CHAPTER ONE

Opening

In seventeenth-century New Spain, amid the continuing chaos of conquest, orderly people whose lives and lands had been invaded a century earlier made their own a system of laws imposed by an empire that sought both to exploit and protect its most vulnerable subjects. They did so by bringing their troubles before judges at the local level and tribunals in Mexico City. Indian claimants, individuals and collectives alike, came to see the law as a means to justice and a position from which to speak. Many defended land and liberty, sought redress for abuses by Spanish and Indian officials, insisted on the enforcement of royal provisions regarding labor conditions, contested village elections and local power, and strained to punish the guilty. Some employed the law as a means to personal advantage, taking land, putting people to work, or ousting rivals from office. Regardless of motivation, tens of thousands of Indians across a long century came to understand what the law could do and how it might disappoint. They recounted their woes, but did so from the conviction that they had more to tell than their suffering. In the telling, they acquired and refined a vocabulary of grievance and redress and developed ideas of protection, liberty, possession, guilt, autonomy, voice, common good, rebellion, and reconciliation. They also learned to make the most of their status as tributaries. While addressing themselves to local conditions, they forged an ever-tenuous relationship to a distant king. Through their active engagement with law they glimpsed justice. And by pursuing justice, they created an enduring politics of colonial lives.

Law was present in the relationship between Indians and Spaniards from the very start. During the years of military conquest, a Spanish notary would, on the eve of a battle, face the city or settlement under threat and read out a document known as the *requerimiento,* or requirement. Initially drawn up by royal lawyer Juan López Palacios Rubios, the document demanded that the Indians acknowledge the Holy Catholic

Church as "Ruler and Superior of the whole world." In the name of the pope and the Spanish monarchs, the document called upon the Indians to allow the gospel to be preached. If they refused, war would be waged against them, "as to vassals who do not obey," and they would be subjected "to the yoke and obedience" of the church and the monarchy and enslaved. If they did not oppose the preaching of God's word, they would be spared and priests would minister to them. After the document was read, the assembled troops served as witnesses and the notary produced a *testimonio,* or legal acknowledgment that proper procedure had been followed. As soon as the ink was dry, Spanish troops, and their allies, were legally free to attack.[1]

It is easy to dismiss the requerimiento as little more than an absurdity of conquest. It might be read across a great distance, or muttered as Spaniards approached a sleeping village. A notary or captain might proclaim it to trees or empty huts.[2] In fact, the document was less concerned with actually warning the Indians than with satisfying the demands of Christian conscience. Theologically, unbelievers could not be conquered without giving them an opportunity to come to Christ of their own free will, God's great gift to man. To have fought them without issuing a warning would have been to deny free will an opportunity to work. And while Palacios Rubios himself and others "laughed often" when regaled with tales of how the requerimiento had been executed, and friar Bartolomé de las Casas could not decide whether to laugh or to weep, the requerimiento contained within it the crucial recognition that indigenous people, under the specific circumstances of willing conversion, were entitled to royal protection.[3] While this legal status seemed more often honored in the breach during the first decades of encounter between Spaniards and Indians in Mexico, the ambit of its relevance grew through the sixteenth century as conquerors and conquered learned to live in each others' presence.

During the decades following the fall of the Aztec capital Tenochtitlan in 1521, newly converted Indians, now vassals of the Spanish king, began to seek justice. By the 1530s, Indian leaders had begun to appear before the audiencia, Mexico City's high court, to protect land and to dispute political arrangements between themselves and Spaniards, and among themselves. Four decades later, Indians had become quite self-consciously litigious. Writing to King Philip II in the early 1570s, a group of Indian leaders expressed amazement at their own penchant for legal dispute. "In the time of our gentility we did not often have lawsuits," they noted. "[N]ow that we are Christians we have many lawsuits, with other natives as well as with the Spanish people of your Majesty."[4] Spaniards, especially in Mexico City's officialdom, also began to comment on how

the Indians were given to lawsuits. By 1600, law and its processes figured centrally in the lives of indigenous individuals and communities.

It has been said that the Spanish empire took shape "under the inspiration of law."[5] Perhaps no other conquest and colonization, certainly none in modern European history, made such a point of its laws and judicial institutions as did Spain in America during and after the sixteenth century. This is the impression one takes from the vast record of legal activity housed at the General Archive of the Nation in Mexico City and the General Archive of the Indies in Seville. Thousands of volumes in crabbed notarial hands testify to the centrality of law in the conqueror's imagination and to the Indians' close engagement with Spanish law during the colonial period. Curiously, what we know of that engagement remains limited. One of the great curiosities of history writing about colonial Mexico—and colonial Latin America more generally—is the mismatch between the volume of legal documentation involving Indians and the attention historians have paid to the processes they represent. Scholars have always drawn on the deep and almost inexhaustible vein of legal source material to reveal aspects of life under Spanish rule. Much less frequently have they sought to understand legal processes themselves and the role they played in mediating the relationship among people very differently situated in Spain's empire in the New World.

To a certain extent, the thin study of Indians' involvement with Spanish law bespeaks a broader inattention to matters of law in colonial Latin America. Through much of the twentieth century, the study of colonial law focused almost exclusively on jurisprudence and its philosophical foundations. Scholars writing in Spanish set out to order and understand the vast corpus of law and learned commentary known as *derecho indiano*—the law of the Indies. Royal decrees, compilations of legislation, jurists' treatises, the deliberations of king and council, the proclamations and orders of viceroys came to be parsed and analyzed with great insight.[6] And not a little celebration, for on paper royal legislation protecting the New World's Indians seemed enlightened compared to the "imposed law" of nineteenth- and twentieth-century European colonialism.[7]

This approach called forth a reaction from scholars who insisted that the texts of imperial law misrepresented reality. These historians came to see Spain's law in the Americas as an impressive formalism largely disregarded in practice. Against derecho indiano's tendency to generalize from the written record while scanting law in practice, these scholars saw a nearly systematic failure to enforce royal decrees protecting the Indians. Far from being "one of the wisest, most human,

and best coordinated" legal systems ever applied in a colonial situation, Spanish law seemed to mock justice.[8] Debate over law and its role in colonial Latin America eventually converged on the question of whether a *Black Legend* of Spanish cruelty toward the Indians or a *White Legend* of Spanish benevolence best described Spain's New World empire.[9] Although both sides recognized that such distinctions produced little light, the sharpness of the contrast underlay much debate that followed. While some argued for a more nuanced approach in seeking to understand the interplay of the "economic and ecclesiastico-humanitarian motives of empire," it became common to dismiss the law as largely "irrelevant" to, "alien, therefore without moral force" in, or "separated, divorced" from the everyday lives of Indians.[10]

Efforts to breach the impasse came when historians began to focus on America's concrete reality alongside derecho indiano's text-driven approach. In Peru, Steve Stern used court records to show that indigenous litigants and petitioners had adopted legal tactics to defend land and challenge abusive labor practices.[11] In Mexico, Woodrow Borah's research demonstrated that from the 1590s forward the institutions of law proved a powerful draw to Indian claimants.[12] In other words, up close, law could be seen for anything but an irrelevancy in Indians' lives.

While in certain regards Stern and Borah held similar concerns, they parted ways on the broad question of how to understand law's role in the lives of indigenous people. Borah argued that law needed to be studied because it was "basic to the experience of mankind whenever and wherever two peoples have come into contact for more than very short periods."[13] He wanted to understand how Mexico's Indians had adjusted to the imposition and acceptance of Spanish law over time. Stern, by contrast, argued that the problem with law in colonial Peru was not its inefficacy, as had earlier been thought, but the Indians' very success before Spanish judges. By reducing the sphere of outright arbitrariness, and by providing complainants a measure of justice, law undermined a "wider, more unified, and independent movement" on behalf of indigenous people. In effect, by giving indigenous litigants a reason to hope for justice, law "rooted exploitation into the enduring fabric" of Indians' lives.[14]

From this point forward, law played a limited role in historical accounts of colonial Latin America's Indians. Instead of the quieter and more ordered processes of law that interested Borah, or the hegemonic processes identified by Stern, revolts and direct resistance carried the day among historians.[15] Law might figure as background to resistance, or as the trigger to rebellion, but few scholars sought to understand law on its own terms, or asked why Indian claimants persisted in challeng-

ing Spaniards and each other in court. Once law had become a "mask for colonial power," there was little reason to study the inner workings of legal process, or to take seriously the proposition that indigenous people might care deeply about legality.[16]

A few scholars refused to surrender law's centrality in Indian lives. Historian William Taylor noted that "law does not have to be the 'ordered irrelevancy' it has become in Latin American social history, if our questions are not limited to whether or not rules and decrees reflected social realities, whether or not they were enforced, whether or not law was a tool of oppression."[17] From those who have followed in this vein, we have learned that law shaped family life and property relations among the Aztecs of central Mexico, that northern New Spain had a dynamic "legal culture" after 1700 that gave Indians a role in shaping regional administration, and that penal law in Quito represented a "common enterprise" allowing the humble as well as the powerful a measure of influence over legal outcomes.[18] More recently, an edited volume has called for a "new social and cultural history of law" in Latin America, though of the dozen or so essays only one dealt with colonial law, and that only at the tail end of the eighteenth century.[19]

A chief reason for slighting law in Latin America has been the tendency to see it through the prism of *the rule of law*.[20] At its most basic, the rule of law insists that impartial, rational, impersonal, universal rules govern legal process, rather than the personal whims of individuals. Administration and adjudication are separated from one another, and politics and law are not supposed to mix. The general supposition is that "modern" legal systems have more or less achieved this condition. The rule of law, as with so many other signs of "modernity," thus became the benchmark by which Latin America's legal-historical experience was judged deficient On this view, Latin America has lacked rule of law in the past and suffers from "the (un)rule of law" in the present.[21] The unspoken implication is that these two facts are related to one another historically. Such a formulation suggests indifference to the history of law in Latin America.[22]

My point is not that the rule of law, broadly conceived, is irrelevant to thinking about law in Latin America. The problem is that as an idea it is a "transplanted philosophy" that bears an ambiguous relationship to Latin America's pasts and histories.[23] While the rule of law has deep roots in Western political thought, it flowered as a defining idea of modern societies under the aegis of nineteenth-century Anglo-American legal history, which understood law's historical trajectory as the unfolding of the "rule of law" over time.[24] Latin American historians' relationship to

this narrative has always been equivocal, at best, because the histories of Latin America have differed so profoundly from the histories of England and the United States. Yet without the rule of law as a benchmark, Latin American historians have shied away from law as an object of inquiry. For if it is an axiom that law in Latin America did not give rise to the rule of law, would-be legal historians would have to commit themselves to studying its failure to do so, a project most scholars have not found compelling enough to pursue.

Developments in legal scholarship and legal history began to challenge uncritical acceptance of the rule-of-law idea during the last quarter of the twentieth century. Theorists and historians in the United States argued that law had never been a value-free, politically neutral body of rules.[25] Historically, it had been a source of power distributed unevenly through society. At any given moment, what counted as "law" did not result from the autonomous and rational evolution of formal doctrine, but from contests between the powerful and the less powerful over the meanings and practices of law and legislation in the heat of legal and political conflict. Freed from teleological notions of law's development over time, and setting aside the idea that law can be understood either as an expression of disembodied, formal rules, or as the exercise of naked power, historians could now take account of what was happening on the ground in legal proceedings. Litigants and witnesses were not merely acted upon by law and its agents, they "participated" in the process by which legal decisions were made. Formal rules did not dictate outcomes so much as written law and actual practice existed in tension with each other, and common people navigated multiple, overlapping legal structures, choosing the ones that best advanced their interests within the constraints of their circumstances.[26]

Such an approach implies a set of conceptual tools more in keeping with the multiform history of law in Latin America, for it recognizes both that law is an expression of power and that people pursue their interests through it. Recognition of the centrality of power in the workings of law, however, does little to tell us how law actually worked. According to legal scholar Steven Winter, to say that the law is finally an expression of power elides the question of what power is and how law comes to be expressed through it. " '[P]ower' can not work as a foundational account of justice, morality, law, or anything else because at each level and every step of the way, the capacity to exercise power is itself contingent on some complex set of social conventions and understandings."[27] This means that power will remain shrouded so long as we persist in seeing human agency in terms of the opposition between freedom and determi-

nation. We must, says Winter, see human acts in terms of "contingency and constraint," which in the final analysis are one and the same because "our very ability to 'have' a world" depends on the preexisting social practices and conditions—the constraints—that set the frame of individual and collective lives.[28] On this view, human beings do not act from freedom so much as they act in relation to constraints that are simultaneously the condition of their being able to act at all.[29] What people can think, what they can envision and aspire to, are products of the circumstances in which any individual or group finds itself.[30] Unmoored from circumstances, no one would know what to want or how to go about getting it, nor would they know when they had achieved anything. Thus, in seeking to understand how and why people have acted, we must inquire into their circumstances as deeply as possible and seek to grasp how they have acted from and through them.[31]

Human actions unavoidably produce conflict. One way of conceptualizing law is to see it as a means by which peace is preserved against the constant threat of discord. From this vantage, law substitutes words for clubs in the hope that parties to a dispute will live to fight, or not, another day. As such, law, though inherently about contest, is also intrinsically about how "those who live together . . . express themselves through it and with respect to it." It is, in short, a highly contentious conversation over how a community lives, the norms it obeys, the things its members value. Legal precepts, principles, and rituals not only embody the rules by which conflict in any given reality is adjudicated, they are also "signs by which each of us communicates with others."[32] As a result, however local a dispute may seem, legal process is always part of a wider societal conversation about what is right or wrong, acceptable or unacceptable, just or unjust in a given "normative universe."[33]

My chief aim in this book is to listen in on just such a conversation, one that took place among Indians and Spaniards in colonial New Spain. I have focused on the seventeenth century because it represents the period when people who first met in the violence and dislocation of Spain's sixteenth-century invasion of Mexico converged on the enduring legal ground rules for living together in a shared social order. This century, roughly spanning the early 1590s and 1700—from the establishment of the General Court of the Indians to the dynastic change from Hapsburgs to Bourbons—is often elided in historical accounts of early modern Mexico.[34] Wedged between a sixteenth century looking back to conquest and an eighteenth century looking forward to independence, it has no obvious center of historiographical gravity. It has been characterized variously, as a period of consolidation, as a diminuendo transition to a mature colonial society. More recently it has been described

as an era of "singular complexity" during which multiple and fragile compromises were reached over how Indians and Spaniards would live together.[35] I have chosen to see these portrayals as constrasting perspectives on a broader process. From the Indians' point of view, the seventeenth century was in many ways a quieter one than the sixteenth. Military conquest had largely abated, except at the margins of empire, and the indigenous population began to recover from its long decline after 1521. At the same time, the decades after 1590 were ones of profound economic, social, and political change that strained frail social arrangements, set individuals and communities in competition with each other, subverted established political ideas, and enhanced local against distant royal power.[36] Law and its processes figured centrally in how Indians and Spaniards confronted these circumstances.

I begin from the premise that law in seventeenth-century Mexico, as elsewhere, is best seen in terms of the complex, open-ended interplay between recognized legal principles and the words and actions of all who took part in legal proceedings—complainants, witnesses, advocates, interpreters, notaries, and judges. Together these participants created "legal meaning," not by some rational process of divining legal rules, but through the struggle to interpret how those rules would apply in concrete situations. In that struggle they allowed themselves to be governed by procedures designed to ensure an orderly treatment of issues. In Spanish law, this interaction came to be recorded as individual episodes of legal process known as "cases."

This book is first and foremost about cases involving indigenous men and women who brought petitions and filed lawsuits—transcripts of the agonistic conversation regarding human relations in seventeenth-century Mexico. I have focused on cases raising fundamental issues in the lives of these colonial subjects—the yearning for royal protection, struggles over the possession of land, disputes regarding labor relations and liberty, efforts to order tribute relations, the concern for village autonomy and governance, and the desire to see the guilty punished for their crimes. By reading case records against each other and in light of more formal sources of law and jurisprudence, I argue that Indian claimants connected with and helped to forge a powerful vocabulary of legal meaning. From the cases I also seek to recover something of the texture, quality, and depth of experience of those who came before the law with their grievances and pleas, and how their participation shaped legal outcomes.[37]

That participation was irreducibly mediated. Indian petitioners and litigants typically retained advocates known as *procuradores* to prepare documents and conduct cases. These procuradores, in turn, acted from what

they knew of the legal principles and procedures underlying litigation. In communicating with their procuradores, and in all official court proceedings, Indian clients generally relied on interpreters to translate from indigenous languages to Spanish, and back. With rare exception, case records contain only Spanish translations of indigenous words.[38] Thus, a voice emerging from any given case is in no way the "true" or "original" voice of this or that person apart from the litigation. It is simply the voice of that person—complainant, respondent, witness, or, for that matter, judge—as a participant in the proceeding. This seems confining only if we insist on the idea of severing individuals from their circumstances.[39] Once we surrender this notion we can hear from the cases themselves—the voices of people who knew that in the consequential conversation of law they were constrained to say and do certain things rather than others if they wished to prevail.

Law is a "resource in signification." It enables human beings to "submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify," and I would add relate, separate, hope, and despair. Yet, the written traces of law—the texts of legislation, the treatises that expound legal principles, the cases that record the process of litigation—are barely adequate to convey this vast "expressive range" and its tangled meanings.[40] Although the law is made of words, the flat, page-bound scrawl that survives any given legal encounter in colonial Mexico can only hint at the experience of those whose lives became enmeshed in the workings of law in action.

From a historian's vantage, this represents an unavoidable paradox of legal documentation. At first glance, the archives of Indian litigation seem incredibly rich and dense. Individual lawsuits can run to hundreds of pages in a tight notarial hand, and thousands of two-page petitions can seem an embarrassment of riches. Upon close inspection, these documents present enormous perplexities. Despite all the writing, much remains shadowy about the encounters these records depict: How did a party decide to file a petition? Why did a lawsuit continue over months or years at great expense or why was it dropped after a certain point? Why did a particular case turn out as it did and how did parties understand the outcome? One must read a case knowing that a great part of what defined a legal encounter lay beyond the record—the often-times grueling trip to Mexico City, conversations with the procurador, efforts to line up witnesses, behind-the-scenes negotiations with an opposing side, the aggrieved party's decision that he had had enough. Attending to context and to the details of process can help fill in some of these

gaps. But this leads to a second problem. The very granularity implied in such an approach seems at times to stymie generalization.

To face these challenges, I have relied on a dynamic structure to reveal broad conceptions and still express the inherent contingency and fluidity of individual encounters. To this end, the chapters are organized around certain fundamental ideas—protection, possession, liberty, guilt, voice in village governance, vassalage—expressed across hundreds of short petitions and full-blown lawsuits.[41] Because these ideas were not expressed abstractly, for legal meaning "must first germinate in action and then take root in our forms of life," the intimate circumstances and procedural details of individual cases are critical to understanding them.[42] Each chapter, thus, represents a three-way fugue among "the facts" of a case given by witnesses or litigants, recognized sources of law and legal principle (such as royal decrees, legal treatises, and compilations of law), and the processes, procedures, and practices that mediated parties' actions.

Chapter 2 grounds this effort by fleshing out the process by which Spaniards and Indians came into relation during the sixteenth century. A final section introduces basic elements of Spanish law in the New World as they had taken shape by roughly 1600. Chapter 3 considers the flowering of the *amparo* petition over the seventeenth century, during which time Indian petitioners from across New Spain traveled to Mexico City in search of royal protection. My central concerns in this chapter are to discern something of petitioners' experiences and to draw from the amparos themselves the vibrant language of royal protection that formed the baseline of Indian expectations of law. Chapters 4 and 5 examine this vocabulary of protection in the context of struggles over land and labor, revealing the instability of "possession" and uncovering indigenous ideas about "liberty" in the colonial context. Chapter 6 peers deeply into a number of criminal cases to show how participatory these proceedings could be in local situations and how struggles over the meaning of criminal wrongdoing could help secure social peace, or disrupt it. Chapter 7 examines heated contests over village governance. I show that these were far from just local affairs, for issues of autonomy, collective liberty, and relations to Spanish power were at stake in any case that got as far as Mexico City. Chapter 8 proposes a rereading of the rebellion of Tehuantepec in 1660–61. I argue that the unfolding of events may be understood in terms of an abiding concern for and relationship to the king's law as an always-equivocal instrument for confronting official misconduct and negotiating with colonial authorities.

Litigation's role in the lives of Mexico's indigenous subjects cannot be reduced to a hard-edged instrumentalism. Too often, it has been sup-

posed that Indians lacked any genuine thoughts beyond the impulse to survive or get on with life, that their relationship to Spanish rule could be summarized as one of resistance, rejection, reaction, fear, or indifference. This book argues for another view. If "colonial situations breed confusion," they also nurture a commensurate desire for order.[43] Law was a medium through which Indians expressed that desire within the broad range of their experience. In the heat of legal contest, indigenous people in Mexico came to ideas of their own about where they stood in the colonial world of Spain's ocean-spanning empire.[44] In doing so, they articulated hard-scrabble lives to the erudite texts penned by Spanish jurists and commentators. Over the seventeenth century, this interaction gave rise to colonial law's cosmopolitan context as the grievances of Indian villagers who paid tribute to a distant king met the aspirational ideals of Spanish imperial legality.

Nor is this simply a matter of watching Indian claimants litigate. Taylor has noted that one of the great advantages of the historical study of "the operation of law in relationships of inequality" is that it allows us to "examine politics without . . . leaving out most of the population as 'unpolitical.' "[45] Law and its processes, in other words, can be thought of as politics by another name, a means to "reclaiming the political" for the colonial period.[46] Law in early modern New Spain was not only about how the colonizers controlled the colonized. It was also about how the crown sought to exert control over its Spanish vassals who so often flouted royal decrees, especially those regarding treatment of the Indians, and how Indian subjects went about trying to have those laws enforced.

Nineteenth-century English legal historian F. Maitland noted in 1898 that "[i]f we speak, we must speak with words; if we think, we must think with thoughts. We are moderns and our words and thoughts can not but be modern. Perhaps . . . it is too late for us to be early English. Every thought will be too sharp, every word will imply too many constraints."[47] It is also too late to be colonial Mexican. The same modern sharpness of words will cut into our ability to connect with indigenous litigants and petitioners, with the witnesses who testified for them or against them, with the procuradores who helped and opposed them, with the judges who ruled on their cases, and even with the decrees and treatises of law in relation to which they were acting. Our ingrained sense of what law is, a modern sense, will constantly interfere with our ability to understand Spanish law in early modern Mexico on its own terms. Historian Victor Tau Anzoategui understood the problem from

the perspective of Latin American colonial law. In its openness, its flexibility, and its willingness to relax principles and precepts in any given case, colonial law (derecho indiano) can seem fatally flawed. Yet such a conclusion, says Tau, can only come from a modern, "rationalist" conception of law, a conception rooted in the notion that a proper legal system must be closed, complete, and self-sufficient. This idea is "inapplicable" to colonial law precisely because it blinks legal reality.[48]

My own experience as an attorney confirms Maitland's and Tau's admonitions. When I first started to read cases for this book, I kept searching for cognates to what I knew from U.S. law and procedure. I recognized that procedure might be different, but at every turn I wanted to find equivalents in colonial law. Sometimes I would find them. Other times not. The question then was how to make sense of the gaps. At times the issue tied me in knots. I would spend days consulting legal treatises, manuals of procedure on some arcane point. I kept track of how often such gaps occurred in cases. Sometimes I would find a rule, sometimes I would discern a practice rather than a principle. Other times not. The other times continued to frustrate me, I see now, because I was looking for a closed, complete, and self-sufficient system.[49] Gradually, I came to realize that I was dealing with no such thing. There were, quite simply, lacunae that could not be filled, contradictions that could not be reconciled, decisions for which I could find no rationale beyond a casuist's sense regarding justice in a particular situation.[50] All participants in Spain's colonial legal system, from Indian claimants, to procuradores, witnesses, notaries, interpreters, and judges, would have understood this intuitively. What we might see as examples of gross injustice, or arbitrariness—the absence of a requirement that judges write opinions, for instance—were simply part of the legal world as they experienced it. This is not to say they were blind to arbitrariness, as many cases attest. It is to recognize that they could see the law and hope for justice only from the perspective of their circumstances—as is true always and everywhere.