



2012

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Recommended Citation

Paul J. Zwier & Alexander Barney, *Moving to an Oral Adversarial System in Mexico: Jurisprudential, Criminal Procedure, Evidence Law, and Trial Advocacy Implications*, 26 Emory Int'l L. Rev. 189 (2012). Available at: <https://scholarlycommons.law.emory.edu/eilr/vol26/iss1/9>

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MOVING TO AN ORAL ADVERSARIAL SYSTEM IN MEXICO: JURISPRUDENTIAL, CRIMINAL PROCEDURE, EVIDENCE LAW, AND TRIAL ADVOCACY IMPLICATIONS

*Paul J. Zwier**

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INTRODUCTION

In 2008, Mexico passed a series of federal constitutional reforms requiring oral adversarial criminal trials. The reforms give Mexican states until 2016 to implement the shift from a written inquisitorial system to the new oral adversarial system.¹ At the time of this writing, twenty-four states have implemented the changes to some degree, with varying degrees of success.²

The reforms were motivated by both internal and external factors. The traditional inquisitorial system had grown cumbersome and inefficient, and it lacked transparency. The system was criticized by the international community, including in a 2002 report by the United Nations Commission on Human Rights.³ Following that report, the United States and Mexico collaborated on a project at the Center for Strategic and International Studies (called the Mexico Project) to advance President Vicente Fox's justice reform proposals.⁴

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¹ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

² Oaxaca, Chihuahua, and Nuevo Leon had oral trials prior to the federal reforms. Miguel Sarre & Jan Perlin, *Mexico*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 351, 352 (Craig M. Bradley ed., 2007).

³ Special Rapporteur on the Independence of Judges and Lawyers, *Civil and Political Rights, Including Questions of: Independence of the Judiciary, Administration of Justice, Impunity*, 4-5, Econ. & Soc. Council, U.N. Doc. E/CN.4/2002/72/Add.1 (Jan. 24, 2002) (by Dato'Param Cumaraswamy).

⁴ See David A. Shirk & Alejandra Ríos Cázares, *Introduction: Reforming the Administration of Justice in Mexico*, in REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 1, 35-38 (Wayne A. Cornelius & David A. Shirk eds., 2007).

Implementing the reforms is a major challenge for Mexico. Creating the new court system and training the judges and staff to manage that system will require an enormous investment of time and resources. The greatest challenge, however, may be in changing the perspective of the Mexican legal community. The Mexican legal system is based on a positivist philosophy that in some ways conflicts with the assumptions behind an oral adversarial system.⁵ For the reforms to work, Mexican judges and lawyers will need to challenge some of the assumptions of the positivist system.

Mexico has looked to countries with oral adversarial traditions for help with the reforms, including the United States. The Authors have worked for the past three years on a partnership between Emory University School of Law and Universidad Panamericana in Mexico City. During that time, we have seen the challenges that the change in perspective poses for the reform. We have also seen how our own assumptions have limited the effectiveness of our training of Mexican judges and attorneys.

To better understand the challenges to the reforms in Mexico, we begin with an examination of the jurisprudential debate between positivism and natural law. This Article attempts to explore what these two fundamentally contradictory legal and political views mean for Mexican lawyers in the context of the new constitutional amendments. In Part I, this Article explores the differences between Mexico's positivism and the aspects of natural law inherent in an oral adversarial system. Specifically, it examines the influence of positivist legal philosopher Hans Kelsen on Mexico's legal tradition and contrasts Kelsen's perspective with that of the Scottish Common Sense School, the philosophy behind the United States' common law system.

In Part II, this Article looks at the major choices before the legislature regarding changes to criminal procedure and evidence,⁶ and what choices Mexico faces in incorporating international human rights law into its law of criminal procedure and evidence law.⁷ Most importantly, where will Mexico finally come down in its identity crisis over natural law and positivist law, as it

⁵ See H. Patrick Glenn, *Doin' the Transsystemic: Legal Systems and Legal Traditions*, 50 MCGILL L.J. 863, 895–96 (describing the Mexican legal system as incompatible with the U.S. system because of the Mexican government's doctrinally founded position); *infra* Part I.

⁶ Código Federal de Procedimientos Penales [CFPP] [Federal Criminal Procedure Code], *as amended*, DO, 30 de Agosto de 1934 (Mex.).

⁷ *Mérida Pillar II: Rule of Law*, USAID/MEX. USAID, <http://www.usaid.gov/mx/ruleoflaweng.html> (last visited May 5, 2012) (describing the Rule of Law initiative and Mexico's incorporation of due process and international human rights).

moves to an oral adversarial system by due process of law?⁸ How much will the common law adversarial system of the Magna Carta become the foundation for its criminal procedure? What will Mexico do with illegal police conduct in the gathering of evidence? How will a prosecutor be held accountable in his or her preparation of the case and gathering of evidence? How much will the pretrial procedure try to filter out evidence that is obtained in violation of the human rights of the witnesses or parties involved? And how much of individual rights will be sacrificed as Mexico deals with the emergency of its drug war?

In Part III, this Article examines objections raised from conference delegates and early participants in training programs alike about the overly emotional nature of oral advocacy.⁹ While these objections might grow out of the philosophical differences between positivism and natural law, they might also be grounded in cultural differences between the United States and Mexico. Moreover, much of the need for passionate advocacy in the United States is based on assumptions about what keeps jurors interested and helps them reach a just understanding of the facts in the case. If Mexico will not use a jury system, then the issue for reformers is how much the Mexican judiciary will similarly need passionate advocacy to discern the facts. The conference attendees reported resistance to the need for giving an opening statement, or conducting confrontational impeachment, or giving a stirring closing argument.¹⁰ They also were quite sure Mexican lawyers would not be permitted to appeal to underlying values, or use analogies to argue the inferences on closing.¹¹ They were unsure about the need for exhibits in criminal cases, as the file already contained the prosecutor's collection of evidence, and the use of pictures and exhibits were thought to be grandstanding.¹² In addition, they were skeptical of making objections to the presentation of evidence because they were convinced their judges would not

⁸ *Id.*

⁹ Rule of Law Reform and the Drug Trade: Challenges and Implications in Mexico and the U.S., held by the Center for Advocacy and Dispute Resolution, and the Institute for Developing Nations (Sept. 29–Oct. 1, 2010) [hereinafter Rule of Law Reform and the Drug Trade.]. Video clips of remarks and panel discussions are available at *Conference & Forum Video Archive*, EMORY L., <http://www.law.emory.edu/centers-clinics/center-for-advocacy-dispute-resolution/conference-forum-video-archive.html> (last visited May 5, 2012) [hereinafter *Conference & Forum Video Archive*].

¹⁰ *See* Rule of Law Reform and the Drug Trade, *supra* note 9.

¹¹ *See id.*

¹² *See id.*

understand hearsay or other evidence rules that prohibited them from considering character evidence.¹³

This Article questions how the court—in its dual role as legal interpreter and as fact-finder—will provide for the system’s transparency and protect itself from bias. How will the court deal with the evidence issues raised by the change to an oral adversarial system? Will Mexican judges find it necessary for a new procedural law and evidence code to be able to justify to the public how the court is making its credibility determinations? Will these decisions give the public confidence that they are made in an unbiased manner? In this regard, how will the court interpret the new constitutional provisions with regard to any confrontation rights that are given to the defendant?¹⁴ Will the right, if any, to confrontation based on reliability considerations be applied only to the weight the judge will give testimony never confronted, or will it be seen as a fundamental constitutional right that makes the evidence inadmissible at trial? The Mexican reformers will need to decide these questions so that judges and lawyers, who will each play new roles in an oral adversarial system, know their respective duties under the law. Answers to these questions will also have major implications for the educational reform effort.

Additionally in Part III, this Article looks at the rhetorical assumptions that underlie the principles of oral persuasion. These are examined to see whether there is enough agreement with these assumptions in Mexico to overcome the resistance to the techniques being taught.

Finally, in Part IV, this Article explores the specific assumptions that underlie the oral presentation of evidence as it plays out in direct examinations, cross-examinations, impeachment, and the giving of opening statements and closing arguments. It considers whether the change to an oral adversarial system will affect the trial judge’s role as fact-finder. When the judge is the trier of fact, how will the court justify its fact-finding based on its view of the credibility of the witnesses? How will the court of appeals review the trial court’s decisions, and what evidence will it consider on appeal relating to credibility determinations? Will the Mexican system eventually need a jury, at least in criminal cases, if it is to deliver on its promises to bring transparency and the rule of law to the judicial process? An oral adversarial system limits

¹³ *See id.*

¹⁴ Carlos F. Natarén, *Notes on Criminal Process and Constitutional Reform in Mexico Today*, 4 MEX. L. REV. 99, 123 (2011).

judges' freedoms to disguise their decisions in a blurring of fact-finding, legal interpretation, and sentencing.

This Article hopes to provide guidance to rule of law reformers on both the U.S. and Mexican sides concerning the challenges that will arise during the design of curricula and training programs for implementing the new constitutional changes. In particular, reformers will need to build in discussion of the philosophical assumptions that underlie the change to an oral adversarial system. In addition, they will need to look at the role that judges will play as fact-finders in order to understand how lawyers will need to present and oppose the presentation of evidence in the most persuasive manner. As a result, Mexican reformers will better understand the decisions they must make as they try to maintain their unique cultural heritage, and at the same time, to make the necessary changes to bring transparency and accountability to their legal system.

I. A CLASH OF JURISPRUDENCE

One of the primary challenges of the Mexican reform is the clash between Mexico's positivist legal system and the aspects of natural law inherent in the oral adversarial system. Positivism sees legal authority as being derived from the enactment of laws by the body politic, as opposed to existing prior to their enactment.¹⁵ In the nineteenth and early twentieth centuries, Mexico developed a secular-positivist legal system that was in part intended to limit the power of the Catholic Church.¹⁶

Analyzing the forces behind the move of Mexican jurisprudence to a legal positivist system and the Mexican legal system's experience with positivist principles provides a framework for examining Mexican legal history and the existing attitudes of the Mexican lawyers and judges the reformers will face in attempting to reform the system.¹⁷ As we will see, positivism contributed to a general disregard of the Mexican Constitution, as the courts, standing in for the state, saw a wide gap between the ideals of the constitution and the realities in

¹⁵ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 328–30 (Andres Wedberg trans., 1945) [hereinafter *LAW AND STATE*].

¹⁶ Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 *SAN DIEGO L. REV.* 1337, 1337–72 (2004) (explaining that Spain saw Mexico and its indigenous people as its property and saw as its legal obligation to instill the religion of Catholicism in its people). See generally STEPHEN ZAMORA ET AL., *MEXICAN LAW* 1–42 (2004).

¹⁷ Stephen D. Morris, *Mexico's Political Culture: The Unrule of Law and Corruption as a Form of Resistance*, 3 *MEX. L. REV.* 327 (2011).

individual communities.¹⁸ Positivism and general disregard of the constitution also led to a disregard of existing criminal law and criminal procedural statutes.¹⁹ Positivist jurisprudence and the realities in society faced by the courts contributed to a widely held view that the laws on the books could be set aside at the discretion of the police and the judges.

The teachings of Hans Kelsen serve as a guide to the legal positivist framework adopted by Mexico, as he is widely seen as the patron saint of Mexican jurisprudence.²⁰ In contrast, in the United States, the Enlightenment—and, in particular, Scottish common sense philosophy—undergirds much of the country’s view of the common law and the role of the jury as fact-finder.²¹ By understanding these different philosophical bases, those participating in Mexico’s transition can more effectively communicate not only the differences in the system, but also the fundamental assumptions that undergird each option for change.²² The following Subparts address the competing philosophies in turn.

A. *Kelsen’s Positivism*

As one of the leading legal positivist theoreticians and international law scholars of the twentieth century, Hans Kelsen developed a “pure theory of law” that focused on the realistic and logical elements of law, while attacking metaphysical ideas such as justice and morality.²³ These positivist ideas were being developed just in time to be included in the constitutional reforms Mexico was implementing in the late 1920s.²⁴

Kelsen’s pure theory of law equated law to a science that “has to describe its object as it actually is, not to prescribe how it should be or should not be

¹⁸ Elisa Speckman Guerra, *Justice Reform and Legal Opinion: The Mexican Criminal Codes of 1871, 1929, and 1931*, in REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO, *supra* note 4, at 225, 226.

¹⁹ *Id.*

²⁰ Juan Abelardo Hernández Franco, Universidad Panamericana Sch. of Law, The Rule of Law: The Cultural Change in Legal Education in Mexico, Address at Emory University School of Law Conference: Rule of Law Reform and the Drug Trade: Challenges and Implications in Mexico and the U.S. (Sept. 30, 2010). The video clip is available at *Conference & Forum Video Archive*, *supra* note 9.

²¹ Susanna Blumenthal, *The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law*, 26 LAW & HIST. REV. 99, 120–22 (2008).

²² While our discussion has implications for any attempt to reform a civil system to a common law system, it is important to note the particular features of Mexico’s history, as our focus is on reform efforts in Mexico.

²³ LAW AND STATE, *supra* note 15, at 124.

²⁴ Speckman Guerra, *supra* note 18, at 239.

from the point of view of some specific value judgments.”²⁵ Moreover, Kelsen served as one of the first scholars to explore the concept of the *Grundnorm*, a basic norm that provides the foundation for all other laws and institutions in any legal system.²⁶ Rejecting a natural law or “image of God” understanding of human nature and human rights, Kelsen based foundations for law in strictly human reason and the social contract.²⁷ His *Grundnorm* placed the ultimate authority of law in the legislative enactments of the state. Kelsen, who drafted an Austrian Constitution in 1920 that still forms the basis of Austrian constitutional law, advocated for a legal order that adhered to a hierarchical structure of norms.²⁸ He reasoned that the constitution of a state should stand in the supreme position atop this hierarchical structure.²⁹ In *General Theory of Law and State*, Kelsen described this tiered approach, writing that all legal norms are established on the validity of other, “higher” legal norms until the examination terminates at “the [*Grundnorm*] which, being the supreme reason of validity of the whole legal order, constitutes its unity.”³⁰ Therefore, Kelsen based the validity of a state’s constitution on the existence of a valid *Grundnorm* within that state, and argued that this hierarchical structure gave legitimacy to subsequent acts by the state.³¹ In Kelsen’s view, a new act would only serve to modify existing law if a higher legal norm—such as the constitution of a state—conferred this power.³² According to Kelsen, only norms that belonged to a system or legal order could be considered legally valid, and this validity occurred through evidence that the relevant population had decided to follow the new law.³³

In his most famous writing, Kelsen developed a pure theory of law that examined the essential features of the law without considering external valuations or judgments.³⁴ For example, Kelsen harshly criticized the concept of justice as an “irrational ideal.”³⁵ In Kelsen’s legal positivist view, justice

²⁵ LAW AND STATE, *supra* note 15, at xiv.

²⁶ HANS KELSEN, PURE THEORY OF LAW 8 (Max Knight trans., Univ. of Cal. Press 1967) (1934) [hereinafter PURE THEORY OF LAW].

²⁷ *Id.* at 18.

²⁸ See LAW AND STATE, *supra* note 15, at 228.

²⁹ *Id.*

³⁰ *Id.* at 124.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 42.

³⁴ See RONALD MOORE, LEGAL NORMS AND LEGAL SCIENCE: A CRITICAL STUDY OF KELSEN’S PURE THEORY OF LAW 8–14 (1978).

³⁵ *Id.* at 10.

served as a value notion that determined what law “ought to be,” rather than what currently exists, and such a future-leaning examination should only proceed after deciphering the existing, necessary features.³⁶ Aligning with Kelsen’s philosophy, legal positivism as a whole eliminated concepts such as justice and morality and instead adopted the view that every rule must be derived from a conscious act of legislation by a state.³⁷ Scholars describe Kelsen’s pure theory as viewing a state as having a complete normative character with no existence separate from the law, and no identity beyond its uniformity with its own laws.³⁸

Important to Kelsen’s view of law is that law also exists through the acts of those empowered by the state to exercise authority. This presents a problem of what, if any, limits there might be to a court’s interpretation of any statute or constitution. Mexico reads Kelsen as “saying that those who are authorized to take any legal decision have the power freely to choose to either apply the law or to decide according to their personal discretion. The claim that the state cannot act illegally, hence, would be trivially true.”³⁹

³⁶ *Id.* at 9.

³⁷ F.A. HAYEK, *The Errors of Constructivism*, in *NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS* 3, 15 (1978).

³⁸ CARL SCHMITT, *CONSTITUTIONAL THEORY* 5 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

³⁹ LARS VINX, *HANS KELSEN’S PURE THEORY OF LAW* 79 (2007).

Public officials who claim to exercise powers conferred by legal order often appear to act in ways that we believe violate constraints of legality. Kelsen’s identity thesis, however, makes it impossible to describe such situations by saying that the state or those acting on its behalf violated the law. The only two possible descriptions of the situation, given the identity thesis, are the following: Either the fact that I believe an act of a public official to have been legally defective in some way or other must entitle me to conclude that the act, though taken by a person who holds public office, was null, not an act of state and therefore not binding, because it was, in my view, not perfectly legal. This first way of interpreting the identity thesis would, for obvious reasons, completely undermine the possibility of legal authority.

The second option is the view that all decisions identifiable as decisions taken by public officials on the basis of some lesser standard than perfect legality are to be considered as legally valid, in virtue of having been taken by public officials, regardless of whether they conform in substance to all the laws they claim to apply. This second approach to the identity thesis, by contrast, fails to impose any constraints on the power of public officials to act as they see fit. The resulting position amounts to law-state dualism in effect, if not in name.

The way in which Kelsen dealt with this problem in the *Introduction to the Problems of Legal Theory* strongly suggests that he adopted the second option by embracing what is called the doctrine of ‘normative alternatives.’ The doctrine of normative alternatives claims that norms on a higher level of the legal hierarchy provide not only for the validity of lower-level norms that conform in procedure and substance to the requirements of legality intended by the higher-level norms. They also provide for the validity of lower-level norms violating those intended

As a result of Kelsen's theory of positivism, Mexican judges came to believe that they could be freed up from the constraints of constitutional provisions if they saw a greater need in the community that needed to be addressed.⁴⁰ As taught today in Mexican law schools, "law" contains authority for judges to reach judicial decisions that do not follow the plain meaning of legislation or even the constitution.⁴¹ One of the hallmarks of Mexican lawyers is their understanding of and pride in Mexico's legal framework after its war for independence from Spain. Mexican law students are taught that legal reformers during the revolution against Spain brought into being a new secular foundation of law. These reformers wanted a new jurisprudence that would place Mexican law in distinction from the Catholic natural law constructs of Spanish colonialism.⁴² Law and Catholicism were separated in order for a new Mexican state to be born.⁴³

requirements. The consistency of legal order is preserved, therefore, even in case officials exercise power in ways that violate higher-order legal norms. Kelsen himself describes the doctrine, with respect to a judicial decision applying a statute to a particular case, as follows:

The statute does not provide simply that the judicial decision [. . .] should be created in a certain way and have a certain content; it also provides, alternatively, that even an individual norm created in another way or having another content should be valid until it is overturned, in a certain procedure, on the basis of its conflict with the first provision of the statute. Once the procedure is exhausted, or if no appropriate procedure is provided for at all, then the doctrine of finality applies, and the force of law accrues to the lower-level norm as against the higher-level norm. This means that the lower-level norm, notwithstanding the fact that its content runs counter to the higher-level norm, remains valid—indeed, it remains valid owing to a principle established by the higher-level norm itself, namely, the doctrine of finality.

It seems hard to avoid the conclusion that Kelsen is in effect saying that those who are authorized to take any legal decision have the power freely to choose to either apply the law or to decide according to their personal discretion. The claim that the state cannot act illegally, hence, would be trivially true. And this trivial truth would do little more than to mask an unfettered discretionary regime of those who wield the powers of the state.

Id. at 78–79 (alteration in original) (quoting HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (Bonnie Litschewsky-Paulson & Stanley L. Paulson trans. & ed., Oxford Univ. Press 1992) (1934)).

⁴⁰ See Speckman Guerra, *supra* note 18, at 226.

⁴¹ Hernández Franco, *supra* note 20.

⁴² Vargas, *supra* note 16, at 1345.

⁴³ In the 1800s, however, these ideas had to be viewed through a lens of Mexican history. Napoleon had taken over Spain, and therefore Mexicans of Spanish heritage no longer felt allegiance to new Spain. They formed coalitions with the indigenous populations to overthrow the new Spanish (French) rule. They adopted secular conventions of law in order to avoid the natural right of kings as appointed by God to rule the people. By the time Kelsen's ideas came along, the Spanish (French) rule of Napoleon was over. The Mexican aristocracy had then adopted secular ideologies of law that eschewed natural law, but maintained an understanding of law that law served the state, not the individual.

The drafters of the Constitution of 1917 picked their words carefully in order to distinguish the new constitution from the natural-law based constitutions born out of Enlightenment philosophy.⁴⁴ The Constitution of 1917 did not grant rights to individuals to be protected from the state, but instead the state *warranted* to the individuals the way it would treat its citizens.⁴⁵ The power to define the community's values was given to the state.⁴⁶ The logic of its power structure, with the constitution ultimately serving the state, was taken from Kelsen.⁴⁷ The state could thus suspend the constitution when its ends were endangered.⁴⁸ Courts, as arms of the state, were means for the suspension of rights of the individual.⁴⁹

Mexican lawyers and judges have resisted shifts to an oral adversarial system, in part because they see it as being based on a natural law/fundamental rights jurisprudence that rejects Mexican jurisprudence and history. In addition, they may resist the implications of an oral adversarial system on their roles in the justice system.

What, then, are the jurisprudential assumptions in an oral adversarial system?

B. The Scottish "Common Sense" School and Enlightenment "Liberalism"

In the late eighteenth and early nineteenth centuries, a school of philosophy grounded in active interactions between people blossomed in Scotland.⁵⁰ Thomas Reid, a professor of philosophy at the University of Glasgow, became a leading authority in this movement, which came to be referred to as the School of Common Sense.⁵¹ Reid and his contemporaries envisioned a philosophy that contrasted with some of the idealistic excesses supported by

⁴⁴ See Fernando Yllanes Ramos, *The Social Rights Enshrined in the Mexican Constitution of 1917*, 96 INT'L LAB. REV. 590, 599 (1967).

⁴⁵ The original Article 1 of the Mexican Constitution of 1917 stated in part "every individual will enjoy the guarantees granted by this Constitution." CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.], *as amended*, art. 1 Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.) (translated by the authors).

⁴⁶ See generally *id.*

⁴⁷ PURE THEORY OF LAW, *supra* note 26, at 221.

⁴⁸ *Id.* at 273–74.

⁴⁹ *Id.*

⁵⁰ See Daniel Walker Howe, *Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution*, 31 COMP. STUD. IN SOC'Y & HIST. 572, 574–80 (1989).

⁵¹ *Biography of Thomas Reid*, UNIV. GLASGOW, <http://www.universitystory.gla.ac.uk/biography/?id=WH0019&type=P> (last visited May 5, 2012).

philosophers such as John Locke and David Hume.⁵² While Locke and Hume argued that the human mind is fundamentally shaped by a person's impressions and perceptions and does not possess traits independent of these occurrences,⁵³ Reid advocated that humans retain a divinely created innate set of principles that serve as the starting point for intellectual activity.⁵⁴ According to Reid, humans are affirmative actors in their own destiny and do not simply react to phenomena from the outside world.⁵⁵ This philosophical approach—developed as Scotland grappled with nation-building problems such as unification, economic development, and religious conflict—proved popular among America's founding fathers, as the United States found itself tackling similar issues as the eighteenth century drew to a close.⁵⁶ Many of these common sense principles guide U.S. jurisprudence today, especially concerning the jury's role in the adjudicatory process and evidence law's assumptions about the admissibility of character evidence.⁵⁷

Simply put, U.S. law assumes that jurors are best at applying their common sense to make findings of fact concerning what happened and the intent of defendants based on witness testimony and the evidence that is presented.⁵⁸

What is the relationship between these assumptions and the Scottish philosopher Reid? Reid viewed "first principles" as the starting point for human interactions, but Reid also advocated a more general framework that presupposed that people share certain attributes prior to beginning their relationships.⁵⁹ In *An Inquiry into the Human Mind*, Reid focused on the importance of a shared, natural language in writing that there can be "no compact or agreement without signs, not without language; and therefore there must be a natural language before any artificial language can be invented."⁶⁰ In addition to the natural language of signs, other such "first principles" continued to highlight certain truths as self-evident and fundamental to human

⁵² See generally DAVID HUME, A TREATISE OF HUMAN NATURE (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739).

⁵³ See generally *id.*

⁵⁴ THOMAS REID, ESSAYS ON THE ACTIVE POWERS OF MAN 8–16 (1788) [hereinafter ACTIVE POWERS].

⁵⁵ THOMAS REID, ESSAYS ON THE INTELLECTUAL POWERS OF MAN 12 (J. Bell, 1785) [hereinafter INTELLECTUAL POWERS].

⁵⁶ See Howe, *supra* note 50, at 580–83.

⁵⁷ Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 BUFF. L. REV. 357, 400 (2010).

⁵⁸ See *id.* at 380–81.

⁵⁹ THOMAS REID, AN INQUIRY INTO THE HUMAN MIND 93 (5th ed. 1801).

⁶⁰ *Id.*

intellect.⁶¹ These “first principles” encompass the common human experience, and therefore, according to Reid, they should serve as a foundation from which to embark on philosophical inquiry.

After assuming these “first principles” to be true, Reid argued that humans could then engage in affirmative acts of communication that moved beyond mere perceptions and impressions delivered by the senses, as discussed by Hume and Locke.⁶² Reid viewed the human mind as an active player in mankind’s interactions, writing that,

the mind is, from its very nature, a living and active being. . . . [I]t implies life and active energy; and the reason why all its modes of thinking are called its operations is, that in all, or in most of them, it is not merely passive, as body is, but is really and properly active.⁶³

Reid particularly emphasized the role that judgment played in formulating human thought. Reid viewed judgment as part of the formation of an idea that also requires approving or negating some aspect of that idea.⁶⁴ For example, Reid wrote that for a person to conceive of an idea (X), the person must first determine what (X) is and then distinguish (X) from all other ideas that are not (X).⁶⁵ By this active process, humans form judgments based on their own interactions and knowledge.⁶⁶ In witnessing the active judgments made by humans during their interactions with each other, Reid equated philosophy with the natural sciences.⁶⁷ Just as a scientist observes nature in determining the accuracy of his hypothesis and formulating general truths, Reid called on philosophers to watch the actual judgments that people make in forming associations and to generalize sociological principles from these active decisions.⁶⁸

While Common Sense School philosophers attempted to use human common experience as a basis for subsequent knowledge, positivist philosophers, such as Kelsen, emphasized the hierarchical structure of rules

⁶¹ These “first principles” included Reid’s view that fellow men engaging in conversations with each other each have life and intelligence, that conscious thoughts are the thoughts of a distinct being called “myself,” and that “it is impossible to reason with someone who has no principles in common with you.” INTELLECTUAL POWERS, *supra* note 55, at 36, 581.

⁶² *Id.*

⁶³ *Id.* at 5.

⁶⁴ *Id.* at 318.

⁶⁵ *See id.* at 318–19.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ ACTIVE POWERS, *supra* note 54, at 13.

and norms.⁶⁹ Kelsen argued that human social acts become norms if the acts were achieved in accordance with other norms existing within the same rule of law framework.⁷⁰ Although Kelsen's positivism focused on the concept of authority as emanating from a state's structural hierarchy, Reid's model opts to avoid emphasizing authority; instead, he centers his analysis on the social operation involving two people.⁷¹ In Reid's view, the social operation would be valid simply because the communicators understood that certain social acts conveyed as part of the exchange possessed social meanings.⁷²

In summary, Reid bases the formation of new social rules on the exchange between two active participants—persons who came into the exchange already having satisfied his “first principles.” This approach differs from the passive model based on impressions and expressions that came before Scottish Enlightenment, and also deviates from the positivist school, advocated by Kelsen, which emphasized that new norms could only be formed if they were in accordance with existing rules.

The Common Sense School provided the underlying assumptions for much of the U.S. oral adversarial system.⁷³ It supported assumptions that witnesses could use their perceptions to “record” memories.⁷⁴ Like a video camera, the memory will most accurately display the witness's perceptions if they are delivered orally before a jury.⁷⁵ The performance should be live.⁷⁶ Testimony should be largely extemporaneous responses to open-ended questions posed by the lawyers. Too much rehearsal will make the witness's testimony stale and flat.⁷⁷ One important question for the jury is how closely the witness's narrative testimony matches the recorded memories and in turn how accurately those memories reflect what the witness saw in the first place.⁷⁸ Leading questions are generally not permitted on direct, though on cross-examinations, leading questions are permitted to test the witness's testimony and determine the witness's sincerity.⁷⁹ All of these procedures then flow from the “common

⁶⁹ *The Pure Theory of Law*, STAN. ENCYCLOPEDIA PHIL. (July 7, 2010), <http://plato.stanford.edu/entries/lawphil-theory>.

⁷⁰ *Id.*

⁷¹ See INTELLECTUAL POWERS, *supra* note 55, 72–74 (chapter on social operations of mind).

⁷² *Id.*

⁷³ Blinka, *supra* note 57, at 370–71.

⁷⁴ *Id.* at 379.

⁷⁵ *Id.*

⁷⁶ *Id.* at 380.

⁷⁷ *Id.* at 381.

⁷⁸ *Id.* at 379–80.

⁷⁹ *Id.* at 381.

sense” assumptions of how one knows what happened, how it happened, and why it happened.⁸⁰

An oral adversarial system puts value on the dialogue between persons as a mechanism for understanding how best to resolve conflicts. Mexico’s move to an oral adversarial system assumes that there is a need for live witness testimony to take the place of a predominantly written system. Mexican reformers must acknowledge the value changes inherent in this shift in order to deal with the natural resistance of the positivist system, which will resist the “common sense” first principles of dialogue.

Mexico’s decision to embrace an oral advocacy system may mean rejection of old processes that view the authority of the law as existing in state enactments, which includes the very act of judicial decision-making. Instead, the dialogue between opponents, and with the court, is essentially a decision for the “finding” of facts and the law to emerge from the adversarial process. Not only does the court make law, but the court also applies the law to facts determined by the presentations of evidence. The new system assumes the judge can find facts not only based on what the witness says, but also on the way the witness testifies in court. The demeanor of the witness is crucial to determining the credibility of the witness. Any inconsistencies in the way she testifies in court and her earlier statements will help bring transparency to the fact-finding process. Cross-examination will be a key way to test a witness’s veracity. In addition, the oral system assumes that once the facts are determined, the court will be more bound to apply existing laws to the facts and use reason to reach more consistent and just results.

II. CHOICES INVOLVED IN CHANGING MEXICO’S CRIMINAL, PROCEDURAL, AND PROFESSIONAL RESPONSIBILITY LAW

To understand how the changes to the Mexican Constitution and code of criminal procedure will impact the advocacy skills the prosecutors and defense lawyers will need, this Part looks at the present criminal trial system. Then, this Part describes the changes mandated by the constitutional reforms. This Part argues that the principles of transparency and due process may require a different method for presenting evidence, which will have implications for the ethical roles required of the advocates, as well as opening statements, direct

⁸⁰ *Id.* at 362; see also Mason Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L. REV. 239, 240 (1967).

and cross-examinations, impeachment, admission of exhibits, and closing arguments. In other words, a shift to an oral adversarial system rejects the jurisprudence of positivism, and puts its faith instead in the ability of judges to discern facts based on evidence presented by live witnesses and tested by cross-examination and argument.

A. *The Present System: A Written System*

Mexican lawyers come out of a legal tradition that is skeptical of oral advocacy.⁸¹ The Mexican legal system specifically abolished the requirement for a popular jury in criminal cases.⁸² Even where oral advocates debate and respond to each other, the Mexican traditionalists worried that the more skillful or more powerful would end up abusing the rule of law rather than upholding it. Concerned that courts would be overly influenced by emotional rhetoric and thus misled rather than ethically persuaded to do the right thing, a file-based or written system has been used for many years. Very simply, the present system depends on the police working with a prosecutor. The prosecutor then is tasked with gathering all relevant evidence—both for the prosecution and for the defense—and then putting that evidence in a written form. All of this written evidence then is placed into a file for the judge to read and then decide the case. As a result, witness testimony was turned into written statements. Exhibits were tested by the prosecutor before they were put in the file. Any disputes were handled by the secretariat, who made the determination of what would get in the file. The judge might hear from the witnesses, but only to confirm the testimony they gave in their statements, and cross-examination was narrowly limited by facts already contained in the file.⁸³

B. *Positivism in Mexico's Criminal Law*

Positivism also affected Mexico's criminal law. As Elisa Speckman Guerra's research indicates, in the period from 1871 to 1929, positivism affected the way that Mexican courts viewed criminal defendants.⁸⁴ Seeing

⁸¹ Oral trials were actually included in Mexican state constitutions in the nineteenth century. Armando Enrique Cruz Covarrubias & Jose Barragan Barragan, *Los Juicios Orales en la Constitucion de 1812 y en la Constitucionalismo Local Mexicano* [Oral Trials in the Constitution of 1812 and in Local Mexican Constitutionalism], 39 *ARS JURIS* 63, 90–103 (2008) (Mex.) (on file with authors).

⁸² Hiroshi Fukurai et al., *Is Mexico Ready for a Jury Trial? Comparative Analysis of Lay Justice Systems in Mexico, the United States, Japan, New Zealand, South Korea, and Ireland*, 2 *MEX. L. REV.* 1, 13 (2009).

⁸³ See generally Sarre & Perlin, *supra* note 2. In addition, the Authors have visited criminal courts in Mexico City and directly observed these procedures.

⁸⁴ Speckman Guerra, *supra* note 18, at 231–35.

individuals as a combination of physical personality (temperament) and psychological personality (character), the positivists viewed the individual as governed by a combination of internal factors and the environment; in any event, the individual was driven by other factors beyond his will. Criminals were classified as either “born criminals,” or “perpetrators of crimes of passion,” or “random criminals.”⁸⁵ Sentences were harshest on the “born criminals.”⁸⁶

As Mexican criminal law evolved in the 1920s and 1930s, the judge was given more and more discretion to make sure the punishment fit the crime.⁸⁷ Criminals who committed crimes of passion and random crimes did not deserve the same punishment as born criminals.⁸⁸ As a result, judges were tasked with gathering information (evidence) of the character of the defendant from whatever source they could.⁸⁹ Was their conduct that of a born criminal? If so, then there was no use in attempting to rehabilitate the defendant. Such criminals needed to be removed from the community in prison camps for as long as possible.

As a result, the judge is given wide latitude to gather evidence that relates to the character of the defendant.⁹⁰ The Mexican judge is accustomed to entering a trial knowing all about the defendant’s background, family, criminal record, and earlier brushes with the law.⁹¹ Much of this “evidence” is based on hearsay, documents and statements contained in the written file, before it is admitted into formal evidence. The question for the Mexican reformers is how much of this evidence must be subject to oral presentation. Moreover, how will the judge protect himself from the bias that such information may cause in making a determination of facts in the subject proceeding? If a move to an oral adversarial system will entail a new, more restricted role for the judge as fact-finder, then the Mexican criminal law’s assumptions about the nature of criminal acts and the concomitant punishments that should be accorded, will need to also be reformed.

⁸⁵ *Id.* at 234.

⁸⁶ *See id.*

⁸⁷ *Id.* at 237.

⁸⁸ *See id.* at 234.

⁸⁹ *Id.* at 237.

⁹⁰ *Id.*

⁹¹ *See id.* at 225.

C. *Changes in Mexico's Criminal Procedure*

The Mexican Congress passed reforms that implement new oral adversarial proceedings that try to incorporate criminal procedure rules that define terms related to asset forfeiture.⁹² However, a number of problems arise. Since the judge is also the trier of fact,⁹³ the illegally searched-for evidence comes to the judge. The judge must often hear about the evidence in order to determine if it has been illegally seized. The prejudice to the defendant by combining judge and fact-finder is problematic. How can the judge not be affected by the evidence illegally obtained in reaching his verdict?

Judges in bench trials in the United States also act as fact-finders. Yet, they live in a system that helps them identify problems with illegally seized or prejudicial evidence, so they are attuned to the prejudicial effects and disciplined to make distinctions between facts and law to preserve the record for appeal. Mexico faces the challenge of training judges to be aware of criminal procedure and evidence considerations in making findings of fact in a setting where judges are used to blurring such distinctions. The question for the Mexican judiciary is what role concepts of due process and fundamental rights against coerced confession, confrontation of witnesses, rights against illegal searches and seizures, and right to counsel will effect what kind of evidence the judge can consider in determining guilt or innocence.

D. *Professional Responsibility Considerations*

Under current ethics rules in place in Mexico, lawyers are not restricted from suborning perjury.⁹⁴ An oral adversarial system partly depends on the new role of defense counsel. The new system will rely, in part, on the integrity of the lawyers—that lawyers will not knowingly enter false testimony to the court, either in writing or through witnesses.

Additionally, if the Mexican legal system continues to give credence to its concerns about the vices of oral advocacy, constraints will necessarily have to be placed on the advocate in a number of ways: the oral advocacy presentations will need to be constrained by ethical rules, and constraints will

⁹² MATTHEW C. INGRAM & DAVID A. SHIRK, JUDICIAL REFORM IN MEXICO: TOWARD A NEW CRIMINAL JUSTICE SYSTEM 8–9, 15–16 (2010), available at [http://catcher.sandiego.edu/items/peacestudies/2010-IngraShirk-JRM%20\(2\).pdf](http://catcher.sandiego.edu/items/peacestudies/2010-IngraShirk-JRM%20(2).pdf).

⁹³ Boris Kozolchyk & Martin L. Ziontz, *A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the United States*, 7 ARIZ. J. INT'L & COMP. L. 1, 11 (1989).

⁹⁴ Sarre & Perlin, *supra* note 2, at 383.

need to be placed on the kind of evidence the advocate can present before a judge. Mexican lawyers need to confront the value changes inherent in the switch to an oral adversarial system. This means that legal educators will have to describe the constraints placed on the advocate by the ethical rules and the common law adversarial process and by a healthy and vital evidence law. Educators in the law reform will have to explain how the Mexican system will need to adopt similar rules. They will do this to show how the Mexican bar might work to develop professional customs limiting the excesses of an unrestrained adversarial system. The educators will have to convince the trainee of the dangers of unrestrained advocacy—advocacy that does not play by any rules, that takes “cheap” shots, that is permissive of lies or allows for the presentation of false evidence, or unchallenged and exaggerated facts.

III. CULTURAL AND VALUES CHOICES INVOLVED IN CHANGING TO AN ORAL ADVERSARIAL ADVOCACY SYSTEM

As the Mexican bar and judiciary considers how or whether to change the way evidence will be presented in court in the light of the principles of oral advocacy, it must make its decisions with an understanding of two somewhat paradoxical cultural beliefs that undergird oral adversarial systems. The first comes from both a widely shared skepticism that religion and science can provide the “truth” about what has happened in the past and that, instead, “common sense” and life experience provide the best foundation for making factual determinations in court.⁹⁵ The second belief is a modern adaptation of the ancient wisdom based on Aristotle’s classic, *Rhetoric*,⁹⁶ and is the foundation for understanding what role an advocate plays in an oral adversarial system.⁹⁷ The presentation of cases by adversaries provides for judicial transparency and ensures that no salient fact is overlooked, toward the end that justice is done. However, it cannot ultimately guard against the human non-rational nature of fact-finding. Fact-finding in court will often be based on the

⁹⁵ Blinka, *supra* note 57, at 368–70. Blinka attributes common law reliance on “common sense” to the nineteenth-century Scottish jurisprudence adopted by England and the United States. This common sense epistemology is markedly different from the German view of judicial fact-finding, which is based on assumptions about human reason and its scientific positivistic epistemology. But such a deductionist theory masks its unscientific and irrational foundation, attributing to judges epistemological powers of fact-finding that they “must have” but have no greater foundation for possessing than any human being has the ability to measure whether a witness is telling the truth. For further discussion of Kelsen and the Scottish common sense school, see *supra* Part I.

⁹⁶ ARISTOTLE, *RHETORIC* (George A. Kennedy ed. & trans., Oxford Univ. Press 1991).

⁹⁷ Rhetorical principles, however, are dependent on a number of non-rational premises, which include the character of the speaker and the unbiased nature of the listener.

judge's own perspectives and limited by time and resources to what evidence can be found and presented.

For the reform to be truly successful, educators will need to educate not only to build skills capacities in the advocate, but also to educate them in the values and character traits that advocates will need to fill the advocacy roles demanded of them. There is a normative aspect to the teaching of oral advocacy that cannot be overlooked. As we have seen in our earlier discussion of the Common Sense School, the oral adversarial system rests on epistemological assumptions as to the ability of a judge to make findings of fact based on principles of intuition and common sense. Common sense is believed to be adequate to the task because we rely upon it in our daily lives. Therefore, it is important to determine what beliefs are foundational in Mexico's taking up an oral adversarial system.

Our common sense leads us to believe that a witness can accurately perceive an event through the witness's five senses, that the witness can recall the event when later testifying, that the witness's words can accurately describe his or her memory, and that the witness's sincerity can be judged during the recounting of the memory. When evidence is presented that lacks one or two of these principles—like whether the witness is sincerely recalling the event he or she is recalling from memory—then the fact-finders will have common sense doubts about the validity of evidence. These common sense principles are at the heart of an oral adversarial system.

On the other hand, as good as a fact-finder's common sense may be, principles of rhetoric point out how non-rational the fact-finder may be, and how, ultimately, a finding of fact relies heavily on faith in the skilled rhetorical presentations of at least two perspectives most intimately involved in a dispute. Rhetorical principles teach that advocacy occupies the heart of anyone trying to persuade another to a particular cause or point of view and forms the foundation of what it means to be a good citizen. Obviously, its teachings apply to any lawyer who speaks on behalf of his or her client and the client's goals. The advocate is the client's champion, not just in courts of law, but in the marketplace and to the public.

The rhetorical skills the advocate needs are timeless and rely on his character as a good citizen. As Aristotle wrote in *Rhetoric*, the effective advocate has the following skills and abilities: (1) integrity; (2) the use of logic, employing syllogisms, juxtaposition, and multifaceted reasoning; (3) empathizing deeply with all sides of an argument to present balanced and fair

arguments; (4) anticipating counter arguments and strategizing her presentations and rebuttal to lead the audience to a place where they will feel “at home,” or comfortable in seeing things the way the advocate intends them to see them; and finally, (5) employing emotion or passion (not too much and not too little) to move the audience to do what is right.⁹⁸ These criteria are believed to not only undergird the success of a system of justice, but also ensure the integrity, competence, and professional reputation of the individual advocate. For many years, most liberal arts educational institutions around the world required at least one course in classical rhetoric.⁹⁹ While these requirements have been dropped by many universities’ modern required curricula, the importance of the subject is nonetheless believed to be vital to the well-educated lawyer.

Like Aristotle, teachers of advocacy have long understood the limits of logic and reasoning, and the role of the “heart” in effective advocacy. A good argument persuades, and persuasion needs to anticipate both the audience’s “better selves”—the audience’s values, deeply held beliefs in justice, and hope for a more compassionate world—and their “bad sides,” described as the audience’s biases and prejudices, and what role each of these may play in shaping a favorable outcome for a client.

This last point is especially important for the Mexican trial lawyer to understand about the new system.¹⁰⁰ An oral adversarial system is structured to try to “unbias” the court by requiring two zealous presentations of the facts. In addition, it seeks to prohibit biasing evidence from being presented before a judicial proceeding, which could cause the judge to make up his or her mind before the hearing even starts. Evidence presented out of the presence of the defendant, without confrontation, objection, or challenge to its relevance and reliability is now thought to be partly to blame for the failing of a written system.¹⁰¹ A “written” system, where evidence comes to the court in a file

⁹⁸ See generally ARISTOTLE, *supra* note 96; Paul Mark Sandler et al., *Classical Rhetoric and the Modern Trial Lawyer*, LITIGATION, Winter 2010, at 16–20.

⁹⁹ David M. Stock, *Educating for Democracy: Reviving Rhetoric in the General Education Curriculum* (Dec. 2005) (unpublished M.A. thesis, Brigham Young University), available at <http://contentdm.lib.byu.edu/cdm/ref/collection/ETD/id/471>.

¹⁰⁰ María Elena Leguizamo Ferrer, Fed. Court of Appeals for the Fed. Dist., Los Principios Acustario y de Oralidad en los Juicios Relativos a los Delitos de Delincuencia Organizada [The Accusatory and Orality Principles in Trials Relating to Organized Crime], Address at Emory University School of Law’s Conference: Rule of Law Reform and the Drug Trade: Challenges and Implications in Mexico and the U.S. (Sept. 30, 2010), available at <http://www.youtube.com/watch?v=BW7iE25S3nU>.

¹⁰¹ *Id.*

ahead of the hearing, does not allow for transparent testing of the evidence to determine if the court has decided the case on the law, or on political, economic, or even corrupt bases.

Much of what has developed as the gospel for advocates—and is put forth in this Article as principles for oral advocacy—comes out of a lawyer's experience advocating before an audience that has heard evidence for the first time in court.¹⁰² In other words, the principles come from the common law: the experience advocating in front of juries adjudicating criminal and civil cases.¹⁰³ Much of what has been learned regarding rhetoric does not seem directly applicable in the Mexican setting. Yet Mexican judges are asked to play a new role as transparent adjudicators of the facts. As fact-finders, they have enormous power and discretion when it comes to deciding the weight given to different facts. Nonetheless, the skills used in jury trials will be of paramount importance for Mexican advocates when helping courts in their fact-finding role.

A challenge for Mexican judges in this fact-finding role is that they, too, are human beings. As fact-finders, like their U.S. counterparts, they will have to guard against the way status differences may lead to faulty results. They must not have a jury made up of the defendant's peers to help them. They will have to self-insure against being blinded by their own class experiences or prejudices to miss what justice dictates. They must guard against the important contextual setting that makes the strict adherence to the law unjust and oppressive. They must worry that their technical adherence to legal precedent or legislative enactments might be colored or biased by the moneyed interests of the rich and powerful, and lacking in basic compassion and empathy.¹⁰⁴ So, while governed by law, they know that they are often asked to decide facts based on incomplete proof, and restrictions placed on the advocates and their clients by time and finite resources. The ideal of syllogistic reasoning, or decisions based solely on logic, is seldom attainable. It is in these settings that judges and administrators need skilled advocates to point out the limitations of proof and logic, realizing that even though pragmatic realism requires that decisions be made, they must take the time to open themselves up to the lawyers' oral persuasion to ensure they do not miss important counter facts and arguments. The court will welcome persuasion that pays careful attention to

¹⁰² See JAMES W. JEANS, TRIAL ADVOCACY 1–3 (1975). See generally ROBERT P. BURNS, A THEORY OF THE TRIAL (1999).

¹⁰³ *Id.* at 73–102 (chapter on the trial's constitutive rules).

¹⁰⁴ *Id.*

proof, facts, and evidence, but will also make appeals to the most basic tools of just decision-making: common sense, fairness, and analogies teaching the community values of right and wrong, and good and evil.

Mexican lawyers will need to appreciate how the modern world has placed added stresses on the techniques of lawyer advocacy. No technique is more important than capturing the decision-maker's attention. The decision-maker receives so many messages from so many actors in the market and must process them in so little time.¹⁰⁵ The decision-maker may find that she does not have the time for logical proof or evidence, and she must make decisions largely in a vacuum and on instinct.¹⁰⁶

These constraints on time and the need for speed increase the importance on the advocate's choices in selecting tools of persuasion to achieve the client's goals. The client will only trust the advocate with his message if he is assured the advocate has the skills commensurate with the task. The client knows he will have to place a significant amount of discretion in the hands of the advocate to convey his message in a moment's time.

In a world where the line between ethical advocacy, advertising, and politics is increasingly blurred, the pressure to win at all costs can become overwhelming. In these days of image advertising, creating the "buzz," and negative political campaigning, examples abound of "successful" persuasion, at least in the short run, which operate through veiled appeals to the "dark side" of humanity—racism, fear, and prejudice. One only need look to examples of modern-day politics, or in the extreme, to the Nazis' use of the media to persuade¹⁰⁷ or to the elite Hutu's use of Rwandan radio to incite genocide,¹⁰⁸ to see the dangers in unconstrained persuasive speech. This type of speech is designed to incite violence, discrimination, or judicial decision-making not based on fairness and reason.

¹⁰⁵ With the increased number of messages, it follows that there is a marked decrease in the average amount of attention any one message can be given; there must also be a marked decrease in the attention span of the listener, consumer, or decision-maker.

¹⁰⁶ See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 97–104 (2011) (explaining the presence of some intuitive judgments).

¹⁰⁷ Laura R. Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-conflict Democratization in Kosovo*, 26 *YALE J. INT'L L.* 179, 197–98 (2001).

¹⁰⁸ Jamie Frederic MetzI, *Rwandan Genocide and the International Law of Radio Jamming*, 91 *AM. J. INT'L L.* 628, 630–36 (1997); *accord id.* at 631 (Hutu radio "broadcasts would identify and criticize an individual, and . . . groups would set out at once to find and attack the person named").

Educators should expect some resistance to these principles. Some Mexican judges and lawyers may feel that the search for the “truth” is passé, even naïve. U.S. legal education itself sends this message, as legal educators hold up clever deconstructions of the law.¹⁰⁹ Consequently, the skill of deconstruction takes precedence even over any “search for truth,” effectively depriving the law of any ethical or moral content or meaning and denying that the true facts can ever be known. Perception is often more important than fact and the facts are said to be what one makes of them. Power is available for those who will take it, and the market rewards those willing to push the envelope and take extreme positions.

To both Mexican and U.S. lawyers, spin can become more important than objective truth. You spin your facts, the opponent spins back. Then you spin their spin. The advocate’s ability to persuade and win trumps everything. Advocacy can seem to place a higher premium on what you can get away with than on playing fair, in making money than in making it honestly, in power more than character, and in moving an audience by fear and suspicion rather than by fairness, mercy, love, and compassion.

How should trainers respond to these objections? What does it mean for a lawyer to be a client’s advocate in a postmodern age? This is an age that doubts the cognizability of objective truth, that is expert at deconstructing what has happened in the past, and that is expert in the use of rhetorical devices like juxtaposition, narrative, visuals, and illusion. For the lawyer whose ethic is only constrained by his client’s ability to pay for results, it is easy to worry less about integrity, and the legal process becomes merely the means by which the ends are obtained. For lawyers today, it is easy to question whether it is better to have integrity or to have success. Is it better to produce a useful product and sell it at a fair price or to sell a cheap, useless product, take the money, and run? Is it better to run an honest campaign that discusses the issues or to say what it takes to win? Is it better to play by the rules or to get your client off for a crime he committed?

To answer these questions, the educator will need to remind the trainee of the first principle of Aristotelian rhetoric: effective advocacy depends on the integrity and character of the person who is the advocate. Once society stops crediting the lawyer with any sense of professional integrity, the lawyer’s rhetoric becomes unpersuasive. Hence, what appears to be the economically

¹⁰⁹ See generally ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (2009).

expedient choice has long-term professional, and thus, economic, consequences for the advocate.

Nonetheless, one could ask, “Who really cares? Who really cares that everyone is so selfish and self-centered?” It turns out it is the advocate herself who may care the most. The advocate is the client’s advisor. The advocate is not the client’s serf. What gives the advocate’s life’s work its meaning and indeed its joy, is not the win, but that the work is done honestly, with integrity, and according to the rules of justice and fair play. Ultimately, this course of study tries to guarantee the reputation of the advocate and validate, from an economic perspective, the rationale of the approach.

At least in the situation of the oral advocate and lawyer, these assumptions operate powerfully to limit the excesses of the postmodern thinking about the non-objectivity of facts and the impossibility of the search for truth. Training must highlight the normative limits of what advocates can say and do. Where these assumptions are violated, the society reacts and rebels. These assumptions are vital to the integrity of the adversarial system, and it is important to be reminded of them to help guide the Mexican officials currently grappling with the reform of their adversarial system.¹¹⁰

¹¹⁰ The common law adversarial system works well if the advocate not only understands the system’s workings and her role in the process but also understands how to resist the pressures of cheating and winning at all costs. Make no mistake, the advocate must advocate zealously. On the other hand, she must not present false evidence and may never lie on behalf of a client.

The system works because the adversaries present competing stories for the decision-maker’s consideration. The system works because the judge or referee tests the admissibility of evidence and exercises his or her discretion to make sure that the excesses of advocacy are constrained. The system, though, depends on the integrity of the advocate and her understanding that she may not advocate a position she knows to be false or take a position merely to harass, annoy, injure, or delay the process.

One wonders whether Mexican legal educators will take the position that, despite the trial process’s constraints and limitations, the truth is at least approximated in a well-designed advocacy system in which a lawyer acts with integrity and within the rules during the trial process. Will they share a belief in the system’s epistemology, or way of discerning what is true and what is fair from what is a lie and what is unjust? Will they adopt a belief that an unbiased group of individuals, or at least a group of professional judges who are aware of their biases and apply themselves to their task out of a sense of public duty to do what is right, can make just decisions? This audience of decision-makers, whether making up a court or a jury, must be assisted to think comprehensively about their decision, and explore fully what can be said on all sides. Then, if made up of well-meaning, caring people, trying to do the right thing, they will pool their experience, practical wisdom, and moral intuitions and make “right” decisions, or at least do as well at getting it right as any other system known to humankind.

The advocacy system depends on a vigorous presentation of evidence by parties who have a real stake in the outcome, and these vigorous and competitive presentations are necessary for the decision-makers to take a comprehensive and considered look at the dispute. Zealous presentations ensure that parties are truly heard, even where the matter is routine or uninteresting, or where one of the parties is unlikable, unpopular, or has little status. Zealous advocacy ensures that the freedom and autonomy of the individual client is maximized,

The challenge, then, to the long-term viability of the Mexican oral adversarial system, will be instilling a shared sense of values in the judges and the advocates that will simultaneously preserve the benefits of zealous representation and limit the excesses of oral advocacy. One nongovernmental resource to support character and fitness development in Mexican lawyers might come from the Mexican bar associations. These bar associations could take the lead in professional education and ethics to instill the values inherent in an adversarial system. Such organizations can take the long view about the need for integrity both in the lawyer and in the judiciary. Ideally, the bar associations will be joined by Mexican law schools in the ongoing task of instilling the character and values necessary to the integrity of the advocacy system. Training institutes—made up of legal educators, judges, and lawyers who develop materials and program designs that pay attention to both skills and values—will be necessary and vital to the success of oral advocacy reforms.¹¹¹

IV. IMPLICATIONS OF APPLYING AN ORAL ADVERSARIAL ADVOCACY SYSTEM TO MEXICAN TRIALS

As we have seen, Mexican law reform education will help define what oral advocacy is in Mexico and its relationship to the way evidence is presented and

even in the face of societal pressure to conform and cooperate. This role is important because society is better off when its processes for justice are less concerned with efficiency and more concerned that the decision-maker hears all that needs to be said in favor of each side and when its processes place the burden of discrediting on the opposition through the discovery processes. These beliefs and values, deeply embedded in the adversary system, are inherent in both the civil law and the common law. They are also deeply embedded in the market and the value placed on an efficient market governed by informed and rational consumer choices.

At the same time, the adversary and market systems' processes do depend on playing fair. Just like a scientist who falsifies research or fails to follow fundamental scientific principles harms the scientific community, the rule of law is harmed where the individual lawyer fails to follow the rules. Lawyers must understand the limitations that are imposed on their persuasion by the rules of evidence. Obviously, the advocate cannot falsify evidence. He cannot make up things or state or allude to facts without a good faith basis to believe those facts are true. Even where the hearing is not being conducted according to rules of evidence, the advocate must understand why hearsay is so dangerous and why arguing irrelevant facts or submitting evidence of prior bad acts that do not relate to truth or veracity is distracting at best and unfair and inflammatory at worst. Even when the message is made to the market, that message can be the basis for lawsuits for consumer fraud, for securities fraud on the market, or for trading on inside information. What is said on behalf of the client cannot ignore the facts or effects on the market that those statements may bring about.

¹¹¹ For example, Instituto Panamericano de Estudios Procesales (Panamerican Institute for the Study of Procedure, "IPAEP") was created to carry out this mission in Mexico. IPAEP is a division within the law school at the Mexico campus of Universidad Panamericana. *Instituto Panamericano de Estudios Procesales*, UNIVERSIDAD PANAMERICANA, <http://www.up.edu.mx/document.aspx?doc=28973> (last visited May 5, 2012).

the values that will need to be instilled in the advocates to constrain against the excesses of those presentations. To further explore the challenges reformers will face, we must be reminded of how the written system works. As every lawyer in Mexico knows, the written accusatorial system depends on the following: before trial, a prosecutor objectively investigating the case brings witnesses to give written statements to the secretariat.¹¹² The secretariat edits these oral statements into a typed summary of what the witness has to say. The secretariat also audits the taking of the statements, to keep out irrelevant evidence and evidence that is without foundation. The witnesses then appear in court at a hearing only to confirm those statements to a judge. The statements are not hearsay. They are the evidence, and oral additions will be prohibited if facts were not raised earlier in the statements, other statements, or documents. While the constitution provides for confrontation and cross-examination in court, this ability to confront is strictly limited by what is already in the file.¹¹³

Under an accusatorial system, the battle over proof is shaped by what facts and details get into the file. Lawyers can examine the witnesses about their statements, but can only do so to contradict opposing witnesses if they have produced written statements to the secretariat that raise contradictory facts. In other words, it will be natural for Mexican trial lawyers to precede every question with a phrase like, "It says in your statement, or in the statement of X, or in Exhibit 5, it says that . . . Is that true?"

One important question for Mexico is whether an oral adversarial system will be based on the right of a defendant in a criminal case to confront witnesses against him. Under an oral adversarial system where the defendant has a right to confront a witness in court where a fact-finder is present, the witness's out-of-court statements are not allowed in court, in the first instance. The court will not allow the statements to be referred to, and instead the statements will be viewed as hearsay, unless there is some rule or exception that would allow their use. Hearsay, an out-of-court statement offered for the truth of the matter asserted,¹¹⁴ is prohibited based at least in part on the unreliability of out-of-court statements and in part on the right of defendants to confront witnesses against them.

¹¹² This description of the present system is supported by the personal observations of the Authors in courts in Mexico and interviews with Mexican judges, lawyers, and law professors. *See also* Sarre & Perlin, *supra* note 2, at 372–89.

¹¹³ *Id.*

¹¹⁴ FED. R. EVID. 801.

If an oral adversarial system incorporates the right of the defendant to be proven guilty beyond a reasonable doubt and also incorporates evidentiary prohibitions against illegally seized evidence, hearsay, and evidence that violates a defendant's confrontation rights, then Mexico's view of an adversarial hearing will have to change dramatically. As a result, the defendant's lawyer would need to be present when statements are taken, including the submission of exhibits and statements of experts, or there would be a constitutional implication. Objections made by counsel on the basis that there is no foundation or that the statements are not in evidence would be sustained or the court would be violating the defendant's right to an oral adversarial process.

If and when these changes are introduced in Mexico, advocacy teachers and students of oral advocacy must understand that, under the Mexican reforms, the court will no longer be able to read statements but will instead hear the evidence for the first time through the testimony of witnesses. Direct examination must be thought of in a whole new way. Cross-examination will also become more important to the hearing. Without cross-examination, the judge will face difficulties in learning about the inconsistencies or biases in what the witness is saying as compared to statements they may have given earlier. If referring to statements without their introduction is objectionable under the new system, the cross-examiner will need to control the witness to keep the witness from repeating the witness's direct testimony.

The need for oral testimony will affect the role of the advocate throughout the trial. In sum, the change to an oral adversarial system will affect the lawyers' skill sets. In an oral advocacy setting, the courts will need to hear opening statements and closing arguments, and lawyers will need to conduct direct examinations, cross-examinations, impeachments, and to offer exhibits. In other words, the new role played by the Mexican judge now presiding over the presentation of oral evidence will make new demands on the Mexican advocate.

A. Changes to Presenting Evidence in Court

The right of the criminal defendant to confrontation is at the heart of the oral adversarial system and significantly changes the ways that evidence will be presented in court. The burden of proof will remain on the state.¹¹⁵ These

¹¹⁵ See, e.g., *Criminal Cases*, U.S. CTS., <http://www.uscourts.gov/federalcourts/understandingthefederalcourts/howcourtwork/CriminalCases.aspx> (last visited May 5, 2012).

changes imply that no longer will it be good enough for the state to collect evidence, put it in a file, and give it to a judge. The state will need to present evidence to the court in an oral format, permitting the defendant to challenge the admissibility of the evidence and the witness who is its source.

Mexican prosecutors will also need to present the evidence in a way that will give the judge a chance to assess the credibility of the witness. The prosecutors will likely have to avoid two extremes in the way they question witnesses on direct examination. First, they will have to avoid leading the witness by asking questions that are unduly suggestive of the answer that will be given.¹¹⁶ Second, they will have to avoid vague or overly broad questions or questions that call the witness into a narrative, not giving the opposing advocate the chance to object to irrelevant evidence¹¹⁷ or hearsay.¹¹⁸

¹¹⁶ FED. R. EVID. 611.

¹¹⁷ Relevance asks the relevance of the background material the prosecutor is asking about. For example, why is it relevant that the witness is married and has a child with mental disabilities? If the prosecutor has a hard time answering the question, then perhaps it should be left out of direct testimony.

Still, the lawyer should realize that questions of background—employment, family, and experience—are crucial for helping a fact-finder assess the credibility of the witnesses's testimony. Mexico will likely adopt a relevance rule that is initially very permissive, and then is restricted where Mexico determines that certain evidence may be prejudicial. Relevance might then be defined as anything that advances a material issue in the case, even in the slightest way. As defined in the U.S. Federal Rules of Evidence ("FRE"), "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. FED. R. EVID. 401.

Under the FRE, relevant evidence may be excluded if it is overly prejudicial for its probative value. FED. R. EVID. 403. Similarly, after determining relevance, Mexico can develop special exclusionary rules for evidence the court determines is overly prejudicial for its probative value or is a matter of character evidence in criminal cases and so may prejudice the court. The court could be prejudiced to make a decision not based on the state's proof in this case, but based on the past bad acts the defendant committed. Of course, these are matters the direct examiner will want to exclude and so will not present in her direct examination. We will have to talk more about these exclusions when we talk about constraints for the cross-examiner.

If the attorney can keep the court from ever hearing about a prior bad act on cross, then there is no need to deal with it defensively. Can the attorney convince the court that it must be careful to try the defendant only on the state's evidence presented in this case and that it must be careful not to twice punish someone for crimes done in the past? After all, the burden is on the state to prove its case beyond a reasonable doubt. *Criminal Cases*, *supra* note 116. So, for example, in the United States, the court does not even admit (and so does not consider) prior misconduct of the defendant, and it is very careful to exclude from its consideration evidence of most criminal acts, if overly prejudicial. Judges will need to be sensitive to these changes because they are different from what Mexican law required of them in the past.

To help attorneys see how this works, they should review: (1) FRE 404, which forbids using prior bad acts to prove an action in conformity therewith; (2) FRE 608, which allows character and prior bad acts in certain narrow circumstances; and (3) FRE 608, which allows evidence of felony convictions. FED. R. EVID. 404, 608. Counsel in Mexico might make a motion to a pretrial judge to exclude this kind of evidence from being presented to the judge trying the case.

1. *Changes to Direct Examination*

On direct examination, if the court has not had the benefit of notice of the statements before hearing the witnesses, the witnesses must be “directed” in their testimony. The court will rely on counsel to conduct a direct examination that is both efficient and complete. The court will want to judge whether the witness is telling the truth. The court, therefore, will likely adopt a rule that prohibits the lawyer from putting words into his own witnesses’ mouth. The lawyer will be constrained to ask only non-leading questions—unless (1) the matter is not in dispute, (2) it is foundational to a particular evidence foundation, or (3) it helps “develop the witness’s testimony”¹¹⁹ or speed it along.

¹¹⁸ As to police officers on stakeouts or other investigators, attorneys may have a reliability problem because the witnesses’ testimony is based on what someone else told the officer or investigator. In oral adversarial jurisdictions, this reliability problem is called hearsay and is based in part on the defendant’s constitutional right to confront witnesses in court. Reliance on out-of-court testimony by witnesses not present for the court to judge their credibility and not subject to cross-examination is objectionable because it is “hearsay.” FED. R. EVID. 801, 802.

On the other hand, the police or investigators are tempted to use hearsay to explain why the witness was at the scene or in position to witness something. Otherwise, the court might think the police was just “out to get” the defendant. (The officer may have received complaints, or the defendant may be a notorious crook.) How will a prosecutor ask the question to explain why the officer was there without violating hearsay? Is the prosecutor offering it for the truth of the matter asserted (FRE 801(c)) or to explain why he was at the scene? Should you ask a leading question to avoid unduly prejudicing the fact-finder? FED. R. EVID. 803. The prosecutor might ask that the witness limit his answer to yes or no, thereby excluding evidence whose prejudice substantially outweighs its probative value. For example the prosecutor might ask, “As a result of being directed by your superiors, where did you go to set up your stakeout?” The attorney could remove the hearsay objection and unfair prejudice by asking, “Were you directed to the scene as a result of information you received from authorities in your office?”

Will the witness offer evidence of conversations (either about what they said, or what someone else said) that occurred out of court that will be offered for the truth of the matter asserted? Most adversarial systems allow for some exceptions. For example, is your witness expected to give evidence of an admission of a party (like that allowed in the United States under FRE 801(d)(2) and therefore not hearsay)? FED. R. EVID. 801(d)(2). Or is it offered as an exception in the evidence law? If so, the attorney must determine what exceptions he or she will rely on. In the United States, FRE 803 includes exceptions for: (1) present sense impression, (2) excited utterance, (3) state of mind, (4) statements for the purpose of medical diagnosis or treatment, (5) recorded recollection, (6) records of a regularly conducted (business) activity, and others. FED. R. EVID. 803. FRE 804 includes hearsay exceptions for situations in which the declarant is unavailable for: (b)(1) former testimony, (b)(2) dying declaration, and (b)(3) statement against interest. FRE 807 is a catchall, with prior notice to the other side. FED. R. EVID. 804, 807.

Attorneys should also determine whether they will ask the court to take judicial notice of any fact, because the facts are so widely considered true in a given community. FED. R. EVID. 201. For example, the time it gets dark during a certain time of year or the weather conditions that were present at the time an event was observed are the sort of facts that can be considered under the doctrine of judicial notice.

¹¹⁸ For examples, see FED. R. EVID. 201 cmt.

¹¹⁹ FED. R. EVID. 611(c).

To help establish witness credibility, Mexican prosecutors need to know how to ask open-ended questions that will give the witness a chance to speak in a narrative. Testimony through narrative helps the direct examiner show the witness's ability to speak in detail about what the witness saw, heard, or did. Lawyers should not ask closed-ended questions on direct examination, because closed-ended questions elicit from witnesses only short answers, such as "Yes," "No," or "I don't know."

It is, however, not enough for the lawyer to simply ask, "Do you confirm your statement you gave to the prosecutor?" Such questions do not permit the judge to assess the witness's credibility from the manner in which they testify. The lawyer must use techniques that will highlight and give emphasis to the important facts the witness knows, and allow the witness to restate for the court what the witness previously has told the prosecutor or police. In other words, the lawyer will need to act like a movie director, giving the witness directions through the questions as to where to give more emphasis and more detail. On key events, the judge will need to *see* what happened, as if he or she were there, and so information about time, place, and circumstance leading up to the event will be important. It is likely that Mexican judges, like American judges, will look for the examining lawyer to use head notes, so that the witness is directed to topics containing important facts and so the witness recognizes when the lawyer is shifting the focus of the testimony to a different subject.

The new oral advocacy procedures will also put more stress on the advocate to prepare the witness for giving testimony in court. An unschooled witness may need real help in this regard. In addition, the court will want the witness to discuss the relevant issues. For efficiency purposes, the lawyer should rehearse with the witness so the witness is ready to give important details. On the other hand, the lawyer must be careful not to tell the witness what to say, or lose sight of the need to present the court with truthful testimony. Mexico may need to adopt an ethical rule that prohibits lawyers from knowingly suborning perjury. The lawyer should instruct the witness to not knowingly present false testimony.

The Mexican lawyers, as new students of the oral adversarial process, will quickly learn that witnesses get nervous and may forget things, or get facts out of order. It is important to explain, then, how a lawyer deals with these problems. The lawyer does not want to appear to doubt or contradict the testimony of the witness. Most importantly, the lawyer should also organize

the direct examination by using questions with imbedded time signals, such as “what did you do *immediately after* you were hit by the defendant?” or “what happened *right after* you saw the man take out a knife?” In other words, the best direct examiners will proceed in an organized fashion, proceed efficiently (by asking open-ended questions), and proceed to highlight important facts in favor of one’s client by corroborating the testimony with exhibits, and asking time, place, and circumstance questions to give context to the important facts.

It is important to note, in an oral adversarial system, that the witnesses’ earlier statements are not in evidence, and the direct examiner should not refer to them. To do so would violate the confrontation rights of the opposition. The evidence is presented through the testimony of the witnesses in court to protect the defendant’s right to be present and to confront witnesses against them.

Moreover, in its new adversarial system, the Mexican court will not have the traditional file, which before would have included information concerning a witness’s earlier criminal conduct. Following the reforms, now such conduct only would be put before the court if the witness “opens the door” by something the witness volunteers.¹²⁰ Not only does the defense give up control during the cross, but it is also difficult to control what the client will say on the stand. This is because the lawyer must give up control by using open-ended questions in order to develop the witness’s credibility, and in so doing, the direct examiner risks that the witness will give short shrift to key points, will over-emphasize matters that are less important, will be boring, arrogant, or, in the worst case, even volunteer testimony that might damage the case.

The standard direct examination is also made difficult by the artificiality of the rules that govern the setting. The court is trying to balance efficiency and fairness: efficiency by trying to ensure that the witness is given direction about

¹²⁰ Mexican reformers might consider evidence code provisions like those contained in FRE 404, 405, 608, and 609. See FED. R. EVID. 404, 405, 608, 609. However, these provisions make different assumptions about the unreliability of character evidence than Mexican judges are accustomed to. Consider two examples: FRE 609 and FRE 404. FRE 609 excludes the defendant’s past criminal convictions of similar crimes, unless their probative value substantially outweighs their prejudicial effects. FED. R. EVID. 609(a)(1). This rule addresses fears that the fact-finder would not demand the requisite proof (proof beyond a reasonable doubt) where the fact-finder knows of the earlier conviction. FRE 404 bars the use of specific instances of bad character evidence to prove the defendant acted in conformity with such bad character in the present case. FED. R. EVID. 404. Mexican judges might feel they do not need to restrict such evidence because they can give such evidence the weight it deserves.

what the court will admit as relevant evidence; and fairness by trying to provide the witness with an opportunity to tell his or her full story.¹²¹

2. *Authenticating Documentary Evidence and Proving Its Reliability*

As to documentary evidence, the Mexican prosecutor must now account for the *authentication* of the document—whether the original is needed, whether it is relevant, whether it is privileged, and whether it is hearsay. Does the Mexican prosecutor have stipulations or admissions in place to cover these issues? Will the prosecutor still lay a persuasive foundation for the use of the documents to help explain to the fact-finder why he or she can rely on it? This is especially important for pictures or photos that can be Photoshopped or created by tricks and manipulations.

As a result, if the Mexican attorney wants to use illustrative and demonstrative exhibits, the attorney should ask if a particular foundation must first be laid. While there is often no specific rule dealing with illustrative or demonstrative exhibits, the foundation for illustrative exhibits is the same as any witness must give before being allowed to testify: does the exhibit or evidence *assist* the fact-finder, or, instead, confuse, mislead, or waste the court's time? For demonstrative exhibits, the court must think the exhibit is relevant and reliable and so the exhibit needs to *fairly and accurately depict* what it purports to show.

It may become important for the lawyer to address these issues at the pretrial conference, so the court is not frustrated with lengthy objections, which

The lawyer must ask interesting questions in a dramatic tone of voice, even though the lawyer may already know the answer to the questions he or she is asking. The lawyer's task on direct examination is to simultaneously develop the witness's credibility while (1) "directing" the witness to emphasize the matters that need emphasizing, (2) dealing with the destructive matters, and (3) efficiently managing the matters that are necessary but—by their nature—boring.

Efficiency in direct examination is especially important because judicial fact-finders in jurisdictions using oral adversarial rules often complain about how repetitive, boring, and condescending trial lawyers are during direct examination. Many times, in the attempt to highlight and underscore matters, lawyers become redundant and repetitive, until these fact finders want to yell at them, "Okay. We got it already. Move on!" (British judges have a more polite way of doing just this. They say, "Hmm, I take your point, please move on." In addition, British barristers check in with the court to give the court an opportunity to move them on by saying, "If you are with me, My Lord?" before moving on.)

¹²¹ Repeating the same testimony from more than one witness, even when it is left unchallenged by the opposition, can lead the fact-finder to think that counsel thinks he or she is stupid. As a result, lawyers in an adversarial system must analyze witnesses' testimony in the light of what is in conflict, and use the persuasion techniques and skills described below to (1) give detail and emphasis to the important points, (2) spin or de-emphasize weak points, and (3) move efficiently and effectively through less important matters.

interrupt and delay the presentation of the case. If, however, these evidentiary issues have not been resolved, the lawyer must prepare his direct examination with the evidence rules in mind. Then, if the lawyer gets an objection, he can respond with arguments about the reliability and relevance of the exhibits and testimony.

B. Changes to Objections and Making a Record

Mexican trial lawyers will also need to expand their understanding of how they must protect the record for appeal. This creates a new role for the trial lawyers. Aside from making objections, the trial lawyer must now also preserve his objections for appeal. An oral adversarial system assumes that a defendant—and in some cases, the prosecution—will have the right to appeal if the court considered unlawfully admitted evidence or misapplied the law. This means that the lawyers may make objections to the admissibility of evidence either before trial—by means of motions in limine—or at trial, at the moment the evidence is introduced. An oral adversarial system also assumes that the court keeps a record of what has been said, so that the appellate court can review the decisions of the lower court, both as to the court's decision on the admissibility of evidence, and to the law it applied to the case. This means that it is incumbent on the objecting attorney to make objections on the record, lest the appellate court reasonably believe that the lawyer waived his objection to the admissibility of the evidence. Lawyers in an oral adversarial system, including lawyers in Mexico under the new reforms, must learn to make a record for appeal whenever they object to the admission of evidence, so that the appellate court knows the trial judge was given a chance to make the right ruling.

Of course, the importance of these skills—of making and responding to objections, as well as preserving objections for appeal—depends on the rules Mexico adopts for appellate review. Will the appellate court be limited in its review to matters of law? Will there be a record of the trial court proceeding that will allow the appellate court to review evidentiary matters? Will the appellate court be able to call witnesses and second-guess credibility decisions of the trial court below? How the Mexican system answers these questions will greatly affect the skills the lawyer will need to present evidence in the trial court.

C. *Cross-examination*

Cross-examination in an oral adversarial system is a time for the opposing lawyer to challenge and confront the witnesses that testified against his or her client. Again, in Mexico, where the judge has not seen witness statements before, this is a time for the cross-examining lawyer to challenge the witness with other statements or other evidence that the lawyer has a “good faith basis” to believe are true. Using a combination of earlier statements, the lawyer’s own fact investigation, and logic, the lawyer challenges the witness by putting forward the facts and exhibits that contradict what the witness said on direct examination, or show bias, lack of consistency, or lack of foundation.

With regard to cross-examination, courts are not interested in hearing either repetitions of the direct examination, or “fishing expeditions,” where the cross-examining lawyer aimlessly asks questions in the hope that the witness will eventually contradict herself. As a result, courts will likely gravitate toward allowing cross-examining lawyers to ask leading questions, which will keep the witness from rehashing the direct. Leading questions allow the cross-examining lawyer to better control the witness, and therefore to more efficiently get the witness to admit holes, inconsistencies, or bias that may have affected the witness’s testimony. For more on cross-examination, see Chapter IV of *Oral Trial Advocacy: A Normative Approach*.¹²²

In addition, where the witness’s statements are not in evidence, the cross-examiner will need to use inconsistent statements to highlight mistakes, changes, or lies that the witness is telling the court. Impeachment by inconsistent statement avoids the hearsay use of the earlier statement, because the earlier statement is not offered for the truth of the earlier assertion, but to attack the credibility of the witness’s testimony in court.¹²³

D. *Closing Arguments*

Finally, presenting closing arguments will now also be important for the Mexican advocate. Closing arguments are important opportunities to review the evidence each side has presented and argue the fair inferences that can be drawn from the evidence. The advocate should show the court the match between the law and the evidence, or lack of evidence. The court should also

¹²² PAUL J. ZWIER ET AL., *ORAL TRIAL ADVOCACY: A NORMATIVE APPROACH* (Mex. ed. 2012) (forthcoming summer 2012) (manuscript at 93–112) (on file with authors).

¹²³ *Id.* (manuscript at 120–51).

be shown the reliability or unreliability of the evidence presented using (1) evidence law, (2) points of impeachment, (3) burden of proof requirements, and (4) arguments about the credibility, bias, or unreliability of the witnesses' testimony or the documents presented. Where the court has received documents, the court will be greatly aided by arguments that draw the court to specific facts contained in these documents and how they relate to proof or lack of proof.¹²⁴

The good news is that these new roles can be taught using learning-by-doing methods that have been used in the United States and in a variety of international law reform contexts. The key here is for the participants to experience the new roles they will play in the new system. By experiencing the new methods for conducting direct and cross-examination, making objections, doing impeachment, and preparing and presenting opening statements and closing arguments, Mexican trial lawyers can gain an understanding of how the system works, confidence, public speaking skills, and leadership capacities necessary for successful advocacy under the new system.

CONCLUSION

Mexican educators must overcome a number of challenges in order for Mexico to meet its 2016 deadline for implementing changes to an oral adversarial system. Assuming that there is political will to implement the changes and sufficient buy-in to an oral adversarial system, these educators will have to teach the lawyers and judges about the new system. To be successful in their educational project, they will need to overcome resistance from the Mexican bar to the need for reform. The requirements of an oral adversarial system will necessitate changes in the way the Mexican bar will see its jurisprudence. The system implicates changes for its criminal law and procedure. An oral advocacy system based in part on the rhetorical skills of the lawyers implicates cultural and value changes. In addition, the new system implicates the role traditionally played by judges, and will have practical implications on the way trials will be conducted.

Mexican reformers and educators must be able to both give respect to the past legal system, and at the same time, advocate for a fundamental shift in an understanding of the *Grundnorm* of the law. The law ultimately resides in the

¹²⁴ *Id.* (manuscript at 268–306).

shared experience, language, and dialogue of the individuals before the court, rather than in the pronouncements of the state.

Legal educators will next need to overcome resistance to change that comes from shifting to an oral advocacy process from a process that depends on the compilation and reading of a file prepared for the court to decide the case. Legal educators will need to explain the role that lawyers play in keeping the fact-finder from information that will create unfair prejudice or bias against one of the parties. As a result, they will have to explain the biasing effects of character evidence and hearsay and explain a pretrial motion practice that will protect the court from consideration of this kind of evidence.

To succeed in making the transition to an oral adversarial tradition, the bench and bar will need to embrace the cultural values inherent in a system dependent on rhetoric. They must understand the assumptions made by an adversarial system: good decisions depend on a zealous presentation by opposing sides. Advocates not only test the evidence presented by the opposing party, but challenge the court to better see how its institutional perspectives can blind it to vital facts necessary to reach fair and just results. Moreover, the new role of rhetorical skills will rest on integrity of the advocate to constrain the excesses of advocacy. New ethical constraints will be needed to make sure that the new system does not replace the lack of transparency inherent in a written system, with a lack of transparency brought about by the clever deceptions of the advocate.

Finally, the educational endeavor will succeed if educators use learning-by-doing techniques designed to have the trainees both experience the confidence and public speaking skills through oral advocacy training, and understand the reasoning behind the oral adversarial method.

The lessons learned in Mexico are applicable to legal reform efforts around the world. As countries like Mexico make changes to their legal systems, there is good reason to look to the systems and experiences of other countries. In doing so, however, a country must carefully consider fundamental philosophical differences between systems. Those assisting in the reforms must also understand the differences in the way a society views both crime and the criminal. Adopting an oral adversarial system will also have implications for cultural beliefs and values in the way that decisions are made, and the constraints to be placed on those who make them. Finally, for rule of law reform to take hold, reformers will need to understand that it will not be enough to simply change the law of the books or the procedures used in court.

Experiential learning and capacity building will be key to true ownership and implementation of any changes to an oral adversarial system.