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## Mexican Drug Violence and Adversarial Experiments Research Paper Series

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# Mexican Drug Violence and Adversarial Experiments

By Ronald F. Wright\*

## INTRODUCTION

Two remarkable developments mark this time in Mexican criminal justice as profoundly different. First, the country is suffering through wrenching violence connected with the drug trade. The violence amounts to far more than background noise, rising to a level that some regard as a “civil war,” or evidence that Mexico could become a “failed state.”<sup>1</sup> Second, Mexico has embarked on procedural changes both at the federal and state levels. The effort has achieved more than procedural tinkering at the edges, creating some base-level changes at the constitutional and statutory level in the legal machinery that responds to crime.

Many characterize this procedural transformation as a shift from an inquisitorial to an adversarial model of criminal procedure. I suggest, however, that the reforms do not simply endorse the strengths of a particular adversarial fact-finding method. Rather, the principal virtue of the new criminal codes in Mexico turn on their efforts to balance powers. In particular, the codes create meaningful competition for the public prosecutors in Mexico during the investigation, trial, and punishment of alleged criminals.

The drug violence in Mexico and the revision of state and federal criminal codes in that country are both stories that deserve intense scrutiny, standing alone. Taken together, they are riveting. This essay will review these events and consider the connections between them, both in the past and the future. Looking back, did one development cause the other, or did they both flow from a single cause? Looking forward, will the procedural reform make it easier to respond to the drug violence? Or will the drug violence distort or disable the procedural reform?

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\* Professor of Law and Associate Dean for Academic Affairs, Wake Forest University School of Law. This essay grows out of a speech delivered at the University of North Carolina in April 2008. I am grateful to Professor Michael Corrado for organizing the conference, and to the participants in the conference for their perceptive observations about my project.

<sup>1</sup> See Ted Galen Carpenter, *Drug Gangs Winning the War for Mexico*, Cato Institute (February 2009), available at [http://www.cato.org/pub\\_display.php?pub\\_id=9948](http://www.cato.org/pub_display.php?pub_id=9948) (“The government thus becomes both an arena for competition among the cartels and an instrument used by one cartel against another. That is the prescription for what is called a ‘failed state’ — a state that no longer can function as a state.”); Sara Miller Llana, *How Mexico is Waging War on Drug Cartels*, CHRISTIAN SCIENCE MONITOR, Aug. 16, 2009 (Pentagon report warned in Winter 2009 that Mexico could become a failed state).

Writ large, these two developments in Mexico raise this basic challenge for lawyers everywhere: does procedure matter at all in conditions of extreme violence and disorder? Does a debate about adversarial versus inquisitorial justice amid ghastly violence resemble a debate about Ipods versus MP3 players in a household where nobody has enough to eat? Alternatively, is an orderly and legitimate procedure the best hope under extreme conditions of disorder?

## I. RECENT DRUG VIOLENCE IN MEXICO

The troubles of the Mexican criminal justice system date back to the earliest days of the nation.<sup>2</sup> The events that capture our attention at present, however, began with the national presidential election campaign of 2006. Three candidates represented the three major parties in the effort to succeed Vicente Fox. Felipe Calderón, like Fox, was the nominee of the National Action Party (the Partido Acción Nacional, or PAN), a right-of-center party. The Party of the Democratic Revolution (the Partido de la Revolución Democrático, or PRD), a left-of-center party, nominated Andrés Manuel López Obrador. Roberto Madrazo represented the Institutional Revolutionary Party (the Partido Revolucionario Institucional, or PRI).<sup>3</sup> The election presented a novel experience for the voters, because the PRI had dominated Mexican politics for nearly a century.<sup>4</sup> After Vicente Fox broke the political monopoly of the PRI, familiar political truths in Mexico no longer applied.

Calderón won an extremely close election, amid many reported voting irregularities. The PRD disputed the legitimacy of this outcome, and Obrador refused to recognize Calderón as President.<sup>5</sup> As a result of the extended turmoil after the election, Calderón believed that he needed to take some unifying actions early in his tenure. He moved against drug cartels to create a sense of law and order that many voters were missing.

The new President's offensive against the cartels faced daunting odds. Drug cartels brought in billions of dollars more than the Mexican government spent to defeat them.<sup>6</sup> Cartel leaders spent a portion of their wealth bribing police, mayors, and some higher-level officials, including some who worked in the customs service and others in the prison system.<sup>7</sup> Even in the army, considered less corrupt than the police, defense officials estimate that 100,000 soldiers have quit to join cartels over

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<sup>2</sup> See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, LEGALIZED INJUSTICE: MEXICAN CRIMINAL PROCEDURE AND HUMAN RIGHTS (2001).

<sup>3</sup> See *Mexican Presidential Election: Political Crossroad*, HOUSTON CHRON., July 2, 2006, at A26

<sup>4</sup> See Dudev Althaus et al., *Changing of the Guard in Mexico: Pomp and Punctures: In What May be a Sign of What's to Come, Calderon Takes Office Amid Brawling Congress*, HOUSTON CHRON., Dec. 2, 2006, at A1.

<sup>5</sup> See Chris Hawley, *Mexican Says He's "Legitimate" President, Lopez Obrador Touring Country, Hasn't Conceded*, USA TODAY, Dec. 19, 2007, at 8A.

<sup>6</sup> See Marc Lacey, *In Escalating Drug War, Mexico Fights Cartel and Itself*, N.Y. TIMES, March 30, 2009.

<sup>7</sup> See Tracy Wilkinson, *Mexico Under Siege: Calderon Shifts Tactics in Fight With Drug Gangs*, LOS ANGELES TIMES, May 28, 2009.

the previous seven years.<sup>8</sup> President Calderón himself received death threats from cartels during the election campaign, suggesting that the new President held a personal commitment to this policy priority.<sup>9</sup>

Because the cartels' bribery of the police remained a pervasive problem, Calderón was unable to call on existing structures of law enforcement. Instead, he sent the army into the fight, devoting more than 40,000 troops to the effort.<sup>10</sup> Mexico started extraditing record numbers of drug suspects to the U.S. for trial, revealing the loss of confidence of political leaders in the Mexican judicial system.<sup>11</sup>

The military offensive against the drug cartels offered some early positive results. The campaign produced record seizures of drugs, money, and guns, along with tens of thousands of arrests to deplete the ranks of the four main Mexican drug cartels. Mexican authorities announced in July 2009 that they had arrested over 60,000 people for drug crimes over the past two years.<sup>12</sup> The government claimed to have reduced the number of "zones of impunity," from 2,204 down to 233.<sup>13</sup> Enforcement efforts against cartels uncovered a large number of high-level officials and police officers who had collaborated in criminal enterprises.

Drug organizations traffic in violence, and the cartels responded violently to the government's offensive. There were 6,200 drug-related killings in 2008 (double the number of drug killings in 2007).<sup>14</sup> Some of these killings involved multiple executions or mutilations of the victims' bodies. Some of the deaths amounted to intra-organization discipline, while some others resulted from struggles among the major cartels. Many of the killings, however, targeted law enforcement agents, along with a few killings of civilian bystanders.<sup>15</sup>

Soldiers in Mexico started to cover their faces while on patrol, because their families faced retribution if the drug traffickers recognized them. The Mexican army allowed soldiers to grow their hair longer, so they were not so easy to identify as soldiers while off-duty.<sup>16</sup> In one riveting incident early in 2009 in Ciudad Juárez, drug traffickers demanded the resignation of police chief Roberto Orduña Cruz, and vowed to kill one police officer every 48 hours until he resigned. They carried out

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<sup>8</sup> See Lacey, *supra* note 6.

<sup>9</sup> *Id.*

<sup>10</sup> See Enrique Krauze, *The Mexican Evolution*, N.Y. TIMES, Mar. 24, 2009 at A27; James C. McKinley, Jr., *Mexico Hits Drug Gangs with Full Fury of War*, N.Y. TIMES, 22 January 2008.

<sup>11</sup> See Oscar Avila, *Mexico Shifts Course, Aggressively Extradites Suspects to U.S.*, CHI. TRIB., Jan. 13, 2009.

<sup>12</sup> See William Booth & Steve Fainaru, *Arrests in Mexico's Drug-Trafficking Offensive Top 60,000*, WASHINGTON POST, May 1, 2009.

<sup>13</sup> See Lacey, *supra* note 6.

<sup>14</sup> See Editorial, *Death and American Guns in Mexico*, N.Y. TIMES, June 25, 2009, at A22; Diana Washington Valdez, *UTEP Drug Conference: New Cartel Methods Widen Drug War's Toll*, EL PASO TIMES, Sept. 21, 2009 (12,000 violent deaths during first two years of Calderon initiative).

<sup>15</sup> See William Booth, *12 Federal Agents Slain in Mexico*, WASHINGTON POST, July 15, 2009.

<sup>16</sup> See Lacey, *supra* note 6.

the threat by killing the deputy chief of the department, another police officer, and a prison guard. Orduña resigned after a few days. The federal government then deployed 5,000 soldiers to Ciudad Juárez and the surrounding state of Chihuahua.<sup>17</sup>

Mexicans actively debated the wisdom of this strategy. For some, it was all a colossal mistake: “Calderón took a stick and whacked the beehive.”<sup>18</sup> The involvement of the military in criminal law enforcement apparently led to an increase in human rights violations.<sup>19</sup> The government’s plan seemed inspired by the U.S. plan to counter narcotics in Colombia, a dispiriting analogy that led some to predict a prolonged violence in the country with little or no gains in public order. Overall, however, the public still supports the Calderón initiative against the cartels.<sup>20</sup>

Remarkably, the extreme conditions of violence led the federal government in Mexico to pass a law in August 2009 legalizing the possession of some small amounts of drugs for personal consumption.<sup>21</sup> The government’s stated strategy was to focus more of its limited law enforcement resources on small-time sellers of drugs.<sup>22</sup>

In the United States, concern about Mexico intensified. The legalization of some drug possession prompted some worries that greater drug use would spread to the U.S.<sup>23</sup> Secretary of State Clinton spoke early in 2009 about the possible spillage of Mexican violence over the border into the U.S., while acknowledging this country’s role in creating the violent environment. It is U.S. demand for drugs that makes the drug business profitable, and the U.S. commerce in firearms that makes the cartel business more deadly.<sup>24</sup>

## II. MOVEMENT AWAY FROM THE INQUISITORIAL SYSTEM IN MEXICO

Which legal actors and institutions in Mexico can respond to such drug violence? The relevant players in Mexican criminal justice, and their capacity to respond to crime, are changing just as rapidly as the drug violence in the country.

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<sup>17</sup> See Marc Lacey, *With Force, Mexican Drug Cartels Get Their Way*, N.Y. TIMES, Mar. 1, 2009.

<sup>18</sup> See Lacey, *supra* note 6.

<sup>19</sup> See Booth & Fainaru, *supra* note 12.

<sup>20</sup> See *A Promising Turn for Mexico*, SAN FRANCISCO CHRON., July 23, 2007.

<sup>21</sup> See Oscar Avila, *Mexico Weighs a Change of Focus on Drugs*, CHICAGO TRIBUNE, October 18, 2008; Sara Miller Llana, *Legalization of Drugs Spreads in Latin America: Will the US Follow?* CHRISTIAN SCIENCE MONITOR, Sept. 23, 2009; Tracy Wilkinson & Richard Marosi, *Mexico Shifts Tactics in Drug Battle*, LOS ANGELES TIMES, Aug. 23, 2009.

<sup>22</sup> See Marc Lacey, *In Mexico, Ambivalence on a Drug Law*, N.Y. TIMES, Aug. 24, 2009.

<sup>23</sup> See Editorial, *Surrender: Mexican Congress Weakens Drug Laws*, SAN DIEGO UNION-TRIBUNE, Aug. 26, 2009; Julie Watson, *Mexico’s Liberal New Drug-Use Law Worries U.S. Police*, DESERET NEWS, Aug. 27, 2009.

<sup>24</sup> See Ken Ellingwood, *Clinton: U.S. Shares Blame for Mexico Ills*, L.A. TIMES, Mar. 26, 2009, at 1; James C. McKinley, Jr., *U.S. Stymied as Guns Flow to Mexican Cartels*, N.Y. TIMES, April 15, 2009.

Mexico, broadly speaking, draws on the civil law tradition, which employs an inquisitorial model of criminal justice.<sup>25</sup> Like the rest of Latin America, Mexico inherited its procedural template from Spain. Today, however, Mexico offers a different take on the civil law system than most other Latin American countries. The distinctions between the Mexican model and the inquisitorial systems in other Latin American countries explains why criminal justice reform in Mexico concentrates more than elsewhere on the role of public prosecutors.

### A. The Traditional Latin American Model

The classic Latin American inquisitorial codes contain two features that distinguish them from more adversarial systems. First, the Latin American criminal codes generally provide a written process that accumulates evidence over time, as opposed to an oral process that concentrates proof into a shorter time frame.<sup>26</sup> Second, the inquisitorial codes assure the quality of evidence through professional standards of the investigating officer—that is, the judge—rather than through a testing of the evidence from the defendant armed with several pre-declared rights, or through presentation of evidence to lay adjudicators such as jurors.<sup>27</sup>

Latin American inquisitorial codes typically divide the criminal process into two stages: a pretrial investigation (*sumario* or *instrucción*) and a verdict and sentencing phase (*plenario* or *juicio*). The keystone of the process during both phases is the dossier (*expediente*) that police and the investigating judge compile.<sup>28</sup>

The judge takes charge of the investigation, which is kept secret from the defendant and his or her attorney. The defense has no right to be present during the production of evidence or to be apprised of charges before being interrogated; with limited exceptions, pretrial detention of the defendant is obligatory.<sup>29</sup> In theory, the

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<sup>25</sup> See Craig Bradley, *Overview*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* xvii (2d ed. 2007). Professor Giulio Illuminati distinguishes accusatorial from inquisitorial systems. See Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 4 WASH. UNIV. GLOBAL STUD. L. REV. 567, 568-569 (2005) (views as accusatorial any model that strictly separates the investigating phase from the trial; under the inquisitorial model, “decisions are based on evidence gathered unilaterally and in secret during the preliminary investigations by the investigating judge”).

<sup>26</sup> Cf. JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* (2005).

<sup>27</sup> For general descriptions of inquisitorial criminal justice systems, see JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (1969); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199 (2006).

<sup>28</sup> See Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 629 (2007); cf. HODGSON, *supra* note 26; STEPHEN ZAMORA, JOSÉ RAMÓN COSSÍO, LEONEL PEREZNIETO, JOSÉ ROLDÁN-XOPA, & DAVID LOPEZ, *MEXICAN LAW* 364-368 (2004).

<sup>29</sup> See Langer, *supra* note 28.

prosecutors hold no charging discretion, so every time the police or judges learn about a possible offense, they have to initiate criminal proceedings.<sup>30</sup>

At the verdict phase, the same judge who supervised the investigation phase remains in control of the case. At this point, the defendant and her attorney gain full access to the written dossier and can request the production of evidence.<sup>31</sup> The dossier is still predominantly written, and de facto remains secret from the public.<sup>32</sup> The resolution of factual disputes does not include a jury.

## **B. The Traditional Mexican Model**

In Mexico, the central distinguishing feature of the system relates to the expansive role of the public prosecutors. Mexican prosecutors at the state and federal levels oversee police, investigations and prosecutions.<sup>33</sup> These duties do not fall to the investigating judge, as they would in the traditional Latin American model.

In general, Mexican prosecutors face less competition from other institutions than do prosecutors in other systems in the Western hemisphere. Compared to prosecutors in the United States, Mexican prosecutors do not face an especially active or empowered defense bar. Compared to other Latin American prosecutors, the prosecutors in Mexico do not defer to judges in the overall conduct of investigations.<sup>34</sup>

Granted, at the trial stage, the prosecutorial role in the traditional Mexican model is more limited than during investigation. Judges in the trial stage render written decisions based on codes, applied to mostly written submissions of facts by prosecutor and defense counsel. The cases are decided in camera.<sup>35</sup> In Mexico, a prosecutor need only show “sufficient evidence of the crime,” not proof beyond a reasonable doubt.<sup>36</sup>

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<sup>30</sup> *Id.* at 629-30.

<sup>31</sup> *Id.* at 630.

<sup>32</sup> *Id.*

<sup>33</sup> See David Brennan, *Mexico's Twin Challenges: Reforming its Criminal Justice System and Combating Drug-Cartel Violence*, ORANGE COUNTY LAWYER, Jan. 2009 at 38; Miguel Sarre & Jan Perlin, *Mexico*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley, ed., 2d ed. 2007); David A. Shirk & Alejandra Rios Càzares, *Introduction: Reforming the Administration of Justice in Mexico*, in REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 1, 17-26 (Wayne A. Cornelius & David A. Shirk, eds. 2007).

<sup>34</sup> See LAWYERS' COMMITTEE, *supra* note 2; Carlos Rios Espinoza, *Redesigning Mexico's Criminal Procedure: The State's Turning Point*, 15 SW. J. L. & TRADE AM. 53, 57-58 (2008); Shirk & Càzares, *supra* note 33, at 17-26.

<sup>35</sup> See Espinoza, *supra* note 34, at 82; Leonard L. Cavise, *The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785 (2007); ZAMORA, COSSÍO, PEREZNIETO, ROLDÁN-XOPA, & LOPEZ, *supra* note 28, at 362-368.

<sup>36</sup> See Brennan, *supra* note 33; ZAMORA, COSSÍO, PEREZNIETO, ROLDÁN-XOPA, & LOPEZ, *supra* note 28, at 368.

The results that these institutions have achieved in Mexico have not been especially encouraging. Many human rights groups have chronicled the ills of Mexico's criminal justice system over the last two decades.<sup>37</sup> Some common themes appear in these reports: corruption of officials, impunity of criminals, and inaccurate evidence. These problems do not flow inevitably from the inquisitorial heritage of the Mexican system, but one can see the connection between the most common malfunctions of the system and the lack of a counterweight to prosecutors, particularly at the investigative stage.<sup>38</sup>

Take, for instance, the perennial problems of bribery and corruption. The prosecutors' dominant role in both investigation and adjudication leads some of them to slight personal liberty protections. The system, built around an assumption of professional competence of a government official, leaves prosecutors (and police, judges, customs officials, and prison administrators) susceptible to bribery and corruption.<sup>39</sup>

The Mexican system leaves far too many crimes undiscovered, with too many criminals untouched. There is widespread perception among Mexican citizens, confirmed in survey after survey, that the system actors do not reliably investigate reports of crimes. Even when investigations occur, the system ultimately produces few convictions.<sup>40</sup>

Some attribute this inefficiency to the mandatory prosecution rule, which prevents officials from prioritizing cases in a rational way, leading to an overloaded system that allows bribery and other corruption to determine which cases drop out of the system. Others suggest that the slow accumulation of proof in a primarily written system prevents efficient case processing, meaning that the cases take so long to wind through the system that prosecutors and judges lose their urgency by the time the cases emerge from the end of the assembly line.<sup>41</sup>

Finally, the Mexican system relies too often on inaccurate evidence and coerced testimony. The system offers defendants no jury trial and other due process protections designed to test the origins and accuracy of evidence. The presumption of regularity and professionalism allows cases to go forward without regular

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<sup>37</sup> See LAWYERS COMMITTEE, *supra* note 2; AMNESTY INTERNATIONAL, UNFAIR TRIALS: UNSAFE CONVICTIONS (March 2003) (AI Index AMR 41/007/2003); Espinoza, *supra* note 34, at 75; Special Report, *Presumed Guilty?: Criminal Justice and Human Rights in Mexico*, 24 FORDHAM INT'L L.J. 801 (2000-2001).

<sup>38</sup> Guillermo Zepeda Lecuona, *Criminal Investigation and the Subversion of the Principles of the Justice System in Mexico*, in REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 133 (Wayne A. Cornelius & David A. Shirk, eds. 2007).

<sup>39</sup> See Bradley, *supra* note 25.

<sup>40</sup> See AMNESTY INT'L USA, INJUSTICE AND IMPUNITY MEXICO'S FLAWED CRIMINAL JUSTICE SYSTEM (Jan. 2007), available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGAMR410012007>.

<sup>41</sup> See Brennan, *supra* note 33.



checks.<sup>42</sup> In Mexico, this opens the way for torture by police to obtain confessions, meaning that some convictions are based on coerced confessions and other false evidence.<sup>43</sup>

Why doesn't the defendant stop this from happening? Defense lawyers are generally precluded from confronting accusers and witnesses before the trial judge, leaving them with little opportunity to challenge corrupted evidence.<sup>44</sup> In addition, defense counsel (especially appointed public counsel) are too often limited in what they can offer any single client because of their large caseloads.<sup>45</sup>

### C. Mexican Code Revisions

While complaints about bribery, impunity, and coerced confessions have dogged the Mexican system for many years, some astonishing changes have appeared recently in Mexico's criminal courts.

The Mexican Congress amended the constitution in 2007 and 2008 to require each Mexican state to study some proposed reforms and to implement them within the state systems.<sup>46</sup> In March 2008, the Congress passed a new federal Criminal Procedure Code.<sup>47</sup> Ten states are further along, with Chihuahua and Oaxaca actually conducting oral trials on a pilot basis.<sup>48</sup>

Mexico designated Proderecho (a "rule of law entity") to coordinate reforms.<sup>49</sup> The government looked to the United States for help with reforms, so U.S. AID is funding Proderecho and several training programs for system actors. Funding came through the Meridá Initiative, named for the city in the Yucatán that was the location for 2007 talks between Presidents Calderón and Bush, leading to this funding agreement.<sup>50</sup>

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<sup>42</sup> See Carlos Rios Espinoza, *Redesigning Mexico's Criminal Procedure: The State's Turning Point*, 15 SW. J. L. & TRADE AM. 53, 66, 82 (2008).

<sup>43</sup> See LAWYERS COMMITTEE, *supra* note 2; AMNESTY INTERNATIONAL, *supra* note 37.

<sup>44</sup> AMNESTY INT'L USA, INJUSTICE AND IMPUNITY MEXICO'S FLAWED CRIMINAL JUSTICE SYSTEM, (Jan. 2007), available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGAMR410012007>.

<sup>45</sup> See Brennan, *supra* note 33.

<sup>46</sup> See USAID/Mexico's Role in the Merida Initiative: Hearing Before the Subcomm. On State, Foreign Operations, and Related Programs of the H. Comm. on Appropriations, 111<sup>th</sup> Cong. (2009) (statement of Roger D. Garner, USAID Mission Director to Mexico).

<sup>47</sup> See Steven E. Hendrix, *The Merida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence*, 5 LOY. U. CHI. INT'L L. REV. 107, 116 (2007-08).

<sup>48</sup> See Hendrix, *supra* note 46, at 116.

<sup>49</sup> See Brennan, *supra* note 33; Hendrix, *supra* note 46, at 109-110.

<sup>50</sup> See Cavise, *supra* note 35; COLLEEN W. COOK ET AL., Congressional Research Service, *Merida Initiative: Proposed Anticrime and Counterdrug Assistance for Mexico and Central America*, CRS Report for Congress (Mar. 18, 2008).

The first reform projects were based in the states of Chihuahua, Oaxaca, and Nuevo Leon. The emphasis there was on developing advocacy skills for prosecutors and defense attorneys to use at oral proceedings during the trial stage. After suitable training, lawyers on both sides are now able to question accusers, witnesses, experts, and others. They engage in oral advocacy on the admissibility of evidence, guilt, and sentencing. These reforms emphasize strong educational programs not only for the advocates, but also for judges, court personnel, police and investigators.<sup>51</sup>

Most of Mexico's remaining states are reviewing and considering these reforms to determine whether to follow suit. The next code revisions and training programs are targeted for Baja California Norte.<sup>52</sup> BCN's new criminal procedure code is modeled after Chihuahua's; it contains over 425 new articles that regulate the conduct of police, prosecutors, investigators, and courts. BCN judges are working with Orange County Superior Court to learn about court administration.<sup>53</sup>

#### **D. Framing the Code Revisions**

It is possible to frame these collected reforms as a movement away from an inquisitorial system, toward the adversarial model of criminal justice associated with the United Kingdom and the United States. Some of these reforms do indeed move Mexico away from a written procedure, toward a system that relies more on oral presentation of evidence in a public forum. They transform the role of defense counsel, giving the attorney more legal tools, such as due process rights that offer a basis for challenging the legitimacy of the investigation and prosecution.

Such a framing of the reform movement might explain why the United States government has funded and endorsed the use of familiar institutions in Mexico. This framing, however, misses just as much as it reveals. It takes a convoluted account of inquisitorial justice to explain why moves designed to involve judges more heavily in investigations should be considered a move in the direction of adversarial justice.

The role changes for institutional actors in Mexico bring the system closer to other Latin American systems that have crafted a distinctive "accusatorial" system, a model that alters several key features of the classic inquisitorial system without fully embracing the common law model. The inspiration for procedural reform in Mexico may be arriving from the south, at least as much as from the north.<sup>54</sup>

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<sup>51</sup> See Brennan, *supra* note 33.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See Langer, *supra* note 28 (suggesting that Mexico reflects "triangular diffusion" of procedural concepts, starting from periphery, moving to center of developed nations for funding and endorsement, and back to periphery).

The reworking of institutional roles in Mexican criminal justice can best be understood as a balance-of-power operation—creating a competition among the actors where monopoly power once existed—not just an endorsement of a particular adversarial method of resolving factual disputes. A purely adversarial reform in Mexico would build a system around an oral trial, with evidence presented by two parties of equal power and opposite interests, decided by judges and juries who remain neutral between those parties. What is happening in Mexico, however, goes beyond the trial. The new codes limit the central importance of the prosecutor during the investigative phase. They involve the public in the investigation and trial phases, by creating more open hearings and open records. They shift more responsibility into the hands of defense attorneys.<sup>55</sup>

While judges lose some authority over the presentation of evidence in the trial phase, they counterbalance the prosecutor during the investigative phase and retain the power to evaluate evidence at trial and to sentence offenders. The new codes enhance the distinction between the perspective and function of the prosecutor and the judge, increasing the odds that these two actors will in fact compete with one another more often.

On the whole, these reforms in Mexico make the field more crowded. They offer more actors the power to influence the outcome at more stages of the criminal process. In this sense, Mexico is moving in the opposite direction from criminal justice systems in the United States, where competition for the administrative power of the prosecutor becomes more slight with each generation.<sup>56</sup>

### **III. CAUSE-EFFECT RELATIONSHIP BETWEEN DRUG VIOLENCE AND PROCEDURAL REFORMS IN MEXICO**

The fact that Mexico has embarked on transformative procedural changes at the very time that drug violence is testing the legitimacy of government raises deep questions about the connection between law and the society it serves. Did the violence cause the procedural change? Let's consider two hypotheses, each offering a different causation story.

First, we will consider the “inevitability hypothesis.” According to this view, procedural reform would have happened with or without the drug violence, and the fact that they occurred at the same moment is simply a coincidence. Second, we take up the “violence-as-causation” hypothesis. According to this account, the extraordinary drug violence of 2007 made possible a sweeping set of procedural

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<sup>55</sup> Cf. Shirk & Càzares, *supra* note 33, at 17-26.

<sup>56</sup> See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005); William T. Pizzi, *Sentencing in the US: An Inquisitorial Soul in an Adversarial Body*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 65 (John Jackson, Máximo Langer & Peter Tillers eds., 2008).

changes. The violence was necessary to motivate actors to embrace major change. The initiative against drug cartels and the effort to revamp criminal justice were from the beginning designed as companions, joint objectives to promote a rule of law that the Mexican public would accept as legitimate.

### **A. The Inevitability Hypothesis**

Taking in the broad sweep of Mexican history, perhaps the criminal code revisions are happening now because of larger changes in the social structure. In this view, the appearance of vivid crime problems is only a distraction; these procedural changes were inevitable.

It is commonplace among lawyers and scholars based in accusatorial systems to note that the inquisitorial systems are based on a relationship of trust between citizens and government agents. As a society becomes less homogenous, it will embrace more explicit declarations of rights and insist on more active checks on official power rather than relying on professionalism and tradition. In this telling, accusatorial justice inevitably arrives in the wake of democracy and social diversity.<sup>57</sup> The loss of the PRI monopoly on political power with the election of Vicente Fox in 2000 signaled the arrival of a more pluralistic and democratically competitive nation. It was only a matter of time before the justice system, with its obvious flaws, reflected this larger social change.

Máximo Langer offers a similar account of procedural reforms in other Latin American countries. Over the last 15 years, 14 Latin American countries have introduced new criminal procedure codes. An active network of Latin American lawyers and other experts drafted and implemented the codes. They framed the changes as a conversion from inquisitorial to accusatorial procedure. The network experts emphasized that this was a regional trend, and thus created a “code cascade effect.” Supporters of reforms often had different political orientations, with different priorities for the problems that accusatorial reforms should address. Legislatures considered the reforms to be technical, deriving from legal expert committees. Mostly they were adopted without much heated debate.<sup>58</sup>

In the end, countries embraced them when governance and public debate became more democratically competitive. Mexico was slow to move to embrace accusatorial justice because it slower than Argentina and other Latin American nations to develop a democratically competitive political culture.

Granting the explanatory power of this view of the connection between legal institutions and the political pluralism of a society, it all seemed to operate too promptly in Mexico. If Vicente Fox was elected in 2000, was an accusatorial justice system truly inevitable by 2008, when the Congress amended the constitution?

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<sup>57</sup> See Bradley, *supra* note 25; Shirk & Càzares, *supra* note 33.

<sup>58</sup> See Langer, *supra* note 28.

While these social dynamics may have created the conditions that were favorable both for unexpected national election results and unprecedented procedural changes, perhaps other factors can help explain their arrival so close in time.

## **B. Violence-as-Causation Hypothesis**

This broad-brush talk of social and political conditions could strike some as missing the obvious and immediate connections between two major events, one following immediately after the other. Current crime conditions played a larger part in Mexico than in other Latin American procedural reforms.

Perhaps the Calderón government thought of the offensive against drug cartels and the revamping of the criminal justice systems as two parts of a comprehensive strategy to promote order and the rule of law. The level of violence after the 2006 elections produced a clear need for the government to take visible action to fix a broken system. The use of an accusatorial framework was a way to signal profound change internally, and to encourage help and endorsement from external sources.

Externally, the embrace of the “accusatorial” label makes the Mexican procedural changes accessible and attractive to funding sources in the United States.<sup>59</sup> The USAID funding targeted both the law enforcement functions and the “rule of law” functions.<sup>60</sup> Funding goes to civilian agencies for technical advice and training to strengthen institutions of justice: vetting for new police force, case management software to track investigations through trial, new offices of citizen complaints and professional responsibility, witness protection programs.<sup>61</sup>

At the same time, the accusatorial packaging of these reforms appealed to a broader external network of Latin American lawyers, judges, and activists, who aimed for more active defense and prosecution involvement in testing of evidence at trial, and more discretion for prosecutors and judges to prioritize among cases. The language of a party-centered adversarial criminal process long ago arrived in Mexico from the south, not from the north.

Criminal code revisions could also serve some useful internal functions for the Calderón government. First, a more accusatorial process seemed the well-targeted answer for the problem of system capacity. Tougher law enforcement must operate together with a justice system that can more quickly and broadly prosecute and punish criminals. Increased arrests must be matched by increased case loads to avoid the appearance of criminal impunity. The accusatorial system, with its emphasis on prosecutorial discretion and plea bargaining, offers a way to expand

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<sup>59</sup> Editorial, *Mexico’s New Justice: A Proposed Overhaul of the Country’s Court System is Good News for its People and the U.S.*, LOS ANGELES TIMES, March 7, 2008, at 22.

<sup>60</sup> See Hendrix, *supra* note 46.

<sup>61</sup> *Id.*

the reach of the system. For instance, in first week of oral trials in Chihuahua, 70% of 48 reviewed cases were resolved through resolution alternatives permitted under the code. Previously these cases would have taken months or a few years to resolve.<sup>62</sup>

Accusatorial reforms could also target the loss of public confidence in the system. Mexicans long ago lost faith in their judicial authorities.<sup>63</sup> Ninety percent of those who have been victims of a crime never reported the episode to the authorities, convinced it would do no good.<sup>64</sup> Less than 4 out of 100 people taken into custody are ever found guilty.<sup>65</sup> A system that depends more on lay adjudicators and public oral trials could demonstrate to its citizens that the system answers to their priorities.

The legitimacy of government in the eyes of the public—including those who are the targets of government punishments—is a principal goal of procedure. In the United States, years of effort to promote the concept of “community policing” and the more recent efforts to create “community prosecution” have aimed to improve broader public perceptions that the system promotes public safety while respecting local priorities and values.<sup>66</sup> Legitimacy in the eyes of the community turns on a perception that parties can speak and be heard, that officials treat parties equally without favoritism.<sup>67</sup>

Will the ongoing revisions to Mexican criminal codes create more public confidence and legitimize the system in their eyes? This is not a question one can answer in the abstract. While the efficiencies of the an accusatorial system may create a more timely system that appears more responsive to public concerns, the tradition of prosecutorial discretion opens up the danger of unequal or unexplained treatment of cases. The empowerment of defense counsel to confront witnesses and test prosecutor case quality, but only if the lawyer seizes a fleeting moment at trial. Could not a written record offer more reliable chances to point out inconsistencies and weaknesses?

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<sup>62</sup> *Id.*

<sup>63</sup> See Jennifer L. Johnson, *When the Poor Police Themselves: Public Insecurity and Extralegal Criminal-Justice Administration in Mexico*, in LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 167-185 (Tom R. Tyler, ed. 2007).

<sup>64</sup> See Lacey, *supra* note 6.

<sup>65</sup> See Brennan, *supra* note 33; Lacey, *supra* note 6.

<sup>66</sup> See Walter J. Dickey & Peggy A. McGarry, *The Search for Justice and Safety Through Community Engagement: Community Justice and Community Prosecution*, 42 IDAHO L. REV. 313 (2006); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1524-25 (2002); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005).

<sup>67</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 Marq. L. Rev. 651 (2009); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

In some ways, the inquisitorial system—with its expectation that judges explain all their decisions in writing—might promote public confidence more easily than an accusatorial system.<sup>68</sup> Certainly a U.S.-style system that relies overwhelmingly on guilty pleas obtained from defendants who would pay an enormous penalty for going to trial is far from ideal as a way to develop and test a full and accurate factual record.

While there is no inherent advantage in the package of new procedures that Mexico is now embracing, the newness of these procedures offers an advantage. Just as it was important to replace police officers in Mexico—perceived as corrupt at every level—with more widely-trusted soldiers from the armed forces, so it is important to replace an older, distrusted judicial system with something that is perceived as a clean sweep. In the long run, replacement of police forces with armed forces might create more problems than it solves, but the move does reset an intolerable status quo. The same might be said of criminal code revisions that create more charging discretion and open the door for more plea bargaining.

## **CONCLUSION: FEDERALISM AND THE LEGITIMACY QUESTION IN MEXICO**

There is an encouraging and intriguing aspect of the foundational procedural changes happening in activities in Mexico: it will allow for some direct comparisons. Because the 31 Mexican states will all eventually try their own reform packages, we can compare results among states. The reforms have started in three states and will spread to others quickly. If one Mexican state employs jury trials and others do not, we may very well be able to notice any effects on crime rates and legitimacy of the system.

Furthermore, such comparisons are likely to happen in Mexico, because of the involvement of U.S. experts and funding sources for training purposes. Many will be watching to see whether the Mexican states start to operate, for better and for worse, more like the state-level systems in the U.S.

Finally, we must keep ourselves open to the discouraging possibility that the comparisons will not matter. What if procedural variety all leads to the same unhappy results in crime control and legitimate outcomes? As lawyers and legal scholars, we must remain humble enough to say that when this many people are dying, it may not matter whether the system is accusatorial or inquisitorial.

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<sup>68</sup> See Michael Tonry, *Preface*, in *LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 3* (Tom R. Tyler, ed. 2007).