POLITICAL CHANGE AND STABILITY

MEXICO'S POLITICAL STABILITY, ECONOMIC GROWTH AND THE FAIRNESS OF ITS LEGAL SYSTEM

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INTRODUCTION

Thoughtful Mexicans and non-Mexicans are increasingly calling for a new fairness in political representation, and in the distribution of resources as a means of restoring political stability and economic growth. Yet, little attention is being paid to what has prompted the inoperativeness or the failure of the existing standards of fairness in Mexico's "official" law (or law in the books) and in its "living" law (or law in action).[1] Similarly, no thought has been given to the process by which standards of fairness conducive to political stability and sustained economic growth can be transformed into viable legal institutions. This article will describe in summary fashion the operation of the most influential standards of fairness present in Mexico's official and living law, and suggest the need for a more efficient use of those standards that can contribute most to political stability and growth.

I. UNFAIRNESS IN SECTORAL AND MARGINAL ALLOCATION

Carlos G. Velez-Ibanez, a distinguished Mexican-American anthropologist, recently called attention to the observations of his National Autonomous University of Mexico (UNAM) colleague Larissa Lomnitz on sectoral allocation of resources in Mexico:

> Although all social structures are hierarchical by definition, Mexican social structure can be understood metaphorically as a "set of free-standing pyramids, each of which duplicates itself hierarchically like a crystal from top to bottom." Such a crystal is made up of layers of relationships defined horizontally by class and ver-

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1. *See* 1 ARIZ. J. INT'L & COMP. L., 85-87 (1982), and 2 ARIZ. J. INT'L & COMP. L., 2-8 (1984) for an introductory discussion of living law.

tically by the "sector" in which persons function.[2]

According to Lomnitz, the vertical dimensions of Mexico's social structure are made up of formal and informal sectors. The formal sector is divided into the "public, private and labor" sectors. The public sector includes governmental and quasi-governmental institutions. The private sector includes private enterprise and the liberal professions. The labor sector includes organized workers and their institutions. Sectors not included among the formal categories are informal or marginal. Despite the myth of universal access to the formal sector, the reality, for large segments of the population trapped in the informal sectors, is continued inequality and lack of access to the shrinking resources available to the formal sectors. Even in the greater federal district, traditionally the most promising of Mexico's urban meccas, the plight of the marginal sectors appears to be approaching desperation. Consider the predicament of street vendors and other informal providers of street services, including the rapidly increasing number of beggars in Mexico City. In order to be allowed to "operate", they must share their daily take with members of the police force. Such sharing makes the lawful survival of marginal members of urban society increasingly difficult. Indeed, a recent Mexico City newspaper report indicates that the number of violent crimes has risen more than 300% in recent months, over the already high levels.[3]

Velez-Ibanez offers a poor prognosis. Prevailing notions of fairness allow isolated individuals to become integrated into the formal sectors. But, the sectors themselves and the resources that they control are closed to groups. Thus, "if any integration is possible, it applies only to selected individuals . . . and in the case of political participants, only to political leaders of local power structures and not to the populations that they ostensibly represent."[4]

The rural picture is equally discouraging, especially for the marginal Indian population which is a significant segment of Mexico's rural population. Dr. James Greenberg, a colleague of Velez-Ibanez at the Bureau of Applied Research of the University of Arizona, illustrates the plight of Chatino coffee growers in Oaxaca:

> Where traditional access to land has been based on usufruct rights and inheritance, this new form of land tenure, where rights

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2. C. VELEZ-IBANEZ, RITUAL OF MARGINALITY 18, 29 (1983) [hereinfter Velez-Ibanez].
3. Uno Mas Uno, Jan. 19, 1987, at 10.
4. C. VELEZ-IBANEZ, *supra* note 2, at 22.

> could be sold, in effect "disinherited" groups of people. As people with money began to buy and accumulate land, the "disinherited" were left with the feeling that the buyers had stolen the land from them. Moreover, boundary conflicts abounded. Since corn was planted with slash and burn techniques requiring long fallow periods, these new claims inevitably encroached on areas to which other members of the community felt they had usufruct rights.[5]

While considerable fortunes continue to be amassed by intermediaries such as coffee buyers, brokers, and lenders, the majority of coffee growers have failed to improve their economic condition and have often deteriorated financially. George Foster, a social scientist quoted by Dr. Greenberg, describes the Mexican peasants' view of the world as one in which all valuable or good things, such as land and other forms of material wealth, but also friendship, love, manliness, honor, respect, and influence are available only in finite quantities.[6] This view of the world and of trade inevitably leads to conflict because rewards from coffee and other cash crops are perceived as not being equitably shared. An individual or a family is perceived as being able to improve its position only at the expense of others. Whether Foster's description established exclusive causation between the world view and violent conflict is not clear. However, it is indisputable that since the introduction of coffee growing and changes in traditional land tenure patterns in Oaxaca, the amount of violence has risen alarmingly. In one of the coffee growing districts studied by Dr. Greenberg, the homicide rate has risen to five times the national average.

Mexico's official or written law cannot be blamed for the unfairness of social justice. Its 1917 Constitution was a trailblazer of social justice, pioneering the right to strike as well as a host of other welfare rights, for the formal and informal sectors. Unlike the nineteenth-century laissez-faire counterparts, Mexico's 1927 Civil Code allowed the rescission of contracts like those between the Chatinos and their overreaching buyers, brokers, or lenders in the following broad terms:

> When any person, taking advantage of the supreme poverty of another, obtains an excessive profit which is evidently disproportionate to the obligation assumed by him, the person damaged has the right to demand rescission of the contract and, if this be im-

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5. J. Greenberg, *Our Struggle: Life and Violence in Rural Mexico* 231-32 (Manuscript at the University of Arizona College of Law, Foreign Law Collection).
6. *Id.* at 245-46.

possible, an equitable reduction in his obligation. . . ."[7]

These and other similarly worded enactments indicate that existing unfairness in sectoral and marginal allocation of resources is not caused by a lack of constitutional or statutory rules. Since rules and principles of interpretation mandating a fairer allocation of resources do exist, attention must be directed to the application and interpretation of these norms by government officials and courts. The description of archetypal moral behavior, *i.e.* the behavior of influential (albeit occasionally larger than life) models of decision making, will be used as an analytical tool to establish the guiding morality and its impact upon stability and growth.

A. The Paternalistic Administrator

Enrique Krauze is a keen observer of Mexico's governmental decision making. In a series of essays recently published in Mexico, Mr. Krauze concludes that the ideology of Mexican administrative or executive branch decisions is not that of nineteenth or twentieth-century socialism but what he refers to as Neo-Thomistic statism, adopted first by Porfirio Diaz and in revolutionary times by Venustiano Carranza:

> Democracy is the government of high, profound and serene reason, that sensing the pulsations of national life . . . searches for formulas to establish and maintain the balance of vital forces, saving measures . . . useful reforms that can awaken pity, and bring about liberation for those who will suffer. Democracy . . . should not search for the majority (will) in the compromises of a party system . . . but in the representation of all classes and of all legitimate interests.[8]

Contrasted with Francisco Madero's, Carranza's government was not a representative form of democracy. The actual will of the majority was only valid and binding when filtered through the government's "profound and serene reason." This reason, as the concept of justice in the Summa Theologica, aims at and is measured by the common good. The party system and the electoral process are ancillary to the implementation of the revolutionary mandate to search for reforms or formulas that would balance the interests of the "haves" and the "have nots". Krauze quoted the recently deceased Jesus Reyes Heroles for the confirmatory aphorism that in

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7. MEXICAN CIVIL CODE 4 (M.W. Gordon tran. 1980).
8. E. KRAUZE, POR UNA DEMOCRACIA SIN ADJETIVOS 11 (1986).

Mexican politics, "form is the substance." Stated simply, the political process must provide the availability of power for those designated by the revolutionary party to govern. This has been accomplished by the administrator acting as an archetypal good father with profound and serene reason, for the common good. The institutional consequences for Mexico of this paternalistic version of statism are readily apparent.

In Mexico, political power is centralized in the executive branch. Centralization has allowed unipersonal decision making that forever seems to be courting authoritarianism. The paternalistic ruler is deemed wise, all powerful and mindful of the common good. He is also frequently magnanimous toward his defeated opponents, particularly if his integrity and dignity have not been attacked. He rewards loyal and obedient friends, but disloyalty or contempt are often considered equivalent to serious crimes or misdemeanors.

This paternalistic reliance upon loyalty and personal friendship is reflected by a system in which goods or services needed by public entities are usually provided by those closest to the rulers. Eventually, a symbiotic relationship developed between the public and private sectors for the abuse of paternalistic privileges. They have become interdependent and in certain vital industries wield political power jointly.

B. The Venal Administrator

The morality of the venal administrator stems from what he perceives as good for himself, his immediate family and closest friends. Purchases are made and public works are undertaken by the venal administrator whenever profitable for himself or for those closest to him. In this context, the bribe taken by the venal administrator is nothing more than a sale of a family or friendly privilege to a stranger, *i.e.*, someone who is neither a close relative nor a friend.

In real life, the paternalistic and the venal administrator are often one (although Krauze claims that the number of venal administrators grew precipitously since the 1950s), and his decisions, whether inspired by paternalism or venality, are seldom inspired by "marketplace" considerations. As a paternalistic administrator, he seeks no counsel from genuine electoral mandates, nor does he allow cost effectiveness to interfere with his favorite course of action. Ultimately what counts is his profound and serene reason, a reason that he often uses to persuade or co-opt "sensitive" sectors such as labor, peasants or students.

The loss of administrative efficiency caused by both paternalistic and venal administrators is an obvious cost of applying their standards of fairness to the allocation and distribution of public resources. Less obvious, but now becoming clearer to observers such as Enrique Krauze, is that the increasingly competitive and cost-efficient international marketplace faced by developed and developing nations alike has no room for such a costly and inefficient administration. Inevitably, both types of administrators become dependent upon foreign lenders or providers for their own, and Mexico's economic lifelines. Also, as the resource pie becomes smaller the number of honest paternalistic administrators is declining while the number of venal administrators is rising. In fact, as it becomes harder to earn a livelihood, the loyalty of subordinates is ensured by allowing them to profit from, or share in, the profits of their venal superiors.

C. The Letter of the Law Judge

The letter of the law judge takes his clues of what is fair from a literal reading of written texts. He is comfortable with narrow rules and uncomfortable with general or "super-eminent" principles. If a literal reading of statutory language leads to a clearly inequitable result, this judge does not apply the principles of fairness and good faith found in the Constitution or in the Civil Code to mitigate the inequity. Similarly, this judge reads contractual stipulations literally even when the literal meaning of a term or stipulation conflicts with its customary or trade meaning, or with the meaning used by the parties in their course of dealing. For example, in a case where plaintiff contended that he was entitled to the monetary value of the currency he had lent, as determined at the time of the maturity of the loan, and should not suffer the severe loss that resulted from a devaluation which took place later, at the time of collection, the Supreme Court responded:

> [e]xcept in those cases where the law authorizes resort to equitable principles . . . (this court) cannot apply such principles because it would violate the principle of equality before the law, which is the basis of social order. As long as there are legal provisions applicable to the case in question there is no reason to attempt to correct them, thereby substituting the legislative by another, entirely subjective will.[9]

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9. "[T]he rise and fall of rates of exchange and their effects upon payment is an eco-

In a brilliant critique of this type of reasoning Professor E. Garcia Maynez[10] showed how an equitable inquiry into the parties' true intent was consistent with legislative intent. One should add that Mexico's Supreme Court's fears about the inherent subjectivity and arbitrariness of equitable determinations are unfounded. Contrary to the Court's view, equity is organically connected to the determination of a contextual, as opposed to a literal or dictionary, meaning of terms. As long as a court resorts to objective tools for the determination of legislative or contractual intent, such as legislative history or parole evidence, or trade custom and usage, it need not fear arbitrariness.

D. The Venal Judge

The venal judge, like the venal administrator places personal profit making above all other considerations. Often he becomes the beneficiary of the litigants' bidding for favorable rulings. If one of the parties has the superior political or economic power he will win. If the two parties have a relatively similar political or economic power, or if one party matches the other's greater political influence with his larger purse, then the bidding, and the stalemate, are on. According to Professor Raul Cervantes Ahumada, this method of dealing with judicial disputes is not unusual when one takes into account not only the parties' but also their attorneys' connections. It accounts for the low esteem in which the Mexican people now hold much of the judicial system.[11] This is not to say that Mexico's judiciary is wholly corrupt or that honest justice is not available in Mexico. Mexico still has a good number of honest, courageous and wise judges. It is to say that their integrity and wisdom are often neutralized by their venal, and letter of the law colleagues, and that it is the latter's behavior which influences public attitudes toward judicial adjudication.

In view of the influence exerted by letter of the law and venal justice, it is pertinent to inquire into its impact upon stability and growth. One of the most distinctive features of letter of the law and

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nomic phenomenon which is independent of the legal necessity to fix, as of the initiation of the lawsuits, the quantum of the claim." Gerhard Karras y Cia v. Friendemberg S.A., 5 REVISTA GENERAL DE DERECHO Y JURISPRUDENCIA 116 (1934). *See also* Kozolchyk, *Fairness in Anglo-American and Latin American Commercial Adjudication*, 2 B.C. INT'L & COMP. L. REV., 219, 244 (1979) [hereafter *Fairness*].

10. 5 REVISTA GENERAL DE DERECHO Y JURISPRUDENCIA, 127 (1934).

11. R. Cervantes Ahumada, Salvemos ala Suprema Corte El Sol de Mexico, Feb. 6, 1986, at 5-17.

venal justice is its factual aloofness. A student of these decisions can seldom find a connection between, the litigated issues and *ratio decidendi*, and the facts that led to the dispute. For example, a buyer sues his seller because the latter was unwilling to deliver a commodity at a certain stipulated price in a written sale agreement. The defendant, however, will not answer the complaint alleging what actually happened, i.e., an unexpected dramatic rise in the price of the commodity as a result of an unforeseen devaluation. Since the letter of the law does not expressly authorize the application of the equitable doctrine of *rebus sic stantibus*, defendant's lawyer will rely on hypertechnical defenses. These defenses are usually procedural, and they often revolve around the attorneys' powers to litigate as found in their respective powers of attorney, or the parties' power to act in a corporate capacity, as found in the corporate books and records. Hence, the final decision, if it is ever handed down, will not address the question of who, between a buyer or seller of commodities, must bear the risk of monetary devaluation in the absence of an express contractual stipulation. Instead, it will address issues of proper formalities for issuance of powers of attorney or for the introduction into evidence of minutes of the meetings of boards of directors. Hence, an attorney counselling a client considering a long-term commodity contract will search in vain for judicial guidance.

The impact of inequitable and unpredictable rules on business planning is quite costly. The volume as well as the quality of desirable trade and investment suffer when traders and investors are not guided by rules based in principles of honest and fair dealing. Contrary to conventional wisdom in the Middle Ages (and in the Iberian peninsula and Latin America until almost our time) commerce is not a vile tricky, "winner take all, loser take none" occupation.[12] Successful commerce requires considerable trust in the honesty and skill of close associates and financial intermediaries such as banks, insurance companies' carriers, warehousemen, agents, and brokers. In addition, successful commerce imposes upon regular participants in market transactions a morality that enables cooperation for mutual profitability. This morality of cooperation must be supported by the legal system and especially by the adjudication of commer-

12. *See Fairness*, supra note 9 at 255-56; *see also* Kozolchyk *Commercialization of Civil Law and Civilization of Commercial Law*, 40 LA. L. REV. 3, 16-27 (1979); MORALITY AND THE DYNAMICS OF COMMERCIAL LAW, COMMERCIAL AND CONSUMER LAW FROM AN INTERNATIONAL PERSPECTIVE 15 (D. King ed., Rothman, 1986).

cial controversies. A marketplace unsure of its morality or inclined to a "winner take all, loser take none" attitude is particularly dependent upon decisional rules to draw the line of permissibility. The absence of such a line encourages transactions that are profitable and productive only for those who have the power to manipulate the outcome and discourages access to the marketplace by new or weaker competitors.

In the marketplace of political activity the judiciary's failure to limit or curb administrative malfeasance carries an equally high political stability price. Once courts are perceived as unable to correct political abuses, ideologies become more radical, and the call to violence or to military type solutions increases.

II. What to Do?

Cervantes Ahumada, Krauze, Greenberg and Velez-Ibanez agree that there is a generalized distrust for legal institutions in Mexico. Trust, however, can only be earned by satisfying the expectations of fairness of those using legal institutions. At a minimum, the user must be reassured that by relying on the fairness of, for example, a contract, a share of stock or of an electoral process, he will not, inevitably, give up something in exchange for nothing. This does not mean that each party to a commercial or political bargain must receive the same mathematically ascertained value that he gave. Despite laudable efforts by moral philosophers from Aristotle's to John Rawles' time, there is no logical formula that insures a universally fair outcome, either in "distributive" or "corrective" justice disputes. There are, however, standards of fairness uniformly used by different societies in developing viable market economies.[13] The first standard (F1) is based upon a brotherly type of morality. It requires that the party with the dominant bargaining power or skill treat the other party as if he were his dependent and cared-for brother. This may require that the dominant party refrain from profit making or absorb the weaker party's losses. This standard was applied to many of the controversies between Jewish and Arab traders from the ninth to the thirteenth centuries in Mediterranean trade and was responsible for these traders' ability to entrust money and wares over long distances without having to accompany them.[14] F1 duties were in large measure religiously inspired and

13. *See Fairness*, *supra* note 9, at 220, 233, 257.
14. *Id.* at 220 *et seq.*

were responsible for a degree of commercial trust unavailable among other traders in continental Europe. Variants of F1 are apparent since that time in societies with developed financial markets and are imposed typically on financial intermediaries acting in a fiduciary capacity for weaker or less knowledgeable parties.

The second standard (F2) is based upon a cooperative market morality and it assumes equality of bargaining and knowledge. It requires that one party treat the other the same way a regular participant in that market transaction would want to be treated when viewing his own advantage. Thus, while it does not require that one party absorb the other's losses, it requires that each party refrain from interfering with the other party's ability to profit. The requirement that a merchant owed another a minimum amount of cooperation became apparent in the so-called law merchant, a law that emerged from commercial fair courts and courts in leading commercial centers particularly in Renaissance Europe. As the professional markets gave way to participation by consumers or nonprofessional merchants the cooperative duties of merchants toward non-merchants became stricter. F2 is the most widely applied standard of fairness in the law of societies with developed market economies.[15]

The third standard (F3) is found predominantly in the law of developing nations and is based on an exclusionary tribal morality of fairness. It assumes that duties of an F1 type are owed to the members of one's own tribe, family, or close friends, but it negates F1 and F2 duties with respect to nonmembers of the exclusive group. It is a standard characteristic of primitive societies or societies whose survival is constantly threatened by outsiders or strangers. Accordingly, a stranger can be treated in any manner the dominant party can get away with.

F3 is frequently applied by courts in developing nations to private law disputes. As long as the dominant party obtained the weaker party's formal consent it does not matter that the latter received nothing or little in exchange for the value or benefit conferred on the former. If the weaker party literally agrees to receive what he got, or the law literally interpreted, does not require a marketlike reciprocity or brotherly care, he has no cause of action.[16]

It is not difficult to see why F1 and F2 contributed most to the

15. *Id.* at 233 *et seq.*
16. *Id.* at 257 *et seq.*

development of trusted legal institutions in nations with developed market economies. Banking, insurance, long distance carriage, and warehousing, as well as the public sale of corporate securities, owe their viability to the reassurance provided by fiduciary and cooperative duties toward perfect strangers. Conversely, if the strangers' monies, goods or services would have been handled in accordance with F3, no stranger would have been willing to entrust his assets to another stranger.

The importance of public perceptions of the prevalence of F3 in developing nations is illustrated by a capital formation study conducted almost two decades ago in Costa Rica. When respondents were asked why they did not invest in a highly profitable industrial concern that had an uninterrupted record of dividend distributions and a higher return on capital than that of real estate mortgages, their response was nearly unanimous: "if it is such a good investment, why would the corporation or the people running it want to share it with us (strangers), rather than with their families or close friends.[17]

In contrast with the widespread distrust for marketplace, and official political and legal institutions, social scientists have found considerable trust in some non-official institutions of developing nations. For example, Velez-Ibanez' and Karon's studies on some of the poorest areas of Mexico City[18] point to the presence of active credit networks based upon reciprocity. Similarly, highly trusting relationships transcend the traditional *compadrazgo* and have arisen in urban political associations. Greenberg's work on the Chatinos in Oaxaca reveals a similar pattern in rural communities. He compares the exploitation by coffee buyers and money lenders with the "indigenous order based upon mutual cooperation and communal property in which coalitions between peasants underwrite individual and family security by emphasizing obligations of reciprocity."[19]

It is true that these informal associations are based upon trust in select members of the community, such as the respected widow who manages the community loan fund, or the village elder who collects and distributes the "saint's money." It is also true that the trust

17. Kozolchyk, *Toward a Theory of Law in Economic Development, The Costa Rican USAID—Rocap Law Reform Project* LAW AND SOCIAL ORDER 681, 713 (1971).

18. VELEZ-IBANEZ, *supra* note 2 at 9; Karon, *Law and Popular Credit in Mexico*, 1 ARIZ. J. INT'L & COMP. L., 89, 92, 102 (1982).

19. Greenberg, *supra* note 5 at 18.

involved in the contemporary versions of F1 and F2 is largely a trust in impersonal legal institutions whether in the form of a savings account, an insurance policy, or share of stock. Yet the transition from a purely personal to an impersonal, institutional type of trust seems to have been effected more easily where the emerging institution was identified with respected members of the community or with their trade associations.[20]

Institutional trust must take place at the communal grassroots; it cannot be legislated or imposed from above. Changes at the grassroots do not happen overnight or in cataclysmic fashion. They involve a protracted trial and error process with transactions that blend easily with the physical and cultural setting, but which also contain the seeds of new relationships, values, and methods of operation.

A grassroots process of economic and legal enfranchisements, if sufficiently widespread, will encourage the growth of democratic institutions that lie beneath the surface of non-official associations. In addition, it will reinforce the need for pluralistic decision making. It is not by accident that the development of pluralistic institutions in Western societies came hand in hand with the legal and economic enfranchisement of large segments of the productive population. After all, true appreciation of one's freedoms can only occur when one realizes the significance of these freedoms to one's rights or duties. If one is not subject to such rights or duties, or if such rights or duties cannot be related to actual people or things, they remain as meaningless entities in the minds of the disenfranchised.

Clearly, the preceding suggestions do not entail a grandiose solution or set of solutions to Mexico's political and economic problems. At best, they are an attempt to cope with one of the aspects of instability and stagnation. Yet this should not disturb those who have identified the grandiose solution of "profound and serene reason" as one of the main causes of these problems. In fact, Krauze, among other Mexican political scientists, counsels a "philosophy of small things to enrich the fertile soil of Mexico's local communities, which are its traditional sources of strength."[21]

Lawyers, in conjunction with social scientists, can make a significant contribution to the search for the "small things" that could help develop trustworthy market institutions. Assume, for example,

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20. *See generally* F. BRAUDEL, II, CIVILIZATION AND CAPITALISM, THE WHEELS OF COMMERCE 433-53 especially at 449 (1982).

21. KRAUZE, *supra* note 8, at 29.

that a rural credit union is created to help the Chatino Indians gain greater self-sufficiency by financing the production and distribution of their coffee or handicrafts. Lawyers using solely their traditional skills would participate in selecting the appropriate type of association, in documenting the decision-making process, the loan and collection procedures and so on. Unlike the traditional lawyers, however, those involved in the credit union project would have to be trained observers of the behavior of highly respected community leaders in order to ascertain what makes them trustworthy and effective. Thus, development lawyers would have to learn how to reconcile the customary or living law institutions they find with the operational needs of a for-profit credit union. This requires a careful monitoring of adopted procedures in order to determine what works, what does not, and why. The purpose of these non-traditional legal tasks, then, is to help fashion a living law of rural credit which is both sensitive to the grassroots sources of trustworthiness and to the unavoidable requirements of F1 and F2.

The growing consensus among thinking Mexicans is that the time for empty rhetoric is long gone. The growing consensus among thinking Americans is that the fate of Mexico is, increasingly, America's own. The traditional meaning of the shared border is being changed by ever growing family, friendship, cultural, economic, and national security ties. Mexico's instability and economic stagnation are, therefore, in the deepest sense the United States' as well. Hopefully, students of the law, both official and living, in both countries will realize that a significant legal problem has been identified, and that it can best be tackled by sharing complementary resources and skills.