

9-1-2005

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Recommended Citation

Smith, James F.; Pearson, Katherine C.; and Rustad, Michael L. (2005) "Book Review: A Review of *Mexican Law* by Stephen Zamora, Jose Ramon Cossio, Leonel Pereznieto, Jose Roldan-Xopa, and David Lopez," *Penn State International Law Review*: Vol. 24: No. 2, Article 5.

Available at: <http://elibrary.law.psu.edu/psilr/vol24/iss2/5>

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Book Review

Why Mexico? Why Mexican Law? Why Now?¹

A Review Essay of *Mexican Law*, by Stephen Zamora, José Ramón Cossío, Leonel Pereznieto, José Roldán-Xopa, David Lopez (Oxford: Oxford University Press, 2004), ISBN 0-19-826777-0, pp. 712.

James F. Smith,² Katherine C. Pearson,³ & Michael L. Rustad⁴

1. © Copyright 2005 by James F. Smith, Katherine C. Pearson & Michael L. Rustad. All rights reserved. We are grateful for the editorial suggestions of Richard Delgado, Thomas H. Koenig, Juan Pablo Vega Cruz, Monica Del Rio Villegas, and Bert Lazerow. We also would like to thank Diane D'Angelo, a reference librarian at Suffolk, who expertly tracked down materials on Mexican law. Finally, we would like to thank Editor-in-Chief Matthew Draper, Articles Editor Colleen Piker, and the staff of the *Penn State International Law Review*.

2. Professor of Law and Founder and Director of the Immigration Law Clinic at the University of California-Davis.

3. Professor of Law and Director of the Elder Law Clinic at the Dickinson School of Law of the Pennsylvania State University.

4. Thomas F. Lambert Jr. Professor of Law and Co-Director of the Intellectual Property Law Program at Suffolk University Law School, Boston.

During the summer of 2005, the three authors of this essay met for the first time in Mexico City on the campus of *Escuela Libre de Derecho (ELD)* as we prepared to teach our respective courses during a five week program sponsored by the University of San Diego's Institute on International and Comparative Law.⁵ We quickly discovered that despite our very different fields of interest, we shared a fascination with international law generally and, Mexican law specifically. We also discovered we each were using a new English-language treatise entitled *Mexican Law*,⁶ as we incorporated aspects of our southern neighbor's law into our courses. *Mexican Law*⁷ is a unique product of bi-national collaboration between top-level legal scholars, high court jurists, and seasoned practitioners.⁸

Over the summer our appreciation for *Mexican Law* grew as we talked about, debated and, at times, challenged each other in responding to recent legal developments in Mexico. Calling upon our respective disciplines, we decided to write a simple review of the treatise. But as the summer progressed, so did our ambitions. Our goals with this "review essay" are both simple and complex: to discuss the important contributions made by *Mexican Law* and thereby call greater attention to this timely work; to describe why we feel there are extraordinarily rich opportunities for further study and legal research in Mexico; and to suggest ways in which we see Mexican law and society changing, often in positive and sometimes in dramatic ways.

5. San Diego's summer program is an intensive, five-week study abroad program based in Mexico City at *Escuela Libre de Derecho (ELD)*. Stephen Zamora and his co-authors describe the free-standing ELD as "one of Mexico's most respected law schools." STEPHEN ZAMORA, JOSÉ RAMÓN COSSÍO, LEONEL PEREZNIETO, JOSÉ ROLDÁN-XOPA, DAVID LOPEZ, *MEXICAN LAW* (2004) [hereinafter *MEXICAN LAW*]. Professor Karen Sigmond, a University of San Diego Law graduate and currently a regular professor at *Tecnológico de Monterrey*, taught a course on NAFTA. Professor James Smith taught immigration law, while Professor Katherine Pearson directed the Mexico City program and taught International Family and Elder Law. Professor Michael Rustad taught International Contract Law. The professors taught each of the courses from a comparative law perspective, using specific references to Mexican law and practice. Field trips to the Senate, Supreme Court, *Instituto de Investigaciones Jurídicas de UNAM*, and the *Instituto Mexicano de la Propiedad Industrial* augmented class instruction. These legal field trips included cultural opportunities, such as visits to the *Palacio de Bellas Artes*, *Museo de Dolores Olmedo* near Xochimilco, *Museo de las Culturas*, and *Museo Nacional de Antropología*, which is surely one of the greatest archeological museums in the world.

6. *MEXICAN LAW*, *supra* note 5.

7. *See id.* at 41.

8. *Id.* at xxvii-xxviii. Stephen Zamora is Professor of Law at the University of Houston, José Ramón Cossío is a Justice of the Mexican Supreme Court, Leonel Perezniето is Professor at *Universidad Nacional Autónoma de México (UNAM)* and a member of the Mexican Bar, José Roldán-Xopa is Professor at the *Instituto Tecnológico Autónomo de México (ITAM)*, and David Lopez is a member of the Texas Bar. *Id.*

As a single volume treatise, *Mexican Law* is an enormous undertaking of comprehensive scope. At times in this essay, our comments may appear critical, but that is not because we see this book—or the Mexican legal system—as inadequate in any way, but rather because we recognize that the study of another country’s law presents an opportunity for us to compare the two systems and to reconsider the “U.S. way” of doing things. When one asks “Why Mexican Law?” one also is forced to question “Why U.S. Law?” For the U.S. lawyer, law professor, or law student studying Mexican law and reading *Mexican Law*, there are exciting opportunities to consider how it is that two countries, so similar in colonial heritage, with all the problems that colonial heritage implies, and so close in proximity and age, have developed such different approaches to law.

Despite growing interaction and close commercial ties between Mexico and the United States, there is still a relatively small number of U.S. legal academics and law students who have even a rudimentary understanding of Mexico’s legal system. United States law schools often choose a European focus for international or comparative studies.⁹ This,

9. U.S. law schools increasingly offer courses with international perspectives, although the trend is still in its infancy. See e.g., Louis F. Del Duca, *Introduction: Symposium on Developing Mechanisms to Enhance Internationalization of Legal Education*, 22 PENN. ST. INT’L L. REV. 393 (Winter 2004). But, as Dean Claudio Grossman, of American University’s Washington College of Law, points out, “Surprisingly, the contemporary law student is only slightly more likely to take an international law course than her counterpart in 1912.” Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 7 AM. U. INT’L L. REV. 815, 825 (2002). The University of San Diego’s summer program in Mexico founded by Professor Bert Lazerow in 1974 is a notable exception to this pattern. Over the past three decades, the Institute on Comparative Law & International Law, directed by Professor Lazerow, has produced more collaboration and introduced more U.S. lawyers to Mexico than, perhaps, any other comparative law program. The University of San Diego has seven other summer programs abroad that provide similar opportunities in European countries. Many of America’s foremost internationalists have taught in the San Diego programs over the past thirty-five years. A number of important international law, NAFTA, and International Business Transaction works had their geneses in San Diego’s summer programs. See also RALPH FOLSOM, MICHAEL GORDON & DAVID GANTZ, *NAFTA* (2d ed. 2005); RICHARD SCHAFFER, BEVERLEY EARLE & FILIBERTO AGUSTI, *INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT* (6th ed. 2003); and RALPH FOLSOM, MICHAEL GORDON & JOHN SPANOGLE, *INTERNATIONAL BUSINESS TRANSACTIONS* (7th ed. 2004). Another well-established summer law program, sponsored by a consortium of schools including University of Guanajuato, University of New Mexico, Southwestern University, and Texas Tech University, takes place in Guanajuato, Mexico. See e.g., University of New Mexico, *Summer Law Institute*, <http://mexicanlawclasses.unm.edu> (last visited Oct. 16, 2005). Among other well-regarded recent Mexico summer programs are those of Chicago-Kent and the University of Houston, as well as a summer law institute in Cuernavaca, Mexico, jointly sponsored by Loyola University New Orleans School of Law and South Texas College of Law. See *Loyola University New Orleans International Programs*, <http://law.loyno.edu/fsp/mexico> (last visited Oct. 16, 2005).

in part, is understandable, given our Anglo-American legal system and early ties to European immigration. Certainly, in the twenty-first century, however, to ignore Mexico is to ignore reality—a reality that is growing ever bigger, more complex, more sophisticated, and more dynamic. Consider the following examples of positive cross-border legal relationships, observed by the authors of this essay during the summer of 2005.

On an airplane ride to Mexico City, one of us conversed with a man from the state of Washington, who was on his way to San Miguel de Allende, flying with his Mexican-born wife and their U.S.-born children for one of three yearly visits to her family's home. The man was a high school teacher near Seattle who met his future wife while studying languages in Mexico, and, in turn, she also became a language teacher in the U.S. When the man learned we were law professors on our way to work with a group of visiting U.S. law students in Mexico City, he asked whether we could recommend a lawyer who knew the rules on whether he would be able to have his widowed and aging mother-in-law admitted to a U.S. nursing home because she had been diagnosed recently with early stages of dementia. Here was an opportunity for a lawyer with knowledge of immigration rules and each country's social security, public health, and long-term care financing laws, to assist the family.

One of our summer faculty members, Professor Karen Sigmond, embodies the cross-cultural legal world. She grew up in southern California and graduated from the University of San Diego School of Law. Professor Sigmond was drawn to central Mexico while still in law school, attending summer programs in Mexico City and Guanajuato, and eventually married a Mexican man. She is now a professor and director for the Masters' program in International Law at *Tecnológico de Monterrey*, one of the nation's fastest growing private universities, and is deeply immersed in research and writing on regulation of the Mexican banking industry.

At the end of the summer, after hearing about the adventures of our faculty and students in Mexico, a prominent U.S. attorney, Michele Guttmann, described her own growing involvement with Mexican legal institutions. She has made the transition from being a partner in an Albuquerque, New Mexico litigation firm to serving as a consultant for various international development programs, primarily in Latin America. She works extensively designing, developing, and assessing the U.S. Agency for International Development's rule of law assistance program in Mexico. The goal of that program is to enhance the rule of law and to support justice reform—at both the state and federal levels—through collaborative and cooperative efforts with Mexican legal institutions and

other legal reform proponents.¹⁰

Each of these examples is a window into traditional and nontraditional roles for lawyers with experience and interest in Mexican law. In this review essay, we use the magisterial treatise of Professor Stephen Zamora, Supreme Court Justice José Ramón Cossío, Professors Leonel Pereznieto and José Roldán-Xopa, and Attorney David Lopez¹¹ as the springboard for our contention that a greater number of American lawyers, jurists, law students, and legal academics need a deeper understanding of Mexican law, history, and culture.¹² This groundbreaking treatise is written in the grand theory tradition that situates each area of Mexican substantive and procedural law in the context of law, history, politics, economy, and culture. Stephen Zamora and his colleagues not only describe the Mexican legal system, the laws, the legal institutions, and the legal norms, but in each of their twenty-two chapters the authors provide insights into key factors shaping the path of Mexican law. Just as the treatise authors are willing to suggest both strengths and weaknesses of Mexico's system of law, we hope the treatise authors will understand why we, as the authors of this admittedly broad "review essay," sometimes go beyond the text of their treatise to suggest other aspects of Mexican law for additional consideration and study. A new generation of scholars will have the opportunity to stand on the shoulders of the authors of this outstanding treatise in conducting new skeptical studies with a focus on how Mexican law works in practice.

We have divided the essay into five parts. Part I describes the general landscape of *Mexican Law*. This one volume work contains what are, in essence, multiple treatises on substantive fields within Mexican law; and therefore, the heart of this essay focuses on several key fields for closer commentary on the contributions made by *Mexican Law*. Part II examines the authors' treatise on Mexican comparative constitutional law. Part III explores the treatise's introduction to Mexican family law and the law of inheritance. Part IV is a study of *Mexican Law's* treatment of tort law. Finally, Part V critically assesses Chapter 21, the treatise on Mexican intellectual property rights, which is a substantive field of law that is of great interest to legal advisors for content creators.

10. For more information on the U.S. Agency for International Development's rule of law assistance program in Mexico, see The United States Agency for International Development, *Mexico*, <http://www.dec.org/country/reports.cfm?region=lac2&country=Mexico> (last visited Aug. 29, 2005).

11. See MEXICAN LAW, *supra* note 5, at 8.

12. Justice Holmes argued that "if we want to know why a rule of law has taken its particular shape, and . . . why it exists at all, we go to tradition." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

We jointly wrote the introductory and concluding sections of this review essay; however, we have identified individual authors for Parts II through V, sections which reflect our respective experiences, substantive legal interests, and, undoubtedly, our individual biases.

I. An Overview of the *Mexican Law* Treatise¹³

During the summer of 2005, *Mexican Law* was our bible, a source for lectures, and a starting point for our summer research. Professor Zamora and his colleagues situate each major substantive branch of Mexican law within an accessible historical and cultural setting, demonstrating that Mexican law continues to evolve. Mexican law is seen as a tapestry, rather than the seamless web of the Anglo-American tradition. Mexican legal history, institutions, and traditions are not just described in this treatise; rather, the authors frequently give their “take” on the causes and consequences of the conflicts leading to social transformation.

Chapter One sets the tone for the overall work, as the authors summarize the debates and the struggles between the indigenous groups and Spanish identities that continue to live in modern Mexico. The authors’ short historical sketches of legal history appear simplistic at first glance, but are the distillation of the best available scholarship and commentary on Mexican politics and legal history. Professor Zamora and his colleagues trace the pre-Hispanic roots of Mexican law from developments in Mesoamerican indigenous cultures and culminating in the hierarchical structure of Aztec culture.¹⁴ Next, they examine colonial legal institutions and changes under Spanish and French rule, leading to a civil law tradition with roots in the Napoleonic Code.¹⁵ The authors explain how Spanish rule shaped such core legal institutions and practices as:

- (i) centralized control of government decision-making, particularly in economic matters;
- (ii) governmental ownership and control of all subsoil hydrocarbons and minerals;
- (iii) special treatment for indigenous populations and a sense of governmental responsibility in handling issues important to indigenous peoples;

13. This part of the review essay was authored by the team.

14. See MEXICAN LAW, *supra* note 5, at 2-8.

15. See *id.* at 8-18.

(iv) lack of a solid foundation for the separation of powers between the legislative, executive, and judicial branches of government; and

(v) historical weak judicial branch of government, as well as limitations on the ability of judges to create legal precedent.¹⁶

In their discussion of Mexican independence¹⁷ and its numerous reform movements,¹⁸ the authors also analyze key moments in Mexico's early relationship with the United States,¹⁹ as well as the effect of French intervention.²⁰

Mexico's modern tradition of presidential power, called *presidencialismo* and often viewed as excessive both by insiders and outsiders, is a critically important concept in explaining much of twentieth century Mexican political history.²¹ Abuses of presidential power, which punctuated the absolute control exercised by the *Partido Revolucionario Institucional (PRI)* for more than seventy years, lead to the eventual withering of the party's hegemony and 2000 election of President Vicente Fox of the *Partido Acción Nacional (PAN)*. The authors describe this period in terms that suggest the beginning of a dynamic, though less predictable, political evolution.²² Dark moments, such as the Tlatelolco student killings in 1968²³ and the government's response to the more recent, indigenous *Zapatista* uprising in 1994²⁴ are discussed objectively in the treatise and are recognized as painful parts of Mexican legal history that contributed to the loss of absolute *PRI* control. The authors also are candid about the "modest" nature of reforms attributable to President Fox, noting the stalemate in the Senate caused by opposition from *PRI* and the members of a major third party, *Partido*

16. *Id.* at 17-18.

17. *See id.* at 18. Although Mexicans "celebrate their independence each 16 September with a re-enactment by the Mexican President of the famous 'Grito de Dolores' that Padre Hidalgo issued on that date in 1810," the country's "independence did not come until 1821, when the Spanish crown weakened by the Napoleonic Wars, could no longer maintain military and political control in the Americas." *Id.*

18. *See MEXICAN LAW, supra* note 5, at 23-5.

19. *See id.* at 21-2.

20. *Id.* at 25-6.

21. *Id.* at 33.

22. *Id.* at 36-41.

23. "[A] peaceful student demonstration in the *Plaza de las Tres Culturas* in the Tlatelolco area of Mexico City prompted a sudden and violent response from soldiers guarding the area, some of whom opened fire on the unarmed demonstrators. The word 'Tlatelolco' became synonymous with violent oppression." *See MEXICAN LAW, supra* note 5, at 36.

24. *See id.* at 39 n.155, 237-8. For expanded treatment of the *Zapatista* movement in the southern region of Chiapas, beginning with the waning days of President Carlos Salinas de Gortari's administration, *see JULIA PRESTON & SAMUEL DILLION, OPENING MEXICO: THE MAKING OF A DEMOCRACY* 230-56, 442-60 (2004).

de la Revolución Democrática (PRD).²⁵

Mexican Law makes important analogies to U.S. legal institutions which help the non-native reader understand the socio-political context under which the government created important laws. Professor Zamora and his colleagues describe Benito Juárez, known in Mexican constitutional history as “*Benemérito de las Americas*” (which roughly translates into English as “The Distinguished Leader of the Americas”), as having a similar background and role as Abraham Lincoln had in U.S. history.²⁶ The authors then compare Lázaro Cárdenas, the first post-revolutionary President, to Franklin D. Roosevelt due to the similarities in their social welfare reforms.²⁷ The Mexican constitution and concept of federalism were drawn in large part from the U.S. Constitution’s scheme of separation of powers and federalism.²⁸

Professor Zamora and his colleagues provide an especially useful examination of the country’s traditions in legal education by carefully outlining the differences in application and evolution of the two nations’ leading political institutions. In the United States, most students receive first year training in specific applications of substantive law, including contracts, torts, criminal law, and property. Most law students in Mexico study the pure theory of the law, including philosophical concepts and fine distinctions between public and private law, as their introduction to Mexican law.²⁹ *Universidad Nacional Autónoma de México (UNAM)* students, for example, take semester-long courses in the sociology of law, as well as economic theory.³⁰ During the second semester of their first year of law school, *UNAM* students study legal theory, political theory, Mexican Legal History, History of Economic Thought, and Roman Law II. The authors critique this adherence to history and theory over application.³¹

For many, an admirable aspect of legal education in Mexico is the compulsory public service requirement.³² Mexican students are required

25. See *MEXICAN LAW*, *supra* note 5, at 41.

26. *Id.* at 26.

27. *Id.* at 35.

28. *Id.* at 20.

29. One of the most read legal textbooks by first year law students in Mexico is *Introducción al Estudio del Derecho* by Eduardo García Máynez. The book first was published in 1940. It has sold over 436,000 copies and is currently in its fiftieth edition. Its first three parts cover the Notion of Law, the Legal Disciplines and the Fundamental Legal Concepts.

30. See *MEXICAN LAW*, *supra* note 5, at 51.

31. See *id.* One of the difficulties of this overwhelming emphasis on history, jurisprudence and politics, is professional socialization. See *id.* at 46. The authors note that because law schools are so theoretical and academic, too little attention is directed to building legal skills. See *id.* at 47.

32. *Id.* at 52 (describing the social service requirement). Mexico’s compulsory

to “perform a prescribed amount of part-time, temporary, uncompensated work in the interest of society as a prerequisite for receiving the law degree.”³³ Only a handful of U.S. law schools have a requirement of public service as extensive as the *UNAM* requirement that each student complete up to 260 hours of public service such as working in free public clinics.³⁴

Unlike the United States, there is no clear consensus on which are the best law schools in Mexico.³⁵ Historically, two schools with very different profiles, the huge public university, *UNAM*, and the stand-alone legal academy, *Escuela Libre de Derecho (ELD)*, have the highest prestige and are regarded as the legal academies that have made the greatest contributions to the profession and public institutions. However, *Reforma*, a Mexican newspaper, highly ranked private institutions such as the *Universidad Iberoamericana* and *Instituto Tecnológico Autónomo de México*, institutions that are now challenging the hegemony of *UNAM* and *ELD*.³⁶

A problematic aspect of Mexican legal education, which the authors identify, is the dependence on adjunct faculty for many of the teaching positions. Most Mexican law schools have only a handful of full-time faculty.³⁷ However, neither the members of the adjunct faculty, nor the full-time law professors, receive substantial compensation for their services.³⁸

The authors of the treatise also point out a huge division that exists

social service requirements are not limited to those earning law degrees, but have different sources depending on the program and the state in which the school is located. Mexico City attorney Juan Pablo Vega Cruz, also a candidate for an LL.M. degree in 2006 at American University’s Washington College of Law, suggested review of *Ley Reglamentaria del Artículo Quinto de la Constitución Política de los Estados Unidos Mexicanos Relativo al Ejercicio de las Profesiones en el Distrito Federal* for the rules governing mandatory social service obligations for professions in Mexico City. Interview with Juan Pablo Vega Cruz, *licenciado*, in Washington D.C. (Sept. 22, 2005).

33. *Id.*

34. MEXICAN LAW, *supra* note 5, at 52.

35. Cf. JORGE VARGAS, 1 MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS 1, 14 (Jorge Vargas ed., 1998) (observing that law schools in Mexico were characterized by an “alarming level of mediocrity”). However, Reader’s Digest’s now offers a Spanish language guide to Mexican universities, suggesting that for better or for worse, the *U.S. News & World Report* trend of ranking higher educational programs is gaining a foothold in Mexico. Diego Marin, *La Universidad No Solo es la Carrera*, GUÍA UNIVERSITARIA, Edición Especial 2005, 16.

36. Each August, Mexico’s *Reforma* newspaper publishes a special section comparing universities and programs such as law or business within the universities. See e.g., *Encuesta las Mejores Universidades 2005-2006*, REFORMA, Aug. 21, 2005.

37. See MEXICAN LAW, *supra* note 5, at 59-60.

38. *Id.* at 54-5. “The prestige of law faculties is high, but pay is meagre. . . . The salary scale for full-time professors and legal researchers at UNAM ranges from 5,000 pesos per month (about US \$500) to 10,000 pesos per month (about US \$1,000).” *Id.*

between those who teach law and those who research Mexican law and policy, which is a distinction that is found in every level of the law school hierarchy in Mexico. Law professors mostly are full-time practicing attorneys with part-time faculty positions, while the “law and policy” researchers are held to be esteemed legal scientists or architects of the law, usually employed as full-time government employees receiving higher pay than faculty members and without any classroom obligations for teaching.³⁹ This division between teaching and research law shapes Mexican legal education whether at the university or graduate levels.⁴⁰

While U.S. law students may perceive the reliance on Mexican practitioners rather than full-time academics as a highly positive innovation that avoids “the ivory tower,” the authors worry that the lack of a strong tradition of professional academics who combine teaching with research, scholarship and service may reduce the opportunities for the academy to contribute to legal theory, law reform, and public policy. The authors conclude that “[t]he main problem of legal education in Mexico, as a part-time endeavour involving institutions with limited resources, has to do with the increasing failure of law schools, and lawyers, to have an impact on societal reforms.”⁴¹ The United States has an on-going debate about the value of “theory” versus “practice,” especially in graduate programs for the professions of business, medicine and law. Educational theorists and historians in the U.S. may find Mexico a fertile field for comparative research on teaching methodology and academic focus.⁴²

The authors ultimately leave it to the readers to form their personal opinions about which method of legal education is superior and what reform policies should be implemented to improve the quality of education and services provided by Mexican attorneys. At the same time, they make it clear that Mexico faces significant questions about the future of its legal education, including: (1) the weak or non-existent financing of university departments,⁴³ (2) low faculty salaries,⁴⁴ (3) the

39. “[P]rospects for legal reforms should generate a greater need for independent legal research on public and private law issues.” MEXICAN LAW, *supra* note 5, at 58.

40. *Id.* at 56-9.

41. *Id.* at 60. At the same time that the authors express hope for the legal academy to play a more active role in legal reforms, the authors note the key lawyer-politicians of the past have played major roles in authoritarian regimes. *Id.*

42. See e.g., Dorothy H. Evensen, *To Group or Not to Group: Students' Perceptions of Collaborative Learning Activities in Law School*, 28 S. ILL. U. L. J. 343 (Winter 2004), in which Dr. Evensen continues her work in evaluation of higher education theories and trends, moving from her previous analysis of learning opportunities in U.S. medical schools, to learning opportunities in U.S. law schools.

43. MEXICAN LAW, *supra* note 5, at 44-7.

44. *Id.* at 54-5.

unfavorable faculty/student ratios,⁴⁵ (4) the massive number of students,⁴⁶ (5) the overly theoretically thrust of academic programs,⁴⁷ (6) the lackadaisical licensing authorities,⁴⁸ (7) the limited availability of advance studies in post-graduate programs,⁴⁹ (8) the prestige, image and professional reputation of lawyers,⁵⁰ and (9) the relatively low salaries available to many practicing attorneys.⁵¹

The Mexican Constitution allocates the authority to regulate the legal profession to each state—or to the federal government, with respect to *Distrito Federal*, or federal matters.⁵² United States lawyers may be surprised to discover that Mexican states do not have government-mandated admission examinations for licensing of practicing attorneys, nor is there any federal bar examination.⁵³ The authors outline the process by which a Mexican attorney graduates and is certified and licensed to practice—leading to the title of *licenciado* or *licenciada*.⁵⁴ Once licensed, the attorney can practice on a national scale, although federal practice requires a license from the General Directorate of Professions in Mexico City, again mostly a matter of completing the correct forms.⁵⁵ Unlike prior works, this book takes on controversial issues that Mexican legal circles rarely discuss and, in particular, the authors critique the lack of uniform standards in legal education and admission to practice.⁵⁶ A matter of growing concern in the U.S. is the question of disciplining practicing attorneys for improper conduct, and the authors are candid in suggesting that a problem exists in Mexico

45. *Id.* at 55.

46. *Id.* at 45.

47. *Id.* at 50-1.

48. MEXICAN LAW, *supra* note 5, at 46.

49. *Id.* at 58-9.

50. *Id.* at 43.

51. *Id.* at 67.

52. *Id.* at 62.

53. MEXICAN LAW, *supra* note 5, at 62.

54. *Id.* at 43. This title is sometimes confusing because it can refer to both the effect of graduation and to the largely ministerial licensing process for *abogados* as practicing attorneys. *Id.*

55. *Id.* at 62, n.86.

56. See MEXICAN LAW, *supra* note 5, at 43. Chapter Two on Legal Education is a critical commentary on law schools in Mexico and is not just a description, but also a tactful call for reform. For example, the authors describe the growth of private law schools in Mexico, the lack of uniform accreditation standards for all schools, and the absence of an objective, uniform examinations for licensing of practitioners, concluding “there is a substantial lack of uniformity not only in the legal education in Mexico, but also in the level of professional preparation of law graduates.” *Id.* at 46-7. Further, the authors note that a failure to modernize legal education in Mexico may be contributing to a shift in the country’s political leadership. “Law schools become conservative reinforcers of the status quo, and the role of legal change was [recently] taken up by economists and others. . . .” *Id.* at 60.

arising from lax or nonexistent patterns of disciplinary enforcement even when there are egregious breaches of professional ethics.⁵⁷ Even though the legal system is mostly codified, the Mexican Congress has yet to enact any particular set of rules for professional responsibility for lawyers.⁵⁸

The legal profession in Mexico sometimes exhibits a schizoid self-alienation, complete with contradictory images. On the one hand, the public respects law schools and legal education. In contrast, lawyers in Mexico, as in the United States, frequently are blamed for complicating things and being too closely connected to a corrupt legal system.⁵⁹ This tendency is offset by the reality that lawyers are relied upon for protection of private property and rights.

While *licenciado* status confers a measure of prestige, status as a *notario* is one of the most prestigious and trusted titles to which a private lawyer can aspire, involving “arduous” additional admission requirements and strict regulation.⁶⁰ Unlike the largely clerical function of a notary public in the United States, Mexico’s public notaries are private attorneys “chosen by a state or by federal government to provide impartial counsel” to clients on sophisticated legal issues.⁶¹ The Mexican legal system requires many formalities in order for certain acts to be valid and some duties of the Mexican notary are somewhat clerical in nature, as the notary is entrusted with a monopoly position of validating, certifying, and authenticating legal formalities. However, the notary plays multiple roles and is critically important to drafting complex contracts for the creation of trusts, the incorporation of businesses, and a wide variety of commercial transactions.⁶²

Cross-border barriers to international practice should concern any lawyer working in the global marketplace.⁶³ Until recently, non-Mexican

57. *Id.* at 65.

58. MEXICAN LAW, *supra* note 5, at 68. While Mexican states have the authority to license attorneys, the Mexican Constitution’s unique guarantee of the “liberty” of profession means that Mexican states cannot mandate membership in professional organization, and thus unlike in many U.S. states, there is no “integrated” bar association membership that commences with licensure. *Id.* Bar associations are voluntary in nature, with the Mexican Bar College of Attorneys (*Barra Mexicana*) the most prestigious organization, taking on “the critical task of developing and enforcing among its members a Code of Professional Ethics.” *Id.* at 68-9.

59. *Id.* at 43, n.1.

60. MEXICAN LAW, *supra* note 5, at 69. Public Notaries (*Notarios Públicos*) have a monopoly which has, arguably, stymied the pace of business transactions. *Id.* In 1992, Mexico recognized Commercial Notaries (*Corredores Públicos*) in order to eliminate the bottlenecks in corporate and commercial transactions. *Id.* at 540. By 2001, there were 228 commercial notaries in Mexico. *Id.*

61. *Id.* at 69.

62. MEXICAN LAW, *supra* note 5 at 70-1.

63. During the Senate confirmation hearings for John Roberts as Chief Justice of the

citizens officially were prohibited from practicing law in Mexico.⁶⁴ However, in 1993, the Mexican Congress amended the federal district's law to prohibit the use of citizenship as a barrier to licensure and, with the adoption of the North American Free Trade Agreement (NAFTA), most of the Mexican states have changed their laws and practices to permit foreign citizens to qualify for licenses to practice.⁶⁵

The next four parts of this essay focus on substantive areas of Mexican law that we believe will be of particular interest to academics, law students, practitioners, and jurists, especially those who are willing to enhance their substantive knowledge with a more global perspective. In these parts, we permit our individual, rather than our collective experiences to color our evaluations of the contributions made by *Mexican Law*.

II. The Treatise on Comparative Constitutional Law⁶⁶

My fascination with Mexico began as an adolescent. Growing up in Anglo Arizona, the stereotypical image of a Mexican was a man with a large sombrero, dozing by a saguaro cactus. Indeed, plaster-of-Paris yard ornaments of this character frequently were seen on manicured lawns tended by Mexican gardeners. This image never resonated with me. My father was a construction foreman, and his crew was mostly Mexican. As part of the summer crew, I came to know Mexican workers for their hard work, jack-of-all-trades can do spirit, and a keen sense of humor. Frequent trips to the border area heightened my fascination with Mexican culture. It was so rich and so textured that it became an irresistible magnet. But, acquiring a taste for jalapeño peppers and ranchero music was not enough.

It has been my practice, for decades, to return to Mexico to get in touch with what is really important to me. About one year after graduating from Boalt Hall, I visited friends in Hermosillo in October,

United States Supreme Court, court watchers debated the comparative philosophies of certain justices on the importance of international law as a modern force shaping the development of American constitutional law. Court watchers speculated that perhaps Justice Anthony Kennedy's appreciation for international law was influenced by his own early role as a cross-border attorney with a license to practice law in Mexico, helping investors to set up border region factories, known as *maquiladoras*. See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005 at 42-51. See also, Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J. 1382 (1998).

64. MEXICAN LAW, *supra* note 5, at 63.

65. *Id.*

66. James F. Smith authored this portion of the article.

1968. Around that time, word quickly spread that the bodies of slain students—from the massacre of Tlatelolco—were arriving by train.⁶⁷ It was an era of student protests in many locations around the globe, often with violent government backlash, and Mexico was no exception to these events. Tlatelolco was an epiphanous moment for me—I wanted to understand how this attractive culture could experience the slaughter of hundreds of student protestors. I vowed someday to teach at *UNAM*. I wanted to understand the students' motives and the violence that came in response, and doing so as an aspiring academic at *UNAM* seemed the right place to start.

I did not achieve this goal until eighteen years later. In the interim, I stayed in touch with Latin American culture through frequent trips to Latin America, by working as a VISTA⁶⁸ volunteer in the San Joaquin Valley with mostly Latino farm workers (1967-68), and by working as a staff attorney for the California Rural Legal Assistance (CRLA) in McFarland and Sacramento (1968-72). In 1981, the faculty at the School of Law of the University of California at Davis granted my request to start an immigration law clinic. The clinic's clients have always included large numbers of immigrants from Mexico.

In 1985, the Fulbright Commission awarded me a teaching research scholarship at *UNAM* for the 1986-87 school year. It was a dynamic time to be in Mexico, as its relatively closed economy and political system were on the verge of dramatic openings. I taught comparative law and researched comparative constitutional law and international trade law in Mexico. While researching, I noticed that comparative law courses and texts in the United States had an overwhelmingly Europhile character. Comparisons of U.S. law with the laws of England, Germany, France, and Italy were readily available, but there existed relatively few comparisons with the laws of Latin America or Asia. I soon exhausted English sources on Latin American law, in general, and Mexican law, in particular.⁶⁹ I then turned to Spanish sources, including books or articles describing the U.S. legal system. Despite the relative dearth of published

67. See MEXICAN LAW, *supra* note 5, at 36 (noting that on October 2, 1968, units of Mexican army opened fire on peaceful demonstration, killing hundreds and arresting thousands). For a detailed account of the event, see ELENA PONIAKOWSKA, *FUERTE ES EL SILENCIO* (1988).

68. Volunteers in Service to America, a program of the Federal Office of Economic Opportunity.

69. See RICHARD BAKER, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* (1971); KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* (1975); JOHN HENRY MERRYMAN, *CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2nd ed. 1985); JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPE AND LATIN AMERICAN LEGAL SYSTEMS* (1978).

books in Mexico, I found more books in Spanish about the U.S. legal system than what I found in English about Latin American systems.

My first venture into Mexican constitutional law was to find a lawyer who would tutor me. The lawyer was a general practitioner in Merida, in the state of Yucutan. We met for one or two hours daily during the summer of 1986, just before my Fulbright fellowship began. My tutor was a friend of the owner of the language institute in which I was enrolled in an intensive Spanish program during a period when my family and I were living with a Mexican family.

We agreed to discuss the Mexican Constitution article by article. When I made cynical comments about the *garantias individuales* (a rough equivalent to the United States' Bill of Rights) in light of the well-documented use of torture to extract confessions, my tutor noted that "at least we do not fry people in electric chairs." Throughout our sessions the question of the relative superiority of the Mexican or the United States legal systems surfaced in many ways. Lawyers from civil law countries view their codes as properly determining the result, resisting the chaotic and subjective "unwritten" common law tradition. To lawyers trained in civil law countries, the decisions of the United States Supreme Court, often by five to four votes, as well as the public reports about outcomes in jury trials, demonstrate a subjective and unpredictable legal system, so much so that civil law practitioners question its legitimacy. Conversely, *presidencialismo* or, indeed, *caudillismo*,⁷⁰ has fostered the dominance of the executive in governance of Mexico and, appears to the U.S-trained lawyer to make the rule of law a mirage. Moreover, Mexico's tradition of short and, almost terse, judicial opinions makes it difficult to analyze the application of any rule of law, thus making the legal system less than transparent and precluding meaningful predictability. I was shocked to see that the Mexican Constitution, ratified in 1917, had been amended over 300 times, while ours, ratified in 1787, has been amended only twenty-seven times. But, as a Mexican colleague reminded me, the U.S. Supreme Court has contributed hundreds of "amendments," in the form of "interpretations" of the Constitution.

This state of affairs inspired me to seek a grant to bring together U.S. and Mexican legal scholars for a colloquium on comparative constitutional law and to publish the results in *Derecho Constitucional*

70. A *caudillo* is the Spanish term for a strong leader. Throughout Mexican history, *caudillos* have dominated political life, beginning with early leaders such as the opportunistic Antonio López Santa Anna and the reformist Benito Juárez, and continuing with recent presidents such as the imperial Porfirio Díaz and the charismatic Lázaro Cárdenas.

Comparado: México y Estados Unidos.⁷¹ The United States Information Agency (USIA), the parent body for the Fulbright program, and the Legal Research Institute (*Instituto de Investigaciones Jurídicas de UNAM*, or the *Instituto*) funded the project.⁷² Two co-authors of *Mexican Law*, Stephen Zamora and Leonel Pereznieto, contributed to the two-volume work.⁷³ Having an office (*cubículo*) at the *Instituto*, where I had access to their fine library of Latin American law and, more importantly, to their resident legal scholars, whose contribution to Mexican law is of lasting importance, made my constitutional and international trade research possible.

The *Instituto* has long been regarded as Mexico's most important center for law and policy studies. This prestigious research center and Mexican law think tank hosted scholars of the caliber of Guillermo Floris Margadant S., whose *Introducción a La Historia del Derecho Mexicano*⁷⁴ continues to be a standard-bearer for lawyers, law students, and jurists. His legal historical treatise not only examines the outlines of most areas of substantive and procedural law but cogently explains the political, historical, cultural, and economic forces shaping the Mexican law. Mexican as well as U.S. attorneys and academics have yet to see another single book describing the Anglo-American legal system in Spanish with comparable amplitude and quality.⁷⁵ However, with the publication of *Mexican Law*, there is now an English language legal treatise that does justice to Mexican law and legal institutions.

A U.S. lawyer reading Mexican constitutional history will be reminded of the principle of federalism in the U.S. Constitution because

71. Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, *Derecho Constitucional Comparado: México y Estados Unidos [Comparative Constitutional Law: Mexico and the United States]* (1990).

72. The decimation of the USIA was a long sought goal of former Senator Jessie Helms (R-North Carolina) that was largely achieved during Senator Helm's tenure as chair of the Senate Foreign Relations committee in the late 1990s. Such scholarships for purposes of cultural exchange have now been replaced by the United States Aid for International Development Projects, which furthers specific United States foreign policy objectives.

73. Leonel Pereznieto wrote Chapter 38, "Aspectos migratorios en la legislación mexicana" (Immigration Aspects in the Mexican legislation) and Stephen Zamora wrote Chapter 50, "El poder presidencial y la economía de los Estados Unidos" (The presidential power and the economy of the United States).

74. GUILLERMO FLORIS MARGADANT S., *INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO* (1971).

75. Peter Hay's book, *Una Introducción al Derecho de los Estados Unidos* is a translation of his book *Introduction to U.S. Law*. Although it is not specifically targeted for Mexican attorneys, the Spanish version is even recognized by a top Comparative Law Scholar in Mexico as one of the best publications available for Mexican attorneys interested in U.S. Law. See JESÚS LÓPEZ MONROY, *SISTEMA JURÍDICO DEL COMMON LAW X* (2001).

it is a founding principle for the development of both constitutions. However, Mexican history differs markedly from United States history in the relative power and prestige accorded to the executive and judicial branches. Recent developments that I address below suggest that the independence and importance of the judiciary are increasing in significant ways, confirming predictions made by the authors in *Mexican Law*.

The U.S. Constitution and the 1812 Spanish Constitution of Cadiz influenced⁷⁶ Mexico's first Constitution, which was written in 1824, following Mexico's independence.⁷⁷ It established separate states, of which there are currently thirty-one.⁷⁸ Mexico's federal government followed the U.S. model of a bicameral legislature and the separation of powers.⁷⁹ However, the drafters of the first Mexican constitution severely limited the power of the federal government.⁸⁰ For example, the federal government did not have significant taxing power.⁸¹ In the ten years following 1824, though, abrogation of the Mexican Constitution increased centralized control.⁸² Other constitutional reforms followed and the power of the central government waxed and waned. The conservatives, who advocated a strong central government, were allies of the church, the army, and landowners.⁸³ The liberals sought greater state autonomy, advocated for land reform, limitations on the power of the church, and civilian control of the army.⁸⁴

Liberal leaders, including Benito Juarez, developed a new Constitution in 1857,⁸⁵ and based the document on the ideals of freedom of association, anti-clericalism, and federalism.⁸⁶ By the end of the eighteenth century, records showed that the Church owned half of the buildings in Mexico City and one-third of the land in Mexico.⁸⁷ The 1857 Constitution served as a model for the later Constitution of 1917.⁸⁸ The 1917 Constitution strengthened the executive and weakened the legislature.⁸⁹ The 1937 Constitution amended the 1917 Constitution by

76. MEXICAN LAW, *supra* note 5, at 20.

77. *Id.* at 19.

78. *Id.*

79. *Id.* at 20.

80. *Id.*

81. MEXICAN LAW, *supra* note 5, at 20.

82. *Id.*

83. *Id.* at 18, 23-24.

84. *Id.* at 23-5.

85. *Id.* at 23.

86. MEXICAN LAW, *supra* note 5, at 23.

87. *Id.* at 24.

88. *Id.* at 25.

89. *Id.* at 34.

completely prohibiting presidential re-election.⁹⁰

The Constitution was amended again in 1994.⁹¹ Until that point, the president appointed the Mayor and governing officials for the *Distrito Federal*,⁹² which effectively gave the president control over fifteen percent of the country's population.⁹³ The *PRI* controlled Mexico for more than seventy years.⁹⁴ The *PRI* achieved domination through centralized voter registration, the *PRI*'s control of the electoral process, the fusion of *PRI* with public administration, and an absence of any single opposition party with enough support to challenge the *PRI*.⁹⁵ The one party system gave the president de facto power to legislate based on his party's legislative support.⁹⁶ The current president, Vicente Fox, however, is not a member of the *PRI*.⁹⁷ His victory has contributed to a reduction in *presidencialismo*. A new electoral regime has been adopted, including a code for organization and oversight of federal elections.⁹⁸

The President is elected by direct popular vote and serves a single six-year term.⁹⁹ Candidates must be at least thirty-five years old, a Mexican citizen by birth, and their parents also must be citizens by birth.¹⁰⁰ The President has the power to promulgate and execute legislation passed by congress, name cabinet and military officers, declare war pursuant to an act of congress, conduct foreign relations, and conclude treaties.¹⁰¹

Mexico has a House of Representatives with 500 members and a Senate with 128 members.¹⁰² Three Senators from each state serve six

90. *Id.* at 32. *Licenciado* Juan Pablo Vega Cruz notes that the motto "*sufragio efectivo, no reelección*" ("effective voting, no reelection") began with the Revolution in 1917 and continues today. See Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 32, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). An early version of the rule prohibiting reelection of the president was published in the Federal Gazette (*Diario Oficial de la Federación*) on January 28, 1928. Interview with Juan Pablo Vega Cruz, *licenciado*, in Washington D.C. (Sept. 22, 2005).

91. MEXICAN LAW, *supra* note 5, at 188.

92. *Id.* at 113-4.

93. *Id.* at 147.

94. *Id.* at 33.

95. *Id.*

96. MEXICAN LAW, *supra* note 5, at 32-3.

97. *Id.* at 41.

98. *Id.* at 170.

99. *Id.*

100. *Id.* at 172. Vicente Fox's candidacy for president was made possible by a July 1, 1994 amendment to article 82, paragraph 1 of the Constitution, permitting Mexican-born citizens who have *either* a mother or a father of Mexican birth to be elected to the highest office. Vicente Fox's father was Mexican born, but his mother was Spanish born. Interview with Juan Pablo Vega Cruz, *licenciado*, in Washington D.C. (Sept. 22, 2005).

101. MEXICAN LAW, *supra* note 5, at 147.

102. *Id.* at 138.

year terms.¹⁰³ Citizens vote for a party list rather than an individual.¹⁰⁴ The party with the highest number of votes wins two Senate seats, while the third Senate seat is awarded to the party winning the second highest number of votes.¹⁰⁵ The power to propose legislation in Congress is vested in the President, the members of the Federal Congress, and the members of state legislatures.¹⁰⁶ The executive branch drafts the vast majority of federal legislation.¹⁰⁷

Traditionally, the judiciary in Mexico has been less prestigious, less independent, and less powerful than the U.S. judiciary.¹⁰⁸ The federal constitution and only a few federal laws define the Mexican court system.¹⁰⁹ The Chief Justice of the Mexican Supreme Court is elected every four years.¹¹⁰ Ten associate judges are appointed for fifteen years and are barred from re-appointment.¹¹¹

One main criticism of the Supreme Court is its lack of lasting influence on the legal system.¹¹² *Stare decisis* is difficult to achieve in Mexico.¹¹³ A Mexican Supreme Court decision is binding only when there are “five consecutive judgments applying the same rule are decided by a vote of at least eight of eleven ministers in cases decided in plenary session, or four of five cases decided [in chambers].”¹¹⁴ This inability to issue binding decisions led to an overload of cases until the creation of the Collegiate Circuit Courts.¹¹⁵ These Courts assumed jurisdiction of many cases that were formerly under the Supreme Court’s jurisdiction.¹¹⁶

Distrito Federal courts have one judge per court who serves a single six-year term.¹¹⁷ After the sixth year, each judge may be ratified and retained, promoted, or dismissed.¹¹⁸ These courts carry a disproportionate caseload for both civil and criminal cases when compared to courts in other Mexican states.¹¹⁹

There are two categories of federal jurisdiction: *Amparo*, which is

103. *Id.* at 138.

104. *Id.* at 173.

105. *Id.*

106. MEXICAN LAW, *supra* note 5, at 183.

107. *Id.*

108. *Id.* at 186.

109. *Id.* at 188.

110. *Id.* at 190.

111. MEXICAN LAW, *supra* note 5, at 189-90.

112. *Id.* at 192.

113. *Id.*

114. *Id.*

115. *Id.* at 191.

116. MEXICAN LAW, *supra* note 5, at 191.

117. *Id.* at 194.

118. *Id.*

119. *Id.*

the right of an individual or enterprise to contest the action of a government agency on the grounds of unconstitutionality; and *Constitucional*, which refers to the federal law assigned to the court.¹²⁰ *Amparo* law, a uniquely Mexican institution created to broadly protect the constitutional guarantees of persons, has proven generally difficult for foreign attorneys to understand. Non-Mexican attorneys have been tempted in the past to oversimplify and conceive of *amparo* as the functional equivalent of the Anglo-American institution of *habeas corpus*. The authors clearly delineate the most relevant differences between these institutions and spell out the procedural requirements.¹²¹

Federal claims, such as constitutional controversies among government agencies and “Actions of Unconstitutionality” apply to the general population, whereas *amparo* is available only to the private litigant. Students of Mexican law study these constitutional claims for years; however, the treatise authors have demystified the concepts and methods of *amparo*, giving their readers an accessible overview with many examples and explanations. The authors assemble the constitutional concepts in a single chapter that provides the novitiate with the raw materials for understanding previously inaccessible concepts.¹²²

In 1994, then-President Ernesto Zedillo proposed amendments to the constitution which radically altered the federal court system.¹²³ A new entity accepted administrative and disciplinary duties allowing the Supreme Court to concentrate on constitutional issues.¹²⁴ Prior to 1990, the Judiciary lacked the independence to challenge the President on important matters¹²⁵ and, until 1994, the President appointed all federal judges.¹²⁶

These constitutional and political changes created favorable conditions for the evolution of a more independent judiciary.¹²⁷ One of the authors of *Mexican Law*, José Ramón Cossío, is now a *ministro* on the Supreme Court. In June 2005, he authored an important Supreme Court decision that highlights the Mexican judiciary’s increasing independence from political influence. The Court ruled that former President Luis Echeverría could be charged for a 1971 Mexico City massacre of student protesters.¹²⁸ At eighty-three years old, Echeverría is

120. *Id.* at 212.

121. MEXICAN LAW, *supra* note 5, at 212-6, 258-78.

122. *Id.* at 257-86.

123. *Id.* at 188. The new entity is called the *Consejo de la Judicatura Federal*. See Consejo de la Judicatura Federal, <http://www.cjf.gob.mx> (last visited Oct. 16, 2005).

124. *Id.*

125. *Id.* at 160.

126. MEXICAN LAW, *supra* note 5, at 160.

127. *Id.* at 188.

128. *Mexico Ex-Leader Can Be Charged*, BBC NEWS, June 15, 2005,

the first former Mexican president who could potentially face human rights abuses charges allegedly committed during his presidency.¹²⁹ As a *PRI* member, he held office from 1970 until 1976, during the so-called “dirty war” in which hundreds of leftist activists died.¹³⁰ The Mexican Supreme Court ruled that a thirty-year statute of limitations protecting Echeverría from prosecution began when he left office in 1976, but the government may still prosecute him for human rights abuses occurring during his term in office.¹³¹ The case proceeded to a lower court to decide whether there was enough evidence for a trial.¹³²

In July 2005, the lower court refused to issue an arrest warrant for the former president, ruling that there was insufficient evidence to try him for genocide.¹³³ Echeverría’s lawyer, Juan Velazquez, argued that the 1971 killings did not constitute genocide.¹³⁴ Special prosecutor Ignacio Carrillo acknowledged that he has no legal recourse to appeal the court’s decision, but states that he plans to charge Echeverría in a 1968 massacre in which government troops killed up to three hundred people in Mexico City.¹³⁵

Carrillo accused Echeverría of ordering an attack on student protestors in June 1971, dubbed the “Corpus Christi massacre.”¹³⁶ Echeverría repeatedly denied involvement in the killings.¹³⁷ Defense lawyers conceded that eleven people died in the attack, while Carrillo insists that as many as fifty demonstrators died.¹³⁸ Prosecutors accused Echeverría of using an armed gang known as the *Halcones* (Falcons) to attack, systematically, opponents of his government.¹³⁹ Prosecutors also accused ten other people of involvement in the student deaths, including five *Halcones* and other former government members.¹⁴⁰ The unfolding of the possible prosecution of Echeverría and his associates underscores the timeliness of *Mexican Law* as a book providing a framework and context in which to understand these cases.

<http://news.bbc.co.uk/2/hi/americas/4097528.stm>) [hereinafter *Mexico Ex-Leader Can Be Charged*].

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Mexican court refuses to issue arrest warrant for ex-president for alleged genocide*, PEOPLE’S DAILY ONLINE, July 27, 2005, http://english1.people.com.cn/200507/27/eng20050727_198558.html.

134. *Id.*

135. *Id.*

136. See *Mexico Ex-Leader Can Be Charged supra* note 136.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

III: The Treatise on Family Law & Inheritance¹⁴¹

In the United States, law schools usually offer family law, the law of wills, trusts and estates, and elder law as separate classes, often with overlapping elements.¹⁴² In Mexico, separate courses on family law and inheritance law are relatively recent additions to the core curriculum of Mexican law schools, and the schools still do not treat elder law as a discrete classroom topic.¹⁴³ During the summer of 2005, students used *Mexican Law* as a supplement to their classroom text in International Family and Elder Law at the University of San Diego's program in Mexico City.¹⁴⁴ It provided substantive information on Mexican family law, succession law and, even touched on emerging Mexican elder law, thus offering the visiting American students opportunities for comparative analysis on all three topics.¹⁴⁵

Some of the toughest issues in U.S. family and elder law involve family finances, including family "support" obligations versus the government's desire to control costs for welfare programs, health care and long-term care for the disabled or the aged.¹⁴⁶ Indeed, by reading

141. Katherine C. Pearson authored this part of the review essay.

142. While Elder Law is probably the "youngest" of family law-related subjects, in the United States it is increasingly recognized as an essential part of a twenty-first century law school curriculum. See e.g., Stetson University College of Law Center for Elder Law and NAELA <http://www.law.stetson.edu/excellence/elderlaw/surveyall.asp> (last visited Sept. 14, 2005) (collection of elder law courses and clinics maintained by Stetson University and the National Academy of Elder Law Attorneys); The Elder Law Professors' Blog, http://lawprofessors.typepad.com/elder_law/ (last visited Sept. 14, 2005).

143. MEXICAN LAW, *supra* note 5, at 47-52 (including tables showing core curriculum changes at Mexico's largest university, UNAM, between 1991 and 2002, with mandatory classes on family and *sucesion* law appearing in the 2002 syllabus). While many U.S. law schools have offered elder law courses for at least ten years, the international realm also is increasingly recognizing elder health and legal concerns. See e.g., *Testimony on "The Graying of Nations"*: Hearing Before the Senate S. Comm. On Aging, 105th Cong. (1998) (statement of Jeannette C. Takamura, Assistant Secretary for Aging, U.S. Department of Health and Human Services) (describing key international initiatives, including an "Aging Coregroup" staffed by U.S. and Mexico officials focusing on "shared issues of our aging populations and exploring opportunities to expand bilateral, collaborative efforts to better address the special health needs of older Mexicans and Americans").

144. D. MARIANNE BLAIR & MERLE H. WEINER, *FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW* (2003).

145. See MEXICAN LAW, *supra* note 5, at chs. 15-16. Chapter 15 is entitled "Family Law and the Law of Persons," and Chapter 16 is entitled "Property and Inheritance Law." Discussions of social security, pensions and public health are found at various points throughout the treatise.

146. See e.g., Seymour Moscovitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL'Y 709 (2001); Seymour Moscovitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86

both *Mexican Law* and current events periodicals, one quickly recognizes that the respective roles for family and government in providing greater assurances of individual financial stability are sizzling hot topics in Mexico. Early in the summer, Mexico City's mayor, Andrés Manuel López Obrador (also an aspiring presidential candidate for the PRD party), announced monthly stipends and "free home health care for the capital's 350,000 elderly,"¹⁴⁷ while noting "[t]here are many elderly adults who now cannot leave their homes and who need medical attention at home."¹⁴⁸ Similarly, he debated sharply the importance of financial "remittances" flowing from individual workers in the United States back to their families in Mexico.¹⁴⁹ Moreover, as attention and rhetoric focused on the pros and cons of a U.S.-Mexico guest worker program,¹⁵⁰ there was renewed opportunity for discussion of totalization treaties¹⁵¹ that can significantly affect a returning worker's prospects for fair treatment as a domestic retiree.¹⁵² These events emphasize the "family" as a key international legal entity, while also demonstrating the

MARQ. L. REV. 401 (2002).

147. *Mayor: Elderly to Get Home Care*, MIAMI HERALD (INT'L.-MEX.), June 3, 2005, at 3.

148. *Id.* In Mexico the oldest institution providing public programs to support older persons is called *Instituto Nacional de la Senectud (INSEN)*. One lifelong citizen of Mexico City observes that election-time movements offering short-term, "free" benefits may do little to improve the living conditions for low-income elderly, particularly without long-term funding and a public policy commitment. Interview with Juan Pablo Vega Cruz, *licencido*, in Washington D.C. (Sept. 22, 2005).

149. See Brendan M. Case, *Stats on Money Transfers Inflated*, MIAMI HERALD (INT'L.-MEX.), June 17, 2005, at 1-2 (suggesting that previous estimates of \$16.6 billion U.S. in transfers from workers in the U.S. to families in Mexico during 2004 are "grossly" overstated).

150. See Robbie Sherwood, *Border Debate Splits Arizonans*, ARIZ. REP., July 10, 2005, at A1 (summarizing responses to McCain-Kennedy's proposed federal legislation on temporary worker programs, including Arizona's pending Proposition 200 prohibiting public benefits for persons without documented residential or citizenship status).

151. Totalization treaties, or agreements, are contracts between two countries that permit a foreign worker to combine or "totalize" social security credits earned in the foreign country with credits earned in his or her home country, thereby maximizing the impact of taxes or withholding paid by the worker while in the foreign country. The U.S. has twenty reciprocal totalization agreements, mostly with western European countries, plus Australia, South Korea and Chile. See Social Security Administration, *Status of Totalization Agreements*, <http://www.ssa.gov/international/status.html> (last visited Sept. 14, 2005). The United States has studied the proposal for a totalization treaty with Mexico for several years. See e.g., United States General Accounting Office, *Social Security: Proposed Totalization Agreement with Mexico Presents Unique Challenges* (Sept. 2003).

152. Compare David C. John and Stephen Johnson, *How a U.S.-Mexico Social Security Agreement Can Benefit Both Nations*, Heritage Foundation Executive Memorandum #849, Jan. 16, 2003, available at <http://www.heritage.org/Research/SocialSecurity/em849.cfm>, with James R. Edwards, Jr., *Social Security Crisis Will Worsen if Mexicans Cash In—Fair Comment*, INSIGHT ON THE NEWS, Mar. 18, 2003.

need for greater understanding of U.S. and Mexican laws affecting families.¹⁵³

Mexican Law introduces the country's approach to family law by referring to its Catholic tradition and associated reverence for family.¹⁵⁴ Statistics cited by the treatise may be somewhat surprising to U.S. readers, indicating that a relatively low national divorce rate in Mexico has declined even further in recent years, from "8.7 per cent in 1970 to 6.5 per cent in 1998."¹⁵⁵ In contrast to the official statistics, however, the authors observe that

there is also an element of myth involved in preserving a traditional notion of the Mexican family. During the past several decades, Mexico has faced the same sociological pressures that have led to the breakdown of family structures and values in other societies: rural poverty, the uprooting and migration of people seeking employment, and an increased incident of divorce.¹⁵⁶

Professor Zamora and his colleagues conclude that despite a "strong social antipathy to divorce," divorce is increasingly common in Mexico's large population centers.¹⁵⁷

A court visit in the country's most concentrated population center provides both context and confirmation for the authors' observations on family and inheritance law. Walking up the steps of the *juzgado de primera instancia*, the local court of first instance in Mexico City, a domestic relations lawyer from the United States would probably feel quite at home.¹⁵⁸ There is a familiar hum to the place as worried litigants

153. The availability and enforcement of legal protections for the individual and the family are bellwether signs of the relative "health" of a democratic society. See e.g., the prescient work on race relations by Professors LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* (2002) (making the apt analogy between the health of canaries used by miners to detect dangerous air and the healthiness of cross-racial initiatives as a key indicator of a democratic nation's legal health).

154. *MEXICAN LAW*, *supra* note 5, at 459. For an interesting anthropological view on family and the respective roles of husbands and wives, with echoes heard in modern Mexican viewpoints, see OSCAR LEWIS, *LIFE IN A MEXICAN VILLAGE: TEPOZTLAN RESTUDIED* (1951).

155. *MEXICAN LAW*, *supra* note 5, at 471 (citing Mexico's National Institute of Statistics and Demographics, which has an excellent on-line database at www.inegi.gob.mx). In contrast, official statistics indicate that the divorce rate in the United States rose over the same period, from 3.5 (per 1,000 in population) in 1970 to 4.3 (per 1,000 in population) in 1998. See U.S. Census Bureau, *STATISTICAL ABSTRACT OF THE UNITED STATES* (2002) at 59.

156. *MEXICAN LAW*, *supra* note 5, at 459.

157. *Id.* at 471.

158. Interview and court tour with Ernesto Enríquez Castillo, *abogado* and *licenciado*, for the University of San Diego School of Law's Summer Program in Mexico City, Mexico, (June 30, 2005). Professor Pearson is enormously grateful to several practicing attorneys who are also on the faculty of the *Escuela Libre de Derecho* in

huddle in small subsets of the family, while lawyers attired in dark suits engage in last minute negotiations or settlements. A few young children, momentarily oblivious to the realities of divorce and custody disputes, play impromptu games of tag on the steps of the courthouse.

The differences between U.S. and Mexico system begin to surface as one walks through the Mexico City court's metal detectors at the threshold of the huge structure. Uniformed security officers wave through *licenciados*. The officers also are fairly casual about which members of the public, if any, to send for closer inspection. In the central hall of the court, a tempting exhibit of fine art was temporarily on display for the public, but attorneys and parties rushed past the art. The Mexican court atmosphere harkens back to the more relaxed security found in U.S. courts before high profile courtroom shootings and color-coded alerts for public buildings. In Mexico City, the foremost concern is processing an enormous number of legal claims, not speculating about the potential for additional problems in the form of terrorism.

Once inside the ten-story building, a visitor finds a facility as alive as the hive of a thriving colony of honeybees.¹⁵⁹ Unlike other species of bees, honeybees never hibernate and, neither does the Mexican City court of first instance which handles an estimated 150,000 new cases each year.¹⁶⁰ The courts divide the cases into three categories: family law cases, civil (mostly commercial) cases, and leases (landlord-tenant).¹⁶¹ Family law cases account for approximately forty percent of

Mexico City, and who generously served as guest lecturers in June 2005 for University of San Diego's classes on Mexican Law. In particular, José Luis Izunza Espinoza, on domestic violence, and Luis M. Díaz Mirón, on social security and workers' rights, provided important insights into recent developments in Mexican law. Ernesto Enríquez Castillo taught a class on adoption and donated hours of time to answer patiently each of Professor Pearson's many questions and to provide her with a unique insider's view of the court system in Mexico City. Following her return from teaching in Mexico City, Professor Pearson had the good fortune to teach a course on Conflict of Laws at American University's Washington College of Law in the Fall of 2005, where LL.M. students were eager to share their own comparative views on international conflicts in family law. Juan Pablo Vega Cruz, a Mexican *abogado* studying for his LL.M. at American University was especially gracious in reading an early draft of this article and offering many additional insights and suggestions, including the encouragement to return for visits to the less burdened Mexican state courts outside the federal district. Interview with Juan Pablo Vega Cruz, *licenciado*, in Washington D.C. (Sept. 22, 2005).

159. Court tour with Ernesto Enríquez Castillo, *abogado* and *licenciado*, for the University of San Diego School of Law's Summer Program in Mexico City, Mexico (June 30, 2005) [hereinafter Court Tour].

160. Interview with Ernest Enríquez Castillo, *abogado* and *licenciado*, for the University of San Diego School of Law's Summer Program in Mexico City, Mexico (June 30, 2005) [hereinafter Enríquez Interview].

161. MEXICAN LAW, *supra* note 5, at 201. The third division of the courts of first instance is described in the treatise as "Landlord-Tenant" court, but the Spanish label, *juzgado de arrendamiento inmobiliario*, also translates fairly directly as the "court of real

new matters.¹⁶² Some fifty separate chambers are devoted to family law, a label that, in Mexico, includes the full gamut of traditional domestic relations disputes such as divorce, property distribution, custody, support, and adoption, as well as disputes over *sucesorio*, or inheritance rights.¹⁶³

Although Mexico City's busy court is comparable, in terms of structure and activity level, to the hive of hard-working honeybees, it is, curiously enough, a hive without a "queen bee." In the U.S., each judge functions somewhat as a queen bee, with staff members alert to every desire or demand. In Mexico City, each judge appears to function more as a head worker bee, somewhat lacking in prestige or, perhaps, lacking in power, given Mexico's civil law tradition and *amparo* federal review system.¹⁶⁴ The structure of the judge's chamber emphasizes a team approach. Each of the chambers is an elongated room.¹⁶⁵ At the rear of the room is a small, glass enclosed section, which serves as the official judge's office.¹⁶⁶ In front of this humbly furnished office is the hub of the operations, a series of desks manned (or usually womanned) by *secretarios*, who are *abogados* with law degrees.¹⁶⁷ Although it would be tempting to compare the *secretarios* to U.S. judicial law clerks, in fact the *secretarios* are career public sector employees, with a much more perceptible official role, as they receive and review motions, hear testimony, receive documentary evidence, and, most importantly, draft orders relating to all aspects of family court matters.¹⁶⁸ The judge of the chambers signs orders—and, when appropriate, hears testimony, especially sensitive testimony such as allegations of adultery—but it is the *secretarios* who keep the system from collapsing under the weight of the massive amount of paper filed daily in each chamber.

In a single chamber, three or four cases might be proceeding concurrently.¹⁶⁹ In front of each desk are two slim chairs, often occupied with opposing parties, perhaps with a lawyer leaning over each client, softly pressing a particular point of fact or law with the *secretario*. The proceedings (other than sensitive matters heard by the judge behind the

estate leasing." See JAVIER F. BECERRA, DICCIONARIO DE TERMINOLOGÍA JURÍDICA MEXICANA (ESPAÑOL-INGLÉS) 493, 79, 452 (1999).

162. Enríquez Interview, *supra* note 160.

163. MEXICAN LAW, *supra* note 6, at 201; Enríquez Interview, *supra* note 159.

164. "The perceived weaknesses of the state court system, and the heavy overlay of federal *amparo* jurisdiction, help explain why a sizeable number of the judgments issued by state courts continue to end up in the federal courts." MEXICAN LAW, *supra* note 5, at 203 (footnotes omitted).

165. Court Tour, *supra* note 159.

166. *Id.*

167. Enríquez Interview, *supra* note 160.

168. *Id.*

169. Court Tour, *supra* note 159.

glass wall) are open to the public, and are remarkably tranquil by comparison to many U.S. family law courtrooms.¹⁷⁰ Mexican first instance court proceedings rely heavily on written submissions as opposed to live testimony.¹⁷¹ There is no formal “courtroom” in the *Law and Order* television show sense of the word, but there are mini-trials being conducted, perhaps hundreds of them at any given hour on any given day in Mexico City.

Mexican Law, unlike other English language sources for Mexican law, which tend to focus mostly on commercial disputes,¹⁷² provides full chapters on the often neglected topics of family law and *sucesorio* and, equally important, describes the growing recognition of family law as an important field for legal education, legal reform, and judicial administration.¹⁷³ The U.S. lawyer faced with a cross-border family law dispute will find a crisp introduction to divorce and filiation¹⁷⁴ law in Mexico City, with essential footnotes detailing key federal, *Distrito Federal*, or other state code citations.¹⁷⁵ In Mexico, the codes are the

170. The format for receipt of evidence in family court, described in this essay, is also used for civil and landlord tenant proceedings in the state courts of first instance, and is very similar to the procedure for first hearings in the federal courts. It is possible that the low key format is better suited to family disputes, and mirrors many practitioners’ experiences in family court in the United States, where full-blown trials, with or without a jury, are very rare. However, the absence of formal public hearings is also a potential weakness in a court system plagued by a past reputation for favoritism and corruption. See MEXICAN LAW, *supra* note 5, at 329 (commenting on the lack of “open” trials in the Mexican system). “If you close [public] access to evidence, you can use it any way you want. It’s not fair play.” Chris Kraul, *Murky Justice System Causes Mistrust*, MIAMI HERALD (INT’L.-MEX.) at 3 (June 12, 2005) (quoting Ernesto López Portillo of the Mexico-based think tank, Institute for Security and Democracy).

171. “Due to the lack of a jury and the periodic gathering of evidence over a lengthy period of time, civil litigation in Mexico is primarily a written process.” MEXICAN LAW, *supra* note 5, at 322.

172. See 4 JORGE A. VARGAS, MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS (1998). But see Martha Frias-Armenta & Bruce D. Sales, *Discretion in the Enforcement of Child Protection Laws in Mexico*, 34 CAL. W.L. REV. 203-224 (Fall. 1997).

173. MEXICAN LAW, *supra* note 5, at chs. 15-16 (Family Law and the Law of Persons and Property Law and Inheritance Law). See also *id.* at ch. 2 (Legal Education and the Legal Profession).

174. In Mexico’s state and federal codes, detailed “filial” rules determine who can be treated as a legitimate parent or child, with the resulting status affecting both the obligation to provide *alimentos* or support and the right to inherit. See *id.* at 474. “Filial” roles, including the obligation to provide financial support, are receiving renewed attention in the United States, particularly in the context of adult children’s responsibility for older adults. See e.g., Katherine C. Pearson, *The Responsible Thing to Do About “Responsible Party” Provisions in Nursing Home Agreements: A Proposal for Change on Three Fronts*, 37 U. MICH. J. L. REFORM 757, 758 n.4 (Spring 20004) (summarizing recent literature on U.S. filial responsibility or family support laws).

175. Unlike the U.S., where family law is largely a creature of state statutes and state common law, in Mexico there is a federal code, federal district (Mexico City) code, and

focus, following the tradition of the civil law system and, interestingly, the codes are readily available for purchase at a modest price in stores and the ubiquitous Sanborn coffee shops throughout the city.¹⁷⁶

Many U.S. lawyers find it hard to appreciate the differences between a strong civil law tradition and the American approach of combining common law and statutes. A recent visit to the Mexico City court provides a simple and somewhat amusing example.¹⁷⁷ In the same chambers as the judge and his or her *secretarios*, there is usually a long counter¹⁷⁸ where several men and women stand, copying information from the records of individual cases. They may be lawyers or law students hired by firms engaged in the daily task of reviewing and hand-copying rulings from the dockets.

The court does not mail or distribute copies of rulings. The room has photocopy machines, but no one is using them. Why is that? As one seasoned *abogado* explained, "Neither the Mexican Constitution nor the applicable codes provides parties with a right to photocopies, and thus most judges take the position that in the absence of specific legal authority, photocopies are not allowed."¹⁷⁹ Even though this is a procedural rather than substantive example, it demonstrates well the significance of a code tradition with a strong adherence to express statutory authority.¹⁸⁰

With that real life example, it becomes easier to appreciate

thirty-one state codes, each with statutory provisions governing family disputes, often identical (or nearly so) in numbering and terminology. Mexico City's code was often treated as a model for the other states, however "in recent years there have been significant changes in the civil codes of some states that set them apart from the Mexico City model." MEXICAN LAW, *supra* note 5, at 459. For example, at least two states, Tamaulipas and Hidalgo, have granted "the same legal rights to spouses in a common law marriage as exist in a conventional marriage." *Id.*

176. For example, the federal social security code, comprising hundreds of pages, and Mexico City's civil code, with thousands of pages, each cost \$99.00 mn (pesos), or approximately \$10.00 U.S.

177. Court Tour, *supra* note 159.

178. Each judge's chamber maintains his or her files for active cases.

179. Enríquez Interview, *supra* note 160.

180. The observations of Professor Zamora and his colleagues, which make *Mexican Law* far more than an encyclopedia, are especially helpful when the authors go beyond a description of the surface differences between Mexico and other countries' approaches to jurisprudence. In commenting on the effect of recent judicial reforms and the continuing importance of a code tradition, for example, the authors point out that "Mexico's civil law tradition does not . . . completely explain a judiciary that has not defended individual liberties and constitutional order on the scale people in the United States have come to expect of their courts." MEXICAN LAW, *supra* note 5, at 187. The authors point to subtle influences on the judiciary, including the long history of a single party's domination through a chief executive and the "powerful forces of centralism that have shaped Mexico's legal landscape." *Id.* The Mexican court system is changing, but change is neither swift nor easy. *Id.* at 188 (noting that reforming an entire judicial system "on a national scale will take decades rather than years").

Professor Zamora and his colleagues' careful description of Mexican statutory law on natural and artificial persons (*personas físicas y personas morales*)¹⁸¹ and the relationship between civil status (including an individual's legally recognized domicile)¹⁸² and choice of law rules¹⁸³ for family¹⁸⁴ or inheritance disputes.¹⁸⁵ The importance of a birth certificate in Mexico, and the rules on what can or cannot appear on a birth certificate, are easier to understand with the practical background provided by the authors.¹⁸⁶

Practitioners report that the two most active substantive areas of law in the family chambers are divorces and succession claims.¹⁸⁷ Mexico retains numerous fault grounds for divorce, and the religious history of the country is echoed in many of the provisions, such as "duly proven adultery committed by one of the spouses," or a history of the "husband proposing to prostitute his wife."¹⁸⁸ Mexico also has what U.S. lawyers would call no-fault grounds, including divorce by mutual consent, or divorce following separation for at least two years.¹⁸⁹ The grounds are stated in Mexican statutes in the alternative, without priority; however, practitioners report that an allegation of marital fault trumps an allegation of mere separation, and thus becomes the primary focus of the divorce proceeding.¹⁹⁰ While a simplified administrative divorce is an option for mutually consenting couples without children,¹⁹¹ the dominance of fault grounds permits lengthy allegations and counter allegations of factual nuances. Similarly, several grounds that may be asserted by blood relatives¹⁹² to disapprove the validity of written

181. *Id.* at 462-3.

182. *Id.* at 462.

183. *See also* MEXICAN LAW, *supra* note 5, at 676. Chapter 22, entitled "Conflict of Laws," reviews Mexico's substantial body of private international laws, which despite *apertura*, or "opening up" to external theories, are still heavily territorial in character.

184. "[Q]uestions of legal capacity, marital status, custody, and financial support are to be determined in accordance with the law of the person's domicile." *Id.* at 462.

185. "[M]atters of inheritance are governed by the civil code of the jurisdiction in which the person was domiciled at the time of death." *Id.* at 500.

186. "[T]he birth certificate is the most important document of identification for persons conducting matters with public agencies, and is the main document employers inspect when hiring employees." *Id.* at 468.

187. Enríquez Interview, *supra* note 163.

188. MEXICAN LAW, *supra* note 5, at 471-2, n.50.

189. *Id.*

190. "Divorce by mutual consent . . . may be granted by an administrative judge, or *juez de Registro Civil*, in the place of domicile." *Id.* at 471. *See also* Enríquez Interview, *supra* note 160.

191. MEXICAN LAW, *supra* note 5, at 471.

192. *Id.* at 502 (listing grounds for intestate inheritance claims, in the absence of a will, or where a will is void, where a will is incomplete, where heirs have failed to fulfill a condition, where whole or partial revocation has occurred, where certain time limits have expired, or where a will has been destroyed, altered or "opened early").

testamentary plans make it difficult to achieve prompt resolution of inheritance claims.¹⁹³

In the United States, family courts spend a major portion of their time on child custody and support determinations.¹⁹⁴ Curiously, *Mexican Law* covers neither topic extensively; rather, the treatise introduces both topics simply as a subset of divorce law.¹⁹⁵ One possible hypothesis is that the book's rather curt treatment reflects a lack of significant disputes about custody or child support in Mexico. A local attorney suggests that this is not the case.¹⁹⁶ Rather, the cursory discussion may reflect another reality. Veteran court attorney Ernesto Enriquez Castillo says that in Mexico City it is tricky for divorced fathers to obtain awards granting them physical custody over children¹⁹⁷—and it is probably equally difficult for mothers to enforce child support orders from an unwilling father. On the one hand, Mexico appears to recognize a “tender years” presumption, providing mothers with an edge in custody disputes.¹⁹⁸ On the other hand, *Mexican Law* fails to offer guidance about the availability of standardized calculations for child support amounts, contempt proceedings for nonpayment of child support, tax refund intercepts, and mandatory wage withholding, tools that in recent years have helped U.S. courts to better ensure enforcement of their awards.¹⁹⁹ Long delays in

193. “Probate is a highly formalistic procedure, and for this reason there are ample opportunities for parties contesting the disposition of an estate to delay the proceedings of the *juicio sucesorio*.” *Id.* at 503.

194. *See e.g.*, National Center for State Courts, <http://www.ncsconline.org> (last visited Sept. 14, 2005) (providing statistics on case filings by type, per 1,000 in state population).

195. MEXICAN LAW, *supra* note 5, at 473; *see also id.* at 482 (discussing the concept of *guarda*).

196. Enríquez Interview, *supra* note 166.

197. *Id.* Difficulties in obtaining custody and visitation rights have led parents in Mexico to form advocacy organizations, such as *Movimiento de Padres en Lucha por sus Hijos [Movement of Parents Fighting for their Children]*. *See* Natalia Vitela, *Defienden padres custodia compartida [Parents Defend Shared Custody]*, REFORMA, June 7, 2005, at 2C. Although the article describes the organization as supporting both men and women's access to shared custody arrangements, it notes that historically, the majority of judges in Mexico have routinely granted full custody rights to women. *Id.* Recent changes in custody law, aimed at providing more clearly defined parameters for shared custody, took effect in December 2004. *Id.* *See also* Patricia Begné, *Parental Authority and Child Custody in Mexico*, 39 FAM. L.Q. 527 (Summer 2005).

198. *See* Código Penal Federal [C.P.F.] [Federal Criminal Code], Diario Oficial de la Federación [D.O.], *as amended*, Ch. XI, art. 282 (V), 14 de agosto de 1931 (Mex.) (referring to a presumption of care by the mother for children younger than seven years of age).

199. Some Mexican states have provisions for wage withholding for *pension alimenticia* (support), although the effectiveness of such a tool in a country without a strong tradition of income reporting is unclear. Interview with Juan Pablo Vega Cruz, *licenciado*, in Washington D.C. (Sept. 22, 2005). *See also* Antoinette Sedillo López, *International Law-U.S./Mexico Cross-Border Child Abduction: The Need for*

achieving finality, starting in the crowded courts of first instance, but compounded by appeals and *amparo* review proceedings, further frustrate enforcement of key family court rulings.²⁰⁰

Mexican Law gives an extensive description of the uniquely Mexican legal concept of *concubinato*.²⁰¹ In contrast to the growing movement by U.S. courts to purge recognition of informal or common law marriages,²⁰² Mexico's state and federal civil codes provide important consequences arising from living together for a period of time as a declared couple,²⁰³ and the legal recognition of *concubinato* status has vital implications for children, including support and inheritance rights.²⁰⁴ A *concubinato* couple also is eligible to adopt under Mexican law, as are single persons.²⁰⁵

Upon hearing that *concubinatos* are eligible to adopt children, students in the University of San Diego's summer program in Mexico City asked the next logical question, "Can same-sex couples adopt?"²⁰⁶ The answer was a firm "No."²⁰⁷ An individual man or woman, gay or lesbian, is legally able to adopt, but a same sex partnership of either gender has no legal standing in Mexico, and *Mexican Law* perhaps speaks volumes about the status of gay rights in Mexico by the authors' apparent decision not to mention same sex unions in the chapter on family law.²⁰⁸

Cooperation, 29 N.M. L. REV. 289 (1999).

200. "Well functioning, modernized, and adequately funded state courts that competently and impartially resolved disputes could reduce the caseload of Mexico's federal courts enormously." MEXICAN LAW, *supra* note 6, at 203.

201. *Id.* at 477.

202. See e.g., PNC Bank Corp. v. Workers' Comp. Appeal Bd. (Stamos), 831 A.2d 1269 (Pa. Commw. 2003) (split decision) (purporting to eliminate recognition of common law marriage in Pennsylvania on a prospective basis); see also 23 PA.C.S.A. 1103 (2004) (providing that common law marriages "contracted after January 1, 2005" are void in Pennsylvania).

203. In Mexico City, *concubinato* status arises after two years of living together "*en forma constante y permanente*," although the two year period is not required if the couple have a child together. Código Penal Federal [C.P.F.] [Federal Criminal Code], Diario Oficial de la Federación [D.O.], *as amended*, Ch. XI, art. 291 BIS 14 de agosto de 1931 (Mex.); see also MEXICAN LAW, *supra* note 6, at 477 (discussing common law spouse rights to social security and other rights occurring upon death or disability).

204. MEXICAN LAW, *supra* note 5, at 477 (discussing presumptions for children born within set periods of time following commencement or end of common law relationship); *id.* at 501 (discussing mandatory support obligations of a testator to certain descendants).

205. *Id.* at 478-80; Class Lecture by Ernesto Enríquez Castillo, *abogado* and *licenciado*, for the University of San Diego School of Law's Summer Program in Mexico City, Mexico (June 30, 2005) [hereinafter Enríquez Class Lecture].

206. Enríquez Class Lecture, *supra* note 205.

207. *Id.*

208. During University of San Diego School of Law's Summer 2005 Program in Mexico City, noteworthy events were occurring in the world for same sex couples, including the Canadian Parliament's approval of same sex marriages, and the Spanish

Professor Zamora and his colleagues do not address one major topic in family law that has been the subject of recent attention in Mexico, at least not in the chapter on Family Law. Domestic violence generally, and specifically violence against women, is a documented problem in both developed and developing nations, and Mexico is no exception.²⁰⁹ After reading an article in the English language, Mexican edition of the *Miami Herald*, published in cooperation with the Mexican newspaper, *El Universal*, documenting “rampant” domestic violence among Huichol Indians in the Mexican state of Jalisco,²¹⁰ students in the University of San Diego School of Law’s summer program in Mexico City asked a guest speaker whether family violence was unique to indigenous groups in Mexico. The answer was a clear no,²¹¹ and the guest speaker’s personal opinion finds dramatic support both in news accounts and in the country’s own official statistics.²¹² One recent article reported family violence as the cause of death for 173 women during the last five years in the state of Guanajuato, in north central Mexico.²¹³ The nation’s department on statistics reports that in a recent survey year, forty-six

government’s similar vote. See e.g., Clifford Krauss, *Gay Marriage Is Extended Nationwide in Canada*, N.Y. TIMES, June 29, 2005 at A4; Renwick McLean, *Spanish Parliament Gives Approval to Bill to Legalize Same-Sex Marriages*, N.Y. TIMES, Apr. 22, 2005 at A12. There is also evidence that Mexico’s attitude towards gay rights is changing. On June 25, 2005, the 27th annual gay pride parade attracted thousands of men and woman marching peacefully down *Paseo de la Reforma* and culminating in front of the towering *Monumento a la Independencia*. See Oscar Araña, *Gay Pride Parade: Legal rights still absent*, MIAMI HERALD (INT’L-MEX.), June 26, 2005, at 3 (reporting an estimated 10,000 participants in the parade, but concluding “there is a long way to go before the [Mexican] government provides greater legal protections and recognizes homosexual couples”).

209. For a fascinating approach to the topic of family violence with an international and comparative legal perspective, see D. MARRIANNE BLAIR & MERL H. WEINER, *FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW* (2003) (Chapter 6 on “Violence between Family Members”).

210. “We are talking about domestic violence in just about every single Huichol home. It’s difficult to come up with an accurate figure, but I feel it’s safe to say that at least 90 percent of Huichol men frequently abuse alcohol and subsequently abuse their wives and families,” said the [state domestic violence agency] official.

Ulises Zamarroni Martínez, *Abuse Rampant Among Huichols*, MIAMI HERALD (INT’L ED.), June 12, 2005, at 2.

211. *Licenciado* José Luis Izunza Espinosa, Criminal Law Specialist and Guest Lecturer at the University of San Diego School of Law’s Summer Program in Mexico City (June 13, 2005).

212. See Mary C. Wagner, *Comment: Belém Do Pará: Moving Towards Eradicating Domestic Violence in Mexico*, 22 PENN ST. INT’L L. REV. 349 (2003) (describing legislative and governmental initiatives in the late 1990s in Mexico to address serious concerns about “pervasive” problems with domestic violence).

213. Ulises Zamarroni Martínez, *Desprotegidas por la ley [Persons unprotected by the law]*, EL UNIVERSAL, June 19, 2005, at A22.

percent of all women had experienced at least one instance of family violence within the most recent twelve months.²¹⁴

Several Mexican states have recently adopted civil and criminal legislation addressing family violence. The authors enumerate “family violence” as one of the crimes listed in the federal criminal code,²¹⁵ but do not provide details that would be useful to a lawyer facing a cross-border family law case.²¹⁶ For example, Mexico City amended the local code in 2000 to criminalize “physical or psycho-emotional means [used] against the integrity of a family member, independent of whether physical injuries are caused.”²¹⁷ Violation of the law can result in a prison sentence of six months to four years as well as loss of *sucesorio*.²¹⁸ The judge can also issue an order prohibiting a defendant convicted of family violence from going to or living in the family home.²¹⁹ The scope of the “family members” subject to the law is broad, including married partners, unmarried couples, and blood relatives without limitation on degree, *concubinatos*, tutors, guardians, and adopted relations.²²⁰

One impending problem for domestic violence victims in Mexico, as compared with the U.S., is the absence in either the civil or the criminal codes of specific authority for the court to grant pre-trial injunctive relief in the form of no-contact or protection orders.²²¹ In the United States, domestic violence specialists view no contact orders as key to reducing tensions and avoiding the potential for the application of pre-trial pressure by the alleged aggressor to the complaining victim.²²² The family law chapter does not cover family violence, but *Mexican*

214. Instituto Nacional de Estadística [National Institute on Intrafamily Violence], <http://www.inegi.gob.mx/est/contenidos/espanol/rutinas/ept.asp?t=mvio32&c=5520> (last visited Sept. 18, 2005).

215. MEXICAN LAW, *supra* note 5, at 378.

216. See e.g., *Gonzales v. Gonzales*, 311 F.3d 942 (9th Cir. 2002) (involving child custody dispute under Hague Convention on International Child Abduction, between father in Mexico and mother in U.S., where mother obtained asylum for self and child based on a history of domestic violence by father occurring in Mexico).

217. Código Penal para del Distrito Federal [C.P.D.F.], [Federal District Criminal Code], *as amended*, art. 200, Diario Oficial de la Federación [D.O.], 14 de agosto de 1931 (Mex.). Professor Pearson is very grateful for assistance in translating this section of the *Código Penal para del Distrito Federal* provided by Antonio Bedolla of Mexico City, who also taught Intermediate Spanish for the 2005 summer program.

218. *Id.*

219. *Id.*

220. *Id.*

221. Enríquez Interview, *supra* note 160.

222. See Nichole Miras Mordini, *Note: Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 322-324 (2004); Christine O'Connor, *Note: Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 961-7 (1999).

Law's chapter on Criminal Law provides definitions for key criminal law concepts, which will help a reader to understand a potentially controversial aspect of Mexico's recent reforms.²²³ In most instances, Mexican law designates that only a *querella* can commence a family violence action,²²⁴ rather than the public prosecutor's decision to file an *acusación*.²²⁵ *Querellas* are a form of private criminal complaint.²²⁶ They permit victims to have a degree of personal control and the right to insist on prosecution; they also give the victim the power to terminate the criminal proceeding by forgiving the wrongdoer or waiving the prosecution.²²⁷ In the United States, it is accepted lore that domestic violence victims are uniquely vulnerable to pressure and control by the aggressor, thus leading many jurisdictions to adopt "no drop" policies for domestic violence complaints, regardless of the views of the victim.²²⁸ However, the U.S. trend is also controversial²²⁹ and thus it is interesting to see the Mexican legislature's recent decision, leaning in favor of empowerment of the victim to pursue or forgive past instances of violence, but perhaps at the risk of continuing or escalating the "cycle of violence"²³⁰ that many believe exists in family abuse patterns.

Just as the legislature in Mexico is demonstrating its commitment to reform by adopting sanctions for domestic violence, there are recent indications the Mexican court system is taking a more assertive role in enforcement. For instance, in January 2001, a federal circuit appellate

223. MEXICAN LAW, *supra* note 5, at ch. 11.

224. Código Penal para del Distrito Federal [C.P.D.F.], [Federal District Criminal Code], *as amended*, art. 200. Diario Oficial de la Federación [D.O.], 14 de agosto de 1931 (Mex.). "Este delito se perseguirá por querrela, salvo que la víctima sea menor de edad o incapaz." ("This offense will be prosecuted as a *querella*, unless the victim is under age or without capacity.") *Id.*

225. Under Mexican criminal procedure, a *querella* is "a complaint filed by the victim against an alleged offender for a criminal offense which may only be prosecuted at the request of the victim or other interested party (contrasted with *acusación*)." JAVIER F. BECERRA, DICCIONARIO DE TERMINOLOGÍA JURÍDICA MEXICANA 652 (1999).

226. MEXICAN LAW, *supra* note 5, at 359, 365 n.69 (discussing *querellas*).

227. *Id.*

228. Edna Eraz, Peter Ibarra & Norman Lurie, *Electronic Monitoring of Domestic Violence Cases: A Study of Two Bilateral Programs*, 68 FED. PROBATION 15 (Jun. 2004) (describing U.S. trends in pre-trial injunctions or protective orders and surveying studies on effectiveness of orders alone in deterring further violence, and proposing expanded use of electronic monitoring of alleged abusers as an enforcement tool).

229. Leigh Goodmark, *Law is the Answer? Do We Know that For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 16-19 (2004) (Domestic Violence Symposium issue). *See also* Mordini, *supra* note 228, at 317-22 (concluding that mandatory state interventions such as "no contact" orders ignore the battered woman's case specific perspective); O'Connor, *supra* note 228, at 943-46.

230. CHARLES P. EWING, *FATAL FAMILIES: THE DYNAMICS OF INTERFAMILIAL HOMICIDE* (1997); PHIL ARKOW, *BREAKING THE CYCLES OF VIOLENCE* (1995); LENORE WALKER, *THE BATTERED WOMAN* (1979).

court in an *amparo* proceeding issued a key decision for publication.²³¹ The ruling interpreted the federal penal law on family violence, concluding that an accused's cultural tradition, lack of education, or lack of civil status cannot serve as a defense to an allegation of physical or moral child abuse.²³²

The authors of *Mexican Law* refuse to pull their punches when describing the relative strengths or weaknesses of current Mexican law and politics or when suggesting the need for further reforms in family, inheritance, or related social welfare laws. A frequent theme throughout *Mexican Law* is the need for sound public financing, including a functional tax collection system.²³³ For example, a substantial portion of the Mexico City family court's work involves inheritance disputes,²³⁴ a fact that suggests there is accumulated lifetime wealth and property for claimants to fight over. One person not making a claim, however, is the tax collector, as there is no inheritance or estate tax on any level in Mexico.²³⁵ As the authors of *Mexican Law* wryly point out, "[d]espite the lack of tax revenues to support public spending, Mexican political leaders have not chosen to endorse such [an estate] tax."²³⁶ The legal challenges created by the absence of a functional, comprehensive tax

231. The decision is a *tesis aislada*, an intermediary step towards full precedential value, created by a series of consistent court rulings that become *jurisprudencia obligatoria*. For a very helpful discussion of the Mexican system of judicial precedent, including recent developments, see MEXICAN LAW, *supra* note 5, at 85. "*Tesis aisladas* do not carry the full weight of legal precedent, yet they are often cited by attorneys as persuasive, in the same way that decisions from a parallel jurisdiction are cited as persuasive authority in the United States." *Id.*

232. VIOLENCIA INTRAFAMILIAR. NO PROCEDE LA EXCLUYENTE DE RESPONSABILIDAD PREVISTA EN EL ARTÍCULO 15, FRACCIÓN VII, INCISO B), DEL CÓDIGO PENAL DEL DISTRITO FEDERAL, CUANDO POR LAS CIRCUNSTANCIAS PERSONALES DE LA ACUSADA PUEDE DETERMINARSE QUE NO IGNORA QUE CON SU CONDUCTA SE TIPIFICA AQUEL DELITO, Tribunales Colegiados de Circuito [T.C.C.] [Federal Appellate Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XIII, Enero de 2001, Tesis I.6o.P.8.P, Página 1817. (Mex.).

233. MEXICAN LAW, *supra* note 5, at 126-31 (describing an imbalance in taxing power of federal and local government in Mexico).

234. Enríquez Interview, *supra* note 160.

235. MEXICAN LAW, *supra* note 5, at 503. Responding to an early draft of this essay, tax law scholar Bert Lazerow, at the University of San Diego School of Law, questioned this criticism, noting that a frequent goal of developing countries is creation of an enforceable, simple tax collection system such as a VAT, or value-added tax, imposed on sales. Memorandum from Professor Bert Lazerow to author (Aug. 18, 2005) (on file with author). Still, in a country hungry for public dollars to finance many of its most basic public services, it is somewhat ironic that the Mexican court system is hosting substantial numbers of protracted *private* battles over wealth, even if modest in amount, of its deceased citizens. Perhaps it is even more ironic that the United States, with its own combination of public deficit problems and disparities in personal taxpayer wealth, is moving in the direction of eliminating federal estate taxes.

236. MEXICAN LAW, *supra* note 5, at 503.

collection system and the robust demand for service, including quality health care, for an enormous and aging population are themes well documented in *Mexican Law*.²³⁷

IV. The Treatise on Torts²³⁸

The *Mexican Law* treatise provides a synoptic sketch of tort law which will be of great interest to scholars, practitioners, and policymakers seeking alternatives to the U.S. civil justice system. Attacks on the U.S. tort system have become as American as apple pie, yellow ribbon magnets, and Wonder bread. Walter Olson of the Manhattan Institute, for example, touts his website, *Overlawyered.com*, as an exploration of “an American legal system that too often turns litigation into a weapon against guilty and innocent alike, erodes individual responsibility, rewards sharp practice, enriches its participants at the public’s expense, and resists even modest efforts at reform and accountability.”²³⁹ The portrayal of juries as runaway radicals, encumbering U.S. companies with increasingly erratic and unpredictable awards has increased in recent years in the United States.²⁴⁰

In Mexico, there are no calls for tort *reform*—perhaps because tort law is comparatively undeveloped in Mexico. As someone who has devoted a substantial portion of his research and writing time to examination of the benefits of a strong tort system, and who is often called upon to defend against recent attacks on the U.S. tradition of recoveries for personal injuries,²⁴¹ I found myself quick to react to what I perceived as possible consequences—both positive, and to my mind, at least, negative—of Mexico’s approach to tort liability. When I landed at Mexico City’s Benito Juarez Airport in late May 2005, I did not see one billboard soliciting accident victims. Our daily walks from the *Hotel Posada Viena* on the corner of *Marsella* and *Dinamarca* to the *ELD* located near the *Balderas* metro station confirmed the presence of many

237. The Mexican system of public health care appears admirable when compared with the United States, where an aversion to public health care exists. This is especially true given the level of poverty that exists in Mexico, and its relative lack of fiscal resources. The Mexican system [of publicly funded health care providers] . . . [is] nevertheless criticized for failing to provide quality health care.

Id. at 445.

238. Michael L. Rustad authored this part.

239. Walter Olson, “Overlawyered” <http://overlawyered.com/> (last visited Sept. 15, 2005).

240. See, e.g., CATHERINE CRIER, *THE CASE AGAINST LAWYERS* 9-10, 196-98 (2002); JOHN STOSSEL, *GIVE ME A BREAK: HOW I EXPOSED HUCKSTERS, CHEATS, AND SCAM ARTISTS AND BECAME THE SCOURGE OF THE LIBERAL MEDIA* (2004).

241. THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2002).

open and obvious dangers not generally found in the United States. Each day we came upon serious hazards such as chasms in the sidewalk, unguarded construction sites, and open manholes. It is unclear whether these widespread hazards were the result of a tax system that leaves municipalities strapped for funds—or the lack of a viable tort system—or a combination of both policy choices. Either way, the individual must maintain a constant state of hyper-alertness to survive what would otherwise be a routine walk to work.

The chief source of Mexican tort law is the Federal Civil Code (FCC), which draws largely upon concepts and methods of The French Civil Code of 1804. Professor Zamora and his colleagues explain how tort liability hinges on the “spare frame” of Article 1910 of the FCC:

He who, acting improperly (*ilícitamente*) or against the proper customs (*buenas costumbres*), causes damage to another, is obliged to make reparation for it, unless (such person) provides that the damage came about as a consequence of the fault or inexcusable negligence of the victim.²⁴²

Despite the reference to “negligence” in the last passage, there is little by way of Mexican authority for calibrating the standard of care for specific activities. Instead, airplane pilots, boat manufacturers, and even car drivers are absolutely liable for injuries caused by deviation from accepted custom.²⁴³ The FCC also covers a large number of *riesgo creado* (created risks),²⁴⁴ including explosions, falling trees, gas leaks, automobiles, pilots, and boats.²⁴⁵ Mexican parents and guardians are liable for the torts of their children.²⁴⁶ As in the United States, corporations are liable for the torts of employees committed within the scope of their duties.²⁴⁷ The FCC also covers work-related injuries,²⁴⁸ but while the Mexican system recognizes liability for a multitude of civil wrongs, often applying a notion of absolute or strict liability, at the same time it is a system with a tradition of minimal damages.²⁴⁹

In general, Mexican tort law is radically different from the civil liability system found in the Anglo-American tradition.²⁵⁰ Damages in

242. Código Civil Federal [C.C.F.] [Federal Civil Code], *as amended*, art. 1910, Diario Oficial de la Federación [D.O.], 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.) (translation found in MEXICAN LAW, *supra* note 5, at 519.)

243. MEXICAN LAW, *supra* note 5, at 520.

244. *Id.* at 523.

245. *Id.*

246. *Id.* at 522.

247. *Id.*

248. MEXICAN LAW, *supra* note 5, at 523 (observing that courts place “severe limits on damages”).

249. *Id.* at 525-27.

250. *Id.* at 520-30 (describing *daños y perjuicios*).

Mexican personal injury cases are capped and the awards in wrongful death cases are based upon a multiple of the minimum daily wage.²⁵¹ Mexico also requires plaintiffs to elect remedies.²⁵² The plaintiff may choose between restoration to the state that existed prior to the injury or the payment of damages or lost income.²⁵³ Contributory fault of the victim may bar recovery, although not every act of contributory negligence constitutes inexcusable fault.²⁵⁴

The treatise authors note that the victims of crimes must file a separate lawsuit for restitution under the Civil Code because the Federal Criminal Law has no well established system of victim compensation.²⁵⁵ While this is the traditional rule, a recent decision by a Mexican federal appeals court stated that a criminal court judge has the discretion to order a criminal defendant to indemnify his victims, so that the victims of crimes do not need to begin a separate civil action.²⁵⁶

Tort victims in Mexico receive extremely modest awards without the possibility of pain and suffering damages, punitive damages, or hedonic damages. Plaintiffs in automobile accident cases, for example, receive only hospital or medical costs and the costs necessary to repair or replace the damaged car.²⁵⁷ Mexico's labor law statute strictly limits recovery to a multiple of the minimum wage for cases of wrongful death, funeral expenses, and lost wages for incapacitation.²⁵⁸ With the minimum daily wage of approximately 43.65 pesos, or approximately \$4 U.S. dollars, the award often is minimal.²⁵⁹ For example, an injured tort victim may recover the princely sum of \$8,760 (U.S.) for permanent disability due to loss of a leg.²⁶⁰ In wrongful death cases, the award "cannot exceed 730 days times \$U.S. 8.00, or \$U.S 5,840. . . ."²⁶¹ The estate also receives two months salary for funeral expenses.²⁶² Also, while injunctions are not recognized, the court has the discretion to shape equitable remedies, such as replevin actions.²⁶³

251. *Id.* at 526.

252. *Id.* at 525.

253. MEXICAN LAW, *supra* note 5, at 525.

254. *Id.* at 524.

255. *Id.* at 525.

256. *Id.*

257. *Id.*

258. MEXICAN LAW, *supra* note 5, at 527.

259. *Id.* at 526. Mexico City (Zone A) has the highest minimum daily wage. The minimum wage changes on a yearly basis and the 2005 rate for Zone A was \$46.80 Pesos. Interview with Juan Pablo Vega Cruz, *licenciado*, in Washington D.C. (Sept. 22, 2005).

260. MEXICAN LAW, *supra* note 5, at 526.

261. *Id.* at 527.

262. *Id.*

263. *Id.* at 527.

The authors provide an insightful discussion on the role of moral damages in the Mexican civil justice system. Moral damages (*daños morales*) are one type of recovery found in Mexico for “the adverse effect a person suffers in his or her feelings, affections, beliefs, respect, honor, reputation, private life, physiognomy and physical appearance, or in the way other people regard the person.”²⁶⁴ A presumption exists in Mexico that tort victims suffer *daños morales* when a tort adversely affects their physical or psychological well-being.²⁶⁵ Moral damages appear to be functionally equivalent to non-economic damages, loss of consortium, or mental anguish.²⁶⁶

Mexican trial judges are reluctant to award significant moral damages, and there is almost no precedent on how to determine the proper amount of indemnification.²⁶⁷ Professor Zamora and his colleagues clearly explain how cultural factors, as well as legal ones, limit tort victims’ rights in Mexico. Typically, tort victims prefer that their injuries be remedied by communitarian, rather than adversarial, adjudications.²⁶⁸ Most accident victims are satisfied with compensation for medical expenses and direct losses and, therefore, never file suit.²⁶⁹

The Federal Consumer Protection Agency may file actions against manufacturers for product defects,²⁷⁰ yet products liability, as a system of public redress, remains undeveloped. However, a consumer has a theoretical cause of action against the manufacturers for injuries due to dangerously defective products.²⁷¹ If a product defect causes an automobile accident, a victim of the accident may seek indemnification.²⁷² As in many areas of Mexican substantive law, “inefficiency, uncertainty, and the perception that the contravention of the law is the daily rule rather than the exception” characterizes the law of torts.²⁷³ One of the great advantages of the Mexican tort system is that it gives manufacturers and other companies a wide berth in which to conduct their activities. However, a disadvantage is that the cost of accidents is reallocated from the tortfeasor to the victim.

264. *Id.* at 528.

265. MEXICAN LAW, *supra* note 5, at 528.

266. *Id.* at 529.

267. *Id.*

268. *Id.* at 528.

269. *Id.* at 521.

270. MEXICAN LAW, *supra* note 5, at 524.

271. *Id.* at 524.

272. *Id.*

273. Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT’L & COMP. LAW 715, 716 (2004).

V. Treatise on Intellectual Property Law²⁷⁴

In 2004, the U.S. and Mexico participated in \$167,543 billion worth of bilateral trade, including \$111,752 billion in U.S. exports to Mexico.²⁷⁵ U.S./Mexico trade is composed of an increasing proportion of intellectual property rights.²⁷⁶ However, the pervasive problem with intellectual property piracy, with which the Mexican government's enforcement efforts are unable to keep up, is that it offsets the increase in bilateral trade.²⁷⁷ Chapter 21 of the treatise covers each of the branches of Mexican intellectual property law.

Historically, the world has regarded Mexico as a country with grossly inadequate intellectual property laws and lax enforcement. The head of the *Instituto Mexicano de la Propiedad Intelectual* (Mexican Institute of Industrial Property) acknowledged "that the present pace of intellectual property reform in the country has done little to avert wide-scale copying of patented goods."²⁷⁸ Estimates show that losses due to trademark counterfeiting, copyright piracy, and patent infringements cost Mexican companies hundreds of millions of dollars annually, and these losses grow larger every year.²⁷⁹ The authors of *Mexican Law* explain that the U.S. government and foreign patent and copyright holders strongly criticize Mexico for the country's inadequate intellectual property laws and its inability to enforce those laws that do exist.²⁸⁰ The authors blame anemic enforcement on the lack of political will, few law enforcement resources, insufficient planning and coordination among industry sectors, and a general cultural malaise.²⁸¹

There is strong empirical data supporting Professor Zamora and his colleagues' observations regarding the enforcement of intellectual property rights. For example, in 2003, the *Instituto Mexicano de la Propiedad Intelectual* (IMPI) conducted only 2,990 inspection visits at Mexico businesses to determine whether they were infringing on the intellectual property rights of others.²⁸² This effort, while significant

274. Michael L. Rustad also authored this portion of the essay.

275. Embassy of the United States in Mexico, *Intellectual Property Rights: Overview of Mexico's IPR Environment*, http://mexico.usembassy.gov/mexico/IPRtoolkit_overview.html (last visited Oct. 3, 2005) [hereinafter *IPR Environment*].

276. *Id.*

277. *Id.*

278. *Mexican Intellectual Property Reforms Alleged Deadlocked*, DAILY INT'L PHARMA ALERT, Feb. 22, 2005.

279. *IPR Environment*, *supra* note 275.

280. MEXICAN LAW, *supra* note 5, at 642.

281. *Id.*

282. INSTITUTO MEXICANO DE LA PROPIEDAD INDUSTRIAL, 2003 INFORME ANUAL [MEXICAN INSTITUTE OF INDUSTRIAL PROPERTY, 2003 ANNUAL REPORT] 41 (2003) [hereinafter 2003 INFORME ANUAL].

given *IMPI*'s limited resources, is like trying to hold back the flood of infringers with only one bag of sand.

The popular perception is that only U.S. companies are the victims of the pirating of brand names and trademarks. Recently, however, *La Michoacana*, a Mexican company, complained of widespread brand-name piracy by a California company using its brand and logo to sell ice cream bars.²⁸³ A number of other Mexican companies are discovering United States companies are misappropriating their brands.²⁸⁴ *Mexican Law* does an excellent job of providing guidance to companies seeking trademark protection by thoroughly explaining the administrative procedures for declarations of infringement.²⁸⁵

Professor Zamora and his colleagues briefly address NAFTA's minimum standards for intellectual property protection in Chapter 18.²⁸⁶ In general, NAFTA requires Mexico to give national treatment to the United States and Canada, providing basic minimum standards for intellectual property protection.²⁸⁷ Mexico's government began to revamp "the recognition and enforcement of intellectual property rights, in part to avoid the increasingly rigorous trade restrictions imposed by the United States."²⁸⁸ The entry into NAFTA and the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS) spearheaded the reform of Mexico's intellectual property laws.²⁸⁹

Mexico also has entered into a number of free trade agreements with specific provisions for protecting intellectual property.²⁹⁰ In 1994, Mexico updated its intellectual property law to meet specific chapters on intellectual property in free trade agreements.²⁹¹ *IMPI* also redefined its mission, increasing its employees from 250 in 1993 to 700 in 2003.²⁹²

Professor Zamora and his colleagues note that while Mexico's President technically has the ability to award patents, it is the *IMPI* that actually wields the power.²⁹³ While the *IMPI* is the functional equivalent

283. Joe Millman, *Now, Complaints of Brand-Name 'Piracy' Goes Both Ways*, WALL ST. J., July 11, 2005, at B1.

284. *Id.*

285. MEXICAN LAW, *supra* note 5, at 651.

286. MEXICAN LAW, *supra* note 5, at 659; *see also*, Stephan Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 4 LAW AND POLICY IN INT'L BUS. 457-8 (1993).

287. MEXICAN LAW, *supra* note 5, at 659.

288. *Id.* at 642-3.

289. *Id.* at 643-4.

290. *Id.*

291. *Id.* at 642.

292. 2003 INFORME ANUAL, *supra* note 282, at 7.

293. MEXICAN LAW, *supra* note 6, at 645; *see* Ley de la Propiedad Industrial Publicada [L.P.I.] [Industrial Property Law], *as amended*, Diario Oficial de la Federación [D.O.], 27 Junio de 1991 (Mex.); Reglamento de la Ley de la Propiedad Industrial

of the United States Patent and Trademark Office (USPTO) as a registry, this quasi-autonomous governmental entity conducts investigations and raids of infringing activities.²⁹⁴ In the United States, individual IPR holders primarily conduct intellectual property enforcement, whereas *IMPI* is the primary enforcer of rights in Mexico.²⁹⁵

Patent infringement is regarded in Mexico as “an administrative wrong with civil consequences and if repeated is a criminal offense.”²⁹⁶ Unlike the USPTO, *IMPI* has its own assets and management apart from the government, but it is regarded as a “young federal agency” that is facing stiff challenges.²⁹⁷ Even though Mexico restructured its intellectual property statutes in 1994 and 2003, enforcement efforts remain weak, resulting in more bark than bite.²⁹⁸

A. *Patents or Industrial Property*

The chief law governing inventions and trademarks is *Ley de La Propiedad Industrial (LPI)*. The *LPI*, in turn, recognizes four categories of invention: patents, utility models, industrial designs, and industrial secrets.²⁹⁹ Mexican patents, in effect, are a privilege given by the state to an individual, to produce or use a product in an exclusive way, or the

[Regulation of the Industrial Property Law], *Diario Oficial de la Federación* [D.O.], 23 Noviembre de 1994 (Mex.).

294. In 1993 the Mexican Patent Office, which was formerly an agency of the Ministry of Commerce and Industry, was reconstituted as the Mexican Institute of Industrial Property, commonly known by its initials in Spanish as IMPI. In addition to the tasks of the former Patent Office, the new Institute is formally charged with the task of “promotional, advisory and public service activities in the industrial property field.”

Ladas & Perry, *Foreign Patent Litigation*, n.2, http://www.ladas.com/Litigation/ForeignPatentLitigation/Mexico_Patent_Litigation.html#fn0 (last visited Aug. 29, 2005) [hereinafter *Foreign Patent Litigation*].

295. MEXICAN LAW, *supra* note 5, at 645.

296. *Foreign Patent Litigation*, *supra* note 294.

297. MEXICAN LAW, *supra* note 5, at 645.

298. *Id.*

299. Under the LIP, an industrial secret consists of information of an industrial or commercial application, kept confidential by an individual or corporate entity, which represents the ability to obtain or maintain a competitive or economic advantage over third parties during the course of economical activities, and with respect to which, sufficient means or systems were adopted to maintain its secrecy and restricted access thereto. Further limitations as to the subject matter of protection are established by the LIP as it is stated that the confidential information of a trade secret must also refer to the nature, characteristics or purposes of the products; production methods or processes; and the means or manner of distribution or trade of products or the rendering of services.

Adriana Menocal Mexico: *Protecting Trade Secrets*, *MANAGING INTELL. PROP.*, Dec. 1999/Jan. 2000, at 10.

patent can be given to a third party, under license for twenty years, to use a product or process that has been developed by such individual. A patent requires novelty, inventive activity, and industrial use.³⁰⁰

Patent applicants must demonstrate that their invention can be produced or used in any branch of economic activity.³⁰¹ In 1903, for example, the Mexican government granted a patent for a new tortilla machine.³⁰² In 2003, Mexico received 338 out of 385 patents for utility model applications.³⁰³ In contrast only 820 out of 1,983 industrial design patents were granted to Mexican applicants.³⁰⁴

If a Mexican invention simply modifies an existing invention or tool, it is protected as a *utility model* with a ten year term.³⁰⁵ Utility models, which are industrial models or drawings, are protected for a term of fifteen years.³⁰⁶ The fee to register a patent is U.S. \$792 and U.S. \$199 for a utility model.³⁰⁷ One example of a Mexican utility patent is a caramel stick used by Mexican pediatricians to help children stay relaxed while a physician examines their throats.³⁰⁸

Professor Zamora and his colleagues explain the basic rules for obtaining patent protection for industrial designs (*diseños industriales*).³⁰⁹ Industrial designs refer to the “figures, lines, or colors of industrial products.”³¹⁰ Mexico’s patent law protects two general types of industrial designs: Industrial Models, which are three-dimensional forms that give special appearance to a product; and Industrial Drawings for “the combination of figures, lines or colors that provide aesthetic appearance to a product.”³¹¹

The data shows that Mexico’s patent office often serves U.S. companies by doing parallel filings. In 2003, Procter & Gamble received 210 Mexican patents.³¹² During that same year, Kimberly-Clark received

300. MEXICAN LAW, *supra* note 5, at 645.

301. *Id.* at 644.

302. *Instituto Mexicano de la Propiedad Industrial*, Presentation at the Visiting Scholar’s Program for Students of the San Diego University and *Escuela Libre de Derecho*, Mexico City, Mexico (Jun. 9, 2005) [hereinafter *IMPI* Presentation].

303. 2003 INFORME ANUAL, *supra* note 282, at 136.

304. *Id.* at 140.

305. MEXICAN LAW, *supra* note 5, at 649 (noting that utility models are “objects, utensils, devices, or tools, that, as a result of a modification of their make-up, configuration, or structure function differently from how the parts that make them up function, or offer certain utilitarian advantages, provided that they qualify as original or novel and have an applied use in industry”).

306. *Id.* at 651.

307. *IMPI* Presentation, *supra* note 302.

308. *Id.*

309. MEXICAN LAW, *supra* note 5, at 651.

310. *Id.*

311. *IMPI* Presentation, *supra* note 302.

312. 2003 INFORME ANUAL, *supra* note 282, at 134.

103 patents, followed by Pfizer with 88 patents.³¹³ The fact that the U.S. economy is twenty times that of Mexico, and the parallel filings are part of a business plan to protect intellectual property all over the world, explains the U.S. dominance in patent filings. Mexican applicants accounted for less than one-third of all patents granted from 1989-2000 in Mexico.³¹⁴ In 2000, for example, U.S. applicants filed 7,249 patent applications versus only 431 applications by Mexican applicants.³¹⁵

Overall, Mexican patent holders accounted for only eight percent of all patents granted in the early 1990s, decreasing to only three percent in 2000.³¹⁶ In 2003, the vast majority of Mexican patent applications were filed in the *Distrito Federal* (167) followed by *Estado de Mexico* (52), *Nuevo Leon* (44) and *Jalisco* (40).³¹⁷ In only thirteen out of the thirty-one Mexican states, including the federal district, were more than four patent applications filed in 2003.³¹⁸ The trend is that Mexican states with greater economic activity have more patent holders.

Mexico has yet to recognize software patents, patents for doing business, or e-commerce patents, which are well-developed areas of patent law in the United States. As the authors of the treatise note, Mexico has yet to recognize genetic material, plant patents, or patents for human genome, in marked contrast to their recognition under U.S. patent law.³¹⁹ Unlike Mexico, the United States recognizes plant patents that may conflict with Mexican interests. For example, in 1999, the United States Patent and Trademark Office awarded a patent for the “yellow-seeded cultivar Enola of common bean” where the principal novel characteristic was the yellow color of the seed coat of Enola.³²⁰ In the Enola bean case, the patent owner obtained this seed in “a mixed bag of seeds of different colors purchased in Mexico in 1994.”³²¹ The Enola bean was from yellow beans grown in Northwest Mexico for centuries.³²² The USPTO granted the Enola bean patent to “John Proctor, the

313. *Id.* Other major U.S. patent holders in 2003 were: Illinois Tool Works, Inc. with 51 patents; Minnesota Mining & Manufacturing Company received 40 patents; Qualcomm Incorporated obtained 40 patents; Exxon received 39 patents; Motorola obtained 35 patents; Schering Corporation received 29 patents; General Electric received 28 patents; and finally, Rohm and Haas Company and Ericsson, Inc. (Sweden) also received patents. *Id.*

314. MEXICAN LAW, *supra* note 5, at 650.

315. *Id.*

316. *Id.* at 649.

317. 2003 INFORME ANUAL, *supra* note 298, at 24.

318. *Id.*

319. MEXICAN LAW, *supra* note 5, at 644.

320. L. Pallottini, et. al., *The Genetic Anatomy of a Patented Yellow Bean*, 44 CROP SCI. 968 (2004).

321. *Id.*

322. *Id.*

president of seed company POD-NERS, LLC, after he planted bean seeds in Colorado from beans purchased in Mexico.”³²³ The patent granted to Proctor gives him “an exclusive monopoly on yellow beans and can exclude the importation or sale of any yellow bean exhibiting the yellow shade of the Enola beans.”³²⁴

The Enola bean controversy is an example of how the biopiracy by international corporations, who file patents to gain control over indigenous plants and processes, can negatively impacted native cultures.³²⁵ It also demonstrates that one of the downsides of Mexico agreeing to U.S. intellectual property protections is that indigenous peoples lose control of their traditional knowledge.³²⁶

B. Trademarks

Professor Zamora and his colleagues extensively discuss trademarks, trade names, appellations of origin and commercial advertisements.³²⁷ A trademark is any sign, or any combination of signs, that can be used to distinguish a product or service from others of the same kind.³²⁸ In Mexico, a trademark can consist of “a word, a figure, a combination of colors, a three-dimensional form, a company name, a name of a person or any combination of the above elements.”³²⁹ In 2003, Mexico trademark applicants filed 34,763 out of 53,724 applications for marks.³³⁰ U.S. companies are filing increasingly for trademark protection. In 2003, American applicants filed 9,215 trademark applications.³³¹ Mexican nationals received 26,412 out of 42,747 trademarks awarded.³³² Trademarks registered by U.S. applicants totaled 7,609.³³³

The authors explain the basis for trademark protection, commercial names, business advertisements, and appellations of origin, all of which are covered by Mexico’s *LPI*.³³⁴ The chapter also provides a concise history of Mexico’s participation in international agreements and treaties

323. *Id.*

324. *Id.*

325. See Gillian N. Rattray, The Enola Bean Patent Controversy: Biopiracy, Novelty, and Fish-and-Chips, 2002 DUKE L. & TECH. REV. 0008, 1 (2002).

326. *Id.*

327. MEXICAN LAW, *supra* note 5, at 652.

328. Ley de la Propiedad Industrial [L.P.I.] [Industrial Property Law], *as amended*, art. 88, Diario Oficial de la Federación [D.O.], 27 de Junio de 1991 (Mex.).

329. *IMPI* Presentation, *supra* note 302.

330. 2003 INFORME ANNUAL, *supra* note 282, at 142.

331. *Id.*

332. *Id.* at 143.

333. *Id.*

334. MEXICAN LAW, *supra* note 5, at 656-7.

as well as international activities to strengthen intellectual property rights. For example, Mexico is a signatory to The Lisbon Agreement, a WIPO agreement binding parties to international appellations of origin.³³⁵

The intellectual property rights chapter does an excellent job of explaining the rules and the recent transformation of intellectual property rights, but falls short when explaining enforcement of these rights. Mexico has long been a signatory to a large number of international treaties including: the Paris Convention for the Protection of Industrial Property of 1883, as modified in Stockholm in 1967; the Convention Establishing the Intellectual Property Organization, signed in Stockholm in 1967; the Lisbon Agreement for the Protection of Appellations of Origin of 1958; and the Patent Co-Operation Treaty of 1970, as modified in 1984 and 1992.³³⁶ Mexico, long a center of intellectual piracy, finds it easy to sign international intellectual property treaties, so long as there is no penalty for not providing the personnel needed to enforce them.³³⁷

The treatise explains the rules for exploiting and protecting trademarks, business advertisements, commercial names, and appellations of origin in detail. Appellations of origin have the potential to create conflict between countries seeking to promote their products. In general, an appellation of origin is granted only for products arising out of a distinctive geographical environment.³³⁸ In 1978, Mexico registered the name "Tequila" at the Registry of Appellations of Origin kept by the World Intellectual Property Organization (WIPO).³³⁹ "The appellation of origin states that Tequila can only be produced in Mexico within a specific region that includes the state of Jalisco in its entirety and specific municipalities."³⁴⁰ Mexican appellation of origin certifications were secured for Mezcal and Talavera pottery in 1994.³⁴¹

335. *Id.* at 657 n.52.

336. *Id.* at 643.

337. I would like to thank Bert Lazerow for pointing out the gap between Mexican intellectual property law-in-the-books and the law-in-action. Professor Lazerow notes the tendency of the Mexican government to enter into international agreements without providing the personnel necessary to enforce these obligations.

338. Appellations of origin frequently involve several Mexican government agencies including: The General Direction of Standards of the Ministry of Economy, Laboratories; Verification Unities, Tequila Regulation Council; and Federal Office of Fair Trading. *IMPI Presentation, supra* note 302.

339. Tequila was the first appellation of origin filed by the Tequila Industry Regional Chamber in 1973. 2003 INFORME ANUAL, *supra* note 298, at 17. Café de Veracruz, Mango Ataulfo del Soconusco Chiapas, and Café Chiapas are also Mexican appellations of origin. *Id.*

340. *Tequila Industry*, TRADE COMMISSION OF MEX. NEWSL. (Trade Commission of Mexico, Los Angeles, Cal.), Nov./Dec. 2004) at 1.

341. 2003 INFORME ANUAL, *supra* note 282, at 17.

The section on trademarks in the treatise thoroughly describes topics such as the administrative procedures of distinctive signs, abandonment, registration, and fees. The authors describe the administrative procedures for declarations of infringement, but fail to examine a fundamental weakness of Mexican administrative procedures.³⁴² Under Mexican trademark law, there is no “opportunity to file a formal opposition against third party applications prior to those applications becoming registrations.”³⁴³ It is understood that a treatise covering all branches of the law can only cover the basic concepts and methods of trademark law.

C. Copyrights

In Mexico City’s *Zocalo*, and in nearly every other local market, there are hundreds of street vendors peddling pirated software, music, and DVDs. Microsoft Office and other state-of-the-art software sell for as little as 10 pesos (less than U.S. \$1). The latest jazz, classical, salsa and other types of music are available for the same price on the subway.³⁴⁴ Despite a state-of-the-art set of intellectual property rights laws and an increase in the number of seizures by the *IMPI*, pirates are undeterred:

Monetary sanctions and penalties are minimal and generally ineffective in deterring these illegal activities. . . . [p]rotection of IPR is complicated by Mexico’s extensive poverty and corruption. Black markets provide a significant source of employment in the informal sector, which accounts for up to 50 percent of the total economy. Illegally reproduced goods, sold at a fraction of the cost of their legitimate counterparts, also give poor consumers access to otherwise unattainable items. Some government leaders are reluctant to crack down on piracy out of fear that this could lead to social unrest, and many Mexicans believe cheap knock-offs offer a preferable

342. It is expected that Mexico will soon become a signatory of the Madrid Protocol which has the advantage of a centralized filing system. The advantage of central filing is that foreign trademark owners can obtain protection by a filing in a single registry. A second advantage would be that trademark owners would have a right to file formal oppositions against third party applications in the registry. *Madrid Waits for Mexico: Jose Graca-Aranha of WIPO Discusses Mexico and the Rest of Latin America’s Developing Attitude Towards Joining the Madrid Protocol*, MANAGING INTELL. PROP., June 2005, at supp. 17.

343. *Id.*

344. DVDs of Hollywood movies sell on the subway for a buck. One hundred (stolen) songs in the MP3 format cost the same. Mostly untouched by authorities, the pirates are now expanding their wares. And consumers can’t seem to resist the temptation for cheap goods—even at the risk of their health or reputation. Laurence Iliff, *Mexico: Land of the Pirates In Counterfeiters’ Haven, Cheap Knockoffs Abound and Designer Labels Are Works of Fiction*, DALLAS MORNING NEWS, June 5, 2005, at 20A.

alternative to what they view as overpriced products sold by greedy American firms. There are also corrupt politicians and law-enforcement officials who protect IPR violators, from the street vendor level up to ringleaders of notorious markets like Mexico City's Tepito.³⁴⁵

Pirated software and music is the basis of one of Mexico's most important industries. Mexico City is home to 193 companies pirating software.³⁴⁶ Another seventy-five companies that specialize in pirated software are located in Monterrey, with another ninety-one copyright piracy companies scattered throughout other Mexican states.³⁴⁷

Even though piracy is prevalent in Mexico, the country does have strong laws on its books that prohibit copyright piracy. In Mexico, the chief source of copyright law is the *Ley Federal del Derecho de Autor (LFDA)*.³⁴⁸ The *Instituto Nacional del Derecho de Autor (INDAUTOR)*, the National Institute of Copyright, is the chief administrative unit for copyrights and allied moral rights. Mexico also is a member of a large number of regional and multilateral treaties such as the International Convention on Copyrights, the Universal Convention on Copyright, the Berne Convention, and copyright related articles of trade agreements such as NAFTA and TRIPS.³⁴⁹

Moral rights are as important in the field of copyright law, as they are in tort remedies.³⁵⁰ In the copyright context, moral rights "are the author's right to be identified as the author of the work and that the author's reputation will not be diminished by the way the work is used."³⁵¹ In Mexico, only authors can exercise moral rights but the government may exercise moral rights if the rights are relevant to the country's cultural heritage.³⁵²

Professor Zamora and his colleagues explain the difference between economic moral rights and patrimonial moral rights (*derechos patrimoniales*).³⁵³ Moral rights are personal to the author, but the author's heirs may inherit them.³⁵⁴ If there is no heir, moral rights

345. *IPR Environment, supra* note 275.

346. *BSA Uncovers 405 Illegal Software Firms*, BUS. NEWS AMS.—ENG., May 26, 2004, at 5.

347. *Id.* (describing how Business Software Alliance is working with Mexico's software association to combat piracy in Mexico).

348. *Ley Federal del Derecho de Autor*, [L.F.D.A.] [Federal Copyright Law], *as amended*, Diario Oficial de la Federación [D.O.], 24 de Diciembre de 1996.

349. MEXICAN LAW, *supra* note 5, at 661.

350. *Id.* at 661.

351. David Canton, *Contract Law Determine Site Ownership*, LONDON FREE PRESS, May 19, 2000, at D3.

352. MEXICAN LAW, *supra* note 5, at 661.

353. *Id.*

354. *Id.*

descend into the public domain.³⁵⁵ Those who own moral rights have control over dissemination of works, even if unpublished.³⁵⁶ Patrimonial rights include the right to reproduce, publish, edit, or physically copy works, and last for the life time of an author plus one hundred years.³⁵⁷ As noted in the following passage from the Canadian government, those who possess Mexican patrimonial rights may not transfer or assign these rights.

In Mexico, moral rights comprise the second pillar of Mexican copyright law. They are divided into six parts that include the disclosure right, paternity right, integrity right, retraction right, retirement right and the right to the honor, that is, the right of any person to affirm or deny that he is the author of a work. In Mexico, moral rights cannot be licensed or assigned and exist in perpetuity. There are two exceptions. The state will hold the right of disclosure when the work is created in the course of employment or within an employer-employee like relationship.³⁵⁸

The authors contend that patrimonial rights may not be transferred. They do, however, note that the Mexican copyright law permits authors to enter into contracts allowing others to exercise patrimonial rights.³⁵⁹ Under the applicable statute, patrimonial rights may not be sold or otherwise transferred to third parties.³⁶⁰ If patrimonial rights are a part of works that are created during employment, the employer and employee divide the rights equally.³⁶¹ Transfer of patrimonial moral rights must be in writing and registered in the public copyright registry.³⁶² The authors explain that patrimonial rights apply equally to databases, which are of great importance to those who license content.³⁶³

Mexico protects original and derivative works, just as the United States Copyright Act of 1976 protects these items in the United States.³⁶⁴ Copyright registration is not required in order to ensure protection for literary and artistic works, but most creators register their works with the *Instituto Nacional de Derecho de Autor (INDA)*.³⁶⁵ In Mexico, absent a

355. *Id.* at 661.

356. *Id.* at 662.

357. MEXICAN LAW, *supra* note 5, at 662.

358. The Canadian Heritage Information Network, *The Law, NAFTA, and Distributed Environments: Legal Inhibitors to Technological Innovation?*, http://www.chin.gc.ca/English/Intellectual_Property/Law_Nafta/moral.html (last visited Sept. 30, 2005).

359. MEXICAN LAW, *supra* note 5, at 663.

360. *Id.* at 662.

361. *Id.*

362. *Id.*

363. *Id.* at 666.

364. MEXICAN LAW, *supra* note 5, at 664.

365. *Id.* at 669.

court order, copyright registration may not be denied “on the grounds of immorality, invasion of privacy, or disturbance of peace.”³⁶⁶ Copyright law has been extended to protect software and application programs as literary works, which also parallels U.S. copyright law.³⁶⁷ Professor Zamora and his colleagues note that copyrights, like patrimonial rights, may protect original databases, restrict the making of copies, rearrangements, and forbid other adaptations of compiled data.³⁶⁸ Mexican developers of non-original databases are entitled to *sui generis* protection for a five year period.³⁶⁹

As in the United States, there is the functional equivalent of a public domain and works of public benefit.³⁷⁰ The Mexican doctrine of fair use permits quoting of Mexican texts so long as there is not a simulated or substantial reproduction of the copyrighted work.³⁷¹

The section on copyrights ends with a discussion of copyright enforcement, including coverage of administrative enforcement,³⁷² private copyright enforcement, and dispute resolution.³⁷³ Copyright penalties range from 2,000 to 20,000 times the minimum daily wage,³⁷⁴ which constitutes greater monetary remedies than are available in a wrongful death case. The treatise is, in effect, a nutshell of the important concepts and methods.

D. Trade Secrets

Mexican Law devotes a single page to trade secret protection, a reflection of the fact that Mexico has only recently strengthened protection in this branch of intellectual property law. Statutes such as the Federal Labor Law, the Federal Criminal Code, and the *LPI* traditionally protected trade secrets in Mexico.³⁷⁵ Professor Zamora and his colleagues note how the *LPI* defines trade secrets as having an “industrial or commercial application that an individual or corporation keeps confidential.”³⁷⁶ In contrast, the first Restatement of Torts defines a trade secret to include “any formula, pattern, device, or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or

366. *Id.* at 670.

367. *Id.* at 665.

368. *Id.* at 666.

369. MEXICAN LAW, *supra* note 5, at 666.

370. *Id.* at 668.

371. *Id.* at 669.

372. *Id.* at 672-3.

373. *Id.* at 673-4.

374. MEXICAN LAW, *supra* note 5, at 674.

375. *Id.* at 651.

376. *Id.*

use it,"³⁷⁷ while the vast majority of U.S. states have adopted the Uniform Trade Secrets Act. This act defines a trade secret as

information, including a formula, pattern, compilation, program, device, method, technique, or process, that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value. From its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.³⁷⁸

An owner of the industrial secret must adopt the necessary means to preserve the confidentiality, as well as a restricted access, to information. The *LPI* requires that any information that is the subject of trade secret protection be "recorded in documents, electronic or magnetic media, optical discs, microfilms, films or in any other similar instruments."³⁷⁹

As in other branches of intellectual property law, Mexico cheerfully signs onto a large number of treaties requiring enforcement of foreign company's rights. Yet the government does not allocate the funds necessary to enforce these obligations. This policy approach may be functional because it spares manufacturers from having to pay royalties and licensing fees as well as the research and development costs required for new technologies.³⁸⁰

V. Conclusion

Perhaps the highest praise that one can bestow upon any written work is that it makes its readers think, question, and debate. Professor Zamora and his colleagues have produced a treatise that does exactly that, as the authors of this essay discovered as we worked together and used the book over the course of several weeks. A new generation of comparative legal scholars should be inspired to turn their critical legal imagination to Mexican law and culture and, perhaps, supplement this treatise with empirical studies of how the Mexican law works and continues to evolve.

American legal academics and law students will gain insights into their own society, as well as that of Mexico, by studying this treatise. Consider just a few recent headlines which confirm that our legal system

377. JERRY COHEN & ALAN S. GUTTERMAN, *TRADE SECRETS: PROTECTION AND EXPLOITATION* 14 (1998) (quoting Restatement § 757).

378. *Id.* at 14.

379. MEXICAN LAW, *supra* note 5, at 652.

380. Frank J. Garcia, *Protection of Intellectual Property Rights in the North American Free Trade Agreement: A Successful Case of Regional Trade Regulation*, 8 AM. U.J. INT'L L. & POL'Y 817, 820 (1993).

and future is intertwined with Mexico:

- *Mexico OKs Landmark Vote by Mail Reform*³⁸¹
- *Wave of Drug-Related Violence in Mexico Blights Texas Border Towns As Well*³⁸²
- *Debate Grows on Whether Mexico Overestimates Money Sent Home*³⁸³

Although NAFTA has critics both in the U.S. and Mexico, a strong trading relationship between the two countries exists. “Since NAFTA’s entry into force, Mexico has overtaken Japan to become our second-largest trading partner.”³⁸⁴ “U.S. goods exports in 2004 were \$110.8 billion, up 13.7 percent from the previous year. Corresponding U.S. imports from Mexico were \$155.8 billion, up 12.9 percent. Mexico is currently the 2nd largest export market for U.S. goods.”³⁸⁵ However, a U.S. lawyer cannot live only in the world of commercial law when dealing with Mexico, and the careful lawyer keeps an eye on national, as well as local politics in Mexico. As we write this essay, Mexico faces an uncertain future as the 2006 Presidential Election looms large. The March 2003 election, in which the *PRI* “regained control of the state legislature and won control of most of the municipal authorities in the State of Mexico, which excludes the Federal District of Mexico City,”³⁸⁶ attracted attention on both sides of the border.

If Mexico were to reverse course and jettison its relatively new democratic tradition in favor of a *presidencialismo* regime, with a corresponding increase in the gulf between those who have power and money and those who have neither, there could be an even greater exodus across the U.S. border. Mexico already provides the largest single group of immigrants to this country³⁸⁷ and constitutes “the greatest

381. Chris Kraul and Sam Quinones, *Mexico OKs Landmark Vote by Mail Reform*, ARIZ. REP., July 8, 2005, <http://www.azcentral.com/arizonarepublic/centralphoenix/articles/0708ext-mexvote0708Z4.html>.

382. *Wave of Drug-Related Violence in Mexico Blights Texas Border Towns, As Well*, HOUSTON CHRON., June 13, 2005, at 6 (reporting cooperation between Mexico and the United States to work together to battle drug cartels which made headlines in a series of killings in border towns in June of 2005).

383. *Southern Arizona, Debate Grows on Whether Mexico Overestimates Money Sent Home*, KVOA 4, June 20, 2005, <http://kvoa.com/global/story.asp?s=3498811&ClientType=Printable>.

384. Press Release, United States Department of State, Commerce Official Call NAFTA’s First Decade a Resounding Success; Says Trade Agreement Raised Living Standards Spurred Reforms (April 21, 2004).

385. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 412 (2005), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/asset_upload_file383_7446.pdf.

386. *Mexico: Review*, AMS. REV. WORLD INFO., Sept. 29, 2003 at 1.

387. Katherine Topulos & Alejandro Portes, *The EU-Mexico Free Trade Agreement*,

migration of people in the history of humanity.”³⁸⁸ For immigration reasons alone, our two countries have strong reasons to understand one another’s laws. Whether one’s interest in the law focuses on the family, on political or governmental institutions, or on the wide array of commercial markets available to U.S. and Mexican interests, the cross-border legal practitioner should welcome the publication of *Mexican Law* as an indispensable guidebook for the adventures ahead.

31 INT’L L.J. LEGAL INFO. 114 (2003) (reviewing FREE TRADE AGREEMENTS OF THE WORLD, eds. JAMES R. HOLBEIN & NICK W. RANIERI).

388. MARILYN P. DAVIS, MEXICAN VOICES/AMERICAN DREAMS 4 (1990).

