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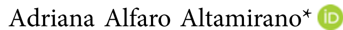

Metaphors judges live by: 'dirty minds' and the 'fear of contamination' in the new criminal justice system in Mexico

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Abstract

In this paper, I take George Lakoff and Mark Johnson's thesis that metaphors shape our reality to approach the judicial imagery of the new criminal justice system in Mexico (in effect since 2016). Based on twenty-nine in-depth interviews with judges and other members of the judiciary, I study what I call the 'dirty minds' metaphor, showing its presence in everyday judicial practice and analysing both its cognitive basis as well as its effects in how criminal judges understand their job. I argue that the such a metaphor, together with the 'fear of contamination' it raises as a result, is misleading and goes to the detriment of the judicial virtues that should populate the new system. The conclusions I offer are relevant beyond the national context, inter alia, because they concern a far-reaching paradigm of judgment.

Keywords: criminal law; metaphor and narrative; judicial impartiality; criminal justice reform; Mexico

1 Introduction

'There are practical virtues to better imagery.' (Nedelsky, 2011a)

In their classic study, *Metaphors We Live By*, George Lakoff and Mark Johnson propose that metaphors are not mere rhetorical devices in the hands of poets and orators, but instead have a crucial role in everybody's normal lives. Moreover, rather than simply being a resource by which we all conceptualise our experiences, metaphors, they claim, have the 'power of creating realities' (Lakoff and Johnson, 1980, p. 144): they guide our thoughts and our actions, such that it is according to them that we categorise, understand, remember and react to our experiences (Lakoff and Johnson, 1980, p. 83).

There are many ways, they argue, in which metaphors structure our experience of reality. They induce similarities between different objects, events and experiences, so that new possibilities for action arise from those connections. Similarly, they downplay, or even hide, certain aspects of reality, so that certain courses of action are rendered unlikely. By justifying certain inferences while disavowing others, and recommending certain actions while discouraging others (Lakoff and Johnson, 1980, pp. 142, 147–148), metaphors (among other figures of speech) create what they call a 'feedback effect', which is so powerful, the authors claim, that 'much of our culture change arises from the introduction of new metaphorical concepts and the loss of old ones' (Lakoff and Johnson, 1980, p. 145).

From the moment that Lakoff and Johnson wrote this book in the early 1980s, their influence has been deeply felt in the study of the law, and today there is a growing body of literature dealing with 'law and metaphor' (see e.g. Solan, 2002; Ritchie, 2007; Smith, 2007, appendix; Gurnham, 2016). While much has been done to understand the role of legal metaphors in the American context, as well as in the study of international law (Del Mar, 2017; Rodiles, 2018), the field has yet to learn from a more

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comparative perspective. In this paper, I take Lakoff and Johnson's thesis on metaphors as a point of departure for approaching the experience of judges in the new criminal justice system in Mexico, which has been officially in effect since 2016. More specifically, I will examine one metaphor that is currently present in the Mexican judicial practice and analyse its normative and practical effects in how criminal judges in this country understand their task as they face their new normative and procedural context.

The 'dirty minds' metaphor, as we may call it, concerns the way in which judges relate to the information that they process as they decide their cases, and conveys the idea that certain information is potentially 'contaminating' for the trial judge. As we will see, 'information as (potential) contamination' is, to use Lakoff and Johnson's words, a metaphor many Mexican judges live by, thereby revealing and fostering certain prevalent attitudes towards the duty they are called to fulfil. Such attitudes, or so I will try to argue, increase the chances that some judges will understand the act of judging in ways that are detrimental to the judicial virtues and practices that should populate the new system.

Even if I focus here only on the Mexican case, the implications of the metaphor under analysis go beyond the specific national context. This is due, first of all, to the fact that, as will become apparent, the metaphors I analyse are related to a conception of objectivity and legal judgment that has a long pedigree, both in common- and civil-law systems. Second, their use is also most probably related to an extensive problem – namely the corruption of the police and of judicial institutions more generally.

The argument is mainly theoretical but has an important empirical footing. Theoretically, as I said before, it is broadly based on Lakoff and Johnson's argument that our conceptual systems and thought processes are largely metaphorical and that, as a consequence, metaphors are not innocuous: they create realities insofar as we abide by them. My argument builds as well on their idea – which has been further developed by other scholars, chiefly among them Steven Winter – that human thought is not primarily propositional but embodied and, similarly, that language is grounded in our bodily experience and motivated by our interactions with the physical world (Johnson, 1987; Winter, 2001). Additionally, the case relies on a certain understanding of impartiality and judgment that I will clarify along the way. Empirically, in turn, it is based on evidence obtained during fieldwork conducted in 2018, 2020 and 2021, consisting of twenty-nine in-depth, semi-structured interviews with members of the judiciary (mainly federal and local trial judges operating within the new system).[1]

In the next section, I offer a very brief overview of the new criminal justice system in Mexico, focusing on the advantages and the challenges that are most relevant for our purposes. Next, I will present evidence of the ways in which the metaphor 'information as contamination' is present in the Mexican judicial imagery, including some administrative and managerial decisions that have been so far associated with it. Right after, I will analyse the metaphor's cognitive basis and explore its normative implications. Based on a conception of judgment rooted in the judges' capacity for 'enlarged thought', I will argue for the metaphor's undesirability: the idea that certain pieces of information can contaminate the judge both misrepresents the task of judging and distorts what should be the rationale behind

[1]The interviews were based in a series of questions I used as a guide, but every conversation developed according to the information that the interviewee provided in each case. I interviewed one top official of the department in charge of the implementation of the criminal justice reform within the federal judiciary, as well as thirteen federal and fifteen local trial judges: the former were assigned to the Centres of Justice located in Mexico City, Baja California Norte, Chihuahua, Coahuila, Estado de México, Guanajuato, Hidalgo, Nuevo León and Zacatecas. The latter were located in Mexico City and Jalisco. Ten interviewees were female and nineteen were male. Conversations in 2018 were usually conducted in their respective offices, except in the case of the federal judges who pertained to states other than Mexico City. In the latter cases, the interviews were conducted for the main part at the Institute of the Federal Judiciary (*Instituto de la Judicatura Federal*) and at the offices of the National Supreme Court of Justice – both in Mexico City – during conferences or colloquia in which they were participating. Only two of the interviews in 2018 were held remotely, via Skype. All interviews in 2020 and 2021 were held via Zoom. The shortest interview went on for fifty minutes and the longest lasted for four hours and fourteen minutes. All interviews were conducted in Spanish. The first six interviewees in my list were referred to me by different people who were not directly related to one another; from then on, I proceeded by way of 'snowball sampling' whereby I asked my interviewees to refer one colleague whom they would consider akin to them in their approach to the law and the judicial practice, and one whom they would not consider so. The project has been approved by ITAM's IRB.

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the existence of different types of judges within the system. Therefore, it is doing judges a disservice as they work hard to meet the normative and social expectations that have been built around the new system.

2 The new Mexican criminal justice system: some context

On 18 June 2008, the *Federal Official Gazette* published a constitutional amendment that has deeply transformed the Mexican criminal justice system. It was actively sponsored and promoted by several civil-society organisations, and later adopted and introduced into Congress by representatives belonging to different political parties. Its main goal was to build a reliable criminal justice system, based on due-process rights for both defendants and victims, and as a means for solving the huge problems of inefficiency, corruption and impunity that afflict the administration of justice in Mexico. Several constitutional articles were amended in order to introduce an accusatorial and adversarial criminal procedure, replacing the prior mixed model, which drew from both adversarial and inquisitorial schemes (Shirk, 2011).[2] Congress gave the federal and the state governments a maximum period of eight years for the full implementation of the new system, which means that it has been officially in effect for almost five years now.

For our purposes, one of the most important consequences of this reform is the transition from a criminal process based on the production and analysis of written documents, where the public prosecutor (*Ministerio Público*) was the dominant figure and the judge had little or no personal contact with the victim or the defendant, to one organised around oral hearings where both parties – the prosecutor and the defence – argue their case live before the judge.

Previously, it was remarkably difficult for the defendants and their lawyers to discredit the evidence presented by the public prosecutor, crime victims had little or no participation in the process and the authorities easily and routinely violated the fundamental rights of both defendants and victims. The new criminal justice system was intended to revert these circumstances. It seeks to clearly delineate the roles of the bench, the prosecution and the defence. It allegedly fosters more transparency and openness to the public. A judge is required to preside and be present at all hearings. It intends to provide for greater equality and balance between the parties. The prosecutor and the defence have the opportunity to present, examine and controvert all the evidence and arguments of the opposite party in a series of hearings designed to reduce the overall duration of the case. In addition, the reform provides for the alternative resolution of cases, privileging the reparation of any damage that the victim may have suffered. It is claimed that, at least in theory, the new criminal justice system represents a significant step forward towards a more just and humane system. In practice, however, it is still far from satisfying the normative and social expectations that justified the reform in the first place (México Evalúa, 2019; World Justice Project, 2018).

Again, for our purposes, one of the most prominent obstacles for the adequate functioning of the new system is that the operators of the criminal justice system are required to make a complete turnaround with respect to the practices and routines prevalent in the former system (López Ayllón, 2018; Laveaga, 2018; Ferreyra, 2018; Fukurai, 2009; González Villalobos, 2018; Zwier and Barney, 2012). One example of this, according to an expert, is that Mexican judges have not yet learnt how to exercise their authority in a proactive, vigorous and still lawful way. In her opinion, given the formalistic legal training that still prevails in our country – and, one may add, the legacy of authoritarian rule that made of the judiciary in Mexico almost a branch of the executive power[3] – judges tend to *overestimate* the limits imposed to them by the accusatorial model that characterises the new system (Novoa, 2018). Within this model, in order to be impartial, judges can only work with the information provided by the parties to the case, live during the trial. However, the argument goes, the traditional incapacity of the police in investigating crimes and of public prosecutors in articulating a case before the courts, as well as the inadequate working conditions that the public

[2]See pp. 203–211 for the specific changes that the reform made to the criminal procedure.

[3]For more reference on these points, see Ríos-Figueroa (2007), Magaloni (2008) and González-Ocantos (2016).

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defender's office is still working under, calls for a stronger judiciary that dares to innovate and can guarantee better conditions for justice to be made.

How can that be achieved? If we take seriously Lakoff and Johnson's suggestion that cultural change is often driven by 'the introduction of new metaphorical concepts and the loss of old ones' (Lakoff and Johnson, 1980, p. 145), then, again, examining some of the prevalent metaphors in judicial practice can shed some light. Metaphors, especially when they go unnoticed, have the hegemonic power of shaping thought and communication. 'Hidden in plain sight', as Michelle LeBaron says, these '*un*marked metaphors' open 'a whole world of possibilities' once they are agreed upon (LeBaron, 2016, p. 150, emphasis added). This text is an effort, then, to 'mark' the 'dirty minds' metaphor, in order to upset the tacit agreement behind its usage and reduce its hegemonic potential, in the hope of opening possibilities that were previously foreclosed.

3 'Dirty minds' and the 'fear of contamination'

One important feature of the new system is the existence of different judges for different stages of the criminal process. There are three of them. The so-called supervisory judge (*juez de control*) oversees the case in the initial stages and revises any action by the public prosecutor that may bear upon the Bill of Rights. With a few exceptions, any such action requires a judicial warrant, even when performed during the preliminary stage of the investigation (which is conducted solely by the public prosecutor).

Once the public prosecutor has completed the preliminary stage of the investigation, the suspect is officially accused and will be subjected to a formal investigation, closely supervised by this judge. When such investigation concludes, the supervisory judge rules whether the accused will appear on trial. This judge also sanctions any plea bargain agreed between the public prosecutor and the accused.

After that, the trial judge (*juez de juicio oral*) presides and conducts the trial of the accused. He or she listens to the case theory of both the public prosecutor and the defence, and decides whether the accused is guilty or innocent. If the accused is found guilty, the trial judge would impose the punishment according to the law. Finally, the enforcement or execution judge (*juez de sentencia*) oversees the execution of the punishment. Any discussion regarding benefits, paroles and incarceration is under their authority (Shirk, 2011; Benavente Chorres, 2012; Valadez Díaz, 2013).

What does the importance of the supervisory judge consist of? In the literature, we find different reasons that justify the existence of such a type of judge. Among them, as mentioned above, first of all we find that they must oversee and limit the action of the police and the prosecution, in order to comply with the principles of due process as guaranteed for both parties. On the one hand, this includes identifying which evidentiary material will be taken for granted as agreed by the parties, and therefore not under review during trial; on the other, it entails making sure that all the evidence that does go to trial is adequately supported, both formally and substantially (Valadez Díaz, 2013; García Ramírez, 2016, pp. 60–66).

Second, it is stated that the supervisory judge must execute every act necessary so that the parties, in case they so agree, avoid going to trial, opting instead for alternative dispute-resolution mechanisms. This is important since such mechanisms are key to the reparative goals of the new system (Valadez Díaz, 2013).

Finally, it has been argued by a commentator that the figure of supervisory judge 'prevents the formation of prejudice or of pernicious influence in the mind of the trial judge' (Martínez Cisneros, 2009, p. 182).[4] What does this mean? The wording indicates that the supervisory judge protects *not only* the defendant from potential abuses on the part of the police or the prosecutor, *but also* the trial judge from potential biases in the form of prejudice and other 'pernicious influences'. The first thing to consider about this purported function of the supervisory judge is that, conceptually, it is a totally separate goal from both overseeing the police and the reparative purposes indicated in the first two points. Thus, calling into question the supervisory judge's relation to the trial judge as it is portrayed in

[4]This same quotation is also cited in Valadez Díaz (2013, p. 36).

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this quotation – as I will do in what follows – should not cast any doubt on the former's importance within the process.

Now, the irony in this idea – namely that the supervisory judge should 'protect' somehow the mind of the trial judge or, as it is also often metaphorically expressed, that one of their functions is that the trial judge's mind does not get 'contaminated' – is that instead of offering the intended protection, it ends up *harming* trial judges. In order to see why, let's first review some evidence of the presence of this idea among members of the judiciary.

In the interviews I conducted, it came up unprompted in eleven out of twenty-nine interviews that knowing the proofs that were dealt with by the supervisory judge in a particular case could 'contaminate' the trial judge, prejudicing them and threatening thus the impartiality of their decision as they assessed the evidence offered orally in the courtroom. Whenever the 'contamination metaphor' did not come unprompted, I went ahead and introduced the expression into the conversation, upon which I encountered that it was easily recognised by the judges, moving them to engage with it – in either agreement or dissent. One example of an unprompted appearance of the metaphor is as follows. Asked about how to prepare before a trial, one judge said the following as he explained the mental state he should be in:

> 'If I know things beforehand, then obviously, when I enter in the courtroom, I already know what will happen in there, I even know already if the accused is guilty or innocent. I have empathy even, I am predisposed, contaminated. Therefore, I am only corroborating information: "This witness will say this, this other will say that. I'd better resolve with what I have here!" But if I go in fresh [*si entro nuevo*], I go in without knowing, I depend only on whatever information I am given there, I perceive everything equally. Notes are taken, videos are reproduced, and now I can weigh the evidence, because they are presented before me.'

In this testimony, 'being contaminated' means 'having certain information', while entering 'fresh' – 'clean', as it were – means 'not knowing'. Another judge gave two examples of situations in which she thought the judge would be susceptible to contamination. The first one occurs as the parties introduce, *during* the trial, some information of what happened in *previous* stages of the process:

> 'That is [where] contamination [comes from] above all: the exclusion of illegally obtained evidence. And sometimes, in trial, you can't stop the parties from telling you, "You know what, Judge, in the intermediary hearing …", and then you have to take control of the hearing, and say, "Hey, do not tell me what happened then; I'm led by the call for trial [*auto de apertura a juicio oral*], and there I don't have that illegally obtained piece of evidence".'

The second example refers to a case in which she was serving as the trial judge and was asked to review some restraining order once the trial had already begun:

> 'What is the trial judge supposed to do [in this case]? I respectfully sent it to the supervisory judge so that I don't get contaminated. Because, without witnessing the production of evidence, I will have information. That is why the decision [by the trial judge] must be made from a "blank slate" [*página en blanco*]: all the evidence will be produced in court, all the arguments by the parties, [there should be] no contamination by evidence that is inadmissible, no information that may harm us [*que nos pueda perjudicar*] in making a decision.'

As can be appreciated in this quotation, in addition to the 'contamination' metaphor, the related 'blank slate' metaphor circulates as well among judges. In approximately one-third of my interviews, I asked the judges whether they were in agreement with the following idea: 'The conscience of the judge, when facing the decision in litigation, should be like a blank slate' (Piero Calamandrei, cited in Andrés Ibañez, 2009, p. 32). Nine out of twelve said they were 'utterly', 'absolutely', 'entirely' in

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agreement with it, and three of them expressed that, while being impossible, that is how things *ought* to be. As one of the latter put it: 'Not to be stained as we enter [the courtroom], that would be ideal [*No tener mancha al entrar, eso sería lo ideal*].'

According to a member of an appellate court (and former judge) in charge of training the first cohort of oral-trial judges at the federal level in Mexico, the idea that prior information can contaminate the trial judge is widespread. The rationale, in his words, is this: 'The trial judge only needs to focus on the facts, and on whether they have been proved or not. If she learns about the investigations conducted in the previous stage, she runs the risk of receiving information that she was never supposed to receive in the first place. That is the point, to have a *clean* judicial mind.'

Notably, even some of those who thought that no such contamination would occur – either because they thought that it is better to be more informed rather than less, or because they thought that if you back up your decision with constitutional principles, then you will not be contaminated – would mention the word 'contaminate' as they discussed the possibility. One judge said that it was an 'exaggeration' to think that a judge who has previously known about a particular case would be, for that reason, immediately disqualified to participate in the oral trial: 'They say, "No, he can't be part of the trial because he got contaminated already." Hold on, hold on, hold on! That's a bit of a stretch! [*¡A ver, a ver, a ver …! ¡Ahí hay un grado de exageración!*].'[5]

The repeated presence of such a metaphor suggested that I should look elsewhere for further manifestations of it. I found that the idea that the trial judge can be 'contaminated' by whatever happens in previous stages is present twice in the legislative bills that gave rise to the reform, discussed in both Congress and the Senate.[6] In one of these legislative bills, for instance, it is stated that 'With the purpose of guaranteeing judicial impartiality and preventing the judges from getting contaminated with information that has not been presented in trial, it is projected that the latter should be developed before a judge or a tribunal different from the one who has heard the case before' (Secretaría de Servicios Parlamentarios, 2008, pp. 139, 289). This shows that the 'fear of contamination' was present from the very beginning in the minds of the legislators pushing for the reform.

Finally, the idea of 'contamination by information' has been associated with certain managerial decisions made in the Justice Centres (*Centros de Justicia*). Up to the present, an arrangement has prevailed in the criminal justice system at the federal level (it does not necessarily work in the same way at the local level) according to which there is not only one, but *several* supervisory judges assigned to *each* case that goes into the system. Consider that each case usually requires several hearings in the stages prior to the court trial in order to adequately process the evidence that is to be presented orally in court, or alternatively to decide not to take the case to trial and have an abridged procedure instead. The federal judiciary decided to adopt a system that assigns hearings randomly during the initial and intermediary stages (i.e. before the court trial) among the judges available in each Justice Centre. The system, which is managed by another judge who acts exclusively as administrator of the centre, is supposed to always leave one judge out of the random assignation of hearings, for them to be available – 'uncontaminated' – in the event that the case goes to trial.

There are several reasons for which this 'judge-per-hearing' system (instead of a 'judge-per-case' one) is said to be in place. According to a top official working at the judiciary's department in charge of implementing the new system, the most important one has to do with efficiency concerns. Since, as I mentioned before, the system now requires a judge to be present in every hearing, and given that there are more judges than courtrooms available in each centre, they need to take turns to use the

[5]I then asked this judge whether he would be comfortable taking part in a trial in a case in which he had previously learnt about inadmissible evidence. After a pause, he said that he would be comfortable if the case were to be decided by a bench (*tribunal colegiado*), but – interestingly – that he would *not* if he were to make the decision by himself (*tribunal unitario*). (In Mexico, there are some types of cases that are decided by a bench, while some others are decided by a single judge. It depends on the crime and varies from state to state.)

[6]Still, notice that the idea did not make it into the explanatory statement of the reform, nor into the legislation itself, as they were published in the legislative gazette (*Diario Oficial de la Nación*).

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space available to conduct the hearings. According to the same official, the 'judge-per-hearing' system was a way of allocating the time of the judges in a more efficient and accountable manner.

Now, as Judith Resnik argued almost four decades ago, the question of how to manage a court logistically is never a mere formality; rather, the managerial approach adopted by a court can alter substantially its adjudicatory function (Resnik, 1982). In this case, it is interesting to note that the 'judge-per-hearing' rule has been largely justified and rationalised in terms of the contamination concern behind the 'dirty minds' metaphor. According to the official I interviewed, one of the alleged reasons the centres are organised in such a way as to 'prevent the contamination of the judges in each one of the hearings at the preliminary [i.e. previous to the trial] stages'. He explained that the judiciary gave 'a radical interpretation' (*una interpretación extrema*) to what he called the 'contamination rule' – namely the disposition in Article 20, section A.IV of the Constitution, according to which 'the trial will be conducted before a judge that has not previously known about the case'.[7] In this way, he told me, it is said that the judges should 'enter cold' (*llegar en frío*) – another related metaphor – to each one of the hearings. Such an interpretation is 'radical', in his view, because the constitutional disposition it honours was supposed to divide the initial and intermediary stages, on the one hand, and the trial, on the other, but not necessarily partition the former stages themselves, assigning different judges to each hearing.

Thus, as we can see, even if maybe originally not its main rationale, the contamination concern has been enlisted to justify the 'judge-per-hearing' system, encouraging thereby the idea that the judges are susceptible to some pernicious information that would ruin the very faculty that they are supposed to exercise in dealing with such kinds of information – namely their judgment. In this way, the contamination metaphor 'coheres', as Lakoff and Johnson would say (Lakoff and Johnson, 1980, chapter 5), with the efficiency rationale behind the random allocation of hearings during the preliminary stages of the case, to the effect of downplaying the judges' agency in the process. The judges' agency is diminished because, as I will argue shortly, promoting 'protection strategies' that recommend 'isolating' the judges from any information that might hinder the task that they are called to perform is the exact opposite of cultivating virtuous judges. The 'judge-per-hearing' system fragments the judicial process, claiming that it prevents the judge from being contaminated *from without*, instead of devising pedagogical interventions[8] that would 'clean' the process *from within* by teaching the judges how to exercise their judgment fairly, even in the presence of problematic information.

Before we go on, it is worth mentioning that, according to the top official I interviewed, there is plenty of dissatisfaction regarding the 'judge-per-hearing' system coming from both judges and prosecutors.[9] In fact, partly as a response to such dissatisfaction, his department has embarked on an administrative reform in order to go back to the 'judge-per-case' rule.[10] The judges complain about two different things. First, according to some of the judges I interviewed, having different judges for different parts of the process, together with the attempt to always 'isolate' one judge from any given case so that they can serve as an oral-trial judge if necessary, often overburdens the workload of the system: the number of people among whom the work can be divided within the centre is reduced and sometimes help must be asked from other centres, making the relation between centres a bit strained. Second, according to the official I talked to, the judges report that 'their capacity to decide in every hearing would be "boosted" or "strengthened" [*se potenciaría su capacidad de decisión*] if they were already acquainted with the facts of the case'.

[7]Constitución Política de los Estados Unidos Mexicanos, available at: http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm (accessed 14 July 2021). The passage quoted says: 'El juicio se celebrará ante un juez que no haya conocido del caso previamente.'

[8]I take the term from González-Ocantos (2016).

[9]Prosecutors express, the official reports to me, not to be able to design an adequate and consistent litigation strategy given that they face different judges in every hearing.

[10]As I write this, such a change has been put on hold due to the COVID-19 pandemic.

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4 The cognitive basis of the 'contamination' metaphor

I turn now to the analysis of the cognitive basis of the contamination metaphor, which will allow us to understand both its discursive strength and the normative implications it has for judicial practice. One of the central aims of Lakoff and Johnson's broader project is to correct the view that meaning exists only in words and sentences (what they call the 'objectivist view'). For them, understanding is not only a matter of reflection through propositions, but rather involves 'our whole being', including, eminently, our embodied nature (Johnson, 1987, p. 102). In Johnson's words, the fact that we are embodied 'directly influences what and how things can be meaningful for us, the ways in which these meanings can be developed and articulated, the ways we are able to comprehend and reason about our experience, and the actions we take' (Johnson, 1987, p. xix).

As embodied beings, our experience is organised according to certain kinaesthetic and perceptual structures or patterns (e.g. the difference between *in* and *out*, *up* and *down*, *near* and *far*, *front* and *back*, *left* and *right*, the notion of *cycle*, the experience of *balance* or of *force* and so forth) that make experience coherent and comprehensible in the first place, and ultimately model our rationality, structure our understanding and constrain the meaning we can find and convey in the world (Lakoff and Johnson, 1980; Johnson, 1987; Lakoff, 1987). Crucially, as we will see below, some of these structures are made possible by certain metaphorical projections – paradigmatically those that go from the physical to the non-physical (Johnson, 1987, p. 34).

Thus, for instance, the possibility of understanding the meaning behind expressions such as 'my stocks *plummeted*', 'her fame *skyrocketed*', 'crime is *down*' or 'productivity is way *up*' is contingent upon two metaphors that are rooted in our experience as bodies that exist in space (see Lakoff and Johnson, 1980, pp. 15–24; Johnson, 1987, pp. 122–123; Winter, 2001, p. 31): first, the metaphor 'actions are motions' (such that e.g. 'to increase' can be interpreted as a motion in space) and, second, the metaphor 'more is up/less is down'. The latter, in turn, is based, as Lakoff and Johnson argue, on the everyday experience of, say, piling more books on the desk and seeing their height going up.

Now, the idea that I want to examine is that, as expressed by a commentator cited a few pages above, the supervisory judge prevents something from happening *in* the mind of the trial judge, *where*, in the former's absence, 'the formation of prejudice or of pernicious influence' could potentially occur (Martínez Cisneros, 2009, p. 182). Following Lakoff and Johnson, we can appreciate various metaphors interacting with each other in this sentence.

First of all, 'mind as a container' – consider again our embodied nature: 'We are physical beings, bounded and set off from the rest of the world by the surface of our skins, and we experience the rest of the world as outside us. Each of us is a container, with a bounding surface and an in-out orientation' (Lakoff and Johnson, 1980, p. 29; Johnson, 1987, p. 21). Given our physical nature as 'containers', Lakoff and Johnson explain, we tend to see other things as containers too, such as land areas ('We finally came *out of* the woods', Lakoff and Johnson 1980, p. 29, emphasis in original); actions and activities ('I *put* a lot of energy *into* washing the windows'); and states ('He is *in* love', Lakoff and Johnson 1980, p. 32, emphases in original). Similarly, we tend to think that things can be stored *in*, formed *within*, taken *out of* or prevented from entering *into* the mind.

Notice as well that the metaphor 'mind is a container' is a further elaboration of another metaphor, namely 'mind is an entity'. The latter constitutes what Lakoff and Johnson call an 'ontological metaphor' (Lakoff and Johnson, 1980, p. 27) – that is, one that allows us to get a sense of the identity of a thing. As the authors explain: 'Ontological metaphors like these are so natural and so pervasive in our thought that they are usually taken as self-evident, direct descriptions of mental phenomena. The fact that they are metaphorical never occurs to most of us' (Lakoff and Johnson, 1980, p. 28). However, when ontological metaphors as 'simple' as 'mind is an entity' are further elaborated, they open up interpretive possibilities that would not have made sense before.

If the 'mind is an entity', then the question becomes: 'What kind of entity is it?' Here, as the authors indicate, different answers are possible, such as 'mind is a machine' and 'mind is a brittle object' (Lakoff and Johnson, 1980, p. 28). These, in turn, make it possible for us to say things such as 'I'm

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a little rusty today' (Lakoff and Johnson, 1980, p. 27, emphasis in original) and 'He *broke* under cross-examination' (Lakoff and Johnson, 1980, p. 28, emphasis in original), respectively. Furthermore, once I have acknowledge that 'I am a bit rusty', I can come up with certain strategies to 'scrape the rust off' my mind; or, closer to home, if I know that the accused can 'break under cross-examination', I can – say, if I am the prosecutor – come up with a strategy to find the 'most fragile' point of the mind of the defendant.

As illustrated by these examples, Lakoff and Johnson's claim is that even the most basic or 'primitive' ontological metaphors make broader 'metaphorical structuring' possible, which, because of their partial nature, necessarily highlight certain aspects of reality at the expense of others. As Johnson says, these structures 'are not just templates for conceptualizing past experience' but, rather, at least some of them 'are plans of a sort for interacting with objects and persons. They give expectations and anticipations that influence our interactions with our environment' (Johnson, 1987, pp. 20–21). Shortly, we will be in a better position to appreciate some of the legally relevant entailments – what is emphasised and what is put aside – of the idea that the mind *as* an entity *is* a container, which, moreover, is presumably located somewhere *inside* our bodies.

First, let's go back to what the supervisory judge is supposed to prevent from happening *in* the mind of the trial judge. As we saw, it is the 'formation of prejudice' or of some other 'pernicious influence'. Thus, 'prejudice' and other 'pernicious influences' are depicted here as 'things' that can be 'formed'. This statement implies the metaphor that 'ideas are objects', which, of course, is what makes it possible that they can be 'formed' inside a given container – in this case, the mind.

Still, the metaphor 'ideas are objects' is very generic and, as Lakoff and Johnson say, it can be further elaborated in various ways, as the following examples illustrate: ideas are food ('All this paper has in it are *raw facts* [and] *half-baked ideas*', Lakoff and Johnson, 1980, p. 46, emphasis in original), ideas are people (that idea 'ought to be *resurrected*', Lakoff and Johnson, 1980, p. 47, emphasis in original), ideas are commodities ('He won't *buy* that', Lakoff and Johnson 1980, p. 47, emphasis in original) and so on. In this case, the metaphor in play is 'ideas (or information, more generally) are infecting, corrupting, or poisoning agents', as the word 'pernicious' clearly indicates in its reference to something injurious, hurtful, insidious or damaging. Thus, in the expression under analysis, the verb 'to form' can be confidently interpreted as 'to contaminate'. Why is this important? Again, the reason is that seeing the cognitive grounding of the 'contamination' metaphor allows us to understand its persuasiveness and the force with which it has taken root, so to speak, in judicial discourse.

Notice, moreover, that 'information as contamination' – or the 'dirty minds' problem, as we may call it – constitutes what Michael R. Smith has labelled 'doctrinal metaphors' (Smith, 2007). According to him, these are 'the most powerful – and potentially more dangerous – metaphors operating in legal discourse' (Smith, 2007, p. 923). The reason is that many 'substantive legal rights are expressed, analyzed, and argued not in literal terms, but in figurative, symbolic, and metaphoric terms' (Smith, 2007, p. 923). Examples of doctrinal metaphors are the 'marketplace of ideas' principle in First Amendment Law, in the American context, or the 'glass ceiling' metaphor, adopted internationally in the legal profession from gender-studies literature. In the present case, the metaphor under study concerns a substantive legal right as well – namely the right to a fair trial and the conditions that are needed for it to be guaranteed. It relates, more precisely, to the *ethos* that must guide the judges in the new criminal justice system so that the right to a fair trial can be enforced.

The more obvious implication of the contamination metaphor is that a judge will be inevitably biased by any legally inadmissible piece of information – hence the purported desirability of managerial measures such as the 'judge-per-hearing' system. The presupposition behind the idea that the trial judge will be able to properly handle information about the case *only* under very specific circumstances is that they are not sufficiently capable of discriminating pieces of illegally obtained evidence. It suggests that the judges are not discerning and clear-sighted enough not to bring a 'tainted fruit' to the table (I will say more about the possible relation to the metaphor of the 'fruit of the poisonous tree' in a moment). In other words, the contamination metaphor implicitly deprives the judges of their agency and lowers the standards of what we, as citizens, should expect from them.

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As Steven Winter notes, 'what is at issue is not the truth of a metaphor but the perceptions and inferences that follow from it and the *actions that are sanctioned by it*' (Winter, 2001, p. 66, emphasis added). What actions, then, are sanctioned and suggested by the 'information is contamination' metaphor, according to which the mind is a container that should remained 'unstained'? According to Johnson, 'the experience of containment typically involves protection from, or resistance to, external forces' (Johnson, 1987, p. 22). In other words, the call for protection is one of the 'entailments' or implications of such an embodied structure. Thus, it should not come as a surprise that, by the constant use of this metaphor, the judges – not necessarily in a conscious way – convey and reinforce the idea that they should 'protect' themselves. Then, of course, the question arises: How is this protection to be achieved? As I have shown from both the written and oral evidence available, an answer that circulates widely among the judges is that this is done by 'isolating' the trial judges' minds – that is, by preventing them from knowing, seeing or hearing things. So much so that, according to some, that is one of the alleged functions of the supervisory judge.[11]

Now, such a strategy of 'protection' reinforces – or, again, to use Lakoff and Johnson's terms, *coheres with* – two related (and quite widespread) ideas about justice and impartial judgment: first, the idea of justice conceived of as something neutral, aseptic and detached; and, second, the idea that the integrity of judgment can only be predicated of what Jennifer Nedelsky has called 'the bounded self' – a self that, she argues, achieves autonomy at the cost of isolation (Nedelsky, 2011a, p. 97). These ideas, in turn, have been forcefully challenged by a paradigm of judgment in which impartiality means not detachment or neutrality, but instead 'coming nearer' in an equal, balanced and fair way to both parties to the case (Arendt, 1982; Nedelsky, 2011a, 2011b). According to an already classical formulation of this paradigm, a good judge is *not* supposed to take 'a stance above the fray', but rather must be capable of an 'enlarged mentality' (Nedelsky, 1997; Moynagh, 1997) – something that is achieved through a constant exercise of imagination, aided, some would even say, by the judicial virtues of empathy and compassion (Massaro, 1989).

Notice that 'enlarging our mentality' is heuristically the opposite of 'isolating our mind' and protecting it in order to 'avoid pernicious or contaminating influences'. Thus, especially from the perspective of the 'enlarged mentality' conception of judgment, the 'dirty minds' metaphor, together with the contamination concerns it raises among judges, appears as a profoundly misleading cue for what judges are supposed to do.

Now, I cannot provide a full justification here for such a paradigm of judgment. However, I would like to briefly outline what, to my mind, are good cognitive and normative reasons to endorse it. Cognitively, the 'blank slate' or 'uncontaminated mind' ideal is, as some of my interviewees acknowledged, impossible. That is because, as Claudio Michelon (2013) has shown, even if we assumed that a particular judge knows nothing about the facts of a particular case, their sense perception has been modelled as they interact with their environment. Thus, in Michelon's view, it is not merely interpretation that varies with subjectivity, but also sensuous perception. The latter is thus a key element in practical reasoning and, by implication, Michelon argues, in legal decision-making. Thus, even if a judge 'enters clean', as one of my interviewees put it – that is, not knowing anything about the case – they will never be a blank slate. On the contrary, supposing that they can be so, can very well create blind spots in their judgment.

Normatively, according to Nedelsky, the image of protective boundaries – those 'boundary metaphors', such as Lady Justice's blindfold, which, she says, are deeply rooted in the conceptions of integrity and autonomy of the self in Western culture (Nedelsky, 2011a, p. 98) – turns our attention away from the social and cultural relationships that actually constitute the self (including the self of the

[11]Notice further that, according to Andreas Philippopoulos-Mihalopoulos, the enclosure of the trial remains the dominant metaphor of the law, since such an isolation is 'the metaphor that defends law's legitimation by excluding the rest of the world' (Philippopoulos-Mihalopoulos, 2016, pp. 50–51). See also Spaulding (2012). A very illuminating exposition of how the paradigm of objectivity that can be associated with the 'trial enclosure' metaphor goes back to early modern times, specifically to the thought of Francis Bacon; see Steinberger (2015, pp. 39–44).

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judge). This, in turn, makes it more difficult to give those relationships, and the legal concepts that accompany them, the scrutiny they require (Nedelsky, 2011a, p. 110).

Moreover, following Nedelsky, the 'fear of contamination' of the judicial mind, as well as the 'blank slate' vs. 'dirty minds' metaphors, is part and parcel of a conception of impartiality incapable of understanding diversity (Nedelsky, 1997, p. 111). Based on the work of Iris Marion Young, Nedelsky argues that impartiality understood as a lack of experience is premised on an 'exclusionary conception of reason and universality' (Nedelsky, 1997, p. 96). Selves are embodied, uniquely situated in time and constituted by a series of relations, and therefore we cannot conceive of individuals as 'interchangeable units'. If we did so, the argument goes, we would automatically miss or exclude diversity. Thus, the only way in which we can 'remedy the incompleteness of our perspectives' is not by 'taking distance', but rather through an 'extensive exposure to diversity' (Nedelsky, 1997, p. 113). According to this view, subjectivity in adjudication is not the same as arbitrariness (Nedelsky, 2011b, p. 232) and therefore justice need not, and should not, be blind.

Along similar lines, Martha Minow argues that impartiality is not at odds with being 'committed to building upon what [judges] already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration' (Minow, 1992, p. 1217). Therefore, she distinguishes between 'prejudice' and 'prior knowledge', and argues that the former interferes with impartiality while the latter may actually assist it 'if coupled with a willingness to be surprised, rather than always confirmed' (Minow, 1992, p. 1214). In that spirit, Minow invites judges not 'to strip themselves like a runner' (in allusion to an expression of Justice Clarence Thomas) as they face a decision, but to acknowledge their own situation 'as implicated in the lives of others and [being] able to be surprised while [they] build upon what [they] already know' (Minow, 1992, p. 1218).

To be sure, the metaphor under study is most pernicious if one subscribes to the aforementioned paradigm of judgment. Notice, however, that even if such a paradigm is rejected, one could still object to the notion that the mind of the judge can get contaminated by any information about the previous stage of the trial: among the main virtues that judges should be expected to have or taught how to develop are the capacity to discern between an enormous amount of (contradictory) information – some of which will be legally admissible and some of which will not – and the ability to arrive at a good decision, in spite of the moral, legal, cognitive and emotional difficulty of the case.[12]

And indeed, some of the judges I interviewed agreed with this. As they were asked to comment on Lady Justice – the classical representation of the values that the judge should personify – some of them said, contrary to what the image suggests, that justice is *not* supposed to be blind in the new system. Rather, they argued, the whole point of the oral and adversarial process is that the judge should have direct and personal contact with the subjects under examination. Some added that the scales would be enough to represent the value of impartiality.[13] Along the same lines goes a ruling of the Supreme Court, which states that judges should be able to perceive every element present in the declaration, so that the 'paralinguistic components' of the testimony, such as 'tone of voice, volume, cadence, pauses, vacillations, body posture, eye-sight, grimaces, blushing, etc.', can be put under proper consideration.[14]

Some judges did express the important concern that being in direct contact with the parties can be potentially distracting or misleading. For instance, one judge told me about a case in which the accused was a young, good-looking woman who clearly flirted with him from the moment she entered

[12]For a different approach, cf. Kahneman and Tversky (1979); Kahneman, Slovic and Tversky (1982), Sunstein (2005); and the Special Symposium Issue: Measuring Judges and Justice, *Duke Law Journal* 58, no. 7 (2009).

[13]The federal judiciary has made an interesting adaptation of the image of Lady Justice: in its institutional communication, it has adopted an image without the blindfold and set over a pre-Hispanic symbol that denotes speech (CJF, 2016, p. 140).

[14]ADR 492/2017, Primera Sala, S.C.J.N. [Supreme Court], available at: http://www2.scjn.gob.mx/juridica/engroses/1/2017/10/2_210294_3725.docx (accessed 11 July 2020). For a view that calls into question the need for assessing demeanour visually and relates it to the current requirement being adopted by many jurisdictions around the globe that all participants in the courtroom should wear masks in order to prevent the spread of COVID-19, see Simon-Kerr (2020).

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the courtroom. As soon as he perceived what she was doing, he tried to put on the sternest face possible so as not to encourage such attitudes. Undoubtedly, it is important to establish some distance, especially if the opposite amounts to the possibility of being bribed in any way – either with money or by other means. However, as I have tried to argue, a better understanding of the moral requirements that the new system imposes on judges is not that they are *not* supposed to know or be exposed to certain things, but that they should have the adequate resources to disregard or properly weigh any information that could potentially result in a biased or unjust decision.

In sum, the idea that information by itself can potentially contaminate their minds is misleading about the fears that judges should have as they enter the courtroom. Instead, we expect them to be able to take in as much information as possible, and to have enough self-confidence that they are sufficiently qualified to clearly lay out in public, during the trial, all the elements, and their corresponding weight, that lead them to make their decision. This becomes especially important as there exist certain 'sources of contamination' that cannot be avoided, even in the presence of different judges for different parts of the trial. As one judge told me when I asked her about potential 'contamination' in cases in which there is information available in traditional and social media:

> 'That's a reality. We can't ignore that we live in a society. However, regrettably, the media circumstance is excessive, there's even those who want to regulate it because it is excessive, and all that information could potentially orient the opinion [*orientar el criterio*] of the judge. However, if that were the case, it would be obvious in the ruling because, as a judge, you have to limit yourself to what was produced in the hearing, and you cannot be alien to society.'

As this judge acknowledges here, even in cases in which it is impossible for her to be isolated, there are resources that prevent her from using information that she is not supposed to – in this case, the requirement to motivate the decision. Now, it is not only through the media that additional information can get into the mind of the judge. In federal courtrooms, for instance, the desk of the judge has a border around it so that people cannot see what is on the table (however, that is not the case for the desks of the prosecutor and the defence, whose surfaces are visible to everyone). Even if it is not seen by the audience, many judges have a laptop with them while they are inside the courtroom. Of course, the presence of a laptop allows the judge to access information that goes beyond what is being offered in the courtroom.

Finally, as one of them told me, some judges have a chat in which both the judges and the clerks of a particular Justice Centre exchange information live, relative to any ongoing trial. As is well known, a requirement of the new system is that every trial must be recorded (both voice and image). Almost everyone at the Justice Centre – not only judges, but clerks, assistants, police officers and myself, as I was there waiting for the judges to take my interviews – has access to the trials via streaming.[15] Some of the judges I have interviewed claim that the chat, together with the live feedback that they obtain from their peers thanks to the streaming system, has helped them to correct many things on the spot. For example, one judge acknowledged that, as the new system came into effect, he tended to look at his notes while testimonies were being offered, instead of looking directly at the face of the person talking. He said that he was able to correct such a vice due to the sustained feedback given by his peers through the chat they have. Others mentioned that thanks to such a channel, they have been able to include relevant information in certain cases that could have been overlooked at the moment.

Beyond the discussion of whether it is possible in practice to 'isolate' the trial judge, the point, again, is that the concern about 'being contaminated' by previous or extraneous information betrays already a certain conception of what being a good judge means. It presupposes, as I said before, that the judge can only get a 'healthy', or 'non-contaminating', exposure to the facts of the cases during the trial as he sits in robes in front of the parties involved in an enclosed room.

[15] I saw this happening at a Federal Justice Centre.

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5 Potential origins of the 'dirty minds' metaphor

Where does the idea that previous information can 'contaminate' the judges come from? It goes beyond the scope of this paper to ascertain the genealogy of the metaphor under study, but let me briefly offer a couple of different possibilities that could very well operate simultaneously.

A very suggestive possibility – one that, as can be seen above, was actually alluded to by one of the judges[16] – is that it results from a misappropriation of the doctrine of the 'fruit of the poisonous tree', another important judicial metaphor that originated in American jurisprudence.[17] As is well known, this doctrine says that any secondary or derived evidence, discovered through other evidence originally obtained through illegal means – either violating the Constitution or any legal disposition or jurisprudence – is characterised as 'fruit of a poisonous tree' and must be excluded. Such an exclusion rule was originally designed to foster respect for constitutional guaranties among police officers, by removing any incentive to obtain evidence illegally (Pitler, 1968).

This doctrine is certainly present in the Mexican judicial imaginary (Guillén López, 2017).[18] Several scholars have rejected its appropriateness for the Mexican case due not so much to the core of the doctrine but to the exceptions that, in the American case, it normally accepts (Gama Leyva, 2015).[19] Aside from that debate, what is important to note for our purposes is that such a doctrine does not necessarily suggest that the mind of the judge can be contaminated by the tainted evidence and that, therefore, they must *not know* about it. Rather, it says that 'poisoned ingredients' are not acceptable and it can very well assume that – to keep with the metaphor – the judge is like a 'good cook' who would know how to identify a 'poisoned fruit' and therefore is capable of *not including* it in the dish, even if it is right in front of them.

Still, if this is indeed the origin of the judicial metaphor that judges get contaminated if they have access to whatever happened in the previous stage of the process, then it should come as no surprise to us, as it is completely in line with Lakoff and Johnson's thesis: the force of the metaphor of the poisonous tree would be such – especially in a context in which the fear of corruption is high – that it is able to structure the horizon of meaning and the normative presuppositions around the task that judges are supposed to perform.

Alternatively, it is also plausible that the 'information as contamination' metaphor is nurtured by the influence exerted in the new judicial imaginary – dominated as it is by an oral paradigm – by the model of trial by jury. Jurors, as we know, are not supposed to be influenced by any outside information that could bias or prejudice their verdict; likewise – the parallel would suggest – the trial judge should be isolated from any sort of 'extraneous' influences. Theoretically, of course, the parallel is dubious since the expectations put on a body of jurors are completely different from the legal requirements that constrain the trial judge, as well as from the judicial virtues that should animate them (Abramson, 1994; Hans, 2007).[20]

Finally, to be sure, the metaphor regarding contamination could be related as well to a concern with corruption – more precisely, the fear that the judge be bribed. According to this line of thought, the judge should not know anything about the case *because* that is a way of fencing them off from any

[16]See section 3 above.

[17]I very much thank Rodrigo Camarena for originally recommending this line of research to me.

[18]See also its translation in the 'corruptive effect' doctrine, issued by the Mexican Supreme Court in the case of Florance Cassez ('Tesis Aislada CLXVI/2013 (10ª). Efecto corruptor del proceso penal. Condiciones para su actualización y alcances', available at: https://sjf.scjn.gob.mx/SJFSem/Paginas/DetalleGeneralScroll.aspx?id=42116&Clase=VotosDetalleBL (accessed 24 July 2021)).

[19]It has been argued, for instance, that in the face of the lack of moral and professional trustworthiness of the Mexican police, the Mexican judiciary should not import such a doctrine with its exceptions included and should keep instead a complete rejection of any illicit evidence.

[20]Still, it is worth mentioning that the concern about biases and prejudice (especially when they go unnoticed) gets plenty of support nowadays from the behavioural law and economics literature, according to which judgment and choice are subject to a number of heuristics that consistently confound them, producing thereby in many people (including judges) predictable mistakes. See references in note 13 above. For a friendly review of this position, see Rachlinski (2008). For an unfriendly one, see Winter (2001, pp. 76–77, 86, 92–96).

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attempt to influence and bias their decision through bribery towards one of the parties. This is a more practical concern, but one that is certainly worrying: there is a pervasive (although not omnipresent) sense of distrust in the Mexican judicial environment that could very well hinder the operation of the new criminal justice system and the extent to which our society can reap the benefits of the new model (México Evalúa, 2019; Morris, 2011).[21]

6 Conclusion

In this paper, I have argued that, to the extent that impartiality as a judicial virtue is considered not as equal detachment, but instead as a balanced and equal approach to the parties involved, the 'dirty minds' metaphor – namely the idea that certain pieces of information can contaminate the judge – interferes with adequate judicial practice. As Nicola Lacey (who concurs with Lakoff and Johnson on this point) has aptly put it: 'the distinctive force of metaphor [in the law] lies in the way it assists in the legitimation of the relevant legal arrangement and/or in the coordination of social expectations around that arrangement' (Lacey, 2016, p. 29). Along these lines, the presence of such a metaphor in the new Mexican judicial imaginary and in the managerial arrangements of the new system has the potential of further structuring the judges' experience in a way contrary to a context-sensible impartiality. Therefore, it is desirable to get rid of the 'fear of contamination' and replace it instead – following Nedelsky (and Arendt) – with something that would invite judges to 'enlarge their mentality'.

That does not mean that the division of labour between supervisory and trial judges is not adequate. To be clear, the existence of a supervisory judge with separate functions from those of the trial judge is a desirable feature of the new system. As we saw before, the former oversees the proceedings of the prosecution and keeps judicial control over whatever happens in the investigative phase of the process. This is an important and difficult task, and it requires someone *solely focused* on it. Moreover, as one judge said to me, it is desirable that the supervisory judge filters the information that the trial judge will consider so that the latter does not lose time and energy in information that is irrelevant or inadmissible. Notice, then, that there are good reasons that justify the existence of such a figure and that regard an appropriate division of labour that allows the supervisory judge to 'set the stage' for a legally adequate trial, independently of any concern 'not to contaminate' the trial judge.[22]

Notice that it is also desirable that all the relevant evidence should be presented live before the trial judge, during public sessions in which all parties to the case are present. However, again, the reason is *not* that certain information can contaminate their mind. Rather, it is due to the accountability and the non-bureaucratic character that should characterise a fairer and more humane administration of justice. According to this view, the justification for the trial judge's 'not knowing' about the case before the trial is rather that the latter should be a 'live' experience for everyone involved: the senses and the minds of everybody – judge, prosecutor, victim, defence, defendant and audience – should be totally focused on what happens there and the judge's decision must be reached, as much as possible, 'on the ground', with the resources that are available and plain for everyone to see.

According to this argument, such a feature is key for the transparency of the process and therefore indispensable support for the protection of the constitutional rights of both victim and defendant. Notice then that the core concern is the promise attached to the new system that the process, *as an experience*, will be more just for both parties. It presupposes not that the judge needs to be 'isolated'

[21] I thank Alejandro Rodiles, who suggested this possibility to me.

[22] Notice that there can be logistical advantages for a *further* division of labour according to which judges fulfil *only* either supervisory or trial roles. As some local judges in Mexico City told me, *given* the prohibition to take part in a trial of which a judge has known before, such a division of labour makes logistics easier (they actually observe such an arrangement). One more reason for such a division of labour, according to some of the judges I interviewed, has to do with the job that each type of judge has to perform. In their view, there are advantages to such a disposition, since the supervisory judge is more 'active', while the trial judge is more 'passive'. From my perspective, that might be part of the problem, though. As one judge said, such a division might have the unwelcome effect of an overspecialisation that ends up narrowing the judge's capacity for judgment.

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from any piece of information in order not to be biased. Rather, they must have the virtues and the training necessary to deal with such information. On that point, it should be noted that the majority of the judges interviewed for this study underlined the importance of the reform in terms of making the administration of justice less bureaucratic, 'more humane' and therefore intrinsically more just. The fact that whatever is decided depends on what goes on in the courtroom is a key part of this promise.

Finally, I would like to make a further distinction between different kinds of protection that the judges might need. On the one hand, there is the one that I have been denouncing as contrary to the conception of justice that animates the reform. On the other hand, there are two different kinds of protection that I do acknowledge as legitimate and very important. First is the one that concerns the physical safety not only of the judges themselves, but of their families. As is well known, their job requires them to deal with people and situations that are potentially dangerous. For example, one of the interviewees told me that he had to relocate his family temporarily, since he felt threatened by the accused in one of his cases. That is a kind of protection that the judges surely need in order to perform their jobs.[23]

Second, criminal justice is certainly a tough area to work in, given the high stakes involved in each of the cases – often the integrity and the lives of people, and always their liberty. It requires a strong character to be a judge. However, in this case, the protection needed should not be thought of under the metaphor of 'isolation'. In the interviews, I got a sense of the array of possibilities available to the judges in this respect: some exercise and try to keep a healthy diet, others pray, one more mentioned that he meditates and a couple of them said that they enjoy time with their families as much as they can. Those are not the only possible sources of alleviation, though. One of them, after acknowledging that there are many cases that have kept him awake at night, said that relief comes from the knowledge that he is not the last instance – the parties can always appeal his decision and go to a higher court. Another one, instead, answered as follows: 'Yes, yes! Many cases have kept me awake at night! What helps? Having to deal with another case!'

Conflicts of interest. None

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[23]As I am writing this conclusion, the country has learnt that a federal judge in the state of Colima, who was in charge of several judicial processes related to drug trafficking, was brutally shot together with his wife. See 'Juez asesinado en Colima llevaba juicios del crimen organizado', *Animal Político*, 17 June 2020, available at: https://www.animalpolitico.com/2020/06/juez-asesinado-en-colima-llevaba-juicios-de-integrantes-del-crimen-organizado/ (accessed 14 July 2021).

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