability."⁴⁹

More disturbingly, some predict that there will also be an increase in drug-related violence as narcotic cartels battle over the new routes of commerce.⁵⁰ U.S. law enforcement has already verified that "Colombian cartels are buying up businesses in Mexico in anticipation of the North American Free Trade Agreement."⁵¹ Ironically, as the nation debated the passage of NAFTA, Cardinal Juan Jesus Posadas Ocampo and six other innocent bystanders were caught in the crossfire of two feuding drug factions in a shoot-out at Guadalajara International Airport.⁵² The epidemic of narcotics trafficking, drug-induced corruption, and violence continues and nothing in NAFTA explicitly addresses the problem.⁵³

Nonetheless, Attorney General Janet Reno has predicted that NAFTA will stem the flow of drugs into the United States.⁵⁴ This prediction is based largely on the hope that better relations between U.S. and Mexican law enforcement will accompany increased trade between the two countries. As the Mexican economy grows, there will be less incentive to rely on illicit businesses such as drugs for economic support.

Both predictions, those in support of and against NAFTA, are probably correct. In the long term, there may be a reduction in drug trade if NAFTA is economically successful. The short-term effects, however, are not promising. It is unlikely that drug traffickers will ignore increased, and easier, routes of distribution.

⁴⁹ Von Raab & Messing, Jr., *supra* note 44. William von Raab is a former U.S. Customs Commissioner. F. Andy Messing, Jr. is the executive director of the National Defense Council Foundation. *Id.*

⁵⁰ *See id.* (recounting destructive cross-fire between feuding drug factions in Guadalajara International Airport).

⁵¹ Sell, *supra* note 31.

⁵² Von Raab & Messing, Jr., *supra* note 44.

⁵³ Although NAFTA itself does not address anti-narcotics actions, President Salinas, in an effort to show good faith, increased resources devoted to Mexico's war on drugs from \$37 million in 1989 to \$77 million in 1991. Mexico also reformed some of its laws on money-laundering and drug-related financial activity. OFFICE OF PUBLIC COMMUNICATION, BUREAU OF PUBLIC AFFAIRS, U.S. DEPT. OF STATE, U.S. - MEXICAN COOPERATION & NAFTA 3 (July 31, 1992).

⁵⁴ Janet Reno, Speech Before University of San Diego graduates (Oct. 7, 1993) *available in* LEXIS, World Library, Allwld File.

B. Immigration

Both sides of the NAFTA debate agree that while NAFTA's long-term effects may strengthen the Mexican economy and therefore provide an inducement for Mexican nationals not to immigrate to the United States, the short-term effect of the Agreement is that illegal immigration will increase for the next five to ten years.⁵⁵ The maquiladora program⁵⁶ demonstrated such a short-term effect. "People from all over Mexico are drawn to these factories; when

⁵⁵ Thomas J. Espenshade & Dolores Acevedo, *NAFTA's Trojan Horse*, N.Y. TIMES, Sept. 13, 1993, at A21; Bob Filner, *Perspective on NAFTA: A 'No' Vote From the Front Lines*, L.A. TIMES, Oct. 28, 1993, at B7; see also Jorge G. Castaneda & Rafael Alarcon, *Perspective on Free Trade: Workers Are a Commodity, Too*, L.A. TIMES, Apr. 22, 1991, at B5 ("A free-trade agreement should include emigrant workers . . . because it is in the interests of both countries to do so."). Those who predict a continued flow of immigration to the United States base their prediction on the continued wage differences between the countries. *Id.*

Immigration issues can be viewed, of course, in both a criminal and civil context. Therefore, it is important to analyze them under both approaches. See, e.g., Kevin Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937 (1994); Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN L. REV. 115 (1992). It is unrealistic, however, to think of immigration cases as merely civil or administrative problems. In 1990, at least 28% of the circuit courts' immigration caseload involved review of criminal immigration prosecutions. *Id.* at 141, Fig. 2. Twenty percent of the district courts' immigration caseload involved criminal prosecutions. *Id.* In fact, the number of criminal prosecutions for immigration violations tripled between 1985 and 1990. *Id.* at 161.

There are a wide range of criminal immigration violations prosecuted by the Department of Justice. They include *inter alia* illegal entry of aliens (8 U.S.C. § 1323 (Supp. IV 1992); 8 U.S.C. § 1324 (1988)); reentry of deported aliens (8 U.S.C. § 1326 (1988)); transporting, harboring, and inducing illegal aliens (8 U.S.C. § 1325 (Supp. IV 1992)); and false statements and misuse of visas and entry permits (18 U.S.C. § 1001 (1988); 18 U.S.C. § 1546 (1988)). The Department of Justice's view of immigration offenses as a criminal justice issue is evidenced by its annual statistics on the number of criminal immigration violations. See, e.g., U.S. IMMIGRATION AND NATURALIZATION SERVICE, 1989 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 134 (indexing 12,379 criminal immigration violations in 1989). Thus, even if illegal immigrants commit no crimes other than those accompanying their illegal entry, their immigration violations under present American laws still raise significant concerns for the criminal justice system.

⁵⁶ The maquiladora program refers to the program of allowing foreign companies to establish plants in border communities in Mexico. See Ansley, *supra* note 45, at 336-42 (explaining maquiladoras). The program, initiated in 1965, allows U.S. companies to import partially-made goods into Mexico from

they find the wages too low to support a family, they keep moving north, across the border and into the United States."⁵⁷ Although NAFTA will place U.S. and Canadian industries throughout Mexico, not just at its northern borders, there are similar estimates regarding the illegal immigration it will cause.

A conservative estimate by a UCLA researcher sees 850,000 families working in Mexican agriculture displaced by NAFTA's removal of government subsidies; 600,000 of those families are expected to make their way to the United States. If we assume four to five people per family, we can expect an increase in illegal immigration of 2.4 million to 3 million — in other words, we can expect illegal immigration to increase by as much as 100% [with NAFTA's approval].⁵⁸

Realistically, law enforcement will never be able to control completely the 2,000-mile border between the United States and Mexico.⁵⁹ Accordingly, NAFTA will pose a serious challenge to the U.S. Border Patrol trying to control illegal entry into the United States. However, unlike other criminal justice issues affected by NAFTA, Congress has recognized that the passage of NAFTA must be supported by additional funding to U.S. border patrol agents. In November 1993, Congress approved a \$45-million funding package providing up to 600 new agents for the 4,100-agent Border Patrol.⁶⁰ Attorney General Janet Reno has also called for more efficient deployment of the Border Patrol. Illegal immigration will continue under NAFTA. Until there are dramatic changes in the Mexican economy, there will be an incentive to immigrate to the United States. Mexican officials traditionally have done very little to stem this tide⁶¹ and no terms are included in NAFTA to require their additional commitment. Thus, the U.S. criminal justice system is likely to bear the additional cost NAFTA will impose at least in the short term on this nation's illegal immigration problems.⁶²

the United States duty-free, finish them in Mexico with Mexican labor, and then re-export them to the United States without customary tariffs. *Id.*

⁵⁷ Filner, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ Sebastian Rotella, *Costs, Risks of Halting Illegal Immigrants Debated*, L.A. TIMES, Nov. 20, 1993, at A1.

⁶⁰ *Id.*

⁶¹ *Id.* ("Mexican authorities . . . rarely interfere with those trying to enter the United States . . .").

⁶² This is not to say that the criminal justice system will bear such costs alone. However, the criminal justice system shares in the costs of illegal immigration. See generally, Dianne Klein, *A Hit or Miss Approach to Curbing*

III. CRIMINAL ENFORCEMENT TERMS IN NAFTA

NAFTA is a remarkable document—not just for what it includes, but also for its omissions. The text of the Agreement seeks to protect only a narrow group of crimes with the power of criminal law enforcement—intellectual property offenses.⁶³ Environmental vio-

Deportable Felons, L.A. TIMES, Nov. 27, 1993, at A1 (estimating \$500 million cost for state to imprison criminal immigrants); *Special Supplement: Full Text of Clinton's 1995 Budget, Submitted to Congress Feb. 7, 1994*; *Personal Security: Crime, Illegal Immigration, and Drug Control*, DAILY REPORT FOR EXECUTIVES (BNA) Feb. 9, 1994 [hereafter *Clinton's 1995 Budget*] (estimating that foreign-born nationals represent approximately 11% of inmate population and 25% of federal inmate population).

There are piecemeal efforts to reduce the cost of illegal immigration on the United States. For example, Kathleen Brown, California State Treasurer and candidate for governor, has joined others in a call to return immigrants who commit crimes in the United States to serve their sentences in Mexico. See Roberto Suro, *House Hearing in Los Angeles Focuses on Illegal Immigrants; California Officials Seek Promised U.S. Help With Costs*, WASH. POST, Sept. 1, 1993, at A2; see also David Lauter & Ronald J. Ostrow, *Mexico Prison Deal Is Linked to NAFTA Votes*, L.A. TIMES, Nov. 12, 1993, at A1 (indicating that several politicians linked immigrant crimes issues to NAFTA). Clinton's proposed 1995 budget also includes \$55 million to enable the INS to deport up to 20,000 more criminal aliens annually. *Clinton's 1995 Budget*, *supra*. Accordingly, one approach has been to push for stepped up deportation of convicted illegal immigrants and increased use of the 1977 prisoner-exchange treaty between Mexico and the United States. See Elise Ackerman, *Mexican Officials Visit San Quentin Death Row*, S.F. CHRON., Aug. 7, 1993, at B4. Currently, only 727 Mexican and 152 U.S. prisoners have been repatriated since the pact went into effect. Reuters, *Mexico, U.S. Conduct 51st Prisoner Exchange*, Sept. 12, 1992.

A less piecemeal approach would be to reexamine, in light of NAFTA's passage, America's overall position on migration issues and immigration laws, see Johnson, *supra* note 55, as well as the legitimacy of claims that illegal immigration contributes to America's crime problems. Many view such allegations with skepticism and believe they are based on anti-immigrant sentiment. See generally Jake Henshaw, *Report: Up to 15 Percent of Calif. Inmates are Illegal Aliens*, Gannett News Service, Mar. 21, 1993; Klein, *supra*, at A1; Ronald J. Ostrow, *INS Assailed for Not Deporting Immigrant Criminals*, L.A. TIMES, Nov. 19, 1993, at A1.

⁶³ See generally Frank J. Garcia, *Protection of Intellectual Property Rights in the North American Free Trade Agreement: A Successful Case of Regional Trade Regulation*, 8 AM. U. J. INT'L L. & POL'Y 817 (1993) (discussing NAFTA's intellectual property provisions in detail); Arthur Wineburg, *Levelling the Intellectual Property Playing Field: NAFTA Looks to Smooth the Rough Edges of High-Technology as Products and Information Flow Across Geographic Borders*, THE RECORDER, Nov. 3, 1992, at 8 (summarizing patent, trademark, copyright, and other design provisions of NAFTA). There are a variety of intellectual

lations,⁶⁴ a source of grave concern for both proponents and opponents of the Agreement, are not articulated.⁶⁵ Certainly, “[w]ithout uniformly strong enforcement in all three NAFTA nations, there is the potential for increased migration of “dirty” industries to nations with lax enforcement, and for increased environmental degradation.”⁶⁶ Given the importance of environmental concerns, it is risky to have entrusted enforcement of environmental laws to a proposed supplemental agreement.⁶⁷ Mexico has neither the tradition nor

property provisions in NAFTA. These provisions do not, however, set forth specific criminal offenses and penalties. Rather, they rely on each party to enact laws to punish violations of intellectual property laws. *See, e.g.*, North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 1717, 32 I.L.M. 605, 678 [hereafter NAFTA]. Article 1717(1) states:

Each Party shall provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Each Party shall provide that penalties available include imprisonment or monetary fines, or both, sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity.

Id.; *see also* NAFTA, art. 1707, 32 I.L.M. at 672., which states:

Within one year from the date of entry into force of this Agreement, each Party shall make it:

(a) a criminal offense to manufacture, import, sell, lease or otherwise make available a device or system that is primarily of assistance in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal.

Id.

⁶⁴ NAFTA creates a range of environmental concerns from importing goods to the United States that have been subject to lower health and safety standards to the physical degradation of the U.S.-Mexico border area. *See* Michael Scott Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 268-80 (1992).

⁶⁵ NAFTA includes some environmental provisions relating directly to subjects covered in the Agreement. *See, e.g.*, NAFTA, *supra* note 63, art. 104 and annex 104, 32 I.L.M. at 297-98 (preserving Parties' rights under international environmental and conservation agreements). Most of the laws regarding the enforcement of environmental standards, however, have been left to subsequent, collateral agreements. *See* Zamora, *supra* note 27, at 419-26 (describing bilateral programs of cooperation and technical assistance anticipated by NAFTA negotiators).

⁶⁶ Robert Housman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593, 593 (1993).

⁶⁷ For details and a critical analysis of the various supplemental proposals, *see* Xaviar Carlos Vasquez, *The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L. J. 357, 374-78 (1993).

judicial mechanisms to ensure aggressive and prompt enforcement of environmental laws.⁶⁸

Moreover, even to the extent that NAFTA addresses intellectual property crimes, its terms may prove to be woefully inadequate.⁶⁹ Consider, for example, Article 1717. In that provision of the Agreement, the parties state that "Each Party shall provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale."⁷⁰ NAFTA, however, fails to provide a definition of trademark or copyright violations, a statement of the penalties, or a deadline as to when each party shall enact appropriate legislation. The treaty relies on intellectual property laws drafted elsewhere. Similarly, in another provision of NAFTA, the parties have simply agreed that to the extent present laws are inadequate, they will draft laws to criminalize the sale of decoding satellite systems.⁷¹

While U.S. law has long prohibited intellectual property crimes,⁷² Mexican Industrial Property laws are relatively new and untested.⁷³ It was only in 1991 that the Mexican authorities reformed their copyright law to expand coverage and enforcement of copyright laws in Mexico.⁷⁴ Not only do experts anticipate serious problems

⁶⁸ See Bruce Zagaris, *The Transformation of Environmental Enforcement Cooperation Between Mexico and the United States in the Wake of NAFTA*, 18 N.C. J. INT'L L. & COM. REG. 61, 104-11 (1992) (detailing Mexico's enforcement policies and practices).

⁶⁹ NAFTA's approach to intellectual property laws involves requiring each country to enact its own laws to prosecute international property law violations. The Agreement itself does not endeavor to define such laws or resolve tensions among countries in the enforcement of such laws. See generally George Y. Gonzalez, *An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement*, 34 HARV. INT'L L. J. 305 (1993).

⁷⁰ NAFTA, *supra* note 63, art. 1717(1), 32 I.L.M. at 678.

⁷¹ *Id.* art. 1707(b), 32 I.L.M. at 672.

⁷² See generally, MARSHALL LEAFFER, *Historical Overview of Copyright, UNDERSTANDING COPYRIGHT LAW* 4-10 (1989) (providing historical overview of copyright law from Constitution to 1976 Copyright Act); MELVILLE B. NIMMER & DAVID NIMMER, *Copyright Timeline*, 1 NIMMER ON COPYRIGHT T-1 to T-4 (1993) (providing timeline history of U.S. copyright law). The criminal copyright laws are currently set forth in Title 17 of the United States Code. See 17 U.S.C. 506 (1993).

⁷³ Zamora, *supra* note 27, at 416-17 (emphasizing that Mexican law reforms are fairly recent).

⁷⁴ See Garcia, *supra* note 63, at 825 ("Prior to 1991, Mexico had been identified as one of seven countries with the largest pirate industries and the least effective [intellectual property] protection."). For a summary of changes

with the enforcement of Mexican intellectual property laws,⁷⁵ but there is no guarantee that these laws are specific enough to survive *ex post facto* challenges by those foreign companies charged after NAFTA goes into effect.⁷⁶ Accordingly, U.S. and Mexican companies may begin trade under NAFTA with only limited protection for copyright, patents, and other types of intellectual property. There is certainly no guarantee that Mexico will have in place a criminal prosecution system that will “achieve the results desired by U.S. negotiators.”⁷⁷

IV. CROSS-POLLINATION OF CRIMINAL LAWS

The final effect of NAFTA may be the cross-pollination of ideas and practices in the U.S. and Mexican criminal justice systems. On paper, the Mexican criminal justice system protects many of the same rights as U.S. laws.⁷⁸ The practices in Mexico, however, are

NAFTA made in intellectual property laws, see Ken Yoshida, *Intellectual Property: How NAFTA Affects Patent Laws*, LEGAL INTELLIGENCER, Nov. 23, 1993, at 9; see also Ley Federal de Derechos de Autor [Federal Law on Rights of an Author], D.O., Dec. 31, 1956, at 21, amended by D.O., July 17, 1991, at 40; David R. Medina, *Derecho de Law Propriedad Industrial e Intelectual*, EL DERECHO EN MEXICO, UNA VISIA DE CONJUNTO 877, 958-98 (1991) (discussing Mexico's copyright law as amended).

⁷⁵ See Zamora, *supra* note 27, at 417 (warning that even with the enactment of criminal intellectual property laws, “[t]he enforcement provisions of Chapter 17 will indeed require a major change in Mexican law.”). Zamora states:

For one thing, Mexico lacks the trained personnel to implement vigorous enforcement at the governmental level. As recently as 1990, the Mexican government employed only 30 patent and trademark examiners, compared to 1500 examiners employed by the U.S. government. The 1991 Industrial Property Law helped stiffen criminal penalties for enforcement, but procedural delays continue to plague the enforcement mechanisms.

Id. (citations omitted); see also Garcia, *supra* note 63, at 828-29.

⁷⁶ The United States Constitution provides “No . . . *ex post facto* Law shall be passed.” U.S. CONST. art. I, § 9; see also U.S. CONST. art. I, § 10, para. 1 (“No State shall . . . pass any . . . *ex post facto* law . . .”). Thus, the law “not only forbids conviction for what was not recognized as a crime when done, but also the imposition of any punishment not provided for in advance The genus — social harm — must be defined and made punishable by law.” ROLLIN M. PERKINS, PERKINS ON CRIMINAL LAW 9 (1969).

⁷⁷ Zamora, *supra* note 27, at 417.

⁷⁸ See generally M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235 (1993). Among the

reported to be quite different.⁷⁹ There are reports of widespread corruption and abuse of human rights by Mexican authorities.⁸⁰ Although Mexico has taken some steps to remedy this situation,⁸¹ torture and abuse by federal and state police appear to be chronic problems.⁸²

There are at least two ways that NAFTA may lead to a change in procedural protections in Mexican criminal courts. First, if U.S. nationals, especially representatives of large companies, are charged with offenses in Mexico, it is likely that there will be

rights protected by the Mexican Constitution are the right to be free from arbitrary arrest, the right not to be tortured or subject to cruel and unusual punishment, the rights to compulsory process, assistance of counsel, speedy trial, appeal, and freedom from ex post facto laws. *Id.*

⁷⁹ See Janita Darling & Sebastian Rotella, *Mexico Justice System Fuels Doubt About Assassination*, L.A. TIMES, Apr. 7, 1994, at A1. The recent assassination of ruling party presidential candidate Luis Donaldo Colosio in March 1994 has focused attention on apparent problems in Mexico's criminal justice system.

As in the United States, the suspect is innocent until proven guilty. But beyond that rudimentary concept, the U.S. and Mexican systems have almost nothing in common.

In Mexico, for example, the victim's family gets a voice in a criminal trial and enjoys a status equal to that of the prosecutor, the defense lawyer or the accused.

If a trial is merited, the Mexican judge independently decides what evidence presented by the prosecutor is pertinent to the case and discards the rest. Each side then presents "proofs," usually testimony. This phase of the trial can take up to a year.

The judge in Mexico decides when sufficient proof has been presented and closes the case, telling prosecutors to present written conclusions. It is only when these conclusions are presented that a suspect is formally charged with a crime.

The defense then rebuts the prosecution—also in writing. The judge then decides the suspect's guilt or innocence and hands down a sentence.

Id. at A6. In sum, the Mexican criminal justice system, which is rooted in Mexico's Spanish conquest and colonization period, is viewed as having "few virtues and all of the defects of the archaic colonial system." *Id.*

⁸⁰ See Mendez, *supra* note 48.

⁸¹ See *id.* Human Rights Watch reports:

Beginning about the time of the first announcement that Mexico and the United States would begin negotiations on a free trade agreement, the Mexican government instituted a series of human rights reforms including the formation of a National Human Rights Commission, the passage of human rights legislation, and the replacement of key law enforcement officials.

Id. at 2-3.

⁸² *Id.*

increased scrutiny of their treatment by the Mexican criminal justice system. Mexican officials have greater incentive to protect these individuals' rights because the negative effect of harsh treatment may be costly trade losses. Second, NAFTA opens the door for more involvement by foreign professionals, including attorneys, in the Mexican court system.⁸³ Under NAFTA's temporary entry provisions, U.S. lawyers can practice in Mexico once they meet the relevant licensing and certification requirements of that country.⁸⁴ Thus, an opportunity exists for U.S. lawyers to infuse into Mexican court proceedings many of the legal arguments that are used to protect defendants' rights in the United States.⁸⁵

It is not at all clear that cross-pollination will be a welcomed phenomenon. As Professor McGee wrote, "The question for Mexicans . . . is whether the impact on the social and political orders will qualitatively outweigh economic advantage."⁸⁶ Some traditionalists are bound to resent the impact of the treaty on Mexican sovereignty and national identity, including its judicial operations.

A preference for adversarial litigation does not fit easily with the characteristics of cooperation and authoritarianism that mark Mexican society. While the Mexican government appears to be interested in more vigorous enforcement of laws, one cannot conclude that the end result will be (or even should be) a law enforcement system that resembles the U.S. model.⁸⁷

There have also been allegations that the judicial system will be used to seek even more exploitation of Mexican nationals.⁸⁸ None-

⁸³ See Zamora, *supra* note 27, at 409. Zamora states that NAFTA provides that in the field of professional services, each NAFTA country will work to ensure that there are licensing and certification procedures that will allow professionals to practice in each country. *Id.*

⁸⁴ Anne M. Driscoll, *Embracing Change, Enhancing Competitiveness: NAFTA's Key Provisions*, reprinted in *BUS. AM.*, Oct. 18, 1993, at 14, 20.

⁸⁵ Zamora, *supra* note 27, at 410. Zamora states: "As foreign service providers bring with them new ways to do business . . . they are bound to present new challenges for Mexican regulators. The result will likely be not only to change the type and quality of services provided in Mexico, but also the legal regime surrounding those services." *Id.* Of course, NAFTA's exchange of professionals is not one sided. Mexican lawyers with the proper qualifications will also be able to participate in the American court system.

⁸⁶ Henry W. McGee, Jr., *Mexican Perspectives on Economic, Political and Cultural Implications of Free Trade*, 12 *CHICANO-LATINO L. REV.* 1, 5 (1992).

⁸⁷ Zamora, *supra* note 27, at 446.

⁸⁸ Cf. Marjorie Miller, *Changing Lifestyles: Confusion, Fear on Mexican Land*, *L.A. TIMES*, Dec. 10, 1991, at A6 (discussing negative impact of land reform laws on Mexicans).

theless, for those who decry abuses in the Mexican criminal justice system, the influx of U.S. lawyers and cases may lead to changes.⁸⁹

CONCLUSION

The political forces have decided that it is only a matter of time before NAFTA goes into effect. While ultimately that may turn out to be the right decision, it is remarkable and somewhat frightening that this decision was made before the criminal justice community made a complete assessment of NAFTA's impact on the U.S., Canadian, and Mexican criminal justice systems. As this Article suggests, the changes could be profound and irrevocable.

Now is the time to plan for all of NAFTA's effects, including those on our safety, courts, and law enforcement. The Department of Justice should prepare a complete, honest, and public assessment of the impact of NAFTA and submit it for comment. The current myopic view of NAFTA as an economic agreement ignores the reality that any major change in the relationship between the United States and its neighboring countries will inevitably have an impact on all of these countries' criminal justice systems.

⁸⁹ Nor should one presume that the cross-pollination of criminal justice systems would or should operate solely to Americanize the Mexican criminal justice system. Opponents of the death penalty welcome increased input from Mexican lawyers on capital punishment issues. Mexico has rejected the death penalty and Mexican officials have increased efforts to save condemned prisoners in the United States. See Anne Dorfman, *A Matter of Life: Mexico Takes a Stand in U.S. Death Penalty Cases*, L.A. DAILY J., March 30, 1994, at 1. Although some critics view Mexico's recent attempts to end American executions as a public relations ploy, increased trade contact between the two nations will give Mexican officials the opportunity to affect American criminal law. *Id.*

