Access to the Legal Systems of the Americas: Informal Processes

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"Secretary: Fill in these papers, this is how to begin. Your name is a number, your story is a case, your need a request, your hopes will be filed. Come back next week."

Gian-Carlo Menotti, The Consul
Act I, Scene 2

I. Introduction

A. Access to What Legal System?

The arguments justifying most legal systems assume that citizens will have access to agencies and courts to seek services or to have wrongs righted. It is almost an axiom that one who has a right must have a remedy. A system in which some people or some groups were formally denied access would violate widely professed norms of equality. To be denied access openly is to be declared a nonperson or an enemy of the state. Whatever the accepted theory, the situation is different in the daily operation of all legal systems. Theories of justice that presume access almost never consider the complicated process involving discretion, power to command and bargaining that constitutes the very real but informal legal process that operates in most societies. Access to this side of the legal system probably is rationed everywhere, and one's share of justice is related to one's status, wealth or both in repressive totalitarian, revolutionary socialist and liberal democratic societies alike. Some nations do a better job of distributing benefits than others, but people will have to wait in line in Santiago, Asuncion, Havana, Chicago or Toronto.

The distinction between formal and informal legal processes is not entirely satisfactory because one shades into the other. However, in most societies, if not all, most problems are solved by some kind of a bargain in

which the formal legal process as it is described in statutes and constitutions plays but an indirect role. Two or more citizens or groups of citizens will reach an agreement to resolve their dispute without involving the legal system; legal officials will negotiate with those they are supposed to control for some measure of compliance with the law or for some benefit to the official. Of course, the latter transaction may take the form of a "gift," but usually we do not have to look far to find the implicit obligation to reciprocate. A critical element in anyone's bargaining power is the view held by the person being bargained with of the alternatives to reaching agreement. You cannot ignore my interests if the failure to satisfy me will prompt a response that you will find more distasteful than meeting my terms for a settlement. One of those distasteful actions might be the use of the formal legal process.

If we survey what I (say, as a private citizen with a business problem) might be able to do to punish you (say, an elected official) for not reaching an agreement with me, we may see better some of the roles of law and access. Borrowing Hirschman's terms,[1] we can say that I can exercise either "exit" or "voice" if I am unhappy with your behavior. I may be able to leave and no longer be in a relationship with you. My influence on you is significantly limited if I cannot leave without a high cost to myself (my threat is not credible), or if you do not care if I leave (I have no threat to make). For example, if we do not reach an agreement, I may withdraw my political support and no longer vote for you. But this assumes that there are elections, or some functional equivalent, and that my vote matters to you. If I am the head of a residents' committee of a large community and I can deliver the votes of my followers to your political party, my "vote" may matter more than that of any isolated individual. Rather than exit, I may attempt to harm you

or your family physically or I may yell insults at you. However, usually the powerful are well protected from individual aggression by police and high fences. I am more likely to complain to some authority that purports to be your superior and ask that he, she or it punish you or order you to act. I may call on supernatural forces, but this will influence your judgments in the bargaining process only if you believe that there is a real risk that God or the gods will intervene. I may turn to your superior if I can find one. If you are a local official, I may appeal to a minister or the president. Or I may appeal to the courts which, in most nations, claim to exercise power over all citizens by an equal application of the rules of law. If, in fact, I am unable to present my case to your superior, or if your nominal superior has no real power over you, I lack access and bargaining power. You are then free to ignore me or to put me at a disadvantage.

These observations about bargaining are fairly simple if one begins by looking at people with problems and then asks what they can do about them. Some might object that such a focus on individuals obscures the vital importance of the social and economic systems and relationships of dominance and dependence. The choices open to an individual may be severely restricted, but few people in any society lack any choice as to how they will attempt to solve their problems. Moreover, a careful examination of the real options open to the less privileged members of a society ought to prompt an examination of who might oppose reforms to widen those choices. This, of course, would bring us back to questions about the distribution of power in the society.

These observations about bargaining power are also important for the study of access to the legal system. If the formal legal system plays its greatest role indirectly as an unpleasant alternative to avoiding disputes or resolving them by compromise--as seems likely in most societies--people who lack access

to the formal process will be at a great disadvantage unless they can find some other unpleasant alternative with which to threaten those with whom they deal. And we must not forget that there are other unpleasant alternatives that can form the foundation of bargaining power. Moreover, if potential access to a legal remedy is to be a factor in bargaining, clearly it is not enough merely to be allowed in the government office or courtroom. There has to be some chance of winning in the official forum--in the language of nuclear politics, the deterrent must be credible. We can underscore the importance of the nature of the access necessary to be meaningful by considering a situation in a hypothetical country where, let us say, the formal rules of law state that certain valuable rights are to be given to anyone applying for them who meets certain fairly objective requirements. Suppose further that the administrative officers charged with providing these rights give them only to members of a privileged elite. The courts engage in legalistic rationalization of their refusal to order the rights given to others. Both the administrators and judges are controlled by the elite. Assume also that all those seeking these rights who are not members of the elite, can afford to pay able lawyers who are available and willing to make impassioned and brilliant legal arguments. These arguments are, however, doomed to fail since the elite controls the formal process. In this situation, we could say that those who sought the rights but lacked the approval of the powerful, had complete access to the formal legal system and no access whatsoever to the informal (and real) legal process as it operated. Put another way, if the reality of a legal system is bribery and influence, one will not reform it by providing more lawyers to make technical arguments.[2]

B. Of Gringos and the Home of Watergate as a Banana Republic

It is necessary to digress at this point. We must deal openly with a major problem that arises when a North American writer deals with certain

features of Latin American societies. There are too many articles where an idealized picture of law in the United States is compared with informal practices in a Latin American country to the disadvantage of that nation.[3] While some parts of what we have called the informal process are unobjectionable, others include bribery, corruption, favoritism and other unsavory elements. Few would be proud of such things; most would want to stress the ways in which their legal system carried out its high ideals. Unfortunately, a student of access cannot afford this luxury.

Only a North American who had not read the newspaper for the last five or ten years could look down on Latin American legal systems as inferior to his own. Although most people in the United States are adept at repressing the memory, President Nixon assured his countrymen that he was not a crook and had to resign to avoid impeachment when it became clear that he was just that. His top aides accepted illegal campaign contributions from the largest corporations, all of which were subject to government regulation or held government contracts to supply weapons or other items to the government. Vice President Spiro Agnew apparently sold the State of of Maryland to the highest bidder while he was its Governor. Moreover, Nixon and Agnew escaped prison for their crimes while a poor black who robs a gasoline station is likely to be sent to a horrible prison for five or ten years. Many large cities in the United States are, and long have been, hopelessly corrupt.[4] Those who control gambling, prostitution and drugs are all but immune from prosecution. In many states, public works contracts are awarded to contractors who will "kick back" part of their profit to the official who represents the state. Moreover, the dark side of United States history includes the political bosses who controlled the big city machines and the spoils system whereby government offices (including judgeships) were rewards for faithful

service. The treatment of Blacks and Native Americans (Indians), and, indeed, the "relocation" of Japanese-Americans in World War II, are as much a part of our history as the Declaration of Independence or the Bill of Rights.

It is futile to try to classify the legal system of one nation as "clean" and that of another as "corrupt." Corruption, discrimination on the basis of social class, and the burdens of mindless bureaucracy--the unsavory parts of informal legal processes--are problems that plague governments in all societies to some degree. The privileged classes in the Soviet Union command far more of the benefits offered by their government than do workers and peasants who are left to cope with an infamous bureaucracy; the Chinese stage great "cultural revolutions" to attack bureaucracy and status differences; Fidel Castro finds it necessary to drive through Cuba in a jeep, often arriving without warning, responding to complaints and giving orders that break through channels to get something done. Of course, one society may deal with these problems more effectively than another. However, an attempt to explain the unpleasant side of informal process in terms of Spanish or Portuguese culture is likely to be successful only if we are to assume that China, the Soviet Union and the United States were all settled primarily by the Spanish and the Portuguese.

In summary, what we learn by studying problems of access to the real day-to-day legal process of, say, Brazil is likely to teach us something about the informal but real legal process in Chicago--it should, at the very least, provide important questions to be asked. These informal legal processes probably serve functions common to all legal systems.

C. The Plan of the Article

There is relatively little written in English, Spanish or Portuguese about the day-to-day operation of governmental agencies, including the courts, in Latin America or in the United States. In this paper, I will review three

bodies of literature, seeking some of the building blocks for a theory about access to the actual legal process in operation. First, I will consider studies of dispute resolution process in Indian communities done by anthropologists. Next I will review some of the studies of the informal legal processes that have emerged from squatter settlements in large Latin American cities. Finally, I will turn to a few studies that discuss informal processes in some Latin American legal systems. At the end, not surprisingly, I will offer some conclusions.

II. Anthropologists and Law in Indian Communities of Latin America that Exist on the Margins of the National Legal System

Anthropologists who are interested in law have written primarily about people living in non-industrial societies that survive in Africa and Asia rather than in Latin America. The notable exceptions--Laura Nader,[5] Jane Collier[6] and the Hunts[7]--have turned their attention to Indian communities existing in one general area in southern Mexico. We must, therefore, be cautious in transporting generalizations from their work to Indians in Brazil, Bolivia, Peru, the United States or other nations in the Americas. Yet, as we shall see, much of what they report raises interesting questions about how the national law of any country relates to groups within that society that do not share all of the dominant culture. While most legal systems claim ultimate authority over all those living within their territory, anthropologists insist that there are multiple legal systems in any society that compete for influence and control. In a federal system, such as is found in several of the Americas, the problem is that much more complicated. This pluralism of formal and informal, official and unofficial, and legitimate and illegitimate legal systems raises opportunities for forum-shopping and manipulation.

Both Laura Nader's Zapotec community and Jane Collier's Zinacantecos resolve disputes among members of their own groups through relatively informal legal systems largely resting on the pressures and sanctions of continuing relationships. The Zapotec presidente "makes the balance" after allowing the parties wide range to express their feelings and to air all of their grievances. He draws on his knowledge of the parties and does not confine himself to an issue before the court. He uses the opportunity to reaffirm the shared values of the Zapotec about such things as the proper roles of husband and wife, father and son, neighbors, and the like. Nader describes the process as "compromise arrived at by adjudication or, in some cases, adjudication based on compromise." [8] She says that the "presidente's role is that of mediator, adjudicator, group therapist. His principal function seems to be to listen--often asking questions to clear up contradictions." [9] The Zinacanteco presidente may be less directive, but he works toward a compromise settlement such that no anger will remain in the hearts of the parties to the dispute. His court, too, talks out the problem with the parties at great length.

There is much to admire in both systems. Laura Nader, for example, has said,

> . . . [T]he single most important difference between the Zapotec legal system of southern Mexico and the American legal system (from the point of view of a middle-class consumer) is that Zapotecs have access to, know how to use access to, the legal system. In the United States, most citizens do not have access to the legal system, either because they are ignorant of the workings of the system or because they cannot afford the professional (lawyer) who would have knowledge of the workings of the system. [10]

Indeed, some law professors in the United States have proposed creating systems of this general type in communities and neighborhoods in this country.[11] Others, however, have questioned whether such systems could be built absent

many of the other features in Zapotec or Zinacanteco society.[12] Zapotecs and Zinacantecos have few disputes with the General Motors Acceptance Corporation or similar modern bureaucracies. They live in relatively self-contained communities which are isolated but economically viable. They seem to want relatively little from the Mexican national or state governments. Most importantly these people know each other and value their reputations since they are unlikely to leave.

Nader and Collier's studies suggest that some people do not need access to the formal legal system to solve some problems because they have something better. Perhaps the important thing is to avoid damaging such informal systems in misguided efforts at modernization. Indeed, what lawyers in more industrialized societies can learn from these community-based courts says much about the disadvantages of procedures run by officials removed from the parties, governed by rules that are not understood, proceeding in terms of normative categories that ill fit the real strains on the relationships between the parties, and awarding remedies that do little but prompt further grievances. Clearly, it would not hurt either common law or civil law trained lawyers to think about why anyone would want access to a system that might be exceedingly rational but almost irrelevant to his or her purposes.

While both the Zapotecs and Zinacantecos are relatively self-contained communities, they do live in Mexico. Sometimes the authorities in the state or national capitals act in ways that injure the Indians' interests. Jane Collier notes that the Pan American Highway was put through the Zinacanteco's area without consultation, and it serves their interests poorly. The Zinacantecos do have "foreign relations" with the institutions of the Mexican national and state governments--formally, of course, the Zinacantecos are technically Mexican citizens but in many ways really they are not.

Mexican law is alien to them and mainly serves as a tool for manipulation in their political fights. One faction can strive to have the leaders of another faction arrested as a critical moment, for example. Zinacanteco leaders have learned to make skillfully phrased arguments that appeal both to the values of conservative or liberal Mexicans, and these leaders are, at times, able to prompt action from the state and national governments. Collier points out that a Zinacanteco can choose to take a problem to a village elder, to the presidente, or to the Mexican officials. Each level offers very different remedies. The more one moves toward the nationally prescribed patterns of dispute resolution, the more likely one is to leave the realm of conciliation and mediation and to seek awards where one wins what the other loses. Nader has reported some of Forman's unpublished work in an Ecuadorian village:

> She separates into categories cases involving people who have multiplex, ongoing relationships and who are disputing specific kinds of issues. She argues that different issues generate the strategies employed by the disputants regardless of type of relationship, and that the apparently desired outcomes were also different. The non-compromise set of cases involved land and other important property, and prestige and access to power and influence within the community. All were cases dealing with scarce resources. Forman points out that there is no reason to believe that people involved in these zero-sum strategies fail to recognize the potential, or actual, damage of their strategies to their relationships with their adversaries . . . In situations in which the object of the dispute is most highly valued, the social relationship will be sacrificed. [13]

We can speculate that the threat of using these higher zero-sum levels of the available legal systems has an important influence on dispute avoidance.

Eva and Robert Hunt did field work in roughly the same general area of southern Mexico as did Nader and Collier. They, however, focused their research not on one community but on "the interlocking of units in the local-regional system." [14] What happens when the Indians (those who do not speak

Spanish as their first language) come into contact with the Mexican legal system staffed by Ladinos or Mestizos (those who speak Spanish as a first language)? There are problems of translation of both language and culture. Indians and officials tend to stereotype each other with negative characteristics. For example, the Mexican legal official sees the Indians as having no respect for the truth and as always trying to manipulate him. The Indian sees the Mexican as foolishly refusing to hear the truth since he says he does not believe in witchcraft. The Hunts report that the Mexican courts tend to apply their norms strictly and in a mechanical fashion to the Indians, while these courts generally are far more flexible in cases involving Mestizos. The Indians see these legal agencies as expensive since they are located in the cities far from where the Indians live, and the agencies are open only during the hours when the Indians normally would be working. The norms are alien. The Mexican courts tend to overpunish by levying heavy fines when all the plaintiffs expect is public censure. The Mexican courts demand that fines be paid in cash and they will laugh at offers of sacks of corn or labor. As a result, the Indians tend to stay away from these courts. The Hunts call the Mexican courts a "conservative interface institution" [15] because they tend to support the Indians' traditional means of dispute resolution by offering a much less attractive alternative. Collier says that Zinacanteco officials change their norms just enough so that the likely outcomes in the Mexican courts remain less attractive than the outcomes in the traditional settlement process.

Indians living as members of an internal colony within their own country may be an extreme case, but they are not a unique one. To some extent their situation serves to highlight what we might expect to find elsewhere. For example, I would expect to discover common elements in these reports by anthropologists and what I might find if I studied the attempts of

Spanish-speaking migrant farm laborers to deal with legal institutions in the State of Wisconsin or the attempts of poor people with but a primary school education to deal with social workers in a government agency in Columbus, Ohio or Santiago, Chile. One lesson of these studies is the difficulty of translation between cultures. Another lesson is that people will attempt to cope with a legal institution as best they can with the means available to them. Jane Collier argues that to understand what is going on, we must view law both as a language and as a procedure that people manipulate in order to try to control their environment. Obviously, it will be more difficult when it is a completely foreign language. The Mexican judge may be seeking what he sees as the truth, but the Indian in his court is seeking a result he wants badly enough to suffer all the costs of appearing before an alien legal institution.

There are some other, more specific lessons for a student of access in these "foreign affairs" problems of Indians in Mexico. The structure of the legal system itself tends to discourage these citizens from using it. Factors of distance and convenience are important. Some agencies are found only in the large towns in a region, and others are located in the capital of the country. The time and cost of transportation becomes a barrier because the citizen must go to the agency in most instances; few agencies come to the citizen. Even office hours are important. High status people can leave their employment at a relatively low cost, but lower status people may lose a day's wages or even their job if they go to a government office or courtroom. There may be problems of translation. Legal systems are worlds of the written word, and this rewards literacy in the language in which the proceedings are conducted. Cultural difference may increase the apparent unreality and abstractness of much legal action. Abstractness is not usually prized by

anyone other than a lawyer. Yet legal personnel may be incapable of dealing with a case presented by a poor Indian except by an impersonal application of high abstractions. The officials cannot mediate between parties anyway since they would not trust the officials to understand the situation involved. Legal personnel are unlikely to be able to educate the parties to see their own self-interest because the officials themselves can seldom take the time necessary to fully understand an entire transaction that spreads over the years. Legal personnel cannot appeal to common values because they hold few values in common with the people before them. Moreover, the application of formal norms usually disposes of the case quickly, and, as far as the official is concerned, the job is done. Finally, problems of status and pride may be critical as well. The Indian who deals with the Mexican official may have to come as a supplicant begging for favors. We might expect that a person with a problem would try to avoid such encounters or would take great glee in trying to manipulate the official with pretensions to superiority.

III. Studies of Squatter Settlements in Large Latin American Cities

There is a vast literature on the favelas, barrios, campamentos, and other settlements of squatters in or near the many large Latin American cities. Only a small number of these studies are relevant to our concern with access to the legal process.[16] Most are single case studies of a settlement selected because of its interesting systems for internal dispute settlement and "foreign affairs" rather than for representativeness. We must be aware that the "pictures described may be accurate, subtle and insightful, but the cases involved may represent atypical rather than typical situations. There is always the possibility that the most highly visible, vivid, poignant or arresting examples . . . are exceptions rather than the rule."[17]

The people living in the settlements studied solve internal disputes much as did the Indian communities described by the anthropologists--family, neighborhood and property disputes are handled by some mixture of therapy, mediation and the imposition of shared norms. Among the reasons for creation of such arrangements are the following: There is little privacy and security behind the thin walls, and disputes may have a tendency to spill over and involve others. There is a need to maintain the ability to live together for it is hard to solve problems by leaving, since for most residents there is nowhere else to go. The formal legal process is too distant and expensive to use for these problems. The group had to work together to survive when it first invaded the land. They had to build houses and find some way to provide essential community services in the face of a formal legal system that saw them as trespassers with no right to exist as a community. Such an outside threat may promote internal unity.

One of the key differences between these settlements and the Indian communities is the impact of the larger society. The barrio is not nearly as self-contained as Zapotec or Zinacanteco society. Since the barrio is built on another's land, the national legal system could at any time attempt to evict the settlers and to destroy what they have built. Internal disputes and violence could call attention to their existence and provide a pretext for turning a bulldozer on their efforts. Moreover, the residents must look outside for work and for some essential services needed to live in a modern industrial society. Thus, the problem of foreign affairs is vital to these settlers.

The settlement is likely to form a residents' association--there are likely to be leaders available among those who organized the original invasion that created the settlement. The leaders, in turn, must deal with important

problems. They must ward off attempts to destroy the settlement, as I have said, and they may turn to a political leader or a party for protection, offering in exchange their votes or support. One can draw important parallels to the role of the political boss and the machine in aiding the immigrant communities in the large cities of the United States fifty to a hundred years ago.[18] On the other hand, the settlement may survive because no one notices it at first, or those responsible for evictions have other things to do. If enough people are involved in the invasion or the settlement has lasted long enough for roots to be put down, the government runs the risk of having to use real force to move the residents. If some are killed or seriously injured, left wing political parties or groups may gain an issue with which to harass the government.

If the settlement survives, one of the first problems is likely to be delinquency within the area. The residents may feel vulnerable to attacks on person and property. The vigilance committee or resident's patrol is a common solution. Another is a kind of bargain with residents who are wanted by the police for crimes committed elsewhere: These people are told to practice their trade elsewhere or their neighbors will lead the police to them. As the settlement acquires some permanence, it is in the interest of the police to patrol the area and provide some protection to the residents. The police often are concerned that vigilance committees will spark violence. The police will not want the area to provide a safe haven from which criminals could go forth to steal elsewhere; they have an interest in knowing who lives there and what they do. Moreover, the police may be able to offer their services in a bargain for information.

Other critical problems for residents' associations are the provision of goods and services such as building materials and tools, water and sewer,

electricity and transportation. The government may supply some of these. Even the upper classes in a society have an interest in the health of the poor; viruses and bacteria do not respect class lines. Often the residents' problem is to gain some of what is available to some but not all settlements, and here some political leader may be able to do the necessary favors. Janice Perlman says:

> Local favela groups . . . have strong ties to the outside. It is these ties that allow the Residents' Association to bargain for benefits for their community. . . . Even sports clubs and social organizations are closely linked to, and often funded by patrons interested in building up a political constituency in the favela.
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> It is not only the funding that is important, but also the contacts to be made with "upper-sector" sponsors. Such contacts are often invaluable for finding a better job or getting medical or educational advantages. And more often than not, relationship is reciprocal: if, for example, the "sponsor" has a friend or relative running for local elective office, he can count on a large ready-made constituency.[19]

Individuals who seek benefits from governmental agencies, often face the problem of documents. For example, they may lack a birth certificate needed to get identification cards and labor permits which unlock jobs paying the minimum wage, health care and disability care. Political leaders and patrons may be able to help solve such problems. (On the other hand, identity cards and the benefits they bring may come at a price. One comes to the attention of the police, and a poor resident's economic activity may be at the margins of the law. One may run a higher risk of being drafted into military service. Access by the citizen to the government may also mean access of the government to him.)

Not all squatter settlements have enough access or political connections to solve their problems. In all nations some of the urban poor are left outside

the legal and political system. Some settlements never succeed in organizing sufficiently to take more than minimal action; others lack a political protector. An often cited report of a case where a North American professor was able to give help to the small settlement in Venezuela that she was studying will serve to illustrate these problems. [20]

This settlement, La Laja, is a barrio in a town included in the planning of a large development by the Corporación Venezolana de Guayana (CVG). It is possible that at the outset of the story the planners did not know that it existed. The CVG ran many activities near La Laja, but the offices that dealt with planning were 350 miles away in Caracas. The political party that was most influential in the national planning agency had but a weak base in the area that included La Laja so there was no patron to offer help. La Laja, itself, had never had a well-functioning organization representing the entire community.

The residents of La Laja did their bathing and laundry in a nearby river. One day construction machinery arrived at the scene to install a large sewer outlet at a point where it would contaminate the beach used by the residents. Representatives of La Laja were told by a local official of the Ministry of Health that he had no control over the project. A delegation went to the public audience of the Governor of the State. Dr. Lisa Redfield Peattie, a North American professor who lived near La Laja, was added to the delegation because of her status as "La Profesora," and because she had a jeep. The delegation was late, but it was seen because of her presence. They were told that the matter would be investigated.

Dr. Peattie sought out the Engineer in Charge of the project, spending a great deal of time and money in the effort to find him. His answer to her complaint was unsatisfactory, and she reported this to residents at La Laja.

Some of them then sabotaged the construction machinery by pouring sand into the carburetors of the engines. Dr. Peattie went to a conference of North American economists who were consulting on the development project. The conference was held in Caracas. In response to questions about the sabotage which was being discussed, she told a Director of the American Planning Consultant Group her story. He then used it in a speech, much to the annoyance of the top Venezuelan officials present. After this, another delegation from La Laja called on the Engineer in Charge. It was first received by a junior official who said he would have to investigate. Dr. Peattie then saw the Engineer in Charge and asked him to see the delegation. He ultimately agreed to extend the sewer further into the current in the river so that the sewage would flow away from the beach used by the residents and to monitor the bacteria count. The residents were satisfied.

We must recognize that few settlements have their resident North American scholar to serve as a political intermediary, and we are left to wonder what would have happened to the residents of La Laja had she not been there. Dr. Peattie sees three major barriers to finding a solution had the residents of La Laja not had the help that she alone was able to give. First, the people did not know who to complain to. It took an investigation by someone with some knowledge of organizational structure to find where the decisions were being made. The other agencies simply got the delegations out of their offices by promising to investigate, a standard ploy.

Second, there was the problem of cost:

> The cost of communication in terms of time, distance, effort, and money is something of which I would perhaps not have been so aware if I had been merely an observer of these events; since it was my time, my gasoline, my bus and ferry fares which were involved, I became acutely conscious of it. It was partly as a rich woman that I was useful to La Laja. I had a jeep, I had time, I had money. Other people in the barrio had very limited stocks of any of these commodities.[21]

Third, there was the problem of social class:

> . . . I was of unique usefulness to La Laja in being a person with some roots in the barrio who was, at the same time, clearly a member of the gente buena, a "Doctora," a person of upper-class level. . . . The chief engineer on the site found it . . . intensely difficult to sit down at the same table with a group of delegates from La Laja. . . . At the same time, even though he had already asked that I be fired, when I greeted him and asked him to give us a few minutes, he could not treat me or my request rudely. . . . [22]

Access to the legal system, then, involves finding and getting in the right door. Yet it also involves what one can accomplish once inside, and this turns, as we said at the outset, on bargaining power.

IV. Some Studies of the Informal Side of Latin American Legal Process

The Hunts' study of courts in rural Mexico made a number of points about how they operated when the parties were not Indians but members of the Spanish-speaking middle and upper class. The local elite had the power to control the legal officials sent to their area by the ministries in Mexico City. The local leaders were tied to the national power structure, and they could have a disagreeable official removed. One aware of the risks to his career would not apply abstract rules equally to all no matter what the results. The local elite supplemented the small salaries of these officials by gifts that further tied them to the elite. Many activities of the elite were illegal under Mexican law, but these people had long ago gained an immunity from the law. Legal officials were expected to overlook violations or to manipulate the forms of the law to rationalize this immunity. This can be viewed as a peculiar but valuable variety of access--access to the official.

Laura Nader has remarked that "developing countries send their least qualified law personnel to the hinterlands." [23] Some of these nations send their younger inexperienced people to legal jobs in smaller cities far from

the capital. The more talented or better connected ones rise and are moved eventually to the capital, leaving the others behind. Such a policy would leave local officials more vulnerable to the pressures described by the Hunts--one group of officials is anxious to rise and concerned about political influence applied against their chances, while those left behind can only prosper by serving the elite since they have nowhere else to go. It seems likely that a similar allocation takes place in the large cities as well. There may be a tendency to assign the less able or less well connected to contact with lower status people. Whatever the basic competence of officials who lack political connections, we can wonder about their zeal and eagerness to serve the public once they realize that the way upward is blocked. A parallel process may occur in the United States where law-trained people are allocated to government jobs by a system that reflects the grades the person won as a student and the prestige of his or her law school, which in turn may also reflect the social status or political connections of his or her family. It might be instructive to turn Nader's hypothesis on the United States and then take the conclusions back to the developing world.

Another study relevant to the problem of access is Keith Rosenn's, "The Jeito: Brazil's Institutional Bypass of the Formal Legal System and Its Developmental Implications."[24] He tells us:

> For analytic purposes the jeito can be broken down into at least five different kinds of behavior frequently observed in Brazil:
>
> (1) When a public servant deviates from his legal obligations because of private pecuniary or status (friends, family, or clique) gains. E.g., a government contract is awarded to the highest briber.
>
> (2) When private citizens employ subterfuges to circumvent legal obligations which are sensible and just (in an objective sense). E.g., a few essential parts are removed from an illegally imported car which is reported to the authorities as contraband; when the car is sold at public auction, as required by law, the smuggler, who is the only one with the missing parts, is the only bidder, thus enabling him to sell the car with a clear legal title.

> (3) When the speed with which a public servant performs his legal obligations depends upon private pecuniary or status gains. E.g., a passport application remains unprocessed for months unless the applicant knows or tips someone in the passport office.
>
> (4) When private citizens employ subterfuges to circumvent legal obligations which are unrealistic, unjust, or wasteful (in an objective sense). E.g., real property is transferred by an agreement of sale rather than by deed to avoid capital gains taxation on nominal profits rendered largely illusory by severe inflation.
>
> (5) When a public servant deviates from his legal obligations because of his conviction that the formal norms are unrealistic, unjust, or wasteful. E.g., a labor inspector condones the failure of a marginal firm in an area of high unemployment to pay the official minimum wage on the theory that strict enforcement would likely throw many employees out of work and perhaps shut down the plant altogether. [25]

Rosenn sees the jeito as a response to certain characteristics of the Brazilian legal system, characteristics that to one degree or another would hold for many legal systems. Of course, the use of these techniques will vary widely, even among regions of a single country or among different agencies. Rosenn says the nature of the laws that officials are called on to enforce in Brazil particularly prompts the jeito. It is hard to determine just what the law is in Brazil since one must synthesize a large number of decrees and amendments, and it is hard to be sure one has them all. The law is often written without consideration of the reality of the situation, and it is likely to have unintended adverse consequences. Laws are often borrowed from Europe or the United States as a kind of transfer of technology without any effort to adapt them to local conditions. On one hand, laws are often written by legal experts as an exercise in deductive logic with little worry about consequences or the difficulties of enforcement. On the other hand, laws may be written by reformers who are unwilling to bother about logical consistency, technicality or the difficulties of enforcement. As a result, their efforts are often doomed to be largely symbolic while the jeito goes on.

The jeito is also encouraged by the general nature of law enforcement and law application in Brazil. The structure of authority does not encourage efficiency. Authority to decide a question is often divided among several agencies or divisions of one agency. An applicant must seek approval in several places in a series of steps. Moreover, authority is seldom delegated very far downward from the top. This means that all but the most routine cases must be sent upward in the hierarchy for final resolution. This insures delay. The characteristics of the administrative personnel themselves call for the jeito in order to produce results. They are likely to owe their position to someone with power, and they can be removed or transferred to less agreeable jobs if they displease those who influence the agency. They are usually educated people and they view themselves as of a different social class than those they serve. Yet, while educated, they are often poorly trained for the particular job they hold. Generally, they are not well paid, and some hold several full-time jobs in order to cling to the margins of the middle-class.

Something like this kind of system exists in many countries, and features of it exist almost everywhere. What are the likely consequences? The citizen seeking some government service faces delay and what appears to be an utterly unreasonable and irrational process.[26] He or she must get in line and wait, only to be sent to yet another line where he or she is told to come back next week. Any transaction seems to require multiple copies of several documents, and each must bear the documentary tax stamps. One must produce documentary evidence of birth, payment of taxes and entitlement to the service. In Chile, at least, these were part of what was called "tramites," a term that often struck an English speaker as far too close to "trauma" in his or her language.

Rosenn also stresses the style of interaction between the citizen and the official, a theme we have already heard sounded by Collier, the Hunts and Peattie. Class difference can lead to paternalism where the official decides what the citizen ought to want, or it can lead to discourtesy designed to signify superiority. Class difference directed to the upper-status applicant usually prompts exaggerated courtesy. Often there are too few officials to handle the number of citizens seeking the service. In such cases, we can expect the harassed decision-maker to resort to easy-to-apply rules of thumb whatever their impact on a particular case.[27] Moreover, the system is characterized by a desire on the part of officials to avoid responsibility for mistakes. The official seeks shelter behind technicality or a refusal to decide and a reference to higher authority.

As Schwartz tells us,[28] those with status seldom wait in line. They seldom try to confront the kind of system I have just described. Rosenn stresses the role of the despachante, one who stands ready to cope with the system for a fee. At the minimum, the despachante knows what lines to stand in and his papers are in order. Those with the right contacts need never stand in line long. Political leaders or parties have long played this role when keeping voters happy matters. For example, this is a major function of representatives at all levels of government in the United States. The network of contacts maintained by high status lawyers in many Latin American countries enables them to call a high official (possibly a cousin or a university classmate) to avoid the entire bureaucratic process. Similarly, in the United States large law firms based in Washington, D.C., have almost immediate access to the top of most administrative agencies or even to the White House when they need it.

Why are these people successful in cutting through bureaucratic systems? The dynamic would seem to be friendship bonds since friends exchange trust and favors. Lawyers with a circle of influential clients often can help a relatively high government official who wants to leave find a very attractive job in the private sector. Professor Sally Falk Moore speaks of "fictive friendships" in referring to attempts to convert adversary or arms-length relationships into situations of mutual obligation.[29] Both the despachante and the political leader are likely to operate this way. In some parts of the United States, lawyers often give clerks of court cases of expensive liquor at Christmas. The clerks can reciprocate by speeding the processing of documents or passing along gossip relevant to the lawyer's practice. Sometimes clerks are able to demand tips or gifts for each filing of a motion in court. One violates this custom only at the risk of having his papers lost or placed at the bottom of the pile. And all of this is relatively minor as compared to the sale of major government decisions by high officials. In the United States, apparently, the form the payment took in the recent past was the "campaign contribution," although some key officials have been allowed to invest their personal funds in magnificent business opportunities that, just by chance, end up paying off at an incredible rate.

Those without influence can wait, rebel, or just give up and not seek the service supposedly offered to all by the legal system. Rebellion, usually, can be controlled if it is not organized. Many just stay away, making a calculation, the economists tell us, that the value of the service does not outweigh the cost of waiting to get it.[30] Part of those costs may be frustration and a sense of powerlessness in the face of such a process. Others wait, fill out forms (if they are literate), buy tax stamps, go from

office to office and finally emerge with the desired documents entitling them to the service. Sometimes it's worth the trouble, sometimes not.

This bureaucratic style of government is functional for some interests and they cannot be ignored in any reform proposal. It provides distance so that clerks, judges and ministers will not have to face human problems that they probably could not solve if they tried. Moreover, the bureaucratic style serves to ration the service actually offered by dampening the demand. Lawrence Friedman has analyzed the use of cost barriers to litigation as a means of rationing judicial services to those who care intensely enough to pay the price. Of course, as Friedman recognizes, this kind of rationing discriminates against the poor.[31] Delay and waiting in line is a kind of cost that may serve the same purpose if it discourages enough people from making application. The poor may, moreover, be better able to pay the cost of waiting than the fees of lawyers. If one were to take down the barriers imposed by the bureaucratic style, the nation would have to provide more services. This often is something that governments are unable or unwilling to do. Thus, access may be related to wealth redistribution or transfers from capital formation to consumption. To the degree that it is, one can predict that tearing down the barriers imposed by the bureaucratic style would result in the erection of new barriers very soon, absent a revolution.

V. Conclusion

When we look at access to the informal and formal legal system from the perspective of the consumer of government services--dispute settlement, documents or benefits--we can make a number of observations. The Indian and the resident of the squatter settlement frequently manipulate the situation with remarkable intelligence given the constraints on their choices.

If they can, they seek a patron to intervene in their behalf. This is an attempt to duplicate the technique of those who are richer and can hire a despanchante or a lawyer with good contacts. Sometimes one cannot find a patron and yet one cannot just walk away. Then, to be successful, he or she must cross a number of barriers. Peattie stressed that one must find the government agency that can decide the matter, and often this is not easy. One must have documents and be prepared to creat more documents. One must be willing to pay the price of getting to the agency and once there to wait. It is easy to see why the poor choose to avoid contact with governmental agencies when they have a choice.

We can ask whether providing legal services for the poor would confront any of these problems. Lawyers may know where the agency is, but often discovering which official will decide requires investigation or knowledge prompted by experience and contacts. Lawyers should know what documents are needed, and they should be able to help the citizen fill them out. Yet it seems clear that real access for all citizens would require more than just legal aid offered on a one-by-one basis. It might require reform in the very style of government itself. As I have said, if this style serves to ration services to those who can wait while denying them to the discouraged, funds would have to be found to provide services for everyone or another rationing system would have to be devised. In sum, access is not a minor technical problem if we mean access to the legal process as it really operates.

If real reform is to come so that all have access in any meaningful sense of the term, far-reaching changes will have to be made in the bureaucratic structure, the important rewards to be gained by bureaucratic personnel, and, perhaps, even in our socially accepted view of what constitutes equity in a supposedly egalitarian society.

FOOTNOTES

1. Hirschman, Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States (Harvard University Press, 2d. ed., 1972); Hirschman, "Exit, Voice and Loyalty: Further Reflections and a Survey of Recent Contributions," 13 Social Science Information 7 (1974).

2. One need not pose such an extreme situation to indicate one of the real problems with the concept of "access." The less powerful person may be able to get inside the courthouse door, but the structure of the process and the rules of the game may give great advantages to the more powerful. See Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," 9 Law & Society Review 95 (1974). In short, access may be a minimum condition for the realization of the ideals of many legal systems, but it is not necessarily a sufficient condition.

3. See van Velsen, "Procedural Informality, Reconciliation, and False Comparisons," in Ideas and Procedures in African Customary Law, at 137 (M. Gluckman ed., Oxford Press, 1969).

4. "I have argued, and I think the data demonstrate quite convincingly, that the people who run the organizations which supply the vices in American cities are members of the business, political, and law enforcement communities--not simply members of a criminal society." Chambliss, "Vice, Corruption, Bureaucracy, and Power," 1971 Wisconsin Law Review 1150, 1172.

5. Nader, "Styles of Court Procedure: To Make the Balance," in Law in Culture and Society, at 69 (L. Nader ed., Aldine Press, 1969).

6. Collier, Law and Social Change in Zanacantan (Stanford Press 1973).

7. Hunt and Hunt, "The Role of Courts in Rural Mexico," in Peasants in the Modern World, at 109 (P. Bock ed., New Mexico Paperbacks, 1969).

8. Nader, supra note 5, at 69.

9. Nader, supra note 5, at 85.

10. Nader, "Up the Anthropologist--Perspectives Gained from Studying Up," in Reinventing Anthropology, at 284, 300 (D. Hymes ed., Random House, 1969).

11. See Danzig, "Toward the Creation of a Complementary Decentralized System of Criminal Justice," 26 Stanford Law Review 1 (1973).

12. See Felstiner, "Influences of Social Organization on Dispute Processing," 9 Law & Society Review 63 (1974). Professors Danzig and Felstiner have debated the matter further. See Danzig and Lowy, "Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner," 9 Law & Society Review 675 (1975); Felstiner, "Avoidance as Dispute Processing: An Elaboration," id. at 695.

13. Nader, "Forums for Justice: A Cross-Cultural Perspective," 31 Journal of Social Issues 151, 159 (1975).

14. Hunt and Hunt, supra note 7, at 109.

15. Id. at 137.

16. See, e.g., Cheetham, Quevedo, Rojas, Sader and Vanderschueren, Pobladores: Del Legalismo a la Justicia Popular (CIDU, Universidad Católica de Chile, Oct. 1972); Equipo de Estudios Poblacionales del "CIDU," "Pobladores y Administración de Justicia," 3 Eure 134 (Julio 1972); Fiori, "Campamento Nueva Habana: Estudio de una Experiencia de Autoadministración de Justicia," 3 Eure 83 (April 1963); Karst, Schwartz and Schwartz, The Evolution of Law in the Barrios of Caracas (UCLA Latin American Center 1973); Means, Book Review, 72 Michigan Law Review 1481 (1974); Langton and Rapoport, "Social Structure, Social Context, and Partisan Mobilization: Urban Workers in Chile," 8 Comparative Political Studies 318 (1975); Pearse, "Some Characteristics of Urbanization in the City of Rio de Janeiro," in Urbanization

in Latin America, at 191 (P. Hauser, ed., Columbia Univ. Press, 1961); Perlman, "Rio's Favelas and the Myth of Marginality," 5 Politics and Society 131 (1975); Boaventura de Sousa Santos, The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada Law (unpublished paper, 1974); Vanderschueren, "Political Significance of Neighborhood Committees in the Settlements of Santiago," in The Chilean Road to Socialism, at 256 (D. Johnson ed., Anchor Books, 1973). See also, Greenfield, The Cabo Eleitoral and the Articulation of Local Community and National Society in Pre-1968 Brazil (Univ. of Wisconsin-Milwaukee Center for Latin America Discussion Paper, No. 54, Aug. 1, 1975).

17. J. Macaulay, A Skeptic's Guide to the Literature of Poverty 5-6 (Institute for Research on Poverty, University of Wisconsin, Dec. 1974). See also Campbell, "'Degrees of Freedom' and the Case Study," 8 Comparative Political Studies 178 (1975).

18. See Merton, Social Theory and Social Structure 71-82 (2d ed., Free Press, 1957); Gottfried, "Political Machines" in 12 International Encyclopedia of the Social Sciences 248-52 (1968).

19. See Perlman, supra note 16, at 141.

20. See Lisa Redfield Peattie, "The Sewer Controversy: A Case History" in The View from the Barrio, at 71 (University of Michigan Press, 1968).

21. Id. at 87.

22. Id. at 87-8.

23. See Nader, supra note 13, at 168.

24. 19 American Journal of Comparative Law 514 (1971).

25. Id. at 515-6.

26. See Schaffer and Huang Wen-hsien, "Distribution and the Theory of Access," 6 Development & Change 13 (1975); Schaffer and Lamb, "Exit, Voice and Access," 13 Social Science Information 73 (1974).

27. See Wright, "The Harassed Decision Maker: Time Pressures, Distractions, and the Use of Evidence," 59 Journal of Applied Psychology 555 (1974).

28. See Schwartz, "Waiting, Exchange, and Power: The Distribution of Time in Social Systems," 79 American Journal of Sociology 841 (1974).

29. See Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," 7 Law & Society Review 719, 723-9 (1973).

30. See, e.g., Barzel, "A Theory of Rationing by Waiting," 17 Journal of Law and Economics 73 (1974).

31. See Friedman, "Legal Rules and the Process of Social Change," 19 Stanford Law Review 786 (1967).