

1-1-2011

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### Recommended Citation

Jonah M. Temple, *The Merry-Go-Round of Youth Gangs: The Failure of the U.S. Immigration Removal Policy and the False Outsourcing of Crime*, 31 B.C. Third World L.J. 193 (2011), <http://lawdigitalcommons.bc.edu/twlj/vol31/iss1/8>

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# THE MERRY-GO-ROUND OF YOUTH GANGS: THE FAILURE OF THE U.S. IMMIGRATION REMOVAL POLICY AND THE FALSE OUTSOURCING OF CRIME

JONAH M. TEMPLE\*

**Abstract:** The United States' policy of deporting noncitizen criminals to their countries of origin is fueling a proliferation of gang membership both in Central America and in the United States. Deportation does not deter gang activity but instead helps to facilitate the transnational movement of youth gangs. Rather than continue this failed approach, this Comment proposes that the United States work with Central American nations to develop an internationally cooperative model for regulating criminal gang activity. In order to strengthen its response, the United States must end its ineffective deportation policy. It must also impose sanctions and make the United States a more costly and less desirable place to conduct criminal activity. With insight from political economic theory, this Comment concludes that any new legislation must be part of an international crime control effort to combat the threat of gang transnationalization most efficiently.

## INTRODUCTION

A central tenet of U.S. immigration policy is the removal and return of criminal noncitizens to their home countries.<sup>1</sup> In 1996, broad legislative reform ushered in a new immigration policy in an effort to curb the growth of gang culture in the inner cities of the United States.<sup>2</sup> Under the new laws, the United States began the large-scale

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<sup>1</sup> See *Deportees in Latin America and the Caribbean: Hearing and Briefing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 110th Cong. 4 (2007) [hereinafter *Deportees in Latin America*] (statement of Rep. Eliot L. Engel, Chairman, H. Subcomm. on the W. Hemisphere).

<sup>2</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 431–43, 110 Stat. 1214, 1273-81 (codified in scattered sections of 8 U.S.C.); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 321–27.

removals of noncitizens to their countries of origin that continues today.<sup>3</sup> Not only has this deportation policy failed in its attempt to combat gang violence in the United States, but the sharp increase in criminals abroad has also led to myriad problems.<sup>4</sup> Most striking is how the influx of criminals to Central America has helped spread the gang phenomenon that began in Los Angeles to nations that are unprepared and ill-equipped to handle such burdens.<sup>5</sup> Specifically, the proliferation of Mara Salvatrucha (MS-13), the largest and most violent gang in Central America with U.S. roots, illustrates the failure of the removal policy at home and abroad.<sup>6</sup>

MS-13 is a phenomenon born in the United States.<sup>7</sup> The catalyst that created these violent gangs was a period of civil unrest and violence in El Salvador in the 1980s that caused Salvadorans to flee their country and settle in U.S. cities.<sup>8</sup> A large number of these Salvadorans settled in lower-income urban communities—primarily in Los Angeles—which were already overrun with drugs and crime, forcing the incoming Salvadoran population to adapt to violent urban life.<sup>9</sup> Salva-

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<sup>3</sup> See *Deportees in Latin America*, *supra* note 1, at 4–5 (statement of Rep. Eliot L. Engel, Chairman, H. Subcomm. on the W. Hemisphere) (“Early last decade, deportations were running at about 40,000 per year. Today, we are removing more than 200,000 people per year.”). Between 1999 and 2008, the United States deported 85,538 immigrants with criminal records to Central America. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T. OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 96–102 (2009) [hereinafter 2008 YEARBOOK].

<sup>4</sup> See *Deportees in Latin America*, *supra* note 1, at 18–19, 34–35 (statements of Rep. Gregory W. Meeks, Member, H. Comm. on Foreign Affairs, Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs, and Rep. William D. Delahunt, Member, H. Subcomm. on the W. Hemisphere); Freddy Funes, Note, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 U. MIAMI L. REV. 301, 310–13 (2008).

<sup>5</sup> See Luz E. Nagle, *Criminal Gangs in Latin America: The Next Great Threat to Regional National Security and Stability?*, 14 TEX. HISP. J.L. & POL’Y 7, 11 (2008) (explaining that the spread of gangs is due in part to the U.S. immigration policy that is sending tens of thousands of criminal convicts to Central America’s weakest nations); Robert J. Lopez et al., *MS-13: An International Franchise, Gang Uses Deportation to Its Advantage to Flourish in U.S.*, L.A. TIMES, Oct. 30, 2005, at A1 (“[A] deportation policy aimed in part at breaking up a Los Angeles street gang has backfired and helped spread it across Central America and back into other parts of the United States.”).

<sup>6</sup> See LAURA PEDRAZA FARIÑA ET AL., INT’L HUMAN RIGHTS CLINIC, HARVARD LAW SCH., NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 50–53 (2010), available at <http://www.law.harvard.edu/programs/hrp/ihr.html> (follow “Previous Projects” hyperlink) [hereinafter NO PLACE TO HIDE]; GEOFF THALE ET AL., WASH. OFFICE ON LATIN AM., YOUTH GANGS IN CENTRAL AMERICA: ISSUES IN HUMAN RIGHTS, EFFECTIVE POLICING, AND PREVENTION 3–4 (2006).

<sup>7</sup> NO PLACE TO HIDE, *supra* note 6, at 50–51.

<sup>8</sup> *Id.*

<sup>9</sup> See Juan J. Fogelbach, Comment, *Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador’s Struggle to Reclaim Social Order*, 7 SAN DIEGO INT’L L.J. 223, 252–58 (2005).

dorans struggled to assimilate into the unwelcoming communities and, to protect themselves, they formed gangs such as MS-13.<sup>10</sup>

The 1996 U.S. immigration reform soon followed, spurring mass deportations of MS-13 members that increased the gang's activities and contributed to its transnationalization.<sup>11</sup> The first wave of deported MS-13 gang members arrived in Central America in the late 1990s.<sup>12</sup> From there, MS-13 began to expand into an international gang undefined by national borders.<sup>13</sup> Thus, U.S. removal has done little to contain MS-13 and gangs like it.<sup>14</sup> Instead, gang membership has grown in recent years and expanded across North America.<sup>15</sup>

It is the removal policy's inability to combat gang violence effectively within the United States, however, that is perhaps the policy's biggest failure.<sup>16</sup> This Comment focuses on the failings of noncitizen removal in the United States.<sup>17</sup> Part I provides an overview of the history, growth, and current organization of MS-13. It also explains U.S. removal procedures and summarizes the Central American response to the increase in criminal removals. Part II shows how the removal policy has failed to reduce gang activity in the United States. Part III uses political economic theory to better understand the root of the failure of the policy.<sup>18</sup> It then presents the idea that the policy of removing criminals falsely suggests that our nation removes crime to other countries, while in reality this policy insources crime by encouraging gang members to conduct profitable criminal activity in the United States.<sup>19</sup> Finally, the

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<sup>10</sup> NO PLACE TO HIDE, *supra* note 6, at 50–51; Fogelbach, *supra* note 9, at 226, 229–30.

<sup>11</sup> See NO PLACE TO HIDE, *supra* note 6, at 50–51.

<sup>12</sup> *Id.*

<sup>13</sup> See *id.* at 51–53.

<sup>14</sup> See Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1888 n.337 (2007).

<sup>15</sup> See THALE ET AL., *supra* note 6, at 2; Lopez et al., *supra* note 5. MS-13 has offshoots in at least thirty-three states. See Chris Kraul et al., *MS-13: An International Franchise*, *L.A. Violence Crosses the Line*, L.A. TIMES, May 15, 2005, at A1.

<sup>16</sup> See Chacón, *supra* note 14, at 1878–79 (“[A]s deportation is on the rise, violent crime is increasing, not decreasing.”).

<sup>17</sup> See *MS-13, and Counting: Gang Activity in Northern Virginia: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 78 (2006) [hereinafter *MS-13, and Counting*] (testimony of Diego G. Rodriguez, Assistant Special Agent in Charge, Washington Field Office, Federal Bureau of Investigation); Funes, *supra* note 4, at 310–13.

<sup>18</sup> See *infra* Part III. See generally Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795, 807–15 (2009) (presenting an economic model theorizing that criminals travel to areas where sanctions are weakest).

<sup>19</sup> See *infra* Part III. See generally Broude & Teichman, *supra* note 18, at 807–15 (explaining that criminal activity will shift to where its expected payoff is most profitable).

Comment concludes by suggesting the United States should work with other nations to create international crime control regulations.

I. THE U.S. REMOVAL POLICY, THE CENTRAL AMERICAN RESPONSE,  
AND THE GROWTH OF INTERNATIONAL GANGS

A. U.S. Removal Policy

In the 1990s, the United States experienced an increase in Central American youth gang membership.<sup>20</sup> Partially in response to problems related to crime and illegal immigration, the United States began to discuss immigration reform.<sup>21</sup> The resulting change in policy and law led to a sharp increase in the number of criminals deported to El Salvador and other Central American countries.<sup>22</sup> Specifically, the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA or "Act") targeted criminal noncitizens for deportation.<sup>23</sup> The IIRIRA expanded crime-related removal grounds for noncitizens, permitting deportation based on lesser violations than previous policy allowed.<sup>24</sup> For example, the Act provided that any noncitizens convicted of crimes with a sentence of one year or longer be eligible for deportation after their completed sentence.<sup>25</sup> By expanding the categories under which immigrants could be removed on criminal grounds, the IIRIRA led to thousands of deportations to Central American nations.<sup>26</sup>

<sup>20</sup> NO PLACE TO HIDE, *supra* note 6, at 50–51; Fogelbach, *supra* note 9, at 226, 229–30.

<sup>21</sup> See *Proposals for Immigration Reform: Hearing Before the S. Comm. on the Judiciary*, 103rd Cong. 14–17 (1994) [hereinafter *Proposals for Immigration Reform*] (statements of Sen. Richard H. Bryan and Sen. William V. Roth, Jr.); Chacón, *supra* note 2, at 321–27; Funes, *supra* note 4, at 301–02.

<sup>22</sup> Harold Sibaja et al., U.S. Agency for Int'l Dev. Bureau for Latin Am. & the Caribbean, *Central America and Mexico Gang Assessment Annex 1: El Salvador Profile*, in CENTRAL AMERICA AND MEXICO GANG ASSESSMENT 41, 45 (2006).

<sup>23</sup> See IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.); THALE ET AL., *supra* note 6, at 4.

<sup>24</sup> See IIRIRA § 321, 110 Stat. at 3009-627 to -628 (codified at 8 U.S.C. § 1101(a)(43)); THALE ET AL., *supra* note 6, at 4.

<sup>25</sup> See IIRIRA § 321; Funes, *supra* note 4, at 306–07.

<sup>26</sup> See NO PLACE TO HIDE, *supra* note 6, at 51–53. Between 1993 and 1998 the United States removed, on average, 1201 noncitizens to El Salvador on criminal grounds per year. See U.S. DEP'T. OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 221–25 (2000). Between 2003 and 2008, the average number of criminal removals to El Salvador increased to 3480. See 2008 YEARBOOK, *supra* note 3. "In [fiscal year 2008], nearly 21,000 Salvadorans were deported from the United States, 27% on criminal grounds." CLARE RIBANDO SEELKE & PETER J. MEYER, CONG. RESEARCH SERV., RS 21,655, EL SALVADOR: POLITICAL, ECONOMIC, AND SOCIAL CONDITIONS AND U.S. RELATIONS 7 (2009).

The nations that receive noncitizen criminals experience numerous problems that are exacerbated by a lack of information sharing and inadequate notice from the United States.<sup>27</sup> Typically, when an immigrant is removed from the United States and returned to his country of origin, that country receives notice of his grounds for removal and his date of arrival.<sup>28</sup> The current notification process, however, requires receiving countries be provided only three days notice before a deportation.<sup>29</sup> Additionally, notification procedures require only minimal information sharing between countries.<sup>30</sup> This lack of information cripples receiving nations' efforts to monitor incoming gang members and contain gang violence.<sup>31</sup> While communication regarding removals has improved, some countries still do not receive any information about whether returned nationals belong to a gang.<sup>32</sup> Furthermore, while receiving countries are given information regarding the specific criminal offense causing deportation, the United States does not regularly provide full criminal records.<sup>33</sup>

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<sup>27</sup> See Sibaja et al., *supra* note 22, at 53 (noting general agreement that the "perceived lack of sharing information among countries about deportees with criminal records . . . [has] exacerbated the problem"); Funes, *supra* note 4, at 310–13 (stating that Central American nations are overwhelmed by the removals that are causing increased poverty and crime, overwhelming prison systems, and weakening legal infrastructures).

<sup>28</sup> See *Deportees in Latin America*, *supra* note 1, at 19 (testimony of Gary Mead, Assistant Director for Management, Office of Detention & Removal Operations, United States Department of Homeland Security).

<sup>29</sup> See Partnership for Prosperity and Security in the Caribbean art. II, § 9, May 10, 1997, 36 I.L.M. 792, 908; *Deportees in Latin America*, *supra* note 1, at 11–13, 75 (testimony of Gary Mead, Assistant Director for Management, Office of Detention & Removal Operations, United States Department of Homeland Security).

<sup>30</sup> See *Violence in Central America: Briefing and Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 110th Cong. 22 (2007) [hereinafter *Violence in Central America*] (testimony of Roberto Flores Bermudez, Ambassador to Honduras).

<sup>31</sup> See *id.* at 22–25; Sibaja et al., *supra* note 22, at 53.

<sup>32</sup> See *Violence in Central America*, *supra* note 30, at 22–25 (testimony of Roberto Flores Bermudez, Ambassador to Honduras) (noting that the United States deported 90,000 Hondurans in 2006 but provided no information concerning whether those deportees were members of gangs).

<sup>33</sup> See *Deportees in Latin America*, *supra* note 1, at 24 (testimony of Gary Mead, Assistant Director for Management, Office of Detention & Removal Operations, United States Department of Homeland Security) (explaining that the United States does not provide receiving nations with the entire criminal history of deportees). For example, if a hardened criminal is deported for committing a minor offense, but has previously committed more serious crimes, the United States will only provide the receiving nation with information regarding the minor criminal charge that led to the deportation. See *id.* at 25–26.

### B. Cycle, Expansion, and the Central American Response

This policy of removal and lack of notice has led to an “unending chain” of gang members being removed to Central America and then returning to the United States.<sup>34</sup> This chain of movement—initiated by removal from the United States—has allowed MS-13 to expand into an international gang.<sup>35</sup> Additionally, gang members deported back to El Salvador actively recruit new gang members at home, leading to the expansion of U.S. gang culture abroad.<sup>36</sup> In turn, gang members frequently return to the United States illegally and spread the gang into new areas.<sup>37</sup> The cycle of immigration and deportation increases the size and geographic reach of MS-13 and gangs like it, leading to systematic problems in both the United States and in Central America.<sup>38</sup>

The movement of deported gang members back into the United States may be driven in part by the Central American response that has increased the cost of gang activity in the region.<sup>39</sup> The large number of well-organized and criminally sophisticated gang members deported to Central America puts significant burdens on “already weak criminal

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<sup>34</sup> See *Gangs and Crime in Latin America: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Int'l Relations*, 109th Cong. 3–5 (2005) [hereinafter *Gangs and Crime in Latin America*] (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); Lopez et al., *supra* note 5 (quoting Rodrigo Avila, El Salvador's Vice Minister of Security). This free movement across national borders can be attributed to a multitude of factors including porous border security and the minimal deterrent effect of deportations. See *Gangs and Crime in Latin America, supra*, at 3.

<sup>35</sup> See Sibaja et al., *supra* note 22, at 45; see also Lopez et al., *supra* note 5. Estimates of gang membership in Central America are currently as high as 300,000 members. See *Violence in Central America, supra* note 30, at 2 (statement of José Guillermo Castillo Villacorta, Ambassador of Guatemala to the United States). El Salvador has become a centralized hub for rapidly growing transnational gangs. See Lopez et al., *supra* note 5 (describing El Salvador as a “pivot point” in the spread of MS-13 to the United States).

<sup>36</sup> See Lopez et al., *supra* note 5. El Salvador's Vice Minister of Security, Rodrigo Avila, has characterized the cycle of removal and return as a “merry-go-round.” See *id.*

<sup>37</sup> See *id.* (“[F]or a sizable number of MS-13 members, deportation is little more than a taxpayer-financed visit with friends and family before returning north.”); see also *Gangs and Crime in Latin America, supra* note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (“[W]e know that gang members who are arrested in the United States and deported are making their way back into the United States, and by the same token influencing and expanding their recruitment of new members in Mexico and Central America along the way.”).

<sup>38</sup> See Sibaja et al., *supra* note 22, at 45–46; Lopez et al., *supra* note 5.

<sup>39</sup> See THALE ET AL., *supra* note 6, at 10–11 (describing the harsh police methods used in El Salvador to regulate gang violence); Broude & Teichman, *supra* note 18, at 809, 817 (giving several examples of how increased regulations will drive criminals to other less regulated localities); see also Funes, *supra* note 4, at 329–30 (suggesting that rising crime rates and diminishing economic opportunities in Central America are creating an incentive for youth gang members to flee to the United States).

justice systems.”<sup>40</sup> Crime and violence rates in the region have increased dramatically and are among the highest in the world, largely due to gang-related violence.<sup>41</sup> This sharp increase in crime, caused in part by the forced return of thousands of criminals from the United States, has destabilized the region because Central American nations face widespread poverty that makes it difficult to stem the steady wave of crime.<sup>42</sup>

In response to the return of gang members from the United States, Central American governments have enacted regulatory schemes which increase the cost of criminal activity, promoting the movement of deported gang members back into the United States.<sup>43</sup> The receiving countries have focused their response efforts on strengthening law enforcement and toughening anti-gang laws.<sup>44</sup> Their inability to cope with the surge in returning criminals, however, has caused many governments to overreact in response, enacting *mano dura*, or “firm hand,” legislation that focuses on repressive and discriminatory enforcement policies.<sup>45</sup> These responses too often sacrifice citizens’ civil liberties and, in

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<sup>40</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 13 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development). The explosive return of deported noncitizen criminals contributed directly to the growth of gangs, primarily in El Salvador, Honduras, and Guatemala. See THALE ET AL., *supra* note 6, at 4; see also *Violence in Central America*, *supra* note 30, at 13 (testimony of Roberto Flores Bermudez, Ambassador to Honduras) (placing partial blame for the growth in gangs on the deportation of thousands of “active gang members” from the United States to Honduras).

<sup>41</sup> See SEELKE & MEYER, *supra* note 26, at 3–4; Sibaja et al., *supra* note 22, at 44.

<sup>42</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 11–14 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development); *Id.* at 2 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (“[H]igh crime rates destabilize Latin American society by undermining support for democratic institutions . . . , by inhibiting economic development . . . , [and] by discouraging people’s participation in community activities.”).

<sup>43</sup> See NO PLACE TO HIDE, *supra* note 6, at 107–166; Broude & Teichman, *supra* note 18, at 814–15.

<sup>44</sup> *Gangs and Crime in Latin America*, *supra* note 34, at 12 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development).

<sup>45</sup> See Lainie Reisman, *Breaking the Vicious Cycle: Responding to Central American Youth Gang Violence*, 26 SAIS REV. INT’L AFF. 147, 148 (2006) (noting that anti-gang initiatives in El Salvador and Honduras are controversial because of their connection to increased human rights and due process violations). *Mano dura* policing strategies include “massive detentions of young people for the crime of gang membership, relaxed evidentiary standards, and harsh prison sentences.” THALE ET AL., *supra* note 6, at 3. For example, the first year after the *mano dura* policies were implemented in El Salvador, “19,275 people were detained by police on the charge of belonging to a gang,” and ninety-one percent of those detained were eventually released because of a lack of evidence. *Id.* at 11. Growing public



turn, weaken the country's democratic ideals.<sup>46</sup> Thus, the U.S. removal policy has caused shifts in law enforcement practices that compromise individual rights in the name of combating the growing youth gang problem.<sup>47</sup>

Moreover, these *mano dura* approaches have proven highly ineffective.<sup>48</sup> Strong-arm tactics have only strengthened the gangs by causing them to unify in response to the harsh laws and limits on civil liberties.<sup>49</sup> Gangs have simply adapted, increasing coordination and becoming more organized.<sup>50</sup> With over 39,000 gang members in El Salvador,

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support for and acceptance of such tactics is creating a climate where these discriminatory practices are tolerated. NO PLACE TO HIDE, *supra* note 6, at 133–34.

<sup>46</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 11–14 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development); NO PLACE TO HIDE, *supra* note 6, at 132–35.

<sup>47</sup> See Chacón, *supra* note 2, at 352–56. This trend towards repressive enforcement can also be seen in the United States. See *id.* at 337–45. Federal task forces created to identify and deport gang members use stereotyping and profiling to identify gang criminal suspects. See *id.* at 337. While impermissible in other forms of law enforcement, racial profiling remains a significant tool used in federal investigations and identifications of gang criminals. See *id.* at 337–45.

<sup>48</sup> See THALE ET AL., *supra* note 6, at 5 (“[T]hese *mano dura* responses to youth gang violence have been ineffective in controlling the problem.”); see also *Gangs and Crime in Latin America*, *supra* note 34, at 67 (statement of Manuel Orozco, Senior Associate, Inter-American Dialogue). Since the *mano dura* plan was established in 2003, there has been an increase in murder and gang-related crimes in El Salvador. See SEELKE & MEYER, *supra* note 26, at 3–4.

<sup>49</sup> See NO PLACE TO HIDE, *supra* note 6, at 56–71 (“[M]ost experts attribute the organizational evolution and consolidation of the two major gangs largely to the Salvadoran government’s law enforcement crackdowns of the past several years.”).

<sup>50</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 1 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); NO PLACE TO HIDE, *supra* note 6, at 56–67. For example, in El Salvador, MS-13 is divided into over three hundred sub-groups known as *clikas* that communicate and coordinate with one another. Sibaja et al., *supra* note 22, at 45. The gangs have vertical hierarchies with national leaders. See *id.* at 45–46. Salvadoran prisons have also become centers of growth for MS-13, with criminal enterprises coordinated within the prisons. See *id.* at 52 (“Salvadoran officials indicate that about 60 percent of the gang members in prison are U.S. deportees or are facing criminal charges in the United States.”). There is also evidence of communication between cells in the United States and cells in El Salvador. See Lopez et al., *supra* note 5 (noting that gang members in the Ciudad Barrios prison in El Salvador frequently communicate with Salvadoran branches of the gang and their extensions in the United States); see also Sibaja et al., *supra* note 22, at 47 (“Members have . . . sophisticated communication networks between prisons and the street, using coded language and paper messages folded in a precise manner, which is also coded.”). Furthermore, the types of criminal activity in which Central American and U.S. youth gangs engage have begun to resemble organized crime groups. See NO PLACE TO HIDE, *supra* note 6, at 217–18; Sibaja et al., *supra* note 22, at 46–47. Particularly in the United States, MS-13 currently engages in extortion, immigrant smuggling, and racketeering. See Lopez et al., *supra* note 5. For example, nineteen MS-13 members in

MS-13 is currently a “fluid” and “complex” organization.<sup>51</sup> Gang membership continues to expand, with members also participating in more violent crimes.<sup>52</sup>

The *mano dura* policies are quick-fix responses that do not address root causes.<sup>53</sup> Rather, the hard-line approach to gang proliferation has inadvertently legitimized the use of force and fostered a culture of violence, furthering the unrest and insecurity of the region.<sup>54</sup> *Mano dura* policies have made Central America an undesirable and less profitable region to conduct criminal gang activity.<sup>55</sup>

## II. THE FAILURE OF THE U.S. REMOVAL POLICY

The current U.S. removal policy is not an effective domestic crime control measure.<sup>56</sup> Instead of reducing gang activity, the U.S. removal policy has contributed to the global growth of youth gangs such as MS-13.<sup>57</sup> The legislative reforms expanding noncitizen criminal removals were enacted in part as crime control initiatives.<sup>58</sup> It is clear, however, that the approach is not working.<sup>59</sup> In fact, the policy has increased

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Maryland were indicted in 2005 on racketeering charges and accused of participating in an organized crime group that had been involved in multiple murders, conspiracy to commit kidnapping, robbery, and obstruction of justice. *See id.*

<sup>51</sup> NO PLACE TO HIDE, *supra* note 6, at 56–57.

<sup>52</sup> *See Gangs and Crime in Latin America, supra* note 34, at 61 (prepared statement of Manuel Orozco, Senior Associate, Inter-American Dialogue); *see also* THALE ET AL., *supra* note 6, at 4 (noting that immigration policies contributed to the international growth of gangs).

<sup>53</sup> *See Gangs and Crime in Latin America, supra* note 34, at 62 (prepared statement of Manuel Orozco, Senior Associate, Inter-American Dialogue).

<sup>54</sup> *See id.* at 60–62; NO PLACE TO HIDE, *supra* note 6, at 200–17, 164–66.

<sup>55</sup> *See* NO PLACE TO HIDE, *supra* note 6, at 107–66 (describing *mano dura* tactics which target youths and deportees in particular); Broude & Teichman, *supra* note 18, at 814–15. *But see* Sibaja et al., *supra* note 22, at 48 (noting that gang violence has caused people to leave El Salvador “in search of a more stable environment, taking their economic potential with them”).

<sup>56</sup> *See Deportees in Latin America, supra* note 1, 34–35 (statements of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs, and Rep. William D. Delahunt, Member, H. Subcomm. on the W. Hemisphere).

<sup>57</sup> *See id.*

<sup>58</sup> IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 431–43, 110 Stat. 1214, 1273-81 (codified in scattered sections of 8 U.S.C.); Chacón, *supra* note 2, at 321–27.

<sup>59</sup> *See Gangs and Crime in Latin America, supra* note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (describing the failures of the current immigration policy and suggesting that the United States rethink what it does with noncitizen gang members); Kraul et al., *supra* note 15 (noting that the “decade long campaign” to deport gang members led to the spread of MS-13 across Central America).

crime by furthering the “transnationalization” of gangs and the proliferation of gang activity across the United States.<sup>60</sup>

The major motivation driving the increase in noncitizen removal was law enforcement and crime control.<sup>61</sup> Congress’s intent was to fight crime and illegal immigration in the United States and to address the problems that noncitizens pose to the justice system.<sup>62</sup> In theory, increasing the deportation of criminal noncitizens would increase the public safety of U.S. citizens.<sup>63</sup> In part, the immigration reforms were enacted with the intent of removing criminal noncitizens in an effort to curb gang activity.<sup>64</sup>

In the first year following the enactment of the 1996 immigration legislation, deportations almost doubled.<sup>65</sup> The increase in removals had some initial success in combating gang problems.<sup>66</sup> After a brief decline, however, gang activity quickly began a steady growth that continues today, a clear indication the policy was a quick-fix solution, short-sighted in its potential for success and its consequences.<sup>67</sup>

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<sup>60</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (explaining that deported gang members frequently return to the United States while “influencing and expanding their recruitment of new members in Mexico and Central America along the way”); Lopez et al., *supra* note 5.

<sup>61</sup> See *Proposals for Immigration Reform*, *supra* note 21, at 15–17 (statement of Sen. William V. Roth, Jr.) (arguing for the need for immigration reform because current law is too complex and unenforceable and noting that only four percent of the total number of criminal aliens in the United States were deported in 1993); see also Chacón, *supra* note 14, at 1831 (“Discussions about the removal of non-citizens have been treated as ‘national security’ issues, when in fact the driving motivation is basic criminal law enforcement.”).

<sup>62</sup> See *Proposals for Immigration Reform*, *supra* note 21, at 15–17 (statement of Sen. William V. Roth, Jr.) (“My legislation addresses the serious problem of criminal aliens by simplifying, streamlining, and strengthening the deportation process for criminal aliens.”).

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* at 26–35 (prepared statement and testimony of Janet Reno, Att’y Gen. of the United States) (advocating for stronger regulations allowing for the deportation of criminal noncitizens).

<sup>65</sup> See Chacón, *supra* note 2, at 326. In 1997, 34,000 noncitizens were removed on the basis of criminal violations, and that number jumped to 61,000 in 1998. *Id.*

<sup>66</sup> See ARLEN EGLEY, JR., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T. OF JUSTICE, NATIONAL YOUTH GANG SURVEY TRENDS FROM 1996 TO 2000, at 1 (2002). In 1996, fifty-three percent of jurisdictions had gang problems, while in 2000 only forty percent of jurisdictions reported gang problems. See *id.*

<sup>67</sup> See ARLEN EGLEY, JR. & CHRISTINA E. O’DONNELL, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T. OF JUSTICE, HIGHLIGHTS OF THE 2007 NATIONAL YOUTH GANG SURVEY 1 (2009). Between 1999 and 2002, gang crime increased fifty percent. See *Immigration and the Alien Gang Epidemic: Problems & Solutions: Hearing Before the Subcomm. on Immigration, Border Sec. and Claims of the H. Comm. on the Judiciary*, 109th Cong. 13, 29–39 (2005) [hereinafter *Immigration and the Alien Gang Epidemic*] (testimony and prepared statement of Heather Mac Donald, Senior Fellow, the Manhattan Institute). The number of juris-

While overall crime rates in the United States have decreased since 1996, gang-related crime continues to increase steadily.<sup>68</sup> Moreover, the increase in gang membership does not show signs of slowing.<sup>69</sup> In particular, the first decade of the twenty-first century saw a “dramatic increase in the number and size of transnational street gangs.”<sup>70</sup> As of 2006, the Federal Bureau of Investigation estimated that there were 38,000 MS-13 gang members in the United States.<sup>71</sup>

The failure of the U.S. removal policy is also evident in the country’s growing prison population.<sup>72</sup> In part, Congress intended the 1996 reforms to reduce the number of criminal noncitizens in the prison population.<sup>73</sup> During debates on the immigration policy, members of Congress noted that in 1994, criminal aliens accounted for twenty-five percent of the federal prison population, and that there were 58,000

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ditions reporting gang problems increased by twenty-five percent between 2002 and 2007. See EGLEY & O’DONNELL, *supra*, at 2. During the same period, there was a twenty-five percent increase in the number of active gangs in the United States and a 7.7% increase in gang members. See *id.* By 2008, fifty-eight percent of state and local law enforcement agencies reported criminal gangs active in their jurisdiction, a higher percentage than before large-scale removal began. NAT’L GANG INTELLIGENCE CTR., NATIONAL GANG THREAT ASSESSMENT 2009, at 5 (2009), available at <http://www.justice.gov/ndic/pubs32/32146/32146p.pdf>. [hereinafter THREAT ASSESSMENT 2009].

<sup>68</sup> See *Immigration and the Alien Gang Epidemic*, *supra* note 67, at 13 (testimony of Heather Mac Donald, Senior Fellow, the Manhattan Institute) (noting that gang crime is “exploding nationally”); Chacón, *supra* note 14, at 1878 n.278 (noting that there is no empirical evidence to support a link between an increase in deportation and decrease in crime). Additionally, violent crime has increased. See Chacón, *supra* note 14, at 1878 n.278. The percentage of both homicides and firearm homicides committed by gang members increased from 1993 to 2003. See ERIKA HARRELL, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T. OF JUSTICE, VIOLENCE BY GANG MEMBERS, 1993–2003, at 2 (2005).

<sup>69</sup> See EGLEY & O’DONNELL, *supra* note 67, at 1–2. There were an “estimated 788,000 gang members and 27,000 gangs . . . active in the United States in 2007.” See *id.* By September 2008, the estimate had risen to approximately one million gang members, an increase of twenty-one percent since 2007. See *id.*; THREAT ASSESSMENT 2009, *supra* note 67, at iii. “Gangs were criminally active within all 50 states and the District of Columbia as of September 2008.” See THREAT ASSESSMENT 2009, *supra* note 67, at iii.

<sup>70</sup> See *MS-13, and Counting*, *supra* note 17, at 78 (statement of James Spero, Acting Assistant Special Agent in Charge, United States Immigrations and Customs Enforcement).

<sup>71</sup> See THALE ET AL., *supra* note 6, at 3. This number also includes members of Calle 18, a gang closely related to MS-13. See *id.*

<sup>72</sup> *Proposals for Immigration Reform*, *supra* note 21, at 52 (testimony of Sen. Diane Feinstein); see WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T. OF JUSTICE, PRISON INMATES AT MIDYEAR 2007, at 8 (2008).

<sup>73</sup> See *Proposals for Immigration Reform*, *supra* note 21, at 52 (testimony of Sen. Diane Feinstein) (advocating for improvements to law allowing transfer of illegal aliens from U.S. prisons to prisons in their own country).

noncitizen prisoners in U.S. prisons.<sup>74</sup> Yet, in 2007, there were 96,707 noncitizen criminals in U.S. prisons, an increase of over thirty-eight percent since 1994.<sup>75</sup>

Beyond increasing the gang population, the removal policy is not an effective means of deterring or preventing criminal noncitizens from returning to the United States after deportation.<sup>76</sup> The United States remains a desirable place for gang activity because deportation does not increase the cost of conducting crime.<sup>77</sup> As a result, gang members freely reenter the country and reoffend without consequence.<sup>78</sup> This movement of criminal gang members across national borders, initiated by the U.S. removal policy, has played a “key role in the transnationalization” of gangs such as MS-13.<sup>79</sup>

The frequent movement of gang members between the United States and Central America has strengthened the connections and influences between the gangs in each country.<sup>80</sup> Newly organized cells from El Salvador and other Central American nations are returning to

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<sup>74</sup> See *id.* at 16, 52 (testimony of Sen. William V. Roth and Sen. Diane Feinstein) (“[A]nywhere from 13,000 to 15,000 illegal aliens are serving time in California State prison today, returning just a few hundred aliens a year is just a drop in the bucket.”).

<sup>75</sup> SABOL & COUTURE, *supra* note 72, at 8; see also *Proposals for Immigration Reform*, *supra* note 21, at 52 (testimony of Sen. Diane Feinstein).

<sup>76</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); Chacón, *supra* note 14, at 1873 (“[T]here is no reason to believe that removal will be an effective security tool.”); Lopez et al., *supra* note 5.

<sup>77</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); Broude & Teichman, *supra* note 18, at 807; Chacón, *supra* note 14, at 1873; Lopez et al., *supra* note 5.

<sup>78</sup> See *Deportees in Latin America*, *supra* note 1, at 38 (statement of Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica) (“While deportation may solve a few problems within the deporting country, the removal of criminal offenders to another geographical location does not protect the United States from further criminal actions by those persons.”); *id.* at 58 (statement of Marsha L. Garst, Commonwealth’s Attorney, Rockingham County, Virginia) (“[C]riminal aliens are reentering our community and reoffending.”); Nagle, *supra* note 5, at 11–13, 16; Reisman, *supra* note 45, at 149 (noting that it is common for deported gang members to return to the United States “within a matter of months”); Lopez et al., *supra* note 5.

<sup>79</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 17 (testimony of Chris Swecker, Assistant Director, Criminal Investigation Division, Federal Bureau of Investigation) (“[D]eportation of MS-13 and [Calle] 18 Street gang members from the United States to their countries of origin is partially responsible for the growth of these gangs in Central America.”); THALE ET AL., *supra* note 6, at 4; Nagle, *supra* note 5, at 11–13, 16.

<sup>80</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); NO PLACE TO HIDE, *supra* note 6, at 51–53; Reisman, *supra* note 45, at 149.

establish cliques and strongholds throughout the United States.<sup>81</sup> In particular, their expansion to smaller U.S. communities that lack adequate resources has allowed gangs to increase their influence and revenue, recruit new members, and grow as criminal enterprises.<sup>82</sup> Many deported gang members simply return to their home country, establish bonds with other gang members, and then reenter their U.S. communities.<sup>83</sup> Thus, the overall increase in gang members and the spread of

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<sup>81</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 40–41, 44 (testimony of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation) (“[I]ncreasing migrant flows over porous borders, deportations, as well as improved transportation and communication have helped transnational gangs grow in North America.”); Lopez et al., *supra* note 5. A prominent example of gang growth is the surge of MS-13 gang members into the Washington, D.C. metropolitan area and surrounding communities of northern Virginia and Maryland. See *MS-13, and Counting*, *supra* note 17, at 92–94 (testimony of Diego G. Rodriguez, Assistant Special Agent in Charge, Washington Field Office, Federal Bureau of Investigation). MS-13 gang members from Los Angeles and El Salvador have traveled to the northern Virginia and Washington, D.C. area in an effort to recruit members and coordinate the creation of new cells. See *id.* at 89; Lopez et al., *supra* note 5 (explaining how a local MS-13 clique in El Salvador, known as the *Marineros*, sent members to the Washington, D.C. area to open new cells). MS-13 began by establishing independent cliques with regional leaders exercising influence over them and today, MS-13 is one of the fastest growing and the most violent gang in the region. See *MS-13, and Counting*, *supra* note 17, at 93–94, 95 (testimony of Diego G. Rodriguez, Assistant Special Agent in Charge, Washington Field Office, Federal Bureau of Investigation).

<sup>82</sup> See *Deportees in Latin America*, *supra* note 1, at 59 (statement of Marsha L. Garst, Commonwealth’s Attorney, Rockingham County, Virginia); THREAT ASSESSMENT 2009, *supra* note 67, at iii (“[G]ang members are increasingly migrating from urban to suburban areas and are responsible for a growing percentage of crime and violence in many communities.”); see also EGLEY & O’DONNELL, *supra* note 67, at 2 (noting that the number of gang-problem jurisdictions in rural counties increased by nearly twenty-five percent between 2002 and 2007). In some communities, “criminal gangs commit as much as 80 percent of the crime.” See THREAT ASSESSMENT 2009, *supra* note 67, at iii. Local law enforcement for communities experiencing an increase in criminal gangs have found it difficult to combat the problem as the criminal activity has become increasingly “extensive, pervasive, and sophisticated.” See *Gangs and Crime in Latin America*, *supra* note 34, at 49–51 (testimony of Kelly L. Smith, Detective First Class, Howard County Police Department, Elicott City, Maryland) (noting difficulty in addressing the emerging presence of MS-13 because the gang “frequently migrate[s] to new communities that are not familiar with the threat that they pose”).

<sup>83</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 40–44 (testimony of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation). The increased removal of criminal gang members has failed to curb the growth of gangs because removed criminals are simply reentering rural communities and reoffending. See *Deportees in Latin America*, *supra* note 1, at 58–59 (statement of Marsha L. Garst, Commonwealth’s Attorney, Rockingham County, Virginia) (stating a need for change in immigration policy “to assure that our communities are safe from the illegal-alien serial offenders”); EGLEY & O’DONNELL, *supra* note 67, at 2. For example, Harrisonburg, Virginia has seen an explosion of gang activity. See *Deportees in Latin America*, *supra* note 1, at 59 (statement of Marsha L. Garst, Common-

gang activity throughout the United States is a direct byproduct of current immigration removal policy.<sup>84</sup>

The failure of this policy as a crime control measure extends beyond the United States and has had major consequences internationally.<sup>85</sup> Central American nations receiving criminals from the United States experience numerous problems such as harsh, inefficient over-enforcement policies that create a culture of fear and violence and threaten the stability of Central American governments.<sup>86</sup> Beyond inundating unstable Central American nations with criminals, the United States has failed to provide adequate support to or coordination with the receiving countries.<sup>87</sup> Thus, criminal removals have simply shifted

wealth's Attorney, Rockingham County, Virginia). In 2005, the community had 10 gangs and over 100 gang members; by 2007, the city had 25 active gangs with over 450 gang members. *See id.* Moreover, there were two cases in 2007 where "gang members were arrested, deported, and then reentered the . . . community to reoffend." *See id.*

<sup>84</sup> *See Gangs and Crime in Latin America*, *supra* note 34, at 39–41 (testimony of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation); Reisman, *supra* note 45, at 149–50; Lopez et al., *supra* note 5.

<sup>85</sup> *See Violence in Central America*, *supra* note 30, at 21 (statement of Rep. Eliot L. Engel, Chairman, H. Subcomm. on the W. Hemisphere) (noting that various governments have criticized the U.S. deportation strategy for thwarting international efforts to reduce gang membership and violence); *Gangs and Crime in Latin America*, *supra* note 34, at 36 (statement of Rep. Barbara Lee, Comm. on Int'l Relations) (suggesting the IIRIRA has had "a negative effect on these [receiving] countries, due to the expanded and retroactive deportation standards"); *see also Deportees in Latin America*, *supra* note 1, at 1–2 (statement of Rep. Eliot L. Engel, Chairman, H. Subcomm. on the W. Hemisphere) ("Displacement of that many people is bound to have repercussions that must be dealt with.").

<sup>86</sup> *See Gangs and Crime in Latin America*, *supra* note 34, at 60–62 (prepared statement of Manuel Orozco, Senior Associate, Inter-American Dialogue); THALE ET AL., *supra* note 6, at 5; Sibaja et al., *supra* note 22, at 49; *see also* NO PLACE TO HIDE, *supra* note 6, at 50 ("The rapid growth in the power and prevalence of Salvadoran street gangs . . . in El Salvador in the 1990s resulted in part from major shifts in U.S. immigration laws during that decade . . ."). In El Salvador, the detrimental effect of gang activity "obstructs economic progress and democratic social development." Sibaja et al., *supra* note 22, at 47, 51–53. Gang violence costs the country approximately 11.5% of its gross domestic product annually and "contributes to deterred trade and investment." *See id.* at 47–48. Gang activity is also influencing policy decisions and affecting democratic stability because hard-line government responses have diverted resources from other social issues. *See id.* at 49; Reisman, *supra* note 45, at 149 ("Because they have had to channel a disproportionate percentage of their scarce resources into security, the governments of the region have continually and consistently short-changed social investment."). Discriminatory tactics, extra-judicial violence, and media stigmatization has all led to a pervading sense of insecurity and instability in the country. *See* NO PLACE TO HIDE, *supra* note 6, at vii–ix; THALE ET AL., *supra* note 6, at 3; Sibaja et al., *supra* note 22, at 47–49.

<sup>87</sup> *See Deportees in Latin America*, *supra* note 1, at 35–39 (statements of Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica, and Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs); *Gangs and Crime in Latin America*, *supra* note 34, at

the burden to these nations, to the detriment of both the United States and the global community.<sup>88</sup>

### III. POLITICAL ECONOMIC THEORY ANALYSIS

With the understanding that the large-scale removal of gang members has fueled the proliferation of transnational gangs, a new approach to the problem is required.<sup>89</sup> Political economic theory may offer some insights on how to chart that new course.<sup>90</sup> Political economic theory suggests that criminal activity will shift to where the “expected criminal payoff” is most profitable.<sup>91</sup> In other words, criminal activity moves in reaction to cost-imposing regulation and legislation that makes crime less lucrative.<sup>92</sup> This economic analysis suggests that effective crime control must impose significant legal costs and sanctions that criminals will consider as major factors when deciding where to commit crimes.<sup>93</sup> In theory, costs and sanctions will force criminal activity to countries where expected sanctions are lowest.<sup>94</sup>

Tomer Broude and Doron Teichman, two professors who recently examined political economic crime control, have concluded that “crime control policies adopted by individual states influence the global distribution of crime and subsequently impact the crime control poli-

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41 (statement of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation). For example, in 2008, the United States provided less than thirty-two million dollars in foreign aid to El Salvador. *See* SEELKE & MEYER, *supra* note 26, at 5. In contrast, the United States spent over seventy-three million dollars in 2007 for the costs of chartered aircraft flights used in deportations to Central and South America. *See Deportees in Latin America, supra* note 1, at 27 (written response from Gary Mead, Assistant Director for Management, Office of Detention & Removal Operations, United States Department of Homeland Security).

<sup>88</sup> *See Deportees in Latin America, supra* note 1, at 65 (statement of Rep. Yvette D. Clarke) (explaining that the United States places receiving countries in a “very difficult and expensive position to cope with an influx of offenders”); THALE ET AL., *supra* note 6, at 3.

<sup>89</sup> *See Deportees in Latin America, supra* note 1, at 35 (statement of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs); *Gangs and Crime in Latin America, supra* note 34, at 41 (statement of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation); NO PLACE TO HIDE, *supra* note 6, at 52–53.

<sup>90</sup> *See* Broude & Teichman, *supra* note 18, at 801.

<sup>91</sup> *See id.*; *see also* MICHAEL WOODIWISS, GANGSTER CAPITALISM: THE UNITED STATES AND THE GLOBAL RISE OF ORGANIZED CRIME 20, 112–13 (2005) (“[T]he chance to make large illegal profits with minimal risks encourages organized crime.”).

<sup>92</sup> *See* Broude & Teichman, *supra* note 18, at 801.

<sup>93</sup> *See id.* at 807 (noting that criminals commit a crime “only if . . . its benefits outweigh its costs”).

<sup>94</sup> *See id.* at 801 (“[I]f the expected sanction in one jurisdiction rises, some crime from that jurisdiction will shift to areas in which the sanction is lower.”).



cies adopted by other states.”<sup>95</sup> Broude and Teichman point out two major approaches to crime control.<sup>96</sup> In one approach, national governments can adopt lenient crime control policies to attract crime that generates economic benefits.<sup>97</sup> In the other approach, governments “outsource” crime by imposing harsher sanctions expected to “shift and displace crimes to other jurisdictions.”<sup>98</sup> Although outsourcing has the benefit of pushing crime to other countries, it also creates an “arms race” in which nations compete with one another to have the harshest crime control policies in an effort to repel crime and shift the burdens to other nations.<sup>99</sup> The resulting regulatory competition has been criticized as detrimental to transnational crime control efforts.<sup>100</sup>

#### A. U.S. Removal Policy Has Triggered Regulatory Competition

U.S. removal policy has created a prime example of this kind of regulatory competition.<sup>101</sup> The United States and the Central American nations that receive deported criminals, most notably El Salvador, are engaged in an outsourcing race that fuels the transnationalization of youth gangs.<sup>102</sup> In the past, El Salvador could have been characterized as an insourcing nation that attracted criminal activity with a lack of sanctions and minimal legal costs.<sup>103</sup> In contrast, the United States increas-

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<sup>95</sup> See *id.* at 826–27.

<sup>96</sup> See *id.* at 800.

<sup>97</sup> See Broude & Teichman, *supra* note 18, at 800. An example of a crime that generates economic benefits is human trafficking. See Stephanie L. Mariconda, Note, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L.J. 151, 165 (2009). Many developing countries depend on human trafficking to “flourish” and “implicitly condone” the activity by either not enforcing the law or not criminalizing the act. See *id.*

<sup>98</sup> See Broude & Teichman, *supra* note 18, at 800, 807 (discussing the effect of “legal costs” on criminal behavior).

<sup>99</sup> See *id.* at 800, 812.

<sup>100</sup> See *id.* at 827–31 (noting that there are “those who argue that regulatory competition is inefficient” and, on the other side of the debate are those who “agitate[] against international harmonization”).

<sup>101</sup> See NO PLACE TO HIDE, *supra* note 6, at 107–66; Broude & Teichman, *supra* note 18, at 800; Chacón, *supra* note 2, at 352; Reisman, *supra* note 45, at 147; Lopez et al., *supra* note 5.

<sup>102</sup> See Broude & Teichman, *supra* note 18, at 800; Reisman, *supra* note 45, at 147 (explaining that youth gang violence is exacerbated by countries enacting policies in their self-interest that “both explicitly and implicitly impact other countries in the region, thus establishing a vicious cycle of violence that is difficult to stem”).

<sup>103</sup> See NO PLACE TO HIDE, *supra* note 6, at 53–56; Broude & Teichman, *supra* note 18, at 814–15 (noting that Central American nations “may have in the past generally considered gang activity . . . desirable or tolerable”); Nagle, *supra* note 5, at 16; Reisman, *supra* note 45, at 149, 151.

ingly combats gang violence by strengthening crime control policies in an effort to outsource crime.<sup>104</sup> While there may have been a previous symbiotic relationship between the United States, an outsourcing nation, and El Salvador, an insourcing nation, recent policy changes undertaken by both nations have led to an ineffective model of regulatory competition that is detrimental to international crime control.<sup>105</sup>

The IIRIRA increased the removal of criminal noncitizens which, in turn, greatly affected the crime control policies in Central America.<sup>106</sup> El Salvador was unprepared for the influx of criminal gang members that resulted from U.S. removals and overcompensated in its response, creating a backlash.<sup>107</sup> El Salvador enacted the repressive *mano dura* policies as a reactive response to U.S. deportations and as the first step in an outsourcing race with the United States.<sup>108</sup> By implementing harsh sanctions, El Salvador quickly transformed from an insourcing nation to an outsourcing nation.<sup>109</sup> Thus, there has been an observable shift in the traditional regulatory dynamic, as El Salvador has become an outsourcing nation competing with the United States for the harshest crime control policies.<sup>110</sup>

The result of this backlash is that El Salvador has increased its crime control policies to the point where they exceed the sanctions im-

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<sup>104</sup> See Broude & Teichman, *supra* note 18, at 814–15 (noting that the U.S. deportation policy “exports” gang members to their home nation). See generally IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.) (broadening the grounds of removal for criminal noncitizens).

<sup>105</sup> See *Deportees in Latin America*, *supra* note 1, at 38 (statement of Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica); *Gangs and Crime in Latin America*, *supra* note 34, at 17 (testimony of Chris Swecker, Assistant Director, Criminal Investigation Division, Federal Bureau of Investigation); Broude & Teichman, *supra* note 18, at 814–15 (the influx of gang members returned to Central America has caused the receiving nations to cease considering gang activity as desirable); Chacón, *supra* note 2, at 352–56; Reisman, *supra* note 45, at 148–49.

<sup>106</sup> See THALE ET AL., *supra* note 6, at 4–5; Broude & Teichman, *supra* note 18, at 814–15; Chacón, *supra* note 2, at 352–56.

<sup>107</sup> See THALE ET AL., *supra* note 6, at 3 (noting that Central American governments responded to the increase in youth gang violence with repressive policing strategies); Reisman, *supra* note 45, at 149 (“[T]he resource-strapped Central American countries have little to no capacity to deal adequately with the influx of gang members.”).

<sup>108</sup> See Broude & Teichman, *supra* note 18, at 812; see also THALE ET AL., *supra* note 6, at 3; Chacón, *supra* note 2, at 352–56.

<sup>109</sup> See NO PLACE TO HIDE, *supra* note 6, at 107–66; Broude & Teichman, *supra* note 18, at 814–15.

<sup>110</sup> See Broude & Teichman, *supra* note 18, at 814–15.

posed by the United States.<sup>111</sup> The *mano dura* response and its strong-arm and oppressive tactics are forcing gang members back into the United States to conduct criminal activity.<sup>112</sup> The United States' reliance on deportations as a criminal control tactic is therefore "not an effective means of achieving either deterrence or incapacitation within the crime control context."<sup>113</sup>

While the United States has not become an insourcing nation—its policies do not aim to attract criminal activity—it is losing the outsourcing race with El Salvador.<sup>114</sup> One explanation for why the removal policy is losing to El Salvador's *mano dura* policies is that removal simply does not increase a gang's cost of doing business in the United States.<sup>115</sup> Gang members do not voluntarily move from the United States to Central America because it is more profitable for them to operate there.<sup>116</sup> Rather, criminals relocate because they are physically removed from one location to the other.<sup>117</sup> Thus, criminal activity may not actually move *in reaction to* cost-imposing regulation.<sup>118</sup>

The U.S. removal policy does not provide strict sanctions nor impose costs that make crime less lucrative within its borders.<sup>119</sup> Deportation is not a working deterrent, as evidenced by the large number of

<sup>111</sup> See NO PLACE TO HIDE, *supra* note 6, at 107–66 (providing an overview of El Salvador's government response to gang violence); Broude & Teichman, *supra* note 18, at 814–15; Lopez et al., *supra* note 5.

<sup>112</sup> See Broude & Teichman, *supra* note 18, at 814–15; Lopez et al., *supra* note 5 (“[H]arsh police reactions in Central America [are] . . . pushing more and more gang members . . . toward the U.S., according to law enforcement officials and gang members.”).

<sup>113</sup> See Broude & Teichman, *supra* note 18, at 814–15; Chacón, *supra* note 14, at 1879, 1888.

<sup>114</sup> See Broude & Teichman, *supra* note 18, at 812, 815; Chacón, *supra* note 2, at 321–27; Kraul et al., *supra* note 15 (“Now, law enforcement crackdowns in Honduras and El Salvador are helping reverse the flow.”).

<sup>115</sup> See *Deportees in Latin America*, *supra* note 1, at 8 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (stating that one failing of the U.S. deportation policy is that many removed gang members simply come back into the United States); Broude & Teichman, *supra* note 18, at 807; Chacón, *supra* note 14, at 1879, 1888; Chacón, *supra* note 2, at 352; Lopez et al., *supra* note 5.

<sup>116</sup> See NO PLACE TO HIDE, *supra* note 6, at 51–53.

<sup>117</sup> See *id.* Thus, U.S. outsourcing could be described as mechanical or artificial because the movement of criminals out of the country is not the result of regulatory outsourcing in the traditional sense. See Broude & Teichman, *supra* note 18, at 807 (basing their model of regulatory outsourcing on economic considerations and motivations).

<sup>118</sup> See Broude & Teichman, *supra* note 18, at 807.

<sup>119</sup> See Chacón, *supra* note 14, at 1888. Rather, after removal, “the locus of their criminal activity simply shifts” without addressing the willingness of gang members to commit future crimes in the United States. See *id.*

deportees who return to the United States and reoffend.<sup>120</sup> The increase in gang membership and crime in the United States since the IIRIRA's passage illustrates that the threat of removal does not make the United States a less desirable location for gang activity.<sup>121</sup>

### B. Regulatory Cooperation as a Possible Solution

One of the factors in the domestic growth of youth gangs is the movement of gang members to the United States because it may be the more desirable—and profitable—location for criminal activity.<sup>122</sup> While there is no easy solution to the growing global gang phenomenon, it has become clear that forced removals have only exacerbated the problem.<sup>123</sup> National and international gang activity and membership are currently at higher rates than when the legislative reform was implemented in 1996 to combat gang problems.<sup>124</sup> Yet, even in the face of

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<sup>120</sup> See *Deportees in Latin America*, *supra* note 1, at 8 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere). In 2007, over thirty thousand noncitizens were re-apprehended in the United States after being formally removed to their home countries. See *id.* at 77 (written responses from Gary Mead, Assistant Director for Management, Office of Detention & Removal Operations, United States Department of Homeland Security). Additionally, in a survey of three hundred deportees removed to El Salvador in 2002, twenty-three percent stated that they had already been deported once before from the United States and thirty-eight percent said they were planning to return. See *id.* at 48–50 (statement of Nestor Rodriguez, Chairman, Department of Sociology, University of Houston).

<sup>121</sup> See EGLEY & O'DONNELL, *supra* note 67, at 1–2; see also *Deportees in Latin America*, *supra* note 1, at 38 (statement of Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica) (“[T]he removal of criminal offenders to another geographical location does not protect the United States from further criminal actions by those persons.”); Chacón, *supra* note 14, at 1888 (“[R]emoved noncitizens . . . are not likely to cease [criminal] conduct simply because they have been removed.”); Chacón, *supra* note 2, at 352–56; Lopez et al., *supra* note 5 (quoting Federal Bureau of Investigation Assistant Director Chris Swecker on the end result of deporting gang members: “I think most of the police departments will agree that you’re just getting them off the street for a couple of months.”).

<sup>122</sup> See *Deportees in Latin America*, *supra* note 1, at 8 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); THALE ET AL., *supra* note 6, at 4 (“As migration between the U.S. and the region continues to surge, the connections and influences between the gangs in each country have only become stronger.”); Broude & Teichman, *supra* note 18, at 807–08.

<sup>123</sup> See *Deportees in Latin America*, *supra* note 1, at 1 (statement of Rep. Eliot L. Engel, Chairman, H. Subcomm. on the W. Hemisphere); Reisman, *supra* note 45, at 148–50 (noting that this gang removal policy has had a complex impact on the United States and Central America, including the proliferation of youth gangs throughout the region).

<sup>124</sup> See *Immigration and the Alien Gang Epidemic*, *supra* note 67, at 13 (statement of Heather Mac Donald, Senior Fellow, the Manhattan Institute); EGLEY, *supra* note 66, at 1–2; EGLEY & O'DONNELL, *supra* note 67, at 1–2; Reisman, *supra* note 45, at 148–50.

failed results, the U.S approach remains wrongly focused on deportation and increasing removal efforts.<sup>125</sup>

Legislative efforts to harden our criminal removal tactics further are not the solution.<sup>126</sup> Several problems might result if the United States takes a more drastic approach to gang-related crime.<sup>127</sup> First, such an approach would increase self-serving regulatory competition.<sup>128</sup> It would lead to a system of crime prevention which would not account for the collective international impact of gang crime.<sup>129</sup> Second, regulatory competition has proven to be ineffective as a crime reduction method.<sup>130</sup> Rather than limit gang activity, deportations create a “merry-go-round” without borders, enabling the movement and transnational spread of MS-13.<sup>131</sup> The failure of the current U.S. removal policy in reducing gang crime is an example of the trouble that can result from a

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<sup>125</sup> See Alien Gang Removal Act of 2005, H.R. 2933, 109th Cong. (2005); THALE ET AL., *supra* note 6, at 4 (discussing the Alien Gang Removal Act as an example of stronger deportation legislation). Such proposed legislation would provide broader definitions of gang crimes in an effort to strengthen and expand U.S. deportations. See *Alien Gang Removal Act of 2005: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 109th Cong. 11–12 (2005) (statement of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs) (noting that the Alien Gang Removal Act would allow individuals to be deported for “being a member of a group or association of three or more individuals that have been designated by the Attorney General as a criminal street gang”). Recently proposed legislation mirrors the repressive *mano dura* policies in many ways and would also increase the possibility of innocent and legally present individuals being deported. See Chacón, *supra* note 2, at 333–36.

<sup>126</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (“[W]e must also rethink what we do with illegal immigrants . . . once we catch them . . . . Simply exporting our problems obviously is not the solution.”); THALE ET AL., *supra* note 6, at 4 (“Some in the United States have proposed a still stronger emphasis on deportation, as a way to get criminals out of the United States.”); Broude & Teichman, *supra* note 18, at 807–08.

<sup>127</sup> See THALE ET AL., *supra* note 6, at 4 (“Increasingly aggressive deportation policies are likely to further strengthen the transnational links between gangs in Central America and in the United States and to worsen the problems in the region.”); Broude & Teichman, *supra* note 18, at 828; Reisman, *supra* note 45, at 147 (advocating that governments should work together in developing enforcement policies in order to end the cycle of ineffective state responses).

<sup>128</sup> See Broude & Teichman, *supra* note 18, at 830–31 (stating that independent “crime control efforts” of one nation displace criminal activity to other nations, creating “negative externalities”).

<sup>129</sup> See *id.* at 831 (noting that when nations engage in regulatory competition it can lead to “suboptimal crime control policies that do not maximize aggregate welfare”).

<sup>130</sup> See *Deportees in Latin America*, *supra* note 1, 34–35 (statements of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs, and Rep. William D. Delahunt, Member, H. Subcomm. on the W. Hemisphere) (noting the failure of current U.S. deportation policy as a crime control measure).

<sup>131</sup> See Sibaja et al., *supra* note 22, at 45; see also Lopez et al., *supra* note 5.

regulatory competition that ignores international impact.<sup>132</sup> Finally, a race to the strictest sanctions may threaten civil liberties, especially for underrepresented groups.<sup>133</sup> This is already evidenced by the discriminatory practices implemented in El Salvador.<sup>134</sup> The United States has also shown recent willingness to compromise constitutional rights in an effort to toughen immigration policy and combat gang crime.<sup>135</sup> Thus, continuing to engage in regulatory competition will only exacerbate the problems resulting from the already decentralized international system of crime control.<sup>136</sup>

It is time to accept the failure of U.S. removal policy and create new ways for immigration law to combat criminal gangs.<sup>137</sup> While concrete solutions do not present themselves readily, political economic theory suggests that international cooperation will provide the most beneficial path to alleviate the problem of gang proliferation.<sup>138</sup> Rather than compete with Central American nations, the United States and the international community must take a cooperative approach in controlling the proliferation of youth gangs.<sup>139</sup> The United States needs to

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<sup>132</sup> See Broude & Teichman, *supra* note 18, at 830–31; Chacón, *supra* note 14, at 1888 (noting that the U.S. removal policy does not “trouble itself” with the consequences for nations receiving the gang members).

<sup>133</sup> See Broude & Teichman, *supra* note 18, at 831 (“[D]ecentralization brings about inequalities that benefit wealthier groups.”). Nations that engage in regulatory competition often adopt harsher sanctions and policies than necessary. See *id.* at 831, 835.

<sup>134</sup> See THALE ET AL., *supra* note 6, at 3; Broude & Teichman, *supra* note 18, at 831 (noting that outsourcing races lead to inefficiencies associated with over-enforcement); Reisman, *supra* note 45, at 148.

<sup>135</sup> See Chacón, *supra* note 2, at 331–36. For example, one federal task force focused on noncitizen gang activity is able to remove noncitizens believed to be gang members even when state and federal law may provide no basis for criminal prosecution. See *id.* at 332 (“[Seventy] percent of the people removed [by this task force] have not been charged with crimes and are deported on the grounds of immigration violations alone.”). By identifying gang members without any legal standards, this task force depends on discretionary policing, which leads to concerns of abusive law enforcement. See *id.* at 332–33, 341–42. Additionally, there are few procedural checks to ensure abuse does not take place because there is no legal process to challenge this type of removal. See *id.*

<sup>136</sup> See Broude & Teichman, *supra* note 18, at 830–31. In the current decentralized system, nations make independent and self-serving policy decisions that displace crime to other nations, leading to over-enforcement and inefficient crime control. See Reisman, *supra* note 45, at 147.

<sup>137</sup> See *Deportees in Latin America*, *supra* note 1, at 35 (statement of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs).

<sup>138</sup> See Broude & Teichman, *supra* note 18, at 801.

<sup>139</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 13 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development) (“[B]y working together with other governments and other U.S. government agencies to implement effective cross-sectoral measures that strengthen institutions and build local capacity, we can—and must—have an

work with other nations to implement actual laws and legal costs that no longer make any location a profitable place for criminal activity.<sup>140</sup> Through international cooperation, the nations of the Americas can develop new forms of international crime control to combat the rising gang problem and avoid inefficient regulatory competition.<sup>141</sup>

The proliferation of youth gangs is a transnational problem that requires a coordinated transnational response.<sup>142</sup> The United States and Central American nations that have been inundated with removed criminals must work together to implement uniform crime control standards that are in the best interests of the international community.<sup>143</sup> While a model for this level of international cooperation does not currently exist and may be difficult to achieve, it is necessary to understand that it is the best approach to combating gang proliferation.<sup>144</sup> A first step might be the formation of an international committee to provide benchmark standards of enforcement and sanction.<sup>145</sup> This “cooperative-outsourcing” approach will provide many advantages over regulatory competition.<sup>146</sup> International crime control standards will

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impact.”); Broude & Teichman, *supra* note 18, at 837 (recommending international normative regimes designed to increase the efficiency of crime control); Reisman, *supra* note 45, at 147.

<sup>140</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 3, 13 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere, and prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development); Broude & Teichman, *supra* note 18, at 800, 807. To make criminal activity unprofitable, the United States should not blindly increase its sanctions; instead it must focus on international cooperation. See THALE ET AL., *supra* note 6, at 4; Broude & Teichman, *supra* note 18, at 837; Reisman, *supra* note 45, at 147. As part of an international approach, the United States should, as others have called for, provide monetary aid and other resources to help improve the law enforcement response of the Central American nations. See *Deportees in Latin America*, *supra* note 1, at 35–36, 38 (statements of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs, and Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica) (recommending increased aid for social reintegration programs and increased support for receiving nations’ law enforcement).

<sup>141</sup> See *Gangs and Crime in Latin America*, *supra* note 34, at 13 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development); Broude & Teichman, *supra* note 18, at 848 (“[T]he traditional concept of state sovereignty over criminal justice must make way for new concepts of international cooperation if efficient crime control is to be achieved.”).

<sup>142</sup> See Reisman, *supra* note 45, at 147, 151.

<sup>143</sup> See Broude & Teichman, *supra* note 18, at 836 (stating that internationally agreed-upon “maximum criminal standards” would allow for optimal crime control without imposing externalities on other nations and without wasting resources).

<sup>144</sup> See *id.* at 835–37.

<sup>145</sup> See *id.* at 838.

<sup>146</sup> See *id.* at 848.

ensure that criminal activity will not be negatively displaced and will lead to the most internationally efficient crime control regulations.<sup>147</sup>

#### CONCLUSION

U.S. legislation that focuses on deporting noncitizen gang members and the harsh policy response from Central American nations has contributed to rather than eliminated transnational gang violence. Rather than engage in such regulatory competition, the United States should work to develop an internationally cooperative model for regulating criminal gang activity. While the United States must implement new regulations that deter crime by imposing sanctions that make the United States a more costly and less desirable place to conduct criminal activity, any new legislation must be a part of a coordinated international crime control effort. The United States must develop new international strategies with Central American nations to avoid overburdening them with the influx of criminal gang members and to combat the threat of gang transnationalization most efficiently.

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<sup>147</sup> *See id.* at 830–31, 836 (suggesting that enforcement-related externalities and inefficiencies could result from the absence of centralized international crime control). For example, if engaged in an outsourcing race, El Salvador could not afford to relax its current repressive enforcement tactics because to do so would cause even more crime to be displaced from the United States. *See id.* at 835. A cooperative crime control effort between the nations, however, would avoid this inefficient regulatory competition and allow nations to adopt policies that are mutually beneficial. *See id.* at 835–36.