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COMMENTS

EL DERECHO Y EL HECHO: LAW AND REALITY IN THE MEXICAN CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

The U.S. takes a selective interest in México's legal system. The interest often appears to be primarily self-centered—how to get around foreign investment laws,¹ how to acquire cheap vacation homes,² what to do when U.S. tourists are arrested in México,³ and how to counteract threats to the business climate,⁴ particularly nationalization of foreign companies.⁵

Most recently, North Americans have developed an uncharacteristic interest in the Mexican criminal justice system due to two news events in which the legal systems intersect—the detention in U.S. federal prison of former Mexico City police chief Arturo Durazo Moreno pending extradition to México on corruption charges⁶ and the arrest of Jalisco state police officers in the kidnap-

* J.D. UCLA School of Law (1985).

1. See generally Ellsworth, *Mexico: An Investment with an International Flavor*, *Financial Freedom Report*, March, 1982.

2. See generally Marks, *Building in the Baja*, *Baja Times*, August, 1983, at A8; R. Hecht and J. Brennan, *All You Ever Wanted to Know About Owning Real Estate in Mexico* (1983); Redburn, *Mexican Experts Clarify New Property-Tax Law*, *Los Angeles Times*, September 19, 1981, at I-5.

3. See generally C. Franz, *The People's Guide to Mexico* (2d ed. 1979).

4. "A similar problem is how you can sell large amounts of securities to the public if you are not sure of the rights and remedies which the public would have in a situation in which they perhaps receive less than they paid for." Bronheim, *Latin American Law: A Coming Task for Law Librarians*, 59 L. Libr. J. 43, 59 (1966). Bronheim at the time was Assistant General Counsel for Latin America, A.I.D., United States Department of State. *Id.* at 43.

5. See Standard Oil Company, *The Reply to México* (1940), in response to the Mexican government's *The True Facts About the Oil Companies' Properties in Mexico* (1940).

6. Friedrich, *A Proud Capital's Distress*, *Time*, August 6, 1984, at 26, 30.

ping and murder of U.S. narcotics agent Enrique S. Camarena.⁷

This Article will examine México's criminal justice system, focusing particularly on the tension created by thrusting U.S. models into the Mexican culture.⁸

Not surprisingly, North Americans tend to view México's criminal justice system from their own limited perspective. The Belgian scholar Jacques Lambert comments that, "Anglo-Saxon observers grow anxious if not indignant when they see that courts modeled on their own have a different idea of their function."⁹ North Americans expect fellow citizens who serve time in Mexican jails to have the same rights, privileges, and amenities they would have at home. They expect criminals, especially those who murder North Americans, to be dealt with by U.S. models of speedy justice. When that does not happen, they tend to support pressure or intervention. For instance, after the arrest of Jalisco police officers in the Camarena case, U.S. officials were reportedly giving "serious consideration" to seeking extradition to the U.S. of the suspects, Mexican citizens accused of committing a crime deep within Mexican territory.¹⁰ Mexican Attorney General Sergio García Ramírez responded, "The investigation of that case will be of a crime committed on Mexican territory and will be carried out by Mexican authorities."¹¹

North American lawyers who encounter the Mexican legal system are not immune from this phenomenon. Those who exported themselves to Latin America during the 1960s "development decade" expected U.S. know-how and their understanding of the importance of law in U.S. development to engender similar results.¹² They came carrying Socratic teaching models, legal aid programs, government internships, and visions of Spanish language legal digests created in the image of the West Publishing Company.¹³ Former California Senator Thomas H. Kuchel captured the

7. Vasquez, *México Judge Orders Trial of 3 in Drug Agent's Death*, *Los Angeles Times*, March 20, 1985, § 1, at 1.

8. Its genesis was a study tour to Mexico City in June and July of 1984, facilitated by Prof. Henry McGee of the UCLA School of Law and Dr. Jorge Vargas of the University of San Diego School of Law's Mexican Legal Studies Institute. The study centered on the Federal District's public defender program and included visits to several prisons and public defender field offices, visits to courts at all levels including a meeting with Supreme Court Minister Lic. Carlos del Río, and discussions with professors, attorneys, and diplomats in various areas. To all those who gave generously of their time, knowledge, and experience, the author expresses his gratitude.

9. J. Lambert, *Latin America: Social Structures and Political Institutions* 287 (1967).

10. Vasquez, *supra*.

11. Ostrow, *U.S., México to Share Data on Drug Trade*, *Los Angeles Times*, March 23, 1985, § 1, at 17.

12. J. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* 12 (1980).

13. *Id.* at 216 and *passim*.

ethnocentric spirit of the endeavor when he wrote, "Lawyers in these new nations must know and have the very feel of the American concept of law if peace through law is to be achieved."¹⁴

On the surface, North Americans see in the Mexican legal system one that in many respects resembles their own.¹⁵ Mexico's constitution, especially those provisions of the 1917 constitution that survive from the 1824 and 1857 constitutions, owes much to ours.¹⁶ In some ways, hindsight has given the Mexican adaptation of U.S. models greater clarity and commitment than the original. For instance, civil rights guarantees in the United States arose as much out of the states' fear of a centralized government as out of a commitment to ideals; the Bill of Rights did not apply to the states until after the Civil War.¹⁷ In México, by contrast, judicial review was established for the express purpose of protecting civil rights, and applied to state and federal authorities with equal force from the outset.¹⁸ México has a Senate and a House of Representatives, a Supreme Court, circuit courts, district courts, checks and balances, and a dual system of state and federal jurisdiction.

While Mexico has borrowed many forms from the United States,¹⁹ those forms have been imposed on a different culture, one primarily rooted in the European civil law tradition.²⁰ Montesquieu

14. *Id.* at 13, 291 n.6, quoting Kuchel, *Lawbooks USA: Messenger of World Peace Through Law*, 50 A.B.A.J. 1161, 1163 (1964).

15. English common law influence is so great that some commentators describe México's system, nominally a civil law jurisdiction, as a combination of civil and common law. J. Lambert, *supra* at 289. The separation between judges and attorneys, strict in civil law countries but not in common law countries, is in México indistinct. *Id.* The Supreme Court performs many functions that, in a civil jurisdiction like France, belong to the Ministry of Justice, such as appointing lower court judges and seeing to its own internal discipline. *Id.* at 291-92. "Latin American law . . . exhibits a tendency to adapt common-law models, particularly in the field of commercial law. Conditional sales, chattel mortgages, and security transactions, all of which were alien to civil-law principles, are being initiated either directly or through some legal fiction. Trusts are also taking root in Latin American law. Such tendencies are not surprising, of course, in the light of the extent of inter-American trade and investment." Clagett, *Law and Court Systems* in H. Davis (ed.), *Government and Politics in Latin American* 366 (1958).

16. J. Lambert, *supra* at 287.

17. Cabrera & Headrick, *Notes on Judicial Review in México and the United States*, 5 *Inter-American Law Review* 253, 254-55 (1963).

18. *Id.*

19. For a discussion of the influence of Mexican law in those United States seized from Mexico during the Mexican-American War, see M. Ruiz, *Mexican American Legal Heritage in the Southwest* (1972).

20. "Particularly in the area of constitutional law, the gap between the law on the books and the living law, a gap which to some extent appears in all societies, has loomed exceedingly large. All too frequently those in power have behaved as though they really believed the canard—constitutions, like virgins, are born to be violated. After noting that from the time of independence until 1959 the twenty Latin American Republics have had a total of 186 constitutions, one scholar concluded: 'Nowhere are constitutions more elaborate and less observed.'" K. Karst, 1 *Materials on Law and Development in Latin America*, chapter two, 1-2 (1971), quoting Mecham, *Latin American Constitutions—Nominal and Real*, 21 *J. Politics* 258 (1959).

once wrote, "It is a great chance if [laws] of one nation suit another They should be relative to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives . . . they should have a relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manner, and customs."²¹ Not only were aspects of the Mexican legal system imported from abroad, they were imported, at least in the immediate post-independence period, by the elite class that led the revolt against Spain. The creoles, Spaniards born in the New World, clearly did not speak for the entire nation.²² What began as a significant, broad based revolution ended as "a conservative coup d'etat," with the creoles, for whom even Spain was getting too liberal, the only victors.²³ México has long felt ambivalent about its relationship to its powerful northern neighbor, and the law is one more area where that ambivalence surfaces. Latin America, in accepting foreign models, has been compared to a man who buys an imported suit. "[F]inding it too tight in some places, too loose in others, too long here, and too short there, [he] tries to change his body instead of buying another suit. The body suffers, and so does the suit."²⁴

I. SOURCES OF MEXICAN LEGAL ATTITUDES: THE COLONIAL EXPERIENCE AND THE CIVIL LAW TRADITION

The Spanish discovered soon after conquest that law was an effective means of supervising a distant colony. Though they initially left substantial power in the hands of their subordinates in the New World, they reversed themselves abruptly when they realized they were losing control.²⁵ In an effort to reestablish their authority, they created "a labyrinth of legalism."²⁶ So many attorneys emigrated from Spain that colonial officials rose up in protest, demanding a ban on any further influx of lawyers.²⁷ Perhaps more effectively, a healthy industry of local attorneys soon sprang up to help the colonists through the labyrinth.²⁸ Despite the new policy of exercising control through law, the most Spain could do from a distance was to outline the broad policy and leave its implementa-

21. Charles Louis de Secondat, Baron de Montesquieu, *The Spirit of Laws* 7 (1873) quoted in J. Gardner, *supra* at 293 n.6 (1980).

22. Busey, *Observations on Latin American Constitutions*, 24 *The Americas* 46 (1967), quoted in K. Karst, *supra* at 8.

23. E.B. Burns, *Latin America: A Concise Interpretive History* 80-81 (2d ed. 1977).

24. L. Harris & V. Alba, *The Political Culture and Behavior of Latin America* 40 (1974).

25. E.B. Burns, *Latin America: A Concise Interpretive History* 39-40 (2d ed. 1977).

26. C. Gibson, *Spain in America* 61 (1966).

27. M. Jorrín, *Governments of Latin America* 120 (1953).

28. C. Gibson, *supra*.

tion to subordinates, depending on immense amounts of paperwork and tattletales hoping to curry favor with the royal court in order to keep the subordinates in line.²⁹ Because of its medieval and 15th century legal heritage, Spanish law was already unwieldy, superficially orderly but ultimately "petty" and given to "minute detail."³⁰

The colonists responded with disobedience.³¹ Faced with a law enforcement crisis, Spain acted as any good bureaucracy would: it wrote more laws.³² Writes Gibson, "One of the more intriguing paradoxes of Spanish American history involves the straight-faced repetition of legal rules in conjunction with the persistent, and expected, violation of them."³³ Phelan views the disparity between law and reality as not a flaw in the system but its inevitable result: "Given the ambiguity of the goals and the conflict among the standards, all the laws could not be enforced simultaneously. The very conflict among the standards, which prevented a subordinate from meeting all the standards at once, gave subordinates a voice in decision making without jeopardizing the control of their superiors over the whole system."³⁴ Subordinates honestly believed they could be loyal to Spain while still bending the laws to suit the local situation; the phrase, "*Obedezco pero no cumplo* (I obey but I do not fulfill)"³⁵ was a rationalization, not a sign of defiance. A contemporary proverb put it another way: "*Hecha la ley, hecha la trampa* (as the law is made, so is the trick.)"³⁶ The result was an efficient compromise, accommodating interests of both monarch and colonist, pleasing no one entirely, but allowing the system to function.³⁷

At independence, México's creoles looked to foreign models—Spain, France, and the United States—in shaping their new nation.³⁸ For example, México adopted the North American model of federalism, even to the point of carving out states where none existed before, granting them sovereign powers with respect to their internal affairs, and sending them off to promulgate bodies of state law.³⁹ Colonial México had little history of regional self-rule to

29. E.B. Burns, *supra* at 40-41. Anyone who has seen modern Mexican bureaucracy in action knows that the immense amounts of paperwork survive to this day.

30. C. Gibson, *supra* at 109.

31. *Id.* at 110.

32. *Id.*

33. C. Gibson, *supra*.

34. Phelan, *Authority and Flexibility in the Spanish Imperial Bureaucracy*, 5 *Administrative Science Quarterly* 63-64 (1960), quoted in Gibson, *supra* at 110 n.25.

35. E.B. Burns, *supra* at 40.

36. M. Jorrín, *Governments of Latin America* 120 (1953).

37. *Id.* The extralegal bureaucracy of colonial days was not the first in México; a system of favors and patronage flourished under the Aztecs as well. A. Riding, *Distant Neighbors: A Portrait of the Mexicans* 113 (1985).

38. A. Golbert & Y. Nun, *Latin American Laws and Institutions* 37 (1982).

39. In practice, it turns out, most state codes follow a uniform model. In criminal matters, many states have adopted without modification the 1931 Penal Code, *Código Penal para el Distrito y Territorios Federales en materia de fuero comun y para toda la*

require the creation of new states.⁴⁰ The model was chosen, according to one Mexican author, "partly for real necessity and partly for the initiative phenomenon."⁴¹ When first introduced in the Constitution of 1824, the idea of statehood did not take; the system disappeared 12 years later, to be replaced by the *Siete Leyes Centralistas* and not restored until the Constitution of 1857.⁴² México also created district courts, circuit courts, and a Supreme Court on the U.S. model.⁴³

Though México adopted North American legal forms, it did not adopt English common law but, rather, retained the European civil law tradition. As Spain lacked modern codes in some areas, the new nations turned to the then new Napoleonic codes to fill the gaps.⁴⁴

The civil law tradition regards the judiciary with distrust.⁴⁵ For example, the French Revolution, which produced the Napoleonic Codes, saw the judiciary as a special enemy because of its disposition to either freely interpret or refuse to enforce the law, whichever would most benefit its friends in the landed aristocracy.⁴⁶ Civil law attempted to place strict limits on judicial power and prestige, reducing the judge's position in government to that of a minor bureaucrat who had no power to go beyond the letter of the law.⁴⁷

In civil law utopia, there are no lawyers.⁴⁸ The answers to all legal questions may be found written down in the codes, in clear

República in materia de fuero federal in Diario Oficial, August 14, 1931. H. Clagett & D. Valderrama *A Revised Guide to the Law and Legal Literature of México*, 177-178 (1973). In civil matters, the states have either adopted with "little or no alteration" the code promulgated for the federal district, *Código Civil del Distrito y Territorios Federales*, in *Diario Oficial*, May 26, July 14, August 3 and 23, 1928. *Id.* at 62, 70, or have followed the federal code closely in drafting their own. *Id.*

40. F. Floresgómez González & G. Carvajal Moreno, *Nociones de derecho positivo mexicano* 101 (1981).

41. M. García Pelayo, *Derecho Constitucional Comparado* 215, quoted in F. Floresgómez González & G. Carvajal Moreno, *supra*.

42. F. Floresgómez González & G. Carvajal Moreno, *supra* at 102-03.

43. This was seen as a simplification. "During the colonial period, the courts of México were a maze of legal complexity. The organization of the Federal and State courts of the United States, with their separate and concurrent jurisdictions, seems simple in comparison to the colonial hierarchy in México, composed of over 30 tribunals of first instance, besides the two Audiencias in Mexico City and Guadalajara which were supreme in power. The tribunals ranged from ecclesiastical and mining courts to special courts for delicts in cockfighting and ballplaying (pelota)." H. Clagett & D. Valderrama, *supra* at 109. See also Mexican Constitution, art. 40.

44. Clagett, *Law and Court Systems* in H. Davis (ed.), *Government and Politics in Latin America* 336 (1958). Though all civil systems owe a great deal to the French, the French intervention in México, from 1864 to 1867, played a little part in Mexican legal history. Maximilian suspended the Constitution provisionally, replacing it with an "organic imperial statute." At his death and the fall of his short-lived empire, the Mexican constitution was restored. H. Clagett & D. Valderrama, *supra* at 10.

45. J. Merryman, *The Civil Law Tradition* 16 (1969).

46. *Id.* at 17.

47. *Id.* at 19.

48. *Id.* at 29.

language understandable to any lay person.⁴⁹ (The most ambitious effort to anticipate every possible fact situation by statute, Frederick the Great's Prussian *Landrecht* of 1794, contained some 16,000 provisions.⁵⁰) The judge becomes nothing more than an "expert clerk"; he lays the fact situation beside the statute, and cranks out the result automatically.⁵¹

The impression persists that the principal difference between civil and common law systems is that the civil law system has no case law and relies entirely upon statutes.⁵² In practice, even Frederick the Great's Prussian judges found themselves engaging in some interpretation.⁵³ By the time of Bismarck, some time after Mexico's independence from Spain, European civil law openly conceded the necessity of judges engaging in interpretation.⁵⁴ Merryman, speaking generally of all civil law jurisdictions, says that "the fact is that courts do not act very differently towards reported decisions in civil law jurisdictions than do courts in the United States."⁵⁵

While it is true that a Mexican district court may ignore a previous Supreme Court interpretation of a statute in a case on all fours with the case at bar (unless the Supreme Court has created binding precedent by ruling the same way in five consecutive cases⁵⁶, there is nothing to keep judges from taking a peek at how other courts, some of them in a position to reverse on appeal, have handled the same problem.⁵⁷ However, it is this author's observation that Mexican lawyers rarely cite cases in their briefs. If they cite anything, they are more likely to cite a treatise, including one from another civil law jurisdiction.⁵⁸ Law schools do not teach case method; in two weeks of auditing classes at the Universidad Nacional Autónoma de México (UNAM), the author did not hear one

49. *Id.*

50. *Id.* at 30.

51. *Id.* at 37.

52. *Id.* at 44.

53. *Id.* at 40.

54. *Id.* at 42.

55. *Id.* at 48.

56. J. Lambert, *supra* at 288; H. Clagett & D. Valderrama, *supra* at 48. The opinions average perhaps a page in length. A topical index in the back of the Supreme Court reporter locates a one-sentence statement of the rule followed by five citations to cases. Some reporters also list cases that have not become precedent. H. Clagett & D. Valderrama, *id.* Further, the extended argument and hair-splitting that common lawyers might anticipate over whether five cases in a row have actually ruled on exactly the same point of law is not present in Mexican law schools or courts. Common lawyers could happily distinguish away cases until no two cases were ever decided on *exactly* the same point; it is the author's observation that the Mexican system seems content, in general, to stop at the statute, turning to case law only as a last resort.

57. J. Merryman, *supra* at 48.

58. Address by Alexander Hoagland, North American attorney practicing in Mexico City, to Mexican Legal Studies Institute, Mexico City, June, 1984.

case mentioned by name, much less discussed.⁵⁹

II. PRETRIAL CRIMINAL PROCEDURE

The procedure leading to indictment in México depends on whether or not the suspect is caught in the act.⁶⁰ If he is caught in the act, he may be detained without a warrant. The prosecutor, who, with the aid of the police under his command, is responsible for criminal investigations,⁶¹ then has 72 hours to complete the investigation, bring the record before a judge, and request formal arrest. The process is called *consignación*.⁶² If the suspect is not caught in the act, or if he is released due to failure to complete the investigation within 72 hours, the prosecutor launches an investigation on his own initiative or in response to a report (*denuncia*) made in writing by anyone with information about the alleged crime.⁶³ Whenever the prosecutor feels he is ready, he may go before the judge to request the arrest warrant.⁶⁴ The judge either may issue an arrest warrant (*orden de aprehensión*) on the spot or send the prosecutor back to the drawing board.⁶⁵

Once the accused is arrested, he must be brought before a judge within 48 hours for his *declaración preparatoria* or general statement.⁶⁶ Not until after he makes this statement is he entitled to have a public defender appointed.⁶⁷ He is not required to make a statement, and has a privilege against self-incrimination.⁶⁸ Within 24 hours of this statement and review of the prosecutor's record, the judge must decide whether to dismiss the case for lack of evidence or go forward.⁶⁹ If there is probable cause to proceed, the judge issues an *auto de formal prisión* formally charging the accused and opens trial.⁷⁰

The Mexican constitution guarantees the right to counsel from

59. Accord J. Herget & J. Camil, *An Introduction to the Mexican Legal System* 77 (1978). "There is seldom citation to previous case authority in legal discourse. Also, the type of reporting available plus the style of opinion typical of most courts make it difficult to compare and analyze cases in the way that common lawyers are accustomed to. It appears, however, that the study of case law *jurisprudencia* may be slowly growing in México, possibly due to United States influence." *Id.*

60. J. Herget & J. Camil, *An Introduction to the Mexican Legal System* 83-84 (1978).

61. A. Mayagoitia, *A Guide to Mexican Law* 81 (1976).

62. *Id.* at 81; J. Herget & J. Camil, *supra* at 84.

63. J. Herget & J. Camil, *supra* at 83.

64. *Id.* at 84.

65. A. Mayagoitia, *supra* at 82.

66. *Id.* at 84.

67. J. Herget & J. Camil, *supra*.

68. Interview with Jorge Arturo Sibaja López, a former prosecutor now in private practice, Mexico City, July, 1984.

69. A. Mayagoitia, *supra* at 84.

70. *Id.*

the moment of detention.⁷¹ One practitioner states, "This is not respected and will never be respected, especially by the police and the agents of the *ministerio público*."⁷² Police sometimes resort to brutality to get confessions, especially if the accused has a record.⁷³ One practitioner reports that, though public defenders are supposed to provide their services without charge, they usually receive a modest fee from their clients under the table. He considers it a fair trade: the clients get legal services for a modest fee and young lawyers without the connections or family wealth to get started in practice receive training and periodic infusions to their official salaries.⁷⁴ Another practitioner sees corruption in the system as an insurmountable obstacle for public defenders who are unable, due to their position, their finances, and perhaps their inexperience, to engage in bribery.⁷⁵ Pressed for time, they throw together stop-gap petitions that virtually always lose, hoping that eventually a money-making case will come their way to supplement their income.⁷⁶ Harris and Alba observe, "The administration of justice is expensive and although there are public defenders, the poor can very seldom take advantage of the protection which the laws theoretically provide. Thus, courts of justice are held in low esteem and in many places are considered corrupt."⁷⁷

Despite the foregoing bleak description, spirits at the public defender's office in Mexico City are high. On the walls of the reception area, prominently displayed, signs say, "For the benefit of imparting justice and in order to maintain your own dignity, please refrain from offering gratuities," and "The imparting of justice is without cost—Mexican Constitution, art. 17."⁷⁸ Guillermo Cuen Rodriguez, an enthusiastic young public defender assigned to Mexico City's modern new *reclusorio oriente* (a federal pretrial detention

71. Mexican constitution, art. 20, section IX.

72. E. Martínez Anaya, *Manual del detenido* 89 (1984).

73. Last year's National Congress of Superior Courts of Justice took as one of its most pressing matters for discussion confessions obtained by violence. Gil, *Difícil, la administración de justicia por las controversias: Benito Morales, Uno Más uno*, June 27, 1984, at 5. "The beatings are not as frequent as some tell. Some 80 to 90 per cent of our crimes are solved thanks to informers. Rarely is a criminal found through modern techniques or a proper investigation. A. Mayagoitia, *supra* at 59-60.

74. Interview, Jorge Arturo Sibaja López, Mexico City, July, 1984.

75. "The only thing lawyers do is shower money on open hands. The *coyote* strikes a bargain. The experienced lawyer knows how much to pay. The system is subtle enough to handle even the most serious crime. At the investigative level, you can make a murder a suicide. Obviously, a front-page crime cannot be covered up overnight by a single payment. But as soon as things quiet down, something can be arranged. How can public defenders do anything in that atmosphere?" Even in a "clean" case, where the defendant is clearly wrongfully accused, payments are still expected if only to smooth the way. Interview, Gonzalo del Castillo Negrete, Mexico City, June, 1984.

76. *Id.* See also A. Mayagoitia, *supra* at 60: "I must add that the rich hire good defense attorneys and the poor rarely can find an adequate public defender."

77. Harris & Alba, *supra* at 64.

78. Personal observations of author, June-July, 1984.

facility)⁷⁹ concedes that access to public defenders during the administration of President Jose López Portillo (1976-82) was limited.⁸⁰ Improper pre-arraignment interrogation of his clients, in some cases involving torture, took place. Now, however, he claims his clients freely and effectively exercise their constitutional rights.⁸¹ In fact, the current atmosphere is such that three of them each month file suit against members of the now-disbanded Dirección de Investigación de la Delincuencia (DIPD) for López-Portillo-era violations of their rights.⁸²

According to Cuen, anyone who asks for a public defender at his *declaración preparatoria* gets one. Of those arrested, 90 percent request, and receive, public defenders. The public defender for the federal district of México (Mexico City, like Washington, D.C., does not belong to any state) has 33 offices, with one attorney assigned to each. In the *juzgados mixtos*, courts that handle less serious matters, the public defender's office provides one lawyer for every two courts; there are 36 such courts in the federal district. The federal district public defender has 61 lawyers in all, who see an average of 122 arrestees each day.

Within the model *reclusorio*, the federal prison system to which Cuen is assigned, it may well be that his idealism is justified.⁸³ Certainly his zest for the system is justified by what he reads in the Mexican constitution and such statutes as the newly enacted *ley defensoría de oficio*.⁸⁴ The Mexican Bar's *Code of Professional Ethics* imposes a duty on the profession to offer free defense to indigents.⁸⁵

The prisoner with access to counsel may take advantage of the

79. See section III, *infra*.

80. Interview, Gonzalo del Castillo Negrete, Mexico City, June, 1984.

81. *Id.*

82. *Id.* See also A. Riding, *Distant Neighbors: A Portrait of the Mexicans* 130 (1985).

83. Outside the model prisons the Federal District has designated for pre-trial detainees, however, the story may be different. Martínez identifies the *centros de readaptación social*, centers of social readaptation, at Guadalajara and Hermosillo as on a par with the federal district *reclusorios* but concedes that there are still horrendous prisons such as the district prison at Tlalnepantla, in the state of Mexico, where rapists are mixed in with public inebriates and conditions of hygiene depend on the ability to pay—"a national shame". E. Martínez Anaya, *supra* at 13. See section III, *infra*.

84. See *Código de procedimientos penales* (distrito federal), art. 31, 64, 69; *Diario Oficial*, February 9, 1922 and subsequent amendments; Mexican constitution, art. 20, section IX.

85. "The profession imposes on the lawyer a duty to defend indigents free of charge whenever requested, for example by official appointment; noncompliance with this duty, without justified and sufficient excuse related to professional activity, location of required services, or similar circumstances, is a grave mistake that detracts from the very essence of advocacy." Colegio de Abogados, *Código de Ética Profesional de la Barra Mexicana* art. 7, quoted in E. Guerrero L., *Algunas Consideraciones de ética profesional para los abogados* 59, 61 (2d ed. 1982).

unique Mexican *amparo* procedure.⁸⁶ Within the U.S. system, the *amparo* would be analogous to an injunction against government violation of civil rights.⁸⁷ The *amparo* applies only to the individual litigants,⁸⁸ the law, even though held unconstitutional, stays on the books until the legislature changes it.⁸⁹ A Mexican court may not strike down a law it considers unconstitutional, nor may it issue a blanket injunction against its enforcement.

The prisoner who brings a successful *amparo* action challenging his unlawful arrest may be set free—but, because *amparo* is granted only to correct existing harm and restore the status quo,⁹⁰ he must exercise the right before he comes before the judge. Note that the accused must move quickly, as he must come before the judge within 48 hours of arrest.⁹¹ If it is too late to challenge the arrest, he may still challenge the trial or the sentencing.⁹² Until recent changes in the law were made, the accused did not have access to a public defender until the first time he came before a judge.⁹³ By that time, it was too late to challenge the arrest. A detainee without private counsel would never get a chance to exercise that right.⁹⁴ Now, at least in theory, public defenders have access to their clients upon detention.⁹⁵ However, the attorney has no right to participate. At least one practitioner prefers to let the detention process go forward as quickly as possible, without intervention by counsel, in order to get before a judge and plead his case.⁹⁶

III. PRETRIAL DETENTION FACILITIES: THE FEDERAL DISTRICT'S MODEL SYSTEM

North Americans have a movie-of-the-week image of Mexican prisons as corrupt and dangerous.⁹⁷ That may have been true once

86. See generally E. Martínez Anaya, *Manual del detenido* (1984); R. Baker, *Judicial Review in Mexico: A Study of the Amparo Suit* (1971); F. Arilla Bas, *El procedimiento penal en México* (1984). For a critical Mexican view of the *amparo*, see C. Sepúlveda, *La crisis actual del derecho en México*, 12 Boletín Mexicano de Derecho Comparado 487, 492 (1979): "The writ of *amparo* does not have the substance nor the brilliance for which it is credited, and . . . it is one more form, quite empty, difficult, temperamental, and always at the service of private interests rather than great social postulates."

87. See E. Martínez Anaya, *supra* at 39-43 for a sample *amparo* petition.

88. W. Tucker, *The Mexican Government Today* 118 (1957).

89. *Id.* The national Commission of Superior Tribunals of Justice has in the past made recommendations to the legislature concerning laws it considers unconstitutional, but still considers the question unresolved. Gil, *Difícil, la administración de justicia por las controversias: Benito Morales, Uno más uno*, June 27, 1984, at 5.

90. F. Floresgómez González & G. Carvajal Moreno, *supra* at 136-37 (1981).

91. See discussion of procedure, *supra*.

92. *Id.*

93. See Cuen interview, *supra*.

94. E. Martínez Anaya, *Manual del detenido* 43 (1984).

95. *Id.*

96. Sibaja interview, *supra*.

97. While not offered as an example of movie-of-the-week thinking, Riding's de-

and it may still be true in the smaller state prisons,⁹⁸ but at least one system, the new *reclusorio*, or pretrial detention, system for the federal district, competes ably with the best the U.S. has to offer.⁹⁹ Wrote Burke, after touring one of the *reclusorios* in Mexico City, "I was convinced the United States could profit by adapting some Mexican practices to our own system."¹⁰⁰

Mexico City's new *reclusorios* are model prisons. The only way to tell prisoners from guards is that prisoners wear khaki pants and work boots. There are no weapons on the grounds. Prisoners are free to play soccer, use the phone, or work (voluntarily) in any of several factories that produce shoes, lacquerware, and diesel engines. A 60-room hotel with its own dining room and play area for children is provided, so that families reunite in a natural environment once or twice a week. A modern auditorium screens movies regularly. Hearing rooms are located on the grounds and, just down the hall, is the public defender. Officials admit they take some criticism for "excessive" humanism. They say they admire the security and work discipline of North American prisons, "but we don't admire the lack of conjugal contact, the exposed toilets to the public, and the suffering of punishment. Crime here is more out of hunger and passion. In the U.S. it's more pathological, more

scription does focus on the corrupt and dangerous: "Prison authorities frequently steal and resell food and other supplies destined for the institution, while drugs, liquor and other banned products can be routinely bought by prisoners from the wardens. Wealthy detainees—occasional politicians, professionals, and union leaders—can in fact live in relative comfort, renting a suite of two or three adjoining cells equipped with television, refrigerator and occasionally even a telephone, obtaining food daily from the outside, receiving regular visitors, including wives or mistresses, and hiring other prisoners to carry out their assigned chores, to clean their cells, to cook their meals and to provide protection from intramural assailants. Poor prisoners, in contrast, may spend years awaiting trial and are condemned to overcrowding, violence and inadequate food." A. Riding, *Distant Neighbors: A Portrait of the Mexicans* 119 (1985). "I must add in all honesty that in many other important aspects of the penal system, México lacks much. The food is so bad that it is customary to take food to the prisoner, also clothes and bedding. The workshops, schools, and entertainment provided for these unfortunate brothers are very limited or nonexistent." A. Mayagoitia, *supra* at 59. For a more positive view of a local prison in Tapachula, Chiapas, by a former North American prisoner who returned to the U.S. under the prisoner exchange program, see Stirewalt, *México's Prisons Deserve Emulation*, 7 *Corrections*, December, 1981, inside front cover.

98. "Penitentiary systems are generally very primitive, and isolation rather than rehabilitation is the purpose of imprisonment, although the law always states the latter as its objective. Nevertheless, certain countries have introduced some modern features, including conjugal visitation, penitentiary settlements where the families of prisoners can move, and shortening sentences by productive work. Frequently the comforts and conveniences of prisoners depend upon the financial resources of those confined." Harris & Alba, *supra* at 64. "The program is progressing more slowly in the hinterland." Burke, *México's New Prisons*, 43 *Corrections Today* March/April, 1981, at 34.

99. This and the rest of the observations in this section are based on the author's visit to Mexico City's *reclusorio norte* and discussions with its staff in July, 1984.

100. Burke, *supra*.

professional."¹⁰¹

México's modern prison system began with a commission President Porfirio Díaz sent to Europe in 1901, to study the latest developments in penology. The commission returned with a plan by Jeremy Bentham, designed to be implemented in Europe. It was never built in Europe, but it was built in Latin America. Lecumberri, Mexico's first attempt at a progressive prison, became a legend—but not the kind of legend Bentham would have wanted to know about. Sections of the building went years without being seen by anyone other than a priest and a prison director. Designed originally as a pre-trial holding facility for 1,000 inmates, Lecumberri became the federal district's sole prison during the Mexican Revolution, when the only other prison, a holdover from colonial days, was damaged. Designed to house 1,000, Lecumberri came to house as many as 5,000. Though it was supposed to be a pre-trial facility, it became a penitentiary as well. It became known as the Black Palace. In the mid-1950s a new penitentiary, Santa Martha Acatitla, relieved some of the burden on Lecumberri. Though Santa Martha Acatitla took some of Lecumberri's overflow, the Black Palace still held political prisoners, convicts, and the insane under one roof.

In 1969, the prison system was taken out of the hands of the military and turned over to Sergio García Ramírez, a young lawyer who had been largely responsible for writing the *ley de normas mínimas* and who is now México's attorney general.¹⁰² As the second civilian director of Lecumberri, García Ramírez had done away with an extraordinary mafia within the prison, one that had established bars, night clubs, and even a Lebanese restaurant inside. By 1976, when President Luis Echeverría left office, the first two of the new model prisons opened. 3,000 prisoners awaiting trial at Lecumberri were transferred to the new prisons, the *reclusorios norte* and *oriente*. The *reclusorio poniente* is currently under construction; eventually there will be a fourth, completing the plan for a *reclusorio* at each end of Mexico City.¹⁰³

While conceding that practice has not always kept up with theory in making public defenders available to prisoners, the administration contends that it respects completely the rights to bail, counsel, and notice of charges. A tunnel connects the prison to state and federal courts just outside. If a judge exceeds the time allotted for his decision on whether to press charges, the prison ad-

101. For a view of a system other than the Federal District's, see García Ramírez, *Examen de la ley de organización penal de Puebla*, 3 *Boletín Mexicano de Derecho Comparativo* 111 (1970).

102. E. Martínez Anaya, *Manual del detenido* 13 (1984).

103. For a view of the federal penal colony at Islas Mariás, see Worrall, *A.C.A. Study Team Visits Unique Mexican Penal Colony*, 44 *Corrections Today*, December, 1982, at 72.

vises him that it must free the prisoner. If there is no word from the judge within three hours, the prisoner goes free, on the prison's initiative, without petitioning for *amparo*.

IV. THE COURTS

A. Trial

Common law trials follow an "accusatorial" or adversary model, while civil law trials follow an "inquisitorial" model—or so it is commonly thought.¹⁰⁴ Viewed in anthropological terms, the common law accusatorial model is the first substitute society develops for private vengeance.¹⁰⁵ The trial becomes a contest between accuser and accused, with the judge as referee.¹⁰⁶ The inquisitorial model is presumably more advanced: the judge becomes an investigatory agent for the public at large and the proceedings less a contest than a cooperative quest for truth.¹⁰⁷ Merryman regards that distinction as inaccurate and misleading; the two systems are becoming more and more similar.¹⁰⁸ He does, however, point to two significant differences that will immediately strike any common lawyer who observes a civil law trial. First, because civil law jurisdictions have placed little emphasis on the jury, there is no need for the evidence to be presented all at once, as a "single, concentrated event."¹⁰⁹ Instead, the "trial" consists of "a series of isolated meetings of and written communications between counsel and the judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made, and so on."¹¹⁰ Second, the judge who hears the evidence and prepares the record is not usually the judge who decides the case.¹¹¹

The following description of a Mexican criminal hearing illustrates some of the differences.¹¹² In what appears to be the reception area of a typical government office, an assistant judge and a typist, both women in their late 20s, sit at two gray metal desks pushed together. Behind them is the senior judge's private office, enclosed in glass, with a sign on the door that says simply "*juez*."¹¹³

104. Merryman, *supra* at 134.

105. *Id.*

106. *Id.* at 135.

107. *Id.*

108. *Id.*

109. *Id.* at 121.

110. *Id.*

111. *Id.* at 122.

112. These and the other observations in this section are based on the author's study of criminal and civil hearings in Mexico City during June and July, 1984. The case described here involved employees of a large company accused of stealing \$13,000 worth of perishable goods. Their defense was that management had been caught embezzling and had sought to shift the blame to the employees.

113. *Cf.* the discussion *supra* of the judge's diminished stature in the civil law tradi-

In front of them is the general entrance to the office. The defendants have already been indicted and signed written declarations. They are present with their attorneys and the prosecutor. Four people are seated at the gray desks opposite them. There are not enough chairs, so eight others stand around, some of them seated on the edge of another desk. They smoke, speak quietly to each other during the proceedings, and come and go freely.

Lawyers have a less active role in the Mexican system than in the North American system. They put questions to the judge, who then puts them to the witness. After the witness answers, the judge dictates a summary to the typist. When the witness steps down (or, rather, out), the lawyers examine the transcript and the witness signs it. These declarations become the record for the decision of the principal judge, who never examines the witnesses personally or hears any oral argument. Only if a declaration is in dispute or there is an appeal does a formal trial take place. Although there are rules of evidence somewhere in the codes, Mexican lawyers are not nearly as formalistic about them as their North American counterparts.¹¹⁴ The judge informally rejects proffered questions as irrelevant, unnecessary, or dealt with elsewhere. When all the declarations of the witnesses have been taken in this fashion, whenever they are available to come in for an appointment with the assistant judge, the lawyers make their closing arguments—in writing only—and the entire record goes on to the principal judge.

B. *Appeal*

At the entrance to México's Supreme Court are two statutes which, though perhaps not placed there for that purpose, indicate two poles of México's legal heritage, foreign and native. On one side of the staircase is a statute of Ignacio L. Vallarta, an admirer of U.S. Chief Justice John Marshall who introduced much of Marshall's thinking into Mexican constitutional doctrine.¹¹⁵ On the other side is a statute of Mariano Otero, the father of the *amparo*.¹¹⁶

The Supreme Court hears primarily constitutional questions

tion. "No successful lawyers want to be judges"—except, perhaps, Supreme Court judges, says practitioner Hoagland. Address, *supra*. Of course, judges might ask in return whether anyone wants to be a lawyer: "Traditionally prominent, indeed dominant, in the public sector of Latin America, the lawyer's position has been eroded in recent years as lawyers have been 'displaced' by emerging technocratic professionals from economics, administrative, architecture, and engineering. But Latin American lawyers remain a formidable, well-entrenched group. Gardner, *supra* at 53.

114. J. Herget & J. Camil, *supra* at 85.

115. Floris Margadant S., *Latin American Contributions to the Development of Law in Latin American Law: A Coming Task for Law Librarians*, 59 L. Lib. J. 43, 51-2 (1966); H. Clagett & D. Valderrama, *A Revised Guide to the Law and Legal Literature of México* 22 (1973).

116. Floris Margadant S., *id.*; H. Clagett & D. Valderrama, *id.* at 42.

presented in *amparo* petitions.¹¹⁷ It consists of 20 members plus a chief justice, divided into four chambers of five judges each—penal, administrative (including tax), mercantile/civil, and labor. Supreme Court justices are appointed by the President, with the consent of Congress.¹¹⁸ The Supreme Court then names circuit and district court judges¹¹⁹ to a four year probationary term followed by lifetime tenure.¹²⁰ The full court hears administrative matters and constitutional questions involving federal and, on occasion, state statutes. It now has the option of granting certiorari for federal cases of national importance or remanding a case to the lower courts for review. Due to the importance of law reform in the Mexican Revolution, the Supreme Court reviews all agrarian questions. It hears 1500 cases a year and has a backlog of 900.

Public plenary sessions resemble the weekly conferences some U.S. state supreme courts hold in private to review petitions for hearing. Pending cases are distributed among the justices, who then report to their fellow justices in open session and make a recommendation. Generally the Court hears one concurring or dissenting view and then votes. About half the cases are postponed for further consideration. An elaborate electronic system controlled by the chief justice activates the microphone and indicates by red light who has the floor. Lawyers do not make appearances before the court. Their arguments are in written form only. Members of the audience approach justices on the bench to chat, even when court is in session. Several of the justices smoke cigars in court. They leave their robes in the courtroom, donning them when they enter.

Although the U.S. model of an activist Supreme Court is foreign to the civil law tradition, the Mexican Supreme Court has had other, historical reasons for refraining from activism. As one Latin American student put it, "If the United States had experienced the 'age of the *caudillos*,'¹²¹ if President Jefferson could have had Chief Justice Marshall summarily shot after his decision in *Marbury v. Madison*, might this not have retarded the emergence of a strong and independent judiciary?"¹²² Lambert notes that México's courts

117. W. Tucker, *The Mexican Government Today* 115 (1957) and address by Justice Carlos de Río at the Mexican Supreme Court in June, 1984, to students and faculty of the Mexican Legal Studies Institute, upon which most of this section is based.

118. G. Fitzgerald, *The Constitutions of Latin America* 142 (1968).

119. *Id.*

120. F. Floresgómez González & G. Carvajal Moreno, *Nociones de derecho positivo mexicano* 132 (1981). In 1934, President Lázaro Cárdenas succeeded in reducing the tenure of Supreme Court justices from life to six years, under the pretext that judges with life-time tenure become too conservative. President Avila Camacho reinstated life tenure in 1944. J. Lambert, *supra* at 294.

121. In Mexico, General Antonio López de Santa Anna, who ruled intermittently for 30 years in the first half of the 19th century, is the best example of the Latin American *caudillo* or strongman tradition.

122. A. Christensen, *The Evolution of Latin American Government* 470 (1951).

have been "very accommodating" in allowing the suspension of constitutional guarantees,¹²³ too lenient in recognizing provisional governments, and too accepting of improper federal intervention in the affairs of the states.¹²⁴ One study concluded that Mexican courts have allowed themselves to be influenced by political considerations in the areas of religion, deportation of "undesirables," election law, dismissal of public officials, and large agrarian land expropriations, while they have remained independent and assertive in the areas of appellate review of military courts, confiscation of small farmers' property by the government, treaty interpretation, income and property taxation, and criminal due process.¹²⁵ In addition, they show little hesitation in enjoining unconstitutional acts of executive officials directed against individuals.¹²⁶

V. EL DERECHO Y EL HECHO: LAW AND REALITY

If a North American media profile of México quotes one term in Spanish these days, it is likely to be *la mordida*. As *Time* explains, "*La mordida* (the bite) is the Mexican term by which underpaid officials supplement their salaries. Those who actually extort money, by such simple methods as stopping motorists for imaginary traffic violations, are known as *mordelones*, or biters. The system is pervasive—and paralyzing."¹²⁷ Writes Alan Riding, the former *New York Times* correspondent in Mexico City, "[T]he system has in fact never lived without corruption and it would disintegrate or change beyond recognition if it tried to do so."¹²⁸

A discussion of the Mexican legal system would not be complete without a discussion of corruption, for codes and precedent mean very little if they are ignored. That the corruption exists and is pervasive has been acknowledged at the highest levels.¹²⁹ Riding speaks of a judiciary that "rarely provides justice."¹³⁰ While he says the Supreme Court does not have a reputation for taking bribes, it is subject to political pressure.¹³¹ Lower courts, however,

123. Article 29 of the Mexican constitution provides for the suspension of constitutional guarantees in case of invasion or national crisis, by the President acting with congressional approval and subject to limitations on time and scope.

124. J. Lambert, *supra* at 288.

125. J. Herget & J. Camil, *supra* at 7.

126. R. Alexander, *Latin American Politics and Government* 39 (1965).

127. Friedrich, *A Proud Capital's Distress*, *Time*, August 6, 1984, 30.

128. A. Riding, *Distant Neighbors* 113 (1985).

129. Presidents from Obregón, who used to boast that "there is no general who can resist a canonade of 50,000 pesos," to Calles and Camacho, who first embarked on "moralization" campaigns, to current President Miguel de la Madrid Hurtado, who came into office promising sweeping "moral renovations," have directly addressed the problem. *Id.* at 115.

130. *Id.* at 119.

131. *Id.*

are a different story.¹³² Former Mexican Supreme Court President Euquerio Guerrero L., upon leaving office in 1976, denounced corruption in his profession, and, as late as 1982, noted that it had not yet disappeared.¹³³ Justice del Río concedes that one reason the Supreme Court has such a backlog of cases is lack of confidence in the lower courts.¹³⁴ Corruption in the judiciary, as might be expected, does not strengthen the institution.¹³⁵

But it is important, also, to understand the cultural differences, some of them due to the experience, discussed earlier, of coping with unreasonably burdensome laws imposed by Spain. Since colonial days, there has always been "a certain irrelevance" between the law and the individual.¹³⁶ Gibson notes that, "Routine business is conducted around the law, in fees and bribes, in personal loyalties, in official compromises, in codes of honor, in tax evasion, and in embezzlement. Such activities continue to be regarded as natural and expectable, as in the colonial period."¹³⁷ It contrasts particularly with the New England Puritan insistence upon strict compliance with law, perhaps out of fear of their own "depravity."¹³⁸ For Spanish Americans it is natural for humans to be imperfect.¹³⁹ Rid-

132. "And if we pass to the tribunals on the common level, with very few exceptions, their mediocrity is disillusioning. It may well be for lack of moral or material incitement, or for political reasons, or for the general absence of a solid judicial or social preparation by the litigants as well as the officers of the court, or perhaps because the matters that come to trial are themselves insipid, the truth is that the tribunals' work is not very impressive and you may be assured that it contributes to some deprecation of the role of the law. We should recognize in relief of this criticism, that the scarce effectiveness of the judicial machinery corresponds in a majority of the cases to a lack of development or a deficient development of the judicial system." C. Sepúlveda, *La crisis actual del derecho en México*, 12 *Boletín Mexicano de Derecho Comparativo* 487, 492 (1979).

133. E. Guerrero L., *Algunas consideraciones de ética profesional para los abogados* 9 (2d ed. 1982).

134. Address, *supra*. "Our supreme and superior courts in the various states do not always adhere to the loftiest technical and moral standards, and our administrative authorities in the states and on the local level are not always the best . . ." Margadant, *supra* at 52. For that reason, appeal to the Supreme Court, and especially the *amparo*, takes on particular importance. *Id.* "We know the reality is different: courts up to their ears in work, desperately tortoise-like, generalized corruption of personnel who are still in the joints, unnecessary delays, unavoidable bribes, very high expenses for prestigious lawyers, pilgrimages to the magistrates in search of justice, etc. etc. . . . Yes, the reality we live is very different. It is absolutely true that, in order for a matter to go forward, a certain sum must be distributed daily to court reporters, secretaries, assistants, commissioners, etc., to the extent that there exist process servers who have set their prices according to the route or street they must serve, which constitutes a real opprobrium detrimental to the administration of justice." E. Martínez Anaya, *Manual del detenido* 72 (1984).

135. "In some countries the courts have undermined their own prestige, and hence their independence from the executive, by their corruptibility." R. Alexander, *Latin American Politics and Government* 39-40 (1965).

136. C. Gibson, *supra* at 109.

137. *Id.* at 212-13.

138. *Id.*

139. *Id.*

ing sees the very word "corruption" as imposing "a moral context that many Mexicans do not recognize. Economic crimes are seen as far less serious than "human or spiritual offenses."¹⁴⁰

Perhaps that explains why Mexican lawyers display what might be described as relish in regaling visitors with horror stories. One former law student, now in business, dropped out of law school after learning that his first summer job consisted of delivering envelopes of cash to official destinations.¹⁴¹ A veteran practitioner tells the story of the case that did away with juries in México.¹⁴² In the 1920s, as he tells it, the first Miss México to vie for a Miss Universe title caused a sensation by posing in a scandalous swimsuit that showed her ankles and part of her calves. She was, perhaps as a result, surrounded by suitors and chose unwisely—a drunkard and playboy who, when he was not out carousing, beat her. Eventually she could take no more and killed him. It was an open and shut case, but her lawyer, a 19th century relic specializing in flowery oratory, bared his client's soul to the jury. He portrayed her as a weak, confused, neurotic victim of this man. Though the evidence was all against her, the jury acquitted. Not long after, feeling that juries were too easily swayed by emotions and too susceptible to bribes, México abolished the jury trial in all but major political cases.¹⁴³ (Former police chief Arturo Durazo Moreno could qualify for a jury trial should he be extradited to México.)¹⁴⁴

The same practitioner tells the story of the idealistic lawyer who believed his client was innocent and, refusing to resort to bribes, resolved to argue the case on the merits.¹⁴⁵ The trial court convicted the client of homicide and sentenced him to eight years in prison. Counsel appealed. The prosecutor was so annoyed at the news that he appealed also, on the grounds that the sentence was too lenient. The court of appeals agreed with the prosecutor, and increased the sentence to 25 years. The defense lawyer then took his case to the Supreme Court and won. The case was remanded with instructions to reduce the sentence, which the court of appeals did—to 24 years, six months.

"We are extremely far from a solution," he laments. "There is

140. A. Riding, *supra* at 113.

141. Conversation, Mexico City, July, 1984.

142. Interview, Gonzalo del Castillo Negrete, Mexico City, July, 1984.

143. *Accord A. Mayagoitia, A Guide to Mexican Law ix-x* (1976): "[T]he jurors were often gullible and tended to render decisions based on sympathy or personal beliefs and with very small consideration for the law, *per se*. On the other hand trial by jury is costly, and a poor country like Mexico cannot afford it, even if we considered it to be the better system." For a more detailed discussion of the Latin American lack of interest in the jury system, see H. Clagett, *Administration of Justice in Latin America* 116-22 (1952).

144. *Id.* See Mexican constitution, art. 111.

145. Interview, *supra*.

no functioning at any level without *la mordida*. To get a judge to render an opinion, to get a clerk to set a trial date, to get a secretary to move the necessary papers alone, all requires a little help."¹⁴⁶ Lawyers count such expenditures as part of the cost of doing business. Only once in his 40-year legal career has a public functionary refused a bribe.¹⁴⁷ A typical judge, by this lawyer's estimate (quite possibly exaggerated for effect), takes in 50,000 to 100,000 pesos a day. If a monetary judgment is involved, the judge takes a percentage. Clerks kick back their salaries to the judges for the privilege of serving the public; the extras are far more lucrative.

After regaling his listener with story after story of judicial corruption, the lawyer, perhaps feeling he had to justify in some way a life spent in the occupation he had just devastated, claimed that a lawyer with prestige and talent can, even in this system, turn judicial error into a reduction of sentence or even a resolution of censure against a particular judge. Pride, arrogance, and natural partisan tenacity still motivate some lawyers to put their best efforts into their papers. Nevertheless, he puns, a *penalista* (a criminal lawyer) must be *penalista* (criminally clever).

CONCLUSION

No society has a monopoly on contradiction or corruption. All experience some tension between law and reality. One could undoubtedly find similar accounts in the U.S. legal system. Neither would care to have its system summarized, or dispensed with, in those terms. Perhaps the greatest tension is one not between two cultural heritages but between the law as it is written and the law as it is practiced—*el derecho y el hecho*.

There is a tension in México's legal system between its Spanish Colonial heritage and the forms and models it has adopted from its North American neighbor. It has separate state and federal bodies of law even though historically there is no need for them. It celebrates the courts' *amparo* power within a civil law system that arose specifically as a response to fear of too much judicial power. Presi-

146. "There are misapplications of the law because of ignorance and cases of wrong decisions for political or monetary reasons. Gifts and gratuities are widely distributed to lower clerks." A. Mayagoitia, *supra* at xi. "We all . . . know of lawyers who, serving in judicial posts, accept gifts in order to activate a case, serve a summons, or authorize a garnishment. . . ." E. Guerrero L., *Algunas consideraciones de ética profesional para los abogados* 9-10 (2d ed. 1982). Guerrero is a former president of the Mexican Supreme Court. *Id.*

147. "Because the legal system is slow and bureaucratic and the judges are poorly paid, bribes serve a double function. A payoff can 'convince' the court clerk to bring a case to a judge's attention. Some judges then try to combine a fair decision with attention. Some judges then try to combine a fair decision with a fair reward, offering the party in the right the first chance to contribute, but others simply 'auction' off their verdict. Similarly, in criminal cases, money can buy innocence and freedom unless politics or publicity interferes." A. Riding, *supra* at 119.

dent Alvaro Obregón, upon taking office shortly after the prevailing revolutionary forces drafted the 1917 Constitution, summarized a feeling that runs throughout Mexican history, one that may be counterintuitive to those who feel that all wrongs could be righted if only the correct statutory language could be found. He said, "The framing of laws in the belief that these can abolish evil and right every wrong—[is futile. México needs] honest and intelligent men to apply good laws."¹⁴⁸ That is an ethic that crosses boundaries.

148. W. Johnson, *Heroic México* 366 (1968).