

WHEN NOT EVEN SAFE IN HER OWN HOME: ADJUDICATING VIOLENCE AGAINST CHILDREN IN 19TH CENTURY MEXICO CITY

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Courts in Mexico City have long recognized that crimes of violence against children, such as rape, murder and infanticide, are particularly horrifying to society. Before the modern era of codification and, most recently, laws designed to protect the rights of children, mid-nineteenth century prosecutors and judges took special care in seeking justice for society's weakest and most vulnerable victims. Those charged with administering justice also recognized the need to adhere rigorously to rules of evidence lest an accused become a victim of revenge rather than be held accountable to society and its laws¹. They applied mandatory sentencing and procedural reviews to insure the legality of proceedings, convictions, and sentences and to protect the rights of those convicted to appeal their sentences. Balancing society's demand for justice and the rights of the accused, prosecutors and judges relied on a rich jurisprudential heritage to prosecute, convict, and sentence perpetrators of violence against children.

¹ Extant constitutional laws and implementing legislation in Mexico during the early 1850s recognized four distinct legal jurisdictions: local and state courts for the adjudication of ordinary jurisdiction cases; federal courts for the adjudication of national law cases and cases involving federal officials, such as secretaries of state and congressmen as defendants; military courts for the adjudication of cases involving members of the military and members of their immediate families as defendants; and ecclesiastical courts. Plaintiffs and defendants in Mexico City and the federal territories appealed their cases to the Supreme Court, acting in its capacity as an audiencia, appellate court. Extant laws also limited cases to three instances; in the case of Mexico City, defendants and plaintiffs appealed judicial findings and sentences issued by first instance judges to the Supreme Court. The Supreme Court had three chambers (*salas*); the first chamber most commonly dealt with conflict of jurisdiction cases; the second and third chambers reviewed and adjudicated appellate cases in turn. A three judge panel handled second instance cases; a five judge panel would hear arguments and review the evidence or procedures of the second instance panel. For the court's bylaws and internal regulations see, Reglamento, 13 May 1826, in *Colección de ordenes y decretos de la Soberana Junta Provisional Gubernativa y soberanos congresos generales de la nación mexicana* (Mexico City: Imprenta de Galván, 1829-1840).

There is no historiography that addresses the nature or extent of violence against children in urban centers in times past or the laws and jurisprudence courts applied to such cases². Consequently, the purposes of this article are twofold: to introduce a methodology based on the legal arguments and laws and to analyze the effectiveness of mid-nineteenth century laws and legal institutions to prosecute, convict, and sentence perpetrators of violence against children. The sources for this study are the appellate briefs, the laws, and the sentences in three Mexico City cases: the 1851 case against Pablo Parra for abduction, rape and murder of five year old Gregoria Rodríguez; the 1850 case against seventeen year old Vicenta Bonilla for infanticide; and the 1851 case against twenty-six year old José Nazario for the rape of María Julia, his 10 year old sister-in-law³. Because the courts considered the circumstances of an accused, the crime, and the victim, the particular details of each case are discussed to shed further light on the relationship between the legal culture of the era and daily life in mid-nineteenth century Mexico City.

In Mexico City during the 1850s ordinary people participated in criminal investigations through witness depositions and court supervised face to face meetings (*careos*) with those against whom they had given depositions⁴. Unlike in the modern courts, the accused did not stand before a judge to hear his sentence. Judicial investigators, normally the court notaries (*escribanos*), deposed witnesses and collected testimony; subsequently, first instance criminal court judges evaluated the depositions, any written evidence, the testimony of the accused, contradictions in the testimonies of the accused and witnesses, and the written arguments of a defense attorney before issuing his findings. After the first instance judge issued his findings, and a sentence if he found an accused guilty, a court notary (*escribano*) went to the jail, read the sentence to the accused, and the accused signed the sentence.

² There is a small body of related literature for the non-Iberian world that addresses infanticide; see for example, Symonds, «Reconstructing Rural Infanticide in Eighteenth-Century Scotland».

³ For the prosecutorial briefs discussed here, see Casasola, *Colección de alegaciones y respuestas fiscales*.

⁴ During those meetings, officers of the court read the portion of a witness's statement that contradicted statements made by accused.

Mandatory procedural and sentencing reviews by the appellate courts of major crimes and the right of the convicted to appeal a sentence guaranteed the legality of judicial findings and sentences⁵. In the Federal District during the early 1850s the Supreme Court acted as the appellate court for ordinary jurisdiction criminal and civil cases. At the appellate level, the prosecutor (*fiscal*) prepared a brief in which he evaluated the proof of the body of the crime, identified a motive, discussed how the evidence linked an accused to the crime, expressed his support or objection to the sentence, analyzed the evidence, and presented the jurisprudence that supported his position. After hearing the prosecutor's arguments, the appellate court issued its own findings that confirmed, modified, or revoked the first instance sentence, citing extant laws and jurisprudence.

DISCOVERING A VICTIM, IDENTIFYING AN ACCUSED

Pablo Parra, covered with dirt and his shirt torn, didn't get to the dance in Jacoba Estrada's room until six in the evening on June 1, 1851⁶. Sweaty in spite of the late afternoon drizzle and visibly agitated, he left shortly after arriving. Finding his way to the fountain in the Plazuela de Santa Cruz Acatlán, Pablo washed himself off then returned to the dance. After he got home around nine that evening, he heard that his employer's five year old daughter, Gregoria Rodríguez, was missing⁷. Insisting that a friend accompany him, Pablo joined others who were searching for the little girl. He didn't return to work for the next three days, walking around the city, as did others, searching for Gregoria. Pablo finally returned to work on June 4.

Two days later some people in the neighborhood reported that a pack of dogs was devouring the body of a small child⁸. Rushing to the

⁵ The 9 October 1813 implementing legislation for judicial administration under the 1812 Spanish constitution mandated that audiencias conduct sentencing and procedural reviews; the centralist congress in Mexico on 23 May 1837 enacted a provisional judicial administration law that extended that requirement to courts throughout Mexico. Subsequently, prosecutors, defense attorneys, and judges throughout Mexico cited the laws and jurisprudence upon which they based their legal arguments and findings.

⁶ Casasola, *Colección de alegaciones y respuestas fiscales*, 60 and 81.

⁷ *Ibid.*, p.63.

⁸ *Ibid.*, p.62.

scene, Benito Rodríguez, Gregoria's father, felt his worst fears come true. The dogs had dug little Gregoria's body out of a shallow grave and eaten the lower part of one of her arms and part of her buttocks. The autopsy findings reported that even though her body was partially decomposed, the evidence showed that her internal organs were torn, swollen, and deeply bruised. Little Gregoria had been brutally raped; and, likely, she had died from the loss of her own blood due to the trauma inflicted on her body.

Local police immediately began interviewing people in the neighborhood where Gregoria had lived and quickly Pablo became the focus of the investigation into her death after a number of witnesses testified that they had seen him carrying her into a nearby shop between 4:30 and 5 o'clock the afternoon she had disappeared⁹. Others reported that they had seen Pablo carrying the little girl in his arms and walking in the direction toward where her little body was found. Pablo denied any knowledge of the girl's death. Yes, he had carried her away from her home without the knowledge and permission of her parents, but only to buy a cookie for her at a nearby store. According to his testimony, he left her outside the store and told her to go home. However, the testimony of a number of witnesses contradicted his story; furthermore, her father and an investigator who arrived at her burial site commented that she had cookie crumbs on her when they found her¹⁰.

THE BODY OF THE CRIME AND PROOF

The preliminary investigation of any crime involved the establishment of the body of the crime, the identification of the perpetrator of the crime, the detention of that person, the deposing of witnesses, and the taking of the confession of the accused¹¹. The body of the crime formed the fundamental bases of a criminal investigation. Extant jurisprudence clearly distinguished between the body of the crime and the evidence or proof of the crime. Legal sources defined the body of the crime as the actual act or acts that violated the law.

⁹ *Ibid.*, pp.66 and 80.

¹⁰ *Ibid.*, p.67.

¹¹ Escriche, *Diccionario razonado*, «Juicio criminal informativo», p.363; Helvia Bolaños, *Curia filípica mexicana*, cuarta parte, segunda sección, para 22, 1858, p.383.

In the three cases addressed here, the courts identified distinct crimes. In the case against Pablo Parra, abduction, rape, and murder formed the basis for the investigation. In the case against Vicenta Bonilla, infanticide formed the body of the crime. In the case against José Nazario, the forceful rape of a minor became the basis for the preliminary investigation. Investigators had up to forty days to establish the body of a crime and connect the evidence to a particular person¹². Toward that end investigators interviewed potential witnesses, deposed witnesses, collected any written evidence, and deposed the accused.

Traditional jurisprudence recognized two types of proof or evidence, defined as conclusive proof (*plena* or *completa*) and partial proof (*semi-plena* or *incompleta*)¹³. In criminal cases both clear and partial proof included the legally deposed confession of an accused, the testimony of at least two eye witnesses, legal documents, a judge's ocular observation, and circumstantial evidence (*conjetural* or *indicios*). Partial proof also included an extrajudicial confession to a second party or hearsay, the testimony of a single witness, personal papers or papers not notarized, unsubstantiated presumptions, and the reputation of the accused based on the testimony of a single witness.

At the first instance level a judge identified the relevant evidence and the jurisprudence upon which he based his findings and the sentence. At the appellate level the prosecutor identified body of the crime and discussed the laws and jurisprudence that defined the evidence and the sentence. If in disagreement with the conviction or sentence, the prosecutor also identified and discussed his judicial reasoning to support a reversal of the first instance conviction or sentence.

Investigators and prosecutors, of course, preferred indisputable evidence of the body of the crime and legal confessions. In the case against Vicenta Bonilla, that seventeen year old testified that on the night of 30 April 1850 she had given birth on the banks of a city drainage canal, where her mother had taken and left her, and that she had tossed her newborn into the canal a short distance from the birthing

¹² Ley de 23 de mayo de 1837, art. 131, «en los casos en que deba abrirse el juicio plenario, se recibirá la causa o prueba por un corto término, prorrogable según las circunstancias de aquella hasta cuarenta días; y solo en el caso de que hayan de examinarse testigos o recibirse alguna otra prueba a distancias tan considerables que no fuere bastante aquel término, se podrá prorogar hasta sesenta (...).».

¹³ Escribhe, *Diccionario razonado*, «Prueba en materia criminal», pp.585-587.

site¹⁴. Corroborating evidence from witnesses who arrived on the scene because they had heard the sounds of a baby's cry, a police official (*alcalde*) who had arrived shortly thereafter, and those who recovered the newborn's body the following day corroborated that confession and established the body of the crime¹⁵.

Those accused, however, did not have to confess or testify against themselves. In the case against Pablo Parra, for example, he did confess that he had taken little Gregoria from the doorway of her home; and eye witness testimony proved that he had Gregoria in his arms in the store where he bought her a cookie¹⁶. Additional witnesses stated that they had seen him with Gregoria in his arms as he walked toward a nearby side street (*callejón*). Parra, however, denied that he had carried Gregoria away from the store, stating that he had set her down and had told her to go home. Consequently, the investigators built the case against him on the basis of circumstantial evidence: witness testimony about his heading toward a side street, witness testimony concerning his appearance when he arrived at Estrada's room an hour later, witness testimony of his cleaning himself in the fountain, witness testimony about the cookie crumbs still on Gregoria's body after the dogs had begun to feast on her, and the medical autopsy report. The overwhelming amount of circumstantial evidence served to substantiate the case against Pablo Parra, who never did confess to the rape and murder of Gregoria Rodríguez.

Even if an accused confessed, a defense attorney could and did resort to diverse jurisprudence in an effort to discount a confession. In the case against twenty-six year old José Nazario, prosecuted for raping María Julia, his ten year old sister-in-law, for example, the defense attorney cited a 13 July 1530 royal resolution (*real cédula*) that Indians should not be punished for polygamy unless Christian and previously warned that polygamy was contrary to Christianity¹⁷. To counter that recourse to colonial law, the appellate prosecutor cited contrary colonial jurisprudence to argue that a royal resolution issued nine years after conquest did not apply under the circumstances. Not only was the case against José Nazario not based on the charge of

¹⁴ Casasola, p.121.

¹⁵ *Ibid.*, pp.116, 127, and 129.

¹⁶ *Ibid.*, p.66.

¹⁷ *Ibid.*, p.10; *Recopilación de las leyes de las Indias*, ley 4, tit. 1, libro 6.

polygamy, other colonial laws stated that Indians were subject to «common laws in civil and criminal cases»¹⁸. The prosecutor further noted that colonial laws charged judges with insuring that they punish grave and violent crimes to the full extent of the law¹⁹.

José Nazario's defense attorney also tried to establish that mitigating circumstances attenuated his client's behavior. The defense attorney drew on José Nazario's testimony that even though he had conjugal relations with his 10 year, 8 month old sister-in-law, she had consented after he asked her if she wanted to have sex with him²⁰. Jose Nazario further stated that he, his wife, and María Julia all slept together naked in the same bed ever since she had moved into their home two weeks previous to help take care of her infant nephew. On that particular 31 August 1851 Sunday morning, María Teodora, María Julia's sister, had risen early and taken her baby to Tlalpan where she went to sell *chile verde*. José Nazario, feeling a «natural impulse» and with the consent of María Julia, had sex with his sister-in-law²¹. Only after consuming the act did María Julia start to cry; and because she was also bleeding profusely, José Nazario found some rags which he placed on her to stop the bleeding-then he left the house.

The effort by the José Nazario's defense attorney to rely solely on his client's story about the events of that Sunday morning did not end with just one mitigating circumstance argument. The defense added three additional claims. First, the medical report did not state unequivocally that María Julia had been raped²². Second, María Julia had already begun to menstruate, thus had the right to consent to have sex with José Nazario²³. Third, José Nazario's stupidity (*estupidez*) further mitigated the gravity of the crime²⁴.

At the appellate level the prosecutor presented his arguments against each of the defense attorney's mitigating circumstances. To

¹⁸ Casasola, pp. 10-11; Solórzano, *Política indiana*, cap. 29, libro 2, stressed that Indians were not exempt from the law.

¹⁹ *Recopilación de las leyes de las Indias*, ley 1, tit. 8, lib. 7, «Ordenamos y mandamos a todas nuestras justicias de las Indias, que averigüen, y procedan al castigo de los delitos, y especialmente públicos, atroces, y escandalosos, contra los culpados, guardando las leyes con toda precisión, y cuidando sin omisión, ni descuido usen de su jurisdicción, pues así conviene al sosiego público, quietud de aquellas provincias, y sus vecinos». Most of the laws quoted here may be found in Rodríguez de San Miguel, *Pandectas hispano-megicanas*.

²⁰ Casasola, p.11.

²¹ *Ibid.*, p.12.

²² *Ibid.*, p.11.

²³ *Ibid.*, p.21.

²⁴ *Ibid.*, p.12.

counter José Nazario's story the prosecutor drew on traditional jurisprudence and the testimony given by María Julia. First, citing the *Siete Partidas* and a gloss by the 16th century legal scholar Gregorio López and a contemporary Spanish commentator, Florencio García Goyena, the prosecutor stressed that a child could not consent to an act that would bring harm on that child²⁵. He quoted ley 9, título 10, partida 7, «*La regla constante de derecho (...) que en el púpilo ó impúbbero no puede haber aquiescencia ni tolerancia en daño suyo, y que ni por su voluntad tácita ni espresa puede hacer peor su condición*».

To corroborate María Julia's version of the events, the prosecutor, citing additional evidence, rejected each of the claims made by the defense attorney concerning the circumstances of the event. That evidence included testimony by María Teodora; María Máxima, María Julia and María Teodora's mother; and a police official (*alcalde*), who provided evidence based on what he saw at the house. Legal documentation included the incomplete medical report about María Julia's injuries and an additional court ordered medical report stating that María Julia was, indeed, a pre-pubescent girl, also corroborated by her mother's testimony.

Significantly, the prosecutor could not rely solely on María Julia's testimony, not because her testimony was that of a single witness, but because the testimony of children was not considered legal evidence²⁶. In her deposition María Julia had testified that she had not consented to sex with her brother-in-law and that they did not sleep in the same bed, but, rather, on different mats (*petates*). She also testified that she had already risen and dressed when her brother-in-law re-entered the house, grabbed her, pinned her arms above her head, and forced himself on her. Her sister, María Teodora, confirmed that María Julia slept on a separate mat; additionally, her mother and an *alcalde* confirmed that the girl was dazed and only semi-conscious when they arrived at José Nazario's house²⁷. The first medical report confirmed that Maria

²⁵ López [de Tovar], *Las Siete Partidas*; y García Goyena, *Código criminal español*.

²⁶ Escriche, *Diccionario razonado*, «Menor», pp.433-435, «El menor no es persona legítima para presentarse en juicio como actor ni como reo, ya sea la causa civil, ya sea criminal». The law distinguished four phases of the legal status of children: infancy, birth to seven years; *próximo a la infancia*, seven to ten and a half years; *próximo a la pubertad*, ten and a half years to fourteen for boys and ten and half years to twelve for girls; and minor (*menor*) until the age of twenty five.

²⁷ Casasola, p.14.

Julia had been traumatized and that her injuries were consistent with her story. An additional medical report and her mother's testimony confirmed that the girl had not yet begun her menstrual periods.

To counter the defense attorney's argument that José Nazario's «stupidity» should be recognized as a mitigating circumstance, the prosecutor offered a definition of stupidity: an affliction of the human senses by which one cannot formulate exact ideas²⁸. Commenting further, he wrote that «stupidity cannot recognize stupidity»²⁹. The prosecutor urged the court to recognize that the logical structure and content of José Nazario's own testimony contradicted his claim of «stupidity».

In all three cases the confessions and partial confessions of the perpetrators of violence against children became the basis for their convictions at the first instance level and for appellate judges to uphold those convictions. Investigators had identified the body of each crime and had collected the evidence to substantiate that crime and link the crime to a perpetrator. Some perpetrators appealed their sentences; all had the right to sentencing and procedural reviews. None of the perpetrators appealed their convictions. In all three cases, though, appellate judges did alter the first instance sentences.

SENTENCING AND APPELLATE PROSECUTION

Just as mid-nineteenth century jurisprudence defined the body of the crime and the rules of evidence based on Iberian and colonial law, the jurisprudence about sentencing and appellate prosecution also relied heavily on a rich jurisprudential legacy. Appellate prosecutors, though, did not rely solely on colonial laws to explain their judicial reasoning. They also drew on additional sources. Those sources included nineteenth century Spanish and Italian criminal codes and legislation, French medical treatises, and diverse legal scholars.

In these three cases involving violence against children during the early 1850s, the first instance judges applied judicial discretion when issuing their sentences. Only in the case against Pablo Parra did the first

²⁸ *Ibid.*, p.12.

²⁹ We might conclude that in today's lexicon the mid-nineteenth century definition of «stupidity» referred to mental retardation.

instance judge sentence the perpetrator to death. Sentencing laws had long given judges the right to take mitigating circumstances into account when issuing sentences not explicitly defined by law³⁰. In each of the cases discussed, the appellate prosecutor prepared a detailed brief based on the evidence, the positions of the defense attorney, the findings at the first instance level and the sentence. He cited a variety of sources to support his request that the appellate court apply the death penalty in all three cases.

The appellate prosecutor handled all three of these cases during 1852. The appellate brief in the case against José Nazario came before the court in March 1852 for sentencing review; at the second instance the prosecutor urged the court to revoke the first instance sentence of six months, counting time served, and instead impose the death penalty. In the case against Pablo Parra, who appealed the first instance court's death penalty sentence, the second instance brief came before court in April 1852; after the second instance court revoked the death penalty against Parra and sentenced him to ten year in prison, the prosecutor appealed the second instance sentence and argued in support of the death penalty at the instance in October 1852. The prosecutor presented his appellate brief in the case involving Vicenta Bonilla, who appealed her first instance sentence of eight years of hard labor in jail, arguing in favor of the death penalty in October 1852.

The appellate prosecutor took particular exception to the first instance judge sentencing José Nazario to six months of jail service, counting time already served since his incarceration in late August, in essence sentencing him to an additional six weeks in jail³¹. The judge's rationale for that sentence had focused on the defense argument that José Nazario as an Indian should be treated with leniency, that María Julia was near puberty, and that she had physically healed from her wounds after several weeks. Drawing on Florencio García Goyena and his work on the contemporary Spanish criminal code, the judge had decided that incest was not the body of the crime³². Drawing on the same tome, the appellate prosecutor wrote that he did not understand why the first instance judge did not take into account that García Goyena also stated in accordance with ley 3, título 20, partida 7

³⁰ Escriche, «Pena arbitraria», p.532.

³¹ Casasola, pp.5-6.

³² The judge cited a section of García Goyena, *Código criminal español*, t. 1.

that the penalty for the use of violence against honorable women was death³³. Furthermore, the prosecutor argued that García Goyena also wrote that the penalty for sexually assaulting a pre-pubescent girl was death. Noting that some writers called for lesser sentences for such violent offenders, the prosecutor rejected that option, citing Gregorio López's gloss of ley 2, tit. 31, partida 7³⁴.

³³ Rodríguez de San Miguel, *Pandectas*, 4925, ley 3, tit. 20, part. 7: «Que pena merecen los que forzar en alguna de las mugeres sobre dichas, e los ayudadores dellos. Robando algund ome alguna muger viuda de buena fama, o viren, o casada, o Religiosa, o yaziendo con alguna dellas por fueras, si le fuere prouado en juyzio, deue morir prende; e demas, deuen ser todos sus bienes de la muger que assi ouiesse robada, o forzada. Fuera ende, si despues desso ella de su grado casasse con el que la robo, o forzo, non auiendo otro marido. Ca estonce, los bienes del forzador deuen ser del padre, e d la madre, de la muger forzada, si ellos non consintiesen en la fuerza, nin en el casamiento. Ca, si prouado les fuesse que auiean consentido en ello, estonce deuen ser todos los bienes del forzador, de la Camara del Rey. Pero destos bienes deuen ser sacadas las dotes, e las arras, de la muger del que fizo la fuerza. E otrosi los debdos que auian fecho fasta aquel deia, en que fue dado juyzio contra el. E si la muger que ouiesse seydo robada, o forzada, fuesse Monja, o Religiosa, estonce todos los bienes del forzador deuen ser del Monesterio donde la saco. E a tanto tuieron los Sabios antiguos este yerro por grande, que mandaron, que si alguno robasse, o lleuasse su esposa por fuerza, con quien non fuesse casado por palabras de presente, que ouiesse aquella mesma pena, que de suso diximos, que deuia auer el que forzasse a otra muger, con quien non ouiesse debdo. E lapena, que diximos de suso, que deue auer el ur forzasse alguna de las mugeres sobredichas, essa misma deuen auer los que le ayudaron a sabiéndas a robarla, o a forzarla: mas si alguno forzasse muger otra, que non fuesse ninguna destas sobredichas, deue auer penaporende, segun aluedrio del Judgador; catando, quien es aquel que fizo la fuerza, e la muger que forzo, e el tiempo e el lugar, en que lo fizo».

³⁴ *Ibid.*, 5228, ley 2, tit. 31, part. 7: «Como el ome non deue rescibir pena por mal pensamiento que aya en el corazon, solo que non lo meta en obra. Pensamientos malos vienen muchas veces en los corazones de los omes, de manera, que se afirman en aquello que peinsan, para lo cumplir por fecho. E despues asman, que si lo cumpliessen que farian mal, e arrepientense: e porende dezimos, que qualquier ome que se arrepiente del mal pensamiento, ante que comenzasse a obrar por el, que non meresce pena porende: porque los primeros mouimientos de las voluntades non son en poder de los omes. Mas si despues que lo ouiesse pensado, se bajasse de lo fazer, e de lo cumplir, comenzandolo de meter en la obra, maguer non lo compliesse de todo, estonce seria encuopa, e meresceria escarmiento, segund el yerro que fizo, porque erro en aquello que era en su poder, de se guardar de lo fazer, si lo quisiera: e esto seria, cono si alguno ouiesse pensado de fazer alguna traycion contra la persona del Rey, e despues comenzasse en alguna manera a meterlo en obra; assi como fablando con otros, para meterlos en aquella traycion que auia pensado él; o faciendo jura, o escripto con ellos; o comenzandolo á meter por obra en alguna otra manera, semeiante destos, maguer non lo ouiesse fecho acabadamente. Eso mesmo seria, si viniessse en voluntad a algund ome, de matar a otro, si tal pensamiento malo como este comenzare a lo meter por obra, teniendo alguna ponzoña aparejada, para darle a comer, o a beuer; o tomando algund cuchillo, o otra arma, yendo contra el para matarlo; o estando armado, assechandolo en algund logar, para darle muerte; o trabajandose de lo matar en alguna otra manera, demejante destas, metiendolo ya por obra: ca, maguer non lo cumpliesse, meresce ser escametado assi como se lo ouiesse cumplido, porque non finco por el de lo cumplir, si pudiera. Otrosi dezimos, que si alguno pensasse de robar, o forzar, alguna muger virgen, o muger casada, e comenzasse a meterlo por obra trauando de alguna dellas, para cumplir su pensamiento malo, o leuandola arrebatada, ca, maguer non passasse a ella, meresce ser escarmetado bien assi como si ouiesse fecho aquello que cobdiciaua, pues que non finco, por quanto el pudo fazer, que se non cumplio el yerro qu auia pasado. En estos casos sobredichos tan solamente ha logar lo que diximos, que deuen rescibir escarmiento los que pensaren de fazer el yerro, pues que comienzan a obrar del, maguer non lo cumplan. Mas en todos los otros yerros que son menores destos, maguer los pensaren los omes de fazer, e comienza a obrar, si se arrepintieren ante que el pensamiento malo se cumpla por fecho, non merescen pena ninguna».

Accordingly, the prosecutor reminded the appellate court judges that the ley 23, tit. 18, libro 2 of the *Recopilación de las leyes de Indias* gave them the power to revoke the first instance sentence³⁵. He also called on those judges to apply art. 7, Chapter 1 of the 13 March 1813 judicial administration law, which gave them the authority to rebuke and even fine lower court judges who deviated from established law in their proceedings and sentences, who abused judicial authority³⁶. Should José Nazario only serve six months for the brutal sexual assault of his sister-in-law, that would be «*un poderoso aliciente para los perversos (...) puedan satisfacer sus brutales apetitos; y un funesto porvenir se presenta á los padres de familia cuando consideren que, al dejar de existir, quedan espuestas sus tiernas hijas á la voracidad de los malvados, por la falta de energía en los encargados de administrar justicia, para imponer las penas señaladas por derecho*»³⁷.

The appellate prosecutor further objected to the behavior of the first instance judge because he had issued a cease and desist order (*desistimiento*) to María Julia to prevent her from pursuing the case against José Nazario any further³⁸. The problem with that order, according to the prosecutor, was that María Julia had never pursued charges against José Nazario, nor had her mother. As a child, María Julia had no standing in court and left the matter to her mother; and her mother had left the matter to the authorities who arrested José Nazario and collected the evidence against him. There was nothing from which María Julia might desist; she had not sued her brother-in-law nor had she filed a complaint.

Calling the attention of the court to the issue of judicial discretion, the appellate prosecutor argued that such discretion could only be used when the law did not explicitly address the punishment for a particular crime³⁹. In no way was judicial discretion in sentencing an option for grave and atrocious crimes for which the law prescribed the penalties. And the penalty in this instance should have been a

³⁵ Rodríguez de San Miguel, *Pandectas*, 1842, *Recopilación de leyes de Indias*, ley 23, tit. 18, lib. 2: «D. Felipe II en la Ordenanza 94 de Audiencias de 1563. Y D. Felipe IV en esta Recopilación. Que los Fiscales tomen la voz en las causas concernientes á la execución de la justicia. Ordenamos y mandamos, que los Fiscales de las Audiencias tomen la voz, é interpongan sus oficio en los pleytos y causas concernientes á la execucion de nuestra Real Justicia, quando se apelere de los corregidores, y de otros Jueces».

³⁶ Casasola, p.22.

³⁷ *Ibid.*, p.6.

³⁸ *Ibid.*, p.21.

³⁹ *Ibid.*

death sentence. The appellate court agreed with the prosecutor's argument concerning the evidence and the brutality of the crime and sentenced José Nazario to ten years of hard labor in a presidio.

Within a few days of filing a brief in the case against José Nazario, the appellate prosecutor filed his brief in the case against Pablo Parra. Parra, sentenced to death for the abduction, rape, and murder of Gregoria Rodríguez, appealed his death penalty sentence. His defense attorney argued that the evidence was insufficient to warrant the application of the death penalty. The appellate prosecutor supported the first instance sentence and elaborated his interpretation of the evidence, arguing that the evidence was sufficient to warrant the death penalty.

Key to the defense and prosecution arguments in the case against Pablo Parra at the second instance was traditional jurisprudence that prohibited convictions based on suspicions and presumptions. The defense argued that the evidence was inconclusive. The prosecutor noted that, most assuredly, ley 7, tit. 31, partida 7 expressly stated that judges could not convict individuals on the basis of suspicion⁴⁰.

⁴⁰ Rodríguez de San Miguel, *Pandectas*, 5234, ley 8, tit. 31, part. 7: «Que cosas deuen catar los Juezes, ante que manden dar las Penas: e por que razones las pueden crecer, o menguar, o toller. Catar deuen los Judgadores, quando quieren dar juyzio descamiento contra alguno, que persona es aquella contra quien lo dan; si es sieruo, o libre, o fidalgo, o ome de Villa, o de Aldea; o si es mozo, o mancebo, o viejo: ca mas crudamente deuen escarmentar al vieruo, que la libre; e al ome vil, que al fidalgo; e al mancebo, que al viejo, non al mozo: que maguer el fidalgo, o otro one que fuesse honrrado, por su sciencia, o por otra bondad que ouiesse en el, fiziesse cosa por que ouiesse a morir, non lo deuen matar tan abiltadamente como a los otros, assi cono arrastrandolo, o enforcandolo, o quemandolo, o echandolo a las bestias brauas; mas deuenlo mandar matar en otra manera, assi como faziendolo sangrar, o afogandolo, o faziendolo echar de la tierra, si le quisieren perdonar la vida. E si por auentura, el que ouiesse errado fuesse menor de diez años e medio, non le deuen dar ninguna pena. E si fuesse mayor desta edad, e menor de diez e siete años, deuenle menguar la pena que darian a los otros mayores por tal yerro. Otrosi deuen catar los Judgadores, las personas de aquellos contra quien fue fecho el yerro; ca mayor pena meresce aquel que erro contra su señor, o contra su padre, o contra su Mayoral, o constra su amigo, que si lo fiziesse contra otro que non ouiesse ninguna destos debdos. E aun deue catar el tiempo, e el logar, en que fueron fechos los yerros. Ca, si el yerro que han de escarmentar es mucho usado de fazer en la tierra a aquella sazón, deuen **estonce** oner crudo escamiento, porque los omes se recelen de lo fazer. E aun dezimos, que deuen catar el tiempo en otra manera. Ca mayor pena deue auer aquel que faze el yerro de noche, que lo faze del día: porque de noche pueden naser muchos peligros ende, e muchos males. Otrosi deuen catar el logar donde judgan los Alcaldes, o en casa de algund su amigo, que se fio en el, que si lo fiziesse en otro logar. E aun deue ser catada la manera que fue fecho el yerro. Ca mayor pena meresce el que mata a otro a traycion, o aleue, que si lo matasse en pelea, o en otra manera: e mas cruelmente deuen ser escarmentados los robadores, que los que furtan ascondidamente. Otrosi deuen catar qual es el yerro, se es grande, **o pequeño**: ca mayor pena deuen dar por el grande, que por el pequeño. E aun deuen catar, quando dan pena de pecho, si aquel a quien la dan, o la mandan dar, es pobre, o rico. Ca menor pena deuen dar al pobre, que al rico: esto, porque manden cosa que pueda ser complida. E despues que los Judgadores ouieren catado acuciosamente todas estas cosas sobre-dichas, pueden crecer, o menguar, o toller la pena, degund entendieren que es guisado, e lo deuen fazer».

The evidence in the case against Parra, though, was much more than suspicion. Drawing on the writings of a noted English writer, Jeremy Bentham, the prosecutor noted that the facts were linked to crimes, they formed the links of a chain in such a manner that the first act (abduction) was linked to the last act (murder)⁴¹. The evidence supported the facts; «positivas demostraciones, deducciones precisas, pruebas clarísimas» supported the conclusions reached by the first instance judge even though Parra had not confessed to the rape and murder of little Gregoria.

Citing a litany of traditional sentencing laws, the appellate prosecutor urged the appellate court to uphold the first instance sentence that condemned Parra to death. The *Siete Partidas* in ley 3, tit. 20, partida 7 stated that the penalty for the forced rape of a woman was death⁴². Ley 6, tit. 20, libro 8 of the laws of Spain identified death as the penalty for rape. Leyes 1, 2, 4, and 10, tit. 21, libro 12 of the laws of the Indies stated that death was the penalty for anyone who murdered another after betraying the trust of the victim.

At the second instance the third chamber of the Supreme Court on April 3, 1852, reversed the first instance sentence, sentencing Parra to ten years in jail; the prosecutor appealed that reversal to the second chamber of the Court. He contested the findings of the second instance court, which had cited ley 12, tit. 14, partida 3 to conclude that the absence of clear, conclusive proof-direct eye witness testimony, a confession, or legal documentation-prevented

⁴¹ The prosecutor did not cite which of Bentham's writings he referenced; some of his writings on civil and criminal legislation, though, had been translated into Spanish several decades earlier, for example, Bentham, *Tratados de legislación*.

⁴² *Op. cit.*

the Court from supporting the death penalty⁴³: Reiterating his position that the evidence supported the conviction and the crimes supported the sentence, the appellate prosecutor agreed with the court that the law prohibited judges from convicting an individual and imposing a sentence based solely on suspicions. Nevertheless, he argued that the law referred to suspicions that consisted of vague, uncertain, and confusing conjectures, but not those conclusions based on facts and testimony that together proved the crime, linked the accused to it, and merited conviction and a sentence.

⁴³ Rodríguez de San Miguel, *Pandectas*, 3870, ley 12, tit. 14, part. 3: «Como el Pleyto criminal non se puede poruar por sospechas, si non en cosas señaladas. Criminal pleyto que sea mouido contra alguno en manera de acusacion, o de riepto, deue ser prouado abiertamente por testigos, o por cartas, o por conocencia del acusado, e non por sospechas tan solamente. Ca derecha cosa es, que el poeyto que es mouido contra la personal del ome, o contra su fama, que sea prouado, e aueriguado por prueuas claras como la luz, en que non venga ninguna dubda. E porende fallaron los Sabios antiguos en tal razon como esta, e dixeron, que mas santa cosa era, de quitar al ome cuppado, contra quien nonpuede fallar el Judgador prueua cierta, e manifesta que dar juyzio contra el que es sin culpa, maguer fallassen por señales alguna sospecha contra el. Pero cosas y a señaladas, en que el pleyto criminal se prueua por sospechas, maguer non se auerigue por otras prueuas. E esto seria, quando alguno que ouiesse sospecha de otro, que le faze, o quiere fazer tuerto de su muger, e lo afrontare tres vezes, por escritura que sea fedcha por mano de Escriuano publico, e ante testigos, diziendole, que se quite del pleyto della, e castigando aun a su muger, que se guarde de fablar con aquel ome. Ca si despues desso lo fallasse con ella en su casa, o en la de la muger, o en la del otro, que quiere fazerle desonra; o en huerta, o en casa apartada de fuera de Villa, o de los arrauales; puedelo matar sin pena ninguna, maguer non se pudiesse prouar, que ouiesse fecho yerro con ella. E esto puede fazer tan solamente por esta razon, porque despues del afrenta los fallo fablando en vno: mas si los fallasse fablando apartadamente en la Eglisia, despues que tal afrenta le ouiesse fecho, assi como de suso diximos, puede el marido prenderlos a amos a dos, e darlos al Mayoral de la Iglesia, o a los **Clerigos** que se acertassen y; que los tengan guardados a amos a dos, apartadamente a cada vno dellos, fasta que venga el Judgador, que dos demande al Obispo, e que los tome para darles la pena que merecen, segun mandan las leyes de este nuestro libor, que fablan de los adulterios. Otrosi dezimos, que si en otro logar qualquier los fallare apartados en vno, luego el marido deue fazer afreuento de tres testigos, de como los falla fablando en vno; e de si, prenderlos, e darlos al Juez del logar: el Jedgador puede, e deueles dar pena de adulterio; maguer otra prueua, o otro aueriguamientos non diesse contra ellos, si non tan solamente esta sospecha, que los fallaran fablando en vno, despues que el afreuento sobredicho les fue fecho. Otrosi dezimos, que quando alguno fuesse acusado, que fazia adulterio con alguna muger: e el, para defenderse, dixesse al Judgador, que ella era su parienta tan cercana, que non deuia ningund ome sospechar, que fiziesse tal yerro con ella; e entonce el Judgador, seyendo aueriguado el parentesco, e coy dando que dezia verdad, lo quitasse de al acusacion; e despues desso acaeciesse, que la touievvse por barragana, o se casasse con ella despues que muriesse su marido; por tal sospecha como esta, dezimos, que puede ser dadao juyzio contra el, tan bien como si fuesse prouado al adulterio a la sazón que fue acusado. Esso mismo seria, si el Judgador maliciosamente lo diesse por quito del acusacion que le fazian del adulterio, o se fuyesse el de la prision en que estaua recaudado por razon de aquel pleyto; si despues desso fuesse fallado en verdad que tenia aquella muger por barragana, o se casasse con ella».

The appellate prosecutor cited the medical evidence to further argue his position. The post mortem examination of the little girl's body found, «(...) *que los órganos sexuales y todos sus adyacentes los encontraron abiertos, rotos, dilacerados y con restos de inflamación profunda, sin que estas lesiones puedan atribuirse a la acción de un instrumento vulnerante, sino a la de violación prematura*»⁴⁴. The medical examiners also concluded that Gregoria likely died as a consequence of loss of blood from the wounds she suffered after being raped.

Noting that witness testimony and medical evidence established that Gregoria had been abducted and had died as a consequence of her rape, the prosecutor argued that Parra's testimony was so full of contradictions that the court should not accept any of his statements. Included among those statements was Parra's accounting for his time, the hour between the time he was last seen with Gregoria and the time he showed up at Estrada's room. Parra claimed that he had gotten into a shuffle with a person in the neighborhood, but that he couldn't remember the name of that person. The prosecutor argued that the court should not consider Parra's unsubstantiated story about his whereabouts; he had opportunity to commit the crime and had presented no evidence or witnesses to the contrary.

The prosecutor then pointed to additional testimony: two witnesses stated that during those days when he did not go to work they had repeatedly seen Parra, although ostensibly searching for Gregoria for three days, lurking near the site of her burial⁴⁵. Why didn't he return to work for three days? Why didn't he even return to his own home at night? Why after he had been apprehended had he sent a message to his wife, Clea Torres, that she had best «(...) *metiese a servir porque él estaba fundido (...) Si Pablo Parra no era culpable en la muerte de Gregoria Rodríguez, ¿por qué se creía perdido cuando lo aprehendieron por aquel motivo?*»⁴⁶.

⁴⁴ Casasola, pp.64 and 86.

⁴⁵ *Ibid.*, p.83.

⁴⁶ *Ibid.*, p.90.

The prosecutor's interpretation of the evidence, his citations of the legal foundations for his recommendation, and his logical reasoning still did not convince the court to sentence Parra to death for the murder of Gregoria Rodríguez. At the third instance the court upheld the sentence of the second instance court. Pablo Parra would spend the next ten years in prison at Santiago Tlaltelolco.

The same day that the appellate prosecutor presented his third instance brief to the court in the Parra case, he also presented his brief for the second instance hearing in the Vicenta Bonilla case. Unlike the José Nazario and Pablo Parra cases, the case involving Vicenta Bonilla also involved a second defendant, her mother, Rosario Cortés. At the first instance the judge convicted Vicenta Bonilla of infanticide and sentenced her to eight years of hard labor; he found insufficient evidence to convict Rosario Cortés of conspiracy to commit infanticide⁴⁷. Vicenta Bonilla appealed her sentence. When the prosecutor received the first instance proceedings, he decided to contest Bonilla's sentence and argue in favor of the death penalty. He also decided to protest the decision against Cortés, arguing that she should be convicted for conspiracy to commit infanticide.

Beginning his brief with an appeal to morality, the prosecutor proclaimed that infanticide was a crime against nature, «un delito que abominan los salvajes y lo repugnan aun las fieras»⁴⁸. He pointed out to the court that Bonilla had previously established a less than reputable name for herself. After her mother, Rosario Cortés, had observed her in a compromising situation with a young man, Rosario had contracted with a wine merchant for her daughter to work in his tavern (*bodegón*), further damaging her reputation⁴⁹. While working and, presumably, living on the premises, Vicenta had an affair with a man whom she refused to identify to the investigating authorities. In sum, Vicenta Bonilla lacked honor.

After she was well into her pregnancy, she returned to her mother's house. Late in her third trimester, her mother took her to a doctor, but not out of concern for her pregnancy. Rosario Cortés told the doctor

⁴⁷ *Ibid.*, pp.116-117.

⁴⁸ *Ibid.*, p.119.

⁴⁹ *Ibid.*, pp.120-121.

that her daughter was suffering from an intestinal inflammation and requested that he give her a particular medication, some form of a potent evacuant, that would cause her daughter to evacuate her bowels. The doctor obliged the mother's request without examining Vicenta. Later that evening after Rosario had administered the one or two doses of the prescription, Vicenta began experiencing contractions. Her mother took her to a drainage canal and left her there while, according to her testimony, she left find a light and smoke a cigarillo. In the interim Vicenta gave birth, tied the umbilical cord around her newborn's neck, and tossed the crying baby into the canal.

To support his premise that Vicenta's actions were a crime against nature and contrary to «maternal instinct», the appellate prosecutor cited authorities as diverse as Saint John and Jean Louis Marie Alibert, the French author of 1825 study on the physiology of emotions⁵⁰. Vicenta's testimony did suggest fear; she said she tossed her baby away out of fear of what her mother might do to her and the newborn. Reflecting on that statement, the prosecutor noted that there were circumstances under which a woman might sacrifice the life of her baby, such as to save her own life or to protect the illusion of her good name and reputation. Those circumstances did not apply in the case against Vicenta Bonilla, however; her life was not in danger and her reputation was less than admirable. He further challenged Vicenta's statement concerning her fear, stating that when witnesses arrived at the scene of her crime and even later in jail where she was questioned, the girl showed absolutely no emotion⁵¹. The prosecutor, basing his interpretation on Alibert, interpreted her absence of emotion as proof of her complete lack of concern for her own baby.

⁵⁰ *Ibid.*, 121; Alibert, *Physiologie des passions*.

⁵¹ Today we might attribute Vicenta's seemingly emotionless state to shock, fear, and a high level of protective self defense.

Calling on the appellate judges to consider the enormity of the crime, the prosecutor asked them to recognize just who the victim was in this case: a newborn baby. There were no mitigating circumstances, no life of a mother in danger, no honor to be protected. If this woman were not punished to the full extent of the law, he argued, the court would open the door to impunity⁵². Voluntary infanticide had to be considered among the most heinous of crimes: «*El infanticidio voluntario tiene el carácter de homicidio alevoso, pues que el niño que es víctima de él no puede defenderse, ni huir, ni pedir socorro, y lejos de escitar la cólera ó el aborrecimiento, no inspira sino sentimientos de lástima y compasión*». Ley 12, tit. 8, partida 7 imposed the death penalty on a parent who murdered a child. The eighth century Visigothic Fuero Juzgo in ley 7, tit. 3, libro 6 did as well: «*Establecemos que si alguna muier libre ó sierva matar su fijo pues que es nado (nacido) ó antes que sea nado prender yerbas por abortar, ó en alguna manera lo afogare el juez de la tierra, luego que lo sopiere condempnela por muerte*»⁵³.

The prosecutor strengthened his references to traditional laws with references to more recent ones. He cited a July 15, 1788, royal disposition (*real cédula*) in which Charles III ordered that unless specifically revoked the laws in the *Siete Partidas* and *Fuero Juzgo* remained in effect. He reminded the court that in the 1848 Spanish criminal code the only mitigating circumstance to the death penalty in infanticide cases was to hide dishonor. Furthermore, in Biec's supplement to the widely consulted *Diccionario razonado de legislación* by Joaquín Escriche, in a defense of honor plea the court must not presume honor; the defense had to prove that mitigating circumstance. Otherwise, the death penalty should be applied. And he quoted Escriche, «*Cuando la infanticida es una muger de corrompidas costumbres, cuando no comete el crimen sino por*

⁵² Casasola, p.132. The prosecutor was also concerned with an apparent increase in infanticide, «Bastante frecuentes son ya los infanticidios que se han cometido y se cometen todos los dias, como lo acreditan las varias causas que sobre esta especie de delitos versan en las salas de este tribunal (...)».

⁵³ *Ibid.*, pp.132-133.

desembarazarse de una carga por un torcido fin, y cuando teniendo medios lícitos de encubrir el olvido de sí misma prefiere el sacrificio sangriento del fruto de su estraviado amor, el rigor de la ley debe caer entonces sobre su cabeza y venir á proteger esos seres desvalidos que produce la desmoralización para lanzarlos desde el seno materno en el sepulcro»⁵⁴.

While arguing to support the first instance judge's findings in the case against Vicenta Bonilla, the prosecutor also tried to convince the appellate court to reverse the findings involving Rosario Cortés. His argument to support reversing the acquittal of Rosario Cortés rested largely on presumption and deduction. How, he asked, could the court believe Rosario Cortés, who claimed that she had not realized that her daughter was pregnant but suffering instead from an inflamed abdomen? Months earlier, when suspicious about her daughter because she had seen her talking all too familiarly with a young man, Cortés had examined her daughter and determined that she was no longer a virgin, then consigned her to work in less than reputable environment. She was a mother herself; she had to know that her daughter was pregnant. Nevertheless, there was no evidence to contradict Rosario Cortés's declaration. The doctor had taken her at her word. There simply was no evidence to support reversing the first instance judge's acquittal of Rosario Cortés. Presumptions were not evidence.

Although lacking evidence to prove Rosario Cortés's complicity in the death of her grandson, the prosecutor still asked the court to reverse her acquittal, convict her of conspiracy to commit premeditated infanticide, and sentence her to ten years hard labor⁵⁵. He also tried to convince the court to reconsider the first instance judge's sentence for

⁵⁴ *Ibid.*, p.134.

⁵⁵ *Ibid.* p.136.

Vicenta Bonilla. Citing art. 6, ley 7, tit. 40, Libro 12 of the *Novísima recopilación de leyes*, he asked the court to condemn Vicenta to death⁵⁶. The court did not oblige the appellate prosecutor. It upheld the acquittal of Rosario Cortés. It did, though, extend the sentence of Vicenta Bonilla from eight to ten years hard labor.

DECLINING CAPITAL PUNISHMENT

Why didn't the appellate court condemn José Nazario, Pablo Parra, and Vicenta Bonilla to death? Why did it permit Rosario Cortés to remain free even though logical deduction would lead anyone to conclude that she, perhaps even more so than her daughter, was the author of an infanticide? What jurisprudence supported their decisions to decline to impose capital punishment on the perpetrators of violence against children?

⁵⁶ Escriche, *Pandectas*, 5244: «Y para que no se haga un uso perjudicial a las saludables providencias que van tomadas, entendiéndose tal vez que por la subrogacion de la pena de **arsenales** en lugar de la de galeras pueden continuar los Jueces en el arbitrio de conmutar con aquella otras penas mayores, dexando de aplicar la capital en muchos casos correspondientes, y cortar de raiz todos los principios introducidos, ya sea por una piedad mal entendida, o por una intempestiva y abusiva inteligencia de algunas leyes del Reyno, que ocasionada sin duda de temporal urgencia, se han traído despues a una perpetua y dañosa práctica; mando asimismo a todos los Jueces y Tribunales con el mas sério encargo, que a los reos por cuyos delitos, segun la expresion literal o equivalencia de razon de las leyes penales del Reyno, corresponda la pena capital, se les imponga esta con toda exactitud y escrupulosidad, sin declinar el extremo de una nimia indulgencia, ni de una remision arbitraria: declarando cono declaro ser mi real intencion, que no pueda servir de pretexto, ni traerse a consecuencia para la conmutacion ni minoracion de **penas** la ley segunda, **no lo prevenido** en la sexta de este título: : : (c) [Véase en la ley 12 del título anterior lo suprimido en la dicha ley 6, sobre no visitar los reos condenados a galeras.] Y asimismo declaro, que sin embargo de estas leyes y otras correlativas providencias, y de qualquier práctica fundada en ellas, es mi voluntad, que se haga cumplimiento de justicia segun la natural calidad de los delitos y casos, sin dar lugar a abusos perjudiciales a la vindicta pública [superscript 3 - Por Real órden comunicada en circular del Consejo de 21 de septiembre de 1799, con motivo de lo ocurrido para la captura de los reos de dos homicidios, que a título de parentesco lograban su asilo de los vecinos del pueblo, se mandó que en los lances que puedan ocurrir de esta naturaleza, se adopte el medio de que, prendiendo y presentando los parientes al reo o reos, logren el alivio de que la pena no sea denigrativa, **salvo** en los casos en que despues de su prision cometan fuga u otros delitos, y se tenga por conveniente lo contrario.] y á la **seguridad**, que **conforme** a la nativa institucion de las leyes deben gozar los buenos en sus personas y bienes por el sangriento exemplar y público castigo de os malos».

The most straight forward reasoning of the appellate judges accompanied their decision in the case involving Rosario Cortés and Vicenta Bonilla. They reviewed the evidence, the arguments of the prosecutor, the arguments of the defense, and the decision of the first instance judge. There simply was no evidence to prove that Cortés had prior knowledge of her daughter's intended actions. Similarly, there was no evidence to prove premeditation on the part of Vicenta Bonilla. Additionally, while the law expressly stated that the punishment for infanticide was death, it did not expressly state that such a sentence should be imposed on a legal minor; and Vicenta Bonilla was legally still a minor and, therefore, not subject to the death penalty⁵⁷. The first instance judge had based his sentence on ley 8, tit. 31, partida 7, which granted judges judicial discretion in sentencing; exercising that same power, the appellate court upheld his decision not to impose the death penalty⁵⁸. The only modification they made to the first instance proceedings involved increasing Vicenta's sentence from eight to ten years hard labor.

The appellate court also applied judicial discretion in the sentencing review of the case against José Nazario. The prosecutor had argued effectively that a sentence of six months, counting time served, would be an inadequate sentence for a twenty-six year old man who had sexually assaulted his ten year old sister-in-law. In spite of the arguments presented by the prosecutor, the appellate court did not find fundamental fault with the decisions by the first instance judge. He had found José Nazario guilty. José Nazario had not appealed his conviction or his sentence; consequently, the case came before the appellate court simply for procedural and sentencing review. The prosecutor had not pointed to or explicated any procedural errors; his brief had focused on the gravity of the crime, the scope of the evidence, and the light sentence. The first instance judge had supported his judicial reasoning with references to the most recent peninsular criminal code; and he cited judicial discretion and the importance of family within indigenous communities to support his sentence.

⁵⁷ Casasola, p.138.

⁵⁸ Rodríguez de San Miguel, *Pandectas*, 5234, *op. cit.*

At the second instance, the court disagreed with the first instance judge's decision to sentence José Nazario to six months in jail; however, in the absence of procedural errors the appellate court had no legal basis for ordering a retrial on a different charge, such as incest. Still, applying judicial discretion themselves, the appellate court judges did modify the sentence⁵⁹. José Nazario would not spend just a few months in the municipal jail. The appellate court sentenced him to ten years in a presidio, recognizing the gravity of the crime he committed, the tender age of his victim, and the evidence.

The second and third instance appellate judges in the case involving Pablo Parra fundamentally altered his sentence, changing it from the death penalty to ten years in a presidio. The first instance judge had convicted Parra for the abduction, rape, and death of Gregoria Rodríguez and sentenced him to death. Parra appealed that sentence. The appellate prosecutor had argued that the appellate court should support the death penalty. The appellate court judges, though, did not support the death penalty because, they wrote, the death penalty should only be applied to perpetrators when their convictions were based on clear, conclusive evidence, as dictated by ley 26, tit. 1, partida 7⁶⁰. Thus, even though the evidence against Parra was

⁵⁹ Casasola, p.22.

⁶⁰ *Ibid.*, p. 99; Escriche, *Pandectas* 4593, Como el Juez deve librar la Acusacion por derecho, despues que la ouiesse oyda. La persona de ome es la mas noble osa del mundo; e porende dizimos, que todo Judgador que ouiesse a conocer de tal pleyto sobre que pudiesse venir puerte, o perdimiento de miembro, que deve poner guarda muy africnadamente, que las pruebas que recibiere sobre tal pleyto, que sean leales, e verdaderas, e sin ninguna sospecha e que los dichos, e las palabras que dixeran firmando, sean ciertas, e claras como la luz, de manera, que non pueda sobre ellas venir duda ninguna. E si las prueuas que fuesseen dadas contra el acusado, non dixessen, e testifuassen claramente el yero sobre que fue fecha la acusacion, e el acusada fuesse ome de buena fama, deuelo el Judgador quitar por sentencia. E si por auentura, fuesse ome mal enfamado, e otrosi por las prueuas fallasse algunas presumpciones contra el, bien lo puede estonce fazer atormenta * [Hoy felizmente está abolido el bárbaro uso del tormento] , de manera que pueda saber la verdad. E si por su conoscencia, nin por las prueuas que fueron aduchas contra el, non lo fallare en culpa de aquel yerro sobre que fue acusado, deuelo dar por quito, e dar al acusador aquella mesma pena que daria al ausado; fueras ende, si el acusador ouiesse fecho la acusacion, sobre tuerto que a el mesmo fuesse fecho; o sobre muerte de su padre, o de su madre, o de su auuelo, o de su auuela, o visauuelo; o sobre meurte de su fijo, o de su fija, o de su nieta, o de su visnieta; o sobre muerte de su hermano, o de su hermana, o de su sobrino, o de su sobrina, o de los hijos, o de las hijas dellos. Esso mismo seria, si el marido accusasse a otro por razon de muerte de su muger, o ella fiziesse acusacion de muerte de su marido. Ca, maguer non la prouasse, non le deuen dar ninguna pena en el cuerpo: porque estos atales se mueuen con derecha razon, e con dloro, a fazer estas acusaciones, e non maliciosamente».

compelling, it was not conclusive. Still, traditional and contemporary jurisprudence called on judges to impose extraordinary sentences on those convicted of heinous crimes. The appellate court cited the Antonio Gómez, *Variae resolutines juris civilis et Regii*, tit. 3, cap. 12, núm. 26; an edition of the *Curia filípica* (part. 3, para. 15, núm 18), originally published in 1603 by Juan Hevia Bolaños; the 1642 compendium by Pedro González de Salcedo, *De lege política ejusque naturali executive et obligatione tam inter laicos quam ecclesiasticos* (lib. 2, D., cap. 23, núm 7); the more recent Spanish author, José Marcos Gutiérrez, *Práctica criminal de España*; and a recent Spanish edition of Joaquín Escriche's *Diccionario razonado de legislación* (tomo 2, p. 347)⁶¹. Pablo Parra escaped the death penalty, but not the weight of more than three centuries of Iberian laws and jurisprudence.

CONCLUSION

Mid-nineteenth century judges and appellate judges did not have the option of sentencing a person to life in prison, not even a person convicted of the forceful rape and murder of a child or infanticide. At the first instance and appellate levels judges, nevertheless, held broad discretionary powers in sentencing those convicted of such dastardly deeds. Appellate judges could agree with the findings of a lower court judge, yet impose a stiffer sentence, as in the sentences of José Nazario and Vicenta Bonilla. They could also change a sentence from death to ten years in jail, as in Pablo Parra's sentence.

⁶¹ The Mexican editions of Escriche's work were published as single volumes; the work cited by the appellate court justices was a multi-volume work. The most recent Spanish edition was a three volume edition, published between 1847 and 1851. See González, «Estudio introductorio», pp.49-54.

Charles Cutter noted in his study of legal culture on the New Mexico frontier during the colonial era that judicial discretion characterized frontier judicial proceedings, empowering judges and royal subjects to shape legal culture⁶². Similarly, judges and citizens in Mexico City after independence shaped their legal culture. Unlike the colonial era when judges were not expected to issue written explanations of their judicial reasoning, under the constitutional system Mexican prosecutors and judges had to produce written explanations in which they cited the legal sources upon which they based their judicial reasoning. Significantly, that mandate provides contemporary scholars with the opportunity to assess the vitality of the rich jurisprudential legacy of empire during the nineteenth century. Well into the nineteenth century, long before the modern codification movement in Mexico led to the specification of crimes and sentences, Mexican judges and society at large benefitted from legal codes and legal commentators who centuries earlier had recognized that justice depended on the application of the law.

Most assuredly, procedural norms, rules of evidence, and judicial discretion could not guarantee the safety of a vulnerable girl, even in her own home. Nevertheless, witnesses, investigators, prosecutors, judges, and appellate judges could and did seek justice for such victims. That appellate judges would not sentence some perpetrators to death underscores their valuing the rules of evidence over the moral outrage that accompanied public awareness of a heinous crime, even when that heinous crime was committed against society's weakest and most vulnerable members. Those rules required conclusive proof, *prueba plena*, to justify the death penalty. Judges understood that the purpose of law, after all, was justice for victims, not vengeance, and that their job was to administer justice.

⁶² Cutter, *Legal Culture*, p.35.

BIBLIOGRAFÍA

Alibert, Jean Louis Marie

1825 *Physiologie des passions; ou, Nouvelle doctrine des sentimens moraux*. 2 vols., 2 ed., Bruxelles, De Mat, 1825; *Fisiología de las pasiones, ó, Nueva doctrina de los afectos morales*. Traducido por Lucas de Tornos. Madrid: D. M. de Burgos, 1831.

Beccaria, Cesare

1764 *Dei delitti e delle pene*. Livorno; *De los delitos y de las penas*. Madrid: Juan Antonio de las Casas, 1774.

Biec, Juan M., y José Vicente Caravantes

1851 *Suplemento. Diccionario razonado de legislación y jurisprudencia de don Joaquín Escriche* (...) Madrid y Santiago: Librerías de don Ángel Calleja, editor; Granada: los señores Calleja y Ojea; Lima: Casa de los señores Calleja Ojea y Compañía.

Casasola, José María

1860 *Colección de alegaciones y respuestas fiscales extendidas en varios negocios civiles y causas criminales que se han visto en el Supremo Tribunal de Justicia de la Nación habiendo entre las últimas algunas bastantes célebres*. Tomo II. México: Imprenta de Mariano Villanueva.

Cutter, Charles

1995 *The Legal Culture of Northern New Spain, 1700-1800*. Albuquerque: University of New Mexico Press.

Escriche, Joaquín

1837 *Diccionario razonado de legislación civil, penal, comercial y forense; ó sea, Resumen de las leyes, usos, prácticas y costumbres, como asimismo de las doctrinas de los jurisconsultos, dispuesto por orden alfabético de materias, con la explicación de los términos del derecho, Por don Joaquin Escriche, y con citas del derecho, notas y adiciones por el lic. Juan Rodríguez de San Miguel*. México,

impreso en la oficina de Galván. Reimpresión, con estudio introductorio de María del Refugio González, México, UNAM, 1993.

Filangieri, Gaetano

1780-83 *La Scienza della legislazione*. 4 vols. Italia; *Ciencia de la Legislación*. 4 vols. Traducido por don Juan Ribera. Burdeos, 1823.

Fodéré, Francois Emmanuel

1801-03 *Tratado de medicina legal y higiene pública*. 8 vols. Traducido por J.D.R.Y.C. Madrid: Imprenta de la Administración Real, Arbitrio de Beneficiencia.

Fuero Juzgo

García Goyena, Florencio

1843 *Código criminal español, comparado con el penal de 1822, el francés y el inglés*. 2 vols. Madrid: R. Callejas.

Gómez, Antonio

1552 *Variae Resolutiones juris civilis communis et Regii*. Salmanticae.

González, María del Refugio

1993 «Estudio introductorio», en Joaquín Escriche, *Diccionario razonado de legislación civil, pena, comercial y forense. Con citas del derecho, notas y adiciones por el licenciado Juan Rodríguez de San Miguel*. Edición facsimilar. México: UNAM.

González de Salcedo, Pedro

1642 *De lege Politica ejusque naturali executive et obligatione tam inter laicos quam ecclesiasticos*. Matriti: Apud Didacum Díaz de la Cerra.

Gutiérrez, José Marcos

1804 *Práctica criminal de España. Publicada por el Lic. D. . . ., editor del Febrero reformado y anotado, para complemento de esta obra que carecía de tratado criminal. Obra tal vez necesaria o útil a los Jueces, Abogados, Escribanos, Notarios, Procuradores, Agentes de negocios y a toda clase de personas*. 3 vols. Madrid: Benito García y Cía.

Hevia Bolaños, Juan

1603 *Curia Philippica*. Impreso en la ciudad de los Reyes por Antonio Ricardo natural de Turín, a costa de Ioan de Soto; *Curia filípica mejicana, Obra completa de práctica forense. En la que se trata de los procedimientos de todos los juicios, ya ordinarios, ya extraordinarios y sumarios, y de todos los tribunales existentes en la República, tanto comunes como privativos y privilegiados. Conteniendo además un tratado íntegro de la jurisprudencia mercantil*. México: Navarro, 1850.

López [de Tovar], Gregorio

1565 *Las siete Partidas del sabio rey don Alonso el nono, nuevamente glosadas por el Licenciado (...), del Consejo Real de Indias de Su Magestad, con su repetorio muy copioso, assí como de la glosa*, 4 vols., Salamanca, Andrea de Portonariis.

Solórzano Pereyra, Juan

1763 *Política Indiana, sacada en lengua castellana de los dos tomos del derecho y gobierno municipal de las Indias Occidentales*, Madrid, Pedro Díaz de la Carrera, 1647; edición corregida e ilustrada con notas por el licenciado don Francisco Ramiro de Valenzuela, Madrid.

Symonds, Deborah A.

1998 «Reconstructing Rural Infanticide in Eighteenth-Century Scotland». *Journal of Women's History*. 10/2 (Summer): 63-85.

Recopilación de las leyes de los reynos de Indias, 3 vols.

1681 Madrid, Julián de Paredes; facsimilar, México, Escuela Libre de Derecho, Miguel Ángel Porrúa, 1987.

Rodríguez de San Miguel, Juan N.

1839 *Pandectas hispano-megicanas*. México, 1839, 3 tomos. Reimpresión con estudio introductorio de María del Refugio González, México, UNAM, 1991.