



Photo by Alejandro Mejía Greene

Boarding a bus in Mexico City.

MEXICO

My Life as a Suspect in Mexico City

By Roberto Hernández

The first time I got arrested, I was probably 20 years old. I am now 40. I was headed home after a long day at law school, and distracted, I leaped on the wrong *trolebus*, one of the shambling, pale-green electric buses that still run in Mexico City. After I had paid the fee to the driver, I realized my mistake and asked for my money back. The driver refused, muttering, “I’ve already issued the ticket.” There was a long line of weary people behind me: some women with children in their arms, laborers, university workers, a few students, most indifferent to my predicament. “You could easily give the ticket to the man behind me and give me my money back,” I said. This drew only silence from the driver. It was the only coin I had. Giving it up meant a two-hour walk home. The driver shook his head. I decided to grab my money from the

marimba — the wooden tray where drivers organized their cash. As I snatched my coin, the *marimba* crashed down, and hundreds of *peso* coins chimed on the metal floor. The passengers’ chatter dwindled into a bewildered silence. The man in line right behind me grabbed me by my trousers. He said he was an off-duty policeman. As he dragged me out of the bus, I held the coin high in my left hand and yelled, “This is about one coin!” Within minutes, two police cars arrived. I was put in the rear of one of them, which rolled off slowly into the red light, followed sluggishly by the empty *trolebus*. From the rear window, I saw people throwing their coins at the rundown bus. Someone yelled, “Catch some real crooks!”

I spent three hours in a holding cell in a prosecutor’s office in Delegación Coyoacán, south of Mexico City, but

was released when the prosecutor in charge found out I was a law student. Only years later would I learn what could have happened to me. In 2003, Mary Jordan and Kevin Sullivan won the Pulitzer for international reporting for a series of articles documenting the injustice rife in Mexico’s justice system. I still remember reading the following passage, published July 6, 2002, in *The Washington Post*, and imagining what could have happened to me:

MEXICO CITY — Giovanni Hurtado Aviles was hurrying to his engineering class when he realized he didn’t have the two pesos — about 20 cents — for the subway. When he tried to use somebody else’s pass to get on, he was caught and hauled to jail. “I made a mistake. I am really sorry. I won’t do it again,” Hurtado, 20, said he told the guard who nabbed him that January morning. But the Mexican justice system, which often fails to punish serious criminals, zealously prosecutes the most minor of offenders. So the college student with no criminal record was denied bail and forced to mop floors for 12 hours a day for two months while he awaited trial.

Had that Coyoacán prosecutor been ill disposed towards me, I could have been indicted for “robo en transporte público” (robbery on public transportation), a more serious crime than trying to skip the fare. Courts didn’t need much evidence to convict, I would later learn. In 2001, freshly graduated from law school and after completing a master’s in comparative law at McGill University, I had been asked to collaborate with the National Center for State Courts, a non-profit organization charged with improving judicial administration in the United States and around the world. We surveyed a random sample of 450 criminal files from Mexico City courts, and the statistics we discovered were eye opening, but not as much as the experience of deploying the survey itself. Part of the data gathering painstakingly took place in the criminal courts, which looked unlike anything I could have imagined.

Back then, and until now, Mexico City courts were small rooms where defendants were prominently displayed behind iron grilles, while judges sat in cubicles surrounded by glass. With gray linoleum on the floor, light curtains covering the windows, brick walls painted a cream color and brown doors, the space of the typical court was divided in five sections: an office for the two prosecutors, one for the defender, a closet where the court files were stored, and two courts within the court. That is, two open spaces divided only by the structure of the furniture, each with a cell attached where prisoners could be observed.

In each of these courts, two separate trials were taking place simultaneously, usually in the presence of a court *secretario*, but in the absence of the judge, who sat in her cubicle, often reading other case files but sometimes the newspaper. The lone, underpaid defender assigned to the court was outnumbered. He had to confront two prosecutors and often had to desperately swing between the two cases, shooting whatever questions and defenses he could craft on the fly.

The court’s operation centered around the production of files. Tables displayed large books, manila folders with the tribunal’s logo, electric drills and balls of white string. The drills were used to perforate the thick files. The string was then used with a needle to sew thousands of pages together. The sound of the printing on old dot matrix printers dwarfed the voices of the witnesses and blended with the other ambient noises: an employee listening to the radio; a microwave oven heating up lunch; a drill piercing a thick file; chatter. A judge could be seen having his shoes polished, while a *secretario* was eating at his desk. I saw the scattered elements of a kitchen mingled with the old furniture of the courtroom. One day, a prosecutor’s birthday party was celebrated in one of the courts we visited. The defender, the secretaries, even the judge, sang “Happy Birthday.” In the meantime, a number of prisoners waited for the celebrations to conclude. Stunned, we diligently filled the survey questionnaires.

The results were in after a few months. What we learned — or should I say, confirmed — was predictable. About 65 percent of the city’s criminal cases were petty thefts. About 90 percent of the suspects were blue-collar workers, caught in the low-skill, low-wage trap. The defendants averaged 11 years of formal education. Some of the indictments were unforgettable: stealing a plastic mango, a broken belt, an old tire, a crushed *Gansito* (Mexico’s favorite snack cake). More than half of the suspects (54 percent) were submitted to pretrial detention. Rather than being thrown out as ridiculous, 72 percent of the cases ended with a conviction, and notably, none ended with a withdrawal of charges.

The trials were swift but senseless, like a runaway train. No opening speech from prosecutors or defenders preceded the examination of witnesses. Professional litigants know never to ask a question whose answer they do not know in advance. But in these courts, questioning seemed like a fishing expedition, like a conversation: “Do you like soccer? Do you smoke? Do you drink alcohol?” These are the questions defendants in the sample got asked by every court. Why? “For statistical purposes,” we were told, but no one knows where those statistics are published.

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Photo courtesy of Layda Negrete and Roberto Hernández.

Toño Zúñiga stands behind bars in an old-style courtroom.

The median duration of a trial was estimated at 97 days, but the procedures were worthless as a probe of the evidence. While filming “El Túnel,” my cameraman followed court employees going through the court’s script: “Do you like soccer? Do you smoke?...” Yet even while being filmed, the question “Were you mistreated by authorities?” was entered in the case file, but the suspect was never actually asked if he was mistreated. Mexico’s police are widely known for continuing to use witness coercion, mistreatment of suspects, and torture as investigative tools, and yet most courtrooms lacked the sense that such behavior needed to be investigated and punished. Our research could never capture the reality.

No justice could be served in these courtrooms. I simply had no idea this was going on in my country. I realized that if numbers could not possibly convey the slow-motion train wreck that is every criminal case in Mexico, perhaps a film could. Eventually, such a film emerged in the form of the documentary “Presunto Culpable” (Presumed Guilty). Filmed during the summers as my family shuttled between Mexico City and Berkeley, no one

(myself included) expected that this documentary would end up being distributed nationally by Cinépolis, one of the world’s largest theater chains. After a judge censored the film, media attention intensified. Censorship was a blessing in disguise. By 2013, the survey firm Parametría found that 36 percent of Mexicans had seen it.

The story is simple: it recounts the case of Toño Zúñiga, a young man wrongly convicted of murder, and his struggle to regain his freedom. We recorded our long telephone calls and filmed conversations with Toño’s wife and friends. When we discovered that his defender had forged his license to practice law, the possibility of requesting a retrial opened up. Eventually, the opportunity to film that retrial materialized. The film was completed in 2009, shown at festivals around the world, and it won an Emmy award. In Mexico, it was broadcast by Televisa, reaching 13 million viewers in one night.

The film’s impact in Mexico was strong in policy-making circles. In 2008, the Constitution was amended to include presumption of innocence and adversary trials, with a 2016 deadline for implementation. By the end of

2013, 17 of 33 Mexican jurisdictions were at an early or intermediate stage of implementation, with three states fully operating a new justice system. In January 2014, the Constitution was again amended to authorize the federal legislatures to issue a National Code of Criminal Procedure, likewise slated to enter into force by 2016. But even before the most recent reform eliminated state authority to legislate on criminal procedures, several states had already taken significant steps to implement the adversary system. As a result, a number of inmates were tried and convicted under the new trial procedures, so we had a marvelous opportunity to measure and project what the Mexican reforms might look like, even before implementation of the new code was complete.

Today, Mexico’s courts are changing dramatically, with significant improvements to their infrastructure. No microwave ovens, balls of string, drills or newspapers can be seen in the new courts. In the meantime, I moved from surveying criminal files to surveying convicted inmates. I had good reason to expect their accounts to be richer and more informative than the official criminal files, and I

hoped to put myself in a position to observe any changes. In collaboration with Layda Negrete, a policy analyst, and Alejandro Ponce, from the World Justice Project, I created a survey questionnaire for inmates. Its deployment was also partially funded by the World Justice Project. A stratified random sample of 750 inmates, about half of them convicted under the old system and about half under the new one, helped reveal the significant changes under the new justice system.

Before, defendants literally stood trial (only 2 percent reported that the courts in Estado de México had a chair for them); under the new justice system, 87 percent reported they had a chair to sit on. The courts now had microphones, speakers and a videotaped record of the proceedings. Some new courts even had air conditioning. Most importantly, the new courts now had judges attentively listening to the cases. In Estado de México, only 9 percent of inmates convicted under the old system said a judge was present. That number rose to 87 percent.

Finally, the outcomes also indicate positive changes. Presumption of innocence is finally beginning to take hold.

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A new courtroom in Sinaloa.



Photo by malova gobernador.

Percentage of inmates claiming innocence of the crime for which they were convicted

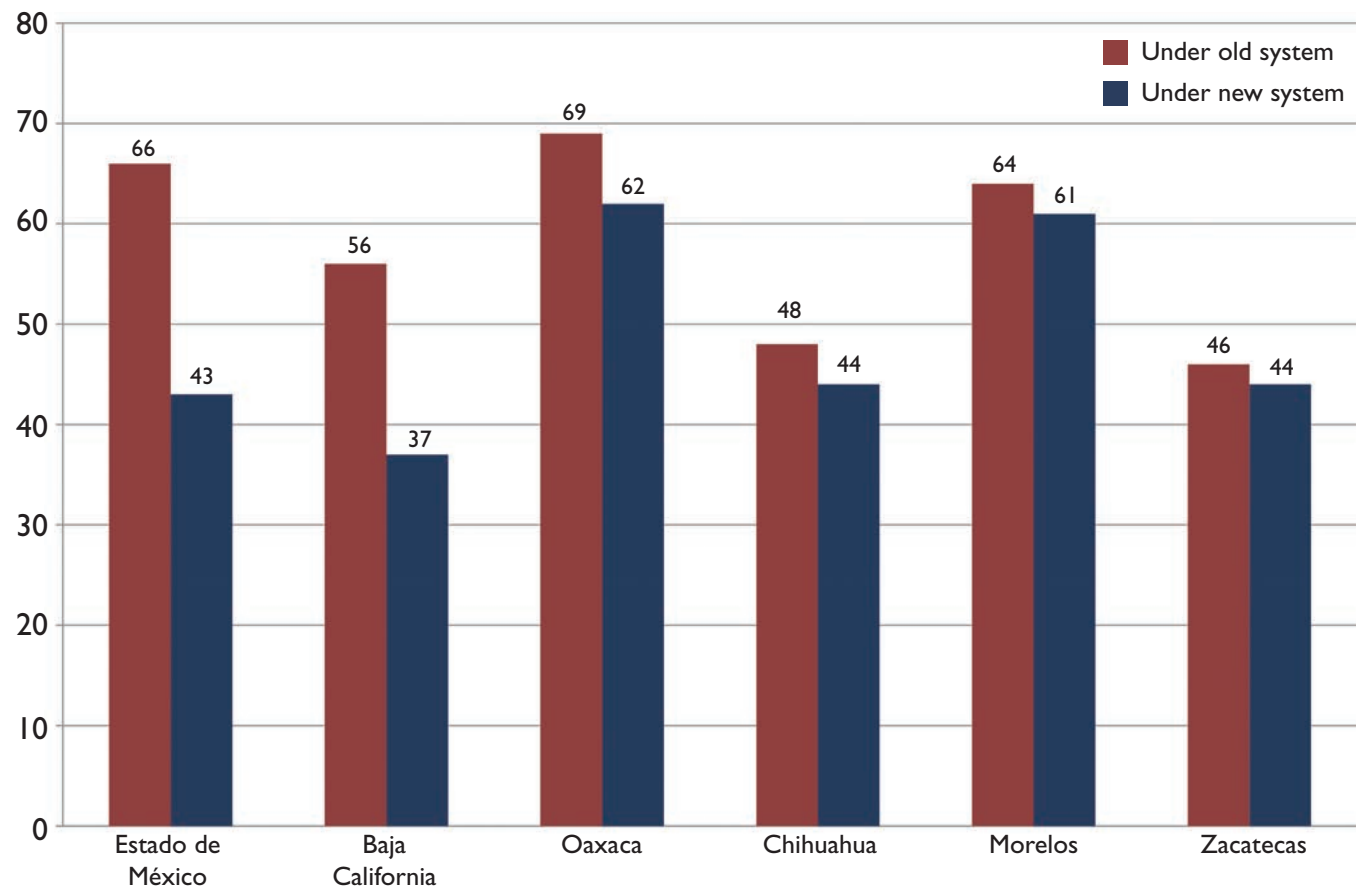


Figure 1: This graphic combines results from two survey deployments where I was the principal investigator: 1) a survey in Mexico City and Estado de México, co-funded by Abogados con Cámara and the World Justice Project, with support from CIDE; 2) a more recent inmate survey deployed in six states by Abogados con Cámara and the World Justice Project, with support from USAID.

Under the old system, 68 percent of the convicted said they were considered guilty before the trial. That number is down to 46 percent. The number of inmates who say that they were wrongly convicted is down from 66 to 43 percent in Estado de México and down from 56 to 37 percent in Baja California. The inmates' reports, which some might intuitively dismiss as inherently biased, are actually quite informative (see Figure 1).

Despite the good news, I have serious doubts about these reforms. While the number of inmates who claim to be convicted in error has dropped significantly, even after the best implementations (as in Estado de México or Mexicali), about 40 percent of inmates still insist that they are innocent. Clearly, transparency soars at the judicial level, but there is insufficient investment in transparency in the police and prosecution services.

Our film exemplifies this concern: we created the first videotaped record of an entire criminal trial. The cameras encouraged the judge to attend the proceedings. We ensured that a vigorous defender litigated the case, and he presented the court with an airtight alibi for the defendant. The evidence of culpability offered by the

prosecutor was feeble and disorganized. Her star witness could not make an in-court identification of the defendant nor physically describe him. The gunpowder residue test was negative. The detectives who made the arrest said they remembered nothing about the case. One of them ventured to tell Toño Zúñiga, with the judge by his side: "Look, I do not think you did it, but there's someone who is accusing you." In sum, it was an easy case. And the threat of public embarrassment should have made it even easier. And yet, to the surprise of audiences who have seen "Presunto Culpable" worldwide, Toño Zúñiga gets reconvicted. We lost. It puzzles me to this day. Why was he reconvicted?

Either the judge had poor judgment or something was missing from the judge's toolkit for evaluating the evidence (not unlike the 300 juries in the United States that wrongly convicted men who were later exonerated with DNA evidence). I think the missing tool in Mexico is a better law, one that regulates typical police powers. In the absence of legislation governing eyewitness identification procedures and custodial interviews of suspects, Mexico's poorly paid defenders are forced to

fight an uphill battle for police accountability, one that they typically lose. In our survey, most inmates reported a dismal performance by their defenders, who never asked them if they were mistreated by detectives during questioning, if their interrogation was filmed, if they were shown alone or in a lineup to the eyewitness, and much else that mattered. Without detailed legislation that defenders could use as guidance during preparation for trial or to cite in court, arguments about departures from acceptable police procedures may be easily discarded as utopian or foreign.

The situation in Mexico, both in terms of public spending and laws, is akin to having an old fleet of buses with flat tires and poorly dressed, myopic drivers. These buses move people with a high rate of fatal accidents, and yet when confronted and forced to invest, the owners of the fleet first spend most of their resources on tailored suits for the drivers rather than on giving them corrective eyeglasses and replacing the tires. And the police are the tires.

This is a country that builds airports when it lacks sidewalks and bike paths. Public spending is focused on beautifying the top of the pyramid of the justice system,

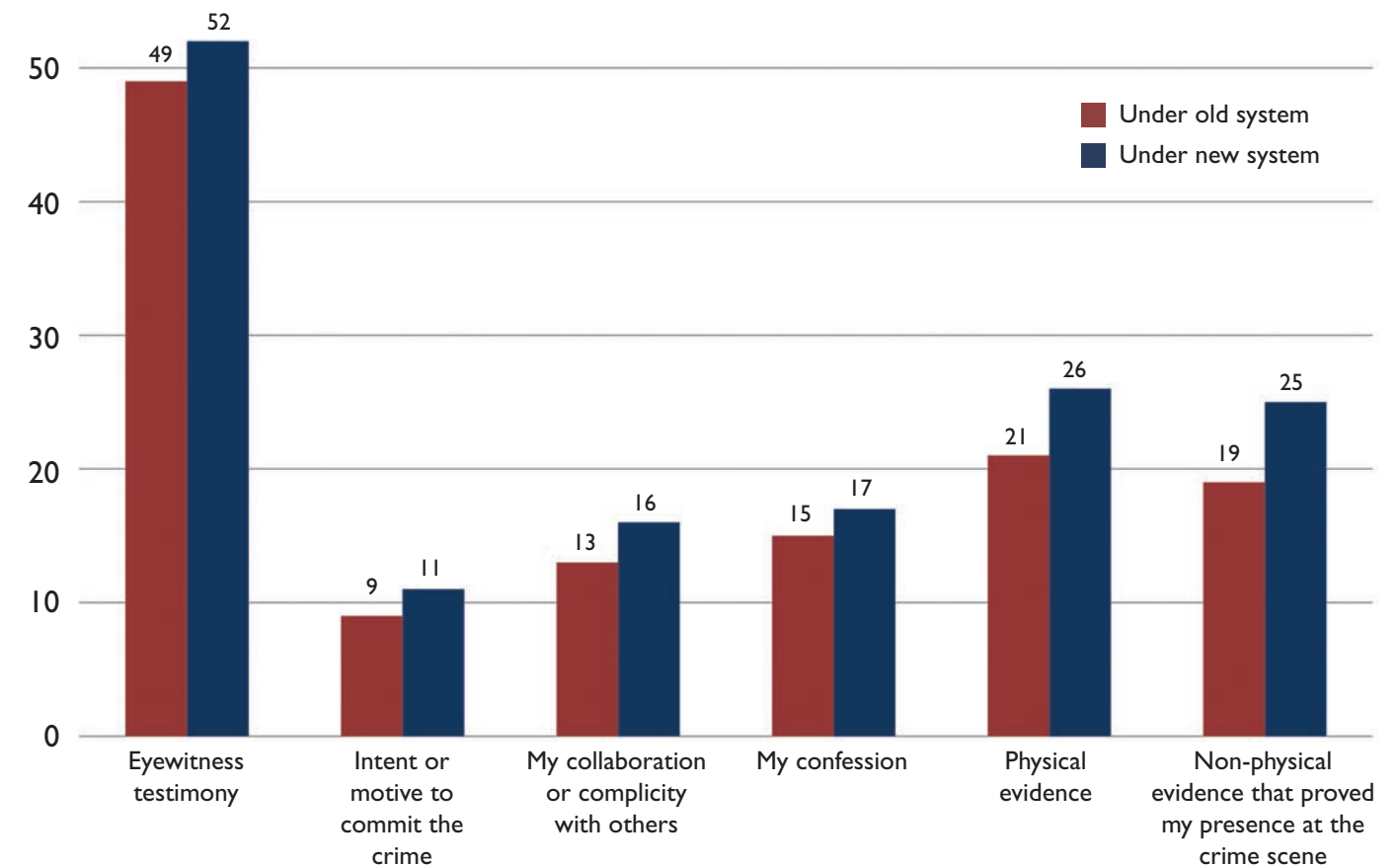
while the bottom lacks elementary resources and rules. The Mexican government is building courts and laying out marble floors in rooms where the hearings are to be held, but we still lack decent police stationhouses. Money pours out to buy wooden hammers and robes for the judges, but policemen are poorly paid and often asked to buy their own bullets or required to use their own money to repair police cars. Courts are given top-notch video surveillance equipment, but the holding cells where suspects are interrogated lack cameras and even lighting. Providing police with telephones, computers, Internet access, offices, case management technologies, and bulletproof vests will surely cost, but such spending is unavoidable, and legislation is a truly inexpensive first step to send public resources to the bottom of the pyramid and to build trust in the police.

In our inmate surveys, we asked about several types of criminal evidence but focused mainly on those that should draw most concern from policy makers: confessions by suspects and eyewitness identifications. These are very persuasive forms of evidence; they frequently result in convictions but also can induce judicial error. Sometimes confessions are false, and eyewitness identifications are

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Figure 2: This chart is drawn from our most recent inmate survey, deployed in six states by Abogados con Cámara and the World Justice Project, with support from USAID. The states surveyed were Baja California, Chihuahua, Hidalgo, Morelos, Oaxaca, and Zacatecas.

Types of evidence cited by inmates as reason for accusation



very frequently mistaken. It turns out that 70 percent of inmates convicted under the old system and 65 percent of inmates convicted under the new system reported being interrogated by authorities in attempts to get them to confess. About 50 percent of inmates reported that an eyewitness was used to testify against them. These numbers suggest that confessions obtained during custodial interrogations of suspects and eyewitness identifications are critical policy-making targets. In fact, eyewitnesses are the most frequently used form of evidence in trial (see Figure 2).

And yet in Mexico, most typical police powers remain unclearly defined under the law. Enormous faith is being put in the new adversary system, but this faith may be misplaced, for it is evident that most police activities will actually never see the light of a public courtroom. Arrests, eyewitness identification lineups, and interrogations of suspects will always occur far more frequently than oral hearings to scrutinize them. Mexico needs to rewrite the laws on police powers, not only to empower police to investigate in a sensible way, but also to provide officers with the necessary independence to investigate, to cut down on corruption and incompetence, and to begin building citizen trust, particularly during the early stages of crime investigations. This is where human rights violations have had the most egregious impact and where departures from acceptable investigative standards occur. This is where the bulk of trust is going to be lost or won.

In the latest reform attempt, however, President Enrique Peña Nieto proposed a “mando único policial,” subjecting all municipal police to the command of each state governor. The President’s focus on who is giving the orders, not on providing police with a new legal script for interacting with citizens, seems to be just thoughtless, old-style centralization. We do not need an emphasis on who is the boss or enlarging police corporations that are already out of control.

A dangerous, authoritarian culture pervades police institutions, and the militarization of policing is widespread: today, more than half the state heads of police were formerly military commanders. Orders from the top of the hierarchy rarely face opposition or questioning, as we have painfully learned from the account of the night when the 43 students disappeared in Ayotzinapa, Guerrero. According to Amnesty international, 64 percent of Mexicans fear they would be tortured if arrested, a sure indicator that suspect mistreatment happens routinely. Trust in the system is won or lost in the first 48 hours after a crime is committed or a person arrested. It will not be won unless police change the way they behave, and they

will not change how they behave unless they receive better guidance from courts, from defenders, and, of course, from legislators.

Mando único and orders by superiors are a poor substitute for laws. In fact, orders from superiors are what we have now. As a result of a historical lack of trust in the police, Mexico’s policy makers have long maintained the notion that police should not be legally authorized to investigate crime. That is why the country lacks a regulation of the typical police investigative powers that we see in other democracies.

In the absence of legislated powers, Mexico’s substitute is an institutional design that is dense in approvals but thin on investigative standards. Police are required to seek permission from prosecutors for every step they take in crime investigations. Just to receive crime reports, police must be so authorized by prosecutors; to interrogate a suspect, prosecutorial nods must be obtained, and so on. This system has been in place in Mexico for many years and was simply retained in the new National Code of Criminal Procedure. Submitting every aspect of crime investigation to a prosecutorial nod rather than to legislation engenders problems. The system places prosecutors — who themselves are not trusted by citizens — as inefficient overseers of the police. In addition to being costly, this design fails to provide police with guidance on how to investigate and fails to understand that prosecutors are experts at following procedure, not at creating it.

Thus, a lack of legislated rules does not promote investigative creativity, as the reformers hoped. Instead, it promotes arbitrariness, torture, human rights violations, and the recurrent imprisonment of innocents, as the data show. Our interviews of a random sample of 750 inmates convicted in Mexico City and Estado de México confirm that mistreatment is widespread and, most importantly, not significantly reduced in Estado de México, even after the new justice system was installed. No statistically significant differences were observed in the reformed state compared to the situation before the reform. Surprisingly, Mexico City — which has not implemented the reforms — is becoming more humane in some forms of mistreatment.

Without better rules, police officers will continue to fall to the same pressures of corruption almost as quickly as they leave the new academies. Investment in the judiciary is unquestionably a necessity, but investment in police is an emergency. A truly effective police reform would be a national law that regulates the following police powers:

- The power to receive crime complaints. Today, the task is delegated to prosecutors, who are outnumbered

by the police ten to one. This situation creates a bottleneck that exposes citizens to long queues to submit their *denuncia* (crime report) and distracts prosecutors from their real job of taking cases to trial.

- The power to search cars, homes, and facilities. Today, the law says precious little about this power, thereby exposing citizens to arbitrariness and abuse by police.
- The power to interrogate suspects. Today, the National Code of Criminal Procedure devotes only 69 words to this matter.
- The power to conduct identification procedures, such as lineups to identify suspects through eyewitnesses. Eyewitness evidence is very commonly used in Mexico, and in the absence of resources, it is the evidence that will more likely be encountered in court, as compared to fingerprints or DNA.

Sadly, the presidential solution remains obsessed with who is the boss rather than with providing scientifically validated procedures that police can follow and that defenders and courts can supervise. The disappearance

of the 43 students in Ayotzinapa is horrifying, yet it offered (and still offers) a political opportunity to launch a nationwide call for police reform.

As for me, I’ve continued to have problems with Mexico City police. The last time I was arrested — for taping a police officer as he made an arrest — it was in the news (unfortunately, I was wearing a fluorescent-green shirt). Unlike the day I was taken into custody for snatching a coin on the trolleybus, this time I was not alone. A search in Google for the incident shows 88,300 results in .45 seconds.

Roberto Hernández is a Mexican lawyer, Emmy Award-winning documentary filmmaker, and policy analyst. His film “Presunto Culpable” has broken every documentary box office record in Mexico. Hernández spoke for CLAS on April 8, 2015.

A police car in Mexico City.



Photo by Alejandro Mejía Greene.