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INTRODUCTORY MESSAGE

The Institute for Legal Research at the National Autonomous University of Mexico (UNAM) is very pleased to announce a new stage in the development of the *Mexican Law Review* (MLR). The journal was created in 2004 under the guidance and vision of Dean Diego Valadés as a way for the professors at the Institute to share their research with English-speaking scholars and practitioners around the globe. For four productive years, MLR was highly successful in furthering a lively dialogue between the professors at the Institute and the international legal community.

Beginning with this volume of the *Mexican Law Review*, we inaugurate three innovations. First, instead of publishing translations of articles and book chapters which were originally published in Spanish, the journal will now only consider unpublished manuscripts originally written in English that are designed to be accessible to readers who have little or no knowledge of Spanish or of Mexico. We are making this change because literal translations are often awkward to read, and because articles written for a local audience may assume background information that is unfamiliar to an international audience.

Second, submissions will now be received from any author independently of their institutional or geographical location and must now pass through a double-blind peer-review process. This will guarantee the academic quality of the work published in the Mexican Law Review and transform the journal into a diverse forum for the debate, research, and analysis of Mexican, North American, Latin American, and comparative law. The journal will also continue to be a platform for scholars based in Mexico to share their research in all fields with the global scholarly community. MLR is edited by professors and is therefore a closer cousin to peer-reviewed social science journals than to typical student-run law journals.

Third, MLR will now publish a print version in addition to the internet-based version of the journal. We recognize that there has been a global shift from paper to electronic means of communication. But we believe a paper version will facilitate the journal's circulation within the international scholarly community.

We hope that our readers enjoy exploring the articles in this inaugural issue of the new series of MLR and strongly encourage scholars and practitioners to submit their articles for consideration in future issues.

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ARTICLES

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FRONT DESK JUSTICE: INSIDE AND OUTSIDE CRIMINAL PROCEDURE IN MEXICO CITY*

Catalina PÉREZ CORREA**

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"What's your name?" —the clerk (*oficial secretario*) at the Public Prosecutor's Office asked him.

"Osvaldo".

"Osvaldo what?"

"Ramos".

"Ramos what?"[1]

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* This paper is part of a dissertation entitled "Criminal Justice and Prosecution in Mexico City: A Case Study of the Miguel Hidalgo County and its *Ministerio Público*" submitted to the Stanford Law School for the completion of the J.S.D. program. The data analyzed in this study comes primarily from participant observations conducted by the author in two different *Ministerio Público* agencies in Mexico City from June 25, 2004, to August 5, 2004, as well as from data obtained from public and private sources (The *Ministerio Público* agencies have the same functions as the Public Prosecutor's office in the United States. In this text, I use both terms interchangeably. Although the duration of the participant observations does not provide sufficient conclusive evidence on the functioning of Mexico City agencies, data from these participant observations exemplify and identify some of the problems and difficulties the criminal justice system faces today).

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[1] In Mexico, full legal names include both maternal and paternal last names.

"I don't know".

"What do you mean you don't know?"

"I don't know".

Exasperated, the clerk sitting next to me said, "Just write 'Ramos Ramos.'"

"How old are you?"

"I don't know".

"Are you trying to be difficult?"

Osvaldo begins to cry. Between sobs, one can only make out part of what he is saying, "It wasn't me. Please let me go. I promise I'll be good. I promise".

"Okay" —the clerk says—, "be quiet now. If you're good, we'll let you go. But tell us, how old are you?"

"I don't know" —repeats Osvaldo.

"How can you not know how old you are?"

"I don't know. I've lived on the street since I was a kid and I don't know when I was born" —Osvaldo begins to cry again.

The police officer standing behind him smacks him on the head. "Open your mouth", he says. Osvaldo opens his mouth wide, showing his rotten teeth. The police officer standing on the other side laughs. The clerk joins in the laughter. Osvaldo laughs too. The public defender does not see any of this. She is talking to one of the other clerks sitting at the next desk and has not spoken to her client since Osvaldo was brought in from the detention center.

"Just write '19'", the clerk tells me. That makes Osvaldo an adult and subject to prosecution. "Where do you live?"

"Nowhere", he replies.

"What do you mean 'nowhere'? Do you want to leave? Because, you know, if you want, we can send you back downstairs to the detention center with the police officers. Do you want that?" —the clerk asks—, "or do you want to go?"

The public defender finally comes over to see what is happening with her client. "Be good", she tells him. Osvaldo nods.

"So?" the clerk asks him, "where do you live? Where do you sleep?"

"There at *Revolucion* Avenue. We sleep inside the drainage pipes, but yesterday it was raining and so it was full of water. That's why I got into the car. I swear I didn't do anything. Can I go? I promise I'll be good. I swear". Osvaldo begins to cry again. "There's a priest who sometimes takes care of us. I have his phone number in my wallet. Maybe I can call him and he can help". Osvaldo tells the secretary, "It's in my wallet. Just let me call him".

"Where is your wallet?" the secretary asks.

"The officers took it. They left it on that desk", he says, pointing to one of the clerks' desks. The clerk in charge of Osvaldo's case walks to the desk and asks if the wallet is there. "It's brown", Osvaldo shouts from behind.

"Did you see the wallet?" the clerk asks the police officers.

"It was on the desk", one of them responds. "Do you know where it is?" he asks the other clerk. The wallet is never found and Osvaldo is still crying at intervals.

"Okay. Be quiet", the clerk tells him.

"Can I please have some water?" —the detainee asks—. "It's just that I'm very thirsty" —the clerk gets up and asks the clerk at the adjacent desk if the food for the detainees has arrived. He then asks to have some food brought over. When the packets arrive, he gives two of them to Osvaldo, who quickly opens one and examines its contents. Osvaldo takes a box of juice out, takes a drink, and then hugs his two packages of food beaming with joy. It is a comic gesture. The two police officers and the public defender laugh. Osvaldo laughs with them.

Osvaldo was detained early that morning. The two police officers who brought him to the agency had found him sleeping in a parked car, after the owner of the car alerted them to his presence. Osvaldo said that he earned money cleaning car windows, working at various stoplights. He makes enough money from this to eat and buy "stone", a drug made from battery fluid and cocaine residue. Searching for a place to sleep the night before, he broke into a car and fell asleep inside. That is how he was found. He claimed that he had not taken anything from the car but, according to the police, the owner said a pair of sunglasses and two CD's were missing. Osvaldo was detained and taken to the public prosecutor's office where he was charged with aggravated theft, a crime punishable by two-and-a-half to eight years of prison and with no possibility of bail.

The clerk dictated Osvaldo's initial declaration and gave it to Osvaldo to sign. "I don't know how to" Osvaldo told him. The public defender took the document and read it to him. As she read it, Osvaldo looked around the room —he looked at the clerks and the police officers still standing near him, and at me, sitting opposite the desk. When the public defender finished reading the document, she took Osvaldo's thumb and pressed it onto an inkpad and then onto the margin of each page of his confession. She repeated the movement for each page while we all watched. "Can I go now boss?" Osvaldo asked the clerk when he finished. "I've been good. Let me go now".

"You'll leave later" —the clerk responded.

That morning, Osvaldo Ramos Ramos was sent to the Mexico City Eastern Detention Center as a pretrial detainee. He is one of the 200,000 detainees in Mexico's prisons and one of the successful detentions brought about by Mexico City's police and its public prosecutor's office.

In Mexico today, reported crimes hover around 1.5 million or 1,490 per 100,000 inhabitants,[2] placing Mexico among countries with relatively high crime rates. Although statistics on reported crimes put Mexico just slightly above the world average and close to Spain (1,770/100,000) and Russia (1,779/100,000), "black number" studies", *i.e.*, studies of *un*reported crimes, place Mexico among the countries with the world's highest crime rates.[3] According to the ICESI[4] 2002 survey, 66% of the crime victims surveyed stated they had not reported the crime to any authority. In Mexico City, 76% of respondents stated they had not reported the crime.[5] The number of unreported crimes brings the total for 2001 to over 4 million crimes (or 4,412/100,000 inhabitants); 44% of which were violent crimes.[6]

The ICESI survey showed that, in 2001, the public prosecutor's office (*ministerio público)* initiated investigations for only 74 out of every 100 crimes reported to it.[7] In addition, in 6 out of every 10 cases for which the public prosecutor's office initiated an investigation, crime victims reported that "nothing happened". Those cases were probably closed, most likely due to lack of evidence. Other studies report an even higher number of "nothing happened" cases. For instance, Guillermo Zepeda states that in 2000, only 11.4% of reported crimes nationwide resulted in the initiation of an investigation.[8] Furthermore, of the investigations opened that year, only 6.4% reached the courts.[9]

In Mexico City, crime rates are especially high. Mexico City has the country's highest concentration of population (10% of the Mexican population —8.5 million people in Mexico City, plus 7.5 million in suburban areas in the State of Mexico) and one of the country's highest crime rates. The city's crime rate is surpassed only by the State of Mexico, which borders the

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2 See INEGI reported crime database. Available at http://www.inegi.gob.mx/est/contenidos/espanol/tematicos/mediano/ent.asp?t=mvio37&c=5599.

3 European Institute for crime prevention, cited in GUILLERMO ZEPEDA LECUONA, CRIMEN SIN CASTIGO (CIDAC, 2004). An even earlier study carried out by FUNSALUD-WORLDBANK in 1995 estimated that only 15% of crimes were reported.

4 Instituto Ciudadano de Estudios sobre la Inseguridad. The ICESI was created by the Consejo Coordinador Empresarial [Entrepreneurial Coordination Council], the Confederación Patronal de la República Mexicana [Mexican Employers Association], the Este País Foundation, the Instituto Tecnológico de Estudios Superiores de Monterrey [Technological and Higher Studies Institute of Monterrey], and the National Autonomous University of Mexico (Universidad Nacional Autónoma de México). Its purpose is to study and generate independent statistics on criminality in Mexico. To this end, the ICESI has conducted national surveys annually since 2001. The surveys are available at http://www.icesi.org.mx/index.cfm?catID=944.

5 *Id.*

6 *Id.*

7 *Id.*

8 GUILLERMO ZEPEDA LECUONA, CRIMEN SIN CASTIGO (CIDAC, 2004).

9 *Id.*

city and is considered part of the metropolitan area, and the State of Baja California, site of the city of Tijuana. The daily average crime rate in 2003, according to the Mexico City Public Security Ministry (SSPDF), stood at 473.5.[10] When the number of unreported crimes is added to those given by the SSPDF, it paints a grim picture.

The failure of the criminal justice system to prosecute and punish criminals has had an unfortunate effect on the enforcement of criminal procedure laws, affecting both defendants and victims alike. The failure to reduce crime has resulted in the enactment of harsher sanctions and criminal laws. Recent judicial reforms to amend the constitution and give more power to police and prosecutors are an example of this. However, as this paper argues, the poor institutional design combined with the existence of corruption, lack of resources, defective coordination among agencies and poor training of officials better explain the system's failures and often result in the arrest and sanctioning of petty criminals or defendants without economic resources. Still, Mexican policy makers insist that a better way to combat crime is to focus on statutory reform. Few, and rarely successful, attempts have been made to modify the legal institutions or culture surrounding the criminal justice system.[11] In most instances, reforms are a great disappointment and rarely achieve anything other than creating conditions for further police abuse and procedural violations.

This paper examines the initial phase of criminal procedure in Mexico and the problems that arise when put into practice. Focusing on the public prosecutor's office, it analyzes and evaluates the structure and functioning of the initial phases of criminal procedure in Mexico City from an ethnographical perspective. This paper explores possible explanations for the constant failures of Mexico City's criminal justice system in two fundamental areas: criminal prosecution and adherence to procedural laws. I focus primarily on the first two phases of the procedure: *barandilla*[12] and pretrial investigation, which occur at the public prosecutor's offices.

The operation of Mexico's criminal justice system begins at the public prosecutor's office when the police, having witnessed a crime, detain a person and bring him or her to the agency, or when a victim comes forward

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10 See http://www.spf.df.gob.mx/htmls/ssp-sec-informe-2004-2.html.

11 On March 18, 2003, for example, the Mexico City Public Security Ministry (SSPDF) told the press that, in an effort to crack down on crime, they would have 18,000 detainees by the end of that year. This goal was achieved on December 23rd, and the 18,000th arrestee appeared on the front page of several newspapers bearing that number. A sign, "We kept our promise," was conspicuously displayed with the arrestee. Yet, the SSPDF reported that police efficiency in 2003 was 14%. See http://www.ssp.df.gob.mx/htmls/ssp-sec-informe-2004-2.html.

12 "*Barandilla*" is the term used in Mexico to refer to the front desk at the public prosecutor´s office. It is literally a desk that stands at the entrance of the agencies. Every person who enters the agency must first talk to the person sitting at the *barandilla*.

and reports a crime to a public prosecutor. The public prosecutor's office is thus the door through which crime victims and alleged criminals enter the Mexican criminal justice system, and the public prosecutors and the police set the criminal justice machinery in motion. What happens or fails to happen there determines not only the nature of procedure but also the functioning of the system as a whole.

These agencies are not only the place where Mexico's criminal justice system begins its interaction with crime victims and alleged criminals, but are also the first place where the system breaks down. The agencies are where initial procedural violations to defendants' rights occur, where victims are denied their right to report a crime, and where over 75% of criminal reports get stranded. The agencies are also where many victims are denied access to the justice system and where many defendants are wrongfully detained and charged. Because of this, this study focuses primarily on the criminal procedure that occurs within the agencies.

I. Initiating Criminal Procedure. The *Barandilla* or front Desk

Formally, Mexican criminal procedure is initiated when one of two events occur: (a) an alleged victim or witness comes to the public prosecutor´s office to report a crime, or (b) the police bring a suspect caught in the act of committing a crime to the agency. Mexican scholars disagree as to when exactly the criminal procedure begins. Former Supreme Court Justice Victoria Adato held that criminal procedure begins when the public prosecutor initiates an investigation and carries out (with the aid of the police) the actions needed to obtain sufficient evidence to press charges.[13] Mexican criminal justice scholar Guillermo Zepeda states that the phase of pretrial investigation begins when the public prosecutor learns that a crime may have occurred and thus begins an investigation.[14] Zepeda does not make a distinction between the prosecutor's learning of a crime and the initiation of an investigation, but describes these two events as simultaneous. Most Mexican legal scholars agree that criminal procedure begins when the public prosecutor learns that a crime may have occurred and opens an investigation.

The formal determination of when criminal procedure begins affects the proper enforcement of criminal law and shapes detainees' rights and victims' access to the criminal justice system. Therefore, determining when criminal procedure begins is important for several reasons. First, it estab-

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[13] Victoria Adato Green, Derechos de los detenidos y sujetos a proceso 2 (UNAM-IIJ, 2000).

[14] Guillermo Zepeda Lecuona, *supra* note 8 at 108.

lishes the moment at which due process rights for both victims and defendants become enforceable.[15] Second, if criminal procedure begins when the public prosecutor initiates an investigation, important antecedent steps may be neglected.

The participant observations carried out for this study at public prosecutor's offices indicate that, although the procedure does not formally begin until public prosecutors open an investigation (during the pretrial investigation phase) and a case file, there is an antecedent step that is traditionally excluded from the study of Mexican criminal procedure. This phase begins when a victim comes to a public prosecutor's office to report a crime and is either granted or denied access to the system. It occurs at the agency's front desk, known in Mexico as the *barandilla* and ends there with the public prosecutor's decision to open an investigation or not.

This part of procedure, often ignored in Mexican criminal procedure studies, is fundamental in understanding many of the problems in criminal procedure, especially that of unreported crimes. An examination of the *barandilla*'s attributes and operations can increase researchers', practitioners' and policymakers' understanding of problems related to reporting and not reporting crimes and shed light on the reasons behind the negative views Mexicans have of their criminal justice system.

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15 There is, for example, controversy regarding when certain rights of defendants begin to be enforceable. Article 20 (IX) of the Constitution states that defendants have a right to a defense from the beginning of the procedure and that *the judge* is responsible for assigning one if the defendant cannot afford one. Article 294 of the Criminal Procedure Code for Mexico City repeats this provision but adds the defendants' right to hire (*or request*) defense from the moment of arrest. However, in 1975 when the Court stated that the law must be interpreted to mean that defendants have a right to request or hire counsel if they wish, and specifically express this desire, it does not imply the authorities' obligation to appoint counsel upon arrest. See: DEFENSA, GARANTÍA DE. MOMENTO EN QUE OPERA, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Séptima Época, 187-192 Segunda Parte, September 1984, p. 25 (Mex.).

The lack of a defense attorney present during police interrogation and investigation was therefore an oversight of the defendant for not requesting to have one present and not of the corresponding authority (See DEFENSA, GARANTÍA DE. MOMENTO EN QUE OPERA, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Séptima Época, 72 Segunda Parte, March 1975, p. 27 (Mex).

In a another decision made that year, the court stated that the failure to notify defendants of their rights could not be imputed to either the police or the public prosecutors because it was, according to the Constitution, the obligation of *the judge* and not of the executing authorities (See DEFENSA, GARANTÍA DE. NO COMPETE AL MINISTERIO PÚBLICO, Primera Sala [S.C.J.N.] [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Séptima Época, 70 Segunda Parte, October 1974, p. 17 (Mex.) and DEFENSA, GARANTÍA DE, Averiguación Previa, Primera Sala [S.C.J.N.] [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Séptima Época, 44 Segunda Parte, July 1972, p. 23 (Mex.).

A chest-high desk dominates the entrance to the public prosecutor's office; this is the *barandilla*. A public prosecutor —called "the agent of *barandilla*" (*agente de barandilla*)— staffs the desk every day from 9:00 a.m. to 7:00 p.m. His job is to attend the people who come to the office and direct them to the appropriate place or person to assist them with their requests. "Good day", says a woman in her sixties upon entering the office. "I'm here because someone stole my license plate".

"Yes, Ma'am" —the agent answers—. "Go down this hall and turn left at the first door. That will take you to the civil judge. Someone there will help you".

"Good morning, I'm here because someone stole my bag on the subway".

"Tell me, sir, where exactly was your bag stolen?" When the man gives the location, the agent responds, "I see… Well, I'm sorry, but this agency does not correspond to the place where you say the crime took place. You need to go to the agency that covers that territory… No, I don't know which one that would be, but if you go down the hall and down the stairs to where the judicial police are, they can tell you where you need to go".

Each one of the public prosecutor's offices in Mexico City has its own assigned territory. All the crimes occurring in an office's territory fall under the jurisdiction of that office. An executive order issued by the district attorney's office mandates that a victim can report a crime at any public prosecutor's office.[16] This order instructs the public prosecutors in charge to initiate the procedure for that case and then send it to the public prosecutor's office in the district where the crime occurred. However, at two of my field sites (which I have coded MH3 and MH5), victims were told that, to report a crime, they had to go to the office in the district where the crime was committed. Victims who tried to report a crime that occurred in a different office's territory were directed to the "correct" agency by the agent of *barandilla*.

Another woman comes to the office to report that her husband hit her. She has a bruise on her face that extends from her mouth to her eye. She is crying as she tells the public prosecutor why she is there. "Yes, ma'am. Can you tell me where these events took place?" She gives him the address. "I see", he says after corroborating that the events took place within MH5 territory. "Do you have your ID with you? We need it to file a report. It's really not up to me. I can send you on to the agent's desk, but he's just going to ask for the same thing. It's really better if you get your ID".

"But I left my ID at home and I'm afraid to go back. You see, my husband is still there", she tells the agent.

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[16] Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal [R.L.O.P.G.J.D.F.] [Regulation of the Organic Law of the Public Prosecutor's Office of Mexico City], art. 14 [D.O.], Apr. 30, 1996 (Mex.).

"Well, don't you have a brother or a friend who could do that for you?" Finally, the friend accompanying her offers to get the ID. The agent of *barandilla* shows his approval and tells them it will be easy once they come back with the ID. "And please bring a photocopy of it when you come back so you don't have to run out again". I watch as they walk away.

There is no law or regulation requiring an ID to report a crime, yet everyone who came to MH5 trying to make a report was asked for one. During the participant observations for this study, I often witnessed people being turned away because they did not have an ID, a photocopy of their ID, or some other document. At first, I thought this happened because the agent of *barandilla* expected a gratuity to begin an investigation, but I never saw him taking or asking for money. I later discovered that there was an explicit policy to dissuade individuals from reporting a crime; it was an effort to lower crime rates. "We need to lower the crime rates!" the head of the office told all of us at the *barandilla* one day. "The boss said 15%, and last time we only reduced 9%. I don't want you initiating procedures for everything that comes along, *Licenciado*"[17] —he said to the agent of *barandilla*. "Open 'special acts,' if you need to". That was exactly what happened with many of the people I saw coming to the office to report a crime. "What am I supposed to do?" he said to me apologetically after he scolded the agent of *barandilla* for initiating too many procedures. Each case initiated counted against MH5's efforts to make its crime statistics appear lower.

The Mexican constitution and the local criminal procedure code indicate the public prosecutor's powers and duties,[18] which are, basically, to investigate and prosecute crimes according to specific procedures. Crime prevention is not a direct function of the public prosecutor,[19] but rather a function of the crime prevention police, which are administratively a separate entity from the public prosecutor's offices and officers.[20] Currently, public prose-

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17 "Licenciado" refers to someone licensed to practice law.

18 See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended on July 7th 2008, art. 21 and 102 [D.O.] 5 de febrero de 1917 (Mex.) and Código de Procedimientos Penales del Distrito Federal [C.P.P.D.F.] [Mexico City's Criminal Procedures Code] art. 3 [D.O.], Aug. 29, 1931. Also see Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal [L.O.P.G.J.D.F.] [Organic Law of the Public Prosecutor's Office of Mexico City] [D.O.], Apr. 30, 1996 (Mex.) and its bylaw, the Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal.

19 The secondary law, which regulates the Office of the General Attorney and its powers state that one of the functions of the Public Prosecutor's Office (*Ministerio Público)* is that of crime prevention. According to this law, the public prosecutor should assume this role by educating the public, investigating criminal behavior, and sharing information with other institutions. See L.O.P.G.J.D.F. [D.O.] Apr. 30, 1996 (Mex.).

20 The prosecutor's police (*policía judicial*) forms part of the Public Prosecutor's Office while other police forces like the crime prevention police, are managed by a different entity.

cutor's offices and agents do not have the means to reduce crime except through deterrence caused by the effective prosecution of criminals. MH5 made crime reporting a long and complicated process for victims and third parties. Victims frequently left the agency frustrated because they were denied the opportunity to report a crime.

Every day, a large number of individuals come to the public prosecutor's offices with different problems and concerns. Some of these are legal problems while others are not. "I'm here because I lost some very important documents from my office and I want a 'proof of facts,'[21]" one woman tells the agent of *barandilla*.

Another person comes in and says, "I'm here because I want to get a divorce".

Yet another asks, "Can you tell me how I can get a driver's license?"

Still another says, "I want to report a crime. My mother died two years ago and now my brother-in-law doesn't want to leave her house".

"Well, you need to go to a civil court for that, ma'am", the agent of *barandilla* patiently explains. "You see, that's not a crime. This is a public prosecutor's office, and we do not deal with those types of issues".

People come to the agency with a sense of urgency to deal with all types of legal matters: family problems, divorces, labor problems, and so on. People come to ask for "no criminal record" certificates or to seek legal guidance on almost any subject. Some of the people who come to MH5 cannot read or write; others have no idea where to go and choose the public prosecutor's office as the first available place to approach Mexico's legal system.

Various regulations state that the agent of *barandilla* is supposed to be a legal expert who can give information on every matter pertaining to legal affairs.[22] At MH5, he would direct people to the agency or office that best suited their needs by telling them which one it was and how to get there. This included civil, labor, family and other courts and offices. He gave legal advice and suggested legal strategies for people to follow. Sometimes, the advice he gave was correct; at others, it was apparent that his advice was wrong, and I watched as he sent people across town with a problem that would probably go unresolved for days, weeks, or even longer. Overburdened by the number of people who came to the agency and his lack of

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[21] A document which consists of official recognition of any ocurrence, including the lost or theft of an object. This recognition has value as it may be used as evidence in legal proceedings.

[22] See the Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 and, Decision A/013/03 of the Mexico City Public Prosecutor, in which the Quality and Compassion Program is Established for Attending Citizens at Decentralized, Central and Processing Offices of the Public Prosecutor *(Acuerdo A/013/03 del C. procurador general de justicia del Distrito Federal, por el cual se establece el programa de calidad y calidez en la atención a la ciudadanía en las agencias del Ministerio Público desconcentradas, centrales y de procesos)*.

knowledge of legal subjects and institutions, MH5's agent of *barandilla* often acted as deficient legal counsel.[23]

Local laws require that the person staffing the *barandilla* be one of the office's personnel and an appointed public prosecutor. The law prohibits trainees and students from working at the *barandilla*.[24] Beyond that, there are no requirements or training needed to staff the *barandilla*.

Bylaws relating to the public prosecutor's office define the agent of *barandilla*'s role as that of facilitating crime reporting. However, the MH5 agent's action often went beyond this. As noted above, when a person came to MH5's *barandilla*, the agent would ask why he or she had come to that office. If the agent of *barandilla* decided to initiate an investigation, he would give the alleged victim a form to fill out. The District Attorney's Office has mandated the use of a form (a standard form for reporting crimes) in 2003 as part of the administration's efforts to simplify and standardize crime reporting[25] by dividing crime reporting into three categories. Each category of crime had its own form. There was one for reporting the theft of cell phones and pagers (Special Preliminary Investigation-*Averiguación Previa Especial*); another for reporting any other crime (Direct Preliminary Investigation-*Averiguación Previa Directa*) and a set of special forms (Special Acts) to report events that do not constitute a crime, but still required legal validation, such as lost documents and public nuisance.

The District Attorney's order mandated the use of these forms to obtain information from victims, as well as an initial, firsthand account of the events reported.[26] These forms were to be available at all agencies for the public, so that crime victims could come to an agency, fill out a form, and then give it to the agent of *barandilla* to initiate a procedure when deemed appropriate.[27] However, this was not the way MH5 operated. Instead of giving the form to people who came to the agency, the agent of *barandilla* would first ask the person to give an account of the events. Based on that

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[23] A worker from the Center of Attention to Victims of Domestic Crime (CAVI for its initials in Spanish: *Centro de Atención a la Violencia Intrafamiliar*) often assisted the MH5 Agent of *Barandilla* with the people who came to the agency. The CAVI is an organization within the Mexico City District Attorney's Office that is aimed at giving psychological, as well as medical assistance, to victims of domestic violence. The CAVI is also geared at giving legal advice to victims of this type of violence. For this purpose, a CAVI representative is placed at the front desk of every agency.

[24] Agents of *Barandilla* are considered public prosecutors for purposes of the law and must meet the same requirements to become agents.

[25] Decision A/003/03 of the Mexico City Public Prosecutor in which the Use of the Standard Format is Authorized to Initiate Special Reports, Special Preliminary Investigations and Direct Preliminary Investigations without a Detainee and Guidelines for its Use are Established for Agents of the Public Prosecutor's Office.

[26] *Id.*

[27] *Id.*

oral account, the agent of *barandilla* would decide whether to process the person's claim. If the agent decided to go even further and initiate a criminal procedure, he would give the person the standard form. After the victim filled out the form, the agent would read it to check for mistakes and style. If he were not satisfied with the way it was written because he felt it was either unclear or inaccurate, he would make the alleged victim fill out a new form. Often, the agent would end up dictating what he thought was an appropriate, legal account of the events. When the victim did not know how to read and write, the agent would fill out the form himself and have the victim put an "X" at the bottom of the page. In the end, what was written on the form was the agent's account of the events and not the victim's version, thus transforming the purpose of the form into a new step in criminal procedure.

Although the *barandilla* is a key component in criminal procedure, MH5 gave it virtually no attention. MH5's head of the agency was almost never at the *barandilla*. On a few occasions, when the reception area became extremely crowded, the prosecutor (the person in charge of all the public prosecutor's Offices in the Miguel Hidalgo Delegation),[28] whose office was on the same floor in that same building, would come to the *barandilla* and ask why so many people were waiting in line. On these occasions, he would reprimand the clerks and the agent for not attending the people in the reception area. At such moments, service at the *barandilla* quickened, but then slowly slipped back to its habitual slow and bureaucratic pace once the prosecutor left.[29]

True, the failures of MH5 cannot necessarily be extended to other agencies. However, the question stands, how does the *barandilla*, the first door to the criminal justice system, work in other agencies? The Mexican criminal justice system's failure to increase the number of reported crimes cannot be solely attributed to the *barandilla* but, if other offices work the same way as the MH5 does, the performance of the *barandilla* can explain some of the fears people have in terms of reporting crimes. The way people are first treated does affect the way they view the criminal justice system, and this in turn affects the trust they have in the system.

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[28] "Delegations" are political divisions equivalent to "Boroughs" for instance in the City of New York. Each *delegación* has a popularly elected head or *delegado,* that may or may not belong to the same party as the Mexico City Mayor.

[29] At MH3 there was no one at the *barandilla.* This agency's lighter workload made this possible, and people simply came to the agency and talked to the public prosecutors or clerks in charge. MH3's agents had a system in which the clerks took turns at attending cases. With this system, every victim or person who came to the agency was able to talk to an agent or clerk, perhaps providing clients with a higher standard of treatment and counsel upon their arrival at the agency. However, it was not uncommon at MH3 for victims to be turned away for not having an ID or for victims to be sent to another agency.

II. Pretrial investigation

As previously noted, most Mexican doctrinal texts on criminal procedure law consider the pretrial investigation phase the starting point of criminal procedure. In this phase, the public prosecutor supposedly conducts an extensive preliminary investigation[30] to determine (a) whether there is sufficient evidence to warrant formal charges against detainees or (b) in situations in which the existence of a crime has already been established, whether there is sufficient evidence to press charges against any suspects. Ideally, during this preliminary investigation, the public prosecutor interrogates suspect(s), victim(s) and any available witnesses, including the police officers involved as either witnesses or first responders.[31] The public prosecutor also supposedly visits the crime scene to look for evidence or other information that may help locate suspects.[32] Based on these interrogations and other evidence, the public prosecutor, the clerks or both the agent and the clerks decide whether to open an investigation and whether to press formal charges against any suspect or detainee.[33]

The procedure begins when one of two events occurs: (1) an alleged victim or witness comes to a public prosecutor's office to report a crime, or (2) the police bring a detainee who was arrested caught in the act of committing a crime. Procedure differs in these two cases. This section describes, analyses and evaluates these two types of procedure separately. Both explanations begin with initiating criminal procedure at the public prosecutor's office and examine the work of public prosecutors, clerks, the police, and experts in gathering evidence to validate the existence of *corpus delicti*[34] and to identify possible suspects.

III. Procedure without a Detainee

After an alleged victim is 'processed' by the agent of *barandilla* and the standard form is filled out, the alleged victim is taken before one of the

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30 This procedure is described in articles 262 to 443 of the Mexico City Code of Criminal Procedure. See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931.

31 *Id.* at art. 94-124.

32 *Id.*

33 Victoria Adato Green, *supra* note 13.

34 "'*Corpus Delicti*' is the body and substance of the crime and with respect to specific crimes it means the actual commission by some of the particular crime charged, which may be established by *prima facie* evidence from which the commission of the crime may be logically inferred". See McGraw-Hill's Spanish and English Legal Dictionary, Dahl's Abridged Law Dictionary, 2004.

clerks. At the public prosecutor's offices studied, victim and witness questioning was typically conducted and initial declarations were typically taken by one of the clerks, and sometimes by a public prosecutor. At the two public prosecutor's offices studied, the agents' work areas were next to each other, separated by partitions with upper glass panels. This made conversations relatively private while allowing others to see what was taking place.

Each agency has three teams of public prosecutors and three or four clerks working 24-hour shifts, followed by 48 hours off-duty time.[35] At MH5, the clerks would initiate procedures and case files, and the agent in charge would supervise their work. The clerks took turns taking crime reports from incoming claimants so that work would be evenly distributed. When an arrestee was brought to the agency, the next clerk in line would take the case.

Once in the presence of a clerk, the victim or witness would again give an oral account of the facts.[36] As required by law, at MH5, this account was usually entered into the agency's computer system. The clerk opened a file and assigned it a case number, which contained information that identified the particular public prosecutor's office, the date and the order of the cases opened at that agency that day.[37] If the workload that day was light, the clerk immediately entered the victim's or witness's account of events. If the clerks were very busy (e.g., because there was an arrestee who had to be indicted or released before the constitutional period expired), the clerks would listen to victim's or witness's account, open a case file and schedule an appointment for the person to come back. The person would then leave the agency with a copy of his or her crime report and a case number to follow the progress of his or her claim. Later in the day, the clerks would use

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[35] Although prohibited by the regulations, some clerks had informal assistants, mostly law students, who helped file cases and initiate procedures for minor crimes. These assistants were paid by the clerks or agents themselves. One assistant at MH3 said she was paid $30 pesos (approx $3 USD) for each case filed as unsolved and $150 ($15 USD) for every successfully concluded case. Having assistants gave the clerks and agents time to deal with cases they considered more important, such as theft, burglary, assault, homicide or cases where an arrestee or a victim of a more serious crime was present.

[36] See article 8 of the bylaw. See Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 8

[37] This in accordance with the attorney's regulation: Decision Number A/010/2001 of the Mexico City Public Prosecutor in which the Acronyms and Numbers Identifying the Preliminary Investigations Opened at Decentralized Public Prosecutor's Offices Subordinate to the Assistant Public Prosecutor's Office for Preliminary Investigations and form part of the District Public Security and Administration of Justice Coordinating Offices and are Established (*Acuerdo no. A/010/20001 del procurador general de justicia del Distrito Federal, por el que se establecen las siglas y números con los que se identificarán las averiguaciones previas que se inicien en las agencias del Ministerio Público dependientes de la Subprocuraduría de Averiguaciones Previas Desconcentradas, que forman parte de las coordinaciones territoriales de seguridad pública y procuración de justicia).*

the information on the standard form to complete the information in the system and submit an order for the proceedings needed to complete the investigation, such as those involving the judicial police and experts.

At the end of each 24-hour shift, incomplete cases (in the form of a case file) are left for the next shift to complete a file or obtain an indictment or arrest warrant. At the end of each shift, the public prosecutors and clerks send case files with no known suspect to the agency's "desks" (*mesas*), where other clerks carry out the necessary procedures to formally close the investigation. Most cases without a known suspect were filed as unsolved and eventually permanently closed due to lack of evidence.

1. *Investigation*

Among the most important parts of criminal procedure are gathering evidence and investigating allegations of illegal conduct. The Mexico City Criminal Code stipulates that, even in cases without a suspect, public prosecutors must conduct a pretrial investigation using every procedure available that might aid in finding evidence and identifying suspects.[38] These procedures include inspecting the crime scene, interrogating possible witnesses and suspects, gathering documentary evidence and any other activities permitted by the Code of Criminal Procedure.[39]

At MH5 and MH3, these proceedings were carried out in form, but not in substance. After a file was opened for a victim's report, the clerks in charge sent a written request to the judicial police to investigate the facts reported by the victim.[40] Even though public prosecutors are supposed to visit crime scenes along with the judicial police and experts, in most cases, MH5's public prosecutors agents did not visit crime scenes, but requested that the police, experts or both visit the crime scene.[41] Police and expert visits rarely yielded any information useful to the case.

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[38] See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at article 4 and 265. See also Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 16.

[39] See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at article 94 and 135-244. Article 135 of the Code of Criminal Procedure catalogs the evidence accepted in criminal courts. The subsequent chapters of the code give specific details for each type of evidence.

[40] As stated above, the public prosecutor is assisted by a police officer in the investigation of a possible crime. Each agency has a judicial police unit assigned to it. The police, like the prosecutors themselves, work on a 24-hour shift and 48-hour time off basis. At MH5 approximately 10 police officers were assigned to the agency to aid prosecutors in their investigations. See Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at article 21.

[41] See Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 16.

During the participant observations carried out at MH5, I was twice sent to conduct the onsite inspection so that the clerk could include the report in the case file. Once, it dealt with a car crash. I was asked to report the state of the vehicles involved and to corroborate the victim's statement. The other time was a burglary of a food stand in a nearby subway station. An assistant and I were sent to interview witnesses and conduct the onsite inspection, along with a judicial police officer. After a 30-minute visit, we left the site without any information that might have aided the investigation. Predictably, these inspections did not provide sufficient evidence to continue the investigations and so the cases were closed as unsolved.

Investigations at MH3 and MH5 rarely yielded any evidence or information to aid in identifying suspects, presumably because no real investigation took place at any level. The work of the public prosecutors and clerks primarily consisted of assembling case files, a task done at their desks. Every decision made by a public prosecutor or clerk and every procedure ordered or conducted must be included in the file, a time-consuming activity. Furthermore, this information must be supported by the corresponding statutes in the Code of Criminal Procedure and its bylaws[42]. In addition to this, each page in the file must be numbered, signed and stamped to prevent any pages from being lost or omitted.[43] Stamping and signing represents an additional burden for public prosecutors and clerks. Since each agent and clerk handles a large number of cases, there is little time to actually investigate crimes. At MH5, I often helped the clerks number and stamp pages.

Part of the work done by public prosecutors and clerks during the pretrial investigation supposes police and expert participation. In theory, both police and experts act jointly with public prosecutors. Criminal procedure is based on this assumption and on the principle that investigative work by police and experts is crucial to finding evidence and identifying suspects. In theory, staff members from all three sectors —public prosecutors (or clerks), the police, and experts— work together to solve cases. However, at MH3 and MH5, neither police nor experts provided any useful input to the investigation.

MH5's public prosecutors and clerks seemed to sense the futility of police reports and the impossibility of identifying suspects. On one occasion, an MH5 clerk was opening an investigation for a stolen cell phone. The victim claimed he had not seen the assailants. Minutes after the victim left with his case file number, the clerk added a note to the case file stating that, at 23:00 hours, he had received a report from the police stating there was no evidence of or witnesses to the events reported by the victim. The clerk made this entry before requesting that the judicial police visit the crime

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42 *Id.*

43 See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 14.

scene. "They use a model form and fill it out each time. They don't even visit the crime scene", another clerk told me later. During my observations at both agencies, I read many police reports and none contained any information that could be used to identify possible suspects.

The final component of pretrial investigations is the evidence gathered by the experts.[44] As in the case of the police reports, the forensic reports examined at MH5 and MH3 served no purpose other than to justify filing a case as unsolved. The shortage of experts and their lack of training and resources made it almost impossible for their work to be of any value. The extremely bureaucratic procedures that had to be followed for each test also minimized the chances of conducting a "real" investigation. Unlike the MH5's police, the agency´s experts seemed to visit crime scenes and perform the tests requested by public prosecutors. However, their work rarely yielded any information useful to the case either and thus, most cases ended up as unsolved.

2. *Unsolved Cases*

On June 25, 2004, three men came to MH3 to report a burglary at a construction site next to the *Periférico* freeway. The men stated that a three-ton bulldozer had been stolen from the site, along with several computers and other tools, the night before. In the morning, the first workers to arrive found the bulldozer missing, the door to the office building open and the security guard with his arms tied, lying on a cot in his station. This security guard was one of the three men who had come to the agency; the other two were the site's administrator and engineer.

During this first interview, the three men sat before one of the clerks. The head of the agency was also present. Once the men made their declarations, the head of the agency asked the security guard what had happened and where he had been hit. "Here, on my head", the man replied.

"Where?" the agent asked, searching the man's head, parting the hairs at the spot where the security guard had pointed. "Here?" the agent inquired. "I don't see anything. Are you sure you were hit?" —he asked again, still searching for the wound. "Are you sure?" he asked again, showing his disbelief in the guard's story.

"Really! I'm not lying", the guard insisted.

"Well, I'm going to ask you to speak with the police officers", the agent said, leading the three men to chairs in the waiting area.

After the men had been interviewed by the clerk, two judicial police officers questioned the security guard in a room at the back of the agency. This room, normally used as an office, was now a storage area with several file

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[44] See Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 77, Section V.

cabinets and stacks of files on the floor. There was also a desk against one of the walls and a chair. Usually, files from past cases are sent to the *bunker* (the general archives), but since the main office had run out of storage space, the files had to be stored at each agency. The head of the agency gave me permission to observe the questioning.

During the questioning, the two police officers asked the security guard to sit in the chair while they (and I) stood. They repeatedly asked the guard if he knew who was responsible for the theft. The security guard seemed to have a low socio-economic background. He spoke very basic Spanish and was dressed in a dirty ripped shirt and his hair was disheveled from the recent search for a head wound. He told the police officers that he had been hit on the head from behind and fell to the ground. His hands had been tied behind him with duct tape and he had been pushed onto the small cot where he usually spent the night after making his rounds. He further stated that he had not seen his assailants; they had pointed a gun at him and had warned him that if he moved, he would be killed. He also said he had heard the sound of machinery outside, but did not dare move for fear of being shot and because, as he said, he was tied up. The officers asked him again if he had been involved. "What type of gun did they use?" they then asked.

"I don't know", the guard answered.

"What do you mean, you don't know? Was it a big gun? What color was it?"

The guard stood by his account of the events, "No, I swear I had nothing to do with it. Really", he insisted.

The officers told him he was going to get into trouble if he was lying. After approximately thirty minutes, they finally told him he could leave. The guard quietly stood up and left the room. When he left, the officers told me that they did not think he had had anything to do with the crime. "He's too stupid", one of the officers told me.

From later conversations with clerks, the police, and the agent, I learned that the burglary had required substantial planning, since a bulldozer could not simply be driven off the site and onto the freeway, but would have to be put on a truck. The police and the clerk said that, at the time of the burglary, many police cars were patrolling the zone and that it was unlikely that a vehicle that size would have gone unnoticed by the officers. The clerk later told me that the police patrolling the area were probably involved, but it was difficult to find the person responsible since they would never find any witnesses. "This will probably end up in the 'dead files'", he told me.

As stated earlier, Guillermo Zepeda pointed out that only 18.2% of the cases initiated in 2000 went to court.[45] More often than not, cases initiated without a detainee are stored as "temporarily unsolved" or "NEAPS", the

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[45] GUILLERMO ZEPEDA LECUONA, *supra* note 8.

initials in Spanish for *No Ejercicio de la Acción Penal* [No Criminal Action Taken].[46] Former Public Security Secretary, Alejandro Gertz Manero, has said that only 10% of the crimes reported in 2004 resulted in an indictment.[47] Of the total number of indictments, approximately half were cases where defendants had been caught in the act.[48]

In principle, the public prosecutor bases his decision to press charges on three types of information: (a) the initial declaration; (b) the subsequent questioning of witnesses and possible suspects, police officers, and victims; and (c) the evidence gathered by the judicial police and experts.[49] Theoretically, if sufficient evidence is gathered and a suspect is identified, the agent requests an arrest warrant from the corresponding judge.[50] If, on the other hand, the pretrial investigation did not yield enough information to identify a suspect, the public prosecutor stores the case as temporarily unsolved. Eventually, most of these cases are permanently closed.[51]

To avoid cases being closed as unsolved without proper investigation, the District Attorney's Office has issued orders that require each case file to be supervised (in the sense of reviewed). When it is determined that a case file is unsolved, it is sent to the head of the agency who reviews the file and ratifies the decision to file the case as such.[52] Once the head of the agency approves and signs the case file, it is sent to the Assistant Public Prosecutor's Coordinating Office (*Coordinación de Agentes del Ministerio Público Auxiliares del Procurador*), a unit within the District Attorney's Office that again reviews and ratifies the decision to store a case file as unsolved.[53] This ratification, however, is based solely on the written contents in the file and whether all

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[46] As noted above, unsolved cases are filed as temporarily or definitely unsolved. Temporary unsolved cases are those that have been temporarily closed because there is not enough to continue with the investigation. Temporarily unsolved cases eventually become definitely unsolved ones if enough time passes without finding any new evidence. The time needed to permanently closed a file is determined by the highest sanction in the Criminal Code that applies to the particular crime. If this period expires, a case is filed as definitely unsolved and is permanently closed. A case is also filed as unsolved when the crime is not serious and the victim pardons the offender, or when, after the pretrial investigation, the public prosecutor determines that no crime was committed. Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 63.

[47] From Alejandro Gertz Manero, Seguridad y Justicia, Address at the Círculo de Estudios México (August 19, 2004).

[48] *Id.*

[49] See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at arts. 16 and 11.

[50] *Id.*

[51] See Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 15.

[52] *Id*. at art. 17.

[53] This office is governed by the Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at chapter XIII.

the formal requirements for a case file have been met, at least "on paper". However, in reality, no real investigation has taken place.

On several occasions, I saw case files the Coordinating Office sent back to MH5 because they were not stamped or numbered properly. On other occasions, I saw case files sent back for not specifying the right articles of the applicable codes or regulations. Once the Coordinating Office is satisfied with these formalities, the case is filed as temporarily unsolved.[54]

Most unsolved cases eventually become permanently unsolved, and the investigations are permanently closed. Guillermo Zepeda found that in 1999, 3.2% of investigations nationwide were closed because the criminal charges were not approved for filing, 24.0% were closed voluntarily, 27.0% were closed because the time limit for prosecution had expired, and only 9.7% were closed because the investigation was successfully concluded.[55] Of those closed due to time limits, over half were definitively closed.[56] Many cases thus go unsolved and unpunished, the typical outcome if there are no known suspects when the case is opened. For cases in which a suspect is known or a person has been detained, cases are usually "successfully concluded".

IV. Procedure with a Detainee

On July 27, 2004, a man was arrested for stealing a screwdriver from a supermarket. As he was leaving, the concealed screwdriver set off the store's alarm and two police officers arrested him and brought him to the agency (MH5). When they arrived, the detainee was put in a chair in front of me. The man started crying and said, "Miss, can you please help me? Please help me". He then turned to someone else standing nearby, "Please, can you help me? Will you please help?" When no one answered, he continued to cry. "Please let me go. I'll be good. I promise. I have a daughter. She's three months old. Please, let me go". One of the clerks walked over and told him to be quiet.

Then, a judicial police officer came over and stood next to him. When the detainee started asking me for help again, the officer told the detainee, "Be quiet, or you'll suffer for it". The officers who brought the man to MH5 put the screwdriver on the clerk's desk. The price tag was still on it. It was worth $175 pesos (approximately $17 USD).

"At least let me make a phone call", the man pleaded. "I know I'm allowed to make a call", he insisted, raising his voice and crying even louder. The officer then made the detainee stand up and took him down to the de-

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54 *Id.* at art. 25.

55 Guillermo Zepeda Lecuona, *supra* note 8 at 189.

56 *Id.*

tention center. Later that day, he was sent under pretrial detention to a Mexico City prison.

That same day, another person —a boy between 16 and 18— was arrested. Like the man described above, the boy had been arrested by security guards for shoplifting. The boy had stolen some perfume and deodorant from a local Wal-Mart. He, too, was sent to prison under pretrial detention without bail. The cost of the items stolen came to $240 pesos (approximately $24 USD).

The participant observations conducted showed that, in most cases with detainees, these individuals were arrested without a warrant and for misdemeanors. Approximately half of Mexico's detainees caught in the act are arrested without warrants.[57] Although human rights activists and NGOs have widely criticized the frequent use of detentions without warrants by the Mexican police,[58] Mexico's legal system and criminal law interpretations still validate and facilitate police arrests without warrants. The broad definition of "special circumstances" in article 16 of the Mexican Constitution is one example of such validation.[59] This article, amended in 1993 and again in 1999, allows arrests without warrants in "urgent cases". The reforms to article 16 elaborate on "urgent cases" to include arrests made when police determine that the suspect might escape the authorities, fundamentally leaving the decision to the officer's discretion.[60]

Another example of this is the concept of "*en flagrancia*" —caught in the act— as used in Mexican law today. Previously, it referred to cases in which police witnessed a crime in progress (i.e., in the act). This concept was later expanded to include an arrest if:

— The arrestee was identified by a victim or witness as the person responsible for committing a crime,
— The arrestee was found in possession of the item subject of the crime, or
— Fingerprints or other evidence made it possible to infer that the arrestee participated in a crime.

The constraints on these bases for an arrest *en flagrancia* are: (a) the law considers it a serious crime, (b) less than 72 hours have passed since the

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57 Alejandro Gertz Manero, *supra* note 47.

58 See also INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN MÉXICO (1998).

59 Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 16.

60 Report of the Joseph R. Crowley Program in International Human Rights & Centro de Derechos Humanos Miguel Agustín Pro Juárez, *Presumed Guilty?: Criminal Justice and Human Rights in Mexico*, 24 FORDHAM INT'L L. J. 801, 809 (2001) [hereinafter the Joseph Crowley Report].

crime occurred, and (c) the criminal investigation was initiated prior to the arrest.[61]

These reforms, intended to facilitate arrests and help police fight crime, have adversely affected criminal prosecution and police practices. Without the resources or the motivation to investigate crimes, Mexico's police focus on apprehending subjects caught in the act. A survey from the Centro de Investigación y Docencia Economicas (CIDE)[62] conducted in Mexico City and its suburbs found that most detainees are petty criminals and not those who commit the serious crimes that most concern Mexican society.[63] This is especially true regarding thefts and robberies of small amounts of money. Many of the defendants I saw at MH5 were arrested under these circumstances. The CIDE survey also found that many detainees are arrested *en flagrancia* (in the act of committing a crime): over half of the surveyed detainees (57.0%) said they had been arrested within the first three hours of committing the crime.[64] An additional 25.0% of the respondents said they were arrested within 30 days of committing a crime, 7.4% within 30 to 180 days, 4.0% between six months and one year after, and a further 6.6%, a year or more after committing a crime.

Before asking a judge to issue an arrest warrant, a public prosecutor must first establish there is reasonable cause against a person. The case file is then sent to a criminal court along with a request for a warrant.[65] Guillermo Zepeda has reported that, nationwide, 85% of the requests for arrest warrants are granted.[66] However, over half of the warrants granted do not result in arrests. Based on data from the National Institute of Statistics (INEGI), 33% of the arrest warrants granted nationwide resulted in arrests.[67] In Mexico City, 47.6% of the arrest warrants resulted in arrests.[68] Since only 11% of the cases opened at a public prosecutor's office obtain an

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61 See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 267.

62 The CIDE is a publicly funded institution located in Mexico City.

63 The CIDE prison survey shows that most detainees in Mexico City are not only arrested without a warrant but are also arrested for misdemeanors. The survey was conducted in Mexico in May 2002. It was given to 1,605 inmates from 18 different prisons in the states of Mexico and Morelos and in Mexico City. See MARCELO BERGMAN coord., DELINCUENCIA, MARGINALIDAD Y DESEMPEÑO INSTITUCIONAL. PRIMERA ENCUESTA DE LA POBLACIÓN EN RECLUSORIOS (CIDE, 2002).

64 *Id.*

65 See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 2 and 4.

66 GUILLERMO ZEPEDA LECUONA, *supra* note 8 at 210.

67 *Id.* at 205 and 206-208. According to Zepeda in 2000, there were 253,539 effective arrest warrants in 30 states, not counting Mexico City or the State of Nayarit, which apparently do not give out this information. Of these, 127,666 were pending from the previous year and 125,873 had been issued that year.

68 *Id.*

arrest warrant, and since only 33% of the arrest warrants result in actual arrests, Mexico's criminals enjoy a great deal of impunity.[69]

Once an arrestee is in custody with or without an arrest warrant, the public prosecutor's office has 48 hours to bring criminal charges against the arrestee in a court or release him.[70] This period can be extended to 72 hours if the suspect is accused of a serious crime.[71] Thus, from the time of arrest, prosecutors have 48 hours (and in certain cases, 72 hours) to gather enough evidence to press charges.

Since public prosecutors and clerks work for 24-hour shifts (followed by 48 hours off-duty), many cases are passed on to the next shift, which must finish the process to obtain an indictment. Detainees remain in the agency's detention center until bail is granted. If bail is refused, they are sent to a pretrial detention center. Many arrestees are sent to prison as pretrial detainees, without the possibility of obtaining bail.

The Mexican Constitution and local code of criminal procedure grant several rights to the accused during the pretrial investigation:

— The right to request provisional release under bail (which is granted unless one of the exceptions stated in article 20 of the Constitution applies);[72]
— The right to be informed of the accusations against him or her;[73]
— The right to not have his or her personal belongings or person taken or searched without a warrant issued by a judge;[74]
— The right to counsel;[75]
— The right to remain silent and not give an initial declaration;[76]

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69 *Id.* at 177. This number reflects the estimated percentage of cases nationwide.

70 In cases where an arrest has been made *en flagrancia*, the case file is also sent to a criminal court for the detention to be validated. Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 268 bis. See also VICTORIA ADATO GREEN, *supra* note 13. Also see Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at articles 16, 20 and 21.

71 Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 268.

72 Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 20; Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 556-574. See also Código Federal de Procedimientos Penales [C.F.P.P.] [Criminal Procedures Code] art. 399 to 417 [D.O.] Aug. 30, 1934.

73 Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 269.

74 Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 16.

75 *Id.* at art. 20 and Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at article 269.

76 Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 20, II; Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at ar-

— The prohibition of torture and of being held *incommunicado*, the lack of legal standing of any statement or declaration given to anyone except the public prosecutor or judge, and the lack of legal standing of any statement or declaration given without the assistance of a defender.[77]

At the agency studied as part of this research, many of these rights were observed in form, but not in substance. Many defendants did not know how to read or write and because of defendants' low socio-economic background and educational level they were unaware that their rights were being violated. The only recourse for many defendants was the often deficient service of public defenders. The code of criminal procedure specifies that the public prosecutor has the obligation to inform defendants of their rights, including their right to not make an initial statement.[78] However, CIDE data suggests that many defendants are not informed that the statement they are asked to give the public prosecutor is not compulsory. The CIDE survey found that 77% of the defendants interviewed responded "No" to the question, "Did anyone inform you at the Public Prosecutor's Office that you had the right not to declare?"[79] At MH5, I saw several defendants being informed of this right; however, both the public defender and the public prosecutor or clerk recommended that they give a statement. Both public prosecutors and public defenders told defendants that invoking their right to not give a declaration would count against them in the future. In these cases, defendants usually gave a statement, often to their detriment.

At MH5, this statement was taken by the clerks. The clerk would first ask the defendant for an oral account of the events and would then include this statement in the file using the SSAP.[80] Statements rendered at the Public Prosecutor's Office under these circumstances practically guaranteed convictions. At MH5, I often saw defendants give incriminating statements, unaware of what they were doing. On several occasions, I observed the clerks as they wrote down the defendant's oral account. In the statements

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ticles 269, 289, 290 and 291; Código Federal de Procedimientos Penales [D.O.] Aug. 30, 1934, at article 128.

77 Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at article 289.

78 *Id.* at art. 269 III.

79 See MARCELO BERGMAN *supra* note 63.

80 The computer software system used today by agents and *oficiales secretarios* (*sistema simplificado de averiguaciones previas or SSAP)* to create files (*expedientes).* The SSAP was instated by the District Attorney's office to simplify procedures and avoid corruption. The information in each case is recorded permanently in the main system. Once a file is created in the system, the case is recorded and may be accessed from any computer within the system that uses the software. Each agent and *oficial secretario* have a number and code that allows them to access the system. Any changes or proceedings added to these files are recorded in the system with the agent's and *oficial secretario*'s number.

that the clerks entered into the SSAP, they would include the incriminating information, but leave out information that might aid the detainees' defense.

In Mexico, statements rendered to the public prosecutor present an enormous problem for defendants. This is largely due to the weight given to confessions and the interpretation the court gives to the principle of proximity.[81] In Mexico, judges consider a confession the most valuable type of evidence.[82] The Mexican Supreme Court has stated that a confession should be considered "absolute evidence" of a person's responsibility as long as it is not implausible and can be corroborated by other evidence.[83] The Court has also declared that, once a confession has been made, the defendant's subsequent denial of statements in the confession does not negate the value of the confession, and the defendant bears the burden of proving that the confession is false.[84]

Given the Court's interpretation of the principle of proximity, based on the theory of procedural proximity, a confession given during the pretrial investigation stage has greater value than any subsequent declarations and invalidates any subsequent declarations to the contrary.[85] As noted in the Joseph Crowley Report, the principle of proximity was originally "intended to function as a procedural protection for the accused".[86] Accordingly, this principle placed the greatest weight "on a statement made to the judge, em-

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81 Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at articles 136 and 137.

82 According to Yamin and Noriega, "In Mexico, the confession has historically been treated by judges as one of the most valuable types of evidence […] Notwithstanding significant evidence indicating that involuntary confessions are unreliable, judges in Mexico view confessions to have the most probative value". Alicia Aly Yamin & Ma. Pilar Noriega, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L. A. INT'L & COMP. L. J. 467, 499 (1999).

83 CONFESIÓN, VALOR DE LA, Primera Sala, S.C.J.N. [SUPREME COURT], Semanario Judicial de la Federación y su Gaceta, Sexta Época, Segunda Parte, XLIV, February 1961, p. 49. (Mex.).

84 RETRACTACIÓN, VALOR PROBATORIO DE LA PRIMERA CONFESIÓN. Primera Sala, S.C.J.N. [SUPREME COURT], Semanario Judicial de la Federación y su Gaceta, Sexta Época, Segunda Parte, XC, December 1962, p. 27 (Mex); and CONFESIÓN ANTE EL MINISTERIO PÚBLICO, RETRACTACIÓN, Primera Sala, S.C.J.N. [SUPREME COURT], Semanario Judicial de la Federación y su Gaceta, Sexta Época, Segunda Parte, XXXIX, September 1960, p. 41 (Mex.). In a later case, the Court stated that if a defendant claimed to have been forced to make a first confession before the *Ministerio Público* through torture or coercion, it was his/her duty to prove that torture had in fact taken place. See RETRACTACIÓN, CONFESIÓN ANTE EL MINISTERIO PÚBLICO, Primera Sala, S.C.J.N. [SUPREME COURT], Semanario Judicial de la Federación y su Gaceta, Sexta Época, Segunda Parte, XVI, Octobre 1958, p. 232 (Mex.).

85 JESÚS ZAMORA PIERCE, GARANTÍAS Y PROCESO PENAL 185 (2001).

86 The Joseph R. Crowley Report, *supra* note 60.

phasizing the importance of the judge's ability to assess the evidence directly".[87] The theory, as interpreted by most Latin American countries and the Inter-American Commission on Human Rights, assumed that acts which occur in the presence of a judge are more valuable because the judge will guarantee the veracity of the statement, as well as insure that the defendant was not coerced. However, the Mexican Supreme Court has given this principle the opposite meaning.[88] It has interpreted "proximity" to refer to the confession given in the time closest to the perpetration of the alleged acts, as opposed to the one rendered in the presence of a judge.[89] Yamin and García have pointed out that, in Mexico, "Given the theory of the procedural proximity of the evidence, the initial declarations of the accused receive priority since the corresponding legal value had been given to them because they were issued within proximity to the acts".[90] If a defendant makes a confession during initial questioning, the court will give it greater weight.

When an initial declaration was given at MH5, the police officers who brought the defendant in would be present, along with the detainee's defender or "person of his or her confidence".[91] When arrests were made *en flagrancia*, the police officers who made the arrest were called in as eye witnesses, further implicating the defendants.

As a final note, it is important to mention that when a case file is closed as unsolved, either because no suspects were identified or because the warrant did not result in an arrest, the public prosecutor's Office that opened the case stores the case file until it is declared permanently closed.[92] In these cases, the file never leaves the agency. When an arrestee is in custody or a defendant has been granted bail, once the pretrial investigation phase is completed the case file is sent to a different public prosecutor, known as the trial prosecutor, who pursues the case in the courts from the instruction phase to the sentencing phase.

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87 *Id.*

88 *Id.*

89 DECLARACIÓN PRIMERA DEL REO, VALOR DE LA. Primera Sala, S.C.J.N. [SUPREME COURT], Semanario Judicial de la Federación y su Gaceta, Sexta Época, Segunda Parte, XLIII, p. 37 (Mex.) and RETRACTACIÓN Y APLICACIÓN DEL PRINCIPIO DE INMEDIATEZ, Primera Sala, S.C.J.N. [SUPREME COURT], Semanario Judicial de la Federación y su Gaceta, Sexta Época, Segunda Parte, LVII, p. 58 (Mex.).

90 Alicia Ely Yamin & Ma. Pilar Noriega, *supra* note 82.

91 Article 20 of the Mexican Constitution establishes that a defender or "person of his or her confidence" be present at the time of the initial declaration. However this right is only fulfilled in form and in most cases, defendants do not have any defense present at this time.

92 This is due to the term barring of the penalty. Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 25.

Mexican prosecutors obtain convictions in almost every case when there is an indictment; the circumstances involve the existence of a confession, hardly any investigation of the fact, and no plea-bargaining whatsoever.[93] The National Institute of Statistics (INEGI) reports that 87% of the rulings made by Mexico's local criminal courts in 2003 ended up in convictions.[94] In Mexico City, 93.4% of the rulings made by the city's local criminal courts ended up in convictions.

V. Conclusions

In Mexican criminal procedure, the pretrial investigation phase is the bottleneck in the system. During this phase, many cases become inactive files (*archivo muerto* —permanently unsolved—). Mexico's public prosecutors —along with clerks, the judicial police and experts— are responsible for investigating crimes and bringing those responsible to court. Mexican criminal procedure is structured on the basis that criminal investigation and gathering evidence are key in finding suspects and prosecuting them. However, at the public prosecutor's offices I observed very little or no investigation takes place. Most procedures which were initiated without a detainee end up unsolved. In many cases, crime victims simply decide not to report the crime, fearing the long and bureaucratic procedures or anticipating the system's ineffectiveness. In cases where an arrest warrant is issued, relatively few arrests result, and many cases that involve a detainee result from an arrest without a warrant. In those cases where an arrestee is brought before a public prosecutor, prosecution and later convictions are the norm.

Public prosecutor's offices are an extremely important part of the Mexican justice system. For many people, the agencies are not only the entrance to the criminal justice system, but also a first approach to the legal system. People arrive at the agencies with all types of issues. Some of these issues are legal, others are not. Some are criminal law issues and others are not. From divorces, inheritance problems, lost driver's licenses, to reporting crimes, people arrive at public prosecutor's offices because it is the only legal institution they seem to know about and choose it as their first approach the legal system.

As previously noted, the ICESI survey indicated that only 24% of the crimes that occurred in Mexico City in 2002 were reported.[95] This paper

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[93] See Open Society Justice Initiative, Myths and Pretrial Detention in Mexico 14 (2005).

[94] See the National Institute of Statistics (INEGI) at http://www.inegi.gob.mx/estadisticas.

[95] See ICESI survey on Victimization. Available at http://www.icesi.org.mx/index.cfm?cat ID=944.

provides several possible explanations for crime victims' reluctance to report a crime.[96] The participant observations conducted for this study at the two Miguel Hidalgo public prosecutor's offices demonstrate that the fears expressed by victims about the agencies and their reluctance to attend have sound bases. Initiating a criminal procedure is a drawn-out and time-consuming experience that usually yields no positive result. Moreover, once a procedure has been opened, victims are often not informed about the status of their procedure —and they need to pay gratuities to receive information, a copy of their file or a copy of their report.

Today, public prosecutors and police officers unilaterally decide if and when to initiate a criminal procedure, and if and when to prosecute. Except for the internal formal case file review process, the work of public prosecutors goes unchecked, and they are not held accountable for their decisions. Part of this lack of accountability results from the fact that case files are hidden from public view and can only be accessed by the parties directly involved in the case. Today, Mexico's criminal investigations and criminal procedures are conducted virtually in secret. Because these files are the sole source of information on each proceeding, and because the public has no access to these files, much of what happens in Mexico's criminal procedure is inaccessible to independent scrutiny.

Aware of the ineffectiveness of police and prosecutorial organizations and activities, Mexico's authorities continue to endorse legal reforms that increase both sanctions and the discretion of the police and prosecutors. As a result of these reforms, there has been an increase in the number of arrests of petty criminals, a dramatic rise in the prison population, a reduction of procedural guarantees and the extensive use of arrests without warrants.[97] Reforms have failed to address the main problem in criminal prosecution: the lack of investigation, without which criminal procedure is simply an empty process damaging both victims and defendants.

Many of the shortcomings of Mexico's criminal procedure result from the lack of preparation and resources available to conduct investigations, without which the pretrial investigation phase becomes a vacuous process. Experts and prosecutors need better resources and the necessary equipment and personnel to conduct investigations. It is essential for public prosecutors and clerks to leave their desks and become real investigators. Today, agents, experts and even public defenders in Mexico City work in precari-

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[96] *Id.* In the ICESI survey, many respondents (39%) stated they had not reported a crime because they felt reporting it would be a waste of time, others (20%) expressed a lack of trust in the authorities, a further 17% showed concern over the long and complicated procedures.

[97] See http://www.spf.df.gob.mx/htmls/ssp-sec-informe-2004-2.html. According to the Public Security Ministry, when the reforms to the criminal code augmenting sanctions and further expanding the circumstances that deny bail were enacted in 2003, prison population increased 20% by 2004.

ous conditions. They receive extremely low salaries[98] and have an overwhelming workload.

Institutions gain dignity and respect from many sources. One of these sources is found in the physical space in which they operate. Social and legal institutions are immersed in symbols that lead us to understand the world in certain ways and give authority and power to institutions. Laws and procedures do not exist exclusively on paper. The manner in which they come to life give them a defining character and meaning. Today's public prosecutor's offices send a mixed message. Mexican citizens see the agencies' decaying facilities, torn furniture and rusty chairs as reflections of the institutional decay that characterizes and pervades the agencies' operations and moral code. With torn and rusty furniture and no tools, it is doubtful that Mexican citizens, public prosecutors and clerks will grasp the importance of their function.

[98] The monthly salary of a local public prosecutor ranges between 8,000 and 12,000 Mexican pesos (approximately 800 to 1,200 USD per month) depending on their seniority.

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FROM REVELATION TO CREATION: THE ORIGINS OF TEXT AND DOCTRINE IN THE CIVIL LAW TRADITION

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I. INTRODUCTION

For common law scholars, one of the most striking features of the civil law tradition is the prominent role played by legal doctrine and legal scholars.[1] For civil law practitioners, on the other hand, one of the most striking features of the common law is the absence of legal texts at the core of its legal culture. This article aims at exploring the origins of these two prominent

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[1] JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (Stanford University Press, 1985) (2nd ed.), chapters IX and X.

features of the civil law tradition: the centrality of text and the authority of doctrine.

These two features of the civil law tradition are the legacy of two distinct conceptual models of legal inquiry, which I call the model of revelation and the model of creation. I argue that each of these models has a distinct origin in separate but related practices of normative inquiry. The model of revelation, concerned for the most part with authoritative texts, emerged from the practice of late medieval jurists known as the glossators. The model of creation, concerned with doctrines, comes from the late Scholastic moral theology of 16th century Spain. These two models lie at the foundation of the civil law tradition.

Exploring medieval jurisprudence can help us understand the origins of the roles of text and doctrine in the civil law tradition. It can also help us understand their relationship to each other. I propose that the differences between these two schools can be understood as a deep transformation in the way the source of legal authority was understood. Underpinning these changes in the understanding of law was a transformation of the metaphysical assumptions brought about by developments in theology. The shift goes from a model in which divine authority is revealed in a fixed text to one in which divine authority is found in creation, i.e. nature. Changes in law mirrored a shift from the preeminence of the notion of revelation (paradigmatically present in the Bible as divine law) to the preeminence of the idea of creation (*i.e.* nature).

Revelation and creation, glossators and Second Scholastics, text and doctrine are three pairs of ideas that underlie the structure of this article. Accordingly, the article is divided into two main sections: revelation and creation. The first section focuses on the work of the glossators and the second section on the Second Scholastics. Throughout the discussion I will illuminate the roles played by text and doctrine in the civil law tradition. I will illustrate the two models by situating the people who used them in specific historical and social contexts, and then analyzing their work in further detail by exploring their methodological and metaphysical underpinnings.

I believe this approach to the origins of the civil law tradition will help understand not only the cult of legal text and the authority of legal doctrine, but other important features of the civil law, such as the tendency towards abstraction, the heavy reliance on definitions and formal concepts and the strongly normative role played by a discipline that thinks of itself as scientific and descriptive (i.e. legal science).

II. Revelation: the Advent of Legal Texts

Ius commune is a vague term that usually refers to the common law of Central and Western Europe from the late Middle Ages on. It was not the law of a particular political entity with a determined jurisdiction. It was

rather a common learned legal culture. In the fractured legal universe of late medieval Europe, the *ius commune* served as a meta-legal system that made it possible to resolve conflicts between competing legal systems, establish common solutions for common problems, and provide legal solutions to problems other laws or customs did not address.

The *Ius commune* pivoted on two authoritative collections of legal texts: the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici*. Late medieval jurists studied these texts using a common set of assumptions and techniques, thus forming a common school. The *Corpus Iuris Civilis* was a compilation of old Eastern Roman law that was revived in the West in the early centuries of the second millennium. The other authoritative legal collection, the *Corpus Iuris Canonici*, was an amalgamation of sacred texts and old laws of the Christian churches and the "new law" of the recently consolidated Roman Catholic Church.

While each of these two legal collections was studied by a distinct academic discipline, the disciplines were closely related. Civil law studied the *Corpus Iuris Civilis* and canon law studied the *Corpus Iuris Canonici*. The texts studied by canon law (and the doctrines of which it consisted) were the positive laws of a political and territorial entity under the authority of the Pope as prince.[2] The *Corpus Iuris Civilis*, on the other hand, was not the positive law of any existing polity. It was a learned law shared by lawyers and bureaucrats in different polities throughout Europe. These two disciplines shared methods, principles and assumptions:

> The canonists shared with the Romanists of their day the same basic theories concerning the nature and functions of law and the same basic methods of analysis and synthesis of opposites — theories and methods which were as much borrowed from them by the Romanists as by them from the Romanists. Indeed, not only theories and methods but also many specific legal concepts and institutions were taken over into contemporary Roman legal science form the new science of canon law.[3]

This interrelatedness included formal academic training.[4] A surge in academic work on canon law at the turn of the first millennium was paralleled and intertwined with the rise of the academic study of civil law. Both

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[2] Canon law was also not only the positive law of a territorial polity under papal jurisdiction, but was also the positive law of the Western Church, which meant it applied to the faithful throughout Europe in matters that fell under Church jurisdiction.

[3] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 204 (Harvard University Press, 1983). In fact, the example of the Scholastic methods of analysis and synthesis as applied by the new legal science used by Berman in his book refers to the monk Gratian who in 1140 wrote a treatise on canon law mentioned below. See also BERMAN at 143-145.

[4] JAMES A. BRUNDAGE, MEDIEVAL CANON LAW 52 (Longman, 1995).

fed an increasingly interrelated class of jurists that populated Church and lay bureaucracies in the centuries to come. To be sure, this cross-fertilization between legal disciplines included sharing some of the same legal texts, but most importantly it involved common terminology, methodology, ideas and concepts.[5]

Noted Mexican legal historian, Guillermo F. Margadant, tells us that the period stretching roughly over the first two centuries of the second millennium was dominated by the ideal of *reductio in unum*: a single Church, under a single authority (the Pope's); a single Empire in which all kings were to be vassals of the Emperor; a single language for culture, Latin; and, to complete this scheme the idea of a single law, the *ius commune*, built by jurists out of the *Corpus Iuris Civilis* and the canon law.[6] Legal and political disputes were not about how to split the pie, but rather about the pecking order; the pie was to remain whole, at least in theory. This idea of *reductio in unum* is important in understanding the universalistic claims of jurists in their work, as will be seen below.

1. *Emerging Institutions and Authoritative Texts*

Two key processes contributed to the emergence of the *ius commune* in the first centuries of the second millennium: the consolidation of the Church under papal authority with a unified legal system (canon law), and the academic revival of Roman law in the universities. The emergence of a centralized Roman Catholic Church under the Pope's authority was a process that spanned from the 10th to the 12th centuries. The university emerged at the end of the 11th century and would successfully reproduce itself throughout Europe (and later America) effectively dominating academic legal studies well into the 18th century. At the university, the formal study of Church law and Roman law would spawn the twin legal sciences of canon law and civil law.[7]

2. *Canon Law*

In the late Middle Ages, the Western Church emerged as a centralized entity under the direct tutelage of the bishop of Rome. The development of

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[5] *Id.* at 22.

[6] GUILLERMO F. MARGADANT, LA SEGUNDA VIDA DEL DERECHO ROMANO 85 (Miguel Ángel Porrúa, 1986). E. N. Van Kleffens also mentions the importance of the idea of *reductio ad unum*, E. N. VAN KLEFFENS, HISPANIC LAW UNTIL THE END OF THE MIDDLE AGES 173 (1968).

[7] One must keep in mind that the distinctions between the legal systems and the disciplines that studied them were blurred. So I will use the terms "canon law" and "Church law" interchangeably, as well as "Roman law" and "civil law".

the Catholic Church's legal system, or canon law, with identifiable sources of law and a determinate jurisdiction, is closely linked to this process of reform and centralization, which Harold Berman has called the Papal Revolution (but which is more commonly known as the Gregorian Reform).[8] Early reformists wanted to advance the Church's independence from secular authorities. Their strategy partly consisted of advancing their claims in legal terms. They pushed for both a substantive revision of the laws governing the Church and an administrative reorganization that would allow the adjudication of Church law in Church tribunals and the persecution of Church criminals.[9]

Previously, authoritative Church documents bearing on law were characterized by multiplicity and inconsistency. These included documents which were very distant in terms of time, authorship and intent.[10] Consequently, proto-canonical lawyers were concerned with reconciling the discrepancies found among the texts. In compiling and interpreting them to better serve their purposes, reformists initiated many of the methodological advances that the glossators would later build upon. From the time of Pope Gregory VII (11th century), collections of old conciliar canons[11] became more frequent. More importantly, the Pope claimed the power to create new laws, called *decretals* (which together were known as *jus novum*, or new law as opposed to *jus antiquum* or old law from the conciliar canons that were being compiled around the same time).[12]

By the early 12th century, the Church had amassed a body of law sufficiently abundant that Berman sees it as the prototype of a modern legal system.[13] The Church had produced a large number of legal precepts that governed matters under its jurisdiction.[14] It had also begun developing interpretative techniques which allowed it to reconcile conflicting authoritative texts. Eventually, the authoritative legal texts of the centralized West-

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8 BERMAN, *supra* note 3 at 145. In the West, secular authorities' control over local churches and the corruption of ecclesiastical conduct had become the norm after the break-up of the Carolingian empire and the rise of "feudalism". See Brundage, *supra* note 4. In the 10th century, reactions against the situation began with the successful withdrawal of a few monastic houses from secular control, notably the Burgundian monastery of Cluny (909). By the mid-eleventh century, reformers had gained the papacy under Leo IX, who gathered around him other reformers who would later also be popes, notably Gregory VII.

9 See BRUNDAGE, *supra* note 4.

10 They included *conciliar* canons (that is, canons agreed upon at Councils, diverse universal or regional summits of high ranking clergy that had taken place throughout Christian history), Scripture, the writings of the Church Fathers and other documents.

11 *i.e.* authoritative norms or interpretations agreed upon by the different ecumenical councils, or bishop assemblies.

12 BERMAN, *supra* note 3 at 202.

13 *Id.* at chapter 5.

14 *i.e.* Church finances and property, crime, labor, taxes, marriage, and family relationships, etc.

ern Church would be compiled and systematized through these interpretative techniques into a collection known as the *Corpus Iuris Canonici*.

3. *Roman Law*

Together with canon law, the *ius commune* tradition of late medieval Europe grew out of the study of Roman law. During the early Middle Ages, the importance of Roman law had been relatively minor. Academic inquiry was the key vehicle in moving Roman law from the periphery to center stage of the Western European legal world. This academic revival of Roman law was linked to a revision of the proper place of law in the general scheme of knowledge.[15] Peter Stein tells us that the traditional view had been to locate law under the category of ethics insofar as it deals with human behavior. The new perspective, arriving with the emergence of the glossators, was to limit the ethical categorization of law to the *content* of the rules, yet to understand law as a part of logic insofar as it consisted of interpreting words in a text.[16] This allowed for the legitimate use of all the arts of traditional education known as *trivium* (grammar, dialectic and rhetoric) in legal inquiry.

Throughout the 11th century, there was increasing interest in jurisprudence with the emergence of several centers of specifically legal learning in Provençe, France, and in Lombard cities of northern Italy. During this period Justinian's Digest (the part of the *Corpus Iuris Civilis* which compiled Roman legal doctrine) was studied in northern Italy.[17] These new centers of learning gradually evolved into an autonomous corporation that came to be known as the University.[18] Starting in Bologna, the study of law would be mostly devoted to Roman law as presented in the *Corpus Iuris Civilis*. From there, its study and the corresponding methodology would consolidate and, in the following centuries, spread throughout Europe through a growing network of universities. The lawyers who spread from Bologna have come to be known as the school of the glossators.

There are two key elements in understanding the work of the glossators and their importance in the subsequent development of a systematic "science" of law. First, they took the Justinian texts to be consistent, complete and coherent (as Justinian affirmed in the beginning of the compilation it-

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15 The question of which social and political reasons stimulated the revival of Roman law is complex and has no clear answer. For accounts of the historical context, see BERMAN, *supra* note 3, STEIN, *infra* note 16 and MARGADANT, *supra* note 6.

16 PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 46 (Cambridge University Press, 1999).

17 Its final part, including its final title, was not known at first. STEIN, *infra* note 19 at 127.

18 BERMAN, *supra* note 3 at 124.

self).[19] Secondly, they built upon the tendency, already reflected in the last title of the Digest,[20] to abstract texts from their context and generalize their applications and implications.[21] The glossators took abstraction to a new level by applying it to the entire compilation and not just to the last title.

The glossators represent a key moment in the secularization of both academic knowledge and legal studies. However, their enterprise can best be understood in relation to the religious context of their origin.[22] Both aspects of the work of the glossators —a) the presupposition of the completeness and consistency of the text; and b) the willingness to abstract and generalize any part of it— were linked to the religious underpinnings of their enterprise: the glossators approached the *Corpus Iuris Civilis* in very much the same way a contemporary theologian would have approached the Bible.

The idea that the authoritative collection of texts was complete was important, especially in the case of civil law. In contrast to Ancient Rome, in late medieval Europe there was no uncontested Imperial authority that could be the source of new Roman law.[23] Civil lawyers had only the *Corpus Iuris Civilis* to work with. In the late medieval revival of Roman law, the Justinian text was assumed to be a complete and authoritative whole, free of contradictions and gaps. The glossators accepted without question Justinian's assurance that the texts contained no contradictions that could not be reconciled by one who tackled them with a subtle mind (*Constitutio Tanta, 15*) and took for granted that the compilation as a whole contained everything necessary to answer any conceivable legal problem.[24]

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19 "The glossators took it for granted that the different texts could be reconciled, for they accepted without question Justinian's assurance that the Digest contained no contradictions which could not be resolved *subtili animo* (*Const. Tanta*, 15)". PETER STEIN, REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS 131-132 (Edinburgh University Press, 1966).

20 The Digest was the fourth and last text of the *Corpus Iuris Civilis*. It was a compilation of opinions on specific matters from authoritative Roman jurists prior to Justinian's time. The last title of the Digest consisted of a list of abstract rules (*regulae*), separated from their specific topic, serving as sort of default solution in case a specific matter was not addressed.

21 The *Corpus Iuris* itself a product of this tendency.

22 Theodor Viehweg warns against assuming that Scholasticism in theology was imported in its entirety into jurisprudence and cautions against drawing parallels between jurisprudence and theology. THEODOR VIEHWEG, TOPICS AND LAW. A CONTRIBUTION TO BASIC RESEARCH IN LAW 54-55 (W. Cole Durham trans.) (Peter Lang, 1993). In this article, the point I wish make about the theological origins of the basic understanding of law and its treatment of authority is not intended to contradict Viehweg. He is concerned with bringing to light the "widely overlooked" influence of topics in jurisprudence, whereas I am concerned with bringing to light the persistent influence of theology in law, a matter which, at least in Mexican legal history and jurisprudence, has also been widely overlooked.

23 Holy Roman Emperors claimed such authority at different times, though the claim was never uncontested.

24 STEIN, *supra* note 16 at 46.

They also treated it as *truth* with *transcendent authority*:

> It was of critical importance, however, that the jurists who studied these ancient texts believed, as did their contemporaries generally, that that earlier civilization, the Roman Empire, had survived until their time, in the West as well as in the East. It had survived in a special sense —in a new form, as the soul of a person might survive the body. More than that, they believed it had a universal and permanent quality. They took Justinian's law not primarily as the law applicable in Byzantium in 534 A.D., but as the law applicable at all times and in all places. They took it, in other words, as truth—the way they took the Bible as truth and the works of Plato and (later) Aristotle as truth.[25]

What was in fact a multiplicity of texts with varying functions, different authors and historically diverse sources, compiled centuries before under Imperial orders, was treated as a unified whole valid for the present.[26]

4. *Interpreting Texts*

The legal collections, then, were authoritative in a transcendental sense. Medieval jurists' understanding of authority paralleled the understanding of authority of the other great discipline concerned with authoritative texts: theology. Harold Berman links the emergence of a legal science with the emergence of a science of theology, which sought to analyze evidence of divine revelation systematically.[27] Knowledge and authority were both understood to come from divine revelation. The *Corpora*[28] played, for their respective disciplines, the role that the Bible played for theology.

In fact, the texts of the *Corpus Iuris Civilis* were anything but systematic. They were arranged with "…appalling lack of coherence… The same matters were dealt with in the Institutes, Digest and Code, but without any order".[29] The decisions and extracts contained in them were often very narrowly tied to concrete cases that had actually taken place; otherwise, they were, for the most part, either imperial ordinances or else statements of how a magistrate (*praetor*) would act on specific cases.[30] As John P. Dawson

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25 BERMAN, *supra* note 3 at 122.

26 *Id.* at127; JOHN P. DAWSON, THE ORACLES OF THE LAW 124 (The University of Michigan, 1968).

27 BERMAN, *supra* note 3 at 132; DAWSON, *supra* note 26 at 126 goes further than Berman in linking the two sciences and locates law at the receiving end of methodological borrowings.

28 *i.e.* both the *Corpus Iuris Canonici* and the *Corpus Iuris Civilis*.

29 STEIN, *supra* note 16 at 46.

30 BERMAN, *supra* note 3 at 128. He uses "…an example, 'The praetor says, 'If you or your slaves have forcibly deprived anyone of property which he had at that time, I will

points out, the concern of Roman jurists had been to find solutions, in the texts, to specific cases; a task in which "no elaborately reasoned justification was needed, for to persons outside the elite group the jurist's own authority was enough and those inside would understand the reasons well enough".[31] These assumptions and experiences did not correspond in time or place to the world in which the glossators worked, making the original meaning of the texts simply incomprehensible —or at best, useless— to them.

The glossators drew the tools with which to generate the meaning of the texts from their intellectual environment. It is common to link the school of the glossators to medieval Scholasticism.[32] Scholastic methods presumed that the mass of propositions with which one worked were all true. At stake was their relation to one another, their systematization, not their validity.

> This [the Scholastic] method, which was first fully developed in the early 1100's, both in law and in theology, presupposes the absolute authority of certain books, which are to be comprehended as containing an integrated and complete body of doctrine; but paradoxically, it also presupposes that there may be both gaps and contradictions within the text: and it sets as its main task the summation of the text, the closing of gaps within it, and the resolution of contradictions. The method is called "dialectical" in the twelfth-century sense of that word, meaning that it seeks the reconciliation of opposites.[33]

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grant an action only for a year, but after the year has elapsed I will grant one with reference to what has [subsequently] come into hands of him who dispossessed the complainant by force'. Such propositions are then followed by quotations from opinions of various jurists".

31 DAWSON, *supra* note 26 at 116.

32 MICHEL VILLEY, LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE 104-108 (Editions Montchrestiene, 1975). Villey goes as far as considering this period as *la Revolution scolastique*. Scholasticism was the dominant philosophical movement in Western Europe from the 9th AD to the 17th century AD, drawing from a tradition which combined religious dogma with patristic philosophy and later, importantly, Aristotelian philosophy.

33 BERMAN, *supra* note 3 at 131. The dialectical method for the summation of the Justinian text, Berman explains, had roots in Greek philosophy and Roman jurisprudence, but transformed the methods of both traditions to a considerable extent. Berman traces dialectics from Greek philosophy starting with Plato who equated it with a method to arrive at truth, that is, a science (*the* science in fact). In Plato's thought it consisted, basically, of refuting one's opponents statements by exposing their own contradictions; drawing generalizations from true propositions about particular cases; and defining concepts through distinctions arrived at through analysis of a genus into species and synthesis of species into genus and genera into larger genera. Plato also believed that the truth was obtainable only through deductive logic, not inductive logic. Aristotle, on the other hand, distinguished between *dialectic* reasoning and *apodictic* reasoning. Apodictic reasoning started from propositions known to be true and arrived at certain truths; dialectical reasoning, on the other hand, started from problems or, at best, debatable premises and arrived, again at best, at probabilities. Although both types of reasoning could use either inductive logic or deduc-

Jurists, like theologians, were concerned with making sense out of the texts without questioning the authority of any part of them. All texts were equally authoritative; they simply had different scopes or spoke to different questions. If authoritative texts seemed conflicting or lacking, it was assumed that this was because further understanding was needed, not because the texts needed correction or addition.

In the process of solving contradictions, medieval jurists increasingly abstracted specific rules from their context, a tendency already present in Roman legal texts. At the risk of oversimplifying, the evolution of ancient Roman law can be depicted as one of increasing abstraction.[34] The activity of the interpreter went from elaborating *definitiones*,[35] which were broad descriptive statements of the law dealing with a common set of specific cases; to producing *regulae*,[36] which were normative propositions (initially elaborated by jurists but later incorporated into imperial legislation) designed to deal with several common cases. Medieval jurists carried this tendency towards abstraction even further by using legal maxims in the sense of self-evident, normative, abstract propositions from which legal conclusions could be deduced.

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tive logic, dialectic reasoning is better suited to use inductive logic whereas, in apodictic reasoning deductive logic is appropriate depending on the kind of science. The Stoics, from whom Roman jurists would inherit the dialectic method, used dialectics as a method for analyzing arguments and defining concepts by analysis and synthesis, separating dialectics from logic and linking it with rhetoric and grammar. The Roman jurists, for their part, were the first to apply these methods to legal texts (the Greeks didn't consider legal rules as valid starting points for reasoning) and used them basically for classifications and for formulating rules implicit in decisions. Though Berman speaks of a "subtle" distinction in this last use between "definitions", which were more closely linked to the case, and "rules" derived from cases but capable of being considered separately from the case, it seems that this distinction pales in comparison with the extrapolation towards "maxims" that the medieval jurists would undertake. See BERMAN, *supra* note 3 at 132-139.

34 The tendency towards abstraction was coupled by a tendency to increased normativeness. By *normativeness*, I refer to the normative character that legal commentaries of normative rules increasingly took. At first look, we would expect a commentary on an authoritative text to *describe* what that text is saying. The authoritativeness of the text implies that the interpreter will clarify the sense that the text already has. The text is normative, the commentary on the text is not and so we should expect it to limit itself to *describing* a *normative* text. In Western legal science what we see, I argue, is an increasingly *normative* character of the *commentary*, rivaling to some extent the authoritative text itself. Rather than *describing* the normative text, commentaries *dictate* or *norm* what the text should be understood to say. Under the pretense of describing the meaning of a text, commentators actually infuse it with new sense. In short, *normativeness* here is to be understood by opposition to *description*.

35 STEIN, *supra* note 19 chapter 2.

36 For a detailed analysis of the emergence of *regulae* in Roman jurisprudence, see STEIN, *supra* note 19, chapters III, IV & V.

This increased abstraction in the work of the glossators requires an explanation of their use of the closing title of the Digest (title 50.17). Justinian had included a list of 211 abstract ('maxim-like', in the words of Stein) legal rules.[37] According to Stein, these rules, in their original contexts, were often *regulae* of the classical period of Roman jurisprudence (the first two and a half centuries A.D.):[38] broad statements which explained a series of concrete juristic decisions in the text preceding it. By removing the texts from the cases, the Digest compilers broadened the scope of application of the formulations. Detached from their context, the broad statements could be applied to an indefinitely growing number of concrete cases. Those new cases might have little to do with the original scope of the rule. An example helps illustrate this:

> Occasionally the compilers were so keen to obtain a neat maxim of dramatic simplicity, that they left it ambiguous, as in the case of fr. 56, *semper in dubiis benigniora praeferenda sunt*. To say that in doubtful matters the more benevolent interpretation should be preferred raises the question, more benevolent to whom? It is only when it is seen that the maxim is derived from a discussion of legacies, that it becomes clear that it originally meant "more favorable to the legatee".[39]

This structure of the *Corpus Iuris* as a mass of specific legal texts sealed by a list of abstract maxims was fundamental to the glossators. The glossators went much further toward abstraction than the Roman jurists had by making generalizations of similar cases: they took the maxim-like *regulae* "as legal 'maxims', that is, as independent principles of universal validity".[40] Furthermore, they used other sections of the Justinian text, not originally stated as *regulae*, and took them out of context so as to make them into maxims as well.[41]

Whenever medieval jurists used *regulae* as maxims, they were fundamentally using solutions resulting from a problematic starting point as maxims from which to deduce necessary conclusions. Aristotle held that *dialectical* reasoning was to be deployed when starting from problematic propositions and could arrive only at probabilities, not certainties; *apodictic* reasoning, on the other hand, was premised on propositions known to be true and could

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37 The following lines are based on Stein's account of the Justinian compilation found in STEIN, *supra* note 19 at 118-120.

38 For details on the periods in which Roman legal history is divided see notes 35 and 36.

39 STEIN, *supra* note 19 at 119. The text "in doubtful matters the more benevolent interpretations should be preferred" would have dramatically different consequences in a different kind of case, say, in sentencing a criminal.

40 BERMAN, *supra* note 3 at 139.

41 STEIN, *supra* note 19 at 131.

therefore arrive at conclusions that were certain.[42] Medieval jurists claimed apodictic certainty for dialectical arguments.

Today it would be problematic, to say the least, to claim the applicability of apodictic reasoning to legal rules, for we would be pressed to accept legal rules as uncontested statements of truth. But that is what medieval jurists did when extracting *regulae* from their specific contexts of the *Corpus Iuris* and using them as universal maxims. The use of apodictic reasoning in law, however, would not be controversial if legal rules are assumed to be divinely inspired truths, which, I propose, is what enabled medieval jurists to deploy their analytic and synthetic methods with apodictic authority in these texts. Treating legal rules as authoritative maxims, that is as truths, was a key move in allowing them to think of the *Corpus Iuris* as a complete and consistent whole. It enabled the glossators to elevate particular statements to general statements and from there derive particular conclusions, which in turn allowed them to close gaps. They were also able to reconcile contradictory propositions by distinguishing them according to their level of generality in genus and species. They moved through the mass of cases, rules and doctrine by way of premising deductive logic on the *regulae* as if they were universal maxims. This might have been consistent with their understanding of the Justinian text as truth, parallel to the revealed truth of the Bible, but it posed serious problems in terms of the Aristotelian logic they thought they were emulating. In the words of Berman:

> Aristotle had denied the apodictic character of dialectical reasoning. It could not achieve certainty because its premises were uncertain. The twelfth-century jurists of Western Europe, on the contrary, used the Aristotelian dialectic for the purpose of demonstrating what is true and what is just. They turned Aristotle on his head by conflating dialectical and apodictic reasoning and applying both to the analysis and synthesis of legal norms. In contrast to the earlier Roman jurists and the earlier Greek philosophers, they supposed that they could prove by reason the universal truth and universal justice of authoritative legal texts… Since Roman legal norms were true and just, they could be reasoned from, apodictically, to discover new truth and justice. But since they contained gaps, ambiguities, and contradictions, they had to be reasoned from dialectically as well; that is, problems had to be put, classifications and definitions made, opposing opinions stated, conflicts synthesized.
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> This was the first systematic application of St. Anselm's famous motto, *Credo ut intelligam* ("I believe in order that I may understand").[43]

Related to the truth-character that the glossators attributed to the texts they expounded, and equally relevant to their work, was the assimilation of

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[42] See *supra* text accompanying note 33.

[43] BERMAN, *supra* note 3 at 140-141.

legal *regulae* to scientific laws.[44] In explaining this, I will borrow from Peter Stein's detailed look at the work of some glossators. Stein tells us that, for Bulgarus, a leading second generation glossator, a "*regula* was not primarily a norm but more like a scientific law, such as the law of gravity, i.e. a generalization from a number of regularly occurring instances".[45] This attitude towards the *regulae* explains the ease with which they abstracted concrete texts and restated them as maxims that could harmonize with each other. It also helps explain the deduction, through syllogism, of legal consequences from abstract (or, more precisely, abstracted) *regulae* as if they logically followed. According to Stein, Bulgarus presents the rule as being constituted by a series of pre-existing situations of fact. "The *regula* converts the single instances into a universal proposition"[46] through the process of induction, so that the legal rule parallels the law of nature. This process was linked to the role the Greek notions of *genus* and *species* played in understanding the *reguale*. A rule that emerges from finding the common element in singly occurring instances was understood as a *genus* and encompassed many *species* (i.e. singularly occurring instances). "The *regula* is thus likened to a *genus* comprehending a number of *species*".[47]

Regulae, however, were not only understood as general descriptive statements of what law is; they became normative statements that made new law. Thus, the descriptive and normative functions of finding *regulae* came to be confused.[48] This expansive understanding of the attributes of the *regulae* of legal texts was coupled with a blurring of the distinction between the *regulae* and the glosses medieval jurists made to those *regulae*. By the late 12th century, civil lawyers had borrowed these glosses or commentaries, called brocards, from canonists to serve as collections of

> ...short general rules, each supported by references to the texts. Often, but not always, one rule is followed by another which seems to contradict it, also backed by texts. The essence of a brocard was coming to be a *generale*, which could be used as the starting point of a legal argument… There is little difference between a *generale* (or brocard) and a *regula*, except that a *regula* was normally found stated in the authoritative texts, while a *generale* was manufactured out of materials found in the texts.[49]

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[44] One must keep in mind that, at the time, scientific truth and biblical truth were not considered separate: scientific truth was expected to confirm biblical truth, which was unquestioned.

[45] STEIN, *supra* note 19 at 135.

[46] *Id.* at 135.

[47] *Id.*

[48] *Id.* at 137-142.

[49] *Id.* at 144-145.

Once the normative character of the *regulae* was considered and the commentaries on the texts formulated in a short and general manner, the three degrees of propositions (particular rule of a decision, universal *regulae* and general brocard) were easily confused. As this happened, the descriptive and normative functions of the practice of medieval jurists were increasingly harder to distinguish. The move of attributing normative qualities to *regulae* had already been taken by canonist glossators before civil glossators reached that point: "Gratian had explained *regula*... as deriving from *regere*, rule, or *rectus*, right, and as being a norm of conduct, prescribing what was right or correcting what was wrong".[50]

Whichever way civil or canon lawyers arrived at attributing normative or law-making qualities to meta-legal interpretations of legal texts, this movement foreshadows the decoupling of juristic analysis from the authoritative text and the independent normative authority that juristic work would acquire in later times, as we will see when we look at the work of Thomas Aquinas and its effects on the legal doctrines of the Second Scholastic.[51]

In short, medieval legal sciences relied on the use of logical tools, such as induction and deduction, classification in *genus* and *species*. Through them, increasingly abstract legal propositions with increasingly normative roles were developed. In doing so, the distinctions between apodictic and dialectic reasoning became blurred, as well as the distinctions between particular rule, universal rule (*regulae*) and commentary (*generale*). This conflation was enabled by the truth-character they attributed to the authoritative texts expounded. In the background, there was the assumption that legal texts expressed truths of unquestioned authority, in a manner similar to the way in which religious texts expressing divine revelation.

5. *The* Ius Commune: *A Leap of Faith*

Late medieval jurists therefore held the mutually exclusive belief that the texts they were expounding were simultaneously known truths and problematic propositions. The gaps and inconsistencies which required dialectical reasoning resulted from the unsystematic nature of the texts themselves. However, their understanding of it as a system emerged out of a leap of faith that owed much to the assimilation of authoritative legal texts to authoritative religious texts. Their use of particular rules as universal maxims was premised on the idea that "every legal decision or rule is a species of the genus law. This made it possible for them to use every part of the law to

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[50] *Id.* at 144. Stein mentions the turn to a normative understanding of *regulae* as simultaneous with the confusion between *regulae* found in the text and *regula* as the product of juristic induction: "As the notion of *regula* was being blurred by the discussions of the canonists, so the distinction between *regulae* and brocards was also disappearing", at 144.

[51] See *infra* "III. Creation: The Ascent of Legal Doctrine" at 13.

build the whole, and at the same time to use the whole to interpret every part".[52]

The Scholasticism of the glossators seems to have been built on a series of contradictions which today seem untenable and betray the Aristotelian foundations on which they were built: confusing particulars and universals, rules and maxims, *obiter dicta* and central statements, analogy and distinction, apodictic and dialectic reasoning, known truths and debatable propositions. This is understandable, however, in a world in which moral precept and statement of truth, reason and revelation, secular and sacred, are confused to the brink of equation. All of this is incomprehensible if the quasi-biblical nature of the *Corpus Iuris Civilis* is not brought to the forefront.

A true, complete and consistent body of law was the premise, not the product, of the endeavor of jurists. This enterprise was made possible by belief; by the collapse of a series of dichotomies: Justice and Truth, biblical authority and imperial authority, certainty and polemic, particular and universal. Quite literally, a leap of faith enabled the display of scientific inquiry.[53]

Whatever the problems with the legal science developed by jurists of late medieval Europe, it lay the foundations on which Western jurisprudence would be built over the coming centuries. A complete, coherent and consistent body of law as the basic assumption; the truth-character attributed to legal propositions and the corresponding study of law by means of working out the logical consequences of those propositions; a marked tendency towards increasing abstraction; and the normative character of juristic commentaries were all elements which, in one way or another, came to determine the development of legal science and positive law in the West. Methodologically, the premises of completeness, truth and normativeness coupled with tools of abstraction would prove long lasting.

At the close of the Middle Ages, in the midst of major historical events like the end of the *Reconquista* in Spain, the Reformation in Central and Northern Europe, the circumnavigation of Africa and the conquest and colonization of America, a great transformation in legal thought would be engendered. This time, however, it would come not from the professional class of jurists, but from a different profession, also grounded in the university: theologians.

III. Creation: the Ascent of Legal Doctrine

In the 16th century, Catholic theologians faced the challenges of the Reformation. In response, they refurbished their doctrines by recasting all

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52 Berman, *supra* note 3 at 140.

53 Thus Berman's reference to St. Anselm's motto see Berman, *supra* note 3 at 140-141.

mayor fields of knowledge, including law, in what had become Catholic orthodoxy: Thomistic theology. This recasting had a profound impact on law and legal studies resulting in a shift from revelation to creation as the source of knowledge about law.

Professor James Gordley[54] holds that the doctrinal structure of private law is common to all Western legal systems, including both common law systems and civil law systems, and has the same origin:

> In the sixteenth and early seventeenth centuries, a fairly small group of theologians and jurists centered in Spain self-consciously attempted to synthesize the Roman legal texts with the moral theology of Thomas Aquinas. The fundamental concepts and doctrines of private law with which we are familiar are a simplification of the synthesis they achieved.[55]

I will follow Professor James Gordley's thesis that Aquinas's contribution to legal doctrine lies in the Aristotelian methodology which he himself applied to the study of marriage and promises. Aquinas set the example that Salamantine theologians and jurists would systematically follow in constructing legal doctrines.

The fairly small group of theologians that Gordley refers to is the Salamanca School, also known as the Second Scholastic or the Spanish Natural Law School. It was composed of two generations of theologians and jurists and was fathered by Francisco de Vitoria in the early 16th century at the University of Salamanca. Thomistic philosophy had resurged at the start of the 16th century at the University of Paris, headed by the Dominican Pierre Crockaert.[56] His pupil there, Francisco de Vitoria, returned to his native Spain in 1526 to the University of Salamanca where he remained until his death 20 years later.[57] The turn to Thomas Aquinas needs to be understood in the context of the Reformation: against the "evils" of philosophical nominalism, religious Protestantism and political absolutism,[58] the Salaman-

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54 JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (Clarendon Press, 1991).

55 *Id.* at 3.

56 *Id.* at 69.

57 At Salamanca, Vitoria taught a generation of theologians and jurists who constituted what is known as the Second Scholastics. Most prominent among these were the jurist Miguel de Covarrubias (1512-77) and the Dominican theologian Domingo de Soto (1494-1560). Later names associated with the School of Salamanca were the Jesuit theologians and metaphysicians Luis de Molina (1535-1600) and Francisco Suárez (1548-1617). See ANTHONY PAGDEN, *Introduction* to FRANCISCO DE VITORIA, POLITICAL WRITINGS (Anthony Pagden *et al*. eds., Cambridge University Press, 1991).

58 GORDLEY, *supra* note 54 at 70. According to Villey, the Jesuits especially, in their struggle against Protestant heresies, sought in Thomas ideas that would defend human liberty and human participation through personal merit, in salvation. VILLEY, *supra* note 32 at 345.

tine thinkers opposed a view of the world which supported the notion that truth and faith were accessible to humankind by means of natural reason.

Legal inquiry, as deployed by the Second Scholastics, pivots on the idea of creation as the source of legal knowledge. It is in nature that they find the source of authoritative norms.[59] Like the previous model built around revelation, this model too finds the ultimate source of authority in divinity. However, in this case, divinity is manifest through nature and not only revelation, and is grasped through observation and reflection and not only by making sense of authoritative texts. The shift to inquiring into nature rather than text does not mean that creation displaced revelation or doctrine replaced text; rather, the idea was that doctrine and nature could speak where text and revelation were silent. The more the text was silent, however, the more important doctrine would become. The relationships between revelation and creation and between divine law and natural law in theology and moral theology are mirrored in the relationship between legal text and legal doctrine in legal science.

Going beyond Professor Gordley's concern with the origins of contract doctrine, I argue that the importance of the Salamanca School in the history of legal thought also relates to the *place* they gave legal doctrine in their work: a place of preeminence with regard to legal texts. The metaphysics and epistemology of Thomas Aquinas on which the Salamantine jurists and theologians relied enabled a shift in the *locus* (location) of the source of authority of the law from specific texts to nature. This shift resulted in the increased importance of doctrines since nature had to be interpreted to render normative guidance. Eventually the emphasis on legal doctrines cast a shadow on the texts themselves.

1. *Doctrinal Work of the Second Scholastics*

Most participants in the Salamanca School were trained as theologians, not as jurists. To convey the importance of their work in law, I will illustrate the doctrinal legal work with some examples, relying on Professor Gordley's detailed and illustrative analysis of their work on contract doctrine.

In discussing contracts, the Salamantines were concerned with a myriad of problems which ranged from such broad fundamental issues as the binding force of contracts to issues as detailed as how one can determine the just price of things. The keystone to the development of their doctrines was to explain the binding force of contracts as a function of the Aristotelian-Thomistic virtues of fidelity (promise-keeping), commutative justice (fair exchan-

[59] Of course, the ultimate source remains God Himself, but for mankind the principal source of knowledge of God's will (or reason) shifted from His revelations to His Creation.

ge) and liberality (gift-giving).[60] They distinguished between different contracts, which they understood as accepted promises (therefore involving the virtue of promise-keeping), by determining whether they constituted an exercise in the virtue of commutative justice or in the virtue of liberality.[61] They explained that, by virtue of fidelity (promise-keeping), contracts performed in exercise of liberality (and thus not directly resulting in an injustice if the obliged party did not perform) were as binding as those made in exercise of commutative justice. In consequence, "every enforceable contract had to be made for one of two *causae* or reasons: 'liberality', or the receipt of a performance in return for one's own". In other words, they had to be made either for *causa gratuita* or *causa onerosa*.[62]

They drew important theoretical implications from the distinction of the reasons or causes for making a contract. Since contracts were promises made in exercise of a virtue it was important that the circumstances (who? what? when?) of the contract be detailed in accordance with such virtues.[63] The detailed issues they raised and attempted to solve were then fit into this virtue-oriented definition of contracts. Depending on the virtue exercised, the enforceability of a contract began at one point or another (when the offer was accepted or when it was first made).[64] Also, the conditions to be met in terms of the understanding and willingness of the parties would be different.[65] The answers to questions, such as "what types of contracts can be made?", "what is required in making them?", "what is presupposed?", "what is implicit?" and "what is allowed?" in each type of contract, were all related in some way to the virtue in pursuance of which the contract was entered.[66]

The method they used to address their concerns "proceeded by defining an object of study and then extracting consequences from the definition".[67] A definition is first constructed by looking at the *end* that is pursued, and then filling in the definition of the concept in accordance with that end. Di-

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60 For a fuller analysis of the Salamantine work on the binding force of contract, see GORDLEY, *supra* note 54 at 71-82. The following remarks will be basically a rough summary of those pages, tailored to illustrate what seems most interesting to the issues at hand.

61 This classification in function of Aristotelian virtues, Gordley tells us, was already present in the works of Bartolus de Sassoferrato and Baldus de Ubaldis, but unlike the Salamantines, they did not derive theoretical implications form the distinction, but used it only to explain the Roman texts. GORDLEY, *supra* note 54 at 77-78.

62 For Gordley's discussion of the doctrine of *causa*, see GORDLEY, *supra* note 54 at 77.

63 "If one promised neither to give 'to the right persons, the right amounts, at the right time' nor to receive an equivalent in return, one was exercising neither virtue. One was lacking in prudence or else dishonest". GORDLEY, *supra* note 54 at 78.

64 See GORDLEY, *supra* note 54 at 79-82.

65 See *id.* at 82-93.

66 *Id.* at 93-111.

67 *Id.* at 14.

verse consequences can, thereby, be derived from the definition. The method is characterized by being *both* teleological and conceptualist. It is based on a method developed by Aristotle and applied by Thomas Aquinas to promises and to the contract of marriage, from which the Spanish jurists borrowed it. In Aristotelian thought, the definition captured the "essence" of a thing, stating it in terms of the *genus* to which it belongs and the *specific difference* that sets it apart from other things in that general class. The *essence* was a mental image corresponding to the *substantial form* —the set characteristics of a thing that make it what it is— of a thing; such characteristics are derived by looking at the causes (material, formal, efficient and final) of a thing, most importantly —for the Second Scholastics— the *final cause*. For Aristotle, the *final cause* refers to the characteristic way in which a thing behaves, not its conscious purpose. [68] As the Second Scholastics used the idea of *final cause* or *end* in building legal concepts, the final cause *was* understood as the conscious purpose of the person that engaged in the legal activity. Starting from that purpose (or rather from the purpose they assumed people must have), they defined the legal concept. With a definition at hand, they derived legal consequences that implied the legal rules that were to regulate that activity.

The whole approach was based on the Aristotelian apparatus for understanding things, which when applied to developing legal concepts provided the basic metaphysical assumptions on which they were built.[69] In the *Physics*, Aristotle held that "we know a thing only when we can say why it is as it is —which in fact means grasping its primary causes—…" which he explains one by one.[70] First, he mentions the *material cause*: "In one sense, what

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[68] Several details need to be explained at this point. In Aristotelian thought, there was a difference between natural things and man-made things in the manner in which the *substantial form* or *formal cause* related to the *final cause* of a thing. For Aristotle, the *final cause* of naturally occurring things and their *formal cause* (or *substantive form*) were the same thing; in contrast, for crafted or man-made things, the *final cause* and the *formal cause* were two different things. See Richard Bodéüs, *Aristotle* in THE COLUMBIA HISTORY OF WESTERN PHILOSOPHY 65 (Richard H. Popkin, ed., 1999): "Unlike products of human art, in which the four causes will be different, in the case of natural things, the form and the end are one and the same…". This is important because the method used by Salamantine jurists in constructing a definition treated contracts or promises, that is, human actions, as naturally occurring things rather than human crafted objects. Intuitively, one would think that the analogy between an action and a craft is closer than an analogy between a human action and a natural object. However, if one thinks of natural objects as creations, concretely God's creations, and thus also involving agency, a closer analogy might be with natural objects; more on this below.

[69] The explanation that follows is taken directly from Aristotle. It might be more helpful to the reader, however, to look at Gordley's explanation of the underlying Aristotelian metaphysics, GORDLEY, *supra* note 54 at 17-18.

[70] ARISTOTLE, *PHYSICS* II.3 (Robert Hooker trans., 1993) available at http://www.wsu.edu:8080/~dee/GREECE/4CAUSES.HTM.

is described as a cause is that material out of which a thing comes into being and which remains present in it. Such, for instance, is bronze in the case of a statute…".[71] Next, the *formal cause* (or *substantial form*): "…the form and pattern are a cause, that is to say the statement of the essence genera to which it belongs…".[72] Here he refers to the characteristics which classify something as belonging to a particular species within a wider genus. Thus, the *formal cause* is expressed in a definition that locates something within a species and a larger genus. Then, there is the *efficient cause* "…the initiating source of change or rest: the person who advises an action, for instance, is the cause of the action; the father is the cause of his child; and in general, what produces is the cause of what is changed".[73] Lastly, he mentions the *final cause*: "There is what is a cause insofar as it is an end (*telos*): this is the purpose of a thing…".[74] Aristotle also states that "All the intermediate things, too, that come into being through the agency of something else for this same end have this as their cause":[75] meaning that all the means that are brought about subsequently for the same end, share this end as a final cause, *e.g.* organs in a body or steps in a recipe.

Aristotle developed the theory of the four causes. With the Aristotelian method in hand, Thomas defined human actions such as the act of marriage. He understood the ends of actions to be the exercise of virtues, such as fidelity. With the example Thomas laid out, the Second Scholastics undertook the enterprise of systematically reformulating legal concepts and Roman law.

The importance of virtues in understanding human actions makes sense in Thomistic philosophy. Fulfilling the principles of natural law, specifically the most fundamental of them —doing good and refraining from doing evil— requires that people act virtuously. People need to draw on such virtues to obey natural law. The four cardinal virtues of Aristotle were key. Out of prudence, fortitude, temperance and justice, this last one was more directly involved in common political life. The virtue of justice, then, was the keystone of many of the laws concerning social interaction. All virtues are required to fulfill the natural law, and the virtue of justice is most relevant concerning the laws of human interaction. Behaving virtuously and fulfilling the law become synonymous.

The reformulation of legal doctrine carried out by the Second Scholastics consisted of systematically subjecting the different legal figures received

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71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* It is worth clarifying that, to Aristotle, as Gordley tells us, natural things do not have a "purpose" in the sense of having a conscious purpose, but rather "purpose" refers here to the way in which a thing tends to behave. Man-made things, on the other hand, are made with a conscious purpose. See *supra* note 68.

75 ARISTOTLE, *supra* note 70.

from Roman law to the Thomistic model so as to build not only definitions of legal concepts, but also theories to go with the concepts. They would define a legal transaction and from that definition derive the obligations which followed for each party. Definitions were constructed by identifying an end for which the transaction served as well as a larger type, *genus*, to which the transaction belonged (*genus* was identified as a function of the virtue which was pursued; for example, whether it was an act of commutative justice or an act of liberality). The obligations derived from the definition were either a) considered included in the concepts used to establish the definition or b) they were necessary means to the end by virtue of which the contract was defined.

Let us explore the example of contracts as presented by Professor Gordley.[76] In trying to answer the question of when (and why) a contract is binding, the Second Scholastics, as we have seen, defined contracts in terms of an *end.* They defined contracts as promises made in pursuit of one of two ends: the virtue of liberality or the virtue of commutative justice. Their legally binding force came from the pursuance of those virtues.[77] When promises were made for a reason that could not be considered an exercise of either virtue (*i.e.* for a good *causa*), they were considered unenforceable.

Contracts then, could be classified as either a) onerous, that is, made by a *causa onerosa*, if there were matching obligations by the parties involved and thus served the virtue of commutative justice, or b) gratuitous, that is, made for a *causa gratuita*, if the obligations fell only on one party and the other party received only benefits. By the implications of "commutative justice" and "liberality", this classification enriched the tautological affirmation that the person who makes a promise can either get something or nothing in exchange for the promise. The implications of the use of the two virtues for defining and classifying contracts were that it had to either impose *equivalent* obligations and benefits, depending on whether a contract was onerous or gratuitous, or give to the "*right* persons, the *right* amounts, at the *right* time", respectively.

Let us imagine the case of an onerous contract that exercised the virtue of commutative justice such as a sale of a horse. The price paid for the horse had to correspond to its value. It would not further commutative justice to trade a prize horse for 50 dollars. If the horse, on the other hand, is dead and is being sold as meat, 50 dollars might be adequate and 50,000 clearly would not. In any case, the price must correspond to the value of the object sold.

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[76] See GORDLEY, *supra* note 54 at chapter 4. The following paragraphs are a simplification of some of the polemics the Second Scholastics dealt with as described by Gordley in that chapter.

[77] The normative obligation of behaving virtuously came from the most fundamental premise of natural law: do good and shun evil.

Let us now imagine the case of a gratuitous contract in exercise of the virtue of liberality such as donating money so that others feed the poor. It would be inappropriate to donate 5 dollars to establish a soup kitchen that would provide relief to the poor. It would also be inappropriate to donate blankets to a homeless shelter at the end of winter instead of at the beginning or else to give the money for establishing a soup kitchen to the local loan shark.

This classification had certain consequences when turning to other questions. For example, when considering the question of when a promise becomes binding (whether when made, when expressed or when accepted), Molina was of the opinion that in onerous contracts, and only in onerous contracts, the offer had to be accepted for it to become binding since by establishing mutual obligations, contracts required mutual consent.[78] Examples: it would be incorrect to consider that I would find myself obligated to give you 50 dollars for the horse carcass if you have not yet accepted to sell it to me for 50 dollars. On the other hand, it seems more reasonable for me to have an obligation to donate blankets at the beginning of winter once I have mentioned it to my friends (or the IRS) even if the homeless shelter has not yet found out about my kind offer.

In dealing with consent in contracts, the theories elaborated by the Second Scholastics again derived from the initial definition of a contract in terms of the ends pursued by the contract. Because contracting was purposeful action, the person must both *know* the essential elements of the action to be performed and *choose* to do them. They interpreted duress as affecting the choice element of consent while mistake and fraud concerned the knowledge element.

Here, Aristotelian-Thomistic metaphysics played a further role: the consequences of the action could be distinguished as being either of the *essence* of the action or merely accidental. A promisor needed only to understand and want the essential characteristics of an action in order to be bound, regardless of whether he wished to avoid or actually avoided other consequences. Example: I need to both *understand* that I have to pay 50 dollars in order to get the horse carcass and *want* to do so in order for the contract to be binding. If I thought you were donating it to me at the time I picked it up, it would not be binding for me to pay (but I would have to return your carcass). If you put a gun to my head so that I would agree to buy the horse's carcass, it also would not be binding.

As to the content of a contract, Aristotelian-Thomistic metaphysical assumptions also determined the theories. Here is where the teleological-conceptual character of the methodology becomes more evident and the definitions better rounded.

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[78] See GORDLEY, *supra* note 54 at 80.

> For the late scholastics, as for Thomas, once one had defined a transaction one could move from the definition to a description of the obligations that the transaction entails. One defined a transaction by identifying its end and placing it in some larger type or category of actions to which it belongs. Thus, as we have seen, Thomas classified the contracts familiar from Roman law by identifying them as acts of liberality or commutative justice and by identifying the end that each serves. Some contracts transfer ownership of a thing, as in a sale, some the use of a thing, as in a lease, and some transfer the thing for safe keeping, as in a deposit, or to secure an obligation, as in pledge and suretyship.[79]

While the classification had been made by Thomas Aquinas, Second Scholastics —such as Conradus and Soto— attempted to "devise a system of classification that would encompass all possible contracts and reduce them to a set number of natural types".[80] The purpose of such classification was to identify types of contracts and the normative consequences that naturally followed from those types. Thus, the terms normally contained in different types of contracts were, in turn, classified according to a distinction developed by an earlier medieval jurist (Baldus), also inspired in Aristotelian philosophy:

> The "essential" terms were necessary for a contract of a given type to exist and were the "original root" form which the "natural" terms arose. The "natural" terms were read into a contract when the parties had made no other express provision. The "accidental" terms were binding only if the parties mentioned them expressly.[81]

In establishing the different "natural" types of contracts, the Second Scholastics established the "natural" terms that could be read into a contract, even if the parties had not agreed to them. Examples: 1) An *essential term* of a contract: that there is a price paid in exchange for the prize horse. If I were to offer a beautiful hog in exchange for the prize horse, we would be talking about a different type of contract, not a sale. 2) A *natural term*: if we did not specify which prize horse was to be sold, that the prize horse should be a healthy prize horse with four legs. 3) An *accidental term*: that the price be paid in one dollar bills at the corner of Chapel Street and College Street at three in the morning by a clown dressed in a green ballet outfit. This system of classification of contracts and of terms of contracts still sounds familiar today in modern contract doctrine in the continental tradition.

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79 *Id.* at 102-103.

80 *Id.* at 103. Soto's classification was later used by Grotius in developing his own classification; at 104.

81 *Id.* at 105.

So far, I have used examples to illustrate how the Salamantine theologians deployed the teleological-conceptual method in defining legal concepts, deriving consequences and developing doctrines. I now want to turn to the manner in which they used Aristotle's four causes, for it will help to better understand the impact of the Second Scholastics on later developments in legal thought. To do so, we must look at how Thomas treated human actions. In some respects, Thomas treated human action as Aristotle would have treated natural objects; in others, he treated human action as Aristotle would treat man-made things. When considering the causes of things, Aristotle held that, in natural things, *formal cause* and *end* (*i.e.* final cause) are one and the same; in the case of products of human art, each *cause* was a different thing.[82] In natural objects, the final cause "is whatever lies at the *end* of the regular series of developmental changes that typical specimens of a given species undergo… the *telos* of a developing tiger is *to be a tiger*".[83] The *formal cause* of a tiger is also to be a tiger: to have the characteristics proper of a tiger. In the case of a chair, the *final cause* is the purpose of the human that made it: to allow someone to sit down or to sell it in order to obtain money. The *formal cause* of a chair is to have the characteristics proper of a chair (the characteristics in the carpenter's mind before being imposed on the *material cause*, i.e. wood): a seat, some sort of support and a back.

I hold that the way Thomas and the theologians of Salamanca understood human actions oscillated between these two kinds of things (natural and man-made). This produced a conflation among end, purpose and essence (*final cause*, *purpose*, and *formal cause*) of legal concepts. For now, let us concentrate on the methods and understandings of the Second Scholastics. On one hand, they treated human actions as man-made things, for they identified the *end* or *final cause* of the action with the *purpose* of the agent. "According to Thomas, the essence of an action is defined by the end for which it is preformed. In that respect, an action is like a man-made thing such as a couch or a house. Such things are defined by the ends for which they are made".[84] On the other hand, however, the *end* of an action was identified with its essence or *formal cause*: "This concept in the mind that corresponds to the 'substantial form' is the 'essence' of a thing".[85] The identification of *formal* and *final* cause —in Aristotle— corresponds to natural things, not to man-made things. In treating human actions as analogous to

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[82] See *supra* note 68.

[83] MARC COHEN, THE FOUR CAUSES, available at http://faculty.washington.edu/smcohen/320/4causes.htm last visited September 29th, 2004 at 4:30 pm (emphasis is in the original text). Gordley explains a *final cause* in natural things as the way something "tends" to behave. See *supra* quote linked to note 69.

[84] GORDLEY, *supra* note 54 at 21.

[85] *Id.* at 18.

crafts or actions in so far as *final cause* and *purpose* are identified; and analogous to natural objects in so far as *final cause* and *formal cause* are identified, the method produced —required— the identification of all three things (*purpose-end/final cause-essence/formal cause*) in dealing with human actions.[86] The result is that human actions —such as exchanging— when translated into legal concepts —such as contracts— become *essentialized* and *objectified*.[87] They acquired the qualities of naturally occurring things and they become objective, constant and discrete entities which can be fully understood by grasping their essence. The difference between their ends and their essence is erased, and thus the end becomes necessarily fixed.

Let us now turn to the normative implications of this understanding of the theory of the four causes. In defining an action and drawing normative consequences from that definition under the Aristotelian-Thomistic methodology, we are engaged in a process that inserts an intermediate step in purely teleological reasoning, rendering a richer ground from which to draw normative implications. We cannot engage in only a two-step process in which one identifies the end of an action and derives proper action to be taken in pursuance of that end. We need to at least a) identify the end or ends, b) develop a definition of a concept that accounts for that end, and c)

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[86] This conflation of *end*, *form*, and *purpose* is better understood if we consider that the notion of *purpose* is equivocal. "Purpose" can refer to the *intent* of the agent. Understood in this way, it seems proper to treat actions like man-made things and identify *end* and *purpose*. "Purpose", however, can refer to an immediate purpose, an immediately desired effect, regardless of whatever the ultimate goal may be. For example, if I walk three blocks to buy tickets for a concert, "walking" has the intent of providing me with concert tickets but it also has the immediate purpose of displacing me from one spot (my home) to the other (the box office). In the case of understanding "purpose" as immediate purpose, it seems correct to identify *purpose* and *formal cause*. It is a different thing, however if we try to equate *formal cause* with *purpose* if by *purpose* we mean something as mediate as living the virtuous life in adoration of God or some analogous end. When discussing an end as distant as that, one cannot equate *final cause* and *formal cause* without further specifying a sequence of immediate ends that link each one as a means to an ultimate end. However, we must keep in mind that Thomas and the Second Scholastics were concerned with moral law. Any "immediate purpose" needs to be understood in its relation to the ultimate purpose of humankind when we are concerned with the morality or normative quality of human activity. If I walk to the box office to steal the tickets I am not likely to forward my ultimate purpose as a human being (whether that ultimate purpose is related to my rational potential, as in Aristotle, or my relationship to God, as in Aquinas).

[87] By "essentialized" I mean that actions are considered only in their essence, that is, only the necessary and sufficient conditions that are thought to make something what it is in detriment of the highly contextual and specific "accidents". By "objectified" I mean that actions are treated as discrete, abstract entities, understandable independently of context, with an objective, true essence. These two characteristics make for the consideration of actions as things that are fixed, constant and abstract. This contrasts with an understanding of actions as deeply imbedded within a context outside of which they are not meaningful.

draw consequences from the concept.[88] What is more, step b), developing a definition, requires accounting for the other causes of something, at least the material and efficient causes. Introducing a definition that must account for causes other than the final cause further complicates teleological-conceptual reasoning and sets it apart from simpler teleological reasoning.

Because in Aristotelian-Thomistic methodology one is necessarily involved in teleological inquiry when constructing concepts, the two processes are intertwined. "Conceptual reasoning, by which one moved from a definition to its consequences, was therefore inseparable from teleological reasoning, by which one moved from a desired end to a conclusion about the appropriate means".[89] Concepts and definitions play a central role that goes beyond the means-to-ends reasoning structure of pure teleological thinking. We are before teleological-conceptual reasoning.

Many of the issues that the Second Scholastics dealt with were not new and the solutions they proposed to concrete problems had often been advanced before, either by Thomas or by medieval jurists. What is important in the work of the Salamantine theologians is that they engaged legal questions by developing concepts and theories that allowed them to treat the problems the texts presented in a consistent manner and provide more coherent sets of solutions for the different sets of problems. They dealt with the problems *systematically*, through *concepts* and elaborate *doctrines* that attempted to solve legal questions in an *integrated* manner. They faced legal *problems*, rather than legal *texts*.[90]

We can summarize the methodology of the Second Scholastic as follows: a) constructing a definition of a concept in reference to the *ends* pursued and its specific differences, and then b) extracting consequences from that definition. Gordley has called this teleological-conceptual thinking. The two basic moves worked by applying Aristotelian metaphysics to a Thomistic world in which, being designed and created by a deity, everything is ordered around final causes; in other words, it is purposeful and accessible to reason. This allowed for the identification of purpose and essence, and resulted in the objectification and essentialization of human actions.

Let us now turn to the theological and epistemological foundations of the methodology.

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88 Of course, a) and b) are performed as one and the same step, for identifying the end is simultaneous with constructing a concept by intersecting the other causes. But here we want to distinguish this type of reasoning from teleological reasoning that goes directly from the identification of an end to the identification of the proper means to that end.

89 GORDLEY, *supra* note 54 at 22.

90 Although the problems they deal with were found in the texts, it was making sense of the problem rather than making sense of the text that interested the Second Scholastics.

2. *The Importance of Aristotelian-Thomistic Metaphysics*

The metaphysical assumptions and methodology underlying the Second Scholastic's doctrinal work were directly taken from the 13th century Dominican theologian Thomas Aquinas. The importance of Thomistic philosophy and metaphysics, as understood by the Spanish theologians, lies not only in that it provided the blueprint for developing legal doctrine in very peculiar and elaborate ways, but also in that it *justified* the *need* for such doctrines and underlined their importance.

The Aristotelian-Thomistic world is a place created by God and imprinted with order. Furthermore, it is a world *knowable* to the human mind through reason because God implanted human reason in people to share in His divine reason. It is a world inhabited by substances. These substances, created by God according to His divine reason, are subject to the metaphysical model discussed above. Thus, they belong to a genus and a species, have specific differences, final causes, natures, substantial forms, accidents, material and efficient causes, etc.[91] In such a world, what is good is for each thing created by God is for it to follow its proper order, as ordained by God when He established its nature.[92]

Michel Villey explains why, in such a world, knowing nature, specifically human nature, both requires and constitutes a moral philosophy.[93] As all else, humans must follow their nature and they must do so in two ways: instinctively, because they share in the class of animals; and rationally, because rationality is the specific difference which distinguishes humans from other animals. This rationality implies that humans have the liberty to act according to, or contrary to their nature. If, because of their rationality, they can act according to or contrary to nature, it is important that they procure themselves of the rationally ascertainable guidelines that will point them toward the good, towards the realization of the potential that corresponds to their nature. Inquiring into human nature thereby acquires a normative dimension. Moral philosophy, which is to guide human liberty, must be an ordering of human life towards the ends proper to human nature.

Thomas's intricate and sophisticated theory of knowledge[94] explains not only how we know the world but also how we make practical (including

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91 See *supra* note 69.

92 See *supra* note 69 for the technical meaning of "nature" in Aristotelian-Thomistic thought.

93 VILLEY, *supra* note 32 at 125.

94 In the traditional classification of the *Summa Theologiae* this "general theory of knowledge" is set out in Ia, qu. 79, qu. 84-89; in the edition by Timothy McDermott, which I used to consult directly the work of Aquinas, the traditional citation is not used, so I will make reference to both the traditional citation system and McDermott's edition. See *infra* AQUINAS, note 95 at 121-124 and 129-142.

moral) deliberations for "[p]*ractical understanding differs from theorizing only in intention*" and "[b]eing good and being true imply one another: we value truth as a good, we perceive goodness as a truth about things".[95] This "general theory of knowledge", as Villey calls it, is the one Aquinas applied to questions of law and justice.[96]

In Aristotelian-Thomistic thought, all knowledge of nature comes through the senses.[97] In contrast, all moral knowledge is known in two ways: a) either directly from God (in Scripture, for instance), or else, b) as does knowledge of nature: through the senses.[98] This, for Villey, has two consequences: first of all, the study of natural law will be based on "reality" (human reality, that is); secondly, because the study of natural law is dependent on our actual experience of the world, our knowledge of natural law is perfectible, provisory and revisable.[99]

At the risk of oversimplifying the process, the Thomistic "general theory of knowledge" sounds something like this:[100] we perceive nature through the senses, but we perceive only specific things (say, concrete people), particulars. This, however, does not tell us much about the nature (say, human nature) of things or about moral law.[101] Through the process of abstracting[102] the common elements of specific, concrete things, we go from the concrete things perceived by our senses to genera and species, which allow us to understand nature: "Since we can only understand what is actually understandable (just as we can only sense what is actually there to be sensed), our minds need to make things actually understandable by abstracting their

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95 THOMAS AQUINAS, SUMMA THEOLOGIAE 123 (Timothy McDermott ed., 1989). Italics are in McDermott's edition. I refer to "natural law" in my text, but respect McDermott's translation in quoting it.

96 In Ia IIae, qu. 94 he speaks of natural law, or, in McDermott's translation, "the law we have in us by nature"; in IIa IIae, qu. 57-79, Thomas deals with justice.

97 VILLEY, *supra* note 32 at 126.

98 "When authority is silent we can only believe what accords with nature. Now men naturally learn by sense-experience, so those born in a state of innocence would also have acquired their knowledge over a period of time by discovery and instruction, though without the difficulties we have. And, as infants, they would no more have had mature use of their reason than they had of their bodily limbs". Ia, qu. 101; AQUINAS, see *supra* note 95 at 149.

99 VILLEY, *supra* note 32 at 126.

100 The account that follows is, largley, a paraphrase of Villey's. VILLEY, *supra* note 32 at 126-127.

101 According to Thomas, this perception involves only our *receptive mind* which is "*a sort of susceptibility*" of humans by which we become aware of what is. Ia qu. 79 art. 2, see AQUINAS, *supra* note 95 at 121-122.

102 This process of abstraction is performed by the ability of the mind which Thomas called *agent mind* to distinguish it form the *receptive mind*. Ia, qu. 79, art. 3; see AQUINAS, *supra* note 95 at 122.

forms from their material conditions".[103] Through abstraction (*i.e.* induction) from experience we can understand: from specific movements we see general inclinations; from concrete desires, we understand ends; from ends, natures. Once we understand natures, we can deduct what is good and the distinction between what is good and what is bad is what natural law is. The science of natural law consists of inquiring into the ends and natures of humans through *observation* so as to determine what is good and what is bad.

In Thomas's world, natural law is not fixed. Thomas acknowledged the essential mobility of human circumstances, and even seems to acknowledge that human nature itself is capable of change.[104] Thomas says that there is an eternal law, but according to Villey, we should understand this in the sense that from the existence of *a* permanent law (do good and avoid evil), it does not follow that all law is fixed. The law which states that we should do good and avoid evil is purely formal. As soon as we derive laws from that first law, we enter contingent and conditional ground.[105]

So much for the place of natural law in Thomas's "theory of knowledge". Natural law is not positive law, and in the work of Thomas they are not to be confused. It is still necessary to further explain the link between the two in order to understand why this Thomistic science of natural law, based on the observation of nature, is relevant for the "doctrinalization" of positive law. We need, therefore, to understand the links between natural law and human law in Thomistic thought.

Positive law is the product of human law-making, not God's. Like other types of laws, it must fulfill the four elements that define law: "law is an ordinance of reason, for the general good, made by whoever has care of the community, and promulgated".[106] Unlike other types of laws,[107] the reason

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[103] Ia, qu. 79, art. 3; see AQUINAS, *supra* note 95 at 122.

[104] VILLEY, *supra* note 32 at 129-130.

[105] *Id.* at 130.

[106] AQUINAS, *supra* note 95 at 281. IaIIae, qu. 90, art. 4. It should be mentioned that the need for law is part of human nature, for, following Aristotle, Aquinas starts from the assumption that humans are social animals by nature, and to order life in society, we need laws to establish what is rightly allocated to whom. AQUINAS, *supra* note 95 at 281. IaIIae, qu. 90, art. 1-2.

[107] Thomas believes that there are *four types of law*: a) eternal law: "The plan by which God, as ruler of the universe, governs all things, is a law in the true sense. And since it is not a plan conceived in time we call it the eternal law". AQUINAS, *supra* note 95 at 281. IaIIae, qu. 91, art.; b) natural law: "Everything God plans obeys the standards of his eternal law, and bears the imprint of that law in the form of a natural tendency to pursue whatever behavior and goals are appropriate to it. Reasoning creatures follow God's plan in a more profound way, themselves sharing the planning, making plans both for themselves and for others; so they share in the eternal reasoning itself that is imprinting them with their natural tendencies to appropriate behavior and goals. This distinctive sharing in the eternal law we call the natural law, the law we have in us by nature". AQUINAS, *supra* note 95 at 281. IaIIae, qu. 91, art. 2. c) human law: "Reason when pursuing truth starts

that ordains it is not God's, but rather human reason, which is what we share of divine reason.[108] Human law is necessary because natural law is indeterminate in its details. Statements of natural law are as broad as first premises and need further determination according to particular circumstance: "The injunctions of the law in us by nature are to reason planning action what the first premises of the sciences are to reason pursuing truth: self-evident starting points".[109] But natural law only gets us so far, for, in deducing from the premises of natural law, natural reason may fail. Even when it does not fail, proper deliberation on how to guide our actions must also take account of the specificities and particular circumstances of a community and thus deal with specific situations in which natural law would be inappropriate or else to which natural law doesn't speak:

> What makes man human is his rational soul, so all men tend by nature to act reasonably, which is to act virtuously. That does not mean that the law which is in us by nature prescribes every specific act of every virtue that can be defined; rather it prescribes the acts to which nature immediately inclines us, but not those that only reasoned investigation can show help us live well.[110]

Through reasoned investigation, then, humans must further determine a course of action, which, when involving collective life, takes the form of law.

This understanding of natural law as premises from which norms of action must be deduced requires certain clarifications to understand the need for human law. First, there are things to which natural law does not speak specifically "(attaching some particular penalty to a crime, for example)".[111] Second, even when natural law speaks to a circumstance and thus the si-

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form premises which cannot be proved but are known by nature, and draws conclusions that belong to the various different sciences: these we do not know by nature but work out by reason. In the same way [when planning action] man's reason starts from injunctions of law he has by nature as if from general premises that need no proof, and arrives at more particular arrangements which, provided they fulfill the other defining conditions of law previously mentioned, are called human laws". AQUINAS, *supra* note 95 at 281. IaIIae, qu. 91, art. 3; and d) divine law: "Since the law of men is not enough to check and guide what goes on within us, we needed a law of God as well". AQUINAS, *supra* note 95 at 282. IaIIae, qu. 91, art. 4. God provides this law through revelation, concretely through the Bible in the Old and New Testaments: "The law of God divides into the Old Law and the New Law, less and more fully developed versions of the same thing, like child and grownup". AQUINAS, *supra* note 95 at 282. IaIIae, qu. 91, art. 5.

108 "For the light of natural reason by which we tell good from evil (the law that is in us by nature) is itself an imprint of God's light in us". AQUINAS, *supra* note 95 at 281. IaIIae, qu. 91, art. 2.

109 *Id.* at 286. IaIIae, qu. 94, art. 2.

110 *Id.* at 287. IaIIae, qu. 94, art. 3.

111 *Id.* at 289. IaIIae, qu. 95, art. 2.

lence of natural law is not a problem, there might be need for exceptions.[112] Finally, because of the possibility of mistakenly deducing a course of action from natural law, the correct consequences of the first premises of natural law should be reinforced and clarified in human law.[113] There is thus a need to determine and adapt the indications of natural law to particular circumstances.[114] So we need human law to keep us from straying from the thrust of natural law, to make exceptions when the particular circumstances of a case require so, and to provide us with specific determinations that do not follow from natural law.

Villey explains the relationship between positive law and natural law in Thomas Aquinas by stating that legislation of positive law is a continuation of the study of what is naturally just. All human law derives from natural law in two ways: either as a *conclusion* arrived at by reasoning from the first premises of natural law and applying it to the historical circumstances; or else as a *determination* by adding specific precepts from a plurality of possible specific precepts amenable to the vague precepts of natural law and in pursuance of their same ends.[115] In this understanding of positive law, the science of natural law does not speak so much *about* positive law as much as it speaks *to* positive law. The inquiries and products of the science of natural law take a prominent position in understanding, interpreting and reforming positive law. When the work of the jurist is to expound an authoritative text, the person that determines which is an authoritative text has the upper hand. When the *contents* of the authoritative texts are subject to criticism by reference to something authoritative *outside* the texts, experts become the authorities.

Michel Villey suggests that the work of Thomas Aquinas provided for a novel importance in the legislative function. In conceiving natural and divine law as incomplete for the comprehensive ordaining of human societies and in conceiving natural law as being subject to change, Thomas assigned a crucial place in the ordaining of communal life to positive law which must fill in and complete the ordering of natural law.[116] The work of the legislator became more important. At the same time, however, it also became far more susceptible to the criticism of jurists in so far as its authority depended in one way or the other on its conformity to natural law, which specialized jurists studied by looking *outside* the authoritative texts and,

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112 "And secondary injunctions (which can be regarded as close consequences of these first premises thought less general) must remain right in the majority of cases, though exceptionally because of intervening factors they may change in some particular". *Id.* at 288. IaIIae, qu. 94, art. 5.

113 *Id.* at 286. IaIIae, qu. 94, art. 4 and 6.

114 *Id.* at 287. IaIIae, qu. 94, art. 4.

115 VILLEY, *supra* note 32 at 132, also AQUINAS, *supra* note 95 at 289-290. IaIIae, qu. 95, art. 2.

116 *Id.* at 133.

through their science, interpreting human nature. Doctrine, the product of legal science, became the dominant source of the substantive contents of legislators' enactments. This preponderance of doctrine would last for centuries.[117]

Villey holds that the need to go beyond the authoritative texts to obtain law came about for several reasons. First, under the Augustinian idea that all law should be derived from (fixed) sacred texts, law was too rigid to adequately address the problems of the increasingly complex society of the late medieval period. Secondly, as the Justinian imperial figure receded as the centuries passed and the pagan origins of the texts and rules included in the Justinian compilation became increasingly clear, there was increased need to justify the authoritativeness of the Roman legal texts, which had already been in use for over a century. Finally, the solutions provided by the texts themselves, both sacral and Roman, were insufficient, and thus required a philosophy which would not only justify them, but allow them to be adapted to the needs of the time.[118]

Whatever the causes of this shift from text to doctrine in the development of legal science, the use of a metaphysics to justify and a methodology to enable doctrine had profound repercussions on legal understanding. By philosophically grounding the creative role of doctrine, conferring authority as to what should be the contents of positive law to an expert class seems justified. The authority of such doctrines derives from their resulting from the proper use of method when inquiring into nature: the person expressing the doctrines needs no longer to be an authority herself.[119] Thus, the force of doctrine hinges on the acceptance of natural law[120] (and of its expositors).

Independently of whether there are causal links, the consequences of Aquinas's work on legal thought were congenial with the flourishing of legislation that began in the later 13th century and continued into the 14th century.[121] The newfound relevance and abundance of positive law necessarily drew the attention of jurists away from the established texts of the *Corpus Iuris*. The juristic activity that systematically incorporated Thomistic notions to the study of law would follow suit in the late 15th and particularly the 16th centuries, thus reinforcing the compatibility of law and Thomistic theology.

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[117] *Id.* at 133. And if we accept Professor Gordley's conclusions, doctrine as a source of legal substance has persisted beyond the French Revolution. See his book, GORDLEY, THE PHILSOPHICAL ORIGINS…, *supra* note 54.

[118] *Id.* at 121-122.

[119] *Id.* at 166.

[120] *Id.* at 169.

[121] Villey believes Thomas's work had direct implications on the law and politics of the 13th century: "in explaining the need for positive legislation to adapt natural law to the concrete historical needs of a time, Thomas empowered political authorities to produce abundant *new* legislation". See VILLEY, *supra* note 32 at 174-175.

Thomas Aquinas was not primarily concerned with law, and even less so with Roman law. Aquinas frequently turned to Roman and canon law, but mostly to support his arguments. He did not seek to explain law through his methods, but rather explain his methods through law. The move away from the texts was not Thomas's innovation. Legal science had been moving rules out of the text and transforming them into maxims and commentators had already departed from strict textual interpretation before the Second Scholastics reformulated law in Thomistic terms.[122] What Thomas's work represents is a substantive, well rounded philosophical framework which justifies, requires and enables a turn to something other than authoritative texts, while providing the methodological tools to do so. It articulated an understanding of the world that allowed —required— positive legislation while providing the basis for a normative doctrinal critique of that positive legislation.

If medieval jurists abstracted the legal rules of the *Corpus Iuris* or canon law on the premise of their authority, completeness and coherence, the Second Scholastics "doctrinalized" the systems of legal rules on the foundations of Thomistic metaphysics and methodology.[123] In doing so they assumed, as jurists, a more authoritative role. Arguably, the role of jurists would eventually become more authoritative than the texts themselves in the civil law tradition. The Second Scholastics deeply altered the role of the jurist.

The Second Scholastics also provided future generations with a body of doctrines that carried the methodology and metaphysics on which they were built into later centuries, when these metaphysics and methodology were no longer explicitly acknowledged. Just as some of Thomas's God's reason-law can be discerned by observing His creation even though we may not understand it, the methodology and metaphysics that Thomas bequeathed to the Second Scholastics remained imprinted in the doctrines the latter passed down to subsequent generations of jurists. Their creations still point towards their origins.

IV. Conclusions

The two models that underlie contemporary legal science emerged from medieval antecedents inspired by theological understandings of authority. The first of these models, the model of revelation, dates from the development, in the late medieval period, of professional legal studies at the university on canon law and civil law, together known as the *ius commune*. The

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[122] James Gordley, *The Achievement of Baldus de Ubaldis (132?-1400)*, 4 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [Z.E.P.], 820-836 (2000) (F.R.G.).

[123] VILLEY, *supra* note 32 at 357.

concerns and methods of the *ius commune* reflect the influence of Scholastic theology: their interest in authoritative texts with quasi-sacred status. Their central work dealt with systematizing, through abstraction and the use of authoritative texts. The second model —the model of creation— dates from the 16th century, no longer part of the Middle Ages. However, it too emerges from a medieval scholastic theological tradition: Thomism. The model of creation is centered not on authoritative texts but rather on nature, as explained in doctrine. It deployed a highly sophisticated method of legal inquiry, which James Gordley labels teleological-conceptual, built on the Aristotelian four causes. Its central concern was with concept-building and drawing normative consequences from the concepts.

Other characteristics still present in the civil law tradition also find their origins in medieval legal thought: a reliance on concepts to work out normative solutions and a drive to abstract to higher and broader general principles are tied to the methodologies used in developing the civil law tradition. These historical roots also help understand the split personality of legal science, which on one hand imagines itself as the descriptive, scientific enterprise concerned with finding out what law is, but on the other hand engages in vigorous normative claims of how legislators' errors should be ignored in favor of the true nature of this or that legal institution.

To understand the possibilities of law in the civil law tradition, we need to take a long, hard look and assess how and under what implicit assumptions it actually works. We can begin by understanding how we came to think this way. In today's secular legal world, it might be painful to look at how reliant on theological underpinnings our understanding of law is. It is, however, quite illustrative.

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INTERPRETATION, POETRY AND THE LAW

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I. INTRODUCTION

This article discusses legal interpretation and poetic interpretation as instances of speculative reasoning. Their similarities are based on the common use of analogical reasoning. Both reading a poem and solving a concrete legal dispute by using what lawyers call analogy, are examples of what Cass R. Sunstein has called an incomplete way of thinking.[1] Poetic interpretation is based on the assumption that no truth can be uncovered from a poem's meaning; since it aims at reaching persuasive conclusions. In my view, legal interpretation, especially the one Dworkin calls into play to solve so-called "hard cases",[2] fits a similar description. Quite often legal interpreters do not reach the truth scientifically, but aim at reaching persuasive conclusions to solve concrete legal cases. The fundamental difference between poetry and law is the system of sovereign right which makes legal interpretation enforceable. This article explores the interpretive relation between poetry and the law. There are strong reasons to believe that analogical thinking plays a fundamental role in this connection.

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[1] Cass R. Sunstein, *On Analogical Reasoning*, 3 HARV. L. REV. 741, 791 (1993).

[2] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard University Press, 1978).

How can a poem be evaluated? How can we discriminate a good poem from a bad one? Is it a matter of personal taste, of personal preference? Is there a reliable method to follow to reach a sound conclusion from a poem's meaning? Is there a path to follow when faced with an ambiguous, unintelligible text which claims to be a poem? Is it possible to read something that we cannot understand no matter how determined we are to understand it? Is it really that important to aesthetically evaluate a poem as a work of art? Is it possible to find similarities between the work of a poet seen as a writer and the work of any legal professional also seen as a writer? These are the basic questions that are explored below.

II. Dialogue and Rational Construction as Features of the Interpretive Task

I understand interpretation to be a rational activity, an instance of rational dialogue. H. G. Gadamer says there is at least one obvious explanation of the proximity between composition and interpretation: they "have something in common. Both take place in the medium of language".[3]

This work is based on a basic assumption: any common conversation can show us that language is a constructive process which implies an ability to articulate, but mainly a disposition to surrender one's convictions and beliefs to another, to the speaker. In other words, reading is like listening. When someone reads another's writings, her epistemic horizon opens up and can therefore be changed. Neither writing nor reading is possible beyond the realms of language and human rationality.

Umberto Eco explains how abduction links scientific investigation to metaphoric interpretation:

> In both scientific models and metaphoric interpretation, some distinctive features are selected as the base on which the work will be deployed. Such features are chosen following some linguistic conventions. The relation between metaphors and models should be seen from an analogical perspective […] In a sense, metaphoric interpretation is similar to a new scientific paradigm […] This can be considered as a significant contribution we owe to modern metaphorology.[4]

Eco's explanation of this idea supports the premise of this article:

> It can be claimed that scientific abduction states a hypothetical law. It does so to build-up a theoretical framework which can be used to solve a partic-

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[3] H. G. Gadamer, *Composition and Interpretation*, in The Relevance of the Beautiful and Other Essays 105 (Cambridge University Press, 1986).

[4] Umberto Eco, Los límites de la interpretación 174 (Lumen, 1998) [English version: The Limits of Interpretation (Indiana University Press, 1994)].

> ular event. From there, scientific abduction proceeds to prove the law through experimental validation (if the law is right, then so and so must happen). On the other hand, metaphoric interpretation, which builds-up a theoretical framework as well, is not aimed at stating a universal law. Rather, it is interested in building-up an interpretation which justifies both itself and the context in which such interpretation happens (a sentence can be taken metaphorically when context justifies the interpretation). In other words, while metaphoric interpretation hunts out valid laws to explain discursive contexts, scientific enquiry does so to explain worlds. From here it can be claimed that metaphoric interpretation allows readers to choose. If I agree with Bohr's analogy I am obliged to see atoms as if they were solar systems. If I agree with the *Canticle of Canticles*' analogy, I am obliged to see the girl's smile as if they were a herd of goats just in such text.[5]

According to Eco, an adequate definition of abduction can be stated as follows:

> Abduction is an inferential process (also known as hypothesis) opposite to deductive reasoning.
>
> …
>
> In semiotics we face many cases in which Universal Laws are not hunted out, but explanations which can help out to clarify a concrete communicative event… To sum up we can say that abduction is useful to make hard choices when instructions are ambiguous.[6]

And lastly:

> Metaphoric interpretation works with signs which, in its turn uncover other signs' contents. We are not talking about empiric similarity but of linguistic similarity. Metaphoric interpretation… does not unveil similarities but constructs them up.[7]

In view of the above, the main argument in this article can be stated as follows:

a) Poetic interpretation is a type of speculative, constructive thinking.
b) Since legal interpretation is usually speculative and constructive, it is therefore closer to poetic interpretation than to scientific interpretation.

To fulfill this article's objectives, it is necessary to explore both the differences and similarities between poetry and the law. Different levels of inter-

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[5] *Id.* at 175.

[6] *Id.* at 249-250.

[7] *Id.* at 163-164.

pretation have long existed in literary studies. We can, for instance, allude to Dante's *Convivio*, in which four levels of interpretation are mentioned: literal, allegorical, moral and theological.[8] There are at least two similarities that link Dante's concept of interpretation to legal interpretation. On the one hand, lawyers, like readers of poetry, understand interpretative tasks as being multi-leveled. On the other hand, when lawyers interpret texts, they aim at retrieving literal meanings from said texts.[9]

However, bearing Dante's classification in mind, there are at least two clear differences between the interpretation of legal texts and of literary ones. On one hand, legal texts do not have allegorical meanings. In other words, legal texts do not hide "truth beneath beautiful fictions". On the other, whereas literary criticism allows disputes between the validity of literal interpretations and of multi-leveled interpretations within a text, these disputes do not exist in the legal arena. Judges' interpretations are obligatory.

No allegorical meanings can be found hidden in the law. Beauty is not a legal objective in itself. The standard definitions of "allegory" are either "a story, play, poem, represented symbolically" or "the use of such symbols".[10]

Allegorical interpretation allows me to claim a subtle difference which can be noted between legal and poetic interpretation, a difference derived from the relation between writing and reading. From my point of view, the use of symbols is a subtle difference between poetry and the law. Legal professionals do not always use symbols to write their documents but poets and authors use them as a common creative device.

Legal writing tries to clearly convey rules of conduct. However, sometimes lawmakers and parties to legal contracts do not want to bar future interpretations of a code or contract. That is why I speak of a subtle difference between poetry and the law. Even though it is not explicitly recognized as such, legal documents allow for two or more contesting interpretations.

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8 "To convey what this means, it is necessary to know that writings can be understood and ought to be expounded principally in four senses. The first is called the *literal*, and this is the sense that does not go beyond the surface of the letter… The next is called the *allegorical*, and this is the one that… is a truth hidden beneath a beautiful fiction. The third sense is called *moral*, and this is the sense that teachers should intently seek to discover throughout the scriptures, for their own profit and that of their pupils… The fourth sense is called *anagogical*, that is to say, beyond the senses; and this occurs when a scripture is expounded in a spiritual sense which… signifies by means of the things signified a part of the supernal things of eternal glory". DANTE ALIGHIERI, THE CONVIVIO (RICHARD LANSING trans., 1998), available at: http://dante.ilt.columbia.edu/books/convivi/index.html.

9 Dante explains the importance of literal interpretation as follows: "In this kind of explanation, the literal must always come first, as being the sense in whose meaning the others are enclosed, and without which it would be impossible and illogical to attend to the other senses, and especially the allegorical". *Id.*

10 THE CONCISE OXFORD DICTIONARY 34 (Oxford, Clarendon Press, 1995).

However, the difference between poetry and the law remains. Even though legal documents may intentionally allow more than one interpretation, they will never allow aesthetic interpretations of any sort to take part in ruling on a dispute.

In my view, this idea supports Kenneth S. Abraham's description of the differences between statutory interpretation (i.e., interpretation of legal texts) and literary studies. In his essay "Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair", Abraham wrote the following:

> The differences between statutory and literary interpretation, then, are differences in communities of interpretation. Law and literature are structurally different disciplines, and interpreters within each discipline use different strategies to aid in understanding their texts. These differences, however, are not prescribed by intrinsic differences between statutory and literary language. The court deciding *Riggs* v. *Palmer*, for example, was authorized to render a final adjudication of the meaning of a statute as it applied to the facts of the case. There is no analogous central authority in the literary world, although the imagination of a Huxley is no longer required to see that this is a possibility.
>
> The *Riggs* court's conception of its proper relation to the legislature allowed, and in a sense required, that it speak the language of intention in interpreting the applicable statute. That statute was an "intentional object", the product of its author's purposes, because the court's interpretive strategies made it so.[11]

Abraham then gives an account of these interpretive strategies. In doing so, he targets some concerns which explain the reason for my research:

> These strategies are still so forceful that it would be astonishing to find a court today waxing eloquent about the alliterative qualities of the statute, the rich ambiguity of the word *person* in a phrase such as "[a]ny person may make a will", or the symbolism of the legislature's confrontation with the problems of mortality. It would be equally surprising for a literary critic to suggest that the meaning of the poem "The Tyger" depends on the effect of certain fundamental maxims, for example, that there is a God and that he is benevolent, which no poem may supersede.[12]

However, Abraham's comments do not end there.

> Competent, professional interpreters of statutes know that there is no symbolism in statutes. Professional literary critics know that, today at least, po-

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[11] SANFORD, LEVINSON & STEVEN MAILLOUX (EDS.), INTERPRETING LAW AND LITERATURE. A HERMENEUTIC READER 126 (Northwestern University Press, 1991).

[12] *Id.*

> ems are not interpreted against background standards of morality in the same way as are statutes. These professionals have been trained in disciplines guided by detailed codes of interpretive behavior. By virtue of conformity of these codes, their interpretations are both more competent than that of the initiate and more reckonable. Indeed, part of their work may well be seen as "teaching" others how to read.[13]

Abraham's concerns target the main objective of this article: is it possible to read a poem using legal methods of interpretation? One answer can be as follows: using legal interpretive methods, lawyers can make sensitive readings of poetry. Besides, using legal methods of interpretation, lawyers can give readings of poetry which can be shared by other lawyers. The idea here is not to replace the sophisticated interpretive methods used by literary critics, but to show how legal methods can be used to read poetry. My goal is to show how legal professionals can read poetry by using some of the cognitive mechanisms they commonly use.

The main difference between legal interpretation and literary criticism is clear. There are different approaches to legal interpretation, but the use of creative devices such as analogical reasoning and *a fortiori* reasoning are institutionalized.

It can be argued that certain literary critics might completely oppose the use of creative strategies for interpreting poems and decide not to use them at all. This difference may have a deeper reason which can, in turn, be considered a third difference between legal interpretation and poetic interpretation. In his essay "The Constitution of the United States: Contemporary Ratification", William J. Brennan Jr., a liberal Supreme Court Justice, wrote:

> Constitutional interpretation for a federal judge is, for the most part, obligatory. When litigants approach the bar of court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate the full meaning of the Constitution's provisions. Unlike literary critics, judges cannot merely savor the tensions or revel in the ambiguities inhering in the text —judges must resolve them.[14]

In general, legal interpreters have the obligation of interpreting the law. Brennan's argument can easily be extended to lawyers and other legal professionals such as prosecutors or arbiters. All of them are obligated to interpret the law.

The difference between the existing interpretive institutions is not the only one separating poetry and law. We can say, for instance, that although many legal documents do contain stories, it is nonetheless obvious that

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[13] *Id.*

[14] *Id.* at 14.

these stories must be narrated clearly and directly, and not allegorically. According to the basic principles of the Rule of Law, legal documents must be as clear and straightforward as possible. Therefore, the use of symbols is not common in legal documents.[15]

There is yet another difference: the relation between form and content is fundamental. Certain legal actions must fulfill concrete formalities in order for them to be valid. However, the need for clarity in legal documents prevents the use of any sort of sophisticated symbolism. Bearing Dante's classification in mind, it can be said that an obvious consequence of the absence of allegories in legal documents is that lawyers do not interpret legal texts to produce pleasure. Moreover, legal documents cannot allow any sort of lie to exist within them, not even beautiful ones.[16]

Perhaps some legal writings are more precise, more accurate or even more elegant than others. So, it can be claimed that a particular ruling is more beautiful than another or that a contract's aesthetic achievements are higher than another's. However, these differences still have no immediate legal relevance from an interpretive point of view. In other words, although the aesthetic irrelevancy of legal texts can say much about an important distinction separating interpretation from writing, it is not important from a strictly interpretive point of view.

Further clarification must be made. The allegorical difference separating poetry and the law is not very solid. It can be established as follows: even though legal documents do not seek to hide truth behind beautiful fictions, the rhetorical devices used to write and interpret legal documents and the rhetorical devices used to write poetry are, basically, the same. As Kathy Eden reminds us in her reading of Aristotle's concept of equity: When the law is either silent or inappropriate before a particular case, the preservers of the law must interpret the intentions of the lawgiver by inferring what he would have legislated in view of the present situation (*Nichomachean Ethics, 5.10.5*).[17]

So far, three premises have been used to build the argument supporting the existence of similarities between poetry and the law. First, writing legal documents and writing a poem usually imply the use of similar rhetoric devices. Second, these rhetorical devices can be recognized by the reader or

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15 Even though the use of symbols in legal documents is not very common, when they appear —mainly as abbreviations— a previous clarification on how these symbols are used is established for each case. This is particularly true of drafting contracts where the legal definitions commonly occupy the first part of the document.

16 The use of rhetorical strategies for persuading listeners is very common in common law where trials are conducted orally. At a trial, lawyers face each other, a judge and sometimes even a jury. The importance of giving seductive performances for favorable resolutions is evident. Such is not the case in Mexico, where trials are conducted in writing.

17 KATHY EDEN, POETIC AND LEGAL FICTION IN THE ARISTOTELIAN TRADITION 44 (Princeton University Press, 1986).

the interpreter of either a legal text or a poem. Finally, the fact that writing and reading are connected can be proved by thinking about how a poet rewrites his work.

Before using these premises to reach a conclusion, further questions need to be answered: if poets and legal writers use similar rhetorical devices in writing, what prevents legal writers from writing allegories? On the other hand, if the similarities between writing and reading link poetry to the law, what prevents legal interpreters from interpreting allegories? The answer to both questions is straightforward: neither legal interpreters nor legal writers have any intention of doing so. In other words, they do not use their rhetorical powers to the fullest. And they do not do so because their professional objectives are not directly concerned with producing beautiful documents, providing pleasure to their readers or writing elegant texts. However, although legal professionals do not pursue aesthetic achievements, it does not follow that they are not able to do so.

Since rewriting can be considered a step of the writing process and can also be understood as an interpretive activity, it can be claimed that writing a text involves at least one interpretation done by the author himself. Therefore, writing and rewriting are united in a practical process known to any author. The important thing, however, is for both a legal writer and a poet to be familiar with this process. Poetry and the law can be seen as activities that share common practices. Thus, writing and interpreting legal documents and writing and interpreting poetry are close to each other from a methodological point of view. As we will see, there are at least a couple of Mexican legal devices of interpretation which can support this claim.

As a matter of fact, legal writers could try to build up allegories simply by using some of the rhetorical devices at hand in their daily work. In my view, traditional legal methods of writing and rewriting —which are also legal methods of interpretation— can be used to write poetry as well.

A second similarity between poetry and the law is based on the fact that legal interpreters do not reject the possibility of interpreting a legal document beyond its literal meaning. In other words, simply because allegorical interpretations of the law do not exist, it does not follow that literal interpretations are the only possible kind that can be used to interpret a legal document. On the contrary, it might be said that there is professional consensus that requires a legal text to be interpreted beyond literal readings.

In order to provide a more complete explanation of this professional consensus, it is important to know that there are different kinds of legal documents. A legal opinion issued by a judge or a court is a particular kind of legal text, which differs from a lawsuit, a code or statute. However, a common feature of these legal documents is the fact that they can be read and, therefore, interpreted by lawyers, judges or even scholars. All legal documents can be interpreted and their interpretation is not necessarily lit-

eral. Sometimes, interpretive instructions to decode the law have been institutionalized, as in article 14 of the Mexican Constitution.

Legal documents have more than one literal meaning because they are not always clear enough to provide a single, unchallengeable solution to a legal dispute. Lawyers do their job by contesting another's interpretations of the law because the legal system is not complete; on the contrary, it is complete through interpretation. A lawyer's job is to interpret the law beyond the literal meanings of codes, statutes and other legal documents.

Latin American lawyers have recently begun to consider the concept of legal interpretation an open-ended activity. From a historical point of view and following Rodolfo Luis Vigo's account, one dogmatic school dominated legal interpretation in the nineteenth century. As Vigo states: "Savigny defines legal interpretation as the reconstruction of the ideas embedded in the law. From Ihering's point of view, since legal interpretation does not create anything new, it can be seen as jurisprudence of a lesser kind. Back then, legislators were considered the true interpreters".[18]

Since legal interpretation was not a creative task, it can be said that lawyers were not real interpreters at all. According to this dogmatic approach to interpretation, lawyers have the mechanical job of interpretation achieved by resolving syllogisms derived from a legal text understood as a main premise. However, this situation no longer prevails.

In spite of Vigo's account, professional consensus of the existence of several interpretive layers can be traced throughout history. Kathy Eden explains the multi-leveled interpretive nature of the law in terms of its fictional nature: "Through an action *fictitia*, the *Praetor* extends the formula of an existing civil law action to a case not strictly under its terms by a direction in the *intentio* to the judge to proceed as if a state of affairs or set of facts existed, whose hypothesized existence for the adjudication in question assures an equitable decision".[19]

To speak of the fictional nature of legal interpretation is to speak of the existence of a creative endeavor. Therefore it is not unusual to find Eden quoting Quintilian's *Institutio Oratoria* as follows:

> I think I should also add that arguments are drawn of merely from admitted facts, but from fictitious suppositions… When I speak of fictitious arguments, I mean the proposition of something which, if true, would either solve a problem or contribute to its solution, and secondly the demonstration of the similarity of our hypothesis to the case under consideration.[20]

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[18] RODOLFO LUIS VIGO, INTERPRETACIÓN JURÍDICA 16 (Rubinzal-Culzoni Editores, 1999).

[19] KATHY EDEN, *supra* note 17 at 46.

[20] *Id.* at 47-48. Eden draws the argumentative line all the way back to Aristotle: "Like the Praetor's instructions to his *iudex*, then Quintilian's instructions to his orator make explicit the coincidence between making fictions and reaching equitable judgements. In view

The interpreter's task can be then understood as a creative one. That is precisely the idea behind Vigo's claim of the change in the role of a legal interpreter. According to Vigo, legal interpretation is not only a judicial feature. Nowadays, judges, lawyers, lawmakers and even legal scholars are recognized as valid interpreters of the law. As Vigo puts it:

> In dogmatic interpretation, judges deploy the interpretive task. They were merely obligated to define what the legislator's intention was. Therefore, interpretation was seen as the opposite of legal creation and faithful to the legislator's credo. Under such a view, science is responsible for re-constructing the law systematically.[21]

The role of legal interpreters is no longer exclusively that of judges and courts. In clarifying this change, another explanation arises. In our days, using logical inferences to obtain the meanings of the law can be considered an incomplete enterprise. Comprehensive interpretive work aims at solving the particular case at hand. Vigo puts it as follows:

> Contemporary theory highlights the common nature of legal professionals: whether teaching, consulting, counselling or judging, all of them have to find a solution for individual cases. There is no substantial difference bringing legislators and judges asunder. Their differences are rather quantitative. Legislators issue legal commands to rule on every person and every case. Judges do so for individual persons and individual cases.[22]

But, what are lawyers looking for? What is there beyond the literal meaning of the law? The answer can be as follows: lawyers look for what the law has to say in the particular case at hand or —as Dworkin has put it— the purpose guiding legal interpretation that the interpreter has to construct. If we accept that whatever the law has to say must be looked for in order to sort out every single case, we have to decide whether this "voice" can always be retrieved by means of a literal interpretation. As we will see, the use of analogical thinking as an interpretative device shows that literal interpretation is not always enough.

As a matter of fact, this legal device of interpretation runs against the opinion of some scholars in the sense that legal interpretation can be done by making no reference whatsoever to any external consideration.

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of the debt of Roman legal philosophy to Aristotelian legal theory, on the one hand, and of Quintilian's *Institutio* to Aristotle's *Rhetoric*, on the other, we should not be surprised to find the analogy in Aristotle's own thinking. Aristotle, as we have seen, considers equity superior to strict justice because it can move more freely between the generality of the law and the details of the individual case". *Id.* at 48.

21 RODOLFO LUIS VIGO, *supra* note 18 at 25.

22 *Id.* at 25.

As Edward W. Said reminds us, controversies between "literalist" approaches to interpretation and "non-literalist'" approaches to interpretation can be tracked back to the disputes held between the Zahirite and Batinist schools on how the Koran was to be interpreted in Andalucia in the eleventh century:

> Batinists held that meaning in language is concealed within the words; meaning is therefore available only as the result of an inword-tending exegesis. The Zahirites —their name derives from the Arabic word for clear, apparent, and phenomenal; *Batin* connotes internal— argues that words had only a surface meaning, one that was anchored to a particular usage, circumstance, historical and religious situation.[23]

According to Said's account of the Arabic interpretive tradition, the Zahirites were opposed to the "excesses of the Batinists, arguing that the very profession of grammar… was an invitation to spinning out private meanings in the otherwise divinely pronounced, and hence unchangeably stable, text".[24]

Kenneth S. Abraham's remarks explain the similarities linking poetry to the law as follows:

> The issues that trouble literary theory, however, are strikingly similar to those that have troubled thinking about statutory interpretation…
>
> Those familiar with only literature or law may be struck by the similarity of the concerns of the disciplines. Both are concerned with the extent to which a text is "self-interpreting", with a meaning in the language of the text itself. Both are also troubled by claims that interpretation is a subjective and even arbitrary process by which individuals impose their prejudices onto texts in the guise of "interpreting" them. Moreover, even proponents of the polar positions are notably in agreement on a crucial point. At both extremes interpretation is seen as the operation of an independent, autonomous force that determines meaning.[25]

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[23] EDWARD W. SAID, THE WORLD, THE TEXT AND THE CRITIC 36 (Harvard University Press, 1983).

[24] According to Said, "the Zahirite effort was to restore by rationalization a system of reading a text in which attention was focused on the phenomenal words themselves, in what might be considered their once-and-for-all sense uttered for and during a specific occasion, not on hidden meanings they might later supposed to contain". *Id.* at 36-37.

[25] SANFORD, LEVINSON & STEVEN MAILLOUX, *supra* note 11 at 116-117. Abraham's description continues as follows: "For the legal formalist and the New Critic the text is a separate object with meaning that inheres in its language. The meaning is simply discovered by the reader, whose views remain subordinate to the 'plain meaning' of the text. In contrast, for the legal realist and the subjective or 'deconstructive' literary critic, the autonomous individual reader creates the text. For theoretical moderates, interpretation is, in the end, some combination of the two extremes; the text is determinate to a point, prescribing its own meaning, but is otherwise dependent on the creative powers of the interpreter". *Id.* p. 117.

I have explored the general dimensions of the relationship between law and literature elsewhere.[26] These dimensions are based on a concept of law and literature linked by common features. As a summary, from my point of view, there are three dimensions that explain the relationship between law and literature. First, I find an aesthetic dimension which contains all the great works of literature that explore traditional legal topics such as the death penalty, imprisonment, the chaotic way in which judicial systems work and so on, from an artistic perspective. Secondly, both law and literature can be seen as interpretive events. There is an interpretive dimension in which both legal professionals and literary critics are interpreters. Thirdly, there is a written dimension linking law to literature. Legal professionals, literary critics, authors and poets are all writers.

From my point of view, all the similarities linking literature to the law can be used to explain the similarities linking poetry to the law. However, this article aims at exploring the relations between poetry and the law derived from the interpretive dimension and not how poets have explored traditional legal topics.

There are some interesting links found in some of Susan Sontag's famous ideas against interpretation and Zahirist interpretive tradition. It seems to me that these ties can shed some light on the relationships between literary interpretation and legal interpretation. Sontag's influential article "Against Interpretation" gives us a stronger grip on both the differences and similarities between literary and legal interpretation. First, let us deal with the effects of Sontag's ideas on the differences between poetry and the law. At the core of this differentiation, I find a vital assertion on the importance of content within any kind of text, which Susan Sontag expresses it as follows:

> The fact is all Western consciousness of and reflection upon art have remained within the confines staked out by the Greek theory of art as mimesis or representation. It is through this theory that art as such —above and beyond given works of art— becomes problematic, in need of defense. And it is the defense of art which gives birth to the odd vision by which something we have learned to call "content", and to the well-intentioned move which makes content essential and form accessory.
>
> …Whether we conceive of the work of art on the model of a picture (art as a picture of reality) or on the model of a statement (art as the statement of the artist), content still comes first. The content may have changed. It may now be less figurative, less lucidly realistic. But it is still assumed that a work of art *is* its content. Or, as it is usually put today, that a work of art by definition says something.[27]

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[26] Carlos Pérez Vázquez, *Derecho y literatura*, ISONOMÍA. REVISTA DE FILOSOFÍA Y TEORÍA DEL DERECHO, April 2004, at 135-153.

[27] Susan Sontag, *Against Interpretation*, AGAINST INTERPRETATION AND OTHER ESSAYS 4 (Picador, 2001).

According to Sontag "the modern style of interpretation excavates, and as it excavates, destroys; it digs 'behind' the text, to find a sub-text which is the true one".[28] It can be said that, from Susan Sontag's point of view, this interpretive style can seem as excessive as the Cordovian Batinist's was ten centuries ago.

Here again, there is a clear distinction between legal and literary interpretation. Today, no one argues against the idea that the law "says something" which must be retrieved. In other words, no one rejects the idea that the law is filled with content through interpretation.

Sontag's concerns about the excessive attention literary critics place on content seems to have no importance to legal interpretation. The relationship between form and content in law is an intimate one. At least in the Mexican system, there are some legal events which require clear formalities. Marriage is a good example. The law requires a judge to utter certain words in a particular order for two people to be married. If the judge fails to do so, then the marriage can be declared null and void.

So, a difference between law and literature can be stated as follows: although reading a literary text may allow separation between form and content, reading a legal one cannot rest upon such a separation.

The closeness between form and content in law can be better understood by comparing it to the relationship between writing and interpreting as referred to above. There are many legal documents which must be written a certain way. For instance, the Mexican procedure for protecting fundamental rights (*juicio de amparo*) requires every single plaintiff to follow a particular model to draft a lawsuit. Although it can be said that writing poetry using a rigid metrical scheme is similar to writing a lawsuit, nothing stops poets from writing in free verse. Lawyers that initiate a legal procedure to protect fundamental rights do not have a similar privilege. They cannot write the lawsuit as best suits them.

The similarities linking Sontag's ideas to the Zahirites views are not only very interesting from a historical point of view. They are also very useful to support similarities between literary and legal interpretations after establishing a subtle differentiation between them. We must recall that Batinists held the view that the Koran's contents could be retrieved. Therefore, it is possible to claim that the Batinists' interpretations of the Koran are closer to modern legal interpretation than the Zahirites', and that modern legal interpretation is closer to the Batinist tradition than Sontag's proposals.

The interesting thing however is that Susan Sontag did not completely reject the possibility of interpreting the content of a work of art. This gives us another chance to understand not only the differences, but also the similarities between legal and literary interpretation.

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[28] *Id.* at 6.

Susan Sontag's complaints about the harmful interference of interpretation in art, are brilliantly established in a few lines: "In the most modern instances, interpretation amounts to the philistine refusal to leave the work of art alone. Real art has the capacity to make us nervous. By reducing the work of art to its content and then interpreting *that*, one tames the work of art. Interpretation makes art manageable, conformable".[29]

Reference to the main difference between law and literature can be drawn from Sontag's argument: the law cannot be left alone. Legal interpreters exist because legal documents need to be interpreted and their meanings need to be perfectly understood, perfectly tamed. Legal interpretation is necessary because there is an objectivist assumption that affects the law. Legal readings of legal documents are used to solve disputes and therefore, it is much more useful to approach them in a way that renders the law "manageable, conformable".

Legal interpreters play a fundamentally creative role. As Rodolfo Luis Vigo points out, "the interpreter has the responsibility of creatively settling from the law as a whole, the unpublished fair solution that will contribute to the case that must be addressed or resolved".[30]

The reasons behind Sontag's ideas on the Zahirite interpretive position are clear. However, common ground is quite difficult to argue from a legal perspective. Legal professionals need to tame the law because society cannot afford to allow the resolutions of legal disputes to be put aside.

Legal systems exist to provide justice by solving controversies. Legal controversies cannot be solved unless what the law means is at least described or paraphrased. From my point of view, there is a relation between Sontag's concerns and legal interpretation. Sontag wrote of her concerns as follows:

> What kind of criticism, of commentary of the arts, is desirable today? For I am not saying that works of art are ineffable, that they cannot be described or paraphrased. They can be. The question is how. What would criticism look like that would serve the work of art, not usurp its place?
>
> What is needed, first, is more attention to form in art. If excessive stress on *content* provokes the arrogance of interpretation, more extended and more thorough descriptions of *form* would silence. What is needed is a vocabulary —a descriptive, rather than prescriptive, vocabulary— for forms. The best criticism, and it is uncommon, is of the sort that dissolves considerations of content into those of form.[31]

I have argued against any attempt to separate legal documents from their content in any way.

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[29] *Id.* at 8.

[30] RODOLFO LUIS VIGO, *supra* note 18 at 39.

[31] SUSAN SONTAG, *supra* note 27 at 12.

I supported the view that legal interpretation can only aim at deciphering the content of a legal document. However, it seems to me that Sontag's concerns can help us improve the general objective of legal interpretation. A balance between form and content within legal documents strengthens legal interpretations. Furthermore, legal interpretations which give form a more important role in the interpretive process can only be creative ones.

The reasons behind this opinion are based on the relationship between writing and reading which, in turn, is based on the relationship between content and form. Rewriting takes place after a holistic review of form and content. Rewriting will always affect and be affected by content and form.

We have established a connection linking Susan Sontag's ideas to the Zahirite school of interpretation during Arab domination. However, Sontag's ideas can also be linked to a particular school of legal interpretation which still exists today. In American Jurisprudence, there is a clear distinction between those supporting a conservative interpretive position and those supporting a more liberal one regarding the United States Constitution. According to the former, the Constitution of the United States must be interpreted narrowly without any room for any creative interpretation whatsoever. Meanwhile, those supporting a more liberal interpretive position claim that some of the more important rights in American Legal History have been adjudicated by the judges interpreting the Constitution more creatively.

Justice Brennan expressed his opinion on the contesting views on constitutional interpretation as follows:

> Because judicial power resides in the authority to give meaning to the Constitution, the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation.
>
> There are those who find legitimacy in fidelity to what they call "the intentions of the Framers". In its most doctrinaire incarnation, this view demands that justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them.
>
> …We current justices read the Constitution in the only way we can: as twentieth-century Americans... Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.[32]

In the last twenty years, a conservative turn has dominated American politics and three Republican presidents have nominated conservative judges to the Supreme Court. As a result, a constrained approach has been

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[32] SANFORD, LEVINSON & STEVEN MAILLOUX, *supra* note 11 at 17-18.

upheld by the majority of United States' Supreme Court judges over the last decades. However, from my point of view, the interesting thing is the closeness between the conservative approach to constitutional interpretation and Susan Sontag's opposition to interpretation. It is striking to think that both positions are close to each other because of a common reverence to the text.[33]

We have said that legal interpreters are obligated to interpret the law. This obligation can also help us clarify possible misunderstandings on legal interpretation in general. Misunderstanding derives from a false analogy between literary criticism and legal interpretation which can be stated as follows: while an author-poem-reader trio that explains the interpretive process from a literary point of view, an equivalent legislator-law-judge trio fittingly explains the legal interpretive process. However, the process of interpretation for ruling on legal disputes is based on a much more complex mechanism. The law can be changed by the interpreter. Revolutionary readings are not initially made by judges. Lawyers play the role of first level interpreters of the law. Besides, once a legal dispute has been solved, it cannot be said that the matter is settled once and for all. On the contrary, almost every legal system has mechanisms to allow judges to modify previous rulings. In other words, the law authorizes certain legal interpreters (lawyers, prosecutors, judges, legal scholars) to modify previous rulings. To do so, a permanent discussion and reinterpretation of already ruled cases is necessary.[34]

We have mentioned three clear differences separating literature from the law. They can be listed as follows:

a) The institutions of legal interpretation are different from those of literary interpretation. When legal institutions rule on legal disputes, they establish authoritative interpretations to be followed by other interpreters.
b) Legal interpreters are obligated to perform interpretive activities. Literary critics are not.
c) Aesthetic considerations play no role in legal interpretation. However, nothing prevents lawyers from using these criteria to evaluate their interpretations. As a matter of fact, the relevance of the relationship between form and content in law seems to point to that direction.

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[33] President George W. Bush has recently nominated John Roberts, a young, talented and conservative judge, as Chief Justice of the United States. In his introductory speech, Mr. Bush said his choice was based on Robert's "deep reverence for the Constitution". Available at http://us.cnn.com/2005/POLITICS/09/05/roberts.nomination/index.html.

[34] In the Mexican system, the interpretation of legal texts may be revived years after a Supreme Court resolution has adjudicated the legal dispute which produced the contested interpretation.

That being said, the similarities between poetry and the law, in particular those relevant to this article's goals, can be summed up as follows:

a) Since both legal interpreters and literary critics, in general terms, aim at finding out the purpose of a text, it can be claimed that both perform creative tasks. The differences are not intrinsic to the language used by both. Analogical reasoning is a common cognitive mechanism. It can be used in law and as well as in literary studies.
b) Poems and legal texts are always open to review. Rewriting and revision imply and are based on interpretation. Therefore, poets and legal writers are at least interpreters of their own works.
c) Poets and legal writers use analogical reasoning in writing, reading and rewriting texts.

III. Law, Literature, and Interpretation

I am indebted to Ronald Dworkin for his insight, which in turn inspired this line of research. In a powerful article, the American philosopher wrote about the so-called "aesthetic-hypothesis":

> An interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art. Different theories or schools of traditions of interpretation disagree on this hypothesis, because they assume significantly different normative theories about what literature is and what it is for and about what makes one work of art better than other.[35]

The basic idea behind the theoretical relationship between law and literature as studied by American and British scholars is summed up in the previous paragraph. According to Dworkin, lawyers can learn a lot from literary critics. However, I believe that the interpretation of poetry can also benefit from the application of some of the interpretive methods used to resolve concrete legal controversies in the "real" world of the courts. This article proposes that legal methods of interpretation tell us something not only about the way we read poetry, but also about the cognitive mechanisms any author uses to rewrite his work.

From my point of view, there is a common bias concerning the relationship between law and literature, which can be considered profession-generated. Many legal scholars are not interested in possible means for interpreting poetry when legal methods of interpretation are used. This is seen in

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[35] Ronald Dworkin, *How Law is Like Literature*, in A Matter of Principle 149 (Harvard University Press, 1985).

the works of legal philosophers, who strongly debate how seriously lawyers should take literary influences, but do not seem much concerned about the implications of legal interpretation on literature.

Interpreting legal materials by using literary methodologies has generated a lot of research and academic discussion, but the relationship between the disciplines has not been explored the other way around. In short, the ways legal interpretation can help a reader tackle a poem has not been thoroughly analyzed.

It is possible to explain this phenomenon by claiming that the interest of legal academics is not aimed at enhancing the interpretation of literary texts. However, I think it might be interesting for readers of poetry to become familiar with legal interpretive tools and know that legal interpreters can also give perceptive readings of poetry. Therefore, this research points toward attempting to interpret poems by using legal methodologies.

There are some works that try to describe the similarities between legal and poetic interpretation. In my view, the most influential was written by Ronald Dworkin, who has recently written a new essay on interpretation. In it, he explains what he understands as "interpretation". In a UCL seminar, the American professor endorsed the idea that the interpretation of a poem is a case of collaborative interpretation:

> I shall defend a general account of interpretation… Interpretation is indeed a distinct form of inquiry. Its goal is to display its object's value for some purpose. That purpose is given by the interpretive genre itself. Each genre of interpretation is defined by a collective practice; each of these practices has a history and each is assumed by its practitioners to have a point or purpose.
>
> Any concrete interpretative claim begins in an assumption, most often hidden and unacknowledged, about what goal or goals should be attributed to the overall practice that constitutes the interpretative genre in which the concrete claim is placed… An interpretation of some object succeeds —it achieves the truth about that object's meaning— when it best realizes, for that object, the purpose properly assigned to the genre. It is often controversial, to a greater or lesser degree, what the purpose of a genre should be taken to be; it is therefore controversial, in parallel degree, what best interpretation is, in that genre, of any particular object.[36]

Dworkin's recent ideas are fundamental. A general account of interpretation is necessary to explain the use of analogical reasoning to interpret both poetry and legal documents and make such a claim possible. In my view, both legal interpreters and literary critics should ask themselves about the purpose of the legal documents and poems they encounter. A general

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[36] Ronald Dworkin, *Interpretation, Morality and Truth*, paper presented at a UCL Seminar, Winter 2003, p. 8.

account of interpretation, according to which every interpretive activity aims at discovering the purpose of the objects to be interpreted, applies to both legal studies and literary studies.

Another important instance of this is found in the magnificent essay "'Sonnet LXV' and the 'Black Ink' of the Framers' Intention" by Charles Fried, a Harvard Law School professor. Professor Fried's work does not analyse Shakespeare's famous poem from a literary point of view, but identifies the most relevant common features shared by the sonnet and the Constitution of the United States of America: their permanence through time.[37]

However, studies concerning the relationships between law and poetry are not as extensive as those exploring the relationships between law and other literary genres. In fact, Dworkin's famous article has been celebrated for using a chain-novel as an analogy of the way judges do their work in the common law system.[38] Dworkin's first ideas on the nature of interpretation do not deal extensively with the implications of his theory within poetic interpretation. The explanation for this is, again, straightforward. Dworkin's approach was philosophical and must be read as a part of his entire jurisprudential system. Legal scholars' interests are focused either on incorporating literature's interpretative methods to the legal system or in denying the plausibility of such an incorporation. Legal scholars are not interested in producing fresh ideas to nourish debates among literary critics.

Dworkin's paragraph presents two very compelling and praise-worthy points. First, one has to read trying to look at the text in its best light. This is a generous approach to textual interpretation and implies a strong trust in the capabilities of human rationality. Even though some of Dworkin's jurisprudential ideas can be thought of as extremely original, there is a connection linking his theory of interpretation of the law to some of Gadamer's ideas on truth in poetry:

> It seems incontrovertible to me that poetic language enjoys a particular and unique relationship to truth. First, this is shown by the fact that poetic language is not equally appropriate at all times to any content whatsoever, and second, by the fact that when such content is given poetic form in language,

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37 Charles Fried, *Sonnet LXV and the 'Black Ink' of the Framers' Intention*, in SANFORD, LEVINSON & STEVEN MAILLOUX, *supra* note 11 at 45-51. The argument presented by Charles Fried brings about striking resemblances to ideas proposed earlier by H. G. Gadamer and to a poem written by Eliseo Diego entitled "Responso por Rubén Darío".

38 Dworkin puts it as follows: "Suppose that a group of novelists is engaged for a particular project and that they draw lots to determine the order of play. The lowest number writes the opening chapter of a novel, which he or she then sends to the next number, who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then he sends the two chapters to the next number and so on. Now every novelist but the first has the dual responsibilities of interpreting and creating because each must read all that has gone before in order to establish, in the interpretivist sense, what novel so far created is". Ronald Dworkin, *supra* note 35 at 158.

> it thereby acquires a certain legitimation. It is the art of language that not only decides upon the success or failure of poetry, but also upon its claim to truth.[39]

According to both Gadamer and Dworkin, reading a poem implies, first of all, recognizing it as such, legitimating it as a work of art of a particular kind. Every single poem presented by its creator deserves a careful reading. The interpreter must point out a poem's achievements and failures from an aesthetic point of view.

A second important point is derived from Dworkin's paragraph: every reading of a poem is supported by a normative theory. Since there is always a normative theory which tells us how to read and guides our readings, the interpreter is not a free agent performing a particular task. An interpreter is influenced by personal taste, competence and aesthetic beliefs.

Joseph Raz has developed ideas on the kind of theories we do use to bear out our readings. These theories can be understood as those Dworkin identifies as "normative": "Interpretation consists in pointing to connections and analogies. The test of a good interpretation is that those connections and interrelations are significant in terms of, or by reference to, some general theory of general truths about people, society or whatever".[40]

Having different theories for different ways of reading might generate philosophical debate. However, both Dworkin and Raz agree that there is no such a thing as casual or accidental readings. Every reading, every interpretation is influenced by the way the reader understands the world.

Can we consider any text a poem? If its author says so, and on a basic level of interpretation, whatever its aesthetic quality may be, we can.

This idea looks like an intentionalist notion. However, taking into account a poet's intention is consistent with defending a non-intentionalist approach to interpretation in general. As Joseph Raz has suggested, a distinction between the two levels of interpretation can be established:

> I will distinguish two levels of meaning which I will call "deep" and "basic" meaning, though one should not make anything of the choice of these terms. The basic meaning of a work concerns the question of the subjects of the work ("a portrait of Alexander VI") or its literal content ("Is Salomé holding the head of John on a platter?" "What does the words of a poem mean?", and so on). The identification of a work's subject and literal meaning does give rise to interpretive issues and there is an understandable feel-

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39 H. G. Gadamer, *supra* note 3 at 105.

40 Joseph Raz, *Interpretation without Retrieval*, in LAW AND INTERPRETATION ESSAYS IN LEGAL PHILOSOPHY 167 (Andrei Marmor ed., Oxford University Press, 1998). Based on Raz's definition of interpretation, one can conclude that interpretation is an application of analogical reasoning. This is important because that specific kind of rationality is a basic feature of poetic interpretation.

> ing that if nowhere else surely here the author's intention reigns supreme. Take portraiture: is it not the case that if Giacometti makes a sculpture which he declares to be the portrait of Annette, then a portrait of Annette it is? It is made so by being baptized by him as such, and nothing else counts… I will focus on the deep level of meaning. It is captured by observations such as: "the painting portrays the compassion of the Christian victors towards the vanquished Muslims", "the play contrasts the new sophisticated metropolitan culture with the crudity of the traditional mores of the provinces", "the music is an expression of the passion of love, followed by the depths of despair when it is not requited", and so on… The deep, more than literal meaning is the subject of most discussions of the meaning of works of art.[41]

If an author presents his work as poetry, the reader is compelled to read it as such. However, the author's statement must be considered a preliminary clue on how to approach the work of art and nothing more. Therefore, a poet's intention expressed as "this is a poem, so read it as such" must be considered as playing a role similar to that of many artists when assigning titles to their works.[42]

Some problems are not solved by recognizing nothing more than a preliminary informative statement in the author's declaration. One could think, for instance, of a particular problem that deals with an interesting question: what happens if the author's intention expressly refuses to identify a text with at least one kind of literary genre?[43]

I think that many of G. E. M. Anscombe's classical ideas and arguments about intention can help us:

> But is there not possible another case in which a man is simply not doing what he says? As when I say to my self "now I press Button A" —pressing Button B— a thing which can certainly happen. This I will call the direct falsification of what I say. And here, to use Theophrastus' expression again, the mistake is not one of judgment but of performance. That is, we do not say: What you said was a mistake, because it was supposed to describe what you did and did not describe it, but: What you did was a mistake, because it was not in accordance with what you said.[44]

In my view, a poem's meaning, just as Dworkin and Gadamer have said, can be unveiled trying to read the text in its best light. In other words, read-

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41 *Id.* at 156.

42 To illustrate how titles are commonly used by authors of a work of art to help interpreters, viewers or listeners understand a work's meaning, it is helpful to recall the way many Cubist painters select titles for their works. In this sense, for example, many of Picasso's paintings would be impossible to understand without a title.

43 This question came to me after reading a recent book by Peruvian writer Jaime Bayley. JAIME BAYLEY, AQUÍ NO HAY POESÍA (Anagrama, 2001).

44 G. E. M. ANSCOMBE, INTENTION 57 (Harvard University Press, 2000).

ing must be understood as a fair and generous enterprise guided by a constructive attitude.

I have claimed that there are differences that set poetry apart from the law. However, I have also claimed that there are similarities linking the two. The relationship between law and literature in general and between law and poetry in particular can be easily grasped by a common feature: they are both susceptible to being interpreted. According to Gadamer:

> We can distinguish two different senses of interpretation: pointing to something and pointing out the meaning of something. Clearly both of these are connected with one another. "Pointing to something" is a kind of "indicating" that functions as a sign. "Pointing out what someone means", on the other hand always refers back to the kind of sign that interprets itself. Thus when we interpret the meaning of something, we actually interpret an interpretation. The attempt to define and establish the limits of our interpretative activity brings us back to the question concerning the nature of interpretation itself. For what is a sign? Is everything a sign in some sense?… Certainly we must often try to read the sign character of things. In this way we attempt to interpret that which at the same time conceals itself, as in the expression of gesture, for example. But even there, the interpretation arises within a self-contained totality and clarifies the direction in which the sign points by eliciting that to which it basically points from that which is itself confused, unclear, and indefinite. This interpreting is not a reading in of some meaning, but clearly a revealing of what the thing itself already points to.[45]

Law and literature share the shortcomings and weaknesses of every natural language: they are insufficient and incomplete. However, they are also susceptible to spawning revelation through interpretation. In fact, the ambiguous nature of language requires the exercise of our interpretive skills.

As Gadamer has affirmed, poetry requires the intervention of a third party whenever its meaning is not clear at all.[46] Although many poems char-

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[45] H. G. Gadamer, *supra* note 3 at 68.

[46] "We have only to interpret something when its meaning is not clearly laid down or when it is ambiguous. Let us recall the classical examples of things that require such interpretation: the flights of birds, oracles, dreams, pictorial images, enigmatic writings. In all these cases there are two sides to interpretation: first, a pointing in a certain direction that itself requires interpretation, but also at the same time a certain holding back on the part of what is to be shown in this way. We have only to interpret that which has a multiplicity of meanings… Art demands interpretation because of its inexhaustible ambiguity. It cannot be satisfactorily translated in terms of conceptual knowledge. And this is true of poetry as well… The ambiguous meaning of poetry is inseparably bound up with the unambiguous meaning of the intentional word… The elements from which language is constructed and which poetry shapes for its own purposes, are pure signs that can only become elements of poetic form by virtue or their meaning… Language as the medium and material

acteristically aspire to meaningfulness, poets sometimes choose not to bare their work to every reader. Anyway, whether the reader faces a transparent poem or a hermetic one, the truth is that interpretive skills are needed. Interpretation is always needed to read a poem. So far, so good, but someone may still ask if it is always possible to interpret a poem. There are poems with dark meanings, poems dark enough to make any attempt at deciphering hopeless and void.

Is obscurity a common feature shared by law and poetry? I do not think so. I have said that the law never intends to be ambiguous, but to be clear. It is in everyone's best interest to have a reliable system to sort out legal controversies and it is evident that legal certainty is a product of meaningfulness. However, it is often possible to face legal conflicts that do not have a clear answer and in those cases legal interpreters are called to fill in the interpretive gaps in the legal system. Interpretation is as important to legal practice as it is to read a poem or, as Ronald Dworkin has put it, "legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally".[47] Therefore, at least a desire for intelligibility can be found within both the aims of legal practice and, in some cases, the aims pursued by poetry readers.

According to many respected legal scholars, law and literature are two very different fields and their differences must be always remembered by those lawyers trying to adapt literary interpretive methods to solve legal disputes. Among the most notable critics is Richard Posner, who has argued that:

> The skeptical vein in literary criticism, and the hermeneutic theories that nourish it, show how difficult the interpretation of texts can be and by doing so should make lawyers, judges, and legal scholars more cautious, more self-conscious, more tentative about the process of interpreting legal texts. But it has been the burden of the argument in this chapter that no specific techniques or discoveries of literary criticism, or literary analogies, such as that of the chain novel, are transferable to the law.[48]

Many of Judge Posner's arguments are compelling. However, I believe that they are not meant to reject the similarities linking legal interpretation to literary interpretation. After all, to interpret is to find the meaning of something, and such an idea implies a basic understanding of both legal interpretation and literary criticism. Posner, like other legal scholars who have studied the relationship between law and literature, did not stop to examine how legal interpretive methods can be used to give sensitive readings

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of expression can never fully emancipate itself from meaning. A genuinely nonobjective poetry would simply be gibberish". *Id.* at 69.

47 Ronald Dworkin, *supra* note 35 at 147.

48 See notes 35 and 36 above.

of poetry. In other words, it could be true that no specific technique for literary criticism is transferable to law; however, from such a claim, it does not follow that legal techniques are not helpful devices to interpret poetry.

I have mentioned some biased approaches so as to think about the relationship between law and literature. However, there are still more dramatic ones. For example, it is possible to recall the tendency to consider literature as more important or "transcendent" than law, as well as writers' work as more sophisticated or complex than the work of the courts. Behind this widespread belief there is the concept of art as the highest expression of human nature, or as the highest product of human spirit whenever compared to other human activities and enterprises. According to this view, whereas poets, storytellers and novelists are illuminated by the flame of the art or something of the sort, legislators, judges and attorneys are trapped in their daily and somehow lower-class life.

From my point of view, this notion must be avoided not only because of the weak metaphysical propositions on which it relies, but also because of the pedantry it presupposes. There are no significant differences between the literary work of an author and any other person's work. In my view, this kind of thinking must be rejected on several grounds. First of all, writing is work just like any other. Besides, there is no doubt that many of the economic, scientific and technological advances over the last two centuries, which have had an incredible effect in elevating the quality of life of millions of persons in the world, are scarcely related to art in general. The existence and practice of Western legal ideas, such as the Rule of Law or the due process of law clause included in almost every democratic legal system nowadays, can be considered human achievements as praiseworthy as any great poem, short story or novel.

Furthermore, from a historical point of view, the popularization of art is a recent phenomenon. It can even be considered a by-product of the improvements in the economic conditions of daily life, which have never been as good and widespread as today and which are the product of the work of many people who have never written literature in their entire life.

IV. Conclusion

The sort of prejudice I refer to is so common that it is easy to find clear examples of it, just as the one I found in a very interesting article written by Jessica Lane entitled "The Poetics of Legal Interpretation":

> Literary criticism is the most highly developed arena we have for the study of the discourse in all its manifestations. Language, the symbolic order, through its construction of the subject, is what constitutes the world, its most perfect products being the texts of reality and art. Consequently, liter-

> ary criticism responds more deeply to the need for individuation, for elaboration of the intricate possibilities hidden in the dialectic of writing and reading.[49]

I do not think more should be read into this cliché because legal practice cannot be carried on without language. It is true that the way lawyers use language might never be as elegant or as innovative as the way professional poets can; however, it does not intend to be so.

Moreover, the raw material used by lawyers and writers is mainly the same: words. The law is as fitting a field to investigate the strengths and weakness of language as literature is.[50] In fact, the origin of interpretation as a creative activity was much closer to judicial practices than to literary delights.[51]

In my view, a legal professional can use methods of interpretation available to him in order to achieve sensitive and speculative readings of poetry. In other words, I think people who usually see themselves as distanced from poetry can produce reasonable readings of poetry.

My claim is two-fold and can be stated as follows: on the one hand, lawyers can interpret poetry by using what they know. On the other hand, from a semiotic point of view, legal interpretation can be seen as an instance of speculative and constructive interpretation.

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[49] SANFORD, LEVINSON & STEVEN MAILLOUX, *supra* note 11 at 283.

[50] I think Richard Weinsberg is right in writing: "Once the judge begins to write, his use of power automatically is bound up in the words he uses… all judges, conscious or no of their crafting powers, must match language to outcome in order to produce a coherent result". RICHARD WEINSBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 8 (Columbia University Press, 1992).

[51] See *supra* note 17.

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SOFT EPISTEMIC PROPOSITIONS OF LAW*

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I. INTRODUCTION

General propositions of law such as "payments to creditors within ninety days of the filing of a petition in bankruptcy are voidable as preferential transfers" and singular propositions of law such as "this contract is valid", or "John is guilty of murder", partially explain how a disputed legal case is settled by a judge or a jury. Both types of propositions are currently at the center of jurisprudential discussions about truth in law. Assuming that it makes sense to evaluate these propositions in terms of their truth or falsity,[1] the discussion in this article centers on the nature of truth within the legal

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[1] Michael Moore refers to asking whether it makes sense or not to evaluate legal propositions in terms of their truth or falsity as "the existential question about truth in law". See *infra* note 5.

domain. This in turn is characterized by the degree of cognitive independence which the truth-conditions (facts or states of affairs) of the propositions are claimed to possess.[2]

For the realist (R), the degree of cognitive independence is complete in the sense that the existence and character of at least some of the facts or states of affairs that make a proposition of law true are not constituted by, or do not depend on cognizers with the appropriate propositional attitudes ("x perceives p", "x believes that p", "x justifiably believes that p", "x knows that p"). In this position, whatever appears to cognizers never determines what is actually the case.[3] The idealist (I) holds the opposite view: the cognizer's perception of the case always determines the case itself since all realms of reality are a product of the mind. The logical space between these extremes is occupied by the "minimal objectivist" (mO) and the "modest objectivist" (MO). For the minimal objectivist, whatever seems right not just to a single agent but to the relevant community determines what is right.[4] For the modest objectivist, whatever seems right to cognizers under appropriate or ideal epistemic conditions determines what is right.[5]

The role of error in these positions represents the other side of the coin. The subjectivist (or idealist) perspective holds that a person can never be wrong about the state of affairs based on what she perceives, believes, justifiably believes, or knows to be the case. Thus, there is no room for error. In the minimal objectivist view, while it is possible for someone to be wrong, it

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[2] See Brian Leiter's discussion on objectivity and law in: Brian Leiter, *Law and Objectivity*, OXFORD HANDBOOK OF JURISPRUDENCE (Oxford University Press, 2002). Unlike myself, he frames the topic of cognitive independence within the issues of law and objectivity. According to Leiter, for a discourse to be semantically objective, that is, for the propositions of that discourse to be apt for an evaluation in terms of their truth or falsity, the things, facts or states of affairs referred to by such propositions must meet cognitive-independence-of-the-human-mind requirements. This may lead one to think Leiter believes that discourse can qualify for semantic objectivity if and only if the truth predicate in the domain is understood as associating discourse propositions with facts or states of affairs for which the fact that a cognizer or a community of cognizers experience a cognizing state is of no bearing for their existence and character. Nevertheless, he continues to say that cognitive independence can have degrees, which correspond to the four positions of the nature of truth to be discussed in this article.

[3] Michael Moore is one champion of contemporary legal realism. His defense of realism in legal discourse can be viewed as a contemporary defense of natural law. In Moore's approach, the truth-conditions of legal propositions include, but are not exhausted by, the truth-conditions of certain moral propositions. The former are totally mind-independent facts. See Michael Moore, *Introduction* to MICHAEL MOORE, OBJECTIVITY IN ETHICS AND LAW, COLLECTED ESSAYS IN LAW (Ashgate-Dartmouth, 2004).

[4] This position seems to be defended by a wide range of legal positivists.

[5] A jurisprudential project that can be seen as an instance of this position is that of Ronald Dworkin. For him, the right answers to disputed legal cases are those reached when the subject is placed under the ideal epistemic conditions such as Judge Hercules.

is not possible for the entire relevant community to be wrong. For the modest objectivist, massive error can occur and it is through devising thought experiments of a counter-factual nature that the situation can be rectified. For the strong objectivist, even the conclusions reached under appropriate or ideal epistemic conditions may be wrong and therefore we can never be sure that the metaphysical objective reality is even close to what we might think or say about it.

So, for "R", the nature of truth in law relates a legal proposition to certain totally mind-independent facts or states of affairs. "I" holds that the nature of truth in law correlates certain legal propositions to entirely mind-dependent facts or entities. "mO" maintains that the nature of truth in law relates a legal proposition to facts or entities and its existence and character depend on the cognizing states of the members of the relevant community. "MO"'s thesis is that the nature of truth in law relates a legal proposition to certain fact(s) the existence and character of which result from an agent(s) experience of a cognizing state under ideal or appropriate epistemic conditions.

There are at least two points at which the entire spectrum of the above positions converge:

1) "Truth" (or the predicate "is true") names a relationship between a proposition (of law) and the attainment of certain fact(s) or state(s) of affairs (truth-conditions), regardless whether those facts or states of affairs are social or conventional (as the legal positivist would like them to be) or whether human cognition has any bearing on the existence and character of those facts (as a natural lawyer would have it).[6]
2) There is a more basic assumption of the meaning of propositions known as a truth-conditional approach to meaning. In this view, the meaning of a proposition is known (understood) when what it would take for that proposition to be true or to state a truth is known. As Patterson puts it, "it is taken to be the case by many philosophers that the meaning of propositions is a function of what makes them true or false".[7] One obvious consequence of this approach to meaning is that when someone fails to recognize something as a truth-condition when it is one or when someone states something that figures within the truth-conditions for a proposition when it does not, that someone can be said not to know the meaning of the proposition in question. In

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[6] This is regardless of the metaphysical account of the truth-makers (facts or states of affairs) adhered to by the realist, the subjectivist, the minimal objectivist, or the modest objectivist position. For an excellent discussion on the nature or metaphysical character of the truth-conditions for legal propositions, or as she calls them, of legal facts, see Connie Rosati, *Some Puzzles about the Objectivity of Law*, 23 L. AND PHIL., 273-323 (2004).

[7] See DENNIS PATTERSON, LAW AND TRUTH 18-19 (Oxford University Press, 2005).

other words, she is giving either a partial (incomplete) or an incorrect account of its meaning.

In view of this, we can see that truth is closely related to meaning. In fact, the entire discussion about the nature of truth rests upon the truth-conditional approach to meaning. Hence, it is important to keep the two issues apart. The semantic one consists of asking what the truth-conditions of *p* are and the mind-independence involved in enquiring about the nature of those truth-conditions.[8] Separating these issues is analytically helpful because it makes it possible to differentiate the semantic or mind-independence level at which claims about truth in law should be placed.

In this article, I will deal with the semantic aspect, focusing on issues regarding the construction of the set of truth-conditions for legal propositions. In particular, I hold that Michael Moore's analysis of the meaning of what he calls "singular propositions of law" (SPL) in his essay entitled "The Plain Truth about Legal Truth",[9] is flawed at least in two ways. Moore gives an inaccurate account of the meaning of SPLs in that 1) he sees the truth of certain "factual propositions" within the set of truth-conditions for SPLs, which is incorrect for reasons explained below; 2) while completely overlooking the role of what I call "soft epistemic propositions of law" (SEPL) as a fundamental component of the set of truth-conditions for SPLs. SEPL's assert that the minimum threshold for asserting as proven some proposition (that describes some aspect of the world) has been reached by the available evidence. Or simply that the relevant standard of proof has been met. I suspect this twofold weakness in analyzing the meaning of SPLs is mainly due to jurisprudence's habitual lack of attention to epistemological concerns like those that explain the function of a standard of proof (SoP) or, as I call it, a proof policy, within some areas of the law.[10] Larry Laudan has recently developed such a model and it is from his insights on what he calls the "soft core of legal epistemology" that I elaborate on the idea of SEPLs.

In saying that true factual propositions do not figure within the set of truth-conditions for SPLs, I am not suggesting that events in the world outside the courtroom have nothing to do with judicial outcomes. In other words, I do not endorse the idea of judicial decisions as constitutive of the

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8 We can also add the matter of procedures for verifying whether the truth-conditions of a proposition have been obtained.

9 See MICHAEL MOORE, *supra* note 3.

10 Legal theorists have been more concerned with how much principles, or more generally, how much evaluative reasoning is involved in adjudication, if there is a necessary link between this type of reasoning and legal reasoning and questions of that sort than with the not less interesting jurisprudential question of when an arbitrator of fact (a judge or a jury) is entitled to regard a factual assertion as proven within a certain area of the law. Neither Hart nor Kelsen, or even Raz, three of the most influential philosophers of law of the twentieth century, have addressed this issue in their work.

facts of the case.[11] Outside events have much to do with a case, at least in Criminal Law[12] (it is often stated —even by Supreme Courts of both Common and Civil Law traditions— that the ultimate purpose of a criminal trial is to determine the truth), but as a criterion to determine whether the verdicts are correct or not and not as a truth-condition of SPLs.[13] Another way of stating this would be: Suppose you were asked to explain the meaning of "John is guilty of murder" (p) when uttered by a judge or jury to an audience. You would have to say things such as "well, among other things, what this assertion basically implies is that the proposition describing a particular act of John's, say that of depriving Julius of his life by hitting him on the head with a tennis racket, has been proven to the appropriate standard/degree, say beyond all reasonable doubt". It would not be necessary to refer to the truth of the proposition describing John's conduct as having been implied by the declaration. However, if you were to judge whether p is correct or not or engage in a discussion on whether the criminal system is fair in terms of convicting the truly guilty or acquitting the truly innocent,

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[11] This is a thorny path. Some might say that there are complex conducts which prior to the decision of a court would not be regarded by citizens as a crime since the extension of some legal concepts, like for instance "tax evasion", have not yet been fixed once and for all by statutory law patterns. Thus, citizens see court pronouncements of those conducts as crimes that are constitutive, in the sense that they are the creators of the relevant facts of the case. I do not think this position would hold even when the qualifying an act as a crime can sometimes be *ex-post* (via judicial activity). Something would still have to be categorized or qualified, something about which there is doubt as to whether it is a crime or not. That something amounts to the facts reported by factual propositions.

[12] There are other branches of the law, like the law of torts, that claim the main purpose of the judicial process is to seek the truth of what happened in the world, which is much more controversial.

[13] Jordi Ferrer makes a similar statement in his analysis of the result of probatory activity in terms of the judge's, or more generally, the arbitrator-of-fact's propositional attitude towards the proposition declared as proven. One of his theses states that the declaration of p as proven (p being the description of the facts of a case with legal consequences, such as sanctions or otherwise, say "x did not pay her taxes") implies the arbitrator-of-fact's knowledge of p. Regarding this point, he says, "It should be pointed out here that from the point of view of the judge, that is to say, the person who declares 'p as proven', there is no difference between the requirement of (justified) belief in p and the requirement of knowledge. In other words, a person who believes that p and that the content of his belief is justified necessarily has to believe that he knows that p. *The distinction is however important from the point of view of third parties controlling judicial decisions. In effect, from the point of view of a third party, it is obvious that he can say that an individual s believes that p, but that p is false, and therefore, that s does not know that p. What we have now is a conception that does not lead to subjectivism in the judicial fact-finding. In effect, given that one of the requirements needed to be able to say that a proposition is known is that it is true and that the truth of a proposition does not depend on the will or the beliefs of any individual, what we obtain is a criterion for checking the justification of the judicial decision regarding facts that is independent of the trier: The truth of the proposition declared proven*". See Jordi Ferrer, *Legal Proof and Fact Finders' Beliefs*, 12 LEGAL THEORY 293-314 (2006).

this would be the appropriate time to make reference to what actually happened.

Having said that, I will clarify what Moore means when he uses the term "singular proposition of law" in the following section by focusing on the set of truth-conditions Moore claims is associated with SPLs. My objective at this stage is to emphasize two factors: the presence of factual propositions within the set and the absence of propositions that assert that the relevant standard of proof has been met by the evidence that support the singular proposition of law. Then, by making a distinction between material guilt and probatory guilt centered on establishing the truth of both "John is guilty (m) of murder" and "John is guilty (p) of murder", and finally by presenting a test for the admission of truth-conditions, I will explain why the two elements emphasized above are mistakes.

II. The Truth-Conditions of SPLs

Regarding SPLs, also known by U.S. lawyers as "the law of a case", Moore states the following:

> A singular legal proposition is one that is neither semantically general nor universally quantified. Its terms do not refer to a class of particulars, and it does not purport to predicate a property of all members of that class. Rather, a singular legal proposition predicates a legal property about one particular item referred to by a proper name or a definite description. Consider the following examples: "This will is valid" and "The defendant is guilty of murder". Such singular legal propositions may be either dispositive, as in the latter example, or evidential, as in the former example. In either case, they are the vehicles for expressing either all or part of a judge's or jury's decision in a particular case.[14]

Moore sees the truth-value of the following propositions as fully determinative of the truth-value of SPLs, that is, as fully determinative of the outcome of disputed legal cases:

1) *Factual propositions*. In the recent film "A few good men", a lawyer tells a witness "I want the truth" whereupon the witness responds, "you can't handle the truth". The characters are referring to the truths of certain propositions of fact relevant to the case. *These are probably the most obvious kinds of statements whose truth or falsity is of interest to lawyers*.

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[14] See Michael Moore, *supra* note 3, at 24-26. Consider also the SPL "Sheriff Kirby was not guilty of obstructing or retarding the passage of the U.S. Mail", which has been the cornerstone on which Moore elaborates on his view of natural law. *Id.* at 324-325.

2) *General legal propositions*. Equally as involved in decisions of disputed legal cases as propositions of fact, are general propositions of law. A general proposition of law is one contained in a universally quantified statement such as "all non-holographic wills require two witnesses in order to be valid".
3) *Interpretive propositions*. Because general propositions of law are about a general class of cases but no one particular case, we need interpretive premises in order to connect the particular facts of a given case to general propositions of law. Such premises connect factual predicates to legal ones, so that one can connect, for example, factual propositions about the written name of a particular person on a particular document, to legal propositions about subscriptions, signatures, witnesses, and valid wills.
4) *Propositions of value*. Some theories of law and of interpretation would reduce items 2) and 3) above to propositions of fact. Rejecting such legal positivists and formalists theories, as I do, requires a fourth kind of proposition, that of value. In various ways, propositions of value are partly truth determinative of both general propositions of law 2) and of interpretive propositions 3). Such propositions of value are thus relevant to our concern about *the kinds of propositions whose truth or falsity is determinative of the outcome of disputed legal cases*.
5) *Propositions of logic*. Contrary to much of the overblown and misdirected rhetoric of the American Legal Realists and their intellectual descendents, a decision in a disputed legal case involves logical deduction. The premises are matters of fact, law, and interpretation, and the conclusion is the proposition describing the decision in the case. What justifies the decision as following from these kinds of proposition is logic. If "p" is true, and if "p implies q" is true, then "q" must be true as well. This rule of inference, which the Stoics named modus ponens, states a necessary kind of truth, logical truth. No one can plausibly urge judges or juries to be illogical in their decisions, so propositions of logic like modus ponens join the other four kinds of propositions as necessarily involved in the decision of disputed legal cases.[15]

As stated in the introduction, I wish to emphasize that in the above list of propositions whose truth or falsity supposedly determine the outcome of disputed legal cases, the first place is occupied by what Moore calls "factual propositions" (propositions describing the facts of a case). Moreover, propositions that state whether the relevant standard of proof has been satisfied or not, which we call "soft epistemic propositions of law" (SEPL), do not appear in the list. But, why is this a mistake?

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[15] *Id.*

III. The Argument

1. *Material Guilt and Probatory Guilt*

The answer is found by focusing on the kind of legal property the singular proposition of law is said to predicate. Take for instance the SLP "John is guilty of murder". We can distinguish two senses of "is guilty". One implies that the defendant really committed the crime (in our example, murder by hitting Julius on the head with a tennis racket) for which he may or may not be charged; and another implies that according to the judicial scrutiny John has been subjected to, he has been condemned. Like Laudan, I refer to the first sense as the expression "material guilt" (guilt m) and to the second as "probatory guilt" (guilt p).[16] For the sake of the argument, let us assume this distinction.[17]

2. *The Truth of "John is Guilty (m) of Murder"*

In determining the truth of "John is guilty (m) of murder", it is only a contingent matter that John had been investigated, that certain inculpatory evidence had been found; that he had pled guilty (not going to trial in this case); that having pled not guilty, that the judge or jury declared there was sufficient evidence to justify a conviction, or even that he is sentenced to jail. It may be the case and makes perfect sense to say that even if all this were true, "John is guilty (m) of murder" could still be false. In other words, it is possible for John to live with the consequences of having been declared guilty (p) without having actually committed the crime.[18] This can occur with the following combination of truth values: We have "John is guilty (m) of murder" as false, which in turn implies the falsity of, to use Moore's terms, the factual proposition "John hit Julius on the head with a tennis racket and this caused his death", and the truth of "John is guilty (p) of murder". The truth of "John is guilty (m) of murder" soley depends on the

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16 Larry Laudan, Truth, Error, and the Criminal Law 11-12 (Cambridge University Press, 2006).

17 This petition is basically addressed to those who wish to confront the thesis that facts exist outside the courtroom and who attribute a fully constitutive power to judicial decisions.

18 This is not unheard of since human inquiries are fallible by nature. In fact, recognizing the possibility of a false inculpatory finding, and the correlative of a false exculpatory finding allows a society to have open discussion on the costs of both types of errors (false convictions and false acquittals). Thus, if such events occur, it ultimately allows them to determine how they want to distribute those errors.

fact that John has actually committed the crime, that is, on the truth of the relevant factual proposition describing John's conduct.[19]

3. *The Truth of "John is Guilty (p) of Murder"*

On the contrary, if we are to determine the truth of "John is guilty (p) of murder" it is as relevant as it could be that there has been a declaration of the propositions describing the facts of the case (in our example, the proposition describing that John hit Julius' head with a tennis racket) as proven (which amounts to say that sufficient evidence has been gathered and assessed), by the trier of fact. In this case, the factual proposition "John hit Julius' head with a tennis racket causing his death" is also involved, but it is its status of being proven, not its truth, not its correspondence with what happened in the world, that is important. For it may be the case, and again, it makes perfectly good sense to say, that it is true that John hit Julius' head with a tennis racket causing his death, and still "John is guilty (p) of murder" is false. That is, that John had really done it; nonetheless he had not been convicted.[20] The particular combination of truth values in this case would be the following: We have the factual proposition of our example being true, but the falsity of "John is guilty (p) of murder", which in turn implies either the falsity of the proposition declaring John's conduct as proven, or not having such a declaration at all. At this point, someone might be inclined to think that I am going against the so called "teleological connection between proof and truth" thesis (or simply teleological connection thesis), which states that the main goal of the institution of legal proof is to achieve truth.[21]

But that would be wrong. I hold that the teleological connection thesis must be understood as having two purposes: One is to serve as a regulatory ideal by establishing what the designers of the judicial process should be aiming for when giving a particular configuration to the set of rules of evidence and procedure. In this sense it can be an incentive to carry out epistemological thought experiments in which the trial could be viewed as a purely truth seeking engine.[22] And the other would be to motivate a critical

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[19] Ultimately, what determines the truth of "John is guilty (m) of murder" is correlating "John hit Julius on the head with a tennis racket causing his death" with reality, with the facts.

[20] This amounts to a false exculpatory finding, or simple, a false acquittal. This type of error has been regarded by different societies along different times in history as less grave an error than a false inculpatory finding. That is, preferable than a false conviction. We are prepared to have big numbers in the left side of the ratio of false acquittals to false convictions, so long as the numbers of the right side maintain being low.

[21] See JORDI FERRER, PRUEBA Y VERDAD EN EL DERECHO 68-69 (Marcial Pons, 2003).

[22] An excellent example of such a thought experiment can be found in: LARRY LAU-

spirit towards the current state of things the outcome of which could be a diagnosis of our evidential practices in terms of how well we are placed on the track that would lead them to achieve truth. But the teleological connection thesis should not be taken so as to be demanding from the judge or jury to do something else apart from following the current rules of evidence and procedure. That is, the current rules telling legal operators in what conditions certain evidence must be excluded, rules about the relevant standard of proof that must be satisfied, etc.

In other words, the teleological connection thesis should not be read so as to make it mandatory that when deciding disputed legal cases, judges consider factual propositions (such as "John hit Julius' head with a tennis racket") as proven only to the extent to which those propositions are true. The way our evidential practices hopefully achieve truth is not by making the truth of factual propositions a necessary condition for the determination of their status as proven,[23] but by making our rules of evidence and procedure, which govern our evidential practices, apt for the task of promoting the truth. That is, by giving those rules the adequate epistemic profile. So, it is the designer's responsibility,[24] and ultimately, given the fact that it is frequently the case that the designers (members of the legislatures) do not have the credentials this task calls for, it is a function of how solid and vigorous our legal epistemology is.

Now, let us return to the declaration of the relevant factual propositions as proven by the trier of fact as implied in the truth of the assertion "John is guilty (p) of murder". This declaration, as we have seen, grants the status of "proven" to "John hit Julius' head with a tennis racket causing his death" of our example. But, is this declaration arbitrary? Are judges and juries left unconstrained in order to regard whatever they feel like as proven? How is this status granted? Another way of asking would be: When, or under what conditions, does the relation of the evidence or the premises to the sought conclusion (that John hit Julius with a tennis racket in his head causing his death) warrant the acceptance of the conclusion as proven in the context of Criminal Law? The answer amounts to the specification of what's been called the "standard of proof" (SoP), also referred to as a proof policy. In

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DAN, *supra* note 16, at 4-9. In this book, the author outlines what can be called the research program for contemporary legal epistemology.

23 This position has been called "the conceptual connection between proof and truth" thesis. See JORDI FERRER, *supra* note 21, at chapter two.

24 Of course, somebody could say that another way in which our evidential practices could not achieve truth would be by ignoring the current rules of evidence and procedure, regardless of their best epistemic profile possible, in which case the responsibility would be on the legal operators themselves. But that is not the picture I'm referring here. I am assuming at least the judge's intention to follow the rules, even though there is room, of course, to make mistakes.

effect, the SoP can be viewed as a decision rule for the judge or jury, which establishes what they should look for in the evidence in order to be entitled to regard the sought conclusion as a proven proposition.

The SoP tells the trier of fact what the characteristics of the inferential link connecting the available evidence and the hypothesis at stake, must be.[25] The form of this decision rule would be along the following lines: If conditions a, b, c, n, are satisfied declare the relevant hypothesis as proven, and therefore, convict the accused. Otherwise, acquit him. For instance, if we are to regard as real standards those currently operating in the U.S.A. or in Mexico,[26] our decision rule would look like this: If you don't have a reasonable doubt about the defendant's guilt (U.S.A.); or: If you are strongly or firmly convinced of the accused being guilty (Mexico); then convict. Otherwise, acquit.

The conditions under which it is valid to declare factual propositions as proven may vary across different legal domains or areas of the law. And they also may vary throughout history, in the same domain or area. For instance, in the law of torts the applicable SoP is that of "the preponderance of the evidence"; while in Criminal Law, the applicable SoP is, as we have mentioned, proof "beyond all reasonable doubt" (BARD), or the firm confidence in the defendant's guilt. A SoP in operation in the middle ages in Roman law tradition countries required either two reliable witnesses or a confession in order to justify a conviction.[27] This contextual element has an interesting effect on the truth value of the declarations of certain factual

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[25] LARRY LAUDAN, *supra* note 16 at 79-81.

[26] Laudan holds that these alleged standards are not real standards due to the fact that they both make legal proof of guilt parasitic on the prior existence of the trier of fact's firm belief about the defendant's guilt. The author says that in other domains such as mathematics or epistemology, "such a proof policy would be a laughingstock. One ought not to say to any trier of fact, 'You have a proof of A provided you are firmly convinced of A'… To the contrary, we say, 'You have no entitlement to be strongly convinced of A unless and until you have a proof of A', adding for good measure that, 'your firm convictions about A count for nothing absent an acceptable proof of A'. And then we tell them what a proof of A would look like. That is what is to have a standard of proof. A proper SoP does not depend on one's subjective confidence in a hypothesis; on the contrary, the standard tells us whether our subjective confidence is justified… Outside Law, rational confidence in a conjecture follows on its proof, it does not precede it. Inside the Law, such confidence precedes, certifies, and even constitutes the 'proof'". LARRY LAUDAN, *supra* note 16, at 80. Ferrer can be said to come to this same conclusion too, but by taking a different but related route. As we said somewhere above, he analyses the result of the probatory activity in terms of the propositional attitudes the trier of fact can be said to assume. He strongly criticizes the position for which the relevant propositional attitude is one of belief. That is, the position which states that "it is proven that p" amounts to the judge's firmly belief in p. He defends the thesis according to which the adequate propositional attitude is that of acceptance of the proposition as if it were true. See JORDI FERRER, *supra* note 13 at 293-314.

[27] This is no longer the case. Or, is it?

propositions as proven. Factual propositions may be either true or false, but when it comes to the proof of those propositions expressed in statements of the form "p (the relevant factual proposition) is proven", the former may be true and, at the same time, false. It is perfectly possible, at least in the common law tradition, that the same factual proposition, say "Simpson killed his wife" had not met the requirements of the criminal SoP, but having done so in other domain of the Law, such as the Law of torts. So, we have "p ("Simpson killed his wife") is proven" as false for the purposes of convicting Simpson, but for the purposes of making him liable for damages, as true.

The severity of the conditions under which it is valid to declare certain factual propositions as proven may also vary across different areas of the law. That is to say that the characteristics of the inferential link between the evidence or the premises, to the sought conclusion, in terms of it being stronger or weaker, may be different depending on the area of law in which we locate ourselves. This amounts to say, regarding our previous example, that the criminal SoP requires a more powerful inferential link connecting the premises to the conclusion. That's why it is relatively easier to prove the same factual proposition in another legal context provided that the inferential link requirement there is less demanding. How demanding we want our SoP to be; how robust a proof we want there to be in order to take practical decisions such as convicting or acquitting the defendant based on it, are questions related to a society's considerations of the costs that errors of the kind of a false inculpatory finding and a false exculpatory finding, may produce. Throughout history, different societies have taken false inculpatory findings to be more serious errors than false exculpatory findings, and thus a whole body of doctrine, concepts, and precepts have been developed so as to make sure that whenever errors do occur they be false exculpatory findings in the vast majority of cases. This doctrine, of which the SoP is the main element, has been referred to by Laudan as the "doctrine of error distribution". The systematic analysis of the intertwined concepts of this doctrine (the SoP, the benefit of the doubt, the presumption of innocence and the burden of proof) is legal epistemology's soft core.[28]

Above I said that declarations of the sort "p (the relevant factual proposition, in our example, "John hit Julius' head with a tennis racket causing his death") is proven" are necessarily implied by true propositions predicating the defendant's probatory guilt uttered by the judge or jury, in our example, by the proposition "John is guilty (p) of murder". Now, we can add to this that the truth of those declarations is a matter of the relevant SoP being satisfied or not. I refer to propositions stating that the appropriate SoP has been satisfied or not as "soft epistemic propositions of law" (SEPL).

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[28] See LARRY LAUDAN, *supra* note 16, at chapters two and three.

IV. Conclusion: A Test for the Admission of Truth-Conditions

Truth and meaning, at least in the modernist tradition, are closely related.[29] Someone can be said to know the meaning of a proposition to the extent to which he is able to give an account of what it would take for that proposition to state a truth. As long as she can specify the truth-condition(s) for the proposition in question, she may be regarded as knowing what that proposition means. Determining the truth value of that proposition is a matter of whether its truth-conditions are satisfied or not: p (the proposition in question) will be true if and only if its truth-conditions are met, and false otherwise. In determining the truth of "John is guilty (m) of murder" the trier of fact's declaration that the factual proposition in question has been proven is irrelevant. Likewise, the determination of the truth of "John is guilty (p) of murder" when uttered by a judge or jury is unaffected by the relevant factual proposition's correspondence to what actually happened.

It is perfectly plausible that the soft epistemic proposition of law (SEPL) is false and the proposition predicating John's material guilt is true. If someone had claimed that the above SEPL figured within the truth-conditions of "John is guilty (m) of murder" would be proven wrong by this case in which even when the supposed truth-condition does not obtain (even when the proposition is false), the proposition in question ended up being true. Thus, he would have to renounce to his claim or be held responsible for adhering to an incorrect account of the meaning of "John is guilty (m) of murder" if he did not.

If proposition describing John's conduct ("John hit Julius on the head with a tennis racket causing his death") is false and the proposition predicating John's probatory guilt is true is also perfectly plausible. In this case, as in the former, if someone had claimed that the previous factual proposition figured within the set of truth-conditions of "John is guilty (p) of murder", as I said Moore had, would be proven wrong by this case in which

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[29] When giving an account of the philosophy of language according to the modernist tradition, Patterson says: "Speaking broadly… philosophy of language in the modernist tradition takes its basic task to be disclosure of the relationship between the word and the world. In the modernist tradition the principal function of language is representational: it depicts the way things are. States of affairs which exist independently of mind, can be portrayed or represented accurately in speech or thought to the degree their depiction in expression correctly or accurately reflects these states of affairs. In modernist terms the question 'What does this sentence mean?' may be translated as 'What state of affairs does the asserted proposition purport to represent (depict)?'... On a modernist representationalist account of language, any given use of language is successful-that is, states a truth- if and only if the utterance accurately describes the facts". See DENIS PATTERSON, *supra* note 7 at 163-167.

even when the proposed truth-condition does not obtain (even when the proposition describing John's conduct turn out to be false), the proposition in question ended up being true.

However, after establishing which factors do not have a bearing on the truth, the question is: On what does the truth of "John is guilty (m) of murder" and "John is guilty (p) of murder" depend? As also mentioned above, the first depends on its correspondence to what actually happened, and it is therefore accurate to claim that the factual proposition "John hit Julius on the head with a tennis racket causing his death" figures within its set of truth-conditions. In the case of the second, it depends, among other things, on the appropriate SoP being satisfied, and thus it is correct to say that soft epistemic propositions of law (SEPLs) figure within its set of truth-conditions.

Therefore, there are reasons why Moore's SLP is correctly said to predicate the property of being guilty in its second sense, that is, the property of being probatory guilt. Moore says that his main concern is with "the kinds of propositions whose truth or falsity is determinative of the outcome of disputed legal cases". In other words, he is interested in the factors on which convictions and acquittals (in the case of Criminal Law) depend. What determines if a disputed legal case ends up, for instance, convicting the defendant, has everything to do with the fact that the appropriate SoP has been satisfied or not in the particular case, which, as we have seen, is a crucial feature of the meaning of "John is guilty (p) of murder".

NOTE

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POLICE EFFICIENCY AND MANAGEMENT: CITIZEN CONFIDENCE AND SATISFACTION*

Gustavo FONDEVILA**

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I. INTRODUCTION

One of the main issues concerning public security in Mexico is people's lack of confidence in the criminal justice system. Citizen confidence is directly related to police performance and is a fundamental factor in understanding people's perception of public security and police work. However, it has often been overlooked by police institutions when designing reform strategies.

Crime fighting is typically perceived to be an exclusively technical task where shortcomings can be resolved by spending additional funds and increasing police capacity. According to this approach, people's opinion and participation are not taken into account since citizens only play the role of

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* All the information presented in this paper comes from the *Programa de Estudios de Seguridad Pública* [PESED — Program of Studies on Public Security] of the *Centro de Investigación y Docencia Económicas* [CIDE, Economics Teaching and Research Center], in collaboration with the *Asociación Mexicana para la Seguridad Ciudadana* [Mexican Association for Civic Security] Available at: http://www.seguridadpublicacide.org.mx.

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victims.[1] For several years, this point of view allowed the police to deal with crime as their own exclusive problem, using only police criteria. However, in recent years, political pressure has been exerted to have this rigid model of public security reformed and relaxed.[2] Two main factors explain this phenomenon: exponential growth in crime rates and a tenfold increase in the public security budget as a percentage of GDP.[3]

These factors have generated slow but steady interaction with societal organizations and citizen groups. Nevertheless, no systematic studies on citizens' perception of and confidence in the police have been carried out. Police institutions apparently have not fully understood the importance citizen confidence plays in their daily activities. Furthermore, they still believe that problems like insecurity, crime and criminality are not associated with citizen confidence.

This note focuses on analyzing both citizens' fluctuating rates of confidence and satisfaction with police services and the levels of perception of insecurity in Mexico. I will also explore possible explanations for the levels of trust and satisfaction insofar as they are directly linked to problems in police management, and not only to the presence or absence of crime as these statistics are usually interpreted by the Mexican police.

II. Sources

a) Graphs 1 to 7 present citizen confidence and satisfaction indicators of different aspects of the criminal justice system, including the performance of public prosecutors (MPs in Spanish) and the police, as well as emergency call response. I also present information on the time it takes to report a crime, taken from the *Metropolitan Survey of Victimization and Police Efficiency*.[4] This poll was taken in January and July 2005 and 2006 in the State of Mexico and Mexico City. The door-to-door survey was applied to 1,750 people (750 from Mexico City and 1,000

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[1] This idea has been also accepted by some politicians, mostly for those who showed some reluctance about this issue during the *priista* regime. Marcelo Sain, La seguridad pública democrática en América Latina. Buenos Aires: Reporte para el Programa de las Naciones Unidas para el Desarrollo (Programa de las Naciones Unidas para el Desarrollo 2006).

[2] Arturo Alvarado, *La inseguridad pública y la gobernabilidad en México. Diagnóstico y propuesta de reforma*, México: Reporte para el Banco Mundial, November 2005 (unpublished manuscript on file with author).

[3] Marcelo Bergman, Seguridad pública y Estado en México (Fontamara, 2007).

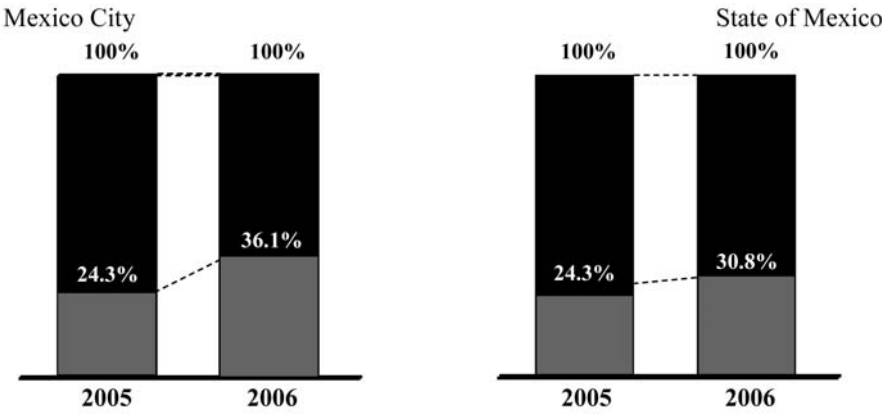
[4] Marcelo Bergman *et al.*, Encuesta Metropolitana de Victimización y Eficacia Institucional (2006-2007) (CIDE, 2008), available at: http://www.seguridadpublicacide.org.mx/CIDE/Portal/cfpages/category.cfm?nodeId= 27&showpage=category&open=8.

from the State of Mexico) and included information on age, gender, sociodemographic profiles and attitudes and perceptions on victimization, exposure to crime and the performance of the authorities. The overall sampling error is ± 3.

b) The next two graphs, 8 and 9, show information on recovered stolen goods, arrest rates and police capacity for criminal investigation and processing. Statistics for these graphs were taken from official records, specifically from a report entitled *Performance Indicators on Police Response to Emergency Calls and Public Prosecutor Activities*.[5]

III. Confidence and Satisfaction with the Police and Public Prosecutors[6]

Graph 1. Percentage of Respondents Expressing Confidence in Public Prosecutors, 2005-2006



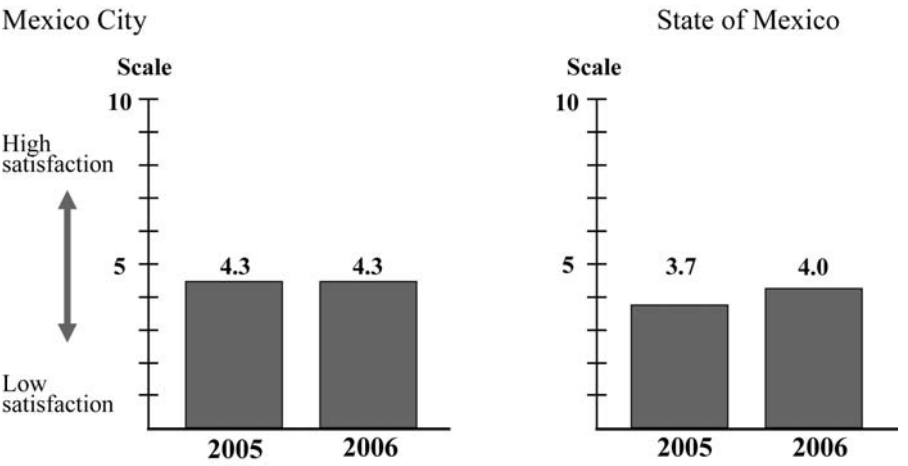
Graph 1 shows citizen's low level of confidence in public prosecutors. This has a direct impact on different issues, such as the number of crimes reported, higher or lower crime rates and peoples' perception of insecurity. Official criminal investigations are difficult to carry out when people do not trust the authorities; and without this confidence police work is limited to

[5] Índices de desempeño del sistema de seguridad pública y de justicia penal (Mexico: Seguridad Ciudadana-CIDE, 2008), available at: http://www.seguridadpublicacide.org.mx/CIDE/Portal/Docs/pdfs/INDICADORES_MP_2007.pdf.

[6] The information in this section is taken from: Índices ciudadanos. Confianza y calidad del servicio percibida por los ciudadanos sobre policías, ministerios públicos y jueces del DF y Estado de México (CIDE-Seguridad Ciudadana, 2007), available at: http://www.seguridadpublicacide.org.mx/CIDE/Portal/cfpages/category.cfm?nodeId=54&showpage=category.

processing the criminals who have been caught red-handed**.** In fact, official statistics show that 93% of prison inmates were arrested at the scene of the crime.[7] Finally, citizen distrust is directly linked to a low level of satisfaction with police in general. Citizens' failure to report crimes also affect police efficiency since crime reports help identify crime patterns.

Graph 2. Citizen Satisfaction Index with the Police, 2005-2006



The above survey covers four basic aspects of police services: protection, police presence, estimated response time and treatment. The following graph reveals that response time and treatment presented the lowest levels in citizens' perception of the quality of police service.

Graph 3. Breakdown of Citizen Satisfaction Index with the Police, 2005-2006

MEXICO CITY

Index		*Indicator*	*2005*	*2006*
2005	2006	Satisfaction with police protection	3.7	3.8
4.3	4.3	Satisfaction with police presence	4.3	4.3
		Satisfaction with response time	3.7	3.7
		Satisfaction with received treatment	5.5	5.4

[7] ÍNDICES DE DESEMPEÑO DEL SISTEMA DE SEGURIDAD PÚBLICA Y DE JUSTICIA PENAL, *supra* note 5.

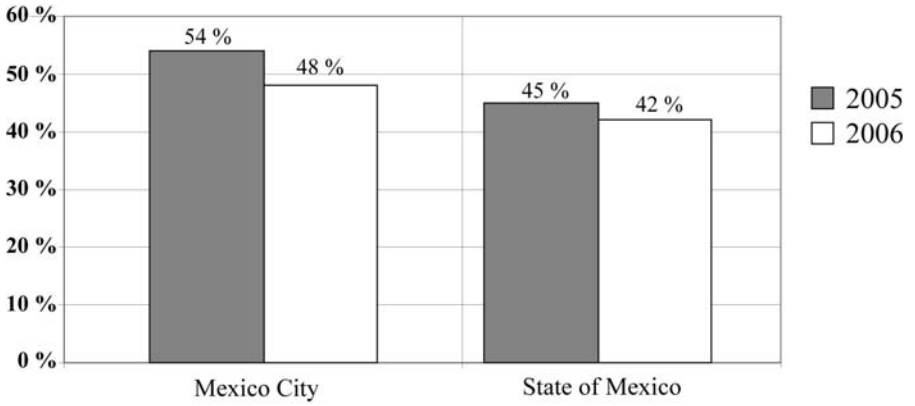
STATE OF MEXICO

Index

2005	2006
3.7	4.0

Indicator	*2005*	*2006*
Satisfaction with police protection	3.3	3.8
Satisfaction with police presence	3.6	3.9
Satisfaction with response time	3.4	3.6
Satisfaction with received treatment	4.8	4.9

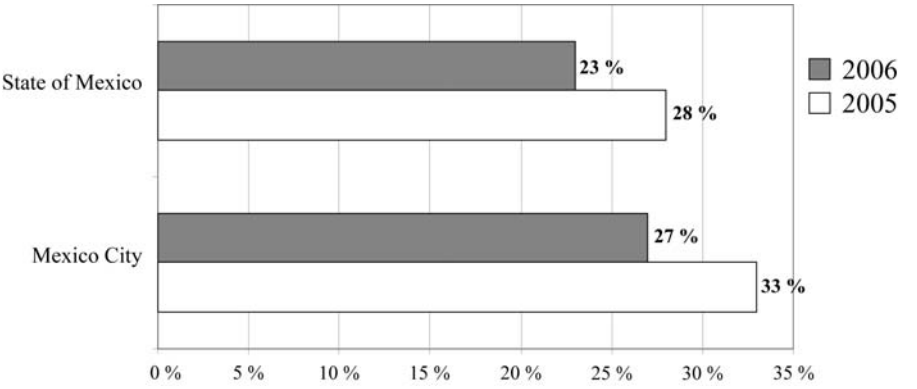
Graph 4. Unattended Emergency Calls



In Mexico City and the State of Mexico, almost half of the emergency calls go unattended, and do not result in any police action. Emergency calls are significant because they have an important influence on two fundamental issues: citizens' satisfaction and confidence in the police. Logically, the perception of insecurity grows when the police do not address citizens' emergencies.

If a citizen needs help and the police do not respond, he loses confidence in that institution. The government cannot demand citizen trust in an institution that disregards emergencies.

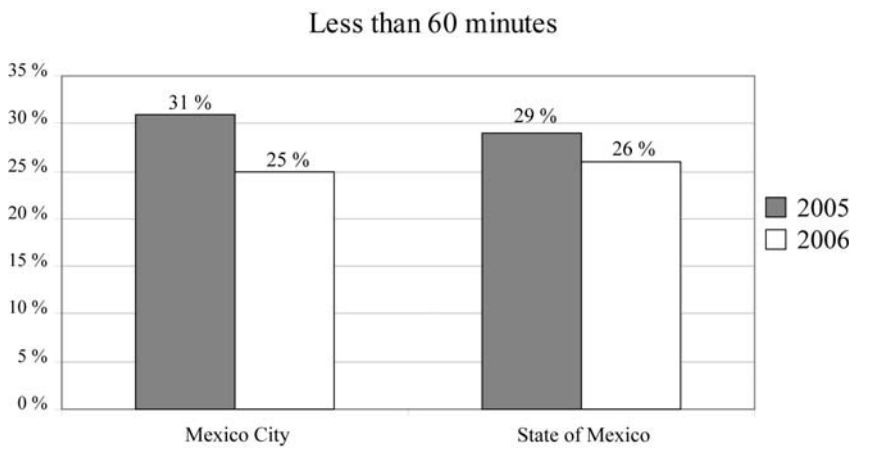
Graph 5. Emergency Calls responded to in less than Thirty Minutes



As a form of direct communication, emergency calls are a fundamental aspect of police-citizen relations. Overall, statistics on police response to emergency calls are not very encouraging. The above graph shows that in Mexico City only 33 of 100 emergency calls are responded to in less than 30 minutes, while the average in the State of Mexico is 5% lower. This means that only three out of every 10 emergencies are responded to under 30 minutes.

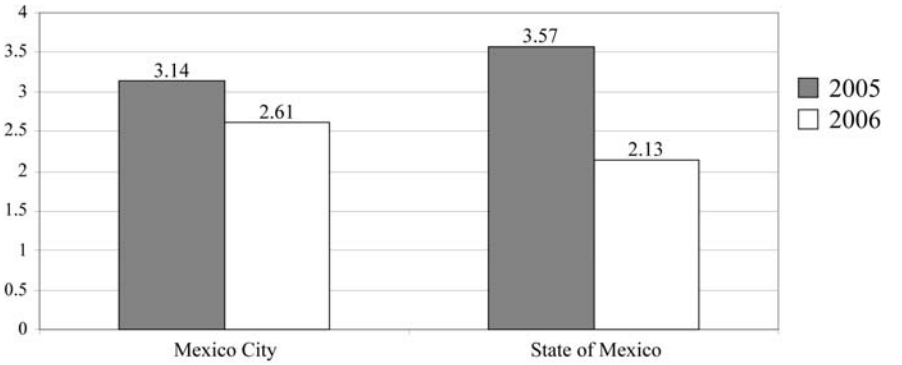
While this scenario is disconcerting, statistics on other aspects of public security do not show much better results. When a citizen is a victim of a crime and decides to report it, filing a report with a public prosecutor also takes a lot of time: only 2 out of 10 citizens are able to process their crime in under 60 minutes.

Graph 6. Time Needed to Report a Crime



Although efforts have been made to improve this situation, statistics reveal that the average time for reporting crimes exceeds 120 minutes in Mexico City.[8] This clearly discourages citizen participation and it also hinders police measures to reduce crime because public prosecutors do not have complete information on the crime.

Graph 7. Average Time Required to Report a Crime (in hours)



Apparently only citizens who feel they have been victims of a serious crime or need an official record (*i.e.* for insurance purposes) are willing to take the time to report the crime. Again, this phenomenon is directly related to citizens' lack of participation and negative opinion of the public security system, but on the other hand, public prosecutors cannot do their work if crimes are not reported on time.[9]

Citizens' perception (confidence and satisfaction) is largely based on certain aspects of police management, mainly in terms of responding to emergency calls and receiving and processing citizens' complaints. However, certain objective aspects of police efficiency also contribute to this perception. For instance, criminal arrests (graph 8), an element that plays a critical role in gauging citizens' perception of both security and levels of impunity, are crucial.

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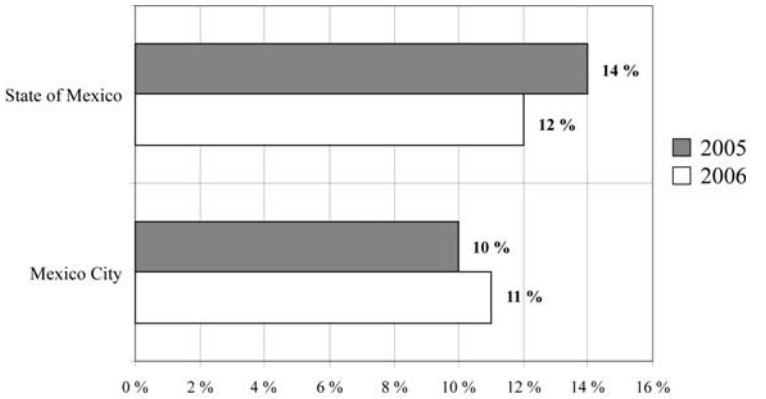
[8] ÍNDICES CIUDADANOS. CONFIANZA Y CALIDAD DEL SERVICIO PERCIBIDA POR LOS CIUDADANOS SOBRE POLICÍAS, MINISTERIOS PÚBLICOS Y JUECES DEL DF Y ESTADO DE MÉXICO, *supra* note 6.

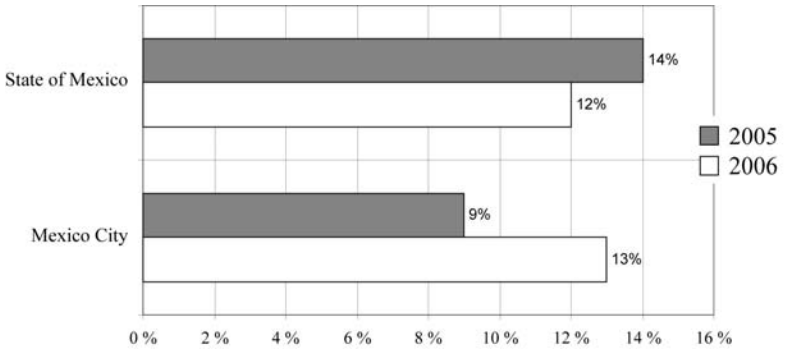
[9] This hypothesis follows the acknowledged model of proactive mobilization developed by Donald Black. DONALD BLACK, THE MOBILIZATION OF LAW, THE INTERNATIONAL LIBRARY ESSAYS IN LAW AND LEGAL THEORY: LAW AND SOCIETY (Roger Cotterrell ed., Darmouth Publishing Company, 1995).

Graph 8. Percentage of Suspects Detained



The data on stolen goods is very similar to the information on arrests (graph 9). The index of recovery of stolen goods is very low, around 12-13%.

Graph 9. Percentage of Stolen Goods Recovered



This data demonstrate that police efficiency is far from ideal. This finding has an immediate impact on two significant elements: impunity and perceptions of insecurity. Two distinct factors discourage citizen collaboration with the penal system: (1) citizens need a lot of time to report a crime; and (2) even if the crime is reported no one can guarantee a conviction or that the goods will be recovered. Practically 90% of all crimes go unpunished.[10]

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[10] ÍNDICES DE DESEMPEÑO DEL SISTEMA DE SEGURIDAD PÚBLICA Y DE JUSTICIA PENAL, *supra* note 5.

IV. Concluding Remarks

As seen above, there are two main issues surrounding citizens' low satisfaction and confidence in the police. One is linked to police *efficiency* in fighting crime (the recovery of stolen goods and criminal arrests). The other is related to police *management*. Intuitively, there is an obvious connection between low satisfaction, lack of confidence and inefficiency, but out of the indicators presented (satisfaction with the police, administrative management, police treatment and response time), only one was directly linked to crime fighting efficiency. The other three have more to do with police management.

Beyond the problem of crime fighting strategies, there is also a serious problem with the attention given to police service "users", or victims of crimes. Regardless of whether poll respondents know the statistics, there is a clear problem of management. Although other issues might also have an effect, the indicators shown have a clear influence on citizens' confidence and satisfaction with the police. These indicators also have an impact on the general perception of insecurity.

In Mexico, citizens' opinions of public security have traditionally been ignored since they are not "objective". As a result, they are not examined or included in the fight against crime. Citizens can only play the role of victims or reluctant users of inadequate police services. In short, public security is exclusively handled by those with the know-how. Throughout the *priista*[11] regime and even now, the established public security procedure has always been treated as exclusively a police issue. In other words, insecurity is a problem that always requires more attention, more personnel, more technology, more skills, more infrastructure, more communication, and so on. Though it may be realistic and productive in the everyday fight against crime, this approach has not produced the desired results.

Confidence is a crucial factor in social development. In Mexico, one of the most important obstacles for developing social norms and networks which allow collective action is the absence of trust.[12] Moreover, one of the most important causes of this lack of confidence is precisely the high level of public insecurity.[13]

Trust is an important issue in four areas concerning public security:[14]

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11 Editor's Note: *Priista* refers to the Institutional Revolutionary Party (PRI).

12 Programa de las Naciones Unidas para el Desarrollo (PNUD), "Encuesta de Capital Social en el Medio Urbano 2006" (Programa de las Naciones Unidas para el Desarrollo), available at: http://www.sedesol.gob.mx/index/index.php?sec=10060202&len=1 (last visited: October 23, 2007).

13 *Id.*

14 Performance Indexes of Public Security and Penal Justice Administration System, 13 (México, CIDE-Seguridad Ciudadana, 2007), available at: http://

— Criminal Intelligence and Investigation. Police investigations require a constant flow of reliable, quality information, which is often provided by citizens or requires the cooperation of potential witnesses. Overall, the main source of information for police and prosecutors comes from citizens.
— Crime Rates. This aspect also involves gathering information to obtain reliable statistics. Low levels of trust and satisfaction lead to a lack of citizen participation, making it impossible to know the actual number of crimes.
— Impunity. If prosecutors and the police have no information on the crimes committed, they have no chance to prosecute those crimes.
— Perceptions of Insecurity. A lack of trust influences perceptions of insecurity because people feel that the police do not protect them.

In recent years, the government has spent more money on public security and yet crime rates have not decreased. This traditional view of public security —as to be exclusively handled by the police and those with the expertise— has made it difficult to establish a more comprehensive one: that public security is a multidimensional —social, political, economic, etc.— issue that should be dealt with the same way as other public issues like health, education and others. This deep-rooted approach poses the risk of doing away with possible citizen participation in the fight against crime. It also contributes to increased public perception of insecurity, low confidence and lack of satisfaction with police activities, including one of its most important aspects, criminal investigation.

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www.seguridadpublicacide.org.mx/CIDE/Portal/cfpages/category.cfm?nodeId=106&showpage=category.

COMMENT

Mexican Law Review
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MEXICO'S ENVIRONMENTAL LAW IN THE GMO ERA

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Table of contents

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I. Overview

Mexico's environmental legislation is rooted in the Constitution of the United Mexican States of 1917.[1] Article 4 provides for the right of all persons to an adequate environment for their development.[2] Although general, this suggests a concern for the environment and for human health. In addition, article 27 of the Constitution regulates the ownership of lands and waters in Mexico while detailing the obligation of the Mexican government "to preserve or restore the ecological balance" of the land".[3] Article 73 empowers Congress to delimit the powers of the States and municipalities regarding environmental protection.[4]

At the federal level, several laws aim to preserve biological resources and regulate Living Modified Organisms (LMOs). One such law is the General Law of Ecological Equilibrium,[5] which establishes the basis for environmental protection in Mexico. This law allocates authority among states and the federation and attempts to coordinate the federal agencies that are responsible for protecting the environment.[6]

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[1] Constitución Política de los Estados Unidos Mexicanos [Const.], as amended on July 7th, 2008, Diario Oficial de la Federación [D.O.] 5 de febrero de 1917 (Mex.), available at: http://constitucion.presidencia.gob.mx/index.php?idseccion=210 (last visited: January 12, 2007).

[2] *Id.* at art. 4.

[3] *Id.* at art. 27.

[4] *Id.* at art. 73. For a comprehensive explanation of Mexican Law, see Stephen Zamora et al., Mexican Law (Oxford University Press, 2004).

[5] Ley General de Equilibrio Ecológico [L.G.E.E.] [General Law of Ecological Equilibrium], as amended February 23th, 2005, Diario Oficial de la Federación [D.O.] 28 de enero de 1988 (Mex.), Available at: http://www.cddhcu.gob.mx/leyinfo/pdf/148.pdf (last visited: January 10, 2007).

[6] *Id.* at arts. 4-14.

The General Law of Ecological Equilibrium also contains provisions with respect to EIA (Environmental Impact Assessment) to be undertaken prior to the disposal of hazardous waste, and prior to the import, export, and introduction of genetic material into the environment.[7] Additionally, subordinate legislation to the General Law of Ecological Equilibrium, the Regulations on Environmental Impact Assessment,[8] sets out federal guidelines and standards to evaluate and perform impact assessments of activities that could negatively alter ecological equilibrium.[9]

Also at the federal level, the Law on Plant Health[10] regulates the use of transgenic material and its introduction into the environment. It does this by requiring phytosanitary certification prior to their commercialization. Also, the Law on the Production, Certification and Commerce of Seeds[11] imposes permit requirement procedures for activities involving experimentation with transgenic crops and their introduction into the environment.[12]

Biotechnology and LMOs are regulated by means of the recent Biosafety Law on Genetically Modified Organisms (GMOs).[13] This law makes use of the broad term "GMO" to regulate both LMOs and GMOs,[14] as well as the introduction of LMOs into the environment upon meeting the criteria of a permit procedure.[15] It also contemplates GMO-free zones to protect native plants and for certification purposes required for the production of organic

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7 The General Law of Ecological Equilibrium refers to LMOs as "genetic material" or "living organisms resulting from biotechnology". *Id.* at 3 section (V).

8 Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en materia de Evaluación de Impacto Ambiental [R.L.G.E.E.P.A.M.E.I.A.] [The Federal Regulatory Law for Ecological Equilibrium in matters of Regulatory Impact Assessment] Diario Oficial de la Federación [D.O.] May 30, 2000. These regulations develop and expand on the Environmental Impact Assessment contained in the Law for Ecological Equilibrium and establishes a national framework for environmental protection.

9 *Id.* at art. 5.

10 Ley de Sanidad Vegetal [L.S.V.] [Law on Plant Health], Diario Oficial de la Federación [D.O.] Jan. 05, 1994, available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/117.pdf. (last visited: January 12, 2007).

11 Ley Federal de Producción, Certificación y Comercio de Semillas [L.P.C.C.S.] [Law on the Production, Certification and Commerce of Seeds], Diario Oficial de la Federación [D.O.] July 15, 1991, available at: http://www.sagarpa.gob.mx/mnormativo/pdf/leyes/L001.pdf#search=%22Ley%20de%20produccion%20y%20comercializacion%20de%20semillas%22 (last visited: January 12, 2007).

12 *Id.* at arts. 1-3.

13 Ley de Bioseguridad de Organismos Genéticamente Modificados [Biosafety Law on GMOs] Diario Oficial de la Federación [D.O.] March 18, 2005, available at: http://www.cddhcu.gob.mx/leyinfo/pdf/Ley_BOGM.pdf (last visited: January 10, 2007), at arts. 86-87.

14 *Id.* at art. 2.

15 The Secretariat of the Environment, the Secretariat of Agriculture or the Secretariat of Health may authorize the introduction of LMOs in their respective areas.

products.[16] Public participation is also contemplated in this law as a democratic tool for decision-making.[17]

Parallel to this federal legislation are the Official Mexican Standards (NOMs) created by the National Standardization Commission and the federal secretariats on issues within their competence.[18] One such NOM is the 1995 NOM-056-FITO.[19] This standard establishes phytosanitary requirements for transportation, import and experimental trials of genetically manipulated organisms in the country.[20] Mexican Federal States also have legislative power to enact environmental protection laws within their respective areas of jurisdiction and in accordance with the Mexican Constitution.[21]

This comment will focus on an analysis of Mexican environmental legislation that plays various roles in the conservation of biological diversity. It will take into account general commitments established at the international level in the United Nations Convention on Biological Diversity (CBD)[22] and the Cartagena Protocol on Biosafety (Cartagena Protocol).[23]

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16 Ley de Bioseguridad de Organismos Genéticamente Modificados [D.O.] March 18, 2005 at art. 86-87. The Biosafety Law on GMOs employs these terms indistinctly although they are different for some. The term LMO refers to organisms that have been modified by the use of biotechnology techniques and to those that are capable of replicating. Genetically Modified Organisms (GMOs), on the other hand, are not defined in the CBD or the Cartagena Protocol and portray dormant organisms that have been genetically modified by the use of biotechnology. The term GMO may be used to refer to LMOs when employed in Mexican legislation. See IUCN ENVIRONMENTAL LAW CENTRE, AN EXPLANATORY GUIDE TO THE CARTAGENA PROTOCOL ON BIOSAFETY, available at: http://pdf.wri.org/biosafety_guide.pdf, at 45, 56-59 (accessed: January 10, 2007).

17 *Id.* at art. 2 section XIV.

18 NOMs are mandatory standards enforced by one or more of the Mexican Secretariats, stating the characteristics and requirements products must meet for their safety and procedures that must be followed to protect people and the environment from harm. One example of an Official Mexican Standard is NOM-056-FITO-1995 developed by the Secretariat of Agriculture and Rural Development which establishes guidelines for the environmental control and protection. According to this standard, the proponent is obliged to request phytosanitary permission to introduce LMOs into the environment for research purposes. In the petition, the proponent must include characteristics of the organisms, place of introduction, route of transportation, etc.

19 SAGARPA, NOM-056-FITO-1995, available at: http://www.cibiogem.gob.mx/normatividad/normatividad_SAGARPA/NOM-056-FITO-1995.html (last visited: January 12, 2007).

20 *Id.*

21 Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988 at art. 8.

22 United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, entered into force on December 29, 1993. Mexico ratified the CBD on March 11, 1993, available at: http://www.cbd.int/doc/legal/cbd-un-en.pdf (last visited: June 4, 2007) [Hereinafter Convention on Biological Diversity].

23 Available at: http://www.biodiv.org/biosafe/BIOSAFETY-PROTOCOL.htm (Mex-

The rest of the comment is organized into three sections. Section II discusses Mexico's environmental legislation and section III gives a conclusion that draws together the weaknesses and shortfalls of the legal regime in light of the purpose of biodiversity conservation which it is otherwise designated to ensure.

II. Mexican Legislation

Mexico's environmental legislation has been evolving since the beginning of the 1970s. Early legislation was specifically created to deal with environmental problems and the effects of environmental degradation on human health. This was the case of the 1971 Law to Prevent and Control Environmental Pollution.[24] It is also important to note that at that time, several legislative reforms took place that gradually empowered the government to take appropriate actions against environmental pollution.[25] One such measure was the creation of the 1982 Federal Law of Environmental Protection, which exhibited an enhanced commitment to preserve the environment in contrast to previous legislation.[26]

Constitutional reforms in 1971 and 1987 granted the Mexican Congress authority to legislate on environmental matters.[27] Consequently, in 1988, the General Law of Ecological Equilibrium and Environmental Protection was created.[28] It offered a more comprehensive approach to environmental conservation. Unlike previous legislation, this law went beyond preserving the environment in its consideration of the importance of biological resources.[29]

Continuous legal reforms and specialized legislation continue to shape Mexico's environmental law regime. One such reform is the 2005 Biosafety Law on GMOs,[30] which constitutes the most advanced legislation that addresses the threat of LMOs to biological resources. A description and analysis of these laws follows.

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ico ratified the Cartagena Protocol on September 11, 2003) (last visited: June 4, 2007) [Hereinafter Cartagena Protocol].

24 *Id.*

25 José M. Vargas, "The Development of Mexico's Environmental Legislation", Mexican National Institute of Ecology, available at: http://www.ine.gob.mx/ueajei/publicaciones/libros/395/vargas.html (last visited: January 12, 2007).

26 *Id.*

27 Jesús Quintana, Derecho ambiental mexicano: lineamientos generales 44 (Porrúa, 2002).

28 Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988.

29 Quintana, *supra* note 27.

30 Ley de Bioseguridad de Organismos Genéticamente Modificados [D.O.] March 18, 2005.

1. *The Mexican Constitution*

The Mexican Constitution contains general provisions that show regard for the environment and natural resources. Two such provisions are found in articles 27 and 73.[31] These articles lay the environmental framework upon which Mexico's environmental legislation is built.[32] Article 27 regarding natural resources states:

> The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth… and to prevent the destruction of natural resources.[33]

This provision is the result of extensive reforms that occurred in 1971 and 1987 and enhanced the authority of the federal government in the task of preserving the environment.[34] Article 27 emphasizes the right of the State to regulate the utilization of natural resources and imposes on it the specific obligation to preserve them.[35] On the basis of this provision, the Mexican government can extensively regulate activities that potentially impact the environment by means of specialized federal laws, national standards or norms on the use of natural resources.

Article 73 also contains several provisions that impact the regulation of natural resources. In general, it states that the Mexican Congress has: "The power to make laws that establish agreement of the Federal Government and of the governments of the States and municipalities, in the areas of their respective jurisdictions, in matters of protection of the environment and preservation and restoration of ecological balance".[36]

This provision goes beyond regulating the use of natural resources. It empowers Congress to define competencies regarding environmental protection, not only at the federal, but also at the State and municipal levels. The enhanced authority vested in Congress to delineate environmental re-

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31 Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 27, 73.

32 CEC, LAW AND ENVIRONMENTAL POLICY IN NORTH AMERICA 160 (Commission for Environmental Cooperation, 1998), available at: http://www.cec.org/files/pdf/LAW POLICY/vol-2s_ES.pdf (last visited: January 12, 2007).

33 Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 27.

34 Micheli, Jordy, *Política ambiental en México y su dimensión regional*, XIV REGIÓN Y SOCIEDAD 23, 137-139 (2002).

35 Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at 227.

36 *Id.* at art. 73 section XIX(G).

sponsibilities at the constitutional level and the inclusion of Mexico's commitment to preserve the environment in the Constitution has the potential not only to unify and strengthen environmental preservation in Mexico, but also to coordinate legislation and institutions for this purpose across the various levels of government.

In addition to articles 27 and 73, there are general provisions in the Constitution regarding the environment. These are contained in articles 4 and 25.[37] Article 4 states that all "individuals have a right to an adequate natural environment for their development and welfare".[38] This provision considers the environment an important factor in the development of individuals and acknowledges the potential effects of a deteriorated environment on human beings. It also shows, at least on paper, concern for the preservation of the environment.[39] Article 25 is concerned with regulating economic activities across the country.[40] This article states that resources utilized in production and "natural resources shall be preserved",[41] implying that economic activities should take into account resources and environment preservation.[42]

General provisions such as articles 4 and 25 tangentially address environmental protection and resources preservation. However, they are not implemented by federal legislation nor can they be directly invoked in court.[43] Consequently, only articles 27 and 73 can be relied upon to pursue the goal of preserving the environment. Although biodiversity is not specifically mentioned in the Constitution, the relevant articles discussed imply that said articles consider the conservation of biodiversity necessary for the welfare and development of Mexico and its citizens.[44]

We now turn to an analysis of Mexico's federal laws and national environmental standards in terms of how far their provisions could preserve Mexico's biological resources and regulate the introduction and spread of LMOs.

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[37] *Id* at arts. 4, 25.

[38] *Id.* at art. 4.

[39] In 2000 a legislative initiative by Mexico's Green Party attempted to reform article 4 of the Mexican Constitution of 1917 to force polluters to compensate for environmental harm. Legislative Initiative, Green Party (7 November 2000), available at: http://www.diputados.gob.mx/sia/coord/pdf/refconst _lviii/archivos_doc/009.doc (last visited: January 12, 2007).

[40] *Id.* at art. 25.

[41] *Id.*

[42] *Id.*

[43] MARÍA DEL CARMEN CARMONA, DERECHOS RELACIONADOS CON EL MEDIO AMBIENTE 10-12 (UNAM, 2000), available at: http://www.bibliojuridica.org/libros/1/66/tc.pdf (last visited: January 12, 2007).

[44] Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 4.

2. *General Law of Ecological Equilibrium and Environmental Protection*

The General Law of Ecological Equilibrium[45] is the backbone of Mexico's environmental law. It is the result of constitutional reforms introduced in 1987 to modernize its predecessor, the Federal Law of Environmental Protection of 1982.[46] The objectives of the General Law of Ecological Equilibrium with respect to conserving biodiversity are, as stated in article 1:

> II. To define environmental policy and guarantee its implementation;
> III. The preservation, restoration and the betterment of the environment;
> IV. The preservation and protection of biological diversity and the creation and management of a system of protected areas to preserve biological diversity and to establish a system of protected areas.[47]

The General Law of Ecological Equilibrium offers the opportunity for a comprehensive approach to dealing with Mexico's environmental problems. This is because it is a framework upon which specialized federal laws and regulations must be based.[48] It sets the basis for regulating various areas of environment-impacting activity, such as nuclear energy, protected areas, biodiversity, atmospheric contamination and hazardous waste.[49]

The General Law of Ecological Equilibrium follows a sustainable development approach to preserve the environment.[50] It reiterates the constitutional commitment to guarantee the right of individuals to an adequate environment and it defines Mexico's environmental policy and instruments for its implementation.[51] Furthermore, this law provides coordination mechanisms for national and state environmental institutions and legislation.[52] It also makes provisions to facilitate the formulation and execution of actions to preserve biological diversity and the use of "genetic material" countrywide.[53]

The General Law of Ecological Equilibrium considers the preservation of biodiversity and the use of genetic material a public issue.[54] It considers

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45 Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988.

46 QUINTANA, *supra* note 27 at 54.

47 Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988 at art. 1.

48 *Id.*

49 George R. González, *Overview of Environmental Laws of Mexico*, (2000) 9 CURRENTS INT'L TRADE L.J. 49, at 50.

50 *Id.* at 56.

51 Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988 at art. 1

52 *Id.*

53 *Id.* at art. 2 (III).

54 *Id.* at art. 2.

"genetic material" similar to Living Modified Organisms. It defines genetic material as "all material of vegetal, animal or microbial origin or of other type that contains functional units of heredity".[55] In addition, it defines biological resources as composed of genetic resources, organisms, populations of biotic components and ecosystems.[56] The General Law of Ecological Equilibrium's definition, although different from that one employed in the CBD, encompasses several components also covered under the Convention.[57]

Overall, the General Law of Ecological Equilibrium has been considered a law that provides for an integrated approach to deal with Mexico's environmental problems. Three outstanding elements comprise this law: environmental and risk assessment requirements; the establishment of protected and restoration zones; and, enforcement mechanisms to achieve its objectives.

A. *Environmental Impact and Risk Assessments*

Environmental impact assessment was consolidated in Mexico with the creation of the Secretariat of the Environment in 1994. This environmental institution proposed extensive reforms to the General Law of Ecological Equilibrium in 1996, aiming to improve the EIA procedure.[58] As a result, EIA provisions clearly establish which activities require said assessment. The provision also allows for public participation in the process.[59] Furthermore, the Federal Regulations on EIA were enacted in June 2000 to assist in the implementation of the General Law of Ecological Equilibrium's provisions on EIA.[60]

Apart from EIA, the General Law of Ecological Equilibrium also provides for the use of risk assessment in an effort to preserve biological resources. These two procedures are used jointly when activities are likely to dramatically alter ecological equilibrium.[61] The activities that require an impact and risk assessment include those involving transgenic material, such as the introduction of LMOs into the environment.[62] It is important to note that neither the General Law of Ecological Equilibrium nor the Fede-

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55 *Id.* at art. 3 (XXII).

56 *Id.* at art. 3 (XXI-XXVII).

57 Convention on Biological Diversity at art. 2.

58 INE, ENVIRONMENTAL IMPACT ASSESSMENT: ACHIEVEMENTS AND CHALLENGES FOR SUSTAINABLE DEVELOPMENT 1995-2000, National Institute of Ecology, General Directorate of Law and Environmental Impact Assessment, at 50-53.

59 *Id.* at 53-54.

60 *Id.*

61 Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988 at art. 28.

62 INE, *supra* note 58 at 82.

ral Regulations provide for the use of Strategic Environmental Assessment in environmental policies.[63]

The General Law of Ecological Equilibrium provides that the following activities require an environmental impact assessment: hydraulic and projects in the oil industry; mining; treatment of hazardous waste or radioactive material; activities in wild forests; changes in the use of land and industrial parks; activities involving coastal ecosystems; activities in protected areas, and activities that can have an impact on marine ecosystems.[64]

As to activities covered under national standards and regulations, such as discharges or emissions or when such activities are performed in authorized industrial parks, the General Law of Ecological Equilibrium only requires a preventive report.[65] Preventive reports include the name of the project, a particular application provided by the Secretariat of the Environment and reference to the Official Mexican Standards applicable to the activity. Based on this report, the SEMARNAT can also decide within twenty days of receiving such report to request an impact assessment if it considers that the activity may harm the environment.[66]

The EIA procedure is initiated by a proponent's request before the Secretariat of the Environment. The request must contain: first of all, an environmental impact statement (EIS), which contains detailed information on the project or activity that may alter or impact the environment, such as the construction of gas plants, oil plants, etc. The EIS must include information on activities that will be performed and the development plans of the project. Second, a legal analysis of the project's compliance with national legislation and regulations must be provided.[67] Third, the economic development path of the project and its potential environmental impact on the local and regional area must be set out. Fourth, identification, description and evaluation of the direct and indirect environmental impacts of the proposed activity must be provided in terms of mitigating and preventive measures.[68] Fifth, an evaluation of alternative locations, and sixth, an analysis of the

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63 Although Strategic Environmental Assessment is not expressly mentioned in the Federal Regulations on Environmental Impact Assessment, of the General Law of Ecological Equilibrium, the Organization for Economic Co-operation and Development (OECD) points out that efforts to use this important planning tool have been taking place in the tourism sector since 2006. See Organization for Economic Co-operation and Development, *Applying Strategic Environmental Assessment: Good Practice Guidance for Development Co-operation*, Guideline and Reference Series, 2006, available at: http://www.oecd.org, data oecd/4/21/37353858.pdf (last visited: January 12, 2007).

64 Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988 at art. 28.

65 *Id*. at art. 31.

66 *Id.*

67 *Id.*

68 *Id.*

methodology employed in the impact assessment must be detailed in the EIS.[69]

Other than the EIA requirements, proponents must also include a risk assessment of the proposed activity where potential harm to the environment is envisaged, such as those projects or activities involving genetic material and LMOs. The risk assessment must be based on the technical information on the environment and on the activity contained in the impact statement. The risk assessment report must contain: first, a detailed analysis of the environmental risks of the project; second, possible scenarios and preventive measures regarding the risks of the proposed project; third, a delimitation of buffer protection zones in the surrounding areas; and, fourth, safety measures to protect from environmental harm.[70]

Once the Secretariat of the Environment receives an application from the proponent, it will evaluate the impact and risk assessment documents within sixty days, after which it will decide if it will allow the activity to proceed.[71] The Secretariat of the Environment also will conduct the necessary tests or request additional information if required for the approval of the project.[72] It is important to note that the General Law of Ecological Equilibrium makes use of general forms for presenting EIAs for the activities covered under article 28. It also employs NOMs to regulate the oil, electric and communications industries in terms of their potential impact on the environment. The NOMs prescribe the technical requirements to be met on matters to be considered in the assessment of the aforementioned activities.[73]

B. *Protected Areas and Restoration Zones*

Besides the EIA and risk assessment procedures, the General Law of Ecological Equilibrium also makes provision for preserving Mexico's biological diversity by means of a sophisticated system of protected areas, in-

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[69] *Id.*

[70] Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en materia de Evaluación de Impacto Ambiental [D.O.] May 30, 2000 at art. 18.

[71] Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988 at art. 35.

[72] *Id.* arts. 34-35.

[73] *Id.* at arts. 152-153. NOM-113-ECOL-1998 establishes specifications for the planning and operation of electric plants to be located in urban areas; NOM-120-ECOL-1997 establishes specifications aimed at preserving the environment with mining activities; NOM-114-ECOL-1998 establishes guidelines to be considered for electric transmission in urban areas; NOM-115-ECOL-1998 establishes specifications regarding soil exploitation in the oil industry; NOM-116-ECOL-1998 provides guidance for the preservation of agricultural zones and livestock; NOM-117-ECOL-1998 establishes guidelines for the transportation of oil derivates; NOM-130-ECOL-1998 provides specifications regarding the operation, planning and design of telecommunication activities and the use of fiber optic cables.

cluding their management regimes.[74] The system of protected areas in Mexico comprises biosphere reserves, national parks, natural monuments, areas of protected natural resources, areas for the preservation of fauna and flora, natural sanctuaries, park and state reserves, and areas for the preservation of ecological zones.[75]

Under this law, the system of protected areas is meant to preserve representative elements of the different climatic and geographic areas in the country,[76] to preserve endangered species and to ensure the sustainable use of biological diversity in the country.[77]

Another measure contemplated in the General Law of Ecological Equilibrium is the restoration of deteriorated zones to thus preserve biological resources. According to this law, in cases of extreme loss of biodiversity, the Secretariat of the Environment can propose to the Executive Branch the creation of restoration zones in places that face degradation problems.[78] The law also provides for biodiversity conservation, the protection of flora and fauna and the ecological processes of biological resources and endangered species.[79]

The General Law of Ecological Equilibrium mandates the elimination of illegal traffic in species and the development of research on the genetic materials of flora and fauna to acquire knowledge of the potential scientific, environmental and economic value of such materials.[80] The General Law of Ecological Equilibrium also regulates the import, propagation and export of flora, fauna and genetic material by means of a permission mechanism overseen by this Secretariat.[81]

Under the General Law of Ecological Equilibrium, environmental impact and risk assessment and the usefulness of protected areas and restorations zones depend on how well this oversight is enforced.

C. *Enforcement*

The Secretariat of the Environment enforces the General Law of Ecological Equilibrium provisions in three ways: first, by means of audits and monitoring inspections; second, by imposing administrative sanctions;[82] and third, by means of public participation in the EIA procedure and the

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74 Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988 at art. 44.

75 *Id.*

76 *Id.*

77 *Id.* at art. 45.

78 *Id.* at art. 78.

79 *Id.*

80 *Id.* at art. 79.

81 *Id.* at art. 82.

82 *Id.* at arts. 160-166.

public complaint procedure overseen by the Attorney General for Environmental Protection.[83]

Monitoring and compliance is ensured by means of inspector visits and audits conducted by the Secretariat of the Environment.[84] Inspectors verify compliance with the commitments or conditions included in authorized impact assessments. By means of audits, compliance with emissions established in official standards is assessed. Pecuniary sanctions are imposed on those responsible for altering ecological equilibrium or causing environmental deterioration.[85] Administrative sanctions include fines as high as 15,000 USD,[86] revocation of licenses and administrative arrest for thirty-six hours.[87]

After risk and impact assessment procedures have been presented to the Secretariat of the Environment and fulfill the legal and formal requirements, a public consultation procedure can be requested by any citizen. This procedure is controlled by the Secretariat of the Environment and is aimed at incorporating public views and suggestions into carrying out the proposed project. The idea behind public participation in the EIA is that average citizens can provide insight to the Secretariat of the Environment because of their familiarity with the project and surrounding areas.[88]

Another tool employed to oversee the implementation of the General Law of Ecological Equilibrium and, in general, Mexican environmental law, is the public complaint procedure.[89] This procedure accomplishes three objectives: first, it helps the Secretariat of the Environment implement the General Law of Ecological Equilibrium's requirements regarding environmental protection; second, the complaint procedure provides an inexpensive means to ensure compliance with Mexican environmental law; and third, the procedure empowers society to play a broader role in the preservation of Mexico's resources and will consequently contribute to create a culture of respect for the environment.[90]

Overall, the General Law of Ecological Equilibrium offers a comprehensive approach to integrate Mexican environmental protection measures. It provides a broad framework upon which federal laws and regulations can be based. The EIA procedure prescribed by the General Law of Ecological Equilibrium has the potential to help preserve biological diversity from harmful individual projects. But the procedure lacks guidelines for uniform

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83 *Id.* at art. 189

84 *Id.* at arts. 160, 171.

85 *Id.* at art. 171 sections I- III.

86 *Id.*

87 *Id.*

88 *Id.* at arts. 28-31.

89 *Id.* at arts. 189-203.

90 *Id.*

application and fails to include Strategic Environmental Assessment for federal policies or plans.

Official Mexican Standards, although available in the implementation of the General Law of Ecological Equilibrium, are only concerned with activities in the oil, electric and communications industries and their impact on the environment. NOMs are necessary to establish guidelines for evaluating EIA. Moreover, the potential effectiveness of audits and inspection visits to enforce environmental laws remains low unless financial resources are made available to carry them out. So far, such resources have barely been adequately provided.

Although the General Law of Ecological Equilibrium does not specifically regulate LMOs, it has the potential to address the risks posed by these organisms in the absence of biosafety legislation in Mexico. It could also complement biosafety legislation when such legislation has unclear provisions. LMOs, for example, could be regulated under activities that may alter ecological equilibrium. Risk and impact assessments are likely to identify some of the risks posed by these organisms. The General Law of Ecological Equilibrium makes all of these possible.

Additionally, the citizen complaint process established in the General Law of Ecological Equilibrium is an innovative mechanism to aid the Secretariat of the Environment in enforcing environmental legislation. It has the potential to contribute to the preservation of biodiversity in cases where pollution and harm to the environment are easily identified by the general population. In the case of LMOs, however, the complaint procedure may not be very helpful since complicated technical analysis and scientific expertise is required to differentiate these organisms from their organic counterparts. Such specialized knowledge and skills are generally beyond the reach of the common citizen. Another federal law relevant to the regulation of LMOs is the Law on Plant Health.

3. *Law on Plant Health*

The Law on Plant Health (LPH)[91] aims preventing, controlling and eradicating plagues and diseases in forests, agricultural areas and wild plants.[92] Plants constitute an essential part of biodiversity in Mexico. Their protection through this law, contributes to the larger objective of preserving biological diversity, particularly from threats posed by LMOs.

The law approaches plant protection by setting out general phytosanitary requirements and formulating national standards on this matter. Also, the LPH establishes requirements on the import, mobilization and intro-

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[91] Ley de Sanidad Vegetal [D.O.] Jan. 05, 1994.

[92] *Id.* at art. 5.

duction of genetically modified plants into the environment. The law acknowledges the potential threats of biotechnology and states that LMOs have the potential to replicate their traits in other organisms and to produce unexpected results.[93]

The LPH, supervised by the Secretariat of Agriculture, utilizes national phytosanitary standard NOM-056-FITO-1995[94] to regulate the national mobilization, import and introduction of LMOs into the environment. Four essential aspects of the LPH can be distinguished: 1) a National Phytosanitary Council, 2) phytosanitary regulations, 3) phytosanitary standard NOM-056-1995 and, 4) enforcement measures.

A. *National Phytosanitary Council*

The National Phytosanitary Council (NAPC) comprises groups of experts on science and agronomy from academia, the government and different sectors of Mexican society.[95] It is assigned the task of providing expert advice on matters covered by the LPH. The Council also organizes national campaigns to eliminate plagues and participates in training agriculture producers on how to provide adequate diagnosis to ensure the health of plants.[96]

Although the Council lacks normative authority, it can propose standards to the Secretariat of Agriculture regarding plant protection and the elimination of plagues. If such proposals are accepted by this Secretariat, they can become national phytosanitary standards. The work of the Council is necessary for implementing the LPH and preserving biological diversity from devastation by plagues and the unintended effects of LMOs.

B. *Phytosanitary Regulations*

The LPH depends on NOMs for its application. Such standards are established by the Secretariat of Agriculture and considered obligatory in Mexico. The law establishes a phytosanitary certificate requirement mechanism and quarantine measures as tools to ensure plant health within Mexican territory. Due to the importance of NOMs as national standards, LPH requires that they must be strictly based on science and on cost-effective risk assessments. Also the standards must emulate international guidelines.[97]

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93 *Id.*

94 SAGARPA, NOM-056-FITO-1995, available at: http://www.cibiogem.gob.mx/normatividad/normatividad_SAGARPA/NOM-056-FITO-1995.html (last visited: January 12, 2007).

95 Ley de Sanidad Vegetal [D.O.] Jan. 05, 1994 at arts. 16-18.

96 *Id.*

97 *Id.* at art. 20.

Specifically, the LPH states that official standards must contain guidelines through which to diagnose and identify plagues in plants.[98] They must also establish the phytosanitary requirements plants must meet for their import, transportation and introduction into the environment. In addition to regulating their compliance with NOMs, the LPH requires a phytosanitary certificate to ensure compliance with the Secretariat of Agriculture's sanitary regulations. This certificate requirement regulates the import, mobilization and introduction of LMOs into the environment.[99]

The LPH contemplates sanitary measures, such as national campaigns to locate possible sites of infestation. These campaigns also aim to identify plagues and to elaborate cost-effective studies on their potential damage on plants.[100] Quarantines may also be ordered by the Secretariat of Agriculture as a means to control infestation and to preserve plant health.[101]

In practice, the LPH is supported for purposes of implementation by the Phytosanitary Standard NOM-056-1995.

C. *The Phytosanitary Standard NOM-056-1995*

By way of a definition, Mexican Official Norms are, under the Federal Law of Metrology and Standardization, defined as: "Obligatory technical regulations enacted by the competent Secretariats establishing rules, specifications, attributes, characteristics of a product or process, activity, service or labeling".[102]

The Federal Law of Metrology and Standardization is implemented by the Secretariat of Economy (SE), which relies on the National Standardization Commission to create NOMs. The Commission hosts several consultative committees on different topics including the environment. On matters regarding the environment, it is the National Consultative Committee of Standardization and the Environment and Natural Resources (COMARNAT) which considers the creation of the appropriate norms. Like other national commissions, the COMARNAT includes in its membership representatives of the public, experts and personnel of the pertinent Secretariats.[103]

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98 *Id.* at art. 19.

99 *Id.*

100 *Id.* at arts. 31-37.

101 *Id.* at art. 36.

102 Ley Federal Sobre Metrología y Normalización [L.F.S.M.N.] [Federal Law of Metrology and Standardization] as amended on July 28, 2006, Diario Oficial de la Federación [D.O.], July 1, 1992 at art. 3 (XI), available at http://www.diputados.gob.mx/LeyesBiblio/doc/130.docart.3 (XI) (last visited: January 12, 2007).

103 *Id.* at arts. 43-44.

Generally, competent Secretariats propose the creation of Official Mexican Standards to their respective National Consultative Committee. After deliberation, these proposals come before the Secretariat of Economy for enactment. Proposals that may have economic or substantial impact on a sector of society must include an economic analysis of the projects to be authorized, alternatives to such projects and a comparative study of relevant and applicable international standards.[104] As pointed out by some, the process of NOM enactment could take up to 230 days.[105] It is important to note that issues have been raised by academics regarding the effectiveness of these standards and their constitutionality in the Mexican legal system.[106]

It is under the complicated procedure described above that Official Mexican Standard NOM-056-1995 emerges. This national standard establishes the obligatory guidelines on the introduction of experimental LMOs into the environment and importing them into the country. This standard also requires a phytosanitary certificate for the introduction of these organisms into the environment.[107] Experimental introduction of LMOs into the environment is overseen by the Secretariat of Agriculture's National Committee on Agricultural Biosafety and the General Office for Plant Health, which are empowered by the LPH to grant phytosanitary certificates for introducing LMOs into the environment.[108]

A request for a phytosanitary certificate must contain technical information on the genetic composition and properties of the LMOs intended to be introduced into the environment. If the phytosanitary certificate is granted by these two institutions, the decision must be communicated to state governments where trials will take place.[109] A similar authorization is required to transport LMOs across the territory of the different Mexican states.[110]

Importing LMOs or transgenic material is also regulated in this official standard by means of a phytosanitary requirement mechanism.[111] This certificate may be granted by the Office for Phytosanitary and Zoosanitary Inspection (DGIF). It is important to note that to obtain this certificate required for experimentation with LMOs, it is required to also obtain an international phytosanitary certificate from the country where the LMOs originated.[112]

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104 *Id.* at art. 45.

105 Carla Huerta, *Las Normas Oficiales Mexicanas en el Ordenamiento Jurídico Mexicano*, 92 BOLETÍN MEXICANO DE DERECHO COMPARADO 1-3 (1988).

106 *Id.*

107 SAGARPA, Phytosanitary Norm NOM-056-FITO-1995, *supra* note 94, art. 3.

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

D. *Enforcement Measures*

On-site inspector visits, a public complaint process and administrative sanctions are employed to achieve compliance with LPH obligations.[113] The Secretariat of Agriculture must conduct on-site visits to places where vegetal material is stored and produced.[114] It must also provide incentives by means of a National Award of Plant Health awarded to outstanding efforts in contributing to the prevention, control and eradication of plagues.[115]

The Secretariat of Agriculture uses a public complaints procedure to enforce LPH provisions.[116] This procedure allows individuals in any region nationwide to denounce acts and omissions that endanger plant health. Finally, the LPH employs administrative sanctions against those who do not obtain phytosanitary certificates or who disregard the conditions established in such certificates. The fines established in the LPH can reach up to 7,000 USD.[117]

Altogether, the LPH is meant to play an important role in preserving biological diversity in Mexico by preventing, controlling and eradicating plant diseases and plagues and LMOs in experimental introduction. Furthermore, the purpose of the NAPC is to supply expert advice to the Secretariat of Agriculture to thus enhance its prospects. Phytosanitary norm NOM-056-FITO-1995 is aimed at curtailing the introduction of LMOs into the environment and their import by means of a certificate requirement. Such a requirement, if fully implemented, has the potential to control possible threats posed by LMOs.

Despite the potential contributions of this law to biosafety in Mexico, its role in regulating LMOs is limited in scope, particularly in that it focuses on LMO experimental trials, excluding commercial crops and transgenic commodities that could be introduced into the environment and thus affect plant health. It also pays little attention to LMOs past the experimental stage, limiting the scope of this law. Also, the implementation of this law is deficient to the extent that it depends heavily on inspector visits to ensure compliance. The problem here is that given Mexico's economic situation, there are few trained personnel for such inspections. Besides, their inspections tasks are not regularly or adequately funded. With this scenario, the LPH actually affords limited protection to Mexico's biological diversity.

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113 Ley de Sanidad Vegetal [D.O.] Jan. 05, 1994 at 54-58.

114 *Id.* at arts. 54-60.

115 *Id.* at art. 61.

116 *Id.* at arts. 63-64.

117 *Id.* at art. 66.

4. *Law on the Production, Certification and Commerce of Seeds*

The Law on the Production, Certification and Commerce of Seeds (LPCCS)[118] was enacted in 1991 under the 1989-1994 National Development Plan.[119] At that time, Mexico was undergoing a severe economic crisis and increasing agricultural production was a national priority to guarantee self-sufficiency with regard to food supplies.[120] The Mexican government advocated the use of "improved seeds" to achieve an increase in food production. These seeds were the result of genetic engineering.[121] This law underwent substantial reforms in 1996 to allow experiments and research on transgenic material to obtain new varieties of plants to overcome droughts, soil infertility and salinity.[122]

The LPCCS is enforced by the Secretariat of Agriculture and regulates government research for the production of improved seeds and the certification of these seeds.[123] The Secretariat of Agriculture is empowered to establish guidelines regarding the use and handling of transgenic material.[124] The major focus of the LPCCS is to regulate experimentation with transgenic seeds.[125]

Experimentation with Transgenic Seeds

The LPCCS requires a permit for conducting experimentation with high risk transgenic material.[126] The Secretariat of Agriculture establishes guidelines to assess the risks posed by transgenic materials by means of scientific tests.[127] Likewise, the LPCCS establishes a review procedure for decisions on considering certain transgenic material high risk and Secretariat of Agriculture decisions that affect individuals.[128] This review must be performed by the Secretariat of Agriculture's Legal Director within 15 days of receiving the complaint.[129] Transgenic material and seeds not considered as posing high risk by the Secretariat of Agriculture are allowed to be planted and

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118 Ley Federal de Producción, Certificación y Comercio de Semillas [D.O.] July 15, 1991.

119 Mexican Senate, Legislative Bill on the Production, Certification and Commerce of Seeds, Agriculture and Hydraulic Commission, July 1, 1991 at 3.

120 *Id.*

121 *Id.* at 4.

122 *Id.*

123 *Id.*

124 Ley Federal de Producción, Certificación y Comercio de Semillas [D.O.] July 15, 1991 at arts. 1-2.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at arts. 34-38.

129 *Id.*

introduced into the environment experimentally.[130] No monitoring mechanisms are provided under this law or federal regulations on transgenic seeds and material deemed "low risk".

Another means of ensuring biosafety in Mexico is the certification of seeds before they are commercialized and introduced into the environment. Certification is performed by the Secretariat of Agriculture in accordance with its technical guidelines. Only seeds that have been approved and certified by the Secretariat of Agriculture are allowed to be introduced into the environment and commercialized.[131] In addition to approval, seeds must be labeled with information on their characteristics, the chemical disinfection treatment they underwent when appropriate and the percentage of content of material from other varieties.[132]

The LPCCS centers on a National Consultative Committee on Plant Varieties which is comprised of representatives of the sectors involved in seed commercialization. This Committee verifies information on the properties of seeds and serves as a conflict-solving agency for conflicts involving seeds.[133] The LPCCS also imposes pecuniary sanctions on those who commercialize or plant seeds that have not met the legal standards or who certify seeds in contravention of the legal provisions.[134]

Overall, the LPCCS emerged in a time of economic crisis. It resembles, more than a law to preserve the environment, an economic instrument to allow experimentation with transgenic material. It opened the door for using biotechnology in Mexico without the supporting biosafety regulations required for such a purpose. Similar to the Law on Plant Health, it offers a limited approach to LMO regulation.

The LPCCS does not include coordination mechanisms among the various environmental institutions and ignores important issues such as a concern for Mexico's native plants and the areas where they exist. As an economic growth instrument, it requires enormous financial backing to monitor seed certification and to ensure compliance with provisions.

Also, the LPCCS lacks the support of environmental institutions and biosafety legislation not yet created in Mexico at the time.

5. *The 2005 Biosafety Law on GMOs*

As discussed in sections II.2-II.4 above, Mexican legislation only recently addressed how to counter the potential threats of LMOs arising from experimentation with transgenic seeds. In spite of the presence of the pieces of

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130 *Id.* at arts. 1-2.

131 *Id.* at arts. 8-11.

132 *Id.*

133 *Id.* at art. 13.

134 *Id.* at arts. 15-20.

legislation described in previous sections, the control of LMOs is still a problem, as evidenced in the CEC's Maize Case.[135] The Mexican Congress also noted that the scope of the provisions in the various laws did not offer "certainty" to national and foreign investments in the biotechnology sector.

Prior to the enactment of the Biosafety Law on GMOs in 2002, the Mexican Congress created Committees for Science and Technology and Environment, Natural Resources and Fisheries to conduct comprehensive studies on how to balance Mexico's wealth of biological resources against its international obligations to promote free trade. These committees strove to unify the biosafety provisions scattered throughout Mexican legislation, keeping in mind the potential contribution of LMOs to meet such pressing challenges as hunger, and general economic underdevelopment, while benefitting the Mexican economy.[136] They acknowledged that there was a close relationship between biotechnology and biosafety and that biotechnology offers innumerable benefits to agriculture and human health, plant and animal health, and the improvement of contaminated soil through bioremediation.[137] They also noted that biotechnology could provide a venue for Mexico to develop economically.[138]

Furthermore, Congress considered the legislative initiatives by Mexico's political parties, namely, the Green Ecological Party of Mexico (Green Party), the National Action Party (PAN) and the Institutional Revolutionary Party (PRI).[139] The Green Party's initiative advocated monitoring the introduction of LMOs into the environment and the creation of Official Mexican Standards to regulate confined use of LMOs.[140]

The PAN's initiative proposed a strict risk assessment to obtain permits for the introduction of LMOs into the environment and that the proponent of introducing LMOs could develop contingent measures for emergency

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[135] CEC, MAIZE AND BIODIVERSITY: THE EFFECTS OF TRANSGENIC MAIZE IN MEXICO: KEY FINDINGS AND RECOMMENDATIONS (Commission for Environmental Cooperation 2004), available at: http://www.cec.org/maize (last visited: May 2, 2007). The Maize Report focused on examining the potential problems related to direct and indirect gene flow from transgenic varieties of maize and on the conservation of maize biodiversity near its center of origin. Several discussion papers were written, chapters were submitted to a peer review process, symposiums were organized and public participation took place. Report findings were meant to aid the Commission for Environmental Cooperation's (CEC) Secretariat to enable it to provide recommendations to the three NAFTA parties. The Maize Report evidenced some deficiencies in Mexico's legislation, environmental policy and institutions.

[136] Mexican Senate, Legislative Initiative of the Biosafety Law on GMOs, Legislative Commissions of Science and Technology and Environment, Natural Resources and Fisheries, November 12, 2002, at 1-2.

[137] *Id.* at 4.

[138] *Id.*

[139] *Id.* at 11.

[140] *Id.*

situations involving LMOs.[141] The PRI also proposed several measures for the preservation of human and animal health and that LMOs were not to be introduced into protected areas.[142] Following the report of the Legislative Committee and taking into account various parts of each of the political parties' proposed initiatives, a "unified" legislative proposal was contemplated by the Mexican Congress in 2003,[143] which resulted in the 2005 Biosafety Law on GMOs. [144]

The enactment of the 2005 Biosafety Law on GMOs was propelled by Mexico's ratification of the Cartagena Protocol in April 2002.[145] This law is seen as the ideal tool to address Mexico's lack of a legislative and institutional biosafety framework needed to meet the obligations imposed by the Cartagena Protocol. The law attempts to unify biosafety provisions in various pieces of legislation such as those in the General Law of Ecological Equilibrium, the Law on Plant Health and the Law on the Production, Certification and Commerce of Seeds. Furthermore, this law strives to strengthen Mexico's environmental institutions, such as the Inter-Secretarial Commission on GMOs and the National Biodiversity Commission and to coordinate their efforts in biosafety regulation.[146] The Biosafety Law affords Mexico a basis for implementing the CBD and the Cartagena Protocol.[147]

A. *Objectives*

The Biosafety Law on GMOs establishes the foundation of biosafety regulations in Mexico and the institutional structure needed for this purpose. This law is implemented by the Secretariat of Agriculture and the Secretariat of the Environment.[148] The objective of the Biosafety Law on GMOs is to regulate the production, introduction and commerce of "GMOs".[149] Such a regulatory approach comprehensively regulates the confined use, experimental introduction, imports and exports of these organisms.[150] Furthermore, the law seeks to prevent, avoid and minimize potential adverse effects of GMOs not only on biological diversity, but also on human health

141 *Id.*

142 *Id.*

143 The 2003 legislative proposal to enact a Biosafety Law on GMOs is almost identical to the current 2005 Biosafety Law on GMOs.

144 *Id.* at 1-2.

145 *Id.*

146 *Id.* See Annex.

147 *Id.*

148 *Id.* at art. 2 (3).

149 The Biosafety Law on GMOs uses the terms LMO and GMOs as synonyms. See Ley de Bioseguridad de Organismos Genéticamente Modificados [D.O.] March 18, 2005 at art. 3 (XXI).

150 *Id.* at art. 1.

and the environment in general. In addition, it seeks to protect animal and plant health.[151]

The Biosafety Law on GMOs serves as a framework for the implementation of the Cartagena Protocol. It strives to define Mexico's policy on LMOs and coordinates interaction among Mexico's environmental institutions, the federal government and Mexican states.[152] It also aims at setting out the administrative and permit procedures for introducing LMOs into the environment.[153]

As to the areas in which LMOs could be released, the Biosafety Law on GMOs may "determine on a case by case basis the establishment of areas in which activities with these organisms will be restricted including those in which Mexican plants originate". It also affords a special protection regime to those areas in which native varieties of maize originate.[154] Furthermore, it establishes the basis for the creation of Official Mexican Standards on biosafety.[155] The Biosafety Law also seeks to unify and coordinate "scattered" biosafety legislation and rely on a precautionary approach in cases of scientific uncertainty.[156]

The objectives set out in this legislation are quite ambitious. It covers the control and regulation of all activities in the country that deal with various aspects of biosafety and biotechnology. In practice, it sets out broader objectives than those employed by the Cartagena Protocol since it addresses issues of labeling, pharmaceuticals and consumption of transgenic commodities.[157] One example of the overbreadth of this law is the use of the term "Genetically Modified Organisms" to encompass LMO/GMOs under the same concept.[158] It also includes titanic commitments, such as generating Official Mexican Standards or national obligatory standards to define the functions of environmental institutions and establish LMO-free zones.[159]

The comprehensiveness of the Biosafety Law on GMOs may prevent it from being fully implemented. On the other hand, any effort at implementation would be a difficult endeavor and would require huge financial resources. Its broad scope also holds the potential to create conflicts regarding the jurisdiction of environmental institutions under its purview.

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151 *Id.* at art. 2.

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at art. 9 (IV).

157 *Id.* at arts. 4-8.

158 The Biosafety Law on GMOs defines Genetically Modified Organisms as living organisms that possess novel genetic combination resulting from biotechnology. *Id.* at art. 3 XXI.

159 *Id.* at arts. 2 (XI), 90.

B. *Powers of Environmental Institutions*

Two institutions play fundamental roles in ensuring biosafety and regulating the introduction of LMOs into the Mexican environment: the Secretariat of Agriculture and the Secretariat of the Environment. The Biosafety Law on GMOs assigns shared responsibility and creates checks and balances between these two institutions.[160] The Secretariat of Agriculture, for instance, can authorize the introduction of LMOs into the environment after taking into account a resolution passed by the Secretariat of the Environment on the safety of such organisms and their potential impact on biological diversity.[161] Likewise, the Secretariat of the Environment has the power to authorize LMOs in forests and for bioremediation purposes, but it must take into account a Secretariat of Agriculture resolution on the safety of these organisms.[162] This shared authorization process is meant to guarantee transparency and impartiality in decisions on the introduction of these organisms into the environment.

The Secretariat of Agriculture formulates national policy on LMOs in agriculture and is in charge of monitoring their introduction into the environment. Additionally, this Secretariat is empowered by the biosafety law to suspend or revoke permits for introducing these organisms into the environment.[163] Similarly, on matters of LMOs in forests and on bioremediation, the Secretariat of the Environment is also able to establish a national biosafety policy and evaluate the risks associated with LMOs in forests and for bioremediation purposes on a case-by-case basis.[164] The two Secretariats are responsible for monitoring LMOs within their areas of competence and implementing the required measures to restore biological diversity countrywide.[165] In cases of accidental introduction of LMOs, the Biosafety Law on GMOs provides coordination mechanisms among all the federal Secretariats so that they can take the necessary measures to address contingency situations nationwide in their respective areas.[166]

An innovative institution created under the Biosafety Law on GMOs is the Inter-Secretarial Commission on GMOs.[167] This institution is comprised of a President-appointed representative and one representative from each of the following institutions: the Secretariat of the Environment, Agricul-

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160 *Id.* at arts. 10-13.

161 *Id.* at art. 15.

162 *Id.* at art. 14.

163 *Id.* at art. 38.

164 *Id.* at art. 11.

165 *Id.*

166 *Id.* at art. 17.

167 *Id.* at arts. 19-24.

ture, Economy (SE), and the National Council of Science and Technology (CONACYT).[168] By law, this institution functions as an advisory body on matters regarding the scientific and technical aspects of biotechnology and biosafety.[169] In addition, the Inter-Secretarial Commission on GMOs coordinates efforts among Mexican institutions in matters related to LMOs.[170]

As noted, the distribution of powers under the Biosafety Law of GMOs strives to guarantee transparency and impartiality in decisions to introduce LMOs into the environment. By placing the responsibility on the Secretariat of the Environment and the Secretariat of Agriculture to ensure this balance, the law embraces its potential to benefit biological diversity because scientists and experts from both institutions are thereby obligated to carefully consider the risks of LMOs and agree on what must be done in each case. The law also ensures that efforts to secure biodiversity on a national level can be coordinated by the Inter-Secretarial Commission on GMOs.

While this system has a great potential, it can also create conflicts and other difficulties among the governmental institutions involved in deciding on the introduction of LMOs into the environment. For example, if federal regulations and Official Mexican Standards do not define the powers of the institutions involved in detail, potential conflicts can arise affecting decision-making and thus biodiversity.

C. *Permit Procedure to Authorize the Introduction of LMOs into the Environment*

The Biosafety Law on GMOs distinguishes three types of authorization for introducing LMOs into the environment: experimental; pilot and commercial.[171] It is important to note that these procedures are distinctive. In general, authorization from the Secretariat of Agriculture or the Secretariat of the Environment begins with a request from a proponent that is immediately recorded in the National Registry of Biosafety and GMOs of the Inter-Secretarial Commission on GMOs.[172] Such a request must include the characteristics of the LMO to be released into the environment based on guidelines and specifications contained in NOMs.[173] In addition, the request must include information on the location where these releases are planned to take place.[174]

The Biosafety Law on GMOs establishes also that LMOs not allowed to be released in their country of origin will not be allowed in Mexico.[175] It

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168 *Id.*

169 *Id.* at art. 20.

170 *Id.* at arts. 19-24.

171 *Id.* at art. 32.

172 *Id.* at art. 109.

173 *Id.* at art. 50 (V).

174 *Id.*

175 *Id.* at art. 40.

also provides that requests to introduce LMOs into the environment must be accompanied by impact and risk assessment studies conducted by the proponent that address the potential impact of these organisms on biological diversity and on plant and animal health.[176] The request must also include monitoring mechanisms and contingency measures to preserve biodiversity from an unintended release of these organisms.[177] A decision made by the Secretariat of the Environment or the Secretariat of Agriculture is based on an analysis of the scientific studies conducted by the proponent and additional scientific considerations of the potential effects of the proposed LMOs on the environment.[178]

As a framework, the Biosafety Law relies on NOMs to establish specific biosafety regulations. At the stage of introducing LMOs into the environment, NOMs are particularly important. These NOMs, according to the Biosafety Law, must establish:

1) The requirements for authorizing general releases of LMOs.[179]
2) The information required to identify LMOs to be introduced into the environment.[180]
3) Information that must be taken into account for LMO releases regarding the risks of these organisms.[181]
4) The information on what the pilot LMO release will contain.[182]
5) The requirements for commercial release of LMOs.[183]

As a final stage in the authorization process, the Biosafety Law calls for the incorporation of public opinion and recommendations into the authorization to release LMOs into the environment.[184] The public participation procedure must take place 20 business days following the submission of the request to introduce LMOs into the environment.[185] The law provides that accepted public opinion must be technically and scientifically based.[186] At the end of this process, the Secretariat of the Environment and the Secretariat of Agriculture issue a technical authorization document. LMOs that can be introduced in their country of origin undergo the above procedures

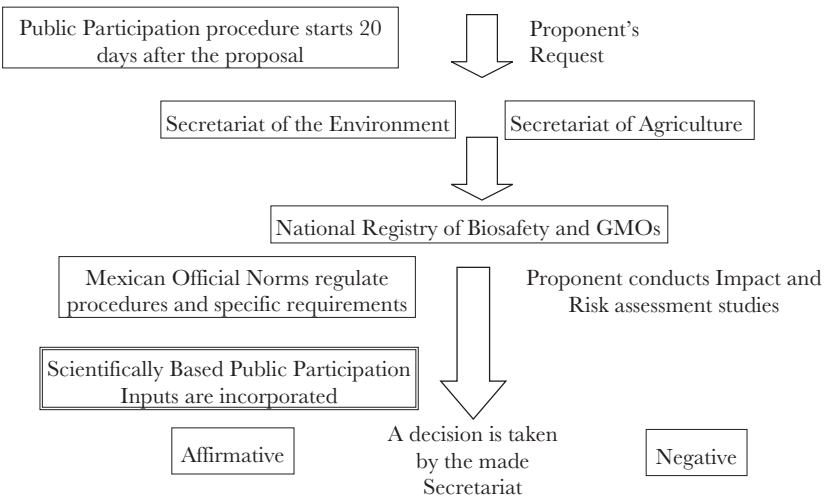
176 *Id.* at arts. 32-41.
177 *Id.*
178 *Id.*
179 *Id.* at art. 34.
180 *Id.* at art. 42 (I).
181 *Id.* at art. 42 (VII).
182 *Id.* at art. 50 (V).
183 *Id.* at art. 55 (VII).
184 *Id.* at art.33.
185 *Id.*
186 *Id.*

to assess the possibility of their being introduced in Mexico. The law gives Official Mexican Standards a central role in authorizing LMO imports and their release into the environment.

As discussed in Section II.3.A, the process for elaborating Official Mexican Standards can be lengthy due to the various institutions that participate in their creation and the potential economic impact they can have on sectors of the population. As to the Biosafety Law on GMOs, it must be pointed out that at present NOMs or any federal regulations to assist in biosafety regulation and the implementation and support of the Biosafety Law have yet to be developed. As it is, the Biosafety Law stands on its own with general guidelines to regulate a growing activity that makes up more than 1 percent of Mexican crop production.[187]

In addition to the lack of NOMs, the public participation process also limits the number of individuals who can participate by requiring that opinions be technically and scientifically based.[188] This means that the views of traditional farmers and plant breeders who have played a role in preserving biological diversity for generations, but are not scientifically and/or technically knowledgeable, are excluded.

Figure 1. Permit Procedure for the Introduction of LMOs in Mexico (Biosafety Law on GMOs Arts. 33-41)



187 ISAAA, Global Status of Commercialized Biotech/GM Crops in 2005, available at: http://www.isaaa.org/kc/bin/briefs34/pk/index.htm (last visited: January 11, 2007).

188 Ley de Bioseguridad de Organismos Genéticamente Modificados [D.O.] March 18, 2005 at art. 3 (XXI).

D. *LMOs for Food, Feed and Processing*

Unlike the Cartagena Protocol, the Biosafety Law on GMOs extensively regulates LMO-FFPs and includes them within its main scope because of the potential they have to harm human health. The Mexican Secretariat of Health (SSA) plays a central role in regulating LMO-FFPs. It regulates commodities for human consumption, including grains, those for processing food for human consumption, those that have an impact on public health and those for bioremediation purposes.[189] In those cases, the Secretariat of Health requires a permit from the proponent.

The permit procedure starts with a proponent's request which includes a risk assessment and scientific information on the products and the potential effects on humans upon consuming them.[190] The assessment required to commercialize and distribute LMOs-FFPs follows the general requirements for agricultural products in the Biosafety Law on GMOs.[191] The Biosafety Law on GMOs also provides that further requirements for authorizing LMO-FFPs are found in Official Mexican Standards.[192] In deciding on the authorization of these commodities, the Secretariat of Health can also request technical opinions from the Secretariat of the Environment or the Secretariat of Agriculture.

Altogether, the Biosafety Law on GMOs goes beyond the Cartagena Protocol by regulating LMOs-FFPs and their potential impacts on human health. This law empowers the Secretariat of Health to authorize importing and consuming LMO-FFPs in Mexico. The procedure to authorize LMO-FFPs is limited in that it focuses exclusively on their effects on human health. A more comprehensive approach could be taken by the Biosafety Law by addressing the potential effects of these commodities on the environment in the risk assessment if they are introduced. Following the CEC's Maize Report, however, the Secretariat of Agriculture and the Secretariat of the Environment launched national campaigns to warn and educate traditional farmers on the potential dangers of introducing these organisms into the environment. Several questions remain unanswered regarding the capabilities of these two environmental agencies to reach indigenous farm-

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189 *Id.* at art. 91. Bioremediation is defined by the National Safety Council as "The use of living organisms to clean up oil spills or remove other pollutants from soil, water, and wastewater, use of organisms such as non-harmful insects to remove agricultural pests or counteract diseases of trees, plants, and garden soil". See NATIONAL SAFETY COUNCIL, ENVIRONMENTAL HEALTH CENTER GLOSSARY, available at: http://www.nsc.org/ehc/glossary.htm#b (last visited: January 12, 2007).

190 Ley de Bioseguridad de Organismos Genéticamente Modificados [D.O.] March 18, 2005 at art. 92.

191 *Id.* at arts. 60-63.

192 *Id.*

ers in remote areas and the availability of resources for such national campaigns.

E. *The Precautionary Principle*

The precautionary principle was enunciated in article 8 of the Biosafety Law on GMOs as an obligation of the Mexican government to:

> Protect the environment and biological diversity, by applying the precautionary approach according to its capabilities, taking into account commitments established in international treaties and agreement of which the United Mexican States is a member. When there is danger of substantial or irreversible harm, lack of absolute scientific certainty shall not be used as justification to postpone the application of cost effective measures to prevent environmental and biodiversity degradation. Such measures shall be applied according to the provisions and administrative procedures established in this law.[193]

This principle is also mentioned at the risk assessment stage. The Biosafety Law on GMOs provides that the Secretariats of Health, Agriculture and the Environment must follow the precautionary approach for the protection of biodiversity and human health. On this matter, article 63 states:

> In case of danger of substantial and irreversible harm, uncertainty from the level of risks that GMOs can cause to biological diversity or to human health should not be used as justification for the competent Secretariat to postpone effective measures that prevent negative effects on biological diversity or human health.[194]

Although this Law does not define how this principle should be applied, it provides that the precautionary principle should be applied taking into account precautionary measures and Mexico's obligations contained in international trade agreements. Article 63, regarding the precautionary principle provides: "In adopting such measures, the relevant Secretariat shall take into account existing scientific evidence to be employed as criteria to establish such measures; administrative procedures in this law and trade legislation contained in international treaties and agreement of which Mexico is a party".[195]

Further precautionary provisions in this law are embedded in the establishment of protected areas, LMO-free zones and areas of origin. [196]

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193 *Id.* at art. 8.

194 *Id.* at art. 63.

195 *Id.*

196 *Id.* at arts. 86-87.

The Biosafety Law casts the application of this principle in light of Mexico's "international commitments". If the principle is applied according to the commitments in the Biodiversity Convention or the Cartagena Protocol, to which Mexico is a party, the interpretation of this principle and its application would be more environmentally oriented. The interpretation would anticipate potential harm and take into account uncertainty so as to take the necessary precautions. On the other hand, if Mexico interprets precaution in light of its commitments under international trade agreements, this principle would be primarily scientifically based and fully rely on risk assessments and scientific evidence, if available. This "trade" interpretation would perhaps not provide comprehensive protection because science is not fully developed (Mexico lacks the technology and infrastructure to monitor an activity once it is permitted) and because Mexico is one of the richest territories in biodiversity and the native home of many plants.

The inclusion of the precautionary principle in the Biosafety Law on GMOs is, therefore, only a "good intention" or a "promise". Although the first enunciation of the principle in Mexican legislation is normatively weak, it could also be the beginning of an effective balance between the demands of capitalism and environmental awareness in Mexico.[197]

F. *Impact and Risk Assessment*

The Biosafety Law's EIA and risk assessment procedures are safeguards to ensure biosafety in activities involving the release of LMOs.[198] The studies are conducted by the proponent of an activity, on a case-by-case basis, and must be based on scientific expert opinions and a precautionary approach.[199] It is important to note that like the General Law of Ecological Equilibrium, the Biosafety Law on GMOs does not contain provisions for the use of Strategic Environmental Assessments in LMO policies or regulations.

Impact and risk assessment procedures in the Biosafety Law follow a threefold process: the initial stage of identifying the LMO and its characteristics; identifying possible impact on biological diversity; and evaluating these risks along with the probability of their occurrence.[200]A recommendation follows these procedures as to whether the risks associated with this activity are acceptable and manageable.[201]

Although this Law does not establish further procedures for evaluating the assessments performed by the proponent, the Secretariat of the Envi-

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197 *Id.*

198 *Id.* at arts. 42-60.

199 *Id.*

200 *Id.*

201 *Id.*

ronment and the Secretariat of Agriculture routinely request technical opinions from the National Biodiversity Commission and the National Institute of Ecology. The technical opinions produced by these two institutions are non-binding and are further evaluated by the two Secretariats before a decision is made.[202] In terms of the EIA, the Biosafety Law on GMOs provides that the characteristics and requirements for evaluating this assessment are to be established in NOMs.[203] To date, these NOMs have not been developed, either under the Biosafety Law on GMO or the General Law of Ecological Equilibrium.

In cases of uncertainty or lack of scientific evidence on the potential effects of LMOs on biodiversity or animal and plant health, this Law provides that Mexican authorities can request additional information from the proponent based on the findings in the impact and risk assessments.[204] Authorities can also adopt additional monitoring measures to scrutinize the potential interaction of LMOs with organic species at the location of the releases.[205] In cases where substantial or irreversible harm may occur as a result of the release of the LMOs into the environment, the law states that "nothing will preclude the competent Secretariats from taking the necessary measures to prevent substantial or irreversible harm to biodiversity, taking into account the available scientific evidence and Mexico's international trade obligations".[206] It also provides that the procedures and guidelines required for carrying out impact and risk assessment studies would be set out in national standards or official norms.[207]

The procedures, which are to be examined by the Secretariat of the Environment or the Secretariat of Agriculture, acknowledge the difficulties in assessing the risks of organisms in situations of uncertainty or lack of scientific evidence. Though it mentions the precautionary approach, the law does not provide guidelines for its application to balance this uncertainty. Thus, it limits the decision-maker's ability to apply the principle, for instance, as it may impact Mexico's international trade obligations. In addition, the Law lacks guidelines regarding the characteristics and requirements for EIA. These requirements have not been established in NOMs. Consequently, the lack of guidelines hampers the adequacy of this important assessment procedure and can be subject to abuse by the Secretariats

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202 NATIONAL INSTITUTE OF ECOLOGY, INTERNAL REGULATIONS (2003), available at: http://www.ine.gob.mx/ueajei/rules32.html#art110 at arts.110-112 (last visited: January 12, 2007).

203 Ley de Bioseguridad de Organismos Genéticamente Modificados [D.O.] March 18, 2005 at art. 65.

204 *Id.* at art. 63.

205 *Id.*

206 *Id.*

207 *Id.*

in light of financial interests that may arise by applications to introduce LMOs through trade.

G. *Restrictions on Introducing LMOs*

The Biosafety Law on GMOs employs a threefold mechanism to restrict the spread of LMOs. First, it restricts the introduction of LMOs in the "areas of origin",[208] in natural protected areas[209] and in zones where organic products are produced.[210] These restrictions will be analyzed accordingly.

The "areas of origin" regime is established and designated by the Secretariat of the Environment and the Secretariat of Agriculture. In so doing, they must take into account areas where the organic counterparts of the proposed LMOs originated.[211] Areas of origin are those that host species and genetic diversity native to Mexico. The introduction of LMOs is forbidden in such areas due to their importance in preserving ecosystems, habitats and in turn, biological diversity.[212]

Introduction of LMOs is also restricted in national protected areas. Though they are allowed as part of bioremediation efforts to cleanse and restore polluted areas or to fight pests and disease,[213] they are banned from the core zones or designated areas within a protected area where ecosystems are preserved.[214]

The introduction of LMOs is also restricted for organic certification purposes in LMO-free zones. These zones are established to preserve agricultural organic production in communities across the country.[215] This system of zones will be established in regions where, according to scientific studies, LMOs and their organic counterparts cannot coexist in the same area.[216] Space establishment in such zones falls under the jurisdiction of the Secretariat of Agriculture, which may request technical opinions from the Inter-

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208 *Id.* at arts. 86-88.

209 *Id.* at art. 89.

210 *Id.* at art. 90.

211 *Id.*

212 *Id.* at art. 86.

213 *Id.* at art. 89.

214 Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Áreas Naturales Protegidas [R.L.G.E.E.P.A.M.A.N.P.] [Regulations of the General Law of Ecological Equilibrium on National Protected Areas] Diario Oficial de la Federación [D.O.] Nov. 30, 2000, available at: http://www.conanp.gob.mx/anp/legal/ANP.pdf (last visited: January 12, 2007). In this law, core zones comprise zones of protection, zones of restricted use, zones of traditional use, zones of sustainable use of natural resources, restoration zones, etc.

215 Ley de Bioseguridad de Organismos Genéticamente Modificados [D.O.] March 18, 2005 at art. 90.

216 *Id.*

Secretarial Commission on GMOs and the National Biodiversity Commission.

The Secretariat of Agriculture must also take into account provisions established in NOMs on the production of organic products.[217] To establish an LMO-free zone, a community request, approved by the municipality and the state government must be made. After such a request, the Secretariat of Agriculture will conduct the scientific and technical tests required by the Biosafety Law on GMOs to determine if it can establish an LMO-free zone.[218]

Although the threefold system of restrictions on the introduction of LMOs into these areas has the potential to preserve biological diversity and native species, it presents a series of pitfalls. The system of areas of origin, for example, lacks mechanisms to compel Mexico's environmental institutions to designate them. There is also no indication that these areas have been delineated or that they exist in Mexico. Similarly, national protected areas may provide limited protection to biological diversity since the introduction of LMOs is only banned in the core zones established within these areas.

LMO-free zones may also provide protection to biological diversity and to traditional agriculture since valuable resources may be found within them. The procedure for designating these areas, however, is complicated and politicized since it involves a unanimous decision by the relevant state, municipalities and communities involved. The proponent of these zones may also find it difficult to prove the incompatibility of modified plants with their organic counterparts.

H. *Enforcement Measures in the 2005 Biosafety Law on GMOs*

The Biosafety Law on GMOs comprises information, monitoring and enforcement mechanisms to achieve its goals. This law implements a National System of Information on Biosafety to organize, update and distribute biosafety information throughout the country.[219] This information system is implemented by the Inter-Secretarial Commission on GMOs, which is also responsible for producing annual reports on the state of national biosafety in Mexico.[220]

The Inter-Secretarial Commission on GMOs is responsible for coordinating efforts with the Secretariat and it is the national authority responsible for liaising with the Secretariat of the CBD and the BCH under the

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217 *Id.*

218 *Id.*

219 *Id.* at art. 108.

220 *Id.*

Cartagena Protocol.[221] In addition to the information system, the law creates a National Biosafety Registry of GMOs that includes all the information on the introduction and experimentation with GMOs and LMOs nationwide.[222]

The Secretariat of Agriculture and the Secretariat of the Environment oversee the enforcement of this law through inspection and financial fines.[223] These institutions are also responsible for establishing contingency measures in the case of adverse effects of LMOs on the environment, human health, and animal and plant health.[224] In the event of such adverse circumstances, the Secretariats are obligated to revoke authorizations for the release of LMOs and in the case of substantial harm resulting from the introduction of such organisms, to destroy them or to return them to their country of origin.[225]

The law also provides for monetary sanctions to be imposed on those who in the absence of the proper authorization introduce LMOs into the environment, falsify information regarding the effects of these organisms on the environment or infringe legal requirements. The corresponding Secretariat is authorized to impose a fine of up to 60,000 USD for violating this law.[226]

The implementation and enforcement of the Biosafety Law on GMOs is left to the institutions that may authorize the introduction of LMOs into the environment, namely, the Secretariat of Agriculture and the Secretariat of the Environment. The Biosafety Law does not allocate a fixed budget for its implementation. These two institutions absorb the costs as they enforce the law through inspections. Inspectors are not only responsible for implementing biosafety regulations nationwide; they also oversee the implementation of general environmental legislation nationwide. The Biosafety Law's potential effectiveness is left, then, to the uncertain availability of inspectors and financial resources.

Altogether, the enactment of the Biosafety Law on GMOs is an important achievement in Mexico. It is a synthesis of the various proposals from Mexico's political parties. As seen from its legislative history, the Mexican Congress fought to preserve biodiversity and create a law that would boost national economic development, particularly by using biotechnology in exploiting genetic resources.

The enactment of this law puts Mexico in a position to regulate activities involving LMO releases into the environment and experiments with these

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221 *Id.* See also the Cartagena Protocol at art. 19.

222 Ley de Bioseguridad de Organismos Genéticamente Modificados [D.O.] March 18, 2005.

223 *Id.* at art. 115.

224 *Id.*

225 *Id.*

226 *Id.*

organisms in the country. It also serves as a framework legislation upon which the application of dispersed biosafety regulations can be based. It contributes to the implementation of the Cartagena Protocol by creating the structure upon which the Protocol can be implemented. The Biosafety Law on GMOs, however, has a broader scope than the Protocol by directly regulating LMO-FFPs. However, the Law lacks the supporting NOMs and regulations required to ensure biosafety and to accomplish its ambitious objectives. Without these regulations and national standards, this law is largely powerless and difficult to implement due to the large amount of resources needed and the many institutions involved.

Likewise, guidelines are needed to designate areas of origin. Although it has the potential to preserve native plants, this system is far from being enforced because they have not been designated. A more active role is required from the Secretariat of the Environment and the Secretariat of Agriculture to conduct the necessary studies and identify these areas. Lack of financial resources and specialized inspectors devoted to biosafety also represent hurdles that need to be overcome to ensure biosafety and to implement the obligations established in the Cartagena Protocol through the Biosafety Law on GMOs.

III. Conclusion

Mexican legislation prior to the Biosafety Law on GMOs contained diffuse provisions on biosafety. The General Law of Ecological Equilibrium and Environmental Protection, for example, provided a general framework for regulating LMOs under activities that are likely to alter ecological equilibrium.[227] This Law, however, lacked the specialized legislative and institutional structure to effectively address threats posed by LMOs. Similarly, the LPH offered a remedial approach to LMOs by addressing the threats posed by these organisms when they become plagues or pests.[228] Preventive approaches and monitoring tools were missing in this law.

While it was possible to preserve biological diversity, the 1995 NOM FITO-056[229] required numerous personnel to carry out inspections and run seed certification centers. These were not available when this NOM was enacted, as seen later in the CEC's Maize Report.[230] Similarly, the Law on Certification and Commerce of Seeds was an economic development tool used to allow LMO experimentation in Mexico. As seen in the aforementioned biosafety provisions, there was a lack of legislative coordi-

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227 Ley General de Equilibrio Ecológico [D.O.] 28 de enero de 1988 at art. 31.

228 Ley de Sanidad Vegetal [D.O.] Jan. 05, 1994 at art. 5.

229 NOM-056-FITO-1995, *supra* note 94.

230 CEC, *supra* note 135.

nation in regulating LMOs. Also, the relevant disaggregated provisions could not extend the protection needed to include Mexico's biological resources.

The 2005 Biosafety Law on GMOs came to unify and coordinate previous biosafety regulation in Mexico. It offers a more comprehensive approach by regulating experimentation, pilot programs and commercialization of LMOs. But again, this law's potential to bring about effective biodiversity preservation is undermined by the lack of NOMs and regulations necessary for its implementation. In their absence, the Biosafety Law on GMOs remains a general framework that is difficult to implement, and therefore, does not afford substantial protection to biodiversity. It also does not further the objectives of the CBD and the Cartagena Protocol in Mexico's effort to observe these international treaties.

Regarding environmental principles, the Biosafety Law on GMOs lacks guidelines and specific regulations to integrate environmental impact assessment into decision making on the introduction of LMOs into the environment. It also fails to provide tools for balancing scientific uncertainty against trade interests, even though it endorses, for the first time in Mexican legislation, observance of the precautionary principle. The enunciation of the precautionary principle in the Biosafety Law on GMOs, however, is weak because it is subordinate in its application to trade agreements and to cost-effective measures. The implementation of the principle also requires extensive rules and national guidelines that must be followed by environmental institutions. As it is, the principle expresses good intentions, but its practical impact is rather remote at the moment. Under these circumstances, Mexico's legislative framework cannot effectively work for the preservation of biological diversity and for the implementation of international obligations contained in the CBD and the Cartagena Protocol.

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ABSTRACTS

Front Desk Justice: Inside and Outside Criminal Procedure in Mexico City

Catalina Pérez Correa

This paper tries to explain why prosecutorial institutions are failing in Mexico through an examination of the problems that arise during the initial phase of criminal procedure. It analyzes and evaluates the structure and functioning of criminal procedure in Mexico City from an ethnografic perspective. The article explores two fundamental areas: criminal prosecution and adherence to procedural laws and focuses primarily on the first two phases of the procedure: *barandilla* (or front desk) and pretrial investigation, which occur at the local public prosecutor's offices.

Key Words: Public prosecutor, criminal justice system, pretrial investigation, criminal prosecution, prosecutorial institutions.

En un esfuerzo por explicar por qué las instituciones de procuración de justicia están fallando en México, este artículo examina la fase inicial del procedimiento penal en México y los problemas que surgen en su práctica. Enfocándose en el Ministerio Público, analiza y evalúa la estructura y el funcionamiento de la fase inicial del procedimiento penal en la Ciudad de México desde una perspectiva etnográfica. El artículo explora las posibles explicaciones para los constantes fracasos del sistema de justicia penal de la Ciudad de México en dos áreas fundamentales: la persecución del delito y el apego a los códigos de procedimientos. El estudio se enfoca básicamente en las dos primeras fases del procedimiento: *la barandilla* y la investigación prejudicial, la cual se lleva a cabo en las oficinas del Ministerio Público.

Palabras clave: Ministerio Público, sistema de justicia penal, investigación prejudicial, persecución del delito, instituciones de procuración de justicia.

From Revelation to Creation: The Origins of Text and Doctrine in the Civil Law Tradition

Alejandro Madrazo

The centrality of text and the authority of doctrine are two of the most salient features of the civil law tradition. These two features of the civil law tradition can be traced to two distinct models of theological inquiry. The first model —revelation— borrows from early scholastic theology, developed during the late medieval emergence of the university, and focused on authoritative collections of legal texts. The second model —creation— stemmed from late scholastic moral theology in the 16th century, shifting the focus of legal inquiry from text to doctrine. Together they shape modern "legal science".

Key Words: Civil law, legal science, theology and law, second scholastics, glossators.

La centralidad del texto y la autoridad de la doctrina son dos de las más destacadas características de la tradición del derecho civil. Se puede rastrear históricamente estos dos rasgos de la tradición del derecho civil hasta dos diferentes modelos de indagación teológica. El primer modelo —revelación— retoma a la teología escolástica temprana, desarrollada durante el surgimiento de la universidad en el medioevo tardío, y se concentra en compilaciones autorizadas de textos legales. El segundo modelo —creación— proviene de la teología escolástica moral tardía del siglo XVI, orientando el foco de la indagación legal del texto a la doctrina. Juntas definen la "ciencia jurídica" moderna.

Palabras clave: Derecho civil, ciencia jurídica, teología y derecho, segunda escolástica, glosadores.

Interpretation, Poetry and the Law

Carlos Pérez Vázquez

This article examines the commonalities between legal and poetic interpretation. It argues that these two types of interpretation are linked by their speculative nature. Both legal professionals and analytical readers of poetry construct explanations for discursive contexts, not general laws that apply to all cases. The article defends the creative and fictional nature of both disciplines, deriving from their use of the same type of reasoning: the analogy. Legal and poetic interpretations try to be reasonable and persuasive, put neither ever reach scientific truth.

KEY WORDS: Interpretation, law, poetry, speculation, analogy.

Este artículo reflexiona acerca de la naturaleza compartida de la interpretación jurídica y la interpretación poética. La idea es que ambos tipos de interpretación se vinculan por su naturaleza especulativa: tanto los profesionales del derecho como los lectores críticos de poesía construyen explicaciones para contextos discursivos, no leyes generales que se aplican a todos los casos. El artículo argumenta en favor de la naturaleza ficticia y creativa de ambas disciplinas, la cual se deriva del uso que ambas hacen del mismo tipo de abducción: la analogía. Las interpretaciones legales y las interpretaciones poéticas intentan ser razonables y persuasivas, pero nunca logran ser verdaderas en términos científicos.

PALABRAS CLAVE: Interpretación, derecho, poesía, especulación, analogía.

SOFT EPISTEMIC PROPOSITIONS OF LAW

Edgar R. AGUILERA

Michael Moore asserts that the truth of propositions such as "John hit Julius' head with a tennis racket causing his death" (p) which he calls "factual propositions" contribute to the determination of the truth of "Singular Propositions of Law" (SPL) such as "John is guilty of murder". This article argues that the truth of "Soft Epistemic Propositions of Law" (SEPL), which state that the relevant standard of proof related to (p) has been met and not factual propositions, perform a decisive role in the determination of a SPL's truth.

KEY WORDS: Truth and judicial fact-finding, legal standards of proof, legal epistemology.

Michael Moore sostiene que la verdad de proposiciones tales como "John golpeó intencionalmente la cabeza de Julius con una raqueta de tenis causándole la muerte" ('p'), a las que denomina "proposiciones fácticas", contribuyen a la determinación de la verdad de las "proposiciones jurídicas singulares" (PJS) tales como "John es culpable del delito de homicidio doloso". La tesis principal que el autor desarrolla en el artículo es que la verdad de las "proposiciones jurídicas de epistemología moderada" (PJEM), las cuales afirman que el estándar de prueba relevante asignado a 'p' ha sido alcanzado, es la que decisivamente contribuye a la determinación de la verdad de PJS.

PALABRAS CLAVE: Verdad y conclusiones judiciales fácticas, lógica de los estándares jurídicos de prueba, epistemología jurídica.

Police Efficiency and Management: Citizen Confidence and Satisfaction

Gustavo Fondevila

Citizens' opinions of public security have traditionally been ignored in Mexico, mainly because crime fighting has typically been perceived as an exclusively technical task. Nevertheless, citizen confidence plays a relevant role in police activities, since police *management* (i.e. administrative management, police treatment and response time), even more than *efficiency* in fighting crime, has a strong impact on the general perception of insecurity. Thus a new and more comprehensive view of public security is necessary, one that approaches it as a multidimensional —social, political, economic, etc.— issue that should be dealt with in the same way as other public issues.

Key Words: Citizen confidence, police management, efficiency.

En México, la opinión ciudadana sobre seguridad pública ha sido tradicionalmente ignorada, principalmente porque el combate al crimen se ha percibido típicamente como una tarea exclusivamente técnica. Sin embargo, la confianza ciudadana juega un papel relevante en las actividades policiacas, pues el *manejo* policial (como manejo administrativo, trato policiaco y tiempo de respuesta), más aún que la *eficiencia* al combatir el crimen, tiene un fuerte impacto en la percepción general de inseguridad. Por tanto, se necesita una visión más comprehensiva de la seguridad pública, que se aproxime a la cuestión como un asunto multidimensional —social, político, económico, etcétera— que debe atenderse de la misma manera que otros asuntos públicos.

Palabras clave: Confianza ciudadana, manejo policial, eficiencia.

Mexico's Environmental Law in the GMO Era

Juan Antonio Herrera Izaguirre
Carlos Hinojosa
Gloria Hagelsieb
René Salinas

This comment provides a review of the state-of-art of legislation in biosafety and Genetically Modified Organisms (GMOs) in Mexico. It analyzes Mexican legislation to assess if it provides protection to the rich biological diversity in this country. The conclusion is that legislation prior to 2005 only contained isolated provisions and did not contribute in any com-

prehensive way to the conservation of biodiversity. The article also discusses the challenges surrounding the implementation of the Biosafety Law on GMOs and notes that there is an urgent need to create new Mexican official norms to aid this process.

KEW WORDS: Biosafety, Mexican environmental law, GMOs.

En el presente trabajo, los autores se enfocan en un tema de actualidad: la seguridad en la biotecnología y los organismos genéticamente modificados. Analizan la legislación mexicana para estimar si ésta brinda protección efectiva a la abundante diversidad biológica en este país. Los autores notan que la legislación anterior a 2005 contenía disposiciones aisladas y no brindaba protección íntegra a la biodiversidad y analizan la Ley de Bioseguridad de Organismos Genéticamente Modificados para ver la posibilidad de su implementación. Los autores notan la urgencia de crear normas oficiales mexicanas para coadyuvar en la implementación de la citada Ley.

PALABRAS CLAVE: Bioseguridad, derecho ambiental mexicano, OGMs.

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