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Report to AID on Legal Reform
and Research in Colombia

by Dennis O. Lynch
Professor of Law
University of Miami (Fla.)

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TO: Agency for International Development

FROM: Dennis Lynch

SUBJECT: Legal Reform and Research in Colombia (AID/LAC-C-1338)

This report is concerned with the following: 1) recent efforts to reorganize the administration of the Colombian legal system, particularly the criminal courts and procedure, 2) research proposals designed to inform and assist the implementation of legal reforms, and 3) projects aimed at increasing the access of low income groups to the legal system or alternative dispute resolution mechanisms. It is based on existing studies of the Colombian legal system,¹ a prior report financed by AID in 1968,² the proposed reforms,³ newspaper accounts of the public debate over legal reforms, the papers and lectures presented at a national forum on legal reform,⁴ and interviews with members of the bar, judges, public officials, and legal educators. Most of the information was gathered during my recent visit to Colombia from July 9 to July 24.

The most important point the report makes is that reform of the criminal process has become a major political issue in Colombia. There is growing concern about the use of military tribunals to maintain order; the President made legal reform a campaign issue and now he must deliver by pushing a reform through Congress and overseeing its implementation. The government's major objective is to improve the efficiency and capacity of the criminal court system, but given the current political and social situation in Colombia,

the reform may have a major impact on the civil and human rights of political dissenters and criminal suspects from low income backgrounds. The potential use of the criminal process to silence political opponents will be an issue in the political bargaining process over the reform, but it is doubtful that much attention will be paid to the human rights of defendants who lack the economic resources to hire adequate counsel. There is, however, an influential research institute that plans to focus attention on these issues through sponsoring seminars and carrying out legal research projects. The report attempts to place this research institute and its ideas in the proper perspective by describing first the political-legal environment in Colombia, the proposed reforms, and the way the reforms would change the current criminal law process.

Section "A" of the report is a brief description of how I spent my time during the two weeks in Colombia. Section "B" is devoted to the political-legal situation, the proposed legal reforms, and Colombian criminal procedure. Readers who are unfamiliar with the inquisitorial model of criminal justice may wish to read section "B-3" on criminal procedure prior to the description of the proposed reforms. The SER Institute and its requests for technical assistance for a seminar on the criminal procedure reform and for funds to support research on the criminal law system are the subject of section "C". This is followed by an overview of Colombian programs to increase access to the legal process, a discussion of the potential role of a Fulbright Lecturer in Law, and my final conclusions and recommendations.

A. Activities in Colombia

Prior to departure, I refreshed my recollection of the court system and criminal and civil procedure by reviewing the codes and constitutional provisions which define the organization of the legal process. I also read an interesting and helpful AID financed report, submitted in 1968 by Professor Abraham S. Goldstein and Jon Newman and addressed to Mario Aramburo Restrepo, Procurador General of Colombia. An additional report prepared by Howard Jewel was not readily available in AID files in Washington or Colombia and Mr. Jewel could not locate a copy in his files. His report was less relevant to the purpose of my visit, however, since it dealt primarily with the lack of coordination between divisions of the "judicial police".

On the morning of July 10, I met briefly with Jerry Martin of AID Colombia. He showed me a copy of a letter dated November 7, 1978, from the Director of Instituto SER de Investigacion [SER] to the U.S. Ambassador. Attached was a proposal requesting funding for a seminar on criminal justice and two research projects. We discussed the orientation and organization of SER; I reviewed the proposal; and then I proceeded to SER where I was scheduled to meet with the Director, Eduardo Aldana, and the two

principal researchers in law, Jaime Giraldo and Annette Pearson de Gonzales. The remainder of the day was mostly devoted to meeting the Colombian researchers working at SER, discussing their various projects, and receiving an orientation on SER's prior research in the legal field. This information is described in more detail in section "C" of the report.

Wednesday and Thursday were devoted to reviewing SER's prior studies of the legal system; reading their back files on the proposed reforms of the constitution, the criminal code, and criminal procedure; discussing SER's ideas for future legal research; and informal meetings in social settings with old friends who are law professors or involved in legal research in other institutions.

Friday and Saturday, July 13-14, SER arranged for me to attend a National Judicial Forum on the proposed constitutional reform. This provided an excellent opportunity to hear the criticisms of Colombia's leading constitutional scholars⁵ as well as a defense of the project by the Minister of Justice, Hugo Sierra Escobar, and the opinions of magistrates and judges from different parts of Colombia.⁶ Many of the District Tribunals also prepared critiques of the reforms which were read and discussed when the assembly divided into smaller commissions to analyze each aspect of the reform in more depth. Friday and Saturday afternoon I attended the Commission concerned with the proposed shift to an accusatorial model of criminal procedure.

The second week was devoted to more meetings with government officials, judges, law professors and members of the bar.⁷ Later in the week, I had the opportunity to discuss my observations with Ambassador Asencio, Jerry Martin and two members of the Embassy's political section. In addition, I discussed the potential role of a Fulbright lecturer in law with Fransisco Genecco, head of the Fulbright Commission in Colombia, and Mike Kristula, the Embassy cultural attache.

Two activities the second week merit special emphasis. One afternoon, Jaime Giraldo invited a group of government officials and judges, who will have important roles in the implementation of the reform, to a meeting at SER to discuss the potential value of a three day seminar on "Models of criminal justice and the Colombian reform." At the outset of this session, I gave a general presentation of the accusatorial model as in functions in the United States; the participants asked extensive questions; and we identified those aspects of U.S. criminal procedure which the Colombians would like to learn more about as a basis for making decisions about the adaptation of the accusatorial model to the Colombian context.

A second afternoon was spent at the juvenile court in Bogota and the juvenile detention center. One of SER's major research interests is the handling of juvenile's accused of crimes, particularly the initial decision whether to hold a minor in the detention center for observation or to release the minor in the

family's custody pending the final resolution of the case. We spoke at length with a juvenile judge and had a limited opportunity to observe the facilities and staff.

On July 23, the day prior to my departure, I finally was able to arrange a meeting with a representative of the Centro de Defensa Pro Intereses Publicas [Pro Publicas], a Colombian public interest law firm partially funded by the Ford Foundation. The director, Fernando Umana, was in Lima, Peru, apparently to learn about plans to organize a similar Peruvian project. In any case, I met with Gonzalo Mendez, Fernando Umana's principal associate.

The final afternoon, the Association of Law Graduates from the Los Andes Law Faculty had organized an open forum to discuss an article of mine on the Colombian legal profession.⁸ The article, a summary of the results of an empirical study which is scheduled to be published as a book this fall, was translated by Professor Ciro Angarita and distributed to the participants in advance. About 30 attorneys and law professors attended the seminar along with a few students. The discussion focused primarily on the roles lawyers occupy in the public and private sectors and the way their work relates to the process of social change. The discussion was lively and a number of participants had actually prepared written critiques of my study.

B. Legal Reform and the Political Environment

The legal process has not been subject to so much political debate since the 1957 plebiscite established the judiciary's

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formal autonomy from the political process. Criminal procedure reform with serious implications may actually be implemented; the reform must be viewed, however, from both political and legal perspectives to be understood.

Since 1976, the Colombia legal process has experienced two parallel trends which are formally independent, but inevitably related from a political perspective. The first is the increased use of military tribunals and councils of war to try persons accused of crimes instead of the ordinary criminal courts. This trend also includes the redefinition of some crimes to include acts of political protest. The second trend is the number of proposed legal reforms at both Constitutional and legislative levels which are designed to reorganize the court structure, particularly criminal procedure. Their objective is to make the process for gathering and presenting evidence more effective, to reduce delays, and to eliminate the backlog in criminal cases. One justification is that the implementation of the reforms would make it possible for the executive to lift the "state of siege" and to cease using military tribunals to maintain order.

On the other hand, critics of the government who feel military tribunals are being used to eliminate political dissent are fearful of the increased controls the reform would give the executive over the gathering of proof and the filing of criminal charges. These issues are discussed in more depth in the following descriptions of 1) the militarization of criminal justice,

2) the proposed legal reforms, and 3) the current system of criminal procedure and its problems.

1) Public Order and Military Justice

The use of a "state of siege" and military tribunals to deal with public disorders that grow out of more profound political conflicts is nothing new in Colombia. The country has spent more time under a "state of siege" than not since the end of the military dictatorship of General Rojas and the formation of the National Front Agreement in 1957. At the same time, the recent increase in the jurisdiction and authority of military tribunals with limited due process rights for the accused is at odds with the trend in Colombia during most of this decade.

In June, 1976, President Alfonso Lopez M. lifted the "estado de sitio" which he had declared because of public disorder following the elections. He had been in office for some time, his economic policies were in place, and he was hopeful that order could be maintained without use of the military. This period of ordinary government did not last long.

First, medical doctors who were residents and interns in the nation's hospitals and employees of the Instituto Colombiana de Seguros Sociales (ICSS) went on strike. Second, the cost of living increase continued at around 25% instead of decreasing. Third, the bipartisan support for Lopez's policies broke down as Liberals and Conservatives began organizing for

the 1978 Presidential Campaign. The strike got worse; the Minister of Labor was forced to resign; guerrilla activity began to increase; and the normal rumors of a "coup" at such times were circulating. Lopez reestablished the "Estado de Sitio" on October 7, 1976.

October 18, 1976, Lopez used his legislative powers under the "Estado de Sitio" to promulgate three decrees which set a tone for what was to follow over the next two and half years. Decree 2193 gave military tribunals the authority to try persons accused of causing personal injury to members of the armed forces or public officials. Decree 2194 gave the Commander of an Army Brigade the authority to sentence a civilian by means of a verbal counsel of war to one year in jail for producing, selling, providing, renting or carrying arms or ammunition without permission. There was no appeal beyond requesting reconsideration by the Brigade Commander. Decree 2195 gave the Commander of a Police Station the authority to detain a person for six months for disturbing the peace, holding a public meeting without permission, blocking public roads, or disobeying a police officer. Again there was no appeal to the ordinary courts.

These decrees granted the military and the national police wide authority to deal with public disturbances, particularly strikes, by detaining the leaders of a political or economic movement for six months under disturbing the peace charges without a trial or other due process safeguards. The first two decrees were designed to be effective against anyone suspected of guerrilla

activity and the latter was aimed at discouraging strikes or other public demonstrations against the government.

Decree 2578 of 1976 further increased the National Police's power to deal with situations of public unrest. The President authorized the police to arrest a person "suspected" of being about to commit a crime because of his criminal record or living environment. Unless the accused could immediately post a 1,000 peso bond, he could be detained for 30 days with no appeal to the ordinary courts.

Even with these measures, the labor movement continued to gather force in 1977; there were a number of strikes which paralyzed major industries; and one general strike in September shut down the major cities and forced the government to restrict the mass media to publishing only official bulletins. The numbers of kidnappings and amount of guerrilla activity continued to increase. By the end of 1977, the military leaders were publically asking Lopez to expand their ability to deal with terrorists and general public disturbances, but the military did not obtain additional power until Julio Cesar Turbay became President in mid-1978.

On September 6, 1978, President Turbay used the power Article 121 of the Colombian Constitution grants him during an "estado de sitio" to promulgate a special security statute ("estatuto de seguridad"). This decree redefined the jurisdiction of military tribunals to include kidnapping and extortion, acts

against the security of the state including conspiracy to undermine the state,¹¹
associating in groups of three or more to commit crimes against property or
person,¹² and causing disorder in urban centers.¹³ In each case, the minimum and
maximum sentence for such criminal acts was also increased. The security statute
also gave military commanders the authority to sentence an individual to one
year in jail, for occupying a public office for the purpose of pressuring a
government official into making a specific decision in his official capacity or
for inciting others to break the law.¹⁴ The sentence can be rendered in written
form after an immediate hearing for the presentation of formal charges and four
days during which the military organizes proof in support of the charges and
counsel for the accused submits evidence to rebut the charges.¹⁵ There is no
appeal from the commander's decision.

Since the first of the year more than 2,500 persons have been arrested
under this statute on charges of subversion.¹⁶ Many of the detentions occurred
shortly after 5,000 arms were stolen from army headquarters through an under-
ground tunnel which ran from a nearby house to the armory. The guerrilla Nine-
teenth of April Movement claimed responsibility.

The incident was followed by a military crackdown on urban
and rural guerrilla groups. A wide variety of Colombians sus-
pected of being sympathetic to the guerrilla groups were detained
and questioned at length. The extent of the arrests and allega-
tions about the methods used to question detained persons (torture
and isolation?) has brought a wave of criticisms against the
government for violating basic human rights.

One particular case, which was being discussed in editorials and columns on a daily basis during my visit, involved the arrest of two jesuit priests. They were arrested in mid-May by army officials and held for questioning for two weeks before their detention was made public. Subsequently, they were charged with complicity in the political assassination of a former minister. The case is complicated by the fact that one of the alleged murderers worked under an alias in the same research center as the two priests, the Center of Investigation and Popular Education (CINEP). CINEP has been active organizing rural and urban cooperatives and it publishes books quite critical of the Colombian government, often from a leftist perspective.¹⁷ Some groups have argued the military is attempting to use this case to destroy CINEP's effectiveness as a critical research center.

There were also strong protests because the priests were held for a month under military detention in accordance with the security statute while the military investigated the case. Arguably, this detention by military authorities violated the Concordat between the Colombian government and the Vatican which requires accused clergy to be tried by civil authorities. Shortly before the military court-martial, the priests were turned over to the civil authorities. Protests flared again, however, when the Minister of Justice commented that there was substantial proof of their guilt during the pretrial evidence gathering stage

which is supposed to be secret with the accused presumed to be innocent.

The above is only one of numerous cases which are regularly discussed in the press. When critics accuse the government of militarizing criminal justice, the executive points to the backlog in the ordinary courts, the delays, and the general ineffectiveness of the civilian criminal system as a deterrent to criminal activities. In the same sense, the President has emphasized the need for Congress to pass his proposed Constitutional reform and to cooperate in the revision of the codes of criminal law and criminal procedure to facilitate the lifting of the "estado de sitio" and the return to civil rather than military justice.

2) Proposed Legal Reforms

Projects to reorganize the ordinary criminal law process have been proposed parallel to Colombia's growing dependency on military justice. In 1976, President Lopez called for a limited Constitutional Convention to redefine the fiscal relationship between the central government and local governing units and to reorganize parts of the court system. The principal constitutional reforms were: 1) to enable "fiscales" in the procurador's office to assume functions which previously had been in the exclusive realm of the judiciary, including the gathering of evidence against a suspect and formulating the charges for trial by a judge; 2) to make the judicial police directly responsible to the Procurador's office; 3) to create a Constitutional Court in lieu of the Constitutional Chamber of the Supreme Court; 4) to create a Superior Court of the Judiciary charged with overseeing the proper functioning of the judiciary and hearing charges and setting sanctions for irregularities in the performance of judicial responsibilities; and 5) to require the selection of new members of the Supreme Court by 2/3 vote of that court subject to a veto by a 2/3 vote of the Senate.¹⁸

Before these proposals were actually presented to the constitutional convention and debated, the convention itself was declared unconstitutional by the Supreme Court because of procedural

irregularities in the way the convention was called and organized. The Supreme Court was sharply criticized by the executive for its legal decision and it was alleged that the judges ruled against the convention because the reform would have removed the Court's exclusive control over the naming of replacements for Supreme Court justices who retire or die. The project also would have made the Supreme Court less important by taking away its power to decide en banc all constitutional challenges after hearing the opinion of the Constitutional chamber. The reform project would have given the new Constitutional Court exclusive jurisdiction to hear all Constitutional challenges and, in the first instance, the justices of the new Constitutional Court would have been named by the executive and Congress.

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The decision of the Supreme Court ended Lopez's reform effort, but Turbay made the need for legal reform a campaign issue and in November, 1978, Turbay had his Constitutional reform proposals presented to the Colombian Congress. The general outline of his project was similar to Lopez's, but there were some important differences. First, instead of altering the Constitution to make possible a shift toward an accusatorial or prosecutorial model, Turbay's project mandated the change. Requiring this shift was suggested by Gomez Hurtado, the leader of the Conservative party, and it was included to obtain bipartisan support for the Constitutional reform.

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More specifically, the project calls for the naming of a "Fiscal General" or general prosecutor who would head a staff of "fiscales" charged with the responsibility to determine and coordinate the work of the judicial police, direct the investigation of crimes and the gathering of evidence, formulate the charges against accused persons, and prosecute the charges before the judiciary. ²² At the practical level, this would be a major shift from the current "inquisitorial" model organized around "judges of instruction" (in some cases the judge who will try the case also conducts the instruction) who oversee the investigation of crimes and decide if there is enough evidence to justify bringing an accused to trial. A more detailed description of the current Colombian criminal procedure and the implications of this change follows this section.

Turbay also retained the idea of a new Constitutional Court and a Superior Court of the Judiciary. His original proposal went much further than Lopez's by drastically altering the method for selecting all judges including the Members of the Supreme Court, and it limited a Supreme Court Justice's tenure in office. ²³ The Superior Court of the Judiciary was made responsible for the administration of a judicial career with competitive examinations for appointments other than to the highest courts; the Superior Court was to be granted the authority to directly appoint all judges and their employees below the level of the Supreme Court.

The members of the highest courts - the Superior Court of the Judiciary, the Constitutional Court, the Supreme Court, and the Counsel of State - were all to be appointed for eight year terms with no possibility of being reappointed to the same court. The Superior Court would select its own members and the remaining three courts would select their members from a list of names prepared by the Superior Court. In the first instance, the members of the two new courts, the Superior Court and the Constitutional Court, were to be selected by Congress based on lists prepared by the President.

The reaction of the judiciary to these proposals was overwhelmingly negative. The proposals were seen as fostering a direct confrontation between the executive and the judiciary in retaliation for the Supreme Court declaring unconstitutional the constitutional convention. There were charges that the executive was trying to politicize the judiciary. It was alleged that by determining the original appointments to the Superior Court of the Judiciary, Turbay could control the appointment and promotion of all judges over the next eight years and thereby increase political control over court decisions. The critics also pointed to Turbay's power to control the first appointments to the Constitutional Court and the implications of this when the Constitutional Court would be asked to decide on the constitutionality of Turbay's future Presidential decrees.

At the more practical level, these changes would substantially alter the distribution of influence within the legal profession. All judges are now appointed by a system of cooptation with the Supreme Court selecting its own members and the Magistrates of Superior Tribunals in each district.²⁴ These Magistrates in turn, select judges for the Circuit Court, the Superior Court, and the municipal courts within their jurisdiction. Systems of influence or networks, often linked to particular law schools, have developed and certain groups or individuals control judicial appointments which can be exchanged for other favors.²⁵ There is also now a judges' union which includes their employees. Recently, the union has gained in membership and influence at the lower levels of the judiciary. To centralize the authority to appoint all judges and their employees would undermine the power base of these groups and their influence.

Turbay's project was proposed late in the 1978 Congressional session and it was approved with little debate as a result of strong pressure from the executive, but all Constitutional reforms by means of a Congressional vote must be passed twice in successive sessions of Congress.²⁶ The period between legislative sessions gave the judiciary and the legal profession time to organize their opposition and to take advantage of traditional divisions within the political party structures. Ex-President Pastrana of the Conservative Party publically criticized Gomez Hurtado for his support of the reform and ex-President Ileras Restrepo of the Liberal Party criticized

Turbay and the Minister of Justice. The most prestigious body of the legal profession, the Academy of Jurisprudence, also attacked the project.²⁸ Local bar groups and the judiciary sponsored a series of open forums where legal scholars criticized the proposals on legal rather than political grounds.

This opposition came to head just before Congress was due to begin its next session on July 20; this period happened to coincide with the two weeks I was in Colombia. The Superior Tribunal of Bogota organized a two day meeting at the Capital, with representatives from the Superior Tribunals of each Department, to hear speakers pro and con the reform and to prepare formal conclusions for the press and Congress.²⁹

By this time the opposition was strong enough to worry Turbay. The same week, he called meetings of Congressional leaders in an effort to find a compromise that would still permit Congress to approve the reform.³⁰ It was agreed that the proposal for a Constitutional Court would be dropped and that the current system of selecting judges would be retained. The Superior Court of the Judiciary would be limited to the functions of overseeing the operations of the judiciary, sanctioning irregularities and hearing ethical complaints against practicing attorneys. The only major reform that remained was the creation of the "fiscal general" and the shift toward an accusatorial system of criminal justice. There was no clear agreement on the method for selecting the general prosecutor, but it appeared that the President would appoint him

from a list of names submitted by the Supreme Court.

The creation of a prosecutor's office was probably the least debated aspect of the reform. Its implications at the practical level are unclear and most Colombian lawyers have no actual knowledge of the way a prosecutorial system works in practice. Consequently, they rarely commented on this aspect of the reform for fear of sounding ignorant in public. This brings me to the way criminal procedure is now organized and some thoughts on the proposed changes, but first a few comments on additional legislative reform projects.

The Minister of Justice has asked Congress to pass a bill declaring a "judicial emergency" for a fifteen month period. The proposal is primarily designed to deal with the backlog in criminal cases. The Senator who presented the project to the Congress described the situation as follows:

"If we analyse the situation in the 45 most populace cities of the country, where 977 judges in the fields of Criminal, Civil and Labor law are located, there are 1,458,668 cases pending. The number of judges are totally insufficient to deal with this volume. If each one handles an average of 100 a year, it would take 16 years just to catch up without any new cases." ³² To deal with this, the Minister has proposed the appointment of Honorary Judges from members of the legal profession who will decide those cases where the fixed time period for rendering a judicial decision has

already run. The Honorary Judges will be assigned only three cases a month; they will be allowed to continue their practice of law; and they will not be paid. If they refuse to be named or to decide the cases without a good reason, they will be suspended from the practice of law for three months. ³³

The project also contemplates naming paid legal assistants for higher court judges to help these judges draft opinions and process cases for the limited period. Similarly, there are to be paid adjunct judges at the lower court levels who will share the regular work with the normal judges.

The latter two proposals make some sense given the number of recent law graduates who need to complete an apprenticeship in the judiciary, government, or under the direction of a practicing attorney before they are allowed to practice. ³⁴ They may find such positions attractive for a limited period of 15 months. The appointment of Honorary Judges sounds like an administrative nightmare that will cause more confusion than benefit. In the criminal field, such judges will also not be very effective since the backlog is during the investigation stage or "sumario" and not the trial stage, where the Honorary Judges are to be involved. For example, in 1976, out of a total of 1,260,000 criminal cases, 1,215,000 were in the "sumario" process and only 45,000 were pending a trial decision. ³⁵

The final major reform is the Congressional grant of power to the executive authorizing the President to promulgate a new

criminal code and new criminal procedure code. One would think the major issue for the criminal code would be whether the types of crimes included in the security statute and the increase in the minimum sentence for existing crimes will be written into the code, but this does not appear to be the case. At this point, the issues are more related to the overall orientation of the code in terms of the underlying theories of criminal law. In other words, the issues relate to a philosophical debate among criminal law scholars with little practical significance.

One exception is the continuing trend to treat the failure to meet economic obligations as a crime.³⁶ For example, I was told that a large percentage of the inactive cases in the "sumario" stage are actually actions to collect debts. Instead of filing a civil action and attempting to attach a defendant's property, the creditor claims fraud by the debtor in inducing the creditor to enter into the contractual relationship. It is much easier for the lower court judge to prepare an order to detain the debtor than to refuse the complaint because the latter must be justified in writing, but not the former. When faced with the possibility of being imprisoned pending the criminal law judge's decision on whether the case justifies an investigation, the debtor quickly pays. The creditor does not continue to press the complaint and it winds up in an inactive file, but the case still appears in gross statistics on pending actions.

No one knows how much of the backlog in criminal cases are of this nature, but, as is described below, Institute SER is doing some preliminary research on this. A number of new "economic crimes", which could be used in a similar fashion, may be included in the new code unless the drafters can be convinced that this is an improper and wasteful use of criminal court resources.

The drafters of the criminal procedure code face a more complicated problem. Until the constitutional reform is enacted and they know whether the "fiscal general" will play a critical role, it is almost impossible to draft the procedure code. In fact, the authorizing legislation appears to contradict the language of the constitutional reform. The former divides the criminal process into three stages: (1) instruction, (2) accusation, and (3) trial.³⁷ This would suggest that judges of instruction will continue to operate as a part of the judiciary, but the constitutional reform indicates "fiscales" will direct the gathering of proof and will coordinate the police.³⁸ If the judges of instruction are relocated under the control of the "fiscal general," it is unlikely that an inquisitorial approach would be retained. Nevertheless, the authorizing legislation suggests it will be retained at the instruction stage. In short, the language of the two projects is hard to reconcile and the Commission charged with drafting the code of procedure is rather confused.

3) Colombian Criminal Procedure and the Proposed Reforms

A brief description of current Colombian criminal procedure may help to clarify the significance of a shift toward an accusatorial model. Criminal investigation is carried out primarily by police under the supervision of judges. The role of the Procuraduria (or Ministerio Publico) and fiscales under the Procurador's direction is more vague.

(a) The judicial police

The police are divided into three organizations: the National Police (F-2), the Department of Administrative Security (DAS), and the Military Police. The latter investigate and gather evidence for military trials. The National Police operate under the Ministry of Defense and engage in a full range of police work. DAS is primarily responsible for the investigation of crimes involving the security of the state, but the limits on their jurisdiction are interpreted broadly and F-2 or DAS's may be asked to assist with an investigation depending on existing working relationships.

Both police agencies have a Division of Judicial Police who work with the judiciary in the investigation of crimes. Their functions are similar to that of a detective in the United States; they may become involved in a case in a variety of ways. The judicial police may receive a copy of a denunciation (criminal complaint) made to a police inspector, police commissioner or municipal judge accompanied by a request for them to investigate. They may also receive a complaint directly from the victim which

they refer to the proper authority for the formal filing of the denunciation, but if the crime is important enough, the judicial police may go ahead and investigate before receiving the formal request from a judge or police inspector. Finally, the police may develop their own cases from police intelligence. Early work by the police is critical because the police inspector or municipal judge does not do actual detective work. These officials mostly wait for evidence or proof to be brought to them and take little initiative in developing the evidence to determine if a crime has been committed and by whom.

The confusion over jurisdiction between the divisions of judicial police and responsibilities at early points of criminal investigations has been a serious problem for years. It was one of the basic concerns of Goldstein and Newman's report for AID in 1968. An experienced U.S. prosecutor, Howard Jewel, spent over six months in Colombia working as an adviser to the Procurador on this problem. Numerous laws have been passed to place the judicial police under the control of the Procurador,³⁹ but with all of this, there has been little actual change.

Both police forces continue to be jealous of their autonomy and jurisdiction and they are not very cooperative. Judges, responsible for directing the investigation of a crime, or the Procurador's office, must go through the hierarchy of each police division to have judicial police assigned to a case. The elimination of these coordination problems and the unification of the judicial police under one authority who is also responsible for

the instruction phase of criminal procedure is critical to any meaningful reform effort. Turbay's project attempts to do this by making the judicial police directly responsible to the "fiscal general."⁴⁰

(b) Pre-trial procedure

The conventional model of criminal procedure for a felony looks something like this: a complaint is made by the victim to a police inspector (or in Bogota to a police commissioner) or to the judicial police who must refer it to a judge within a limited time period. If the official who receives the complaint lacks the authority to proceed because of the serious nature of the crime, it will be referred to the appropriate judicial officer, normally a municipal judge. Once the complaining party has presented his "denunciation" to the appropriate judicial authority, the complaining party is instructed to carry a copy to the police. If the accused is known, he may be apprehended by the police and detained for questioning. Notice of the detention must be given to the judge responsible for the case at this point. Such detention should not last more than 24 hours.⁴¹ During this time the judge must decide, based on the complaint, whether (a) to open a complete investigation, (b) to release the accused and issue an opinion that there is no basis to believe a crime was committed or, (c) if he has doubts, open a limited investigation for up to ten days in order to decide whether to proceed. Since the latter is the easiest, it

is the normal approach. The accused may continue to be detained, set free, or released on his own recognizance with instructions to report to the court.

If there is no suspect, the judicial official can wait as long as sixty days to decide if the case justifies opening a more complete investigation. During this period, he should ask the judicial police to carry out a preliminary investigation and to keep him informed. This is another point where a large number of relatively minor crimes wind up in judicial inactive files where they remain until the statute of limitations has run.

One function of the reform would be to have complaints made to the police or to agents of the "fiscal general" rather than to the judiciary. The agents of the "fiscal general" would not take the case to a judge unless there was sufficient evidence to merit accusing someone. This would allow judges to concentrate on cases where their expertise is needed and make it easier to identify the actual number of criminal cases with an accused, pending a determination by the judiciary.

At the close of this preliminary investigation stage, the judge must decide whether or not there is a reasonable basis for believing the suspect guilty. If there is a basis, the judge issues an order and the "sumario" stage continues to completion. The "sumario" is the formal pretrial process during which a judge must assemble proofs meeting the standards of sufficiency and formality necessary to charge a crime. The judge responsible for this process may be

(a) the same judge who will try the case if there is sufficient evidence, (b) a judge of instruction if the case is referred to him for investigation and preparation of the proof during the "sumario" or (c) a municipal judge. There appears to be a great deal of discretion as to whether the direction of the judicial police and the gathering of proof is carried out by the same judge who will eventually determine the accused's guilt or innocence or by a separate instruction judge. There are obvious due process problems with this approach in terms of the prejudice which may result from mixing investigatory and adjudicative functions. It is one of the problems which the reform would apparently remedy by increasing the role of the "fiscal" during the "sumario."

c) The role of the "fiscal".

In theory, the office of the Procurador (or Ministerio Publico) is notified of every case where a "sumario" is initiated and the Procurador's representative can intervene to make sure the judge is properly protecting the interests of the accused and the state. A fiscal, representing the Procurador, can request the police to gather evidence, ask the judge to grant the accused conditional liberty, or give opinions on the quality of the evidence. In practice, this rarely occurs; most "fiscales" limit their work to providing legal opinions on criminal law doctrine at the appellate level. At times the Procurador may intervene at the trial level through "personeros municipales," but they often lack legal training. There is a general feeling that the resources and human skills devoted to the current task of a "fiscal" who assists the appellate level judiciary is mostly wasted effort because the fiscal's work duplicates the functions of the judge.^{42.}

From the perspective of altering the fiscal's role so that he is more of a prosecutor, the reform makes sense. It could end the duplication of functions and place the preparation of cases in the hands of the "fiscal general" who would also control the judicial police. Whether this would actually occur, however, depends on what happens to the 560 judges of criminal instruction. The Constitutional language seems to suggest these resources would go to the "fiscal general" to hire prosecutors, but the decree authorizing the President to promulgate a code of criminal procedure appears to retain the duplication of functions. The persons I interviewed, including the National Director of Judges of Instruction, were

confused and unclear on this point.

d) The "juicio" or trial.

The "sumario" can last up to thirty days when the proof is to be turned over to the "juez de conocimiento" or the judge who will try the case; if it is the same judge who conducted the "sumario" he simply proceeds to the next stage. In any case, in thirty days, the judge decides whether 1) there is enough proof to initiate a "juicio" or formal trial, b) more proof is needed, or c) the case should be dropped or placed in a dead file. If more proof is needed, the sumario can last another sixty days if no accused is detained, or 15 days if someone is being held.

In reality many cases appear to be stalled in the "sumario" stage and the time limitations are not observed if the accused does not have adequate counsel to request his release if the courts fail to follow set procedures. Whether this results from the lack of interest of the complaining party, judicial inefficiency, the lack of resources to carry out the investigation, or incompetence, is unclear. However, the current reform may provide an opportunity to set up an information system to help clarify what is happening.

If the judge decides to continue, a "Proceso" takes place at the level of the municipal judge, a Superior Court judge, or a Circuit Court judge depending on the seriousness of the offense. ^{43.} Counsel for the defense can view the proof, address briefs to the court and suggest additional proof. After the "Proceso," a formal trial ("Audiencia publica") takes place. For certain offenses a jury may be impanelled, but that is normally not the case. Even if there is a jury, witnesses are rarely heard. The judge normally

reads the previous judicial orders and statements to the jury, including the depositions of witnesses gathered during the "sumario." Following this, the "fiscal" representing the Procurador argues if the ministerio publico has intervened in the action, then the attorney representing the complaining party for the purpose of a civil action for damages, and last comes the arguments of the defense counsel for the accused. ^{44.} The attorneys may argue both fact and law to the jury, and the jury decides by majority vote. If there is no jury, the attorneys make their arguments to the judge. After the audiencia, a final verdict is rendered and the sentence imposed.

If the case is decided by a municipal judge, it can be appealed to the Circuit Court. If it is tried by a Circuit Court judge or a Superior Court judge, it is appealed to the Superior Tribunal of the Department. From there, the case can go to the Criminal Chambers of the Supreme Court by "cassation" on an issue of law. Appeals are written with no oral argument.

e) Some advantages and problems with the proposed changes

The above description identifies some of the bottlenecks and problems with Colombian criminal procedure and the way the proposed reform may help the situation. Transferring the handling of initial criminal complaints from the judiciary to judicial police and agents of the fiscal general would allow judges to concentrate on cases where their skills are needed most. Reorganizing the process for directing the gathering of proof during the "sumario" may eliminate the duplication of functions, make "fiscales" more productive, provide a method for making more rational decisions about when to drop

a case, and improve coordination between the police and the official responsible for deciding whether to charge a suspect.

At the same time, a shift toward a prosecutorial model raises serious issues. The persons I interviewed were hesitant to remove judicial control over police investigations. They felt the police lacked the training and background to investigate crimes without substantial supervision and they feared police abuse. In fact, I believe the judicial police are already relatively autonomous because the judges lack the time and resources to control the police in any real sense.

One can also respond that attorneys in the office of the "fiscal general" will now play the role of overseeing police work. This approach also concerned many practicing lawyers and judges, because they fear the executive's role in the selection of the "fiscal general" will give the President control over criminal investigations and create a greater potential for using the criminal process to achieve political goals. As support for this view, the critics point to the government's current use of military tribunals and military police to try persons suspected of engaging in subversive activities and the lack of concern for the due process rights of the accused. The fact that President Turbay appears to have conditioned the lifting of the state of seige on Congress passing the constitutional reform automatically raises questions about the relationship between a general prosecutor's office and the President. Judges of instruction are now a part of the judicial branch and they depend on the approval of higher court judges to

retain their position rather than the executive. Judges of instruction do have more autonomy in the investigation of crimes than the "fiscal general" will enjoy under a prosecutorial model.

Even assuming good faith on the part of the executive or the enactment of adequate legal guarantees, a change toward the prosecutorial model still has important implications for the rights of the accused. In the inquisitorial model, the judge responsible for overseeing the gathering and assessing of proof during the "sumario" is supposed to be searching for the truth. The judge should be as concerned about the rights of the accused and as interested in finding proof that the suspect is innocent as he is in identifying evidence to support the charges. There is no substitution for adequate defense counsel, but one can argue a low income suspect who cannot afford an attorney may be more protected in an inquisitorial process than in an accusatorial model where the prosecutor primarily represents the interests of the state and the judge is a neutral hearing the arguments and evidence of counsel. ⁴⁵

Under Colombian law a defendant who is indigent will have court appointed counsel, but the attorney is not paid and the general view is that such attorneys do as little as possible on behalf of their indigent clients. Since a large percentage of the accused in Colombia are from lower income groups, the proposed reform may have significant implications for their civil rights.

My knowledge of Colombian criminal law and procedure is limited, so these observations should be taken primarily as general concerns.

They are based on comments of the Colombian lawyers and judges I interviewed, but their knowledge is also limited to personal experience because the criminal law process has not been the subject of much serious empirical research. No one knows how many accused individuals now go through a criminal trial without adequate counsel. Most studies of the prisons suggest that approximately one-third of the prison population has a right to be released for failures to charge and try them within the set time limits, but they lack access to counsel.⁴⁶ Such observations suggest there are serious human rights issues which merit special attention during this period of legal reform.

C. Instituto SER de Investigacion

When President Turbay presented his Constitutional reform package to Congress in November of last year, Instituto SER approached the United States Ambassador, Diego Asencio, to inquire about financial support for a seminar on the implications of an accusatorial model of criminal justice and for two research projects. The Ambassador was interested in SER's ideas and through his efforts, AID Washington agreed to send a consultant to Colombia to gather information on the proposed legal reforms and to evaluate SER's proposals. This section of the report attempts to place SER in the proper Colombia context, discusses the idea of a seminar, and reviews SER's research interests.

1) SER as a Research Institution

Instituto SER employs approximately fifteen principal researchers and additional associate researchers on a contract basis. A list of the researchers and their qualifications is provided in appendix "C". Most of them teach in a Colombian university and work at SER half-time or more. The Director of SER, Eduardo Aldana, is a Civil Engineer with a Ph.D. in systems analysis from MIT. He has been Rector of the Universidad de los Andes and he is highly regarded as an academic and an administrator.

The early financial support for SER came from a powerful group in the Colombian financial community led by a banker named Jaime Michelsen. This group supported Aldana's idea to create a non-political research center employing persons skilled in the application

of computers to social problems, particularly the evaluation of government programs designed to help low income groups. The backers helped SER to convince IBM to donate a 370/145 computer. SER describes its specific objectives as follows:

1. To increase the capacity for scientific research of the Institute in the field of public systems, in effect, on those of State programs and institutions which promote the improvement of the quality of life for society in general and the most underprivileged groups in particular. The public systems which will be given attention include education, health, social security and the administration of justice, but special preference will be given to the development and application of methods of research, analysis and the administration of programs whose purpose is to improve the health and nutritional conditions of the most vulnerable groups of society.
2. To promote the use of the results of that research by expediting the collaboration between the Institute and some of the more important public agencies in charge of defining, planning and carrying out social policies.
3. Insofar as resources will permit, to support the scientific research activity of other research centers, of a public or private non-profit nature, which have interests similar to those of the SER Institute. Special attention will be given to research groups located outside Bogota.⁴⁷

Within a short time, the institute has been relatively suc-

successful in achieving these objectives. SER has a contract with the National Coffee Growers' Federation to evaluate programs designed to extend health services to rural populations in coffee regions. SER is also working with the National Planning Department on a methodology to evaluate the National Food and Nutrition Plan and to analyze existing data on malnutrition. In the education field, SER is working on models to make more equitable the distribution of budgetary resources for education and a methodology to evaluate the impact of curriculum reforms. The model used to study the education process is also being adjusted and applied to research on social security policies and the way these policies influence the finances of state agencies responsible for their administration.

In the area of criminal justice, SER describes its work as follows:

Last year the Institute completed a series of studies on the administration of criminal justice in which several factors were identified as contributing to the impressive congestion of the courts (1,200,000 cases accumulated as of December 31, 1976) and to the injustice of the system in regard to those defendants without education and with low economic resources.* The SER recommendations include a broad policy of decriminalizing offenses with a relatively low potential of social damage and their transfer to the attention of other mechanisms for solving conflicts; a vigorous prevention policy incorporated in the national development plans; the drastic restriction of preventive imprisonment which does not follow clear criteria of societal defense and the bases for an administrative restructuring of that branch of justice. As part of the research, a preliminary version of a simulation model of the penal process was constructed, for the purpose of predicting the consequences of its possible reforms. An administrative information system was also designed, for the purpose of recording the movement of the different cases and, in this way, making it easier for the judges to program their activities and for the Attorney General's Office to

control and supervise the progress of the trials. Unfortunately, for lack of an adequate computer, it has been impossible to prove the importance and usefulness of these last two efforts. In view of the good acceptance which the other SER recommendations have had in very different Government circles and in public opinion, it would seem advisable to take advantage of the ISL facilities to verify the benefits of these novel applications of systems engineering in the legal field.

The SER personnel interested in this research area are presently preparing research projects on two main lines. The first proposes adapting the previously developed methodology to the study of the function of Police Precincts which have the responsibility of making decisions about minor offenses (misdemeanors). The number of persons affected by these decisions is so high that it justifies a systematic study of these institutions. The second line seeks a better understanding of the relationship between certain socioeconomic factors and crime. Possible projects along this line include a longitudinal study of juvenile delinquents and an examination of employment characteristics in relation to the criminal activities of young people.⁴⁸

*An examination of a sample of the records of prisoners in Bogota jails showed that 32% of them could have been released if they had adequate legal assistance.

What I found was quite consistent with SER's description of its research in the criminal law field. With little outside assistance, SER has managed to complete and publish an impressive amount of empirical research on the criminal courts.⁴⁹ Their efforts are particularly striking in the Colombian context where there is almost a total absence of empirical research on the legal process.⁵⁰ The studies are more descriptive than analytical and they suffer from too much concern with a systems analysis approach, but they have generated the best data available on the criminal courts and they have identified those points in the process where bottlenecks exist and reforms are needed.

This preliminary research has enabled SER to identify particular aspects of the criminal law system where the potential is greatest for the contribution of research to meaningful legal reform. The empirical work has also made SER's researchers sensitive to the gap between the way Colombian criminal procedure is supposed to function and reality. They argue that a seminar designed to stimulate concern about the implications of the proposed changes is critical. The seminar would focus on the mix of characteristics of the accusatorial and inquisitorial models which Colombia should adopt given the way Colombian criminal procedure actually operates. The participants would be key government officials, judges, and criminal law scholars who will draft the new codes and be responsible for implementing the reform Congress passes. The orientation of this seminar and SER's principal research interests are described below.

2) Proposed Seminar on the Accusatorial Model of Criminal Justice

The idea is for SER to host a three day seminar and to invite the key Colombians who will implement the criminal justice reform once Congress has passed the Constitutional amendments. There is a general lack of consensus about what the reform will mean at the practical level. The relationships among the judicial police, the office of the "fiscal general," the Procurador, the judges of instruction, and the judges who try cases will all have to be redefined. Colombian criminal law specialists are trained in the Italian and French inquisitorial tradition; they do not really understand the philosophy of the accusatorial system or the way it works in practice.

The fact that all Colombian lawyers and judges are trained in

the philosophy of the inquisitorial system means that a prosecutorial approach similar to that of the United States will not actually be adopted. Indeed, it is not clear that such a change would be appropriate for the Colombian context. The language of the Constitutional reform is vague and the actual content of the reform will be determined by the lawyers who implement it. The important point is that the seminar would provide a setting where these key people could come together and discuss their views on the best working relationship among the police, the fiscal, and the judiciary.

Specialists in American criminal law could make several important contributions to such a seminar. First, they provide a justification for the seminar itself and a means of attracting the critical Colombians. There is a lot of confusion and curiosity about the way the U.S. criminal law system functions in practice. By lecturing on the working relationships among police, prosecutors and judges in the U.S., American specialists could correct misconceptions about the accusatorial model and make it easier for Colombians to concentrate on the best way to define a prosecutor's role in Colombia. In addition, a discussion of the U.S. system with its good and bad aspects should help Colombians to approach their own problems from a less rigid and more creative perspective.

Based on the round table discussion we had at SER during my visit, the topics which interest the Colombians most are the following:

- a) The philosophy of the accusatorial system: Our criminal justice system is structured around the role of the jury. In a sense, the roles of the police, prosecutors, judges and defense counsel are all influenced by the way their work relates to the jury. The type of evidence police gather, the way prosecutors assess the evidence, and the evidentiary rulings of the judge reflect our concern for the rights of the accused and the jury's capacity to make a non-prejudicial judgment. Many of these ideas are foreign to the Colombian context and they should be thoroughly discussed in an introductory lecture giving an overview of U.S. criminal procedure.
- b) The police: A central issue for the Colombians is the type of controls prosecutors and judges should exercise over police work including the process for receiving complaints, whether the case merits a police investigation, the decision to detain or arrest a suspect, the gathering of proof after an arrest, and the methods used to investigate in the sense of protecting the rights of the suspect. Behind these concerns is the whole issue of how to re-structure and control the judicial police.
- c) The prosecutor: The relationship between the prosecutor and the police was mentioned above. The focus here should probably be prosecutorial discretion in the evaluation of evidence, in the decision whether formally to charge a suspect and in plea bargaining.

In addition, the incentive structures of prosecutors and how their career opportunities shape their perspective might be compared to the incentive structure of the Colombian fiscal and judge of instruction as a way of giving shape to practical considerations about the implications of a broader role for the fiscal.

- d) The judge: Here the concern will mostly be with the judges control over the police, the prosecutor's discretion, plea bargaining, the sufficiency of the evidence and the trial process. They will want to look at both the relationship between the judge and the prosecutor on the one hand and between the judge and the accused and his counsel on the other.
- e) Defense counsel: This topic is critical in the sense of comparing the role of a defense counsel in a prosecutorial system with his role in the inquisitorial process. The lack of paid counsel for indigents is a major problem in Colombia and it may be aggravated further by the reform. One can argue this is positive because it will underscore the need to develop a public defenders office or to reorient the role of the Procurador in this direction. At the same time, resources are limited and I am skeptical that providing an adequate defense for indigent defendants will be a high priority item. There are a series of parallel issues such as the access of the accused to the evidence against him, whether the accused can use the technical and scientific equipment of the state to prepare his case, etc. This is an area where serious empirical research is needed to clarify the

current situation of criminal defendants and to suggest ways of structuring the reform so as to minimize the problem of inadequate counsel for an accused without financial resources.

The topics are divided according to the major actors in the process, but many themes will cut across this division such as rules of evidence, relationships among federal, state and local authorities, the protection of basic civil rights, systems of control, the role of plea bargaining, etc. Nevertheless, the above division reflects the major concerns of the Colombians and the organizational issues which are central to the reform.

The next question is the type of U.S. consultant(s) who would be most helpful in such a seminar. If it were feasible to send two U.S. advisers for a one week period, I would suggest a criminal law professor and a prosecutor. They must speak Spanish, however, and, if possible, have some familiarity with criminal procedure in France, Italy or Latin America. One of them should also be familiar with the Colombian legal process and political situation. The ideal choice would be Professor Lloyd Weinreb of Harvard if he were available. Professor Weinreb was in Colombia for a year in 1969-70 as a part of a legal education program; he recently published a book comparing the accusatorial and inquisitorial models of criminal procedure; and he speaks Spanish -- at least he spoke Spanish in 1970. Many of the Colombians involved also know and respect Professor Weinreb.

A second alternative might be Professor Peter Westen of Michigan. He also spent some time in Colombia, but he is less

familiar with the Colombian criminal law system. A third option would be Professor Thomas Heller of Stanford. He does not teach criminal law, but he worked with the office of the Procurador in Colombia and he is very familiar with the country. He could prepare himself to handle the criminal law issues on a broad basis. If needed, I could possibly suggest some additional names. The prosecutor might be someone who works for a U.S. attorney's office from a Puerto Rican or Mexican American background. If only one advisor could be sent, I suggest the prosecutor since the most important factor should be concrete working knowledge of the U.S. criminal law system.

The advisors could arrive on a Monday and have a couple of days to prepare together for a seminar from Thursday through Saturday. Materials (in Spanish if possible, but if not, in English) describing some aspects of the U.S. criminal law system and its problems should be distributed in advance to give the discussion more of a focus. In terms of timing, I would suggest November, perhaps Thanksgiving week to minimize the amount of time the advisors would have to take away from their own commitments. By November, the content of the Constitutional changes should be clear and the commissions responsible for drafting the codes will be working.

Of course SER should be asked to obtain letters of cooperation from the relevant government officials (Minister of Justice, Procurador, Criminal Chambers of the Supreme Court, Congressional Commissions) before AID would agree to cooperate. Whether AID should consider assistance beyond the cost of U.S. consultants is debatable. I would suggest a small budget for the materials, but SER should be encouraged to raise Colombian funds for most of the local peso costs as a way of assuring local commitment to the seminar.

3) SER's Research Ideas

SER requested funding for two research projects in the document which accompanied their letter to Ambassador Asencio. Two additional ideas emerged from our discussion of the legal reform projects. All four projects suffer from the lack of a comprehensive research design, but their ideas are more developed than is indicated by the document they sent to the ambassador. If there is a chance that any of the projects would receive serious consideration for funding, SER would certainly be willing to provide a more complete research proposal. What follows is a brief treatment of each research idea:

(a) An information control system:

This is not really a research idea, but it is the project in which SER has invested the bulk of its efforts so it deserves to be treated first. As the list of SER's research staff illustrates, the institution is strongest in the application of system's analysis to public decision-making procedures. The legal process is a likely candidate for this type of work because there is no centralized information system which can be used to determine whether judges are actually processing cases at a sensible rate and where the bottlenecks are located which cause delays.

SER began its work in the legal field by developing a comprehensive flow chart of the criminal system. They then attempted to use data of the National Statistics Department (DANE) to chart

the volume and flow of cases in different stages of the criminal process, but the way in which DANE data was organized made such an analysis extremely difficult.

This preliminary work indicated that the problem was to find out what happened to cases between the time a complaint was filed and the end of the "sumario" and what causes the delays. According to SER's data, only about 4% of the cases filed wind up being tried, but very few of the remaining complaints are officially dropped. A method was needed to organize information about the status of most pending cases and the actions taken before any study of court delay would be feasible.

This led SER to design an information control system where a computer could provide a printout of the cases pending before each judge and actions taken. They were working under a contract with the Ministry of Justice and expected the system to be implemented, but when the government changed in mid-1978, the new Minister of Justice and the new Procurador were not interested. SER was unable to convince them that concrete information would be needed to understand the problems with the system and to implement meaningful reforms.

Even though this government contract fell through, SER kept the project alive on a limited basis by raising money in the private sector to finance a pilot project in four judicial chambers in Bogota. The judges are cooperating and students are being used to review and code the pending files for computer analysis. Each file is coded as follows: judicial chambers, case number. name of

accused, alleged crime, actions taken and dates, and current status of the case. The results will be analyzed by computer and published in an effort to demonstrate the utility of the system as a means of finding out what is actually occurring and of controlling and distributing the workload of judges.

More judges are interested in cooperating, but SER has almost used up its private funding source and cannot afford to expand the pilot projects at this time.

This information system would be very valuable to the new "fiscal general" if he is placed in charge of a substantial staff of prosecutors. It is also important at a more general level in terms of generating data that will force Colombians to face the issue of who uses the criminal court system and for what purposes. This type of information is basic to any critical analysis of both the criminal and civil courts. At the same time, it is the type of project that SER should be able to sell to the Colombian government.

The real problem is whether the pilot projects which SER has carried out in four judicial chambers is sufficient to demonstrate the potential importance of this information and to provide SER with enough of an example to sell the idea. I recommend encouraging SER to analyse the data it now has and to publish the results. If SER is able to generate some important hypotheses from this data about abuses of the criminal courts,

types of conflict that could be channeled to alternative dispute resolution processes, or critical bottlenecks, and needs limited funds to test these hypotheses with a broader sample, I would consider providing some research funds. This would enable SER to demonstrate the importance of such information to legal reform, and its usefulness as an administrative control mechanism. From that point on SER would have to carry the burden of selling the idea to the government on a broader basis.

(b) The access to counsel of low income criminal defendants:

This is a research idea which grew out of our conversations about the proposed reform; I think it is terribly important from a human rights perspective. There is not much hard data, but it is generally believed that a large percentage of the individuals accused of crimes lack the financial resources to hire counsel. Many of those who are able to hire an attorney on a limited basis, may not have sufficient funds to pay the attorney to prepare an

effective defense.

Studies regularly estimate that over one-third of the prison population have a right to be released if they had access to an attorney.⁵¹ It is not abnormal for over 60% of the Colombian prison population to never have been actually convicted of a crime.⁵² There is no way to know what percentage of these individuals simply lack the resources to defend themselves when they are caught up in the Colombian criminal system.

In theory, the law requires the appointment of defense counsel, but few people claim this system actually works. More than anything, it may justify the process at a formal level and make possible the ability of the judges to ignore the real situation. Recently the law school legal aid clinics have become more involved in defending indigent suspects, but the impact of this program is also unknown.

The purpose of this research would be to map the extent, type, and quality of legal services being rendered to low income clients by (a) court appointed counsel, (b) lawyers who are retained and paid what the accused can afford, (c) law school legal aid clinics, and (d) the Fundacion Servicio Juridicio Popular. This part would probably involve a sample survey of the prison population and accused persons who have obtained a conditional or complete release. The survey should focus on (1) their access to an attorney in terms of how they found out about a lawyer and contacted him; (2) if they hired an attorney, the services he provided and the cost; (3) if a lawyer was appointed by the court, the accused's contact with him and what the lawyer

did on behalf of the accused, and (4) the respondent's knowledge of the status of his own case and what steps he has taken to obtain a release. This information would have to be checked against court files

to determine the difference between the accused's perceptions and what actually occurred.

A second approach of particular importance to the proposed reform would be to model the incentive structure of the participants in the criminal process including (a) the official who receives the complaint and decides whether to issue an order to detain a suspect, (b) the police, (c) the judge of instruction, (d) the fiscal, (e) the judge who decides guilt or innocence, and (f) the defense attorney. In each case the theory of the inquisitorial process (or what grows out of the reform) will posit certain attitudes about the rights of the accused, his presumed innocence, and the unimportance of his social and economic status. The theoretical set of attitudes the participants should harbor can then be compared with their real incentive structures in terms of what factors determine whether they succeed in their jobs and how that influences their actual attitudes about the rights of the accused. A methodology would then be developed to test the actual biases of these participants to determine if the system creates inherent biases against underprivileged defendants that are inconsistent with the formal justification of the system.

These are examples of somewhat different approaches to the same basic issues: to what degree is the criminal justice system

inherently bias against low income individuals? if they are caught up in the system, what is the likelihood that they can obtain a meaningful legal defense? will the proposed reforms aggravate the situation or make it better? These are important questions and I believe SER should receive encouragement and support to design and carry out a research project aimed at these issues.

(c) The juvenile justice system:

This is a long standing research interest of SER and one with a potential to influence public policy. "Bienestar familiar," the institution charged with the responsibility for dealing with juveniles accused of crimes, has been granted a guaranteed income from a tax base which can be used to improve their facilities and programs for juveniles.

Just as with the ordinary criminal justice system, SER began its research by preparing a comprehensive flow chart of the juvenile justice system and identifying the critical points in the process. Several important observations have come out of this preliminary study.

First of all, only children from low income families are ever caught up in the juvenile justice system. The judges I spoke with repeatedly said the children of middle and upper income families who commit crimes are immediately released or the problems are handled informally through private compensation for the victim and charges are dropped. Second, the process is often used to punish a minor who causes economic harm or a personal injury when the family lacks the funds to compensate the victim. There is no system for channeling such

cases to a social worker or mediator before the minor is caught in the process. Third, the judges, trained in law, often treat the legal decision about a minor's situation as a formal legal process to determine guilt or innocence rather than an issue of reeducation or rehabilitation. They regularly ignore the recommendations of social workers and psychologists who have observed the minor.

None of the above is very surprising, but there is a more serious aspect of the process which may be increasing rather than limiting juvenile delinquency. After the complaint is filed and the child detained, the judge must decide whether to release the minor in custody of the family or to keep the child in "observation" for up to ninety days pending the final decision about the minor's status. Minors who are initially detained are automatically placed in observation pending this decision. If their families lack financial resources to help them, they are there for the ninety days.

The problem is that minors exposed to this situation for the first time are placed in the same facility with minors who are regularly arrested. Once the ninety days are over, a minor can only be sent to a reeducation facility where the hardened ones escape to return again when they are picked up for a street crime. Thus, the repeat juvenile delinquents are mixed with minors who are being sent to observation for the first time for the legitimate purpose of being observed by social workers and psychologists. No one has done any research on the impact of those ninety days on a minor who has never been involved in the process before, but

it is probably disastrous.

SER's research proposal focuses on several points in the process. They would like to study the initial point when the complaint is received to see what percent of cases might be channeled instead to a social worker or family mediator rather than to a court system. Next, they want to study the factors which appear to influence the judge in deciding whether to hold a minor in observation for ninety days and then the impact of this detention period on the minor's self-image. Finally, they are interested in the factors the judge considers in deciding what to do with the minor and how this relates to the overall objective of the juvenile justice system.

I do not feel this project is as important as the one concerning access to defense counsel, but some of the implications are similar. Only children from low income families are the victims of this process. As it is now structured, it appears to foster increased juvenile delinquency rather than to rehabilitate or reeducate minors. This is a complex social problem and I have no idea how it should be handled, but the current process does violate the basic human rights of a minor from an underprivileged background.

(d) Delegalization of Conflict:

This topic is the least structured of SER's research interests, but it is regularly discussed in SER's publications on the criminal process and the juvenile court system. Colombian legal scholars share the tendency of many civilian trained lawyers to make the

legal codes as comprehensive as possible by including legal categories and procedures for dealing with all forms of conflict. At the same time, the legal process continues to become more distant from the people it is designed to serve; the complexity of legal language and procedures increases making it almost impossible for a normal user to understand the process; and the cost of legal services relative to normal salaries continues to increase. Under these conditions a legal system can become primarily an instrument of institutions who have the resources to hire attorneys on a regular basis and who utilize the legal process as an integral part of their business. Examples are banks, businesses selling on credit, insurance companies, etc. They are repetitive users of the legal process on a volume basis and they normally lobby to obtain legal procedures which serve their needs.⁵³

At the same time, law is much too distant and costly to be an effective way of resolving a boundary dispute between neighbors, the breaking of a window by a neighbor's child, a minor car accident, family conflicts, etc. In the United States we have begun to experiment with a wide variety of less formal and less costly alternatives to the ordinary legal process such as small claims court, mediation centers, arbitrators, and family counseling and mediation services. In Latin America, little thought has been given to developing ways to delegalize conflict and to channel problems to institutions which are easier to understand and less socially distant from the users. A major exception to this generalization may be the labor courts which have a

conciliation process for conflicts between employers and employees that appears to be heavily used.

SER's interest in this problem has grown out of its systems analysis approach. This methodology provides a picture of who uses the legal process and for what purposes. From this, SER has begun to develop ideas about the types of conflicts that could be channeled to alternative and less formal modes of resolving the problem. How one moves from this to the next step of designing pilot projects which offer an alternative way of dealing with conflict is complex. SER might begin by studying the labor conciliation service in more depth, reading the literature from the United States and Europe, and visiting such projects in other countries.

This is an important area, but SER's research staff has not had much exposure to the literature on alternative dispute resolution procedures. They could not design a very sophisticated research proposal in this field as compared with SER's capability in the area of systems analysis. At the same time, that is not a reason to avoid supporting this research interest on a limited scale.

SER should be encouraged to identify a lawyer or sociologist who would like to complete postgraduate studies with an emphasis on the dispute resolution literature and given assistance in finding a fellowship for this person. In the meantime, I might encourage SER to attempt a study of the labor conciliation service

and its possible adaptation to other types of conflict. As a part of this, SER might do a general survey of those areas where further research on delegalization of conflict could have important implications for the underprivileged. No one else is doing similar research in Latin America so a limited pilot study of this sort would be a means of testing SER's competency in this field, making SER researchers aware of the relevant literature, and generating a paper that might stimulate similar concerns in other parts of Latin America.

D. Access of the Underprivileged to the Legal Process

Given the complexity of the proposed legal reforms and the extent of SER's research interests, I spent less time on this topic than originally contemplated. I did, however, manage to interview a representative of Pro-Publicas, to visit CINEP's legal aid group, and to discuss the progress of law school legal aid clinics with

professors from Los Andes, Rosario and Externado. In addition, this subject was one of the central issues at the round table discussion on my study of the Colombian legal profession. Since my views on some of the inherent difficulties with legal aid have not changed much since the completion of the legal profession study, I am including in Appendix "D" a brief section of the article which discusses problems with programs to alter the distribution of legal services. The following is a brief overview of the principal Colombian institutions providing free legal services to low income groups at the current time:

1) Centro de Defensa Pro Intereses Publicos (Pro-Publicos)

The director, Fernando Umana, was in Lima during my stay in Bogota so I spoke with his research associate, Gonzalo Mendez, a recent law school graduate. The core staff of Pro-Publicos is currently limited to Fernando Umana, Gonzalo Mendez, an executive secretary with legal training, and a secretary. They are engaged in three principal activities:

(a) The "ecology project"

This project is designed to force government regulatory bodies to apply existing regulations to aerial crop dusters. Apparently the location of their air strips, their insurance policies for harm caused by the spraying, and the way they conduct the fumigation flights do not comply with existing health legislation. The legal actions against crop dusting companies and the government regulatory agencies were initiated by prior staff attorneys at Pro-Publicos

and now they are being prosecuted by Mendez. The system of civil justice is slow and interlocutory orders are difficult to obtain, so the project has not had much impact.

(b) The legal rights of Indians in Cauca

This is Fernando Umana's project. It was one of the original interests of Umana when Pro-Publicos was founded five years ago, and it has continued to be a central Pro-Publicos Project. The center has contracted a lawyer in Cauca who represents the Indians at no cost or very minimal cost on individual legal problems. The disputes normally involve title and possession of land, or criminal actions, with a civil counterpart against an Indian, for which he might be jailed. As best I could tell from the description of Mendez, the legal services provided the Indians do not include an effort to select cases where "group representation" or "test cases" are possible in the sense of influencing the position of a large number of Indians similarly situated. The major accomplishment seems to be that anyone who attempts to interfere systematically with Indians' rights on a regular basis, particularly in relation to conflicts over land titles, will be challenged by the Pro-Publicos attorney. In this sense, the project may have a deterrent effect which protects group interests, but it is doubtful that this legal representation has increased the sense of shared problems or shared rights among the Indian population.

(c) The "efficiency" of Congress:

This project grows out of the relationship between Umana and Daniel Samper, a columnist for El Tiempo and a member of the

family which publishes the newspaper. The Samper family is powerful and, through a series of private friendships, Daniel Samper obtained funds for Umana to run a study of Congressional "efficiency." The basic methodology seems to be that two students are compiling a record of the activities of congressmen including the amount of Congressional legislation introduced by congressmen rather than the executive, and attendance at congressional sessions. Their definition of "efficiency" is not very worked out and there is no apparent political theory which is guiding the orientation of the study.

Pro-Publicos still needs to develop a more coherent philosophy on the role of public interest litigation in Colombia and to concentrate on integrating its projects to maximize the institution's impact. This is not easy given Pro-Publico's limited funds and staff. The concept of group representation is inconsistent with the traditional model of legal services and the system of civil procedure inhibits most types of group legal actions. There are, however, important exceptions to these limitations which cut in favor of public interest law, particularly Colombia's liberal standing requirements for challenging governmental regulations and decrees. The center needs to survey systematically such possibilities and to identify the types of programs that will attract local support and guarantee its future on a limited basis.

2) Law School Legal Aid Clinics

In 1969, the Association for the Reform of Legal Education (ARED) included as one of its main programs the creation of law school legal aid clinics. A few years later, a government decree regulating legal education mandated the formation of legal aid clinics by all law schools. Fourth and fifth year students must earn a certain amount of credits, approximately equivalent to one course each semester, in clinical work.

At approximately the same time, the government encouraged the Banco Popular to finance a Fundacion Servicio Juridicio Popular. The idea was for the Foundation to hire a staff of attorneys who would work one-half time in the law faculties as directors of the legal aid clinics and one-half time in the Foundation's central office handling cases which come directly to the Foundation. This would provide the legal aid clinics in diverse faculties with a central coordinating body and allow for the development of a meaningful effort to deliver legal services to low income groups.

The idea never really worked for a number of reasons. First, the Foundation director, Vicente Pineros, lacked managerial skills and an understanding of the legal problems of low income groups. Second, the law schools were extremely jealous of their own autonomy and only a few cooperated with the Foundation. Third, legal services were always offered on an individualized basis in such areas as family law, labor benefits, identification documents, and land title and tenancy problems. On a few occasions the center did receive cases from invasion communities or pirate barrios where joint litigation or a group action would have been feasible, but

they kept their services at the more individual level to avoid political problems.^{54.}

Today this Foundation has fallen on hard times. The director has been changed several times; the Banco Popular wanted to withdraw its support and only the intervention of the government saved the program; and the staff has been reduced to five lawyers. The current director, German Navas, had previously been head of Gran Colombian Law School's legal aid clinic. He is capable and dedicated to the idea of legal aid, but not likely to be very imaginative in seeking cases with a broader impact on the living conditions of the urban poor.^{55.}

During the height of the legal aid movement in the mid-seventies, most of the law faculties founded clinics, but they do not appear to have progressed very far. There are some exceptions. Externado now has offices outside of the law school in several different low income communities and the clinic is well organized to deliver limited services on an individualized basis.

The clinics of Los Andes, Gran Colombia, Rosario and Santo Tomas are operating out of offices adjacent to each university. This has obvious implications in terms of the self-selection of clients who will come to a university office, but they continue to handle as many cases as the number of students and supervision will permit. All of these clinics tend to provide services primarily in the fields of family law, title to property, labor benefits -- particularly the collection of severance pay when employment is terminated, and criminal law.

One has to be cautious about being too critical of the clinics since the good ones are obviously fulfilling some important functions. They are providing limited legal services to some indigent clients, and the students are being exposed to the needs of low income groups. Hopefully this will have an impact on the students' subsequent ideas about legal reform.

At the same time, the clinics have not really taken their programs to low income communities and become involved in a way that would enable them to understand the client's problems in a more general sense. They have not attempted to distribute simple pamphlets designed to inform potential clients about their rights or about cases the clinic has won which might be important to other persons in similar situations. In short, they have not moved beyond the point of dealing with the particular legal problem of the client who comes in the door. This approach is consistent with traditional Colombian concepts of legal services, but it also means the impact of the clinics on the poor's problems will be very limited.

3) Centro de Defensa Popular

This is a legal aid clinic operated out of the Centro de Investigacion de Educacion Popular (CINEP). As noted earlier, CINEP is a research center staffed by intellectuals of the Colombian left and led by Jesuit priests. The clinic is mostly run by a recent law school graduate and a number of fifth year law students under the guidance of Father Carlos Vasco, who is also a professor of mathematics. The individuals involved in the clinic are more interested in representing "group interests" than is true of any other Colombian clinic. They selectively screen

cases; they are trying to become involved in the communities they serve; and they have been holding discussions about legal rights and distributing pamphlets on the rights of renters. At the same time, they admit their efforts have not had much impact and the interest of the low income communities in their programs is still quite limited.

While this is a modest effort at the current time, its potential for survival may be fairly high because of its relations with CINEP. I did not inquire into finances, however, and I did not get any strong feeling that the leadership of CINEP was committed to the idea of a legal action center. In any case, the group has more interesting ideas than most of the clinics. Hopefully it will survive on a modest basis.

This overview of programs providing legal services for the poor is not very positive, but one must remember that there were no free legal services in Colombia ten years ago. Legal aid clinics have become a permanent fixture in some law schools. The first effort at coordination failed, but some thought might be given to alternative approaches. At a minimum, Colombian programs should be encouraged that provide an opportunity for the clinic directors (a) to discuss mutual problems, (b) to be exposed to what is occurring in Legal Aid elsewhere in Latin America, and (c) to benefit from the experience of programs such as CLEPER in the United States. Some type of loose network of persons involved in similar activities and a central means of reproducing and distributing information and ideas in the field of legal services

is probably the best approach at this time.

E. A Fulbright Lectureship in Law

It is a good time for a Fulbright lecturer given the current interest in legal reform, but more thought needs to be given to the objectives. Very few U.S. Law Professors have enough understanding of the Civil Law tradition and of Colombia to be effective critics of the Colombian legal process. A better approach is to plan a set of lectures on developments in the administration of justice in the United States that are provocative for Colombians in the sense of encouraging them to view their own problems from different perspectives.

With the current interest in Criminal Law reform, the lecturer could concentrate on recent research and experimental programs aimed at improving U.S. criminal courts. The criminal court reform should be in the early phase of implementation by the summer of 1980 and a lecturer could generate discussions about decriminalizing some types of conflict, pre-trial intervention programs, pilot projects to improve working relations between police and prosecutors, alternatives to plea bargaining, control of prosecutorial discretion, etc.

A somewhat different approach, and one I favor because of the potential to foster a dialogue on a broader set of issues about law and social change, is to concentrate the lectures on "access to law." This theme encompasses a wide range of topics that are all related in the sense of being concerned about who

uses law (and who does not) and for what purposes. For example, the lectures might discuss (a) recent procedural developments, primarily class actions, that have increased access to law for group conflicts, (b) the role of public interest law, (c) new models for the delivery of legal services to middle and low income groups, and (d) programs aimed at delegalizing conflict and establishing alternative dispute resolution institutions. These topics are only meant to be suggestive; their value is they have practical implications, they can be used to encourage research or experimental action projects on aspects of the legal process which influence the capacity of people to meet basic human needs, and they relate to the more general dialogue on the relationship between law and social change.

A Fulbright lecturer should also be willing to spend time with SER advising on their legal research projects. I assume, however, that a Fulbright lecturer should have an affiliation with a Colombian law school. Los Andes or Rosario are probably the best alternatives, but if the lecturer is to emphasize Criminal Law, the possibility of Externado should also be explored.

F. Conclusions and Recommendations:

There will be a reform of the Colombian criminal process, but at this point the exact orientation of that reform is unclear. Within the next few months, the changes will be defined at the "formal" level through Congressional action on the Constitutional reform and the promulgation of a new code of criminal procedure. This will be achieved through a complex set of political negotiations between the leadership of the two major parties which reflects in different ways the interests of the Presidency, the Judiciary, the Procurador, the National Police, and the Military.

Once the formal characteristics of the reform have been defined at this level, a somewhat distinct process of political bargaining will begin over the implementation of the formal changes. The political compromises necessary to pass the reform will inevitably lead to rather vague language at the formal level; many of the most critical questions will be decided at the implementation stage when the struggle for influence and control among the Ministry of Justice, the Procurador, the new "fiscal general", the police and the court system will become more obvious.

It is not clear that the most important policy issues will receive adequate attention through this political process, but this does not detract from the significance of these issues for the Colombian population. The leadership of Instituto SER perceives the importance

of an ongoing dialogue on the implications of the reform for human and civil rights and for the creation of an effective criminal court system. Because of SER's contacts and support within powerful segments of Colombian society, the institute is in a position where it can generate research and organize seminars to foster this dialogue without becoming embroiled in the political struggles. Within reasonable limits, I believe these efforts merit the support of AID and other U.S. funding agencies.

More specifically, I recommend the following:

1. Assisting SER with a seminar on an accusatorial model of criminal justice by funding the cost of a criminal law professor and a prosecutor to attend the seminar in Bogota.

2. Consider funding a research project by SER on the access to legal counsel of criminal suspects from low income backgrounds. This research would focus on the accused's relations with paid counsel, court appointed counsel, a legal aid attorney, or a law student. SER would analyze the implications of their empirical findings for the rights of low income suspects and make recommendations on how the protection of their rights should be reflected in the implementation of the criminal court reform. The latter might involve a parallel research effort to examine the incentive structures of participants in the criminal court system and whether their working situations foster biases against the rights of indigent suspects or

defendants in political crimes. These studies on the rights of criminal suspects raise basic human rights issues.

3. As the reform reaches the implementation stage, AID should encourage SER to make another effort to sell the idea of an information system to the minister of justice and the new "fiscal general." AID should also demonstrate an interest in the results of the pilot study and encourage SER to think about how a more complete system could be designed to demonstrate who uses law and for what purposes and to identify the types of litigation that could be handled at less cost and more effectively by alternative dispute resolution procedures. If SER can adapt its systems analysis model to generate this type of information and comes up with a research design to test hypotheses with important implications for delegating conflict, I would support the project. Such a research approach could provide a useful model for possible adoption in other parts of Latin America.

4. SER's proposed research on the juvenile justice system and its impact on the rate of juvenile delinquency is also the type of research that an institution like Bienestar Familiar should be willing to fund. At most, I would consider limited seed money to help SER demonstrate the importance of this research through a limited pilot study on the observation center.

5. The Fulbright Commission should be encouraged to select

a Fulbright lecturer in law who would spend one to two months in Colombia in 1980 lecturing on recent U.S. trends in the administration of justice and the distribution of legal services.

Footnotes

1. See the Bibliography, sections "A" and "C".
2. Abraham S. Goldstein and Jon Newman, "Criminal Investigation, The Procurador-General and Colombia's Law 16" (November 29, 1968).
3. See the Bibliography, section "B" for a list of materials consulted on the reform.
4. See the Bibliography, section "D".
5. See Appendix B for a list of the speakers. The two prominent Constitutional scholars were Jorge Velez and Jaime Vidal.
6. See the Bibliography, section "D".
7. See Appendix "A" for a list of the persons interviewed.
8. D. Lynch, "Legal Roles in Colombia: Some Social, Economic and Political Perspectives" in Legal Professions in Development: Comparative Perspectives, C.J. Dias, R. Luckham, D.O. Lynch, J.C.N. Paul (eds.) forthcoming, 1979.
9. The plebiscite of 1957 changed Articles 136 and 148 of the Constitution to give the Justices life tenure during good behavior until retirement at seventy and to give the judiciary the authority to appoint all judges.
10. Decree 1923 of 1978, Art. 1.
11. Id., Art. 2.
12. Id., Art. 3.
13. Id., Art. 4
14. Id., Art. 9.
15. Id., Art.11.
16. This estimate comes from a newspaper article by June Erlick, "Priests' Arrests Worry Colombian Churchmen," The Miami Herald (July 29, 1979) p. 16-A.
17. See e.g. F. Rojas, Constituyente II: Hegemonia del Capitalismo Monopolista (1978), and the CINEO publications listed in the Bibliography.

18. See Guillermo Gonzalo Charry, "Proyecto de la Reforma Constitucional del Poder Judicial y Comentarios" in La Justicia en Colombia esta Congestionada (1978) pp. 137-159.
19. Id. at 155-156.
20. Proyecto de Acto Legislativo No. 4/78, Art. 10.
21. See Alvaro Gomez Hurtado and Miguel Escobar Mendez, "Proyecto de Acto Legislativo para la Reforma de la Administracion de la Justicia al Congreso y Exposicion de Motivos." in La Justicia en Colombia esta Congestionada supra note 18, pp. 163-168.
22. Proyecto de Acto Legislativo No. 4/78, Art. 11.
23. Id., Articles 14-21.
24. Constitucion Politica de Colombia, Articles 147-164.
25. See D. Lynch, supra note 8 for a discussion of legal career patterns and the influence of law schools.
26. Constitucion Politica de Colombia, Art. 218.
27. See "Nuevo enfrentamiento Gomez - Pastrana," in El Tiempo (July 10, 1979) p. 7A and "Fuerte Critica de Lleras a Min-Justicia" in El Espectador (July 18, 1979) p. 1-A.
28. See El Espectador (December 12, 1978) p. 9A.
29. See "Foro Judicial Rechaza Puntos Fundamentales del Proyecto" in El Espectador (July 17, 1979) p. 11-A.
30. See "Disciplina para Aprobar las Reformas Pide Turbay" in El Espectador (July 18, 1979) p. 7-A.
31. Id.
32. "Ponencia de Honorable Representante Ernesto Luceno Quevedo" in El Espectador (December 12, 1978) p. 9-A.
33. Proyecto de Ley No. 79 de 1978, Art. 5.
34. See Decree 225 of 1977.
35. See Institute SER "Fundamentos Empiricos para una Reforma de la Justicia Penal" (1978).

36. See the list of new crimes to be included in the code in the ponencia of H.R. Jairo Ortega on the "Reforma alCodigo Penal", El Tiempo (December 13, 1978) pp. 6C-7C.
37. Proyecto de Ley No. 20 de 1978, Art. 1(b).
38. Proyecto de Acto Legislativo No. 4 de 1978, Arts. 10-11.
39. See "Fundamentos Empiricos para una Reforma de la Justicia Penal" supra note 35, pp. 92-95.
40. Proyecto de Acto Legislativo No. 4 de 1978, Art. 11.
41. Codigo de Procedimiento Penal, Art. 290.
42. See "Fundamentos Empiricos para una Reforma de la Justicia," supra note 35, p. 103.
43. See Codigo de Procedimiento Penal, Articles 31-40.
44. Id., Art. 511.
45. One could also argue the formal justification for the inquisitorial process helps to legitimize the current Colombian practice of not providing adequate counsel for indigent suspects and that the change to the accusatorial process would improve the situation by making the violations of the accused's rights more obvious.
46. See Annette Pearson "La Congestion Carcelaria en Colombia," (1978).
47. "Instituto SER de Investigacion" (1979) p.4.
48. Id., p. 18.
49. See the Bibliography, section "C".
50. During the five years of the Association for the Reform of Legal Education (1969-1974), ARED did not produce any serious empirical research even though there were adequate Ford Foundation funds to finance the studies.
51. See supra note 46.
52. See "Instituto SER de Investigacion," (1979)p. 21 citing Direccion General de Prisiones.

53. For a useful theoretical treatment of these issues see M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 Law & Soc'y. Rev. 95 (1974).
54. These observations are partially based on my prior conversations with Vicente Pineros between 1971 and 1974.
55. I did not meet with German Navas during my two week stay in Colombia, but I interviewed him when he was head of the Gran Colombia legal aid clinic in 1975.

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Hernan Echavarria Olozaga, Aspectos Administrativos de la Reforma Judicial (1979).

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C. Studies and Publications of Institute SER on the Legal System and Legal Reform.

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Ricardo Sala and Eduardo Aldana; "Analisis Estadistico del Proceso Penal" (1976).

Eduardo Aldana and Hernando Valencia, "Analysis Funcional del Proceso Penal" (1976).

Ignacio Duran, "Modelo de Analisis del Proceso Penal" (1977).

Annette Pearson, "La Congestion en la Administracion de Justicia" (1977).

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Ricardo Sala and Eduardo Aldana "Diagnostico y Alternativas del Sistema de Informacion en la Administracion de Justicia Penal" (1978).

Jaime Giraldo, Mauricio Luna, y Hector Rojas "Mecanismos para Descongestionar los Establecimientos Carcelarios" (1978).

Jaime Giraldo and Hector Rojas, "La Proteccion Legal del Menor." (1978).

"Fundamentos Empiricos Para una Reforma de la Justicia Penal," (Instituto SER, 1978).

D. A Partial List of the Papers Presented at the National Forum of the Judiciary on the Constitutional Reform.*

"Ponencia que Presenta el Tribunal Superior de Bogota" including Servio Tulio Pinzon, "Division Territorial Judicial"; Ricardo Medina "Control de la Constitucion"; Gonzalo Mejia, "El Ministerio Publico"; Manuel Corredor, "Fiscal General de la Nacion"; Gregorio Rodriguez, "Consejo de Estado y Justicia Administrativa;" Jorge Ortiz, "Administracion de Justicia"; Gregorio Rodriguez, "El Consejo Superior de la Judicatura: Sus funciones heterogeneas"; Alfonso Cabra, "La Fuerza Politica de la Rama Jurisdiccional."

Luis Francisco Serrano and Jaime Dario Cordoba, "Ponencia Presentada por los Delegados del Cuerpo Auxiliar de la Corte Suprema de Justicia al Foro Nacional Judicial Sobre la Reforma a la Administracion Judicial."

"Ponencia del Tribunal Superior de Santa Marta"

"Ponencia del Tribunal Superior de Bucaramanga"

"Ponencia del Tribunal Superior de Manizales"

"La Reforma Constitucional a la Administracion de Jusitica" Ponencia de afiliados a ASONAL JUDICIAL.

*More Papers were actually presented, but it was not possible to obtain copies of all of them.

APPENDIX "A"

Colombians Consulted About the Legal Reforms in
Formal Interviews or Social Settings over Lunch
or Dinner.

Judges:

- Miguel Lleras Pizarro - Ex-Counselor of State and current Supreme Court Justice in the Constitutional Chamber.
- *Jaime Bernal - Supreme Court Justice in the Criminal Chamber and Member of the Commission drafting the Code of Criminal Procedure.
- *Ricardo Medina Moyano - Magistrate of the Superior Tribunal of Bogota in the Criminal Section.
- *Didimo Paez Velandia - Magistrate of the Superior Tribunal of Bogota in the Criminal Section.
- *Alberto Hernandez - Circuit Court Criminal Law Judge
- *Carlos Valencia - Municipal Court Criminal Law Judge
- Clarita de Segura - Juvenile Court Judge

Judicial Administrator

- *Dario Velazquez - National Director of the Judges of Criminal Instruction

Delegates of the Procurador

- *Enrique Aldana - Delegate of the Procurador in Criminal Law and Member of the Commission drafting the Criminal Code.
- *Hernando Baquero - Delegate of the Procurador in Criminal Law

Fiscales

- *Manuel Corredor Pardo - Fiscal of the Superior Tribunal in Bogota and Secretary of the Commission drafting the Criminal Law Code.

Appendix "A" (Cont'd)

*Augusto Lozano - Fiscal of the Superior Tribunal of Bogota

Distinguished Colombians with a Special Interest in Legal Reform

Alfredo Vasquez Carrizosa - Ex-Foreign Minister of Colombia and Ex-Ambassador to England (He is an outspoken critic of the government on civil rights issues.)

Hernan Echavarria Olozaga - Twice Minister of Government and Ex-Ambassador of Colombia to the White House. (He is a major backer of Instituto SER and the author of a book on judicial reform.)

Law Professors and Researchers (Other than at SER)

Eduardo Alvarez-Correa - Dean, University of the Andes

Ciro Angarita - Law Professor at the University of the Andes.

Alvaro Tafur Galvis - Rector and Dean of the Rosario Law Faculty

Fernando Rojas H. - Researcher in Law and Political Science at CINEP

Alejandro Reyes - Researcher in Law and Political Science at CINEP

Alejandro Angulo - Director of CINEP

Other

Gonzalo Mendez - Pro Publicas researcher in Law.

Carlos Alzate - Director, Los Andes Legal Aid Clinic.

Gloria Lucy Zamora - Director, CINEP Legal Aid Clinic (I met with the Director and four last-year law students who staff the clinic.)

*Indicates the individual attended the round table discussion at SER on the proposed seminar on the accusatorial model.

APPENDIX "B"

Prominent Speakers on the Proposed Reforms at the
National Forum of Judges.

- | | |
|-------------------------|---|
| Hugo Escobar Sierra | - Minister of Justice |
| Fernando Hinestroza | - Ex-Minister of Justice and Rector of Externado de Colombia |
| Carlos Augusto Norriega | - Senator of the Republic and an author of the Reform Project |
| Jorge Velez | - Ex-Justice of the Supreme Court |
| Jaime Vidal Perdomo | - Senator of the Republic and noted Constitutional Law Scholar. |

APPENDIX "C"

List of Researchers of Instituto SER de Investigacion

JORGE E. ACEVEDO B.

Civil Engineer, Javeriana University
M.S. in Engineering, Texas A & M University
C.E., Massachusetts Institute of Technology (Transport)
Areas: Transport, Public Systems and Services. Urban Systems.

EDUARDO ALDANA VALDES

Civil Engineer, Andes University
M.S. in Engineering, Illinois University
Ph.D., Massachusetts Institute of Technology (Urban Systems)
Director of the Institute; Professor at Andes University
Areas: Public Systems (Education, Justice, Health, Social Security)
Urban Systems, Statistical Models, Systems Analysis.

ELENA AMEZQUITA DE PARDO

Mathematics Degree, University of Los Andes
Areas: Systems Analysis, Computers, Applied Mathematics, Education.

CARLOS BECERRA CHAPARRO

Engineer, Industrial University of Santander
Sociologist, National University of Colombia
Areas: Sample Designs, Opinion Research and Models for Information
Systems.

FABIO DURAN CASTRO

Industrial Engineer, University of Los Andes
Master in Industrial Engineering, University of Los Andes
Professor of Electrical Engineering, University of Los Andes
Areas: Statistics, Research Methods, Program Evaluations

MAURICIO FERRO CALVO

Diploma, Leopold Franzens University
Th.M., Leopold Franzens University
Td.D., University of San Anselma (Medieval History)
Ed.D., (Cand.) Harvard University (Planning, Administration and Policy
Science.
Professor, University of Los Andes
Areas: Public Decision-making, Organizational Behavior, Sociology
of Education, Educational Planning, Statistical Models

Appendix "C" (Cont'd Page 2.)

JAIME GIRALDO ANGEL

Degrees in Law and Political Science, Universidad Externado de Colombia
Degree in Psychology, National University of Colombia
Doctor in Psychology, Universidad Autonoma of Mexico,
Professor, Law School, University of Los Andes
Areas: Criminal Law, Criminology, Public Administration

PATRICIA GOMEZ DE LEON

Degree in Mathematics, University of los Andes
M.S. Industrial Engineering, University of los Andes
Areas: Statistical Analysis, Nutrition

HUMBERTO GUTIERREZ G.

Forestal Engineer, Universidad Distrital
M.S. in Administration of Companies, University of los Andes
Specialization in Agricultural Economics, National University (ILMA).
Professor, Universidad Externado de Colombia, and Universidad Distrital.
Areas: Administrative Models, Agricultural Trade and Commerce

GERMAN GRANADOS

Mechanical Engineer, University of los Andes
Postgraduate, Mechanical Engineering, University of los Andes
Areas: Information Systems, Financial Analysis, Project Evaluation,

GUILLERMO OWEN SALAZAR

Mathematician, Fordham University
Ph.D. in Mathematics, Princeton University
Professor, Department of Mathematics, University of Los Andes
during sabbatical year from Rice University.
Areas: Research Methods, Econometrics, Games Theory, Mathematical
Models

ANNETTE PEARSON

L.L.L. (Hons), Victoria University of Wellington; New Zealand
Degree in Criminology, Cambridge University, England
Areas: Criminology, Criminal Law, Family Law

JAIME ENRIQUE VARELA

Industrial Engineer, University of los Andes
M.S. in Systems Analysis; University of California, Berkely
Ph.D. (Cand.); Pennsylvania University
Professor, Industrial Engineering Department, University of Los Andes
Areas: Public Administration, System Analysis, Budgetary Models, Health
Systems, Statistical Models.

Appendix "C" (Cont'd Page 3.)

EDUARDO VELEZ BUSTILLO

Political Scientist, University of Los Andes
M.A. in Sociology, Illinois University
Ph.D. (Cand.), Illinois University
Professor, Political Science Department, University of los Andes
Areas: Research Methods and Statistics, Political Sociology.

JORGE ENRIQUE WAHANIK

Law Degree; "Colegio Mayor del Rosario" University
Ed.D. (Cand.); Harvard University
Areas: Administrative Law, Higher Education. Educational Research and
Evaluation.

LEONOR ZUBIETA VEGA

Degree in Social Work, Universidad Externado de Colombia
Scholastic Degree in Education (Cand.), Socio-Educational Research
Professor, Universidad Pedagogica Nacional.
Areas: Economics of Education, Educational Sociology, Rural Development,
Rural sociology

OTHER ASSOCIATED RESEARCHERS

Carlos J. Ayalde L., Industrial Engineer.
Hugo Diaz Baez, Chemical Engineer, Postgraduate in Industrial Planning.
Mauricio Luna B., Law Degree, M.S. Criminal Science, Criminology.
Hector Munera, Nuclear Engineer, Ph.D.
Ivan Obregon S., Civil Engineer, Ph.D.
Hector Rojas, Law Degree
Graciela Coatz-Romer, Sociology
Humberto Serna, Lawyer, Doctorated in Education.

APPENDIX "D"

Excerpt from D. Lynch, "Lawyers in Colombia: Perspectives on the Organization and Allocation of Legal Services" 13 Texas Int. Law Journal 199 (1978).

V. PROGRAMS TO ALTER THE DISTRIBUTION OF LEGAL SERVICES

There are a variety of ways to supplement the fee for service method of allocating legal services and thereby to increase access to lawyers by lower income groups or by unorganized interests which share legal needs. In Colombia there has been some experimentation with legal aid, and recently a small public interest law firm was started with partial funding from the Ford Foundation.¹¹⁵ Serious questions, however, can be raised about the potential success of these alternatives in the Colombian context.

In the early 1970's, the Colombian government encouraged a bank to establish and fund a Legal Aid Foundation.¹¹⁶ In a parallel action the Ministry of Justice promulgated an executive decree requiring all Colombian law faculties to establish legal aid clinics offering free legal assistance to indigents.¹¹⁷ The Foundation was to employ approximately ten young attorneys who would devote half their time to the organization and supervision of the law school legal aid clinics. The other half would be spent on cases taken directly by the central Foundation office.

The success of this experiment has been limited. Some law faculties have taken advantage of the free half-time assistance in the organization of a clinic, but others refused to cooperate because they feared student political problems would be caused by the Foundation's link to the government. The Foundation itself has pursued a cautious course of action. It has kept its services on an individualized basis and has avoided conflicts which would involve the representation of group or community interests against government agencies.¹¹⁸

115. This small firm was in the planning stage at the time of this study. It has now been operating on a small scale for three years, but it is not yet possible to assess its potential importance.

116. The *Banco Popular* provided the early funding for the *Fundacion Servicio Juridico Popular*.

117. See Decree-Law No. 971 of 1970, Decree-Law No. 1189 of 1974, and Decree-Law No. 225 of 1977.

118. These observations are based on informal conversations over a three year period with the Director of the legal aid program and various staff members.

One of the primary difficulties with this legal aid approach is the underlying assumption that the fundamental problem is the poor's lack of resources to purchase legal services. This is a major concern, but it is a limited perspective on the question of legal services for low income groups. Very little is known about what low income groups regard as their primary needs and the relevancy of the legal process to these problems. The criteria they use to identify what is a "legal problem" will depend partially on the view of the legal process they have developed over time. Leon Mayhew has succinctly stated the problem:

Needs for legal services and opportunities for beneficial legal action cannot be enumerated as if they were so many diseases or injuries in need of treatment. Rather, we have a vast array of disputes, disorders, vulnerabilities, and wrongs, which contain an enormous potential for the generation of legal actions. Whether any given situation becomes defined as a "legal" problem, or even if so defined, makes its way to an attorney or other agency for possible aid or redress, is a consequence of the social organization of the legal system and the organization of the larger society—including shifting currents of social ideology, the available legal machinery, and the channels for bringing perceived injustices to legal agencies.¹¹⁹

If one applies this view of legal services to the Colombian context, there is little reason to assume the poor would use free legal services in a way different than the way they have used services for a fee.¹²⁰ Their contact with the legal system will normally be a negative experience. Inherent in the legal order of a capitalist society is the protection of relationships concerned with the allocation of productive resources.

Security in property and contract rights are basic to the society's incentive structure, but from the perspective of the poor, these legal rules perpetuate inequalities in control over property.¹²¹ The poor's past contacts with the legal system will often have involved a threat to personal liberty through the criminal process, the taking of personal property to satisfy a debt, the taking of the land they have farmed if the owner decides to change its use, or, if they have some family property, the probation of their estate through a complex procedure they do not understand.¹²²

119. Mayhew, *supra* note 75, at 404.

120. Without "proactive" organizations demonstrating different ways of using law the tendency will be to follow established routines and to turn to lawyers in those situations where the poor know, based on past experience, that the legal process may provide some relief. For a theoretical overview of some of the problems involved in allocating legal services to the poor, see J. CARLIN, J. HOWARD & S. MESSINGER, *CIVIL JUSTICE AND THE POOR* (1967); Galanter, *supra* note 96; Galanter, *The Duty Not to Deliver Legal Services*, 30 U. MIAMI L. REV. 929 (1976); Hazard, *Legal Problems Peculiar to the Poor*, 26 J. SOC. ISSUES 47 (1970); Marks, *A Lawyer's Duty to Take All Comers and Many Who Do Not Come*, 30 U. MIAMI L. REV. 915 (1976); Mayhew, *supra* note 75.

121. For an interesting critique of the view that law sanctions poverty, see Hazard, *supra* note 120.

122. See Table XII for an overview of the areas where low income persons are most likely to have contact with the legal process.

When the negative nature of their most frequent contacts with the legal process is combined with the social distance between the lower class and lawyers, there is little reason to believe they would identify a problem as "legal" if an alternative means of coping with it existed. To make the point another way, if the public funds which would be necessary to mount a meaningful legal aid program were granted to the potential clientele in the form of a direct payment, there is no reason to believe they would use these funds to purchase more legal services in the market place.

The organization of a typical legal aid program in Colombia would not tend to ameliorate their view of the legal process. The normal pattern in Colombia would be to hire young attorneys willing to work for a lower salary while they obtain experience and prepare themselves for a legal career serving institutional clients or the middle and upper classes. They would have no long-run identification with the needs of their clients, and their perspective would be that of a patron who knows what is best for his client. Since the services would not be on a fee basis, some alternative mechanism such as queuing would be needed to allocate the services. There is no reason to assume the costs of waiting in line or similar alternatives will allocate the subsidy in a way that matches the clientele's most critical legal needs.¹²³ In addition, legal aid would have to be funded by the government or powerful private institutions acting at the request of the government. The recipient of such funds always operates under a constraint. If they begin to represent the interests of lower class groups in a fashion which presents a fundamental challenge to the allocation of power or wealth, their funds can be cut off and the institution terminated. Consequently, they will tend to favor individualized legal problems which do not challenge or attempt to change the existing allocation of legal rights.

In addition, one cannot automatically assume that discouraging people from identifying a problem as "legal" is necessarily negative. Given the costs of any comprehensive legal aid program, the resources which would be needed for the courts to handle more cases, and the social distance of judges and lawyers from low income clients, encouraging and developing alternative forms of dispute resolution may be a more sensible course of action. Access to public decision-making as contrasted with access to the courts is more fundamental because of the government's role in resource distribution, but there is no necessary reason why lawyers should dominate the avenues of access. Political parties, their leaders, or other types of intermediaries may have a more long-run identification with the interests of low income groups than university-trained lawyers. It may be worthwhile to consider ways to encourage other types of community advocates while reducing the scope of the profession's legal monopoly.

This analysis is not meant to suggest that legal aid programs should be eliminated. The purpose of the criticism is to focus attention on the idea that legal aid is just one aspect of a much broader perspective on access to law and

¹²³ See Mayhew *supra* note 75 at 418-20, for a discussion of the problems inherent in the alternatives to rationing by fees.

government by low income groups, and that there may be meaningful alternatives to legal aid which should also be considered.¹²⁴

As noted above, the poor's lack of resources to purchase better quality legal services is partly a function of the organization of the services they have received. Since the system has primarily offered individualized services, they lack the information to identify shared legal needs and methods to aggregate resources for the purchase of legal services on a group basis. The results of this study indicate that the fundamental disparities in the use of law are less between rich and poor than between organizations and individuals. Individuals seek out the services of an attorney in times of personal crisis when their liberty or a basic property interest is at stake. In contrast, organizations routinely use the same lawyers on a recurring basis to collect debts, handle claims against the organization, draft contracts, and mediate with government agencies.

Professor Galanter has pointed out the advantages that "recurrent organizational players" enjoy over infrequent individual users of the legal process. He briefly summarizes them as follows:

- (1) ability to utilize advance intelligence, structure the next transaction, and build a record,
- (2) ability to develop expertise and have ready access to specialists, economies of scale, and low start-up costs for any case;
- (3) opportunity to develop facilitative informal relations with institutional incumbents;
- (4) ability to establish and maintain credibility as a combatant (i.e., interest in bargaining reputation serves as a resource to establish "commitment to bargaining positions." With no bargaining reputation to maintain, the one-time litigant has more difficulty in convincingly committing himself in bargaining),
- (5) ability to play the odds. The larger the matter at issue looms for the one-timer, the more likely he is to avoid risk (i.e., minimize the probability of maximum loss). Assuming that the stakes are relatively smaller for recurrent litigants, they can adopt strategies calculated to maximize gain over a long series of cases, even where this involves the risk of maximum loss in some cases,
- (6) ability to play for rules as well as immediate gains. It pays a recurrent litigant to expend resources in influencing the making of the relevant rules by lobbying. Recurrent litigants can also play for rules in litigation itself, whereas a one-time litigant is unlikely to.¹²⁵

Professor Galanter's analysis suggests that the poor's limited capacity to use law is not just a question of resources. There is a need to create the opportunity for them to identify and pursue shared legal needs on a recurrent basis through the aggregation of resources and rights. The most common method of aggregation in Colombia is through the formation of interest group associations such as unions, agricultural federations, and neighborhood community groups. These

¹²⁴ See Galanter *supra* note 96, for a conceptual overview of the alternatives.

¹²⁵ Galanter, *supra* note 120, at 937.

types of associations are common among the more wealthy and politically powerful segments of the society, but with the exception of the unions, they are rare among lower income groups.¹²⁶

Even if the poor were highly organized, however, there is again no reason to assume they would make more use of the legal process. The status quo orientation of the law is inherent in the first principles, which emphasize the protection of property and contract. Young judges, concerned about their future legal careers and the impressions they make on powerful interests in the private sector, are not likely to alter this orientation. Direct political action through administrative channels or political party structures will probably yield more results. At the same time, law is an important institution, and there may be some types of rule or institutional changes which could increase its potential use.

Rule changes to facilitate the representation of aggregated claims are an example. There is no procedural form in Colombia similar to the class action. Under some circumstances this procedural device enables the claimants to achieve the same economies of scale in litigation as an organization. Claims which, relative to the cost of litigation, are too small or too speculative in outcome can be combined and made economical. Class actions can also be used prior to undergoing the cost of organizing and can become a means of disseminating information about shared interests and an avenue to overcome the transaction costs of organizing.¹²⁷

There are other rule changes of a procedural nature which would also create an economic incentive for private attorneys to identify and represent aggregate claims. For example, the legal system could recognize the assignment of fragmentary rights, not worth the cost of an individual suit, to a "legal manager" who would monitor the protection of the assigned rights and seek damages in case of a violation.¹²⁸ A somewhat different approach would be to require the losing party in a law suit to reimburse the winning party's attorney fees, but this could also operate to discourage litigation by lower income groups given their lack of confidence in the court system.

Both of these alternatives also raise problems.¹²⁹ They tend to separate the real client's claim from the litigation process so that the actual victim may never be compensated. The absence of a real client may also undermine the lawyer's incentive to seek a solution in the interests of the class of claimants.¹³⁰ The attorney is interested in the size of his fee and not the final judgment. Defend-

¹²⁶ There is a national association of *campesinos* with some links to the political parties and there are *juntas de Accion Comunal* in the *barrios* organized by the government, but they tend to be a political instrument of the party in power rather than a grass roots organization seeking a way to represent the interests of the community. For a description of some of the more powerful interest group associations among the dominant economic groups, see R. Dix *supra* note 3, at 322-59.

¹²⁷ See Galanter *supra* note 120, at 943; R. POSNER, *ECONOMIC ANALYSIS OF LAW* 349-51 (1972).

¹²⁸ Galanter *supra* note 120 at 941.

¹²⁹ See R. POSNER, *supra* note 127 350-51.

¹³⁰ *Id.*

ants will have an incentive to make a settlement offer that maximizes the attorney's gain and minimizes the harm to defendant. Unless the judge carefully controls the settlement process, the results may not be in the best interests of the actual aggrieved parties.¹³¹

Each of these alternatives is also contrary to the typical rules against champerty. They make lawyers entrepreneurs rather than agents of a client, but this is also to their advantage. They do not depend on the reallocation of resources. Instead, they create an economic incentive for lawyers to represent aggregated private rights.

Finally, there is the example of the labor attorney who reorganized the way his office delivered legal services to low income groups to take advantage of economies of scale in handling similar claims. This is an outgrowth of the new competition among lawyers for low income clients which has accompanied the expansion in the profession's size. The attorney was a night school graduate, and he planned to continue in the same type of legal practice. He has a long-run interest in the development of labor laws which will favor his clients and thereby improve his fees. Changes in the organization and delivery of legal services of this type, which are based on the private bar's economic incentives, may have more impact on meaningful access than any government-subsidized legal aid program.

The example also suggests that even without such rule changes, there may be more flexibility in the current legal system than is apparent from this study. The transaction costs involved in organizing groups, aggregating small claims, and identifying existing procedural methods to represent group interests are high. One important role for legal aid or the new outside-funded public interest law firm is to obtain information of this type and to litigate highly visible group claims. This could foster the dissemination of information about the economic potential of group claims and encourage more low income individuals and private attorneys to explore the alternative of group legal actions.

131. *Id.*