Access to the Local Systems of the Americas: Unfamil Processes
which the formal legal process as it is described in statutes and
c constitutions plays but an indirect role. Two or more citizens or groups
of citizens will reach an agreement to resolve their dispute without in-
volving 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, 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
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
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. While some parts of what we have called the informal process are unobjectionable
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.
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, Jane Collier and the Hunts—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
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 particular context.
many of the other features in Zapotec or Zinacanteco society. 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 local
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.
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. 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."
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.
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. 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.
electricity and transportation. The government may supply some of these.

Even the lower classes in a society have an interest in the health of the
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.
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...
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
(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
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.
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. 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.
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 Holtman spoke.
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. 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 despachante 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 create 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


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
8. Nader, supra note 5, at 69.

9. Nader, supra note 5, at 85.


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,"