

LEGAL TOLLS AND THE RULE OF LAW:  
THE JUDICIAL RESPONSE TO POLICE KILLINGS IN SOUTH AMERICA

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by

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Abstract

by

Daniel M. Brinks

This dissertation addresses core issues relating to law and democracy in Latin America. The judicial response to continuing high levels of police violence in Latin America is the empirical context used to explore the oft-mentioned but little studied gap between the law on the books and the law in practice in the region. The theoretical chapter presents a model that is applicable to many of the problems usually placed under the “rule of law” rubric, while the empirical chapters contribute new information on one of the key problems faced by these legal systems, the effectiveness and enforcement of civil rights. The dissertation addresses such key themes as equality before the law, access to justice, judicial independence and legal reform.

The dissertation relies partly on an original database documenting the outcome of approximately 500 cases of police violence ending in death in Buenos Aires and Córdoba, Argentina, São Paulo and Salvador, Brazil, and all of Uruguay. The database includes information about the case, the victims, the perpetrators, and all the legal actors involved. This information is used to measure levels of effectiveness and inequality

within and across social groups, cities, and countries. The comparison of five cities across three countries, in provincial and federal legal systems, allows controls on a wide variety of social, economic, political and institutional variables.

Beginning with a heuristic model of the process of legal decision-making, and deriving implications for legal effectiveness from this model, the dissertation argues that disparate outcomes across cases are caused primarily by gaps in the supply of information to the legal system, compounded in certain systems by normative failures on the part of key decision-makers. It includes insights into possible institutional arrangements that might produce better results.

## DEDICATION

I dedicate this dissertation in the first place to my family – to my wife Sandra, who indulged me by leaving behind a secure lifestyle and a sunny Caribbean island to travel with me on my academic (and physical) journey from the Virgin Islands to South Bend, Indiana, to Latin America and back again; to my children, Derek and Aaron, who left their comfortable spaces to spend time in tiny apartments in São Paulo and damp houses in Buenos Aires, to walk the streets of Montevideo and the beaches of Salvador, and Liam, who enlivened the last two years of this odyssey; and, finally, to my parents, Raymond and Gladys Brinks, whose lifelong dedication to and service among the outcasts of society inspired me to make the journey in the first place. Without their encouragement and support this would have been a much darker, more difficult, and less interesting trip.

I also dedicate this dissertation to the victims of police violence everywhere and to their families. It is all too easy to forget that behind the theory and the data and the cases discussed in these pages are real people – a young man dead, a woman executed by the police, parents who have lost a child, children who have lost a father. May their voices be heard.

## CONTENTS

|  |    |
|--|----|
| <b>PREFACE</b> .....   | x  |
| <b>CHAPTER 1 INTRODUCTION – EFFECTIVENESS AND INEQUALITY IN THE LEGAL SYSTEM</b> ..... | 1  |
| A. THE RESEARCH QUESTION .....   | 5  |
| B. THE LITERATURE ON THE RULE OF LAW .....   | 9  |
| C. THE DEPENDENT VARIABLE: LEGAL EFFECTIVENESS.....                                    | 15 |
| 1. <i>Legal tolls and the rule of law</i> .....  | 15 |
| 2. <i>The process of adjudication</i> .....  | 21 |
| D. PROPOSING AN EXPLANATION .....  | 25 |
| 1. <i>An interdependent model of the legal system</i> .....                            | 26 |
| 2. <i>Consequences of the model for prosecutions of police officers</i> .....          | 31 |
| 3. <i>Concrete implications of the theory</i> .....                                    | 40 |
| <b>CHAPTER 2 METHODS, CASE SELECTION AND SAMPLING</b> .....                            | 42 |
| A. CASE SELECTION .....  | 42 |
| B. THE CHOICE OF DEPENDENT VARIABLE: .....   | 46 |
| C. DATA SOURCES AND SAMPLING.....  | 50 |
| 1. <i>Uruguay</i> .....  | 51 |
| 2. <i>Buenos Aires and Córdoba</i> .....   | 52 |
| 3. <i>São Paulo</i> .....  | 59 |
| 4. <i>Salvador da Bahia</i> .....  | 63 |
| <b>CHAPTER 3 THE DEPENDENT VARIABLE – LEGAL TOLLS AND ILLUSORY RIGHTS</b> .....        | 65 |
| A. URUGUAY .....   | 68 |
| 1. <i>Violations</i> .....   | 69 |
| 2. <i>Judicial response</i> .....  | 74 |

|    |   |     |
|----|---|-----|
| B. | BUENOS AIRES AND CÓRDOBA, ARGENTINA .....   | 81  |
| 1. | <i>Violations</i> .....   | 82  |
| 2. | <i>Judicial response</i> .....  | 88  |
| C. | SÃO PAULO .....   | 96  |
| 1. | <i>Violations</i> .....   | 96  |
| 2. | <i>Judicial response</i> .....  | 102 |
| D. | SALVADOR DA BAHIA .....   | 110 |
| 1. | <i>Violations</i> .....   | 111 |
| 2. | <i>Judicial response</i> .....  | 111 |
| E. | CONCLUSION: COMPARING THE JURISDICTIONS .....   | 118 |
| 1. | <i>P<sub>prior</sub> and p<sub>toll</sub>: the likelihood of a violation across cities and within them</i><br>.....   | 119 |
| 2. | <i>Δp and p<sub>toll</sub> – the likelihood of a conviction across jurisdictions and</i><br><i>victim class</i> ..... | 126 |
|    | <b>CHAPTER 4 BUENOS AIRES – POLITICAL INTERFERENCE AND</b><br><b>INFORMATIONAL DEPENDENCE</b> .....                   | 132 |
| A. | FEDERAL AND PROVINCIAL CRIMINAL PROCEDURE .....   | 133 |
| B. | SOCIAL CONTEXT .....  | 138 |
| 1. | <i>Socio-economic context</i> .....   | 138 |
| 2. | <i>Socio-political context</i> .....  | 143 |
| C. | CONNECTIONS BETWEEN THE LEGAL SYSTEM AND THE SOCIAL CONTEXT. 149  |     |
| 1. | <i>Police forces active in the Buenos Aires area</i> .....  | 149 |
| 2. | <i>Non-state agents</i> .....   | 155 |
| D. | PROSECUTORS .....   | 159 |
| E. | JUDGES .....  | 162 |
| F. | SUMMARY .....   | 173 |
|    | <b>CHAPTER 5 SÃO PAULO – NORMATIVE AUTONOMY, UNEQUAL</b><br><b>CONTEXT</b> .....                                      | 178 |
| A. | CODE OF CRIMINAL PROCEDURE .....  | 180 |
| B. | SOCIAL CONTEXT .....  | 187 |
| 1. | <i>Socio-economic context</i> .....   | 187 |
| 2. | <i>Socio-political context</i> .....  | 190 |
| C. | CONNECTIONS BETWEEN THE LEGAL SYSTEM AND THE SOCIAL CONTEXT. 195  |     |
| 1. | <i>São Paulo police forces</i> .....  | 195 |

|   |            |
|---|------------|
| 2. <i>Other state agencies</i> .....  | 203        |
| 3. <i>Non-state agents</i> .....  | 205        |
| D. THE PROSECUTORS .....  | 209        |
| E. THE COURTS.....  | 215        |
| F. OVERVIEW OF SÃO PAULO.....   | 224        |
| 1. <i>Illustrative case studies</i> .....   | 224        |
| 2. <i>Summary</i> .....   | 228        |
| <b>CHAPTER 6 URUGUAY – STRONG RESULTS FROM A WEAK SYSTEM</b> ....                                     | <b>233</b> |
| A. THE URUGUAYAN CODE OF CRIMINAL PROCEDURE.....  | 238        |
| B. SOCIAL CONTEXT .....   | 242        |
| 1. <i>Socio-economic context</i> .....  | 242        |
| 2. <i>Socio-political context</i> .....   | 246        |
| C. CONNECTIONS BETWEEN THE LEGAL SYSTEM AND THE SOCIAL CONTEXT. ....                                  | 252        |
| 1. <i>Police forces in Uruguay</i> .....  | 252        |
| 2. <i>Civil society actors</i> .....  | 257        |
| D. PROSECUTORS .....  | 258        |
| E. JUDGES .....   | 261        |
| F. OVERVIEW OF URUGUAY .....  | 270        |
| <b>CHAPTER 7 CÓRDOBA – HIGH LEVELS OF INEQUALITY IN A STRONG SYSTEM</b> .....                         | <b>276</b> |
| A. THE CODE OF CRIMINAL PROCEDURE IN CÓRDOBA .....  | 279        |
| B. THE SOCIAL CONTEXT .....   | 282        |
| 1. <i>Socio-economic context</i> .....  | 282        |
| 2. <i>Socio-political context</i> .....   | 285        |
| C. THE INVESTIGATIVE POLICE .....   | 287        |
| D. CIVIL SOCIETY ACTORS .....   | 289        |
| E. THE PROSECUTORS .....  | 290        |
| F. THE COURTS.....  | 293        |
| G. OVERVIEW OF CÓRDOBA .....  | 298        |
| <b>CHAPTER 8 SALVADOR DA BAHIA – SOCIAL CLEANSING UNDER POLITICAL AND JUDICIAL INDIFFERENCE</b> ..... | <b>302</b> |
| A. THE CODE OF CRIMINAL PROCEDURE.....  | 305        |
| B. SOCIAL CONTEXT .....   | 307        |



|  |            |
|--|------------|
| 1. <i>Socio-economic context</i> .....   | 307        |
| 2. <i>Socio-political context</i> .....  | 308        |
| C. THE INVESTIGATIVE POLICE .....  | 312        |
| D. CIVIL SOCIETY ACTORS .....  | 314        |
| E. THE PROSECUTORS .....   | 317        |
| F. THE COURTS .....  | 320        |
| G. OVERVIEW OF SALVADOR .....  | 323        |
| <b>CHAPTER 9 INFORMATIONAL AND NORMATIVE SHIFTS ACROSS<br/>JURISDICTIONS</b> .....                         | <b>326</b> |
| A. OPEN AND NOTORIOUS VIOLATIONS: NORMATIVE FAILURES IN<br>INFORMATIONALLY OPEN SYSTEMS .....              | 327        |
| 1. <i>Police homicides in Salvador</i> .....   | 328        |
| 2. <i>The “Violent Victim” exception to laws against police violence</i> .....                             | 331        |
| B. EFFECTIVE APPLICATION OF THE LAW: NORMATIVE AND INFORMATION-<br>GATHERING SUCCESSES .....               | 336        |
| 1. <i>Routine policing cases in Uruguay</i> .....  | 336        |
| 2. <i>The innocent bystander exception</i> .....   | 338        |
| C. SEE NO EVIL, HEAR NO EVIL, SPEAK NO EVIL: NORMATIVE AND<br>INFORMATIONAL FAILURES IN BUENOS AIRES ..... | 342        |
| D. GARBAGE IN, GARBAGE OUT: NORMATIVE SUCCESS FRUSTRATED BY<br>INFORMATION-GATHERING FAILURES .....        | 351        |
| 1. <i>Routine policing cases in São Paulo</i> .....  | 352        |
| 2. <i>Routine policing cases in Córdoba</i> .....  | 357        |
| E. OVERVIEW OF NORMATIVE AND INFORMATIONAL FAILURES .....  | 364        |
| <b>CHAPTER 10 CONCLUSION – BINDING LEVIATHAN</b> .....   | <b>368</b> |
| A. THE EMPIRICAL FINDINGS .....  | 370        |
| 1. <i>Legal tolls across systems – from tollways to freeways</i> .....                                     | 370        |
| 2. <i>Normative and Informational Autonomy across the systems</i> .....                                    | 376        |
| 3. <i>Connecting the dots</i> .....  | 381        |
| B. GENERAL CONCLUSIONS FROM THESE EMPIRICAL FINDINGS .....   | 392        |
| 1. <i>On the functioning of a legal system</i> .....   | 392        |
| 2. <i>On the rule of law</i> .....   | 398        |
| 3. <i>Institutional theory revisited</i> .....   | 400        |
| <b>BIBLIOGRAPHY</b> .....  | <b>405</b> |

## LIST OF TABLES

|  |     |
|--|-----|
| TABLE 3.1: TYPES OF CASES IN URUGUAY SAMPLE .....  | 72  |
| TABLE 3.2: TYPES OF CASES IN THE SAMPLE – BUENOS AIRES AND CÓRDOBA .....                                     | 84  |
| TABLE 3.3: CONVICTION RATES BY TYPE OF CASE AND CITY – BUENOS AIRES AND<br>CÓRDOBA .....                     | 89  |
| TABLE 3.4: LOGISTIC REGRESSION RESULTS FOR CÓRDOBA AND BUENOS AIRES .....                                    | 92  |
| TABLE 3.5: TYPES OF CASES IN SÃO PAULO SAMPLE .....  | 100 |
| TABLE 3.6: OUTCOME BY EVENT TYPE IN SÃO PAULO .....  | 102 |
| TABLE 3.7: CONVICTION RATE BY COLOR IN SÃO PAULO POLICE ACTIONS .....  | 104 |
| TABLE 3.8: CONVICTIONS BY CLASS IN SÃO PAULO .....   | 105 |
| TABLE 3.9: CONVICTION RATE BY TYPE OF DWELLING IN SÃO PAULO .....  | 106 |
| TABLE 3.10: CONVICTION RATE BY AGE IN SÃO PAULO, EXCLUDING CASES WITH EVIDENCE<br>OF CONFRONTATION .....     | 107 |
| TABLE 3.11: CONVICTION RATE IN CASES INVOLVING VICTIMS WITH A CRIMINAL RECORD IN<br>SÃO PAULO .....          | 108 |
| TABLE 3.12: CONVICTION RATES BY LEGAL ASSISTANCE IN SÃO PAULO .....  | 109 |
| TABLE 3.13: TABLE COMPARING $P_{LAW}$ AND $P_{TOLL}$ ACROSS JURISDICTIONS AT PRE-JUDICIAL<br>STAGE .....     | 123 |
| TABLE 3.14: TABLE COMPARING $P_{LAW}$ AND $P_{TOLL}$ AT THE JUDICIAL STAGE .....                             | 128 |
| TABLE 9.1: CONVICTION RATE IN VIOLENT VICTIM CASES IN BUENOS AIRES, SÃO PAULO,<br>CÓRDOBA, AND URUGUAY ..... | 332 |
| TABLE 10.1: SUMMARY OF VARIABLES AND OUTCOMES IN ALL FIVE LOCATIONS .....                                    | 391 |

## LIST OF FIGURES

|   |     |
|---|-----|
| FIGURE 1.1: AVERAGE ANNUAL PER CAPITA POLICE HOMICIDES AND CONVICTION RATES<br>IN URUGUAY, CÓRDOBA, BUENOS AIRES, SÃO PAULO AND SALVADOR IN THE 1990s | 7   |
| FIGURE 1.2: SCHEMATIC REPRESENTATION OF ADJUDICATION IN A MURDER CASE .....   | 22  |
| FIGURE 1.3: ORDERING OF PREFERENCES IN ORDINARY CRIMINAL CASES.....   | 32  |
| FIGURE 1.4: ORDERING OF PREFERENCES IN CRIMINAL CASES INVOLVING POLICE CONDUCT<br>.....   | 34  |
| FIGURE 1.5: INFORMATIONAL SHIFT RESULTING FROM NORMATIVE SHIFTS AT LOWER<br>LEVELS .....  | 37  |
| FIGURE 2.1: PERCENTAGE OF POPULATION IN LATIN AMERICAN COUNTRIES THAT<br>EXPRESSES “SOME” OR “A LOT” OF CONFIDENCE IN THE JUDICIARY.....              | 43  |
| FIGURE 3.1: CIVILIAN DEATHS AT THE HANDS OF THE POLICE IN METRO BUENOS AIRES,<br>1990-2000 .....  | 83  |
| FIGURE 3.2: CIVILIAN DEATHS AT THE HANDS OF THE POLICE IN CÓRDOBA, 1990-2000 ..   | 84  |
| FIGURE 3.3: IMPACT OF CLASS, DEMONSTRATIONS AND RETAINING A PRIVATE ATTORNEY IN<br>CÓRDOBA AND BUENOS AIRES .....                                     | 93  |
| FIGURE 3.4: CIVILIAN DEATHS AT THE HANDS OF THE POLICE IN SÃO PAULO, 1990-2000 .  | 98  |
| FIGURE 4.1: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN BUENOS AIRES .  | 176 |
| FIGURE 4.2: TYPICAL SHIFTING OF $R'$ AND $O'$ IN BUENOS AIRES COURTS .....  | 177 |
| FIGURE 5.1: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN SÃO PAULO .....   | 230 |
| FIGURE 5.2: TYPICAL SHIFTING OF $R'$ AND $O'$ IN SÃO PAULO COURTS .....   | 231 |
| FIGURE 6.1: POTENTIAL ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES ON THE<br>BASIS OF ENDOGENOUS INCENTIVES ALONE – URUGUAY .....                 | 242 |
| FIGURE 6.2: RATIO OF THE SHARE OF TOTAL INCOME EARNED BY 1ST/10TH DECILE IN<br>ARGENTINA, BRAZIL AND URUGUAY.....                                     | 244 |

|   |     |
|---|-----|
| FIGURE 6.3: URBAN HOUSEHOLDS BELOW POVERTY LINE IN ARGENTINA, BRAZIL AND URUGUAY .....  | 245 |
| FIGURE 6.4: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN URUGUAY .....   | 271 |
| FIGURE 6.5: TYPICAL PLACEMENT OF $R'$ AND $O'$ IN URUGUAY .....   | 274 |
| FIGURE 7.1: POTENTIAL ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES ON THE BASIS OF FORMAL ANALYSIS ALONE – CÓRDOBA.....                         | 282 |
| FIGURE 7.2: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN CÓRDOBA.....  | 300 |
| FIGURE 8.1: POTENTIAL ORDERING OF PREFERENCES ON THE BASIS OF FORMAL ANALYSIS OF CRIMINAL PROCEDURE – SALVADOR .....                                | 307 |
| FIGURE 8.2: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN SALVADOR.....   | 324 |
| FIGURE 8.3: NORMATIVE FAILURE IN SALVADOR .....   | 325 |
| FIGURE 9.1: RANK ORDERING OF THE LEGAL SYSTEM IN BUENOS AIRES, SÃO PAULO, CÓRDOBA, URUGUAY, AND SALVADOR DA BAHIA, ON TWO DIMENSIONS .....          | 366 |
| FIGURE 10.1: THE EFFECT OF TOLLS ON THE LIKELIHOOD OF A VIOLATION IN BUENOS AIRES, SÃO PAULO, URUGUAY, CÓRDOBA AND SALVADOR DA BAHIA.....           | 372 |
| FIGURE 10.2: THE IMPACT OF TOLLS ON THE EFFECTIVENESS OF THE LEGAL SYSTEM IN BUENOS AIRES, SÃO PAULO, URUGUAY, CÓRDOBA AND SALVADOR DA BAHIA .....  | 374 |
| FIGURE 10.3: EFFECTIVENESS AND EQUALITY IN THE JUDICIAL SYSTEMS OF BUENOS AIRES, SÃO PAULO, URUGUAY, CÓRDOBA AND SALVADOR DA BAHIA .....            | 375 |
| FIGURE 10.4: NORMATIVE AND INFORMATIONAL AUTONOMY IN THE LEGAL SYSTEMS OF BUENOS AIRES, SÃO PAULO, URUGUAY, CÓRDOBA AND SALVADOR IN THE 1990s ..... | 378 |
| FIGURE 10.5: TYPICAL SHIFTING OF $R'$ AND $O'$ IN BUENOS AIRES' COURTS .....  | 383 |
| FIGURE 10.6: TYPICAL SHIFTING OF $R'$ AND $O'$ IN SÃO PAULO'S COURTS .....  | 384 |
| FIGURE 10.7: TYPICAL PLACEMENT OF $R'$ AND $O'$ IN URUGUAY'S COURTS .....   | 386 |
| FIGURE 10.8: TYPICAL SHIFTING OF $R'$ AND $O'$ IN CÓRDOBA'S COURTS.....   | 388 |
| FIGURE 10.9: TYPICAL SHIFTING OF $R'$ AND $O'$ IN SALVADOR'S COURTS .....   | 389 |

## PREFACE

Empirically, this dissertation shines a light into some rather dark corners of Latin American democracy. Police violence continues to be a difficult issue for these governments to address, and as a research subject it presents some special challenges, since it is not only illegal but embarrassing to elected leaders. As a result, most of the actors involved are not overly eager to produce information about this conduct. While the police themselves are usually more than willing to acknowledge the killing of a person, the details are, from their perspective, best left unexplored. In some of the places I studied, the police take this seriously enough to kill those who tried to dig too deeply. Even the prosecutorial and judicial response is difficult to discuss openly, as most of those interviewed assume from the beginning that the goal of the research is to show just how badly they are failing in their duties.

I have chosen to use a broad brush on a large canvas to paint a more complete picture of how the legal system works together, across a variety of jurisdictions. Although the empirical focus is relatively narrow – the prosecution of police homicides – my research covers six different jurisdictions, in five different cities, in three different countries. To explain legal outcomes in each jurisdiction I look not only at the judiciary, but also at the social, economic and political context in which it is inserted, at the procedural structure that governs prosecutions, at the police and prosecutorial forces upon which it relies, and even, briefly, at other social actors at work in these prosecutions.

One cost of this theoretical approach may be some loss of detail, as it is difficult to navigate between the Scylla of unsupported generalization and the Charybdis of too much undigested information. Hopefully, the payoff is a useful reflection on questions of larger theoretical interest, illustrating how structure constrains actors, context affects institutions, politics modify institutional design, and institutions interact with each other.

Whatever the payoff, however, it should be clear that I could not have completed this task without a great deal of help along the way. A proper accounting of all the intellectual and personal debts I accrued as I pursued this research would likely dwarf the dissertation itself. With any luck, I have properly expressed my gratitude to the many people who helped me along the way, and this brief summary will serve merely to indicate the magnitude of the assistance I received.

To Guillermo O'Donnell, my advisor, I owe a deep intellectual debt. Any reader of this piece who is familiar with Guillermo's work will undoubtedly see his fingerprints on every page, when I cite him and when I do not. He told me to put on my pith helmet and go exploring empirically and theoretically uncharted territory; and his writings and advice were the lodestar that took me there and brought me back. He gave me the inspiration to take on a rather unwieldy and undefined project into important questions; he guided my reading and thinking about the problem; and he tolerated my meandering exploratory drafts.

The readers on my committee went far beyond the call of duty, and deserve a great deal of the credit for whatever is worthwhile in this dissertation. By now Scott Mainwaring must have read a thousand pages of my early drafts, and exhausted a gross of red pens. He more than once dragged me from an impenetrable morass in a first draft to

relatively high ground in a final draft. His comments were always detailed and incisive, never cutting. One of the greatest benefits of this project has been the opportunity to learn from him.

Michael Coppedge and Andy Gould have been a pleasure to work with, and a source of useful and timely advice. Michael was always available with assistance on both substantive and methodological issues, but especially the latter – from operationalization, to analysis, to graphing. I have learned volumes from him, on this project and others, that will serve me throughout my career. Andy did much of the work of turning me from a lawyer into a beginning social scientist when I first arrived at Notre Dame. On this project, he helped me especially when I had just returned from the field, and was beginning the task of organizing a jungle of data into a (relatively) disciplined social scientific garden plot.

The comments of all four often pushed me to think in new directions, in ways too many to acknowledge. They will no doubt recognize many of their ideas and suggestions in the text. My next project will be the poorer without the constant support of these dedicated and knowledgeable academics.

I learned just as much from my friends and fellow graduate students here at Notre Dame. I leave out many more than I include, but at least need to mention Rossana Castiglioni, David Altman, Aníbal Pérez-Liñán, Andreas Feldman, Helena Olea, Juan Andrés Moraes and Andrés Mejía, all of whom have made these years in South Bend a rich and enjoyable time, read early drafts, listened to my questions, gently relieved me of my ignorance and, on occasion, indulged my attempts to play soccer.

Many lawyers helped me along the way. Juan Méndez, former member of the Inter-American Commission on Human Rights, Professor of Law and Director of the Center for Civil and Human Rights at Notre Dame, generously put me in touch with his vast network of human rights colleagues across the continent, and then read drafts of my chapters in spite of his busy schedule. His name was the password that opened many, many doors at all levels in Buenos Aires, Córdoba, São Paulo, and Costa Rica.

I could not have completed this project without the help of the courageous (and stubborn) human rights lawyers who push and pull on the levers of the creaky and often reluctant systems in Argentina, Brazil and Uruguay: María del Carmen Verdú in Buenos Aires, Silvia Osaba in Córdoba, Ariela Peralta and Susana Falca in Uruguay, Maria Beatriz Sinisgalli at the Centro Santo Dias and the whole staff of the Ouvidoria da Polícia in São Paulo, and finally Marília Veloso, who drove me all over Salvador for an intense and exhausting few weeks, and then took me and my family into her home for several days of much needed rest and relaxation. I will never forget standing in the middle of the street in the hot Bahian sun next to Marília and Nelson Pellegrino, halfway between a platoon of Military Police officers in full riot gear and a vociferous crowd of protesters who just the day before had been tear-gassed and clubbed. Marília's notion of fieldwork is somewhat more participatory than is comfortable in a project of this nature.

These lawyers are immersed in the daily reality I interpret in this dissertation. Surely they will find in my conclusions a lot to criticize, full as they are of the oversimplification and stylizing we sometimes call social science. Hopefully they will also find some encouragement and useful information, from someone who could step back and look at what they are all doing in their different settings.



Of course, I could not have completed this research without the financial and institutional support of a number of remarkable institutions. The Kellogg Institute for International Studies generously funded the preliminary research trip that helped me to begin mapping a research strategy, and has, over the years, made me welcome in that remarkable environment. Judy Bartlett, also at the Kellogg, is responsible for performing emergency resuscitation and miraculous feats on my overworked computers. The Social Science Research Council paid for nine months of fieldwork across six cities in three different countries through an International Dissertation Research Fellowship. The Notre Dame Laboratory for Social Research was my home for a full year and contributed not just financial and institutional support but a warm and stimulating academic environment. Felicia LeClere, Kajal Mukhopadhyay, and Eugene Walls made my time there both fruitful and enjoyable.

Abroad, the Núcleo de Estudos da Violência of the Universidade de São Paulo – especially Beatriz Azevedo Affonso, Sérgio Adorno and Paulo Sérgio Pinheiro – made São Paulo a slightly less imposing place and introduced me to many of the people I needed to know. The researchers of the Instituto de Ciencia Política, of the Universidad de la República in Montevideo, with their humor and in-depth knowledge of Uruguayan politics, made my all too brief visits to Uruguay as productive as they could be. CORREPI, of course, in Buenos Aires and Córdoba, was the starting point for much of the information on which this dissertation is based.

The American Bar Foundation, my home for nearly two years now, provided support during the crucial time of distillation and writing. The talented researchers there have broadened and deepened my understanding of the law. I would be remiss if I did not

mention the encouragement and support of Bryant Garth and Terry Halliday, and my fellow fellows in Law and Social Science, David Altshuler, Sara Parikh, and Christa McGill. The ABF is an unparalleled place to be, for those of us who are interested in the law.

With this many brilliant, dedicated and generous people and institutions helping me along the way, the only surprise should be that there remain as many errors as there undoubtedly are. They are, of course, entirely my responsibility.

## CHAPTER 1

### INTRODUCTION – EFFECTIVENESS AND INEQUALITY IN THE LEGAL SYSTEM

*Injustice anywhere is a threat to justice everywhere.  
We are caught in an inescapable network of mutuality,  
tied in a single garment of destiny.  
Whatever affects one directly, affects all indirectly.*

*Martin Luther King, Jr., Letter from the Birmingham Jail, April 16, 1963*

As we move beyond the study of transitions to democracy to the study of democratic performance, the gap between the promise of democracy and the practice of democracy has become a recurring theme for scholars of the developing world. An important part of this gap is the divergence between the formal, liberal-democratic, rules of the game and actual practices. In fact, this phenomenon, which we might generally label the failure of the rule of law, is mentioned in nearly all discussions of democracy in Latin America as one of the challenges facing the countries of the region. These shortcomings often affect most crucially some of the core promises of democracy, including the extension of civil rights, equality before the law, freedom from torture and state killings. O'Donnell has called attention to this with especially evocative terms: the “brown areas” of democracy and low intensity citizenship (O'Donnell 1993). Other scholars have spoken of “illiberal” democracy (Diamond 1999b), or disjunctive democratization (Holston and Caldeira 1998).

In this dissertation I explore the nature, extent, and reasons for the failure of the rule of law. I do so in the context of one of the most basic promises of the rule of law in a liberal democracy: legal protection from arbitrary killing by agents of the state. The regimes that tortured and killed in the 1970s in places like Argentina, Brazil and Uruguay have been replaced with democratic regimes that hold elections and legally guarantee all the basic civil and human rights. Elected national leaders like Alfonsín in Argentina and Cardoso in Brazil demonstrated a commitment to democracy and the protection of individual rights; local politicians such as Covas in São Paulo have done the same at the subnational level. Argentina reformed its constitution in 1994 to grant international human rights treaties constitutional status. Brazil drafted an entirely new constitution in 1988 that contains some of the most extensive protections of individual rights found in any constitution anywhere.

And yet, in the darker corners of large cities and in remote rural areas, in the back rooms of police stations and in vacant lots, the promise that the law will protect individuals from state violence is an empty one. With public safety as the justification, torture is the preferred method for extracting information, and criminal investigations sometimes begin and end with a bullet to the head. In practice, then, many of the governments called into existence by the democratic transitions of two decades ago have a distinctively Hobbesian feel: in the name of protecting citizens from the depredations of fellow citizens, there are few if any restraints on the actions of the state, so that the hands of “that Man, or Assembly of men that hath the Sovereignty” remain “untied” (Hobbes [1651] 1964: 122).

In designing the dependent variable for this study I approach the problem from the perspective of the individual citizen, and answer some of the most basic questions of the rule of law: how effective are my individual rights in this legal and political context? How likely is it that my rights will be violated; and if they are, what will the police, the prosecutors, the courts do about it? How much does it matter that I am white or black, middle class or poor, a young unemployed male or a middle aged professional?

To answer these questions I gathered original information on over 500 homicides committed by the police in Uruguay, in Buenos Aires and Córdoba, Argentina, and in São Paulo and Salvador, Brazil, and tracked the legal response to these homicides through the courts. In the end, information on actual judicial outcomes opens the door to some surprises: How much does it matter that a victim of police violence is poor? Surprisingly little, in Buenos Aires; surprisingly much, in Córdoba.

But it is not enough to know what or how much; we also need to know why, to explore the causes of success or failure in different locations. Why is it that Uruguay, with an outdated procedural code and a dilapidated judiciary, can do a better job of protecting my physical integrity than São Paulo, with all its wealth and a relatively more modern court system? Why have millions of aid dollars not resulted in significant improvements in judicial performance? Why have numerous reforms, in Buenos Aires for example, not resulted in appreciable changes in judicial outcomes? Are judges in São Paulo or Buenos Aires simply authoritarian throwbacks to an earlier era, or are they hampered by institutional or other failures?

I use an institutional analysis, broadly defined, to uncover the way institutional design interacts with political currents and socio-economic conditions to modify actors'

incentives, as they work within the legal system. I pay attention to formal and informal institutions, as well as to the unexpected institutional outcomes produced by the interaction of the rules of the game with larger social and economic variables. To do this, I develop a heuristic model of the legal system that simplifies the process of adjudication and lays bare the essential conditions for the rule of law. The model highlights the institutions, actors and processes that underlie the failure or success of the law in curbing state violence.

To explore questions of causation, in addition to aggregating the case-level information described above, I move the analysis up to the system level. I make extensive use of interview and archival data, internal evaluations, and published and unpublished studies of all the legal systems in question. In addition, I use information on the socio-economic situation in each of the five locations, and the recent political history of each place. The judicial case-level information allows for comparisons within jurisdictions, while the system level information permits comparisons across and within countries.

In the course of answering the specific question – how do we account for variations in the ability of the courts to respond to police violence – I hope to shed light on issues of broader social and theoretical interest. I push institutional analysis beyond an acontextual study of the formal rules, to incorporate a deeper understanding of how these rules work in practice, and how the social, economic and political context affects the way they operate. The questions raised – and, I hope, answered at least partially here – have to do with democracy, the rule of law generally, judicial decision-making at the trial level, connections between social inequality and state outputs, and institutional theory.

In addition to what this discussion may contribute to social science, I hope it may highlight some of the inhumanity currently being practiced in the name of public safety, and contribute to a solution, so that the citizens of the evolving democracies of Latin America and elsewhere may see their dignity more fully respected by the very government they have called into being.

### **A. The research question**

Over the course of the 1990s, the police in the state of São Paulo, Brazil, killed more than 7500 people. In some years, the São Paulo police killed, on average, one person every six hours. Nor is São Paulo the worst. In Salvador da Bahia, in Northeastern Brazil, the per capita rate of police killings for a three year period in the mid-nineties was three times higher than the worst years in São Paulo. The phenomenon is not limited to Brazil. In the second half of the decade, the police in Buenos Aires killed, on a population-adjusted basis, just as often as the police in São Paulo. There is information to suggest that in Venezuela, which is not a part of this study, the police killed twice as often as in Salvador.<sup>1</sup>

But the phenomenon is also not universal; there are variations even within countries. In the province of Córdoba in north-central Argentina, and in Uruguay, rates of killing are very much lower. Uruguay is the lowest, reporting two or three deaths per year at the hands of the police, and Córdoba follows with about 30 killings per year. Adjusted

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<sup>1</sup> The 2001 U.S. State Department Human Rights Report for Venezuela notes that the government claimed that 2000 criminals had been shot by the police in the first eight months of that year. That figure suggests an annual per capita rate of killings of 12.75 per hundred thousand, twice as high as Salvador's.

for population levels, Uruguay's rate is about .1 per hundred thousand, and Córdoba's about .3, compared to more than 6 per hundred thousand for Salvador.

The courts, the principal mechanism for identifying and redressing rights violations in a liberal democracy, have largely remained at the margin of this virtual civil war in three of the five cities in the study. Conviction rates for police officers who kill are well below 5% in both Brazilian cities and about 20% in Buenos Aires. But conviction rates climb as high as 50% in Uruguay, and hover around 40% in Córdoba. The response by the courts to this situation suggests a problem if not a paradox: precisely in those places where the police use lethal force most indiscriminately, the justice system punishes police homicides least often, as we see in Figure 1.1.



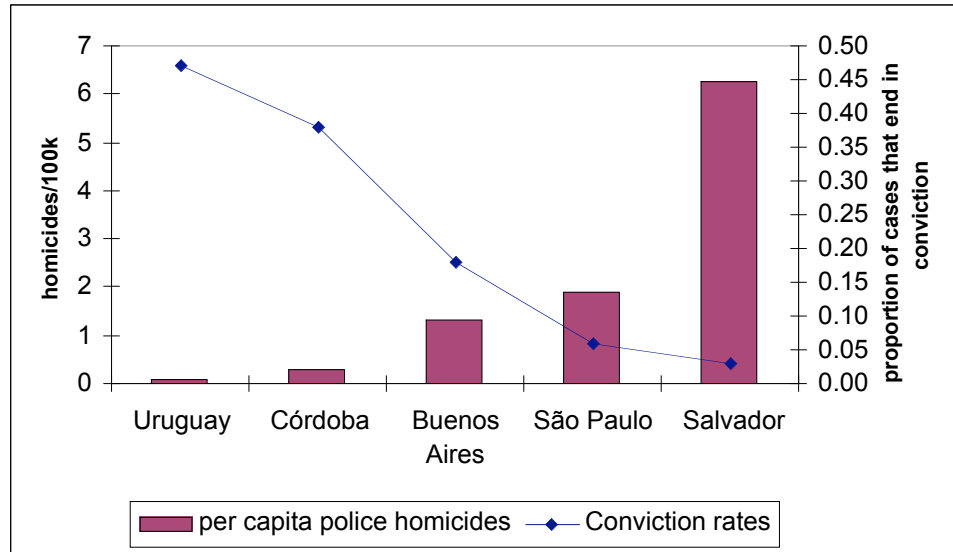


FIGURE 1.1: AVERAGE ANNUAL PER CAPITA POLICE HOMICIDES AND CONVICTION RATES IN URUGUAY, CÓRDOBA, BUENOS AIRES, SÃO PAULO AND SALVADOR IN THE 1990S

Importantly, however, these aggregate results hide another injury to a central liberal democratic value: equality before the law. In Córdoba, which is one of the high performers in the previous graph, a claim presented by a shantytown resident is about three times more likely to be rejected than a claim presented by a middle class individual. Despite its relatively high conviction rate, then, Córdoba shows the highest degree of outcome inequality of all the legal systems in this study. The police in São Paulo, meanwhile, carefully select their victims from among the underprivileged, so that the system rarely has the opportunity to show how it might treat the case of a middle class victim. The courts of Uruguay, on the other hand, seem to hold a special place for the underprivileged. In Buenos Aires, socio-economic conditions matter little, but political factors have a great impact on legal outcomes. In Salvador, the police have *carte blanche*

to clean up the streets by any means necessary, and those who object are more likely than not to be added to the list of victims. Here, inequality disappears in the face of a more general failure of the law.

The first challenge in solving the questions raised by these facts is simply measurement. How do we measure the effectiveness of people's rights? How do we know if things are better or worse in Buenos Aires than in São Paulo, when close observers simply say both judiciaries are "in crisis"? For a more direct, and hopefully more accurate, measure, I use actual judicial outcomes rather than perceptions, formal rules, or other indirect measures. The second challenge lies in knowing where to look for the causes of this "crisis." Most studies to date limit the view to one piece of the puzzle – the courts, prosecutors, police, the legal profession. I have chosen to analyze the entire system at once, to uncover the relationship among the various actors. In addition, the study of institutions demands that we go even further, and look at the political and economic context in which the entire legal system is inserted, despite the obviously greater burden on researchers' resources. I have done this as well, including an analysis of the social, economic and political context for each of the legal systems in question.

This project adds significantly to the literature on the rule of law in Latin America. The recent empirical literature on the rule of law in the region has focused primarily on legal and judicial reform, or on judicial independence at the level of the highest courts. But there are no studies of the courts that focus specifically on their response to state violence, there are no comparative studies of Latin American systems that use extensive data on actual judicial outcomes and systematically measure judicial

performance. And few of the studies consciously locate the legal system in its broader social, economic and political context.

### **B. The literature on the rule of law**

Over the last few decades, the literature on Latin American regimes has gone through various phases bringing us to the current concern with democratic performance. In the 1970s, scholars were concerned almost exclusively with the prevalence of authoritarian regimes, their causes, and their conduct (O'Donnell 1979; Linz and Stepan 1978). As more and more of these regimes began to fall in the 1980s, the literature focused on the causes and processes of transitions to democracy, and the effects of different modes of transition on the resulting regime (O'Donnell, Schmitter, and Whitehead 1986). Finally, as Latin America continues to be dominated by democratic regimes, the focus has changed to what scholars have variously called consolidation or institutionalization: issues of democratic governance, especially the quality of democracy (Mainwaring and Welna 2003; Diamond 1999b; O'Donnell 1999b; O'Donnell 1999c; Hartlyn 1998; Diamond 1996; Karl 1995; O'Donnell 1994; Valenzuela 1992; Schmitter and Karl 1991). One of the issues of quality that is repeatedly mentioned in these recent writings is the failure of the courts or, more generally, the absence of the rule of law.

The rule of law is mentioned more and more often for the simple reason that it is one of the pressing issues facing the region. The new democracies fall short on a number of dimensions, to be sure, but they often fall shortest in terms of the rule of law (Diamond 1999a). "Latin American democracy is most seriously stalled on two key fronts. The first is a drive for a legal system that guarantees both the equality of all citizens before the law and basic personal rights. The second has to do with the separation of powers and the

imposition of effective checks on executive authority” (Shifter 1997: 116). Here I explore both of these “key fronts:” the police are members of the executive and (technically if not always actually) subject to its control. Moreover, I look at questions of equality before the law in the context of the most basic of personal rights – the right not to be killed.

To be sure, there have been attempts to improve the level of individual rights and judicial functioning. The recent wave of democratization was followed by significant legal reforms in most of the countries of the region, including the subjects of this study. Brazil, for example, adopted a new constitution in 1988 that guarantees a plethora of basic rights, while Argentina made fairly extensive reforms to its constitution in 1994. In addition, all these countries have implemented or at least considered a number of legislative reforms meant to “democratize” or “modernize” the law and its attendant institutions. Despite these efforts, journalistic accounts, the reports of agencies such as Amnesty International and Human Rights Watch, and articles by comparative political scientists all demonstrate that an effective rule of law still eludes many of the countries of the region (Hammergren 1999; Mendez, O'Donnell, and Pinheiro 1999; Stotzky 1993).

Moreover, this issue is central to the quality of democracy. Guillermo O'Donnell (1993) argues that the legal system is an important part of the state, and must also be democratic, if the country as a whole is to bear that label. Indeed O'Donnell (O'Donnell 2001b; 1999a) has made the role of the legal system central to a democratic theory that is grounded in a comparative view. Larry Diamond agrees, arguing that one of the characteristics of liberal democracy is the requirement that “citizens are politically equal under the law ... and protected by an independent, nondiscriminatory judiciary” (Diamond 1997: 12).

Still, while most observers of Latin American politics point out the importance of the issue, there is very little work that combines close theoretical and empirical attention to the subject. The body of empirical work addressing something called the “rule of law” in Latin America is certainly growing. There are many authors who examine the reasons for the failure of judicial reform projects in various countries (Correa Sutil 2001; Davis and Trebilcock 2001; Domingo 2001; Galleguillos 2001; Ungar 2001; Popkin 2000; Prillaman 2000; Hammergren 1999; Correa Sutil 1998; Frühling 1998; Jarquín and Carrillo Flores 1998; Buscaglia, Dakolias, and Ratliff 1995; Dakolias 1995). These authors have offered important insights into the politics of judicial reform, describing how many of these projects founder on the shoals of local politics. But this literature does not offer a systematic measure of judicial performance either before the reforms, to set a baseline against which post-reform performance could be measured, or after them, to show in what sense particular reforms have failed. In fact, one of the clearest findings of this literature points exactly to this sort of diagnostic failure: they note that the various international and domestic reformers still do not have a good understanding of or consensus on what exactly needs to be fixed in the first place.

An ever-expanding list of authors tackles questions of judicial independence (Helmke 2002; Iaryczower, Spiller, and Tommasi 2002; Prillaman 2000; Correa Sutil 1998; Gibson, Caldeira, and Baird 1998; Larkins 1998; de Castro 1997; Gargarella 1996; Larkins 1996; Buscaglia, Dakolias, and Ratliff 1995; Rhenan-Segura 1990; Caldeira 1986). But their view is generally limited to political interference with the highest courts in politically sensitive cases, especially in the context of the relationship between the executive and the highest court. My own study looks at all the sources of interference

with judicial decision-making. In addition, these authors are not concerned with the work of lower courts and the ordinary cases that account for the vast majority of legal activity. Because they look primarily at the highest courts, many of these works simply assume that whatever normative guidelines are established at the top will somehow filter down to the lowest levels (Bueno de Mesquita and Stephenson 2002, for example, do so explicitly). These studies typically elide the question of how the lower courts actually decide cases.

There are some studies that address questions of equality before the law and the enforcement and protection of civil and human rights at the trial level. Adorno takes a sociological look at the question of legal equality in São Paulo, using a demographic analysis of judicial outcomes, and looking at homicide prosecutions generally (Adorno 1995; Adorno 1994). There is a similar study of inequality in judicial outcomes in the U.S., which looks at the impact of race and ethnicity on judicial and prosecutorial decisions in the U.S. juvenile justice system (Poe-Yamagata and Jones 2000). Méndez, O'Donnell and Pinheiro (1999) examine the reach of the legal systems to the poorest sectors of society. But none of these studies offer a broadly comparative and systematic look at the problem of legal inequality, nor do they address in depth its possible causes.

Most studies of police violence, on the other hand, focus primarily on actual violations with only a cursory glance at the judicial response (CELS/HRW 1998; Holston and Caldeira 1998; Geller and Toch 1995; Skolnick and Fyfe 1993; Geller and Karales 1981, as well as the many reports by human rights organizations). Moreover, while most of these works make reference to the impunity the police enjoy in these cases, with the exception of Geller and Toth, the analysis is based on individual case accounts and the

examination of notorious cases rather than data on a broad selection of routine prosecutions. The studies that come closest to this one in terms of their focus on the judicial response to police homicides are Lemos Nelson's (2001) study of Civil Police killings in Salvador, Cano's (1999) study of the role of the military justice system in the State of Rio de Janeiro or Zaverucha's (1999) study of military justice in the state of Pernambuco. But both of these study single jurisdictions and a judicial system that, since 1996, no longer has jurisdiction over the most serious cases involving homicides.

The authors that do focus on judicial accountability for rights violations are mostly those preoccupied with transitional justice (Skaar 2003; SERPAJ - Servicio Paz y Justicia 2000; SERPAJ - Servicio Paz y Justicia 1999; Acuña and Smulovitz 1997; Barahona de Brito 1997). These authors ask when democratic societies, politicians and judges might find the political will to dig up the skeletons of an earlier regime. But they rarely address the practicalities of actually judging cases, and they make only passing reference to the daily construction of a legal order that protects civil rights in the present.

The issue of how claims and information get into the legal system, which plays an important part in my account, is most prominent in studies of access to justice (Correa Sutil 2001; Prillaman 2000; Vanderscheuren and Oviedo 1995; Berizonce 1987; Cappelletti and Garth 1978-79). Very often, however, the focus on bringing claims into the legal system distracts attention from the reception these claims encounter once they arrive. Though they often raise exactly this question, none of these studies have looked in a systematic way at legal outcomes in different systems.

In short, all of these authors have made valuable contributions to our understanding of particular dynamics ultimately affecting the rule of law. But none of

these studies undertake an empirically grounded, comparative look at several jurisdictions, measuring legal effectiveness and explaining its roots in the everyday workings of the legal system. Thus there is an important gap in the literature on Latin American democracies. Observers agree that the rule of law is a critical challenge for these democracies; at the same time, a key component of this concept – the effectiveness of the legal system in guaranteeing rights and enforcing obligations – is given little or no empirical or theoretical treatment. And there is little attention to this issue in precisely one of the areas where it is most needed: the protection of citizens’ lives from arbitrary state violence.

This is also the first project that looks at the legal system from the victim’s perspective, to discover how the legal system constructs legality in the daily lives of persons subject to state action. To pose this question is to raise at once all the piecemeal issues addressed in the literature. The failure of the courts could be attributed to inefficiency, lack of access, lack of independence, lack of resources, poorly drafted laws, the failure of political will and more; and could be blamed on the police, the prosecutors, judges, elected leaders, and even “culture” more broadly. The answer to the question will require a comprehensive framework that can incorporate and make sense of all these disparate projects, and apply them specifically to the way in which the legal system responds to one particular kind of claim: the claim that an agent of the state has exceeded the legal boundaries on the use of lethal force.

In the rest of this chapter I present such a framework, in the form of a schematic model of the legal system. The model itself is applicable to many if not all the varied *problématiques* subsumed by various authors under the rubric of “rule of law,” from



limited government to bureaucratic corruption, from violent crime to the enforceability of contracts, from effective policing to the presence of due process guarantees in criminal prosecutions. In this dissertation, however, I look in detail at only one application of the theory, and elaborate the aspects that deal with criminal prosecutions and in particular the prosecution of police officers accused of homicide.

### **C. The dependent variable: legal effectiveness**

In this section I will explore the dependent variable, legal effectiveness, or the effectiveness of a given right. First I will present a way to conceptualize and measure varying degrees of legal effectiveness across the cases in my study, using the legal tolls metaphor. Then I will examine the process of adjudication, to see where the tolls might creep into the system, and present a simplified model of legal decision making that will help to structure the discussion of legal failures throughout this dissertation.

#### **1. Legal tolls and the rule of law**

In each jurisdiction, as noted, I will assess the effectiveness of the legal right to be free from arbitrary killing by agents of the state. Article 4.1 of the American Convention on Human Rights summarizes this right by saying that “every person has the right to have his life respected. This right shall be protected by law ... No one shall be arbitrarily deprived of his life.” Despite significant procedural differences, this right is protected by a network of substantive laws and constitutional rights that are very similar in all three countries: Everyone is entitled to due process and a fair hearing before being punished for a crime, and there is no death penalty in any event, no matter what the crime.

The police, like everyone else, may not take a life except in self-defense or, under carefully specified circumstances, to protect the public order. The law includes a penalty for any violation of this right, which varies from 3 years or less, in the case of an involuntary killing, to about 10 years in the case of an intentional killing, to life in prison in the presence of aggravating circumstances. In addition, there are peripheral rights that accompany this one, such as the right of those aggrieved by violations to petition the courts, and the right of relatives of the victim (and society in general) to see the violators punished.

There are two aspects to the effectiveness of this right. First, of course, is the frequency of violations – regardless of the effectiveness and efficiency of the legal system in providing redress, it is always (but most crucially in the case of the right not to be killed) better for the individual to have his or her rights respected than to secure a remedy for a violation after the fact. But from a societal or regime standpoint, the question whether there is an effective mechanism to redress and punish violations is almost as important. And eventually, of course, the hope is that an adequate mechanism for punishing violations will reduce their number.<sup>2</sup> I will address both of these aspects taking as the point of departure a – rather simplified and positivistic – definition of a legal right.

Max Weber defined a right as no more than “an increase of the probability that a certain expectation of the one to whom the law grants that right will not be disappointed” (Weber [1921] 1978). I call this increase in probability attributable to the existence of a

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<sup>2</sup> I am aware, of course, that the question of deterrence is not a simple one, as the voluminous literature on the subject can attest. For the present, suffice it to say that when the likelihood of punishment approaches 0, we may expect, *ceteris paribus*, a greater number of violations than when it is considerably more substantial.

legal right backed by the state through its legal system “ $\Delta p$ ” (delta p). In Weberian terms, then, the probability that an expectation will not be disappointed can be written as follows:  $p_{\text{satisf}} = p_{\text{prior}} + \Delta p$ , where  $p_{\text{satisf}}$  is the probability that the expectation will be satisfied,  $p_{\text{prior}}$  is the *a priori* probability that the expectation will be satisfied in the absence of state intervention, and  $\Delta p$  is the increase in probability attributable to the application of the law by the state.

Weber’s definition assumes that all rights are (at least to some degree) effective in becoming “a source of power of which even a hitherto powerless person may become possessed” ([1921] 1978:666-667). The reality, of course, is otherwise: in many cases and many places, many remain powerless even after the creation of formal rights. When a right is ineffective the increase in the probability that the interests it protects will be satisfied –  $\Delta p$  – approximates 0. The challenge is to estimate as closely as possible the value of  $\Delta p$  in the various cities in Argentina, Brazil and Uruguay.  $\Delta p$ , however, varies not only across systems, but within them. A highly effective legal system may have pockets of ineffectiveness reserved for unpopular groups, while a generally ineffective but more egalitarian one may treat these same groups no worse and perhaps even better. For any given claimant, then, ineffectiveness can result either because rights are ineffective for all equally, or because rights are denied to that sector of the population to which the claimant belongs.

To focus on this distinction between general effectiveness and inequality, I borrow a metaphor from Hobbes. In the *Leviathan*, Hobbes said that the use of laws is to direct people and keep them in motion, “as Hedges are set, not to stop Travellers, but to keep them in the way” (Hobbes [1651] 1964:250). A well-ordered and well-functioning

legal system acts as a series of signposts or barriers along the sides of a highway, marking the way to achieve valued social goals by setting universal conditions for passage. When the system imports extra-legal particularistic conditions, however, laws and legal instances function more as a set of toll barriers set across the highway, before which one must surrender some toll – be it cash for bribes, high-priced legal representation or, more commonly, less tangible means of exchange like social status or personal connections – or be refused passage.

In these systems, the laws still matter, but their application is conditioned by the tolls. Where this is true, then,  $\Delta p$  is composed of two elements: one is the background level of effectiveness of the legal apparatus – or the state itself – and the other is a factor that changes the level of effectiveness depending on the extralegal characteristics of the individual in question, the tolls that individual holds or lacks. What separates users into this three-tiered system is the presence or lack of the toll. This can be written  $\Delta p = p_{\text{law}} * p_{\text{toll}}$ , where  $p_{\text{law}}$  is the probability that the right will be respected purely due in response to the actual or potential legal claim of the individual in question, and  $p_{\text{toll}}$  is the change in probability that the right will be respected in response to extra-legal characteristics of the claimant.

The tolls are, by definition, characteristics of the actors or cases in question that are not legally prescribed conditions for extension of the right in question – examples are the use of race or class to deny rights that the law purports to make universal, or even the disparate ability of criminal defendants to put on sophisticated defenses depending on their financial resources. Every legal system has some tolls – that is, securing a legal result always requires some investment that is not contemplated in the laws, no matter

how minor – the only question is how high they are and whether they are distributed in such a way as to ultimately produce unequal results.

Importantly, the tolls operate at both the  $\Delta p$  and the  $p_{\text{prior}}$  levels. The wealthy residents of gated communities in Buenos Aires and São Paulo have purchased immunity from police violence by removing themselves from the places where the state, and especially its police force, interacts with society (O'Donnell 1999c). They have purchased private security and interact in private communal spaces like country clubs and golf courses. It is more than unlikely that one of São Paulo's elite *empresários* rushing through the city in his bulletproof chauffeured car, or flying over it in his helicopter, will meet a police officer with his finger on the trigger. On the other side of the toll barrier are the *favelados* living in São Paulo's shantytowns, whose vision of the state is often limited to a police officer – more often than not, a police officer with a drawn gun.

In short,  $p_{\text{toll}}$  is a measure of legal inequality that in theory can vary independently from the strength of the legal institutions. In an egalitarian system,  $p_{\text{toll}}$  will tend to 0, so that outcomes will depend solely on the strength of the legal claim and the overall effectiveness of the legal system.  $P_{\text{law}}$ , on the other hand, is a measure of the strength and presence of the justice system in a given environment. While we cannot measure it directly, we can infer it from the average response given to claims of a certain nature. To adequately gauge the effectiveness of rights in a particular context, we need to know both the background or average level of effectiveness, and the peaks and valleys caused by the presence or lack of the toll.

Given the general crisis of confidence and the negative press that has attended most of the justice systems of Latin America, observers sometimes imagine a virtual state

of nature, where naked power rules and the economically dispossessed have no legal rights at all. In fact, the legal systems in Brazil, Argentina and Uruguay are not completely unresponsive to the legal elements of a claim. Closer observation reveals the existence of a three-tiered system of legal participation.<sup>3</sup> A favored few are exempt from complying with the rules altogether; and there are some for whom the legal system does not respond at all, regardless of the strength of the legal claim. But the vast majority of the population inhabits a gray area. They suffer the generalized delays, inefficiencies and cost of the legal system but they often can, after some delay and investing the right tolls, make the system work for them.

This conceptualization does not define a completely lawless system. In fact, formal rights do matter, to different degrees in different cases and in different systems. Outcomes must be phrased in formally legal terms, and possession of a right is important. As we will see in Córdoba and São Paulo in particular, formalism is one of the enduring characteristics of these systems, and formalism generally tends toward emphasizing the importance of formal legal rights (for a discussion of formalism as a pre-requisite for autonomy, see Lempert 1987). The argument is simply that, while rights matter, they only gain effectiveness with the addition of something else, here called the toll. The weaker the claim, the greater the toll required to make the claimant's expectations effective; the more egregious the violation, the more toll required of the defendant to achieve impunity.

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<sup>3</sup> In addition to my own observations in the field, this discussion owes a great deal to discussions with Guillermo O'Donnell, who also refers to this tri-partite legal stratification in an interview published in *Página 12*, an Argentine newspaper.

The analysis of individual and aggregate data on judicial outcomes will allow us to map both the general level of effectiveness and the legal tolls present in each system.  $p_{\text{law}}$  and  $p_{\text{toll}}$ , in combination, explain the level of effectiveness of a given claimant's rights. But the ultimately more interesting question is explaining aggregate levels of  $p_{\text{law}}$  and  $p_{\text{toll}}$  in a given system.

The question then is, how do these tolls enter the system? From unequal results observers often infer that conscious, animus-based discrimination in the decision-making process imports different rules of decision for different groups into the legal system. But the toll imagery suggests that legal exclusion for certain social groups may simply be a by-product of the system's universal demand for the investment of a resource which these groups, on average, do not possess. Impartially applying universal rules in a radically unequal context will produce unequal results. Thus, Anatole France's familiar aphorism: "The law, in its majesty, prohibits the rich and the poor alike from sleeping under bridges"(France (1964 [1894])). In the following section I begin to answer this question, presenting a simplified model of legal decision-making, and arguing that the tolls can affect either of two dimensions of that decision making process.

## **2. The process of adjudication**

On its face, the process of adjudication is simply the application of rule  $r$  established by the rule-making authority (legislature, constituent assembly, authoritative judicial body, etc.) to a set of facts and circumstances that make up social object  $o$ , to determine where  $o$  falls within the categories defined by  $r$ .<sup>4</sup> An effective right or more

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<sup>4</sup> The concepts coincide roughly with discussions of the law and the facts in judicial decisions. I have chosen to use  $r$  and  $o$ , because, as we will see, it is not always clear that the "law" in any ordinary

generally an effective law, is one that so guides decision-making that the instances of  $o$  that come up for decision are placed in the correct categories as defined by  $r$ . An effective legal system, by extension, is one where this happens more often than not. Such a system translates formal rules into actual legal outcomes by ensuring that publicly binding decisions are made in accord with the categories created in these rules.<sup>5</sup>

In practice, however, both  $r$  and  $o$  are unobserved, and the decision maker applies his or her understanding of the norm ( $r'$ , “r prime”), to a re-creation of the social object to be judged ( $o'$ , “o prime”). In a homicide case, to take a simple example, there is a continuum of possible versions of  $r'$  and  $o'$ . Whether the defendant is found guilty of murder or not will depend on where we place  $o'$  in relation to  $r'$ . We can depict this schematically, as in Figure 1.2:

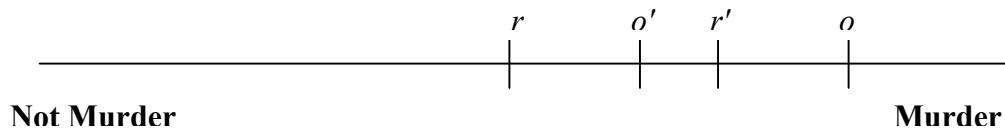


FIGURE 1.2: SCHEMATIC REPRESENTATION OF ADJUDICATION IN A MURDER CASE

In Figure 1.2, what might have been objectively murder is classified as not murder under a lenient interpretation of  $r$  and an exculpatory re-construction of  $o$ . To

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sense is being applied to the “facts” as we might ordinarily understand this term. I simplify the terms to their initials for the sake of efficiency.

<sup>5</sup> This has been used as a definition of independence (Skaar 2002 for a discussion of independence), but, as I argue throughout, outcomes can fail to match prescriptions for reasons that have nothing to do with judicial independence.



achieve the “correct” result in this example we might either shift  $r'$  to the left, or  $o'$  to the right.<sup>6</sup> A shift away from the true position of  $o$  is what I will call an informational or information-gathering failure, while a shift away from  $r$  is a normative or processing failure (because the information is processed according to the wrong rule or norm). In this example, the system has experienced a double failure. The focus of this project is on precisely these shifts.<sup>7</sup>

Some of these shifts are more or less random – the normative shift that occurs when a judge wakes up in a bad mood, to borrow an example from the critical legal scholars. Others are tied to individual decision-makers – individual variation in sentencing strictness, for example. Neither of these is, in and of itself, a system-wide phenomenon, but system characteristics such as a weak appellate structure or indefinite sentencing rules can create openings, making some systems more prone to these shifts than others. Other tolls may affect a narrow class of users across the entire system – race-based animus in the Deep South surely meant a normative shift for African-Americans seeking to use the system to enforce their rights. Yet others will affect all claimants equally, in particular classes of cases – the police in Salvador, we will see, appear to have free rein in using lethal force, and can almost count on impunity

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<sup>6</sup> Note that a more lenient interpretation of the law (for the defendant) draws the category of murder narrowly, which is depicted, somewhat counterintuitively, by moving  $r_+$  closer to the “murder” end of the spectrum of behavior. This shift has the effect of including less behavior in the proscribed category.

<sup>7</sup> This two-dimensional formulation is somewhat related to a notion Niklas Luhmann (Luhmann 1988; Luhmann 1985) developed in connection with his “autopoietic” theory of law. He argued that legal systems are “normatively closed” – that is, any new rule or decision must be validated by reference to standards that are internal to the law – and “cognitively open” – that is, the system must be open to receiving information from its environment. After using these terms for some time, I decided to abandon them, as they appeared to raise more questions than they answered and were confusing for many readers. Nevertheless, my own distinction between normative and informational failures is indirectly descended from Luhmann’s observations.

regardless of the characteristics of the victim. High filing fees and a lack of free legal assistance will import socio-economic tolls into the system, keeping out the underprivileged.

Calculating the tolls (that is, analyzing the outcomes of individual judicial cases) will allow us to measure these shifts systematically, so that we can reasonably compare across social groups, across jurisdictions, across cities, and across countries. Analyzing system characteristics and the process of decision-making in individual cases can tell us what sort of shift the various tolls are effecting.

There could be some objections raised to this simplification. That it assumes the law is more definite than it really is, or that the “facts” are more knowable than they are; that locating  $r$  and  $r'$ , or  $o$  and  $o'$  requires knowing what, by implication, the judges themselves in the actual cases did not or could not know; or that the two concepts are not independent, since it is often the rule of decision that determines what the relevant facts are. I will defer an answer to these and similar objections to the next chapter, in which I deal with the methods and the data.

For now, let me say only that the model is intended to highlight just how legally constructed the facts are in a given case, and how contingent the actual rule of decision is in individual cases. Most importantly, the graph is intended to emphasize an important variable missing from most of the literature on both judicial decision-making and the rule of law: that not all failures are simply the consequence of having (or using) the wrong rules, the result of corruption and improper influences on the judicial rule of decision. It is at least as likely that the failures are the consequence of systemic blindness to information about certain classes of cases or certain classes of claimants. In the next

section I present a theoretical model that accounts for the prevalence of information or normative-shifting tolls in the different systems.

#### **D. Proposing an explanation**

As we saw in the discussion of the literature, many scholars of the legal system are concerned with evaluating the system's independence or autonomy from political actors. The implicit subject of this inquiry is a normative shift: when outside actors interfere with the courts they cause a shift in  $r'$ , in a given case. But the simplified model of legal decision making described in section C.2 suggests that legal systems' performance can be measured along two dimensions. The first, a familiar one to scholars of the legal system, is normative autonomy (a subset of which is judicial independence, but which also includes other forms of undue influence on judicial decision-making).

To this we must add a second dimension which we might label informational autonomy.<sup>8</sup> This dimension varies to the degree that the legal system is not only open to claims and information brought to it by many different agents (the classic concern of the judicial access literature), but also has the capacity to seek out the information it needs from a variety of sources. Greater informational autonomy means that no one party can command a monopoly on the flow of information into the legal system. In order to understand what makes a given system more or less vulnerable along these two dimensions, we need first to understand how the legal system produces  $r'$  and  $o'$ .

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<sup>8</sup> I use the term "informational autonomy" to maintain the parallel with the more familiar concept of judicial autonomy. Another way to think of this concept is in terms of informational self-sufficiency – a "better" legal system is one that is not only open and accessible to many sources of information, but that also has the capacity to proactively seek out information when it judges it necessary.

Many of the proposed hypotheses for judicial failures – a dysfunctional legal culture (Rosenn 1987), excessive formalism (Djankov et al. 2002; Faria 1996), inefficiency (FORES and Colegio de Abogados de Buenos Aires 1999b), lack of resources (the implicit argument behind many earlier judicial assistance projects), lack of independence (Prillaman 2000; Vega 1998; Gargarella 1996; Verbitsky 1993), and the like – are true to varying degrees in different systems, and all, if improved, may well improve judicial performance somewhat.<sup>9</sup> But each of these is a partial and ultimately unsatisfactory account of the reasons why the various systems work the way they do. Each of the links in the legal chain is not independent of the others and should not be considered in isolation. To identify the factors that systematically produce tolls, I now introduce a schematic model of the structure of the legal system, and examine the way this structure affects the production of  $r'$  and  $o'$ .

## **1. An interdependent model of the legal system**

### **a) The production of $o'$**

The legal system, broadly understood as the set of actors, institutions and organizations that make, administer and enforce the law, forms a pyramid that goes far beyond the judiciary, incorporating many non-state actors. Information enters the system almost exclusively from the bottom. At each successive level of the system – even at the appellate level – there is an increasingly reduced number of actors, claims, decisions, and information. Many potential claims are screened out; and even with respect to a single

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<sup>9</sup> There is some debate on this point, with some arguing that a one-step-at-a-time approach to reform necessarily fails because the system is too interconnected, and others arguing that a focused approach can succeed. See the discussion in Pásara (2000).

claim a winnowing process pares down all the potentially available information to what is trustworthy and relevant according to the standards of the legal system.

The bottom tier of actors is the mass of potential claimants who must decide whether or not to engage the legal system at all (and, of course, those who must respond once a claim is brought to the system), and the crowd of witnesses and peripheral actors who decide whether or not to support claimants in their attempts. In criminal cases, the decision to engage the system is, obviously, more constrained for the defendant. But witnesses and affected parties will still need to make a decision to engage and cooperate with the system. As we will see, except in Uruguay, in all the systems that are the subject of this study, the survivors of a murder victim can decide whether or not to participate in the prosecution of the case, thus becoming claimants working in parallel with the prosecution.

The struggle to define *o'* is a contest between competing claimants – in civil cases, two non-state actors will compete, while a criminal case typically pits the state against the defendant. The balance of power between claimants critically affects the construction of *o'*. This is at least one of the reasons why, in a criminal case, procedural protections are put in place to even out the disparity between the state and the typical defendant. Similarly, in civil cases, the state may decide to step in with legal assistance for those who do not have the resources. The socio-economic condition of the claimants, as well as the context from which they are taken – and the state's response to that condition – then, will affect the resources these actors can bring to bear on the struggle to define *o'*.

To the extent the state takes a hand in the proceedings (as in a criminal case, or by providing free legal assistance), socio-political conditions determine the importance and legitimacy accorded to the various potential claims, and thus the resources expended by the state to develop these claims. Both the socio-economic and socio-political context in which the courts are inserted play a part in determining which claims and information reach the courts.

Between purely social actors and the judiciary *per se* are a series of gatekeepers and facilitators that channel information to the legal system. In the civil arena, these are primarily lawyers, while in the criminal arena, the police are the predominant actors who receive information, screen it, and pass it on to courts and prosecutors (Kritzer 1990; Ross 1980; Macaulay 1979 discuss lawyers' roles in screening civil claims in the United States). Prosecutors can at times serve the same entry/screening function, and in certain systems, as we will see, private parties (with or without lawyers) can sometimes access the courts directly even in a criminal case. The nature of these gatekeepers will crucially determine the informational autonomy of the legal system: the more effective and more varied the sources of information, the more equal the resources of the contending parties, the more accessible the legal system, and the less burdensome the requirements for establishing a claim, the more (and more balanced) information will enter the system.

### **b) The production of $r'$**

The actors' preference as to  $r'$ , the rule of decision, is affected by the incentives generated from two different sources. Some of the incentives affecting these actors are endogenous to the legal process itself. Endogenous pressures are those that arise from the structure of the legal system, as a consequence of each actor's role in the legal process,

and are usually applied by other actors in the system. This point simply recognizes that prosecutors and defense attorneys have very different perspectives on the law, and that these perspectives are clearly a consequence of their function within the legal process. Different legal systems assign different roles to the various actors in the process, thus affecting their normative tendencies. The investigative judges of the civil law tradition have a quasi-prosecutorial function, and therefore have been criticized for being insufficiently impartial, and too quick to convict – i.e., their  $r'$  is shifted, including too much behavior in the definition of murder.

In addition, however, some incentives are exogenous to the legal process but impinge on individual actors by way of career incentives or social and political pressures. Thus, to understand why certain actors may take a more activist approach in one system than in another, we must look not only to their role in the process, but to the incentives generated by the broader political context, as mediated by institutional design. Front-line prosecutors will be more sensitive to political demands for aggressive action (or inaction) in a police case, if their career depends on the benevolence of elected officials. Judges will be more or less strict with certain types of cases, depending on whether they are susceptible to outside pressures that demand a certain response. In each case, then, actors' preferences and capacities are a function of the interplay between the exogenous and endogenous incentives to which each of the actors is subject.

### **c) The effect of strategic calculations**

Epstein and Knight make a convincing argument that judges are strategic actors (Epstein and Knight 1998), and urge scholars of judicial politics to take this characteristic into consideration in analyzing judicial behavior (Epstein and Knight 2000). If we look at

the legal system as a whole, it becomes clear that it is not only judges who have the potential and opportunity for strategic behavior, but all legal actors. As a result, we should expect lower level actors to anticipate the actions of higher level actors, and act accordingly. Prosecutors will not invest in prosecutions they expect to lose, claimants will not bring claims they feel will not be successful. Some actors (defendants on the one hand, or victims on other) will have strong preferences as to the outcome of a case, which color their preference as to the construction of both  $r'$  and  $o'$ . Thus the claimant with the upper hand in the production of  $o'$  will craft it in such a way as to meet the expected content of  $r'$  and produce the desired outcome.

One key characteristic of the legal system is that, while higher level actors are legally superior in creating and framing  $r$ , the norm that will ultimately decide the case, lower level actors have the upper hand in the production of information about social object  $o$ . Lower level actors, to the extent they can monopolize the information available to the system, can anticipate the  $r'$  that will decide their claim and craft  $o'$  in such a way as to obtain their preferred outcome regardless of the legal standard expected.<sup>10</sup> In addition, they may be able to use their informational ascendancy to lobby (or blackmail) higher level actors into shifting  $r'$  so that it matches their normative preference. In

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<sup>10</sup> This informational dilemma is akin to what has been described in the principal-agent literature as the problem of hidden information (Kiewiet and McCubbins 1991: 25). While I have occasionally referred to lower level agents as subordinates of higher-level agents, and while I have implied that the relationship is hierarchical, the police are not, in the true sense, agents of prosecutors, nor are the latter agents of judges. The police are typically agents of the executive, while prosecutors are in many courts, including the federal courts of Argentina and in Brazil, constitutionally guaranteed independence of action. In most cases, prosecutors tend to respond more to the Executive who typically names their leader, even when they are not included in the Executive branch. Moreover, higher level “principals” in the legal system do not establish the terms of the “contract,” they do not select the “agent,” and they cannot terminate the relationship; for the most part, they cannot choose whether or not to delegate, though they can occasionally choose to supplement the work of the “agent.” Thus, while information plays a key role in setting the limits of oversight, many of the insights from the principal-agent literature simply do not apply in this context.



explaining the functioning of the legal system as a whole, therefore, it is important to uncover just how dependent upper level actors are on lower level actors for information, and, where they are dependent, what are the likely preferences of the information-supplying actors. In the following section I develop the consequences of this model of the legal system for the prosecution of homicides committed by the police.

## **2. Consequences of the model for prosecutions of police officers**

### **a) Constructing $r'$**

Putting aside for the moment exogenous pressures, which will vary from case to case, in the ordinary criminal prosecution the actors' preferences as to the rule of decision can be expected to line up fairly consistently. We can make this visible by plotting the location on the continuum of factual situations where they would prefer to place  $r'$  to mark the boundary between murder and not murder. As a general rule, the closer the actor is to the task of information gathering, the more the actor's preference tends toward conviction. Conversely, as the actors deal more abstractly with the facts and more purely with the law, they tend toward a more balanced view of cases, and a more nuanced view of the rule to be applied. Thus we have the police complaining that they arrest criminals only to have soft-on-crime judges let them go again, and judges complaining that prosecutors are running wild and trying defendants in the press.

A number of reasons could be offered for this tendency, but what is important for current purposes is simply that in the typical prosecution the police are, after the victim, the most interested in a conviction and resist attempts to free defendants in whom they have invested investigative resources. Next to the police are the prosecutors, whose

primary imperative is to prosecute cases to a successful conclusion, but who are more sensitive to the nuances of the law, and more prepared to abandon marginal cases. The final decision maker (labeled “judge” in Figure 1.3 and Figure 1.4 for simplicity), is a neutral arbiter and will fall somewhere between the prosecutor and the defendant in the zeal to convict. The line-up of actors’ preferences on a continuum from most lenient to strictest construction of the law in a given case, therefore, would look something like

Figure 1.3:

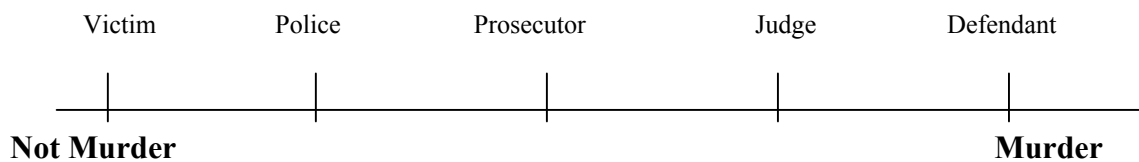


FIGURE 1.3: ORDERING OF PREFERENCES IN ORDINARY CRIMINAL CASES

If the defendant is a police officer, however, and the conduct in question involves the way the police carry out their assigned task, the line-up changes substantially. Now the preferences of the police will be closer to the defendant’s than to the victim’s, because a strict application of the law limits their freedom of action and exposes them to a greater risk of prosecution in the future. They now have to worry about how the rule of decision applied in this case will affect their own ability to do their job, and about their own chances in the event of a future prosecution. Of course, not all police officers are created equal in this respect. In most police forces there is a division of labor between those who do the security policing, and are more likely to find themselves in the defendant’s seat in a future prosecution, and those who do the judicial investigation, and thus might distance themselves from the defendant. As a general rule, we might expect

that, the closer the investigative arm of the police is to the front-line police force, the closer it will be to the defendant's position in Figure 1.4.

Similarly, to the extent prosecutors and investigative judges are operationally indebted to the police, their preferences will be pulled closer to the police's, and hence to the defendant's. At best, the trial judge's preferences will be unchanged, though an investigative judge in the civil law tradition or who works closely with the police on many other issues will be more like a prosecutor, inching closer to the police's preferences. All else equal, whether the prosecutor and investigative judge remain between the decision maker and the victim or squeeze in between the trial judge (if there is one) and the police will depend largely on the level of their operational dependence on the police. The more prosecutors and judges are indebted to the police in their everyday work, the closer their alignment with the police's preferences.

The victim's preferences, meanwhile, remain unchanged, leaving the claimant (in my cases this figure represents the victim's survivors) increasingly isolated, as shown in Figure 1.4. This figure depicts expected preferences in a case in which the Judge is unchanged, while the prosecutors are indebted to the police.



FIGURE 1.4: ORDERING OF PREFERENCES IN CRIMINAL CASES INVOLVING POLICE CONDUCT

One of the most consistent complaints of victims and victim advocate groups in police violence cases is that the whole system is lined up against them. Figure 1.4 clearly illustrates the source of this perception. From the point of view of the victim, and especially in contrast with the typical criminal case, it looks very much like everyone is grouped at the far end, conspiring against the victim to deny his or her rights.

The importance of the victim’s ability to be heard in the process is a consequence of this line up of preferences. The state usually asserts ownership of the right to prosecute, so the typical claimants in a criminal case are the state on one side and the individual defendant on the other, while victims and their survivors remain outside the system. But the system may be left completely unbalanced, as shown in Figure 1.4, if these internal legal actors are the only ones contending for the legal characterization of *o* in a given case. If prosecutors are aligned with the police – in fact, even if they affect a relatively neutral stance – the outcome will tend to fall somewhere between the judge’s preference and the defendants and vastly distant from the victim’s preferred outcome.

Exogenous pressures could in principle ameliorate the consequences of the endogenous tendencies detailed above. Exogenous incentives are, as discussed above, a function of broader social and political pressures and the actors’ susceptibility to these

pressures. If they are not completely isolated from society, strong social or political demands for repressive police tactics will move prosecutors and judges closer to the police's preferred outcome. On the other hand, if prosecutors and judges expect that they will be held to account for failing to prosecute police officers, they will shift  $r'$  to the left and invest more resources in these prosecutions. In my analysis of each actor's preferences I will take the default position to be a function of the endogenous pressures it faces, while exogenous pressures will influence each one to greater or lesser degrees depending on the decisional autonomy of front line actors and the overall independence of the institution to which they belong.

The empirical discussion of the actual systems will have to identify whether exogenous pressures tend in the direction of stricter or looser enforcement of the law in police cases, and the extent to which legal actors are susceptible to those pressures. Judicial and prosecutorial independence are, for this project, independent variables, not the dependent variable.

This model suggests that endogenous factors in police homicide cases tend to shift the location of  $r'$  away from the victim's interests and toward impunity. To move the center of gravity back in the other direction, it will be necessary but not sufficient to generate exogenous pressures to move the preferences of judicial actors (at minimum, the ultimate decision makers) away from the police. To gain a complete picture we must turn to the construction of  $o'$ .

### **b) The construction of $o'$**

Any actors that are aligned against impunity must have sufficient informational autonomy to adequately oversee the production of an  $o'$  that will support a conviction

under their preferred construction of  $r'$ , and to resist pressures from below to shift the location of  $r'$ . The police cannot formally change the legal standards decision makers will apply, but they can affect outcomes by rationing information in the particular case or by blackmailing prosecutors and judges by withholding information more generally.

The following graph depicts the expected impact of the line-up of normative preferences described above on the construction of  $o'$ . I have so far depicted the actors on the same line, but these actors typically act sequentially, feeding information up to the next level of the system. Strategic investigators who prefer a not-guilty outcome and know where judges and prosecutors will place  $r'$  will seek to shift  $o'$  to produce their preferred outcome. To the extent they have a monopoly on the flow of information, they will be able to effect an informational shift, as in the following figure:

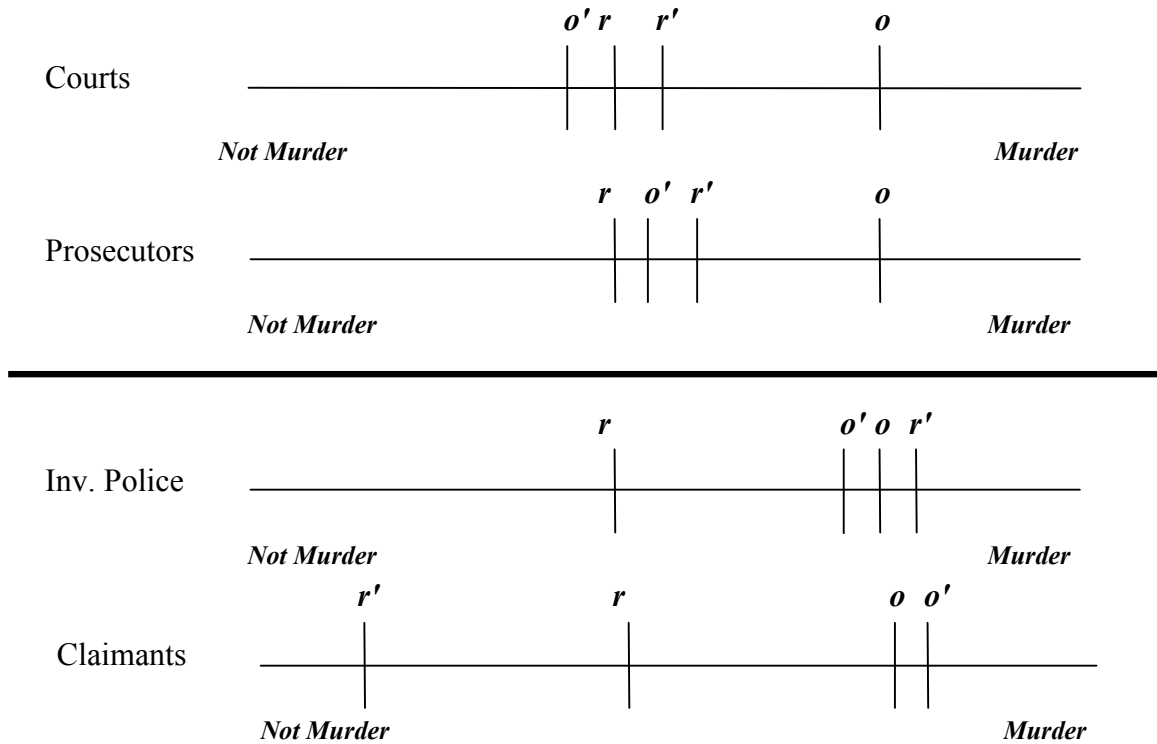


FIGURE 1.5: INFORMATIONAL SHIFT RESULTING FROM NORMATIVE SHIFTS  
AT LOWER LEVELS

The dark black line in Figure 1.5 is, in essence, a distorting filter imposed by the investigative agent, the police, to refract  $o'$  into the preferred normative category. The stronger the control exercised by the police over the investigation, and thus over the construction of  $o'$ , the greater the likelihood of this informational shift.

If they are aware of the potential for an informational shift and are effectively deployed, other actors may seek to correct this bias. Judicial investigators are present in some of the systems, as we will see. But the closer their preferred  $r'$  to that of the police and the defendant – and as we saw, endogenous pressures will draw them far closer than in the ordinary case – the less likely it is that they will expend significant resources to

correct the problem. In addition, as we will see, the rules in Brazil and Argentina permit interested parties to name attorneys who will act as a sort of Private Prosecutor in the case. Depending on the strength of this figure and its attributes, a Private Prosecutor who owes nothing to any of the other actors is the best chance victims may have of correcting this informational bias.

The primary limit on the ability of the police to force an informational shift (or to blackmail upper level agents into a normative shift) is the level of informational autonomy higher-level agents can achieve, that is, the diversity (and effectiveness) of alternative sources of information routinely available to judges and prosecutors.

The counterpart of judges' and prosecutors' informational autonomy is the police's normative autonomy. The police always have some normative autonomy – the decision by the lowliest police officer *not* to arrest someone is hardly ever reviewed by anyone – but the level of autonomy is not constant across systems. The same institutional arrangements that affect their legal superiors' informational autonomy, coupled with the presence or absence of effective sanctioning mechanisms, determine the police's capacity of resistance to unwelcome directives. The dependence of higher levels on information from below allows us to state something close to an axiom: a normative shift, so that the agents who produce information uphold a different rule of decision, at lower levels of the system will produce at least an informational challenge (if not a shift) at higher levels – the dark black line in Figure 1.5.

This axiom has a corollary: A single channel for generating and moving information up the system will only be effective if there is a relatively high degree of consensus within the system on the proper norm to be applied – that is, on the placement



of  $r'$ . But, as we saw, the placement of  $r'$  is not independent of judges' and prosecutors' informational dependence. *Ceteris paribus*, the more dependent they are on the police, the closer their placement of  $r'$  will come to that of the police. Thus we should see consensus within the legal system at both extremes: if the upper reaches of the system are highly dependent on the lower reaches, then we should observe a bottom-up consensus that reflects the preferences of lower level actors; if there is a rich variety of alternative sources of information, then we should see a top-down consensus that reflects the preferences of the highest levels. The higher the degree of resistance among lower-level actors, the more important will be the presence of a number of information-producing agents with a variety of interests, reporting to upper-level agents.

This has broad implications for the rule of law, which presupposes the supremacy of the lawgiver at the top of the system. The internal mechanism for producing that supremacy is precisely the presence of alternative sources of information about the performance of lower level actors (coupled, of course, with effective sanctions for non-compliance, but presumably the lawgiver can create such sanctions, if necessary). Greater inequalities in the capacity of lower level actors to generate information increase the likelihood of the failure of the rule of law. In the absence of such alternatives, there is no guarantee that lower level actors will locate their  $r'$  anywhere near the lawgiver's  $r$ , and there is a higher likelihood that oversight instances will be forced to acquiesce in illegal practices.

In general, then, a variety of reporting and monitoring agencies reduces the likelihood that information will be screened out and maximizes the possibility that lower level agents will act according to the normative guidelines laid down by upper-level

agents. This is at least one of the ways in which the interlocking agencies described by O'Donnell (1994) contribute to accountability. Ultimately, of course, this top-down control can serve democratic or authoritarian purposes, depending on the content of the rules set down by the lawmaker.

### 3. Concrete implications of the theory

Here I summarize the hypotheses to be derived from this general model of the legal system for our cases in particular. Because we can expect them to adopt a more expansive view of the rules governing the use of lethal force than any other actor in the system, the police will seek to shut down the flow of information into the system in these cases. Thus we expect the following:

As to  $r'$ :

1. The greater the reliance of judges and prosecutors on the police for information in all their cases, the more permissive their preferred version of  $r'$ , and, *ceteris paribus*, the lower the conviction rate.
2. The tighter the links between judges and prosecutors and their political environment (through appointment, advancement and discipline mechanisms) the more susceptible they are to exogenous incentives, which can cut either way:
  - a. The greater social and political approval of police violence, the more permissive  $r'$ , thus the lower the conviction rate; and
  - b. The less social and political approval, the stricter  $r'$ , thus the higher the conviction rate. But these links to the political context open the door to political tolls, so we should see higher inequality tied to the political construction of the case (i.e. political tolls).

As to  $o'$ :

3. The greater the general disparity in power between the police and the claimants (either prosecutors or victims' survivors) who are contending for the construction of  $o'$ , the greater the shift in  $o'$ , and therefore the fewer convictions of police officers we should see (i.e., the lower  $p_{\text{law}}$  will be).

4. Conversely, all else equal, more alternative, independent and effective channels for feeding information to judges and prosecutors should produce more convictions in the prosecution of police officers (i.e., higher  $p_{law}$ ). And,
  - a. The more state actors take on this task, the less socio-economic resources will affect the fact-finding process and thus the lower the socio-economic tolls in the system. Conversely, the more these channels are merely passive recipients of information relying on individual initiative, the more socio-economic inequality we should find in the outcomes.
  - b. Since endogenous factors predispose them to leniency in police cases, prosecutors and investigative judges will seek to actively prosecute these cases only where there is strong exogenous pressure to do so.

In the following chapter I outline the principal methodological choices made in the course of this research. Chapter 3 sets up the dependent variable, measuring the values of  $p_{law}$  and  $p_{toll}$  in each of the cases. Chapters 4-8 examine each of the cases, explaining the sources of the levels of effectiveness and inequality in each. Chapter 9 contains in-depth case studies of representative individual prosecutions from each jurisdiction, locating each of legal systems in question along the two dimensions of normative and informational autonomy. Finally, Chapter 10 presents the concluding reflections.

## CHAPTER 2

### METHODS, CASE SELECTION AND SAMPLING

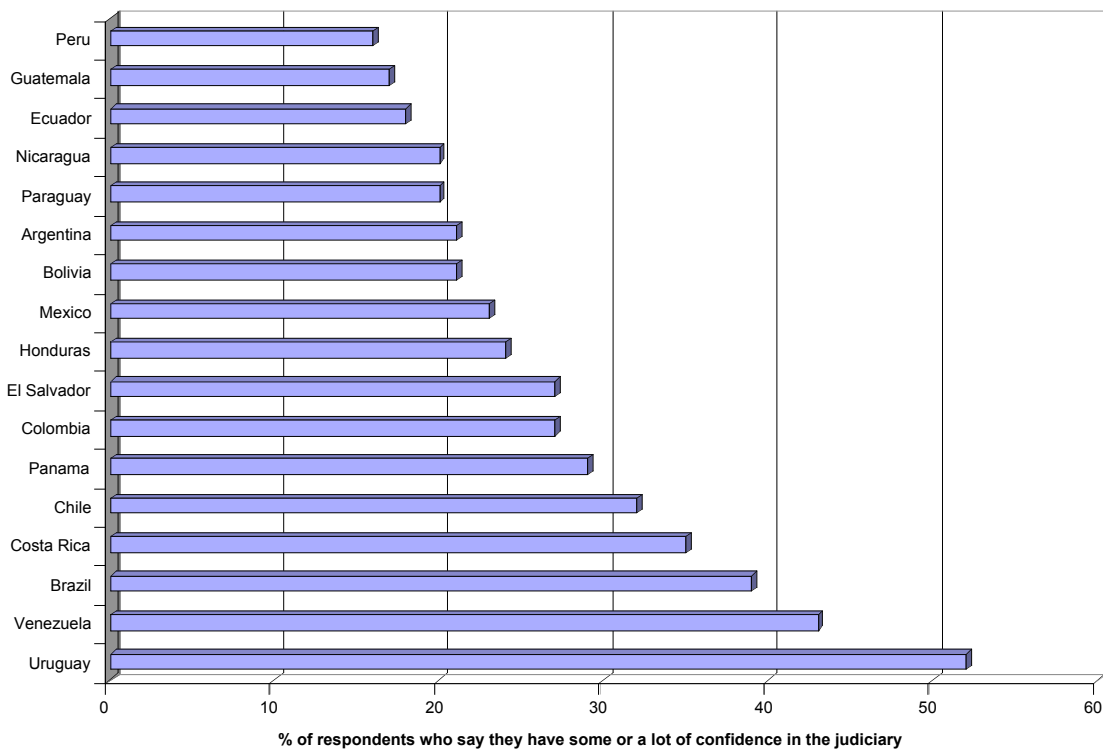
In this chapter I discuss some of the methodological choices made, the case selection, and principally, the sources of data and sampling for the dependent variable.

#### A. Case selection

In the dissertation I work at three levels of analysis: countries, specific judicial districts, and individual legal cases. The three countries I have chosen are Argentina, Brazil and Uruguay, which offer a wide range of variation on the dependent as well as the independent variables. In terms of the dependent variable, Uruguay, by reputation at least, shows a relatively effective legal system, while Argentina and Brazil evidence more problems in this regard. A review of U.S. State Department reports on human rights practices in the three countries also reveals a stark contrast between them (U.S. State Department 1998). The reports on Argentina and Brazil show patterns of violence and disregard of the laws by state actors and high levels of impunity. Uruguay, on the other hand, fares well in these reports, which suggest that it is largely free of abuses and takes action to punish them when they occur.

There is also some variation, by reputation at least, in the performance of the judiciaries in the three countries. Uruguay consistently ranks among the top Latin American countries in opinion polls (expert and popular) testing confidence in the judiciary. Close observers in Argentina and Brazil, on the other hand, describe both

systems as being “in crisis.” Still, by many measures, Argentina and Brazil are not such abysmal failures that we can simply say their legal systems are in collapse. The results of the 2000 Latinobarómetro, for example, suggest that these systems enjoy more confidence than many of their Latin American neighbors.



Source: Latinobarómetro 2000.

FIGURE 2.1: PERCENTAGE OF POPULATION IN LATIN AMERICAN COUNTRIES THAT EXPRESSES “SOME” OR “A LOT” OF CONFIDENCE IN THE JUDICIARY

There appears to be, therefore, considerable variation on the dependent variable across countries, which will be laid out in even more detail in the following chapter.

The next level of analysis is subnational. Within Brazil and Argentina, which are federal systems, I have selected two different legal environments – in each case, I

compare the largest and most economically important city in the country to a more remote provincial capital, with similar populations (just over and just under two million) and a solid industrial base. Each of these constitutes a separate legal system, responding to a different supreme court, with judges and prosecutors named by different political authorities, and police responding to different elected leaders. One of these cases, the Buenos Aires metropolitan area, has two separate legal systems, the federal one within the borders of the City of Buenos Aires, and the provincial one acting outside those borders.

I compare each of these to Uruguay. While it may seem strained to compare provincial systems to a national one, Uruguay is a single legal system: judges and prosecutors in the whole country are named by the same political authorities, the police respond to the same elected leadership, and the laws are uniform across the country. In the size of the population covered, Uruguay is comparable to the smaller cities in each of the other two countries. Thus, though it is at times awkward to be comparing a country to four cities, a direct comparison is valid for most purposes. When it is not – for example, in comparing the amount spent on the judiciary in Uruguay (with its single unitary system) to the amount spent on the judiciary in São Paulo (with a state and federal system operating side by side), I make the necessary adjustments, and discuss them in the text.

Within each legal environment, I do an analysis of individual prosecutions, comparing effectiveness and inequality within the system. For this level of analysis, I selected the investigation and prosecution of homicides committed by the police.<sup>11</sup> While

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<sup>11</sup> A note here about terminology: a homicide is simply a case involving the killing of a human being, whether intentional or not, whether illegal or not. Thus when I speak of homicide cases, I do not

homicides are possibly not the most representative type of violence perpetrated by the police, nor the most representative sort of right asserted by claimants in these courts, they offer some advantages that outweigh their drawbacks. In the first place, since the end of the dictatorships, victims do not simply disappear. When the police kill someone in the course of their duties, they typically acknowledge the killing, or it comes to light very quickly. There continue to be deaths that the police do not claim, of course. These are more common in Brazil, as a result of police involvement in so-called extermination groups (Oiticica 2001). But in relation to, for example, the universe of torture incidents, the percentage of the universe that is available to a researcher is vastly greater in studying homicides.

Using homicides obviates one of the most vexing problems for scholars of a legal system. By beginning the inquiry with lists of victims of police homicides, I avoid the selection problem that afflicts studies of legal outcomes, which for the most part cannot account for the many cases that never get to the courts in the first place. Moreover, the law governing homicides is more discrete and straightforward than, say, the law regarding the constitutional separation of powers. A youth shot in the head while kneeling with his hands in the air was almost certainly murdered, while one who was shot as he attempted to kill a police officer was almost certainly killed in self-defense. There are borderline cases, but in the end, the judgments are relatively clear cut.

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mean to suggest that all these cases are murder – though, as we will see, I did take care to exclude those cases that quite clearly were not.

Finally, all the countries are signatories to the same international codes proscribing arbitrary killings, and have very similar substantive laws outlawing murder. The underlying normative framework is quite similar across all the cases.

The nested research design allows for comparisons within legal systems, holding constant system-level variables; within metropolitan areas, holding constant city-specific variables; within countries, holding constant national-level variables; and ultimately across countries. The result is a rich and varied view of the dependent and independent variables, multiplying the cases and contributing to the resolution of the typical small N-too many variables problem.

#### **B. The choice of dependent variable:**

The dependent variable in this study is a comparison (at times aggregated) of judicial outcomes in actual prosecutions. As discussed in the Introduction, I will focus on what I call informational and normative shifts, to evaluate the effectiveness of different legal systems. In more concrete terms, I compare conviction rates across social groups, across legal systems, across countries, to come to conclusions about legal effectiveness and inequality. Some objections could be raised to this approach. First is the objection that conviction rates may reflect differences in the nature of the cases, rather than shortcomings in the legal systems. This is the objection most often raised by judicial and legal actors to social scientific studies of legal functioning.

In terms of the model of legal decision-making presented in the Introduction, the assumption underlying the use of conviction rates is not that all the cases should end in a conviction. Rather, the assumption is that the underlying distribution of events (what I have labeled  $o$  in the graphs summarizing the model) is more or less the same across the



categories being compared. I have taken some care in choosing the category of cases under study, in controlling for different types of cases within that category, and in the sampling, to ensure both that the samples being compared are as similar as possible in terms of the underlying merits of the case, and that a low conviction rate suggests a high number of errors, and not, say, especially good procedural protections for innocent defendants.

The point, of course, is not that the conviction rate should be 100% everywhere. On this measure, Stalin's judiciary was almost certainly among the most effective in history. The flip side of a successful prosecution is the success of the institution in protecting the rights of those who are accused on the basis of flimsy or inaccurate evidence. A certain number of acquittals are to be expected and are a sign of health. But the rate of appropriate convictions should be higher where the investigative, prosecutorial and judicial functions are most effective, so long as the system is not simply rubber-stamping political decisions by convicting everyone who is accused.

I readily acknowledge that the task of meting out justice is a difficult, political, human endeavor, fraught with conflict and uncertainty. The law's categories are often drawn with this in mind, giving latitude to the decision maker both on interpreting the law and the facts. Moreover, there is often some latitude possible in the interpretation of an event even if the "facts" are perfectly known. As a result,  $o$  and  $r$  would perhaps be better represented by a section or area of the continuum rather than a single point.<sup>12</sup> I retain the use of the single point simply for notational efficiency and not to suggest that the law does not permit the decision-maker any latitude. It is certainly not the case that if

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<sup>12</sup> I am grateful to Guillermo O'Donnell in a personal communication for this observation.

two decision-makers come to a different decision, one or the other has necessarily suffered a legal “failure.” At some point, however, the divergence from any reasonable understanding of the legal standard or the truth about the facts becomes sufficiently great as to be properly classified as a failure. And, again, I have taken some care to select the samples so that a large proportion of the cases, under any reasonable construction of the legal standard, are rights violations.

One might argue that this formulation implies that there is a “correct” outcome, contrary to the observations of critical legal scholars and post-modern critiques of the law. While I am sympathetic to accounts that point out the indeterminacy and polyvalence of the law and the social construction of all facts, the basic assumption behind the legal system in a constitutional democracy is that the law imposes some restraints on permissible behavior. Any legal system assumes that the policies embodied in the law are – barring a legislative failure – sufficiently well-specified as to allow the courts to implement them. As a result, while the precise location of  $r$  and  $o$  are unobservable in practice, the premise of the law is that the courts can approximate both of these with varying degrees of success. As I discuss in connection with the choice of homicide cases as the basic unit of analysis and the sampling approach, and as will become evident when we turn to the details of actual cases, my analysis relies on cases that, on average, are not so indeterminate that a good judge, with good information, could not decide if the case was murder or not.

To some degree, in using actual outcomes of legal disputes to evaluate the performance of the courts – on any variable other than purely mechanical ones, such as average delays – we cannot avoid delving some distance into the merits of the cases. In

Chapter 9, for example, I will look at a sampling of cases from each jurisdiction to classify a failure to convict in those cases as either an information-gathering or an information-processing failure. I have already conceded that the indeterminacy of the law, and the unknowability of the “true” facts is likely to make this a difficult task. But the task is not in its essence different than evaluating any other factual assertion in the social sciences, and it is considerably more simple than some – whether a given regime in a given year is democratic or authoritarian, for example. So long as we establish clear standards and fairly present the evidence, leaving some margin for uncertainty, the reader can decide whether the assertion is supported by the evidence.

The pay-off from looking at individual cases to identify the type of failure that is most prevalent in a given system is, I think, substantial. Whether a system failure is an informational failure or a normative one matters for a number of reasons. If the problem is that judges are applying the wrong rules, for example, an attentive Court of Appeals and some continuing legal education on policing standards might be the prescription. If, on the other hand, the problem is an information-gathering failure, then the answer is to create more effective investigative agencies that can assist the courts in these cases, or strengthen existing ones.

But my analysis does not rest primarily on second-guessing judicial and prosecutorial decisions. So long as there is no reason to believe that there are systematic differences in the nature of the cases that affect different classes of victims or systematic differences in the sample of cases across legal systems, a comparison of conviction rates is a valid measure of whether informational or processing errors affect some classes more than others. It is not a coincidence that the courts in São Paulo fail to convict in 93% of

the cases even in the absence of a blanket rule granting the police complete autonomy in the use of deadly force. It is not stochastic error that produces a marked difference in conviction rates across social classes in Córdoba. And it is certainly not the case that Uruguay has a higher conviction rate because its police are more violent and prone to human rights violations than the police of, say, Salvador.

In addition, I use the results of the quantitative analysis of aggregate results to double check the conclusions from the close qualitative analysis of individual cases. The impact of a victim's socio-economic status on the probability of a conviction suggests that what matters is the ability to produce information for the legal system. Finally, in doing the analysis of the overall system in each location, I locate the weaknesses and use inductive reasoning to infer whether such a weakness might have an impact of the system's information gathering or information processing capacities – a judiciary that is prone to tampering by political powers who express an interest in using repressive police tactics is likely to suffer from normative failures, at least. If all these sources of data concur, then the diagnosis is more certain.

Finally, I have not avoided tentative language, where it is appropriate. If I do not have sufficient data to be certain of a conclusion – something that is more frequent than I would like, given the understandable paucity of reliable data on matters that concern illegality and deeply troubling failures of the institutions in question – I have said so.

### **C. Data sources and sampling**

One of the many difficulties in conducting a study of the problem of police homicides and the state response to them is obtaining accurate information about the overall universe of cases. In each location, therefore, I consulted the best available

sources, using the work of NGOs, state oversight agencies, newspaper archives and various reports by human rights organizations, as described below.

## **1. Uruguay**

A detailed search of the available online databases of Uruguayan newspapers, and an analysis of all the available human rights reports produced both internally and externally<sup>13</sup> suggests that the Uruguayan police do occasionally kill, but the killings are sporadic and sometimes simply the result of poor training and inexperience. This sampling of the cases is surely not fully exhaustive, but it suits the needs of this study. It is possible, for example, that the high proportion of executions and near executions detailed below is a result of sampling bias, in that egregious cases are more likely to receive press coverage and attention from human rights organizations. Uncontroversial cases, especially in remote areas, in which the police kill someone in the course of an armed confrontation, may not even be reported in the press, in which case they would appear neither in the Serpaj report nor in the on-line news archives.

But Uruguay is a small country, and Serpaj does a daily search of newspapers in addition to receiving complaints, and so it is unlikely that a very large number of cases that are actually rights violations would go undetected. Moreover, as we will see, uncontroversial uses of police power are excluded from the sample in Argentina and Brazil as well, and so the samples for the different countries are comparable in this respect. If anything, the lower number of incidents, the smaller population and the

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<sup>13</sup> I reviewed the US State Department and Freedom House reports, and all the available reports from Serpaj, for the 1990s. I have also talked to lawyers working in the area of human rights, and they were unable to point out any cases not captured by these methods.

reduced geographic area make it more likely that marginal cases will be newsworthy. This sampling is at least as trustworthy and complete as that in Buenos Aires and São Paulo, and possibly better than that in Córdoba. According to this sample, then, the number of persons killed by the police in the last decade has remained very stable, somewhere around two or three per year in a country with a population that hovers around 3 million for this period.

## **2. Buenos Aires and Córdoba**

In Argentina, for example, no official figures are released detailing how many people die at the hands of the police. Nor do the courts report statistics on their handling of these cases. This may well be why existing studies of the problem tend to focus on exemplary cases, rather than approaching the problem in a more systematic way. But there are some efforts to monitor this issue. The two most important civil society organizations in this respect are the CELS (*Centro de Estudios Legales y Sociales*) and CORREPI (*Coordinadora Contra la Represión Policial e Institucional*). The CELS has been combing the newspapers in the Metropolitan Buenos Aires area since 1985 for instances in which the police were involved in an act of violence. Their figures include fatal and non-fatal shootings, torture and deaths that result from ill treatment at the hands of the police, and other violent acts by the police. In addition, CORREPI has been gathering similar information since 1996, and lists all cases that have come to its attention and occurred in the years since democratization. CELS publishes statistics on the problem every year (CELS 2001b; CELS 2001a; CELS 2000; CELS/HRW 1998), and CORREPI disseminates a comprehensive list of its cases that, in its latest edition, covers 1983 through 2001 (CORREPI 2001).

The two studies do not overlap perfectly. CELS reviews the 4 newspapers with the greatest circulation in Argentina on a daily basis, and enters the information in a database. It lists all acts of violence by or against security agents in the Greater Buenos Aires area, and classifies them into four groups: 1) deaths or injuries in confrontations (“*enfrentamientos*”), 2) deaths or injuries while in custody, 3) deaths or injuries arising from the extra-official use of force, and 4) deaths or injuries arising out of the negligence of the security forces. CORREPI, on the other hand, gathers information from a less systematic daily survey of major periodicals, and in addition relies on the complaints of friends and relatives of victims, and a network of affiliated organizations around the country, in an effort to include cases from all of Argentina.

Both lists are, of course, necessarily incomplete. In the first place, of course, neither one includes killings in which the police do not acknowledge authorship, and in which their participation is not otherwise discovered. It is hard to gauge just how much of a problem this is, since the tendency to use body counts as a measure of police success in the war against crime means the police are usually more than willing to acknowledge their participation. Moreover, even in some covert cases, CORREPI’s contacts bring the information forward. But of course, the more patently unlawful the incident, the more likely the police are to act in secret and not to claim attribution. To some degree, this aspect of the problem must remain unobserved, and so any conclusions I derive will necessarily be conservative, underestimating the degree of impunity. In any event, the focus of this study is more on the response of the state in those cases that are brought to the attention of the courts, and so this deficiency, though troubling, is not fatal.

Secondly, as the CELS itself acknowledges, news reporting of crime and police repression is affected by variables that have nothing to do with the phenomenon itself. A big soccer game, the death of a celebrity or any other major news event can easily squeeze a crime report off the back page, particularly if the only newsworthy aspect of the article is the reported shooting of a suspected criminal during the commission of a crime. This is especially likely, even on a slow news day, for incidents that take place on the margins of society, in the *villas* that are Argentina's response to the Brazilian *favelas*. And it is likely in all cases for occurrences far from a major metropolitan area.<sup>14</sup> In short, the information is trustworthy as far as it goes, but the ordinary cases that affect single individuals in out of the way places may well go unreported.

To a degree that is difficult to estimate, this bias is corrected, especially in recent years, by CORREPI's ever-greater insertion into many of the *villas* around the capital, and the likelihood that someone will report incidents to CORREPI even if the media do not pick them up. It is hard, after all, to permanently and completely hide the death of someone. And in the close and promiscuous world of the *villas* the police are often as well known as those they pursue, so authorship is also likely to be known. CORREPI itself acknowledges that its list reports a higher incidence of killings in areas in which it is better organized, and attributes this result to better reporting, not a higher number of cases.

Third, CORREPI imposes additional filters on the cases it reports. Three of the following criteria are appropriate for the goal of this study, but the third, if it were

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<sup>14</sup> Recognizing this, CELS wisely limits its statistics to the Metropolitan Buenos Aires area, as the newspapers it canvasses are not likely to report at all on minor events occurring in the interior of the province, let alone in more remote regions of Argentina.



perfectly applied, would preclude comparison with cases of the legitimate exercise of force by the police, and, in a situation of imperfect information, introduces some possible distortions in the data:

1. We only include cases that end with the death of the victim.
2. We only include those cases in which the persons responsible have been members of the security forces of the State: federal police, provincial police forces, gendarmería, the penitentiary service, etc., or the armed forces.
3. We only include those cases in which, without any doubt, the death occurred in circumstances in which the victim posed absolutely no danger to third parties or the slayer. In other words, we do not include true armed confrontations.
4. As to the modality of the cases, we include cases of *gatillo fácil*<sup>15</sup> proper (more often than not executions masquerading as pseudo-confrontations), “negligent” *gatillo fácil* (the death of innocent bystanders in true confrontations), torture ending in death, and disappearances (CORREPI 2001, translation mine).

In accordance with the third item above, CORREPI’s list expressly excludes deaths that take place in the course of armed confrontations between the police and criminals. The difficulty here is that in many cases the police take care to stage a confrontation, if the circumstances permit. The CELS report argues that the category labeled

‘deaths and injuries in confrontations’ involves conflicts in which, according to the police, both sides are armed. The majority of the events is related to robberies and thefts of lesser values, robberies of off-duty police officers, and police operations prompted solely by the presence of “suspicious” characters and requests for identification. These circumstances, and the fact that in almost the totality of serious human rights violations the police version

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<sup>15</sup> *Gatillo fácil* (literally, “easy trigger”) has become both a term of art and a contentious one, with some on the right denouncing it as tendencious, and some on the left criticizing it as obscuring the intentionality of the acts. It was coined by human rights activists, including those involved with the CORREPI, to denote that these killings are the result of a tendency to solve all aspects of law enforcement by shooting first. It is, in any event, often the term of choice for the media and others whenever there seems to be an instance of excessive use of force.

continues to obscure the true events, compel the conclusion that a great majority of cases of “confrontation” in reality are executions, excessive uses of force, point-blank shootings (fusilamientos) during a repressive or preventive police action and abuses of power (CELS 2000:138, translation mine).

The media in most cases necessarily relies on the police version of events, unless there is some striking evidence to the contrary. As a result, it seems unlikely that CORREPI will be able to successfully distinguish “true” confrontations from staged ones in every case. To some degree CORREPI compensates for this, by being exceedingly skeptical of the police version of events, and giving the benefit of the doubt in most cases to the victim. Moreover, in many cases, CORREPI comes to know the friends or relatives of the victim and thus can conduct an informal investigation into the facts to determine whether to include the case in the list, by talking to those who are most likely to be sympathetic to the victim. This, in the end, reintroduces some cases in which the illegality of the police action may not be susceptible to proof or otherwise clear-cut to an impartial adjudicator. Thus, in cases that occur in the Buenos Aires metropolitan area, where journalistic reports are likely to be a little more detailed and where interested parties have the option of contacting CORREPI or other human rights organizations, the list is likely to be more complete. These cases will therefore be more representative of a wide range of police actions that can span the continuum from the patently illegal to those approaching the legitimate exercise of the State’s police power, though the bias, CORREPI would insist (and my examination of the cases confirms this), is to include only those cases that are actual violations.

I use both the CORREPI list and the CELS information in my study, in different ways. The CELS statistics illuminate the entire universe of cases in a more systematic

and complete way, for the Metro Buenos Aires area. But the information is summary, and does not refer in a consistent way to the judicial *sequelae* of the incidents it reports.

CORREPI, on the other hand, makes a concerted effort to follow the cases through the courts, and to report the consequences that accrue to the members of the security forces who use deadly force. Thus they include fewer cases for the Metropolitan Buenos Aires area than CELS, but the information is more complete on the cases they include. In addition, CORREPI has associated organizations in different provinces that also report these events. In Córdoba, for example, there is a group of lawyers and others who monitor police violence and report to CORREPI, based on both complaints and journalistic reports (primarily in *La Voz del Interior*, the largest newspaper in Córdoba). The cases on their list come from both the capital city and other areas of Córdoba, though, since they are located in Córdoba City and in nearby Villa Carlos Paz and newspaper coverage of large cities is more complete, it is likely that their coverage is better in the main urban areas. CORREPI's list is, therefore, the beginning point for selecting a sample of cases to study in more detail, for both Buenos Aires and Córdoba.

During the course of a nine-month research trip to Argentina, Uruguay and Brazil, I selected a sample of cases from Buenos Aires and Córdoba to analyze in greater depth. I interviewed advocates and victim's relatives, copied available key legal documents, and filled out a summary sheet with information for each of the cases in these samples, in an effort to understand the characteristics and dynamics of each case that might lead to divergent outcomes. Ideally, I would have simply taken a randomly selected sample from the CELS list. But in order to gather more information about the judicial aspects of a particular case, some identifying data are necessary: at minimum the specific court in

which the case is pending, and often the case number as well. The need for identifying information is especially great when dealing with judicial officials who are reluctant to make too much information available to anyone under the best of circumstances, and even more so in sensitive cases such as these. As a result, I used a different procedure.

In both Buenos Aires and Córdoba I interviewed the people at CORREPI to identify those cases on their list in which they knew the lawyers or other interested parties who were involved. In addition to getting all the information they could provide, I contacted the lawyers and others they mentioned to gather additional information about the cases, and to review and copy the legal documents involved, if any were available. More recently, I also undertook searches in La Nación's and La Voz del Interior's on line archives to update and complete the available information. In some cases I was never able to reach anyone, and failed to find the case reported in La Nación, but the sample now consists of the following Argentine cases with complete judicial outcome information: 227 cases from the provincial courts of the province of Buenos Aires, located in the greater Buenos Aires area (including a very small number from La Plata); 49 cases pending or decided in the federal courts of the Autonomous City of Buenos Aires (also known as Capital Federal); 90 cases from the Provincial courts in the province of Córdoba, and two from the Federal courts in Córdoba.<sup>16</sup> Some of these cases still have incomplete information on a number of variables, of course, but the basic data, at least, are there for all of them.

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<sup>16</sup> As in Uruguay, because the information about the victim or the suspect may be different, and the results may vary according the individual defendant or the individual victim, a case is counted as each victim in relation to each defendant.

The sample size is large enough for most purposes, but the sample selection process is likely to incorporate some biases which must be noted. In the first place, to the extent that results are affected at all – and this is the most likely conclusion – by the involvement of civil society groups, lawyers and concerned friends and relatives of the victims, the results of the sample will be biased in favor of “better” results. As noted earlier, this bias is present at the time of defining the universe of cases to some degree, but it is much more present at the sampling stage. In fact, the complete set of cases for which CORREPI has outcome information only shows a 16% conviction rate, while in the more detailed sample used here the rate rises to 29.35% (though this is partly the result of updating and completing information once the initial selection was made). The conclusions derived for Córdoba and Buenos Aires will, therefore, necessarily be conservative ones, overstating the responsiveness of the system. At the same time, given the lack of official data on police killings and the failure of the judiciary to generate, centralize and disclose information on these cases, these are likely to be the best data available.

### **3. São Paulo**

Fortunately, official data on the subject of police violence is available in São Paulo. In recent years the São Paulo state government has collected (and released) information on the number of deaths attributable to police action, so that this summary information is available at least since 1990. Moreover, since 1996, the *Ouvidoria da Polícia*, a state agency, has served as an independent ombudsman monitoring the conduct of the Civil and Military Police of the state of São Paulo. It receives complaints from any

source, reviews the principal journals daily and usually receives an official telex whenever a police officer is involved in a fatal incident.

Since the creation of the *Ouvidoria*, of course, the two sources of data overlap, and the latter appears to be informed in about 60% of the cases of homicide (the agency monitored 1,190 cases of police homicide from 1996 through 2000, while police figures show a total of 2,838 deaths for the same period). While the *Ouvidoria* does not have its own investigative personnel, by state law police agencies are required to respond to the requests for information. As a result, this source is more likely to have complete information than the private initiatives in Argentina. The cases found in the *Ouvidoria*'s files, and which go into my sample, include primarily cases that take place in the course of official police functions, together with a smattering of homicides committed by police in the course of private security functions, domestic violence cases and other crimes of passion in which the killer is identified as a police officer.

The main source of missing data in São Paulo will be those cases in which the police do not acknowledge participation. Unfortunately, this is likely to be a greater problem here than in Argentina. Brazil has a history of police involvement in *grupos de extermínio* – vigilante groups that are often hired by small merchants in crime-prone areas to simply kill off known or suspected criminals and other unwanted individuals (Lemos-Nelson 2001; Oiticica 2001). This activity will not be reflected in the *Ouvidoria*'s data and systematic information about it is, at present at least, beyond the reach of social science investigators. The *Ouvidoria* is also less likely than CORREPI to include instances of the private use of deadly force by members of the security forces, such as in cases of domestic violence. On the other hand, the *Ouvidoria*'s list will include

all cases of which it is informed, even those that are patently and credibly the result of armed confrontations, and in this sense it is slightly more inclusive than CORREPI's list.

The figures on judicial performance are based on a sample of cases from the city of São Paulo, which was selected from the *Ouvidoria* files. The information gathered by the *Ouvidoria* is organized in an electronic database. The agency opens a file on each incident report, and gathers certain documents in every case, including, where they exist, (a) the results of the *Inquérito Policial* (the basic criminal investigation carried out by the *Policia Civil* if there are indications of a violation to the Penal Code), (b) the *Inquérito Policial Militar* (the basic criminal investigation carried out by the *Policia Militar* to ascertain if there were any violations of the Military Penal Code), and (c) the final resolution of the prosecutor, asking the court either to dismiss the case, or to indict the suspect. In addition, they often request additional documents such as autopsy reports or other forensic test results. Copies of these documents are included in each file. The final action of the prosecutor, recommending prosecution or dismissal, closes the file for the *Ouvidoria*, which does not, properly enough, feel it is its mandate to oversee the actions of the courts. The inclusion of this last document from the prosecutor adds some crucial information to the file: the court and judge to which the case is assigned, the name of the individual defendants, and the case number.

I obtained a list, from the *Ouvidoria*, of all the files opened to investigate a homicide committed by the police from 1996 through 1998, in which the prosecutor's office had recommended either dismissal or prosecution. I only included cases in which the prosecutor had taken a position, primarily because time limitations required that I focus my attention on those cases in which there was at least a chance that the courts had

ruled in some way. The focus of this research is on the courts, and the prosecutor's action is the first step in the process of judicial involvement. I further limited the search to cases falling within the jurisdiction of the courts in the São Paulo Metro area, to avoid having to range into the interior of the state for additional information. The final list included 158 cases in which the prosecutor requested dismissal of the case and 30 cases in which the prosecutor sought an indictment of the police officer(s) suspected in the killing. In the latter cases, where much of the story takes place outside the *Ouvidoria's* files, I went into the courts to secure the relevant documents and information.

The indictment leads to a more extensive judicial process. In most cases this will include a closer investigation and ultimately a ruling on the case by a jury though, rarely, the judge will summarily dismiss the case, if it seems not to warrant a trial. The cases that are not dismissed, therefore, are the more interesting ones for my purposes. Moreover, they are drastically fewer in number. As a result, I included all 30 of these cases in my sample, and used a computer program to randomly select just over 20% of the dismissed cases to complete the sample. As a result, the final sample from the *Ouvidoria* includes (a) all the cases originating in the São Paulo metropolitan area between 1996 and the end of 1998, which were reported to the *Ouvidoria* and generated an indictment, and (b) a randomly selected 20% of the São Paulo 1996-98 *Ouvidoria* cases in which the police investigation ended in a dismissal. By weighting the 20% appropriately, I can generate valid comparisons between the two groups, and conclusions about the universe of cases that is defined by the criteria for inclusion in the initial *Ouvidoria* list.

In addition, I reviewed the files kept by the Centro Santo Dias, of the São Paulo Archdiocese, an organization that provides free legal representation to the families of



victims of police violence. Their files yielded another 37 cases, only 8% of which were dismissed outright. The conviction rate in this group is much higher than that in the *Ouvidoria* sample, probably reflecting the involvement of the Center at all stages of the case. This introduces some distortion to the overall sample of cases from São Paulo, but, on the other hand, it compensates somewhat for the higher degree of civil society involvement in the sample of cases from Buenos Aires. As in Buenos Aires, these sampling criteria will cause any conclusions to be more conservative (i.e., based on a higher conviction rate) than a purely random sample of police homicide cases would produce, since the sample over-represents cases with civil society involvement, and under-represents cases in which the investigation led nowhere. Still, the sample opens a window into a universe about which there is currently very little data.

#### **4. Salvador da Bahia**

The information on judicial responses to police homicides is very scanty in Salvador. There is no *Ouvidoria da Polícia*, and the relevant NGOs do not collect systematic information on the subject. Without these starting points, the limited amount of time I was able to spend there precluded creating a comprehensive and systematic listing of victims and resulting judicial proceedings. But there is one entity, the *Centro de Atendimento da Criança e do Adolescente* (CEDECA), that works with children and adolescents and has followed certain cases in which the police killed minors. I obtained their list of “exemplary” cases, and interviewed their director about the circumstances of each incident and the judicial follow up to it. I spoke to prosecutors, human rights activists, and private lawyers with personal experience in police homicides. I also interviewed state legislators, principally from the Workers’ Party (PT), who have been

trying to address the problem of police violence for years. In addition, I obtained two unpublished “dossiers” collecting information about police homicides and extermination groups in Salvador. The data presented in this section is the result of these interviews, the review of the dossiers and newspaper stories about individual cases.

## CHAPTER 3

### THE DEPENDENT VARIABLE – LEGAL TOLLS AND ILLUSORY RIGHTS

The purpose of this chapter is to explore the dependent variable for this study: the effectiveness of the laws in each of the countries in the study. The chapter will examine six jurisdictions in the five locations that are the subject of this study: Uruguay has a unitary system and has more or less the population of the smaller cities in my study, so the analysis encompasses the entire country. I examine three separate jurisdictions in two locations in Argentina – the federal and provincial courts of the Buenos Aires metropolitan area, and the provincial courts of Córdoba. Finally, I present data on two jurisdictions in Brazil – the state courts of the city of São Paulo and the Bahian courts of the city of Salvador da Bahia in Northeastern Brazil.

The analysis follows the theoretical structure laid out in Chapter 1. In each jurisdiction I will assess the effectiveness of the legal right to be free from arbitrary killing by the police. As noted, the effectiveness of a legal right is given by the probability that it will be violated in the first place ( $p_{\text{prior}}$ ), plus the increase in the probability that the interest protected by that right will be respected ( $\Delta p$ ) which is due to the state's enforcement of the right.  $P_{\text{prior}}$  and  $\Delta p$  (the baseline level of violations and of the state response to violations) are, in turn, each modified by inequality factors, which I call  $p_{\text{toll}}$  (the difference in treatment of classes of persons defined by extra-legal characteristics or resources).

$p_{\text{prior}}$  and  $\Delta p$  measure general effectiveness while  $p_{\text{toll}}$  is a measure of legal inequality. In practical terms, low levels of the first two mean that rights (and the courts) are ineffective for everyone, more or less equally. If  $p_{\text{toll}}$  is high, then state actors are more likely to respect the rights of, and the courts are more responsive to, those who possess certain extra-legal goods or characteristics, regardless of the overall level of effectiveness of rights. The combination of these elements gives  $p_{\text{satisf}}$ , the effectiveness of the right for a given individual showing particular characteristics – in Weberian terms, the likelihood that the expectation protected by the right in question will be satisfied:

$$p_{\text{satisf}} = (p_{\text{prior}} * p_{\text{toll}}) + (\Delta p * p_{\text{toll}}).$$

While the focus of this dissertation is on the judiciary's role in producing  $\Delta p$ ,  $p_{\text{prior}}$  is sufficiently important that I devote considerable time to it here. Always, but most poignantly in connection with the right not to be killed, an after-the-fact legal remedy is a far cry from having the right respected in the first place. A meaningful picture of  $p_{\text{satisf}}$  must include a look at the incidence of violations, and the extent to which the toll affects the likelihood that the police will respect a citizen's rights on the street.

The citizens of Uruguay, Brazil and Argentina were *legally* powerless twenty years ago when confronting the security forces of authoritarian regimes that had explicitly suspended constitutional guarantees – at that time demanding a badge number, in the classical expression of power conferred by a legal right, was not only dangerous but futile. Today, those regimes have been replaced by formally constitutionalist liberal democratic regimes that explicitly guarantee due process and legal redress, and forbid police violence and extra-judicial executions. If they are effective, these formal rights

should produce an increase in the power of those who are most likely to be the victims of police violence.

The data presented in this chapter graphically demonstrate two things: first, the systems studied vary independently along the twin dimensions of background effectiveness and inequality. Córdoba shows high levels of both  $\Delta p$  and  $p_{\text{toll}}$  (high effectiveness and inequality), while Uruguay shows high levels of  $\Delta p$  and low levels of  $p_{\text{toll}}$  (high effectiveness and low inequality); São Paulo, on the other hand, shows very low levels of  $\Delta p$  and low levels of inequality; Buenos Aires is in the low middle on both.<sup>17</sup>

Secondly, in three out of the five cases the courts are quite ineffective, while in Córdoba, lacking the tolls can reduce  $\Delta p$  to a similarly minimal level. The sole exception is Uruguay, in which the courts seem to respond even to those who cannot supply their own resources. In São Paulo and Salvador one might question whether the right is effective at all for the underprivileged, while in the Metro Buenos Aires area the probability of redress is still small but noticeably greater. In Córdoba, the middle classes have little to fear, but marginalized victims can expect both a high likelihood of a violation and little chance of redress. Finally, in Uruguay, violations are much less frequent, and the courts seem to respond primarily on the basis of the legal characteristics of the event, rather than on the strength of extra-legal factors.

This chapter will proceed as follows. For each jurisdiction, there will first be a general description of the incidence of violations, to establish the floor or generalized

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<sup>17</sup> São Paulo is, however, a special case in this respect, as its low levels of inequality are primarily a function of excluding higher socio-economic classes from the victim pool and consequently low effectiveness. To some degree, it remains an open question how the system would respond to the claims of those who have more resources to bring to bear on their case.

level of expectation that a right will be respected. Then I will look at the factors that define inequality, making it more likely that certain individuals will see their rights violated than the general population. Next I will follow the same outline with respect to the actions of the judiciary, evaluating first the overall likelihood that the courts will intervene in the event of a violation, and then in more detail the extra-legal factors that affect the success of a prosecution –  $\Delta p$  and  $p_{\text{toll}}$  in the courts. This analysis is cast at the level of individual legal cases, and will permit intra and inter-jurisdictional comparisons among social groups as well as a ranking of the various legal systems. In following chapters, I will turn to an examination of the system-level variables that produce, facilitate or permit different levels of  $p_{\text{toll}}$  and  $\Delta p$  in the various jurisdictions.

### **A. Uruguay**

Despite failings in the prosecution of violations dating from the dictatorship, Uruguay has acquired a deserved reputation for respect for civil rights and the rule of law. O'Donnell, as we saw, lists it as one of two countries in which the state has established a legal system that covers its whole territory and all social classes (O'Donnell 1999c:311). Human Rights Watch does not even bother producing a report on rights violations in Uruguay. Amnesty International criticizes some other aspects of its civil rights performance but acknowledges that police killings are exceedingly rare. The US State Department Human Rights Reports in recent years simply say “There were no reports of political or other extra-judicial killings.” In fact, as we shall see, not only are killings by the police rare events, but in addition, most of those that occur are punished in the courts.

As described more fully in the methods chapter, to gather the data for this study, I made a detailed search of the available online databases of Uruguayan newspapers, and an analysis of all the available human rights reports produced both internally and externally, as well as interviewing lawyers who work in the area of criminal law and police violence, including especially lawyers from Serpaj (Servicio Paz y Justicia) a human rights NGO with a long trajectory in Uruguay. The low number of cases in Uruguay, as in Salvador, means that the analysis of the tolls is more qualitative than what we will see in other jurisdictions, where hundreds of cases permit meaningful aggregation and testing the statistical significance of differences across social groups.

### **1. Violations**

From 1992 (the first year for which there were complete sources of data) to 2000 my search revealed either two or three victims of police homicides each year (four in 2000), for a total of 23 deaths over 8 years, and an annual per capita rate of about .1 per hundred thousand. A total of 32 security officials have been charged or named in connection with these incidents, one of whom is a defendant in connection with two separate deaths. This results in a total of 33 cases, one per defendant, per victim. Twenty-one of these officials are charged with an active role in the killing, one with inflicting serious injuries, four with a secondary support role, and three with failing to properly supervise their subordinates. Four were prosecuted for covering up the facts or interfering with the prosecution.

Of these cases, two occurred in the course of routine policing, in what news accounts convincingly describe as a shootout between three armed bank robbers and the police. Several other routine policing cases appear less justifiable, taking place when the

victims tried to evade control in one way or another. P.D.L.V.<sup>18</sup> was walking down the street with a group of people when the group was approached by policemen searching for the person who had just killed a police officer. He ran from the police and was shot in the back. Eduardo Albín was a *bagayero*, a member of the informal economy who smuggled in cheap merchandise to resell it at an informal open-air market. He was shot after a car chase involving a load of smuggled goods. Three of the victims died when one or more police officers were trying to control a crowd or break up a fight: one of these, when he was laying on the ground, with his hands over his head, another in the back with a shotgun, another from a few feet away. A 16-year old was shot after waving a toy gun at a police officer.

Other cases approximate outright executions to varying degrees: N.A. was wounded in a shootout, taken to a remote place and killed. Similarly, J.C.C.E. was picked up by a police officer, taken to a remote place for questioning, and shot when he allegedly tried to run away. A locally well-known cattle rustler who was reputed to have dealings with the police was ambushed and shot in the back when he tried to escape. Hector Valente Gómez was shot point-blank in the head, allegedly by mistake, when he descended from his car after leading the police on a high-speed car chase.

Berrios was a member of Pinochet's secret police, who escaped from Chile and was unofficially in the custody of the army until he disappeared, and was later found dead. Two other victims died while in custody from injuries sustained in beatings. Another was an innocent bystander, shot when the police tried to thwart the rescue/escape

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<sup>18</sup> Both Serpaj and Uruguayan papers use initials when identifying persons who are alleged to have committed crimes, at least until there is a conviction.



of a prisoner. And two others were killed by an officer engaged in criminal activity, for reasons that are unclear.

In classifying the kinds of cases encountered in each location, I will use the following six categories:

1. *Routine Policing*: Intentional shootings in the course of routine policing operations;
2. *Execution*: the execution of suspected criminals after they have been reduced to custody, wounded or otherwise incapacitated;
3. *Torture*: cases of torture ending in death;
4. *Death while in custody*: an intermediate category of deaths in custody that are at least partially attributable to an act of the victim him or herself. A number of inmates in different countries have died after setting fire to mattresses in their cells as a protest, or in suicides. Family members blame the correctional institutions for the deaths when there is a suggestion that the guards staged the suicide or contributed to the death by mistreating the inmates before the event, egging them on, failing to come to their aid during or after the event, or even maliciously providing the materials used, and (especially in Córdoba) when prison conditions repeatedly lead to suicides in a particular facility;
5. *Private violence*: “private” homicides committed by police officers in the course of a personal quarrel, domestic dispute or crime; that is, in events that are unconnected with their official duties; and
6. *Bystander*: the death of an individual who was not the target of police action, but who was accidentally shot in the course of a police action.

The table below summarizes the sort of cases encountered in Uruguay for the entire nine years:

TABLE 3.1:  
TYPES OF CASES IN URUGUAY SAMPLE

| EVENT TYPE             | FREQUENCY | PERCENTAGE |
|------------------------|-----------|------------|
| Routine policing       | 14        | 42.42      |
| Execution              | 11        | 33.33      |
| Torture                | 1         | 3.03       |
| Death while in custody | 2         | 6.06       |
| Bystander              | 2         | 6.06       |
| Private Violence       | 2         | 6.06       |
| Missing information    | 1         | 3.03       |
| TOTAL                  | 33        | 100        |

In the terms set forth in the introduction, this means  $p_{\text{prior}}$  at the level of the enforcement agencies is generally high in Uruguay compared to the other places in this study – initial violations are rare, even on a per capita basis, so the expectation that these rights will be respected is quite high for all the residents of Uruguay.

There are some tolls, however, that raise the likelihood of a violation for certain individuals, as we see from an examination of who is over-represented in the victim population as compared to the population at large. All of the victims were male, so that men appear in the victim pool about twice as often as in the general population. The unemployed represent 50% of the victims but only (on average for the period in question) 10.2% of the population.<sup>19</sup> Two of the 16 victims for whom this information is available (12.5%) lived in the shantytowns called *villas* in Uruguay while 5% of the population is estimated to do so.<sup>20</sup> Eighteen of the victims lived in or around Montevideo, the capital, two in Salto and the rest in various smaller towns in the interior, so that the cases are somewhat more concentrated in urban areas than the national population. In fact, many of

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<sup>19</sup> Source: Instituto Nacional de Estadística of Uruguay, figures available at [www.ine.gub.uy](http://www.ine.gub.uy).

<sup>20</sup> Serpaj (1998:202) reports studies finding that 151,541 of the country's 3 million people live in the precarious housing of a shantytown, most of them (122,000) in the capital itself.

the incidents involve police activity in what are called “conflictive” areas of the capital (typically lower-class neighborhoods perceived as having a high incidence of police activity).

I have no information on the age of 9 of the victims. The majority of the others were young but not disproportionately so: three were under 20 years old, another six between 20 and 30, and three in their thirties. Comparing this distribution to the general population, 61% of the victims were below 40, while 67% of the total population of Uruguay falls in this age group.

Social classes up to the middle class are represented: five of the victims can be identified by their income or mode of employment as members of the lowest class, five of the lower working class, and four of the middle class, while there is insufficient information to categorize the remaining seven. Fourteen of the victims (in fact, all but two of the ones for whom we can identify a motive) were shot because they were suspected of committing a crime or were thought to be resisting police identification or control; of these fourteen, only two were middle class. In short, an initial violation is more likely for men who attract the attention of the police by fleeing or resisting attempts at control, especially in conflictive areas of the city; victims come from all social strata, but the lower classes are probably over-represented. In the language with which I began this paper,  $p_{\text{prior}}$  is high in Uruguay, as noted earlier, and  $p_{\text{toll}}$  is clearly present but, as we will see, relatively low when we compare to other countries. The comparative tables in the conclusion to this chapter quantify this observation a little more, in the course of comparing across jurisdictions.

## 2. Judicial response

The Uruguayan courts' response in these cases is quite effective. The proportion of cases in which a suspect is charged after the initial investigative stage is very high – out of 33 suspects named in the various cases, 25 (85%) were indicted, and 21 of these were jailed pending their trial (the other four are accused of negligence-based crimes, which require judges to free suspects pending their trial).<sup>21</sup> Only 5 officers (15%), accounting for five victims, had their cases dismissed outright on a determination that their actions were justified (in the three remaining cases I have no information of the judicial action taken). The conviction rate is 42% to date, and 67% among decided cases.

The one case that probably shows the Uruguayan justice system in the best light is that of Ismael Gamarra. Gamarra was 41 years old at the time of his death.<sup>22</sup> He was widely known in the border town of Rivera to be a cattle rustler working both sides of the border with Brazil, and had a police record that included prison time for killing a Brazilian police officer on the Uruguayan side of the border. He was also known to carry a weapon, and believed by some to have occasional illegal dealings with the police arising out of his smuggling activities. In August 1996 the police announced that he had been killed in the course of an armed confrontation that had not been witnessed by anyone other than the policemen actually involved. A gun attributed to Gamarra was

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<sup>21</sup> Uruguay has a shamefully high percentage of individuals in custody pending a judicial determination of their case. About 75% of all inmates in 1999 were still awaiting trial. The percentage is almost 85% in some large penitentiaries, and has been higher in the past – in 1993, for example, it was 85% (Serpaj 1994:26-27) (see, e.g., 2000:31; SERPAJ - Servicio Paz y Justicia 1999:75). This represents a failure of the legal system to protect the presumption of innocence and provide a speedy trial, and not a sign of its effectiveness in combating crime. Nevertheless, the point is that individual police officers are not treated more favorably than anyone else in this respect. In a very limited sense, then, this is a positive finding, suggesting low tolls albeit equally low levels of p<sub>law</sub>.

<sup>22</sup> This account is taken from accounts appearing in *El País*, Uruguay's leading daily, and in Serpaj reports.

recovered at the scene. Far from outrage, the general feeling in the town of Salto was that he had met his just deserts. With no witnesses and no public outrage to fuel aggressive judicial intervention, the case was ripe for a perfunctory dismissal on the basis of the police account of events.

Nevertheless, Gamarra's mother insisted that he had been murdered by the police to settle accounts and hired a young lawyer to talk to the prosecutor and the judge. Prompted by her demands, the judge and the prosecutor decided to take a closer look at the events leading to his death, and carried out an extensive investigation, including a reenactment of the crime. Digging up indirect witnesses and performing forensic tests on the weapon Gamarra had allegedly used in the exchange of gunfire, they concluded that the police version did not square with the evidence. The picture that emerged was that Gamarra had been ambushed by the police, and when he turned his horse to flee had been cut down in a hail of automatic rifle fire. Moreover, additional investigation uncovered witnesses that suggested the *Comisario* (the head of the local police station) had been looking for Gamarra, perhaps to settle accounts relating to their illegal dealings.

In the end, the *Comisario* who commanded the raid, one officer and one lower level policeman were indicted for the murder – the first two for aiding and abetting, the latter for murder. It is possible that state action was not completely spontaneous, as Gamarra's mother had hired a young lawyer to take up the case and push for an investigation. At the same time, it is surprising to say the least that a case with these characteristics was treated so aggressively, not even sparing the local police hierarchy. This is especially true since while the case was pending it became clear that town opinion

was sharply divided on whether a prosecution should proceed, if not opposed. Local landowners in particular were opposed to the prosecution.

Nor is this an isolated incident of judicial and prosecutorial activism. The case of Eduardo Albín is very similar, though he is a less marginal individual, and there is quite a large mobilization protesting his death. Albín was known as a *bagayero*, someone who sells often pirated name-brand merchandise or other cheap goods imported illegally into the country. On October 6, 1998, near the town of Salto, he was a passenger in a car on a highway that comes from the Brazilian border when the car was intercepted by a police operation aimed at smuggling prevention. Because they were carrying illegal merchandise, the driver turned the car and ran, while the police gave chase. At one point the smugglers attempted to lose their pursuers by entering a ranch that borders the road. Albín got out of the car to open the gate while his companion drove through, and as he was closing the gate he was shot and killed. The police reported the incident, and turned in a weapon that Albín had allegedly used to shoot at them during the persecution. This time the only witnesses were the police and the driver of the car, who had driven on and could say nothing about the circumstances immediately surrounding the shooting.

Initial press reports carried the police version. The driver, they said, had left Albín behind, apparently to close the gate while the other made the getaway to destroy the merchandise. The smuggler, they reported, had confronted the police with a 38-caliber pistol that was recovered at the scene, shooting several times in their direction. A bullet hole in the jacket of one of the officers and another in the side-view mirror of the police car appeared to seal the matter. *El País* also reported negatively on the demonstrations staged by hundreds of *bagayeros* and their relatives – who insisted that Albín had been

murdered while unarmed – explicitly noting the vagueness of the information on which they relied, and the fact that no one could provide specific evidence of wrongdoing on the part of the police. More demonstrations, including disturbances in which people threw rocks at the headquarters of the anti-smuggling brigade that had been involved in the action, were prompted by the release of the policemen involved pending the investigation. Again, the headlines focused on the violence of the demonstrators, rather than possible wrongdoing by the police.

Over the next ten months, however, the judge and prosecutor conducted what was described as an intensive investigation, sometimes accompanied by small demonstrations on behalf of the victim. Almost exactly one year later, the judge concluded that the victim had been unarmed, no shootout had taken place, and the police officers at the scene had planted the gun and shot holes in their own car and clothing. The prosecutor requested that the judge indict four members of the police force on a charge of intentional homicide. The judge, however, indicted one police officer on a non-intentional killing, and two others for *encubrimiento* (obstruction of justice). The prosecutor was disappointed with the lesser charges and indicated his intent to appeal.

Clearly the judicial response in this case is less severe than in the Gamarra case – as are the facts, which involve a single shot in the leg which angled upward bizarrely, at the end of a chase, as opposed to a fusillade of shots in the back, after an ambush. In the final analysis, the court chose a middle course, neither taking the police version uncritically (though there was plenty of opportunity to do so), nor simply responding to popular pressure by the *bagayero* association to throw the book at the police.

In these two cases, the key actors are the judge and the prosecutor. In both, it would have been easiest to simply accept the police version: there was plenty of support for the conclusion that the victim had provoked his own death, by armed resistance to legitimate policing activity. There was also resistance to the prosecution by local economic elites: Gamarra's killers were championed by wealthy local landowners who disliked his cattle rustling, while Albín's supporters were strongly criticized by Salto's formal merchants, who believe the smuggling activity hurts their business. While there was some intervention by interested parties to pressure the legal system to prosecute the cases effectively, in both cases supporters of the prosecution are marginal social actors – in one the mother of an acknowledged criminal, in the other a group of participants in the informal economy. In the final analysis, however, the judge and prosecutor chose to take the time and the resources to look carefully at the case, and ultimately to accuse the police of exceeding the legitimate use of force.

There are two high-profile cases in Uruguay, however, that end inconclusively and color much of the perception of judicial effectiveness by the general population and the human rights community. One of these is the case known as "Hospital Filtro" and the other is the Berríos case. The Hospital Filtro case arises out of a violently repressed demonstration in support of a group of Spanish citizens (ETA separatists) who were being deported. In the confusion, one demonstrator was shot to death and several others were wounded by police shotguns. When it occurred, in August 1994, the case shocked Uruguayan society, which values its freedom of expression and interpreted police actions as a deliberate provocation (a police caravan ran directly into the densest part of the demonstration, instead of taking an alternate route). Virtually live TV coverage of the



disturbances brought the police actions sharply into focus. The individual policeman who shot and killed Fernando Morroni with a shotgun blast to the back was never identified, though people associated with the case have little doubt that his or her companions and supervisors could do so if they truly wanted to.

After three years of investigations, two officers directly responsible for directing the repression were convicted for failing to properly supervise the police operation and failing to prevent the killing. Three others were acquitted. The two convicted officers received one and two year sentences, respectively, which were suspended. The lawyer who represented Morroni's family argues that no one was punished for killing him, and that the supervisors' sentences are deeply unsatisfactory, as they focus on technical violations of police duties. The feeling in this case is that the justice system ultimately failed to produce justice. Witnesses were fearful of the police, the prosecutor was not cooperative, and the police failed to identify the individual shooter. The judge, on the other hand, took the case very seriously and was the main force behind the outcome. The judge ultimately wrote a strong opinion convicting the supervisors, criticizing the manner in which the police repression was carried out, and highlighting the police's obstruction of the investigation.

The Berríos case is unique in Uruguay. Eugenio Berríos was a former officer in Pinochet's secret police. He went into hiding in Uruguay in 1991, presumably with the assistance of Chilean and Uruguayan military personnel, to avoid testifying in the Letelier case (the murder of a Chilean diplomat in Washington, D.C. in the 1970s by the Chilean secret police). In Uruguay, there is evidence he was in the custody of the military. In November of 1992 he appeared at a police station, claiming to have been

kidnapped and requesting some sort of protection. The police nevertheless released him to some military officials, though exactly who took custody of him, and when, is unclear.

That is the last trace of him until about eight months later, when his body was found on a beach near the capital, with two bullets to the head. Suspicion focused on the police and the intelligence services of Uruguay and Chile, the former because they were the last to see him alive and failed to protect him; the latter because of his connection to Chilean military secrets and their presumed collaboration in moving him to and hiding him in Uruguay. Nothing, however, has ever been proven in the case, despite a considerable forensic effort and cooperation with Chilean investigators.

This famous case, together with the Hospital Filtro repression, and the failure to prosecute rights violations committed during the dictatorship, completes the trilogy that is sometimes cited as an example of the inability of the Uruguayan justice system to penetrate the wall of impunity that surrounds the military or the police. This leads Amnesty International, for example, to say in its 1996 report “The vast majority of human rights violations committed in past years remained uninvestigated.” In light of the other information presented here, this perception is patently unfair, unless we limit “past years” to the dictatorship period, which ended in 1985.

While outcomes in these signal cases are less than satisfactory, the routine cases are well handled and produce strong results. From the perspective of the victim, the only ones whose killers went unpunished are Berríos and Morróni, whose killers are unknown, the 16-year old who waved a toy gun at the policeman, the nurse who was hit by a stray bullet, and the two robbers killed in a shootout. There are no clear patterns associating the characteristics of the victim with judicial outcomes. Indeed, if anything, there are more

convictions in cases where the victim is a more marginal member of society – the case of Gamarra or Albin, for example. Nor does the rank of the accused seem to matter much, as mid- and upper-level officers are jailed at least as often as the rank and file, though they appear much less often as suspects in a killing.

Justice is not swift, however. Only 64% of the cases have been decided. The initial indictment or dismissal delays anywhere from a few days to a full year after the incident, while the cases in my sample that went to trial all took between three and four years to do so.<sup>23</sup> Interlocutory appeals (appeals that challenge intermediate rulings before the final disposition of the case) can eat up about two years.

In conclusion,  $p_{\text{prior}}$  and  $\Delta p$ , in police homicide cases, seem quite high in Uruguay, though long delays increase the number of pending cases at any given time. The toll for socio-economic characteristics is appreciably higher at the initial violation stage, as the violations disproportionately affect the underprivileged. But  $p_{\text{toll}}$  at the judicial stage is low, as it is hard to pinpoint any extralegal variable that affects outcomes in an important way. The courts, in fact, seem to go out of their way to conduct a thorough investigation even in cases in which the victim was a social outcast, and when the local economic elites are opposed to the prosecution.

## **B. Buenos Aires and Córdoba, Argentina**

The courts in Argentina began the democratic period in 1983 with a great deal of popular support. In polls, nearly 60% of the population claimed to have at least some

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<sup>23</sup> Actually, the word trial is a misnomer. As we will see, Uruguay still follows the written, inquisitorial model of penal justice. The length of time thus refers to the time from the events to the decision taken after full evidentiary review, in cases that survive an early decision to dismiss.

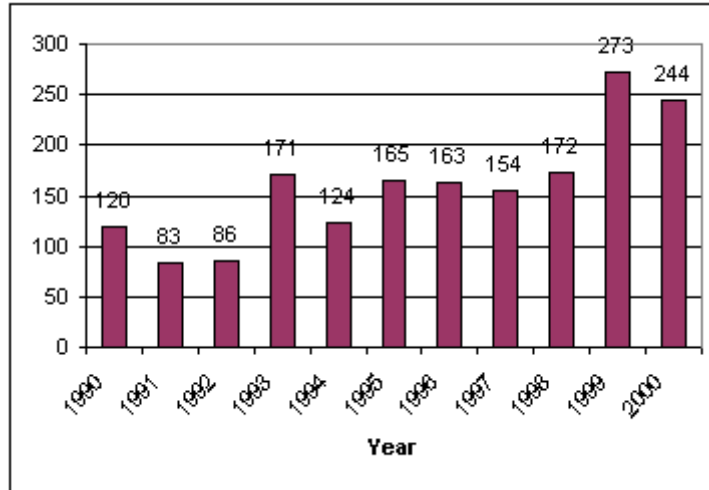
confidence in the courts. But after twenty years of democratic rule, the judiciary became the object of almost universal contempt in Argentina. At the end of the decade, public opinion polls showed that less than 20% of the population reported “some” or “a lot” of confidence in the courts.<sup>24</sup> As we shall see, the critical attitudes are partially warranted. This section will evaluate the effectiveness of the courts in translating legal rights into effective protection from the state, in Buenos Aires (both the City and the surrounding Metro Area) and Córdoba.

### **1. Violations**

As shown in Figure 3.1, in the last decade the number of civilians killed in Buenos Aires has been very high (on a per capita basis, it tends to be between three and four times higher than the highest figures for large cities in the U.S.), and generally trends upwards.

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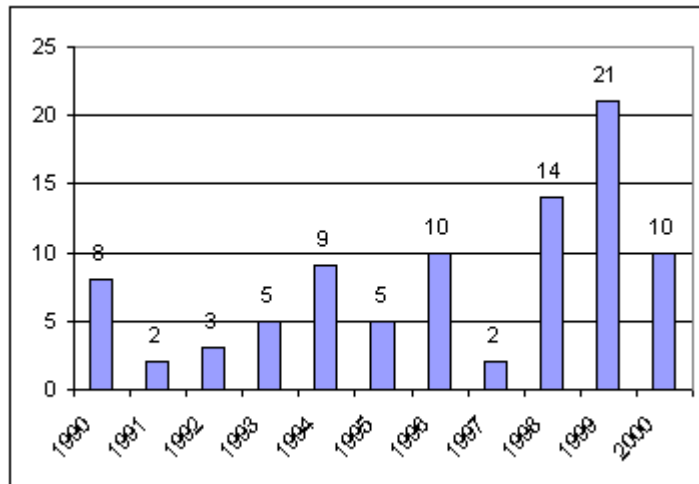
<sup>24</sup> The source of these figures are Gallup polls reported in *La Nación*, January 21, 2001, p.1, showing that in 1981, 57% of Argentines reported some or much confidence in the courts, a percentage that declined steadily until reaching no more than 18% in 2000. These numbers have surely dropped even further in the current crisis, since there have been regular demonstrations calling for the ouster of the Supreme Court Justices, and a campaign to have them all impeached. In fact, *La Nación* reported, in October 2002 that 96% of the population expressed “little” or “no” confidence in the courts.



Source: CELS (CELS 2001a; 2000).

FIGURE 3.1: CIVILIAN DEATHS AT THE HANDS OF THE POLICE IN METRO BUENOS AIRES, 1990-2000

CORREPI's contacts in Córdoba have reported a total of 107 deaths over the years, recording an average of just fewer than ten cases per year in the 1990s.



Source: CORREPI Córdoba

FIGURE 3.2: CIVILIAN DEATHS AT THE HANDS OF THE POLICE IN CÓRDOBA,  
1990-2000

Given CORREPI's selection criteria, discussed in the previous chapter, their Córdoba figures probably underestimate somewhat the total number of deaths at the hands of the police in the province, though they are more likely to include only actual rights violations. On the other hand, Córdoba has a more reduced population, so that CORREPI Córdoba is more likely to be informed than CORREPI Buenos Aires when a death occurs.

Using the same six categories described in the Uruguay portion of this chapter, the cases in the Argentine sample break down as follows:

TABLE 3.2:  
TYPES OF CASES IN THE SAMPLE – BUENOS AIRES AND CÓRDOBA

|                        | CITY         |              | Total        |
|------------------------|--------------|--------------|--------------|
|                        | Buenos Aires | Córdoba      |              |
| Routine Police Action  | 81<br>28.99% | 20<br>20.65% | 101<br>26.9% |
| Execution              | 71<br>25.72% | 8<br>8.7%    | 79<br>21.47% |
| Torture                | 34<br>12.32% | 15<br>16.3%  | 49<br>13.32% |
| Death while in custody | 24<br>8.7%   | 35<br>38.04% | 59<br>16.03% |
| Private violence       | 27<br>9.78%  | 11<br>11.96% | 38<br>10.33% |
| Bystander              | 39<br>14.13% | 3<br>3.26%   | 42<br>17.39% |
| Total                  | 276<br>100%  | 92<br>100%   | 368<br>100%  |

Cells show frequency and percentage by column.

The differences worth noting between the two jurisdictions are the much higher incidence of executions and bystander shootings in Buenos Aires, and the higher incidence of deaths while in custody in Córdoba. Routine police actions and executions together account for more than 50% of the cases in Buenos Aires but only about 30% of the cases in Córdoba. Partly this is the result of a much higher incidence of deaths in custody in Córdoba, which in turn is likely to be more a problem of underreporting in Buenos Aires than a reflection of real differences in the universe of cases. The population of jail and prison inmates is vastly larger and more dispersed in Buenos Aires, and two well-publicized phenomena in Córdoba have focused attention on the topic of inmate deaths: a number of juvenile detainees burned to death while the jailers did nothing to help them, and a string of suicides in a new facility in Córdoba has been blamed on conditions there.

The lower proportion of executions to police actions in Córdoba, however, is more likely to be a true reflection of police practices. Excluding deaths in custody, the proportion of executions is twice as high in Buenos Aires (28%) than in Córdoba. This classification is made on the basis of information generated about the case from the advocates involved, and the advocates in Córdoba have fewer cases to deal with and know them as well as or better than those in Buenos Aires. The difference is not likely to be due to lack of information on the part of CORREPI. Similarly, bystander shootings are always fully reported in the press, and thus it is likely that, for whatever reason, the police in Córdoba are less prone to shooting innocent bystanders than their counterparts in Buenos Aires (14% in Buenos Aires versus 2% in Córdoba). On the other hand, deaths

as a result of torture and personal quarrels are twice as high in Córdoba (26% and 19%, respectively) as in Buenos Aires.

This detailed breakdown into different categories produces individual cell counts that are too small for most analyses. In analyzing the cases I will aggregate routine police actions, executions, death while in custody, and bystander shootings into Police Actions, as they all arise out of the exercise of police powers, while occasionally noting differences among these categories. Torture deserves its own category because of special difficulties in prosecuting these cases, and special sensitivities to the issue, while we might expect personal quarrels and killings committed by police officers while they were committing a crime to be treated somewhat differently as well. Thus, for most purposes, I will use a tri-partite classification into Police Actions, Torture, and Private Violence.

Who are the victims, in Argentina? Unsurprisingly, the data I collected in Argentina suggests a disproportionate targeting of young, lower class, unemployed males from precarious housing. The victims are overwhelmingly male: 94% in the *conurbano*, 85% in the capital, and 90% in Córdoba. They are disproportionately young by a ratio of more than 1.5 to 1: in the *conurbano* 91% and in the City 88% of victims are 35 or younger, while in Córdoba, 93% of the victims fall in that age group, as compared to 58% who are under 35 in the overall population of the provinces of Buenos Aires and Córdoba.<sup>25</sup>

Class and social marginality is also a factor. Among those victims for whom I have this information, two thirds were classified as either “lower class” (a classification

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<sup>25</sup> Source: INDEC (Instituto Nacional de Estadística y Censos), Proyecciones de población por sexo según grupos quinquenales de edad, año 2000.



based on employment, dwelling and income information, collecting those who are members of the informal economy, are uneducated, live in precarious housing, etc.) or a slightly higher category my interviewees agreed to call “lower working class” (people who worked steady jobs but were still below middle class). This classification was done by the advocates who knew them, though I classified some of the cases myself where I had the pertinent information. Given how I constructed this variable, however, there is no comparable figure for the population as a whole, so it impossible to tell how closely this matches the overall population.

Other more objective socio-economic variables do offer a basis for comparison: more than 38% lived in the precarious housing of a *villa* (shantytown) in Córdoba, while almost 19% did so in the greater Buenos Aires area. According to Argentine sociologist Blaustein, the percentage of the population of the metropolitan area that lives in *villas* is only about 3.3%.<sup>26</sup> Victims were more than twice as often unemployed as the general population: 32 and 52% of the victims in Buenos Aires and Córdoba, respectively, were unemployed (not including those attending school), and the proportion is higher still in Police Actions.<sup>27</sup> This proportion is high compared to unemployment in both the greater Buenos Aires area and Córdoba which rose from 5% in 1991 to 13% in 1994, and

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<sup>26</sup> The percentage of villeros in the population is estimated from a current article written by Eduardo Blaustein, and reproduced at <http://www.piketes.com.ar/documentos/villas1.htm>. He reports that in 1976, before a major eradication effort by the military government there were a total of 400,000 shantytown dwellers in the Greater Buenos Aires. The eradication effort essentially moved them from the city to the outer rings of the *conurbano*, but did not reduce the numbers appreciably. Figures are not available for Córdoba, so I use the same percentage there. This is likely to overestimate shantytown population in that province. Since I calculate the toll factor by comparing the incidence of a certain class in the victim population to the incidence of that class in the population as a whole, this produces a conservative estimate of the importance of that toll, as explained more fully in the Conclusion to this paper.

<sup>27</sup> Employment information is missing for 30% of the Buenos Aires cases in my sample, and for 21% of the cases in Córdoba.

averaged 16% between 1995 and 1999 for an overall average of about 13% for the decade.<sup>28</sup>

Half of the victims in Córdoba had an immediate association with crime (that is, they were shot during or immediately after the commission of a crime, or had a known criminal record), while 37% of the victims in Buenos Aires fit this description.

## **2. Judicial response**

In this section I tally the judicial response to these acts. In the complete sample of cases analyzed here, conviction rates are relatively low in Buenos Aires (24%) and higher in Córdoba (45%), suggesting that, where the police are concerned,  $p_{law}$  is higher in Córdoba. Moreover, if we look at the Private Violence cases, we get a better sense of the potential effectiveness of the courts: in both cities, the courts punish Private Violence killings at a rate that is twice as high as in Routine Policing cases. In these cases, the conviction rate in Córdoba drops to 38%. This evidence suggests that the courts in Córdoba are a more effective resource overall than those in Buenos Aires, and that cases that involve the exercise of force by agents of the state receive special treatment in both jurisdictions. Torture is clearly a special case, and shows a markedly higher (and similar) conviction rate in both cities.

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<sup>28</sup> Unemployment information is taken from a United Nations Development Project publication (UNDP 1998:129) for the early nineties, and from the Encuesta Permanente de Hogares available from INDEC for the second half of the decade.

TABLE 3.3:  
CONVICTION RATES BY TYPE OF CASE AND CITY – BUENOS AIRES AND  
CÓRDOBA

| TYPES            | BUENOS AIRES   | CÓRDOBA        |
|------------------|----------------|----------------|
| Police Actions   | 18.14%<br>(39) | 37.88%<br>(25) |
| Private Violence | 37.04%<br>(10) | 63.64%<br>(7)  |
| Torture          | 52.94%<br>(18) | 60%<br>(9)     |
| Total            | 24.28%<br>(67) | 44.57%<br>(41) |

Cells contain convictions as a percentage of total cases and  
(number of convictions).

The background level of effectiveness, then, varies substantially in the two jurisdictions, with Córdoba nearly doubling the conviction rate in the Police Action and Private Violence cases. The next question is the prevalence and importance of tolls. That is, how do measures of judicial effectiveness vary according to extra-legal variables?

Two tolls are worth discussing, before entering into the details of the results of a logistic regression. The first relates to the ability of the police corporation to place its own finger on the scales of justice. The difference in conviction rates between Private Violence and Police Action cases demonstrates that a police officer has a much greater expectation of impunity, when he or she is acting in that capacity. Toll number one, then, is the identity of the defendant: a police officer has a certain amount of legal capital that ensures impunity in 82% of the cases in Buenos Aires and 62% of the cases in Córdoba.

The second toll will be discussed in more detail in Chapter 9A.2, but needs to be mentioned here. One of the critical factors affecting the likelihood of a conviction in

Buenos Aires, but not Córdoba, is the perceived criminality or dangerousness of the victim. I coded all the cases according to whether the victim had some association with violent crime.<sup>29</sup> The results for Buenos Aires are compelling: if there is clear evidence that the victim had been involved in a violent crime that presented a serious risk to other members of society, then the victim's killing by the police is not punished even if there is abundant evidence that the case involves an extra-judicial execution carried out long after the threat was over. Of sixteen cases I coded as belonging in this category in the province of Buenos Aires, none led to a conviction. The same is not true in Córdoba, where one of only two cases in this category ended in a conviction.

These cases go unpunished even though they represent some of the most egregious violations: 6 of the sixteen are outright executions of victims who were offering no resistance, and one other is among the clearest cases of the execution of an inmate made to look like a suicide after the fact. In short, in Buenos Aires (and, as we shall see, São Paulo), persons who are perceived as engaging in violent crime essentially forfeit due process rights, earning an automatic death penalty.

To examine the remaining tolls, I used a multivariate analysis. A logistic regression predicting the likelihood of a conviction in cases involving Police Actions in Córdoba and Buenos Aires confirms that certain key tolls must be present to ensure the success of a prosecution. For purposes of this analysis, I included dummy variables

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<sup>29</sup> I used a dichotomy to classify these cases. In practice, of course, victims may be more or less tainted by a connection with violence, and the evidence of that involvement may be more or less firm. For purposes of this tabulation, I coded as "Violent Victim" cases only those in which there was solid third party evidence that the victim had a close connection to a violent crime. Since the police attempt to characterize most cases in this manner, I decided not to rely on evidence that came from the police, without corroboration. This category may be larger, therefore, than what these figures reflect, and it is possible that some of these cases might have led to a conviction.

identifying those cases in which the relatives of the victim had retained a lawyer to accompany the prosecution, and those cases in which there were popular demonstrations in support of the victims. I also constructed a class variable that runs from 1-4: 1 denotes victims who lived in a shantytown, 2 members of the lower class who did not live in a shantytown, 3 members of the lower working class, and 4 members of the middle class or higher. In order to identify the differing impact of class and popular demonstrations in the two cities, I included interaction terms between the class and demonstration variables, and the city dummy.

The results show considerable inequality, associated with different traits in the two systems. The ability to enlist a lawyer who will essentially police the legal process, keeping pressure on the prosecutor and judge to move the case forward, is almost essential in Buenos Aires, and has a strong impact in Córdoba as well. The presence of a private attorney accompanying the prosecution vastly increases the chances of conviction in both places, but in Buenos Aires the probability of a conviction without an outside attorney is nearly 0 regardless of social class.<sup>30</sup> These attorneys, in most cases, have the ability to request certain investigative measures, to present evidence and argue the case in court, and generally to act as a prosecutor would, though of course without the support of an official government office behind them. Finally, a case involving a sympathetic victim whose survivors can summon popular demonstrations is also much more likely to end in a conviction. Table 3.4 presents the results of the logistic regression.

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<sup>30</sup> All the jurisdictions in this study permit persons with an interest in the case to be joined as parties to the prosecution, though with prerogatives that vary somewhat from place to place and from time to time. These prerogatives are discussed in more detail in the context of the Codes of Criminal Procedure for each location.

TABLE 3.4:  
LOGISTIC REGRESSION RESULTS FOR CÓRDOBA AND BUENOS AIRES

| Probability of a conviction | COEF.  | STD. ERROR           | Z     | P>Z  |
|-----------------------------|--------|----------------------|-------|------|
| Prosecutor's Assistant      | 2.06   | 1.03                 | 2.00  | 0.04 |
| Popular Demonst. (BA)       | 0.34   | 0.71                 | 0.48  | 0.63 |
| Class (BA)                  | -0.03  | 0.28                 | -0.11 | 0.91 |
| Popular Demonst. (Córdoba)  | 2.95   | 1.46                 | 2.02  | 0.04 |
| Class (Córdoba)             | 1.40   | 0.62                 | 2.25  | 0.02 |
| Year of Judgment            | -0.14  | 0.10                 | -1.36 | 0.17 |
| Córdoba                     | -2.25  | 1.89                 | -1.19 | 0.23 |
| cons                        | 272.41 | 202.77               | 1.34  | 0.18 |
| Number of obs = 112         |        | Prob > chi2 = 0.0000 |       |      |
| LR chi2(6) = 38.45          |        | Pseudo R2 = 0.2910   |       |      |
| Log likelihood = -46.841196 |        |                      |       |      |

The presence of an interaction term makes it more difficult to interpret the results for social class. In order to make clear the effect of class in each city, I used a Stata procedure called Clarify (Tomz, Wittenberg & King 2001) to generate the predicted probability of a conviction given certain conditions, and graphed the results. The following graph shows the probability of a conviction in each city, by class, in cases that did or did not prompt popular demonstrations, with or without the presence of an attorney serving as prosecutor's assistant.

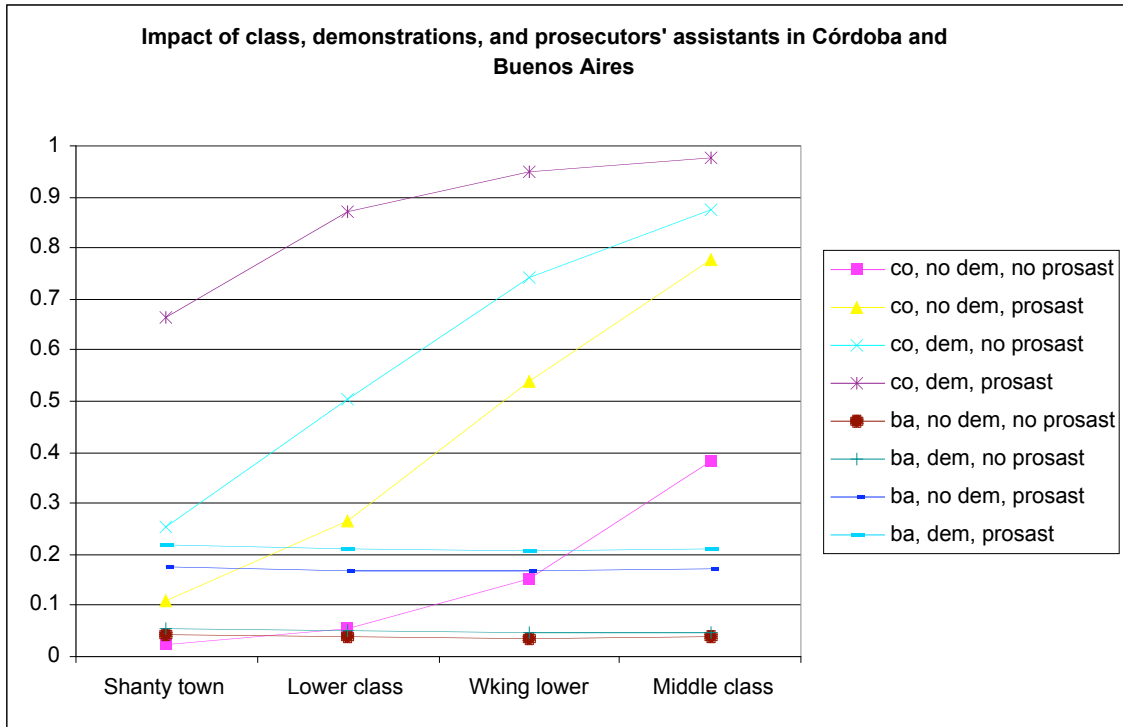


FIGURE 3.3: IMPACT OF CLASS, DEMONSTRATIONS AND RETAINING A PRIVATE ATTORNEY IN CÓRDOBA AND BUENOS AIRES

As the graph shows, even after controlling for a number of factors, the Córdoba courts remain much more likely to convict than those in Buenos Aires. The importance of three tolls offers an important qualification to this, however: a claimant who lacks middle class standing must ensure, at minimum, that his or her case is accompanied by a private attorney retained for this purpose or that the case prompts popular demonstrations. The combination of the two raises the effectiveness of the system more or less to the same level it offers a middle class claimant. But Córdoba's courts simply do not respond to the claims of shantytown dwellers whose family cannot muster the assistance of an attorney to keep after the prosecutors and whose case does not prompt any popular outrage. For this group the probability of a conviction hovers just above 0 in either place.

On the other hand, for a middle class victim in Córdoba whose case is accompanied by both demonstrations and a private attorney the likelihood of a conviction approaches 1. Generally, the probability of a conviction rises rapidly in Córdoba as the victims' class rises, while in Buenos Aires it is flat, remaining around 0 for those who do not retain an attorney and do not have popular support, regardless of class. Conviction rates rise appreciably in both systems when the victims' families are able to bring both external and internal pressures to bear on the system. In contrast to Córdoba, then, the key tolls in Buenos Aires are not economic. Instead, the process appears to require political mobilization and a privately supplied prosecutor, suggesting a sensitivity to politics and that the prosecutor's office is not adequately performing its task.

Using a probability of .5 as the cut point, the model correctly predicted almost 55% of the convictions and 94% of the failures, for an overall success rate of 83%. These are surprising results considering that none of the variables included are *legally* relevant. In other words, knowing nothing about the cases other than some basic characteristics of the victim and the fact that the death occurred in the course of a police operation, we can pick out more than half of those cases that are bound for a positive outcome, and almost all the cases in which the prosecution will not succeed. And yet (according to the pseudo  $R^2$ ) there remains another 70% to be explained by other variables – possibly legally relevant variables such as the strength of the evidence, the conditions under which the shooting took place, etc. This is strong evidence that the legal system is indeed operating on the basis of both  $\Delta p$  and  $p_{\text{toll}}$  – legal and extra-legal factors.

These results mesh with the experience of lawyers who practice in this area. In interviews with practicing lawyers, and especially with lawyers who represent victims'



families, there are several recurring themes. One of these is the importance attributed to their own participation by private and NGO attorneys acting next to the prosecutors in an official capacity (and to the popular demonstrations they sometimes help organize). These observations are confirmed by the strongest results of the regression. Moreover, several lawyers suggested in interviews that the police have the freest hand in the *villas*, and the overrepresentation of victims from these neighborhoods in the sample confirms this impression. At the same time, lawyers do not suggest that the law is completely irrelevant to the outcome – they continue to work within the system, with the tools and language of legality.

In summary,  $p_{law}$  is higher in Córdoba than in Buenos Aires – justice in Córdoba is more effective as a general rule. But there is also more disparity in Córdoba:  $p_{toll}$  is high in both places, but socio-economic tolls are much more important in Córdoba. In fact,  $p_{toll}$  matters to such a degree that we can predict the majority of the outcomes without knowing anything about such legally relevant issues as the characteristics of the event or the strength of the evidence.

The key tolls identified here are, first, the capacity of the police to ensure impunity for those who are acting, however illegally and violently, in a social control capacity. A dummy variable identifying the most egregious violations, the extra-judicial execution of a person in the control of the police, is not significant when included in the multivariate model. In addition, certain characteristics of the victim matter in both places, while in Córdoba, social class matters more. In both places, killing a truly marginal member of society – either a shantytown dweller or someone perceived as a violent criminal – is almost a guarantee of impunity for the killer. But enlisting private counsel to

accompany the prosecution and mustering popular demonstrations can improve the chances of success.

### **C. São Paulo**

São Paulo is the largest city in Brazil. Approximately 20 million people live in or around the city proper, and another 16 million in the rest of the state of São Paulo. It has a reputation for being among the most violent cities in Brazil, which has no shortage of violent cities. Police violence is also rife in São Paulo. The absolute number of deaths at the hands of the police – more than 7500 in the period of this study – is the highest of any city for which I have seen data. What we find in São Paulo is a high level of violence that is sharply focused on the most vulnerable part of the population, so that the middle and upper classes are almost completely excluded from the victim pool. The courts, in addition, are almost completely incapable of responding effectively. In other words, São Paulo has both a low level of  $p_{\text{prior}}$ , with high tolls, and a low level of  $\Delta p$ . The socio-economic tolls for a state response are impossible to observe as a practical matter, because the victims are uniformly taken from among the disadvantaged.

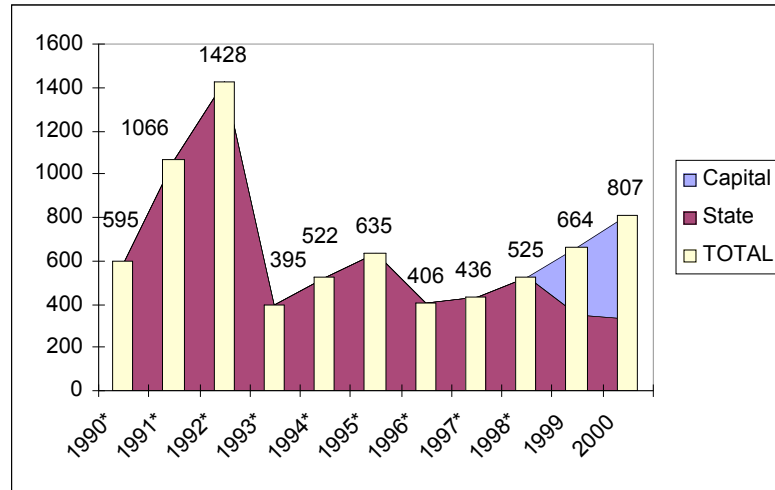
#### **1. Violations**

There are primarily two police forces at work in the São Paulo area, the Civil and Military Police, with a fierce rivalry and notorious lack of communication between the two. The State Military Police carries out the public safety function (the *policiamiento ostensivo*) which comprises all aspects of street policing and security details, and is called in to correctional institutions when police intervention is needed. This is the larger of the two police forces, growing from about 70,000 in 1992 to over 81,000 in 1999. It is

organized along strictly military lines. The Civil Police of São Paulo is a smaller force, numbering between 30,000 and about 40,000 for this period, and serves an investigative function. This is the branch that carries out forensic tests, examines crime scenes, and is supposed to be in charge of developing evidence not only to solve crimes, but also to use in the prosecution of a suspect by the *Ministério Público*, the prosecutor's office.

The pattern of complaints against the two police forces reflects this division of labor. The Military Police is overwhelmingly the force named in police killings, while the Civil Police has the majority of complaints for torture and abuses of suspects. For the decade, the Civil Police is responsible for only 5% of the total number of deaths, exceeding 10% only in 1998 and 1999.

Over the last decade, police killings in São Paulo follow a clear pattern: the number rises over a number of years, then abruptly drops (after 1992 and 1995) only to begin rising again in the following year. The following graph includes numbers for the entire State of São Paulo, with estimates of the proportion attributable to the capital city in the last two years of the decade (the estimate is based on the proportion of cases arriving at the *Ouvidoria* from the capital in 1999 and 2000). The figures for those two years suggest that at least half of all the reported killings take place in the capital of the State.



\* Data for these years is total of Capital and State.  
Source: Ouvidoria da Polícia de São Paulo

FIGURE 3.4: CIVILIAN DEATHS AT THE HANDS OF THE POLICE IN SÃO PAULO, 1990-2000

The number of police killings in São Paulo peaked in 1992, at a stunning 1428. That was the year of the notorious Carandiru massacre, in which the police killed 111 inmates of the São Paulo House of Detention. With a strong media presence, the Military Police entered the prison to suppress an uprising. In addition to the initial violence, which claimed some lives, the police moved through the cell blocks shooting inmates, sometimes through the bars of the cell with the victims cowering against the walls. Media images of naked inmates and bodies in the yard of the prison – strongly reminiscent of concentration camp photos – temporarily focused attention on the problem. The resulting public and political backlash led to a drop in the number of shootings in the following year of almost 75%.

The killing started to grow again in the following year, until 1996 when the frequency of killings dropped again, by about a third. That was the year the Lei Bicudo

took effect, transferring jurisdiction over these homicides from the military justice system to the civilian homicide courts. This drop cannot be attributed to a decrease in violent crime, which did not happen. Once again, it appears to be a voluntary response to a changed environment – legal rather than political this time. Both of these sudden drops in the level of violence starkly illustrate the extent to which the use of lethal force is well within the control of the police. The pattern is hard to square with arguments that this is a “natural” level of violence, in response to the (undeniably) high level of violent crime in Brazil.

Police killings have never returned to pre-1992 levels, but the numbers began climbing again the following year, and are still growing. Even considering the immense population of the State of São Paulo – around 36 million – this is a number of casualties that many countries in the midst of a civil war do not experience. As Chevigny points out, in 1992 alone, in one state, the São Paulo police killed more people than the military dictatorship did, for political reasons, in fifteen years of rule in the entire country (1995:145).

Except for one torture case, the São Paulo sample does not include any cases of inmates who died while in custody. The near absence of victims in the sample who die as a result of torture is most likely a consequence of sampling, not a true reflection of the universe of cases in São Paulo. The problem of torture in Brazil in general is widespread and widely documented, and São Paulo is no exception (see, e.g., Folha de São Paulo, April 11, 2001, pp.1, C1, C4-5 reporting on the visit of a UN investigator). Nor does it seem likely that *paulista* torturers are so much more proficient (or less brutal) than

Argentine torturers that they can invariably stop a session before it ends with the death of a victim. The general distribution of cases in the sample is shown in the following table.

TABLE 3.5:  
TYPES OF CASES IN SÃO PAULO SAMPLE

| Event Type       | Freq. | Percent |
|------------------|-------|---------|
| Routine policing | 136   | 62.1    |
| Execution        | 60    | 27.4    |
| Torture          | 1     | 0.46    |
| Quarrel          | 9     | 4.11    |
| Bystander        | 13    | 5.94    |
| Total            | 219   | 100     |

The tolls at street level seem more important in São Paulo, beginning with race, which is not a factor in any of the other cities we have seen thus far (primarily because of the more racially homogeneous population in those other cities). In one of the *paulista* cases I reviewed, for example, a witness reported a police officer saying, in the wake of a deadly shooting, “If he’s black and from the *favela*, we shoot first and ask questions later.”<sup>31</sup>

The available figures confirm this policeman’s claim. According to a study by the *Ouvidoria da Polícia de São Paulo* (1999), in 1999 blacks appear 2.2 times more often in the victim than in the general population: nearly 55% of the victims were black, while similar studies report that only about 25% of the population of São Paulo is black (including those generally described as *pardos*).<sup>32</sup> The same study demonstrates that the police generally act in response to perceived criminality. The *Ouvidoria* reports that 44%

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<sup>31</sup> “Se é preto e favelado, a gente atira primero, para perguntar depois.”

<sup>32</sup> 1991 Census data cited by Sadek, et al. (2000) suggests that 26% of the population of São Paulo is parda or black. Census data for 1980, cited in two separate studies by Adorno (1995; 1994) puts the figure at 24%.

of the victims were engaged in the commission of a crime at the time they were killed (the crime may or not have been a violent one), another 28% were *suspected* of having committed a crime, while the remaining 28% had no immediate link to an actual crime – they were approached by police simply to verify their identity, for example. The data from my own sample, which covers three years instead of one, show essentially the same results on these variables.

This sample further opens up a vista of inequality based on age, gender, class and *favela* residence. Persons under 35 were 1.5 times more likely to appear in the population of victims than in the general population (93% of victims compared to 64% in the overall population).<sup>33</sup> Virtually all of the victims were male while the general population is only about 47% male. About 82% of the 167 victims for whom relevant information is available I classified as lower class based on their employment, income, or type of residence (e.g., whether they lived in a *favela*).<sup>34</sup> In the 91 cases in which there is information about the neighborhood where the victim lived, 64% of the victims lived in a *favela* (58.5% of the cases in the sample did not have residence information), while according to IBGE's 2000 Census, 10% of the population of São Paulo lives in *favelas*.<sup>35</sup> Seventy two percent of the victims for whom this information was available were unemployed (10% of the cases do not have this information), while unemployment rates

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<sup>33</sup> Total population numbers are from Instituto Brasileiro de Geografia e Estatística (IBGE), Contagem da População 1996 and Malha Municipal Digital do Brasil 1997. Data from the 2000 Census, national statistics (which are not disaggregated by city on the website of the Instituto Brasileiro de Geografia e Estatística) are similar.

<sup>34</sup> Since I coded this variable myself, and it is a composite of employment, dwelling and income information, I do not have a similar figure for the population at large.

<sup>35</sup> Reported in the Folha de São Paulo, July 28, 2002, on the basis of an analysis of Census 2000 data for São Paulo (found at <http://www.ibge.net/censo/noticias.shtml>).

in São Paulo in the 1990s are around 5%. These groups are, therefore, significantly over-represented in the population of victims, as are Blacks and the suspects of crime.

## 2. Judicial response

In São Paulo, even more so than in Buenos Aires, the killing of a civilian by the police is almost never punished. Of all the cases in the sample, only 17 (7.76%) resulted in a conviction.<sup>36</sup> Even though the conviction rates are low, clearly not all police killings go unpunished. To begin to sort out the factors that produce different outcomes in different cases, the first rough cut is the type of case. The most striking difference here, as in Argentina, is between cases involving the exercise of police powers and the private use of force by a police officer. All other types of cases receive roughly the same treatment:

TABLE 3.6:

### OUTCOME BY EVENT TYPE IN SÃO PAULO

|            |       | TYPE OF EVENT       |            |           |                     |            | Total       |
|------------|-------|---------------------|------------|-----------|---------------------|------------|-------------|
|            |       | Routine<br>policing | Execution  | Torture   | Private<br>Violence | Bystander  |             |
| CONVICTION | Yes   | 7<br>5%             | 5<br>8%    | 0<br>0%   | 4<br>44%            | 1<br>8%    | 17<br>8%    |
|            | No    | 129<br>95%          | 55<br>92%  | 1<br>100% | 5<br>56%            | 12<br>92%  | 202<br>92%  |
|            | Total | 136<br>100%         | 60<br>100% | 1<br>100% | 9<br>100%           | 13<br>100% | 219<br>100% |

Fisher's exact test of significance = 0.009 (used instead of a Pearson chi2 because some of the cells have expected frequencies lower than 5).

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<sup>36</sup> The low number of convictions makes it impossible to carry out a satisfactory logistic regression, as I did for Buenos Aires and Córdoba. As a result, the analysis will have to rely on bivariate analyses, the principal drawback of which is that, whenever there is collinearity, we cannot distinguish between the effect of two variables. The following tables should be read with this caveat in mind.



In fact, though their low number qualifies this observation, all the Private Violence cases that have been decided resulted in a conviction. Note, however, that these are cases (like the police cases studied here) in which a defendant has been identified. Most cases of murder are never solved, and consequently cannot be prosecuted. Excluding pending cases from the other categories does not have a similarly dramatic impact on the conviction rate: only in the case of executions does the rate rise, and then only by two percentage points. This suggests that in ordinary homicide cases  $p_{law}$  can be very high in São Paulo, while for the victims of police actions, the legal system becomes drastically less effective.

Other evidence supports this conclusion. A prosecutor in São Paulo said their figures show a conviction rate for ordinary homicide cases (assuming a defendant has been identified) that is as high as 80%, while a study by Adorno (1995) of race and criminal prosecutions reports an overall conviction rate around 70% in homicide cases. In police actions, however, even among the 38 cases in my sample that survived all the pretrial dismissals, juries convict less than 35% of the time. As in Argentina, then, the first toll is the affirmative one enjoyed by the police corporation on behalf of its members, which somehow ensures impunity so long as they use lethal force in the course of their duties.

Focusing now on Police Actions and drawing on the sample data, we can identify other tolls that relate to the characteristics of the victim. Interestingly, some of the more likely candidates – including some of the tolls that were very important at the  $p_{prior}$  level – do not show up at all in the courts. While race is clearly a factor in the selection of the

victims, as seen above, it loses all significance within the judicial arena, as the following table reveals:

TABLE 3.7:  
CONVICTION RATE BY COLOR IN SÃO PAULO POLICE ACTIONS

| CONVICTION | Victim's Color |              |               | Total         |
|------------|----------------|--------------|---------------|---------------|
|            | White          | Black/Pardo  | Missing Data  |               |
| no         | 35<br>92.11%   | 31<br>88.57% | 136<br>93.15% | 202<br>92.24% |
| Yes        | 3<br>7.89%     | 4<br>11.43%  | 10<br>6.85%   | 17<br>7.76%   |
| Total      | 38<br>100%     | 35<br>100%   | 146<br>100%   | 219<br>100%   |

Pearson chi2(2) = 0.8280 Pr = 0.661

The conviction rate is statistically identical for all the categories, including those cases in which the race of the victim is unknown (excluding missing data cases from the table does not affect this result). The courts themselves, then, are less sensitive to the color of the victim than the police are in choosing their victims. The victim's gender is similarly non-significant at this stage (though this may be a consequence of the fact that there are only five in the entire sample).

Class may well affect outcomes but it is difficult to be certain just how much, from this sample. There are five middle class victims in the entire São Paulo sample. Four of these were innocent bystanders, not the target of police action. None of these cases leads to a conviction (regardless of class). That leaves only one member of the middle class, who was killed in a routine police action. His case led to an acquittal, but it is difficult to generalize from one case. That leaves the two lowest classes, which are abundantly represented. The conviction rate is indeed lower for members of the lowest class – *favelados*, those with a primary education or less, the unemployed – than for

members of the lower working class, but the chi2 does not attain the .05 significance level:

TABLE 3.8:  
CONVICTIONS BY CLASS IN SÃO PAULO

| CONVICTION | Lowest Class  | Lower Working Class | Total         |
|------------|---------------|---------------------|---------------|
| No         | 115<br>94.26% | 20<br>83.33%        | 135<br>92.47% |
| Yes        | 7<br>5.74%    | 4<br>16.67%         | 11<br>7.53%   |
| Total      | 122<br>100%   | 24<br>100%          | 146<br>100%   |

Pearson chi2(1) = 3.4384 Pr = 0.064

What is most striking about this table, however, is not so much the difference in conviction rates, but the vast overrepresentation of the poorest sectors of society in the sample, a theme that was addressed earlier. Almost 85% of the victims in the sample come from among the unemployed, the shantytown residents, the most underprivileged residents of São Paulo.

Calculating the impact of being a *favelado* is more difficult because of the large amount of missing data and the fact that the data are not missing at random. My information is taken from the legal system in the form of documents and interviews with advocates. The further a case travels in the system, the more likely it is that I will have detailed information about the victim – thus the conviction rate for cases in which the type of residence of the victim is unknown is just over 2%, while cases that have that information, regardless of where the victim lived, achieve more than a 15% conviction rate (chi2 significant at better than the .001 level). If living in a shantytown is a legal disadvantage, therefore, *favelados* will be more likely to fail in their efforts to use the

legal system and consequently more likely to fall in the missing data category. Even among the selective sample for which I have information, however, the conviction rate for *favelados* is lower (13.8% versus 18.2%), though the chi2 remains non-significant.

We can roughly infer the type of residence for some of the victims in the missing data category by looking at social class information. Eighty-five percent of those in the lowest social class, for whom we know the type of residence, are *favela* dwellers, and 90% of those in the second lowest are not. Inferring overall levels from this sample, and accepting an error rate of about 15% for the first group and 10% for the latter, we can assign all members of the lowest social class for whom we do not have type of dwelling information to the shantytown category, and all members of the second lowest to ordinary urban neighborhoods. This results in the reassignment of 70 cases from missing to shanty dweller, and 6 cases from missing to urban. Running a table with this recoded variable results in stronger results – *favelados* now obtain a conviction less than half as many cases as their neighbors; the chi2 is, however, still not significant, due to the poor distribution of cases:

TABLE 3.9:  
CONVICTION RATE BY TYPE OF DWELLING IN SÃO PAULO

| Conviction | Type of neighborhood of victim |               | Total         |
|------------|--------------------------------|---------------|---------------|
|            | Urban                          | Shantytown    |               |
| Yes        | 5<br>13.51%                    | 7<br>5.65%    | 12<br>7.45%   |
| No         | 32<br>86.49%                   | 117<br>94.35% | 149<br>92.55% |
| Total      | 37<br>100%                     | 124<br>100%   | 161<br>100%   |

Pearson chi2(1) = 2.5577 Pr = 0.110

Age continues to play a role, as the courts are more likely to conclude there was excessive use of force if the victim was under 20 or over 30: the conviction rate for cases involving victims in those age groups is 20 and 12%, respectively, while the conviction rate when the victims are in their 20s is only 4%. It is also possible, of course, that victims in their twenties are more likely to trigger a justified use of force, but excluding cases in which there is credible evidence of an armed confrontation does not greatly affect the results, as the following table shows:

TABLE 3.10:  
CONVICTION RATE BY AGE IN SÃO PAULO, EXCLUDING CASES WITH  
EVIDENCE OF CONFRONTATION

| Conviction | Age group of victim |              |               | Total         |
|------------|---------------------|--------------|---------------|---------------|
|            | Under 20            | Twenties     | 30 and higher |               |
| Yes        | 10<br>23.81%        | 3<br>5.88%   | 4<br>13.79%   | 17<br>13.93%  |
| No         | 32<br>76.19%        | 48<br>94.12% | 25<br>86.21%  | 105<br>86.07% |
| Total      | 42<br>100%          | 51<br>100%   | 29<br>100%    | 122<br>100%   |

Pearson  $\chi^2(2) = 6.1729$  Pr = 0.046

As in Argentina, if the victim is classified as a violent criminal the prosecution of the killer will fail: of the 78 cases in which the victim was so classified, none led to a conviction. But in São Paulo criminality, even of a lesser degree, matters more. In fact, a pristine record on the part of the victim is almost a prerequisite for the conviction of his or her killer. As seen in the next table, only two of the 143 cases in which the victims had a criminal past ended in a conviction (as before, excluding cases in which there is some

evidence of a real armed confrontation does not affect the results).<sup>37</sup> The same variable, in Buenos Aires and Córdoba, is non-significant.

TABLE 3.11:  
CONVICTION RATE IN CASES INVOLVING VICTIMS WITH A CRIMINAL  
RECORD IN SÃO PAULO

| Conviction | Victim with criminal record |              | Total         |
|------------|-----------------------------|--------------|---------------|
|            | No                          | Yes          |               |
| No         | 45<br>81.82%                | 141<br>98.6% | 186<br>93.94% |
| Yes        | 10<br>18.18%                | 2<br>1.4%    | 12<br>6.06%   |
| Total      | 55<br>100%                  | 143<br>100%  | 198<br>100%   |

Pearson chi2(1) = 19.6526 Pr = 0.000

Victims' survivors have the option, if they can afford it or find someone who will work for free, of engaging an attorney to act as a Private Prosecutor (this figure is explained in more detail in the discussion of the various Codes of Criminal Procedure, in the country chapters). The impact of hiring a lawyer to accompany the prosecution on conviction rates in São Paulo suggests this may be a necessary if not a sufficient condition for a successful prosecution, in spite of the presence of a well-regarded public prosecutor:

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<sup>37</sup> Coded as having a criminal record are all those victims who had a record or who were killed during or immediately after the commission of a crime, no matter how petty.

TABLE 3.12:  
CONVICTION RATES BY LEGAL ASSISTANCE IN SÃO PAULO

| Conviction | Private Prosecutor |              | Total        |
|------------|--------------------|--------------|--------------|
|            | No                 | Yes          |              |
| No         | 174<br>99.43%      | 22<br>64.71% | 196<br>93.78 |
| Yes        | 1<br>0.57%         | 12<br>35.29% | 13<br>6.22   |
| Total      | 175<br>100%        | 34<br>100%   | 209<br>100   |

Pearson  $\chi^2(1) = 58.8424$  Pr = 0.000

These results are entirely consistent with findings in a similar study of accountability for acts of torture and other gross violations of human rights. Lemos-Nelson finds that, for example, complaints of torture in the state of Bahia only produce results if they are accompanied by a third party, other than the victim; the perceived criminality of the victim is highly influential in the way the cases are treated; and the violations target Afro-Americans (Lemos-Nelson 2001). Despite its high performance in other areas, the vaunted Ministério Público does not appear to work so well in this area, as claimants need to engage a private attorney if they wish to improve their chances of a conviction.

In short, at street level  $p_{\text{prior}}$  is very low and  $p_{\text{toll}}$  is high: not only is the overall level of violations very high in São Paulo, but it is also targeted to particular disfavored groups. The groups that are more likely to have their rights violated in the first place, it should come as no surprise, are young males, blacks and the poor – especially residents of shantytowns and those perceived as criminals. Members of the middle class, on the other hand, need only fear being shot by mistake.

The courts, on the other hand, are more equitable on some counts (though not on others) and still very ineffective overall in Routine Policing cases (i.e.,  $\Delta p$  is low in these cases, while  $p_{\text{toll}}$  within the courts is lower than at street level). Average conviction rates for police actions are around 6% as compared to rates for ordinary homicides that are around 80% according to various sources and nearly 100% in the case of police officers in private disputes among decided cases in the sample. Race, however, is *not* a factor in judicial outcomes for this sample of cases, nor is gender. The victim's class and residence in a *favela* may play a role, though there are significant data issues, and the cross-tabulation is only significant at the .06 level. There is more impunity for the killing of twenty-year-olds than for younger and older victims. And victims with a criminal record are truly unprotected – the conviction rate is a mere 1.4%. Finally, with a single exception, convictions only took place in cases in which relatives of the victim engaged an attorney to accompany the prosecution. The conviction rate for this group is about 35%, which is the highest of any identifiable groups in the São Paulo sample.

#### **D. Salvador da Bahia**

Salvador is the most violent of the locations in this study. While the absolute numbers of killings in São Paulo are chilling, the population adjusted rate is twice as high in Salvador. It also appears to have the greatest difficulty prosecuting these cases; despite hundreds of killings, it is hard to find any convictions of police officers. Even in cases where suspects are executed practically in front of the cameras, the years go by with no judicial response. Unfortunately, along with the violence is a great deal of secrecy – or at least lack of information – about these cases. As a result, as in Uruguay though for



different reasons, the analysis of the effectiveness of rights in Salvador relies heavily on qualitative information from case studies of individual homicides.

## 1. Violations

What we know about police homicides in Salvador suggests that the incidence of violations is even higher, and that judicial results are worse, than in São Paulo. A study by the Justice and Peace Commission of the Archdiocese of Salvador based on press reports counted 623 homicides by police officers in the Salvador metropolitan area between January 1996 and December 1999. The average annual rate of deaths per 100 thousand for these four years in this metropolitan area of 2.5 million people is 6.23, three times higher than São Paulo's average for its worst quinquennium on record, 1990-1994.<sup>38</sup>

## 2. Judicial response

A study by Lemos Nelson shows that members of the Civil Police who kill a suspect are rarely investigated by the police. She finds that in most cases the very first step in a judicial investigation, the *inquérito*, is never completed. Those cases do not even reach the prosecutor's office or the judiciary (Lemos-Nelson 2001). Homicide cases that are not solved in the first 15 days by the local police delegation are devolved to the *Delegacia de Homicídios de Salvador*. In October 1998, the investigator in charge, a person with 7 years' experience in that job, estimated that nearly 70% of the 1000 pending cases on file in that *delegacia* involved the Military Police, often in cases that

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<sup>38</sup> This figure does not include the additional 85 annual victims of grupos de extermínio, even though all the accounts of these groups confirm a high participation of police officers (see, e.g., interview with Costa Ferreira, in Oiticica 2001; de Oliveira, Sousa Ribeiro, and Zanetti 2000).

had all the indicia of an execution.<sup>39</sup> Despite these thousands of unsolved homicides, the *Delegacia* had only about 60 suspects in custody at one time. Two things are likely, therefore: policemen who kill enjoy nearly complete impunity, and this is not exclusive to the police.

Even well documented high profile cases in Salvador are marked by nearly complete impunity. The case of Heloísa Gomes dos Santos and her partner, Manuel Ferreira dos Santos, is considered a typical one by the entities and individuals I talked to in Salvador. Manuel was a former Military Police Corporal. His son Valdemir was killed for refusing to comply with an attempted extortion by a group of Military Police officers acting in a certain neighborhood of Salvador.

Heloísa and her partner appear to have brought all the necessary tolls to the table in their search for justice. They were (lower) middle class and employed. They carried out a very public campaign, bringing their complaints to the media, testifying before the legislature, joining various human rights organizations, even speaking to Federal legislators. They identified the alleged killers by name – Eliomar Nascimento Machado, Antônio Fernando Barbosa Rodrigues, Luiz Sérgio Lopes Sampaio, Paulo Roberto Conceição Terra Nova, and Edson Soares dos Santos. Heloísa in particular became a very public figure. In short, they marshaled considerable personal and political resources.

Soon after they began their campaign, Heloísa and Manuel received several death threats. On June 21, 1998, they were shot to death as they sat in their car in front of the hospital where Heloísa worked as a nurse. Since then, two other witnesses against these

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<sup>39</sup> The president of the Military Police Corporals' and Privates' Union of Bahia suggested that the figure could well rise above 70%. He defended his colleagues only by pointing out their lack of preparation and resources and arguing that the Polícia Civil committed just as many crimes.

same policemen have been murdered, one has disappeared and is presumed murdered, and one is in hiding under the auspices of Bahia's witness protection program. There have been no convictions in connection with the murder of Manuel's son, the murder of Heloísa and Manuel, or the murder of the other three witnesses.

Another case of considerable prominence is the case of Robélio Lima dos Santos. On October 11, 1999, Robélio was apprehended after he and three others committed a bank robbery that resulted in one police officer being seriously wounded. Robélio himself was photographed as he was handcuffed and placed in the back of a police wagon. In the photograph, taken from no more than six feet away, one can clearly see that he has only one wound in the pelvic region. Some time later he arrived at the Emergency Room of the local hospital. He was dead, shot in the chest with at least two different weapons. The four police officers who were in the car when Robélio was murdered were initially arrested for the murder, but they have been released and in the nearly three and a half years since the event, no convictions have resulted.

A more typical case, and one that received considerably less media attention, is the case of Sérgio Silva Santos, a physically handicapped youth who lived in one of the favelas around Salvador. On January 22, 1999, five police officers on midnight rounds decided to question a group of men standing around a street-side vending post. One of the police officers had drawn his gun as he approached the men and he accidentally fired a shot, wounding Sérgio in the neck. The five loaded Sérgio, who was still alive, in the police car, took him to a remote region, debated briefly about their course of action, and executed him, with at least two officers taking part in the actual shooting. Then they

placed a gun in Sérgio's hand and prepared a report that said he had died in an exchange of gunfire with the police.

Eventually, confronted with the witnesses to the initial wounding, the evidence of the victim's physical disability and other damning evidence, one of the five disclosed what had actually happened, and testified to the entire sequence of events. In spite of all this, four years later the five were still employed by the police, remain free, and have not been convicted of anything. The judge's office reports that the difficulty in moving forward with the case lies in locating the witnesses to the initial event. This should come as no surprise, as on April 16, 2000, we read that "one of the main witnesses in the killing of the physically handicapped Sérgio Silva Santos ... was beaten to death in Nordeste de Amaralina, the neighborhood where he lived" (A Tarde, 4/16/00, p.7).

There are many more stories like these, including the cases of no less than ten journalists who were killed in Bahia during the 1990s. A Tarde carried out an extensive investigation into these ten cases and was able to secure the names of suspects in every case, noting that politicians working with police officers were often the principal suspects. The daily concluded that "in traveling through the eight cities in which the crimes occurred, A Tarde's reporting verified – in only 7 days of investigation – that the criminals enjoy impunity purely as a result of the omissions of the Courts and the Civil Police. There are witnesses and proofs for each of these crimes" (A Tarde, 4-2-2000).

Information from CEDECA follows the same pattern, with a possible exception for children.<sup>40</sup> CEDECA does not systematically track all cases of violence against

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<sup>40</sup> The following discussion of violence against children is based on a personal interview with Dr. Valdemar Oliveira, Director, CEDECA, Salvador, Bahia (5-15-01), and documents he provided.

children but rather selects particularly egregious cases involving poor children from marginal neighborhoods and attempts to pressure the legal system to respond effectively. The result is not a representative sampling of all cases of police homicides in Salvador. They involve a special class – children from poor neighborhoods –; they concern special facts – selected for their shock value –; and they get special attention from an NGO and a specialized subset of the justice system.

Before the creation of a specialized juvenile justice system, police killings of children and adolescents were an open secret in Salvador. Many of the killings fit the mold of the so-called *grupos de exterminio* – a kind of social cleansing carried out by or with the cooperation of the police, against petty criminals or other “undesirable” elements, often at the behest of small merchants. In 1992, for example, a group of Military Police officers had a confrontation in Liberdade, a peripheral neighborhood of Salvador, with a band of youth that apparently engaged in petty crime. The next day the police officers returned, out of uniform, and picked up two children they suspected of belonging to the gang. One day later, the parents found their children’s bodies, savagely mutilated. The parents knew who had picked up the children and they were identified and charged with the crime. But the file on the case mysteriously disappeared from the court records, and the case has gone nowhere in ten years.

In another case, in 1991, a child from one of the *invasões* or shantytowns around Salvador tried to beg a ride from a bus driver. The driver refused to let him on, and as he drove away the child threw a stone, hitting the bus on the side. The bus stopped, a policeman descended with his gun drawn and shot the child in the back as he ran away. This case never even triggered a formal investigation by the prosecutor’s office, and so

did not make it into the courts at all. In 1992, another policeman stabbed a child to death for hitting his dog with a stone. When representatives of CEDECA confronted the investigator in charge for his failure to open a formal inquiry, his only response was: “when are people like CEDECA going to establish a center for the defense of the police?”

The stories are chilling for many reasons, not least because so many of the killings were almost casual, perpetrators did very little to hide their participation, the justice system did not investigate them, and no one was ever punished for the crimes. CEDECA’s director told me that their first systematic investigation revealed that there were 80 children murdered in 1991 in Salvador. Of those cases, only 11 led to a formal judicial proceeding; only one of these led to a trial, and that single trial ended in an acquittal. Though he could not say exactly how many, he noted that the police were involved in a large percentage of these homicides. So far, then, almost complete ineffectiveness.

But the legal apparatus that attended these crimes in Bahia was reformed after the passage in 1990 of the *Estatuto da Criança e do Adolescente*. This reform created the *Vara Criminal Especializada da Infância e da Juventude*, a specialized juvenile justice system that acts in criminal cases by or against minors. The investigators, prosecutors and judges in this system work only in cases involving minors.

According to the Director of CEDECA, as cases began to be processed by the new system, beginning around 1992 or so, there has been a marked difference in the way child homicides are treated. Whereas before it was difficult to find a police investigator, prosecutor or judge who might show even a minimal interest in prosecuting violence

against children, now the prosecutors and judges, who deal only with cases involving children, are much more aggressive. Today, a specialized investigative office (*delegacia*) opens formal inquiries in all the cases that take place. They are somewhat slow, they do not have a great deal of resources, the *inqueritos* often have errors, but at least they are done, and in good faith – this was the evaluation of the office by CEDECA’s director. Similarly, one of the two judges in this system noted many changes in the treatment of minors since the early 1990s, all of which permit monitoring their safety from the time they come in contact with law enforcement.

As the system became more aggressive in protecting the rights of children, a new problem has come to the fore. Since the police can no longer count on the benign neglect of the justice system, the rate of threats and violence against complainants and witnesses has vastly increased. Now, CEDECA’s director reports, relatives of the victims come into his office in the initial days after the event, impelled by anger and grief at the harm to or loss of a child, asking the Center to take some action to ensure that the perpetrators are held accountable. But often they call back some days later to withdraw the complaint, citing threats of violence against them if they persist: “His father has three other children to raise,” said a mother recently. “Even the judge is afraid. We will trust to divine justice; they will be punished there.” Witnesses also cease cooperating with prosecutors and withdraw statements made initially about police participation in the crime. In short, those involved close down the flow of essential information to the system without which it cannot effectively prosecute the case.

In short, Salvador shows the highest level of violations of any of the cases. All the information suggests that the violations especially target the disadvantaged, though there

are notorious cases against relatively middle class people who dared speak out against police violence. While it is hard to estimate exactly, the pattern looks similar to São Paulo's but more generalized: focused on the lower classes and the *favelados*, but with considerably more spillover into slightly more affluent classes; focused on suspects of crime and other “undesirables” but with more spillover into ordinary poor people who happen to be in the wrong place at the wrong time. This suggests a system with very low  $p_{\text{prior}}$  and moderately high tolls at the violation stage.

At the judicial stage, nearly complete impunity marks a system with low  $\Delta p$ , while the fact that the system appears to fail for everyone, from bank robbers to nurses, suggests a low  $p_{\text{toll}}$  as well. It now appears that children can command a more assertive reaction from the legal system, so perhaps we could identify them as a relatively more favored group, though, as we saw, a high level of violence against complainants and witnesses keeps the level of effectiveness low, even in these cases.

#### **E. Conclusion: comparing the jurisdictions**

To make the comparison across cases I standardize the measures by returning to the Weberian formulation set forth in the introduction: a right is no more than “an increase of the probability that a certain expectation of the one to whom the law grants that right will not be disappointed” (Weber [1921] 1925). Recall that the *a priori* likelihood of a violation is a function of  $p_{\text{prior}}$  and  $p_{\text{toll}}$ , while the increase in effectiveness attributable to the state response is  $\Delta p$ , the background level of effectiveness, also modified by  $p_{\text{toll}}$ , the effect of extra-legal characteristics of the claimant on the judicial response.



## **1. $p_{\text{prior}}$ and $p_{\text{toll}}$ : the likelihood of a violation across cities and within them**

In this section I compare  $p_{\text{prior}}$  and  $p_{\text{toll}}$  for the first four jurisdictions discussed in this chapter. Salvador is not included because, as we saw, the information is too qualitative to include in such a table without an undue amount of speculation. In fact, the table itself, and the one after it, is primarily meant as a heuristic device, offering a glimpse into these issues and making cross-country comparisons possible, rather than as a precise meter of the actual values of  $p_{\text{prior}}$  and  $p_{\text{toll}}$ , which we could obtain only if we had perfect information about the number of violations and the characteristics of each victim, in a perfectly representative sample.

As is usual in discussions of discrimination and inequality, my discussion presents somewhat of a double negative, focusing on the *detrimental* effect of *disfavored* characteristics rather than on the positive effects of favored traits. To make the results more intuitive, instead of using  $p_{\text{prior}}$ , I calculate the tolls to show the effect of lacking the favored characteristic on  $p_{\text{viol}}$ , the probability of a violation for the average citizen of a given locale over his or her lifetime.  $P_{\text{viol}}$  is calculated by simply extending the rate of violations from the period under study over a hypothetical 70-year life period and dividing by the total population ( $p_{\text{prior}}$ , then, is  $1 - p_{\text{viol}}$ ).

The effect of each toll is calculated as the ratio of the percentage of persons with that characteristic in the victim population to the percentage of persons with that characteristic in the overall population. This ratio, in keeping with the Weberian formula, produces a coefficient which, when multiplied by  $p_{\text{viol}}$ , gives the probability that a citizen

lacking that toll (that is to say, exhibiting a disfavored characteristic) will suffer a violation in his or her lifetime.

For one of the tolls this calculation presents special difficulties. Simply comparing the percentage of criminal suspects in the victim population across countries was not a satisfactory way of determining the extent to which police killings target criminal suspects since different jurisdictions have different background levels of criminal activity. The differences could simply be the product of those different levels, rather than of police targeting. In order to follow the same methodology I used for the other tolls I needed to compare the proportion of crime suspects in the victim population to the proportion in the total population. The latter number is not available anywhere, of course, but a reasonable approximation is to compare the number of events that come to the attention of the police in each location, on a per capita basis, since it will approximate the proportion of people in each place approached by the police in connection with a crime.

This is not a perfect solution, but it comes reasonably close for the heuristic purposes of this exercise. On the one hand, there might be more than one suspect for any given event; but most crimes, especially property crimes, are committed by repeat offenders, so this brings the number back down. In addition, many of the reports are generated by citizen complaints rather than police reports, and may not ever bring the police in contact with a suspect; but many of the events included in the total number are ones for which no one has ever been in any danger of being shot – such as white collar crimes, fraud, failure to pay child support, etc. I use the same basic statistic, on a *per capita* basis, in all the jurisdictions, so the biases should cancel out at least for purposes of the cross-country comparison.

For São Paulo I took the number of *ocorrencias policiais criminais*, and in Uruguay and Argentina I used the number of *hechos delictuosos* for each location.<sup>41</sup> The calculation produces an estimate of about 2 criminal events investigated per hundred inhabitants in Buenos Aires and São Paulo, and right around 4 per hundred in Córdoba and Uruguay. This is more or less consistent with what we might expect: while instances of violent crime are somewhat lower in Córdoba and Uruguay, police responsiveness to crime is by reputation quite a bit lower in Buenos Aires and São Paulo, so we might expect the police to come in contact with a higher proportion of suspects relative to the number of crimes in the former.

The formula for  $p_{\text{toll}}$  is  $\frac{Vict_x / Vict_{\text{total}}}{Pop_x / Pop_{\text{total}}}$  where  $Vict_x$  is the number of victims that

lack toll  $x$ ,  $Vict_{\text{total}}$  is the total number of victims,  $Pop_x$  is the number of persons in the relevant population that lack toll  $x$ , and  $Pop_{\text{total}}$  is the total population. The toll, for example, will be greater than 1 for Blacks and smaller than 1 for whites if being Black increases the probability of a violation. If there is no effect of race on the probability of being targeted for a violation, the toll will be 1.

In comparing different jurisdictions, two numbers are important:  $p_{\text{viol}}$ , which gives the background level of effectiveness, and  $p_{\text{toll}}$ , which measures the level of inequality associated with a given characteristic of (generally) the victim. The higher the value of  $p_{\text{viol}}$ , the more likely the average citizen is to suffer a violation and thus the less effective

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<sup>41</sup> The figures used are official police statistics from SEADE: Anuário Estatístico do Estado do São Paulo for São Paulo (2000); <http://www.globalmarch.org/worstformsreport/world/uruguay.html> for Uruguay (1998); and <http://www.jus.gov.ar/polcrim/Snic2001/Informe%20pais%202001/SNICInformePais2001Cuadro21.pdf> for Buenos Aires and Córdoba (2001).

a given right. The greater the toll value, the greater inequality there is associated with that characteristic. The greater their combined effect, the less effective a given right is for people exhibiting the relevant characteristic.

Thus, a right may be ineffective either because a weak justice system leaves everyone equally unprotected (high  $p_{\text{viol}}$  and low  $p_{\text{toll}}$ ), or because an otherwise strong system leaves a disfavored group outside the protection of the law (low  $p_{\text{viol}}$  but high  $p_{\text{toll}}$ ), or both. As shown in the following table, in the cases discussed here there is considerable variation in both measures: Uruguay has the highest  $p_{\text{law}}$  and the lowest socio-economic tolls. Córdoba is next highest in  $p_{\text{law}}$  but has higher tolls than Buenos Aires, which has a lower overall level of effectiveness but is more egalitarian. São Paulo in turn exhibits the worst combination – low  $p_{\text{law}}$  and high tolls.

TABLE 3.13:

TABLE COMPARING  $P_{LAW}$  AND  $P_{TOLL}$  ACROSS JURISDICTIONS AT PRE-JUDICIAL STAGE

| Feature   |                    | Jurisdiction  |  |   |   |
|---|--------------------|---|--|---|---|
|   |                    | Uruguay <sup>1</sup>  | Córdoba  | Buenos Aires  | São Paulo   |
| $P_{viol}$  |                    | .0001   | .0004  | .0015   | .0019   |
| $P_{toll}$  | Male               | 2.08  | 1.84   | 1.88  | 2.09  |
|   | Class              | 2   | 2  | 2   | 2   |
|   | Unemployed         | 5.10  | 4.0  | 2.46  | 1.44  |
|   | Age <35            | 1.00  | 1.60   | 1.47  | 1.45  |
|   | Black              | Not applicable  | Not applicable   | Not applicable  | 2.20  |
|   | Shantytown dweller | 2.66  | 11.7   | 5.6   | 6.40  |
|   | Criminality        | 25.74   | 12.5   | 17.62   | 32.14   |
| Probability of a violation for most disfavored group in table |                    | 0.00027<br>(for an individual suspected of criminal activity) | 0.0045<br>(for an individual suspected of criminal activity) | 0.026<br>(for an individual suspected of criminal activity) | 0.063<br>(for an individual suspected of criminal activity) |

<sup>1</sup> The low number of victims in Uruguay means that these results are very unstable and do not reach conventional levels of significance, as noted in the individual discussion of Uruguay.

<sup>2</sup> Class appears to be an important variable in some cases, but the variable used is a composite, as explained earlier, and so is not comparable to statistics available for the general population.

This table prompts a number of observations. Clearly, as we see from levels of  $p_{viol}$ , the odds of any given individual being killed by the state are low; but they vary considerably across jurisdictions. Taking Uruguay as the reference point, the likelihood of being shot by the police for the average individual living in São Paulo is about 20 times greater, 15 times greater for one in Buenos Aires and 4 times greater for one in Córdoba. But these ratios change considerably when we take into account the impact of the tolls on the probability of an initial violation.

Being involved with crime, for example, shows the highest values of the toll in all places. Because the high percentage of crime suspects in the cases in Uruguay is exceeded only in São Paulo, a suspect's risk in São Paulo is only slightly increased in relation to Uruguay – according to these figures, a suspect is 24 times more likely to be killed by the police than one in Uruguay – while one in Argentina sees the difference decrease – a suspect in Buenos Aires is “only” 10 times more likely (and one in Córdoba twice as likely) to be killed than one in Uruguay. For a non-suspect, on the other hand, the difference between countries becomes even greater, and Buenos Aires takes the lead in deadliness. An ordinary citizen in Buenos Aires, with no connection to crime, is 71 times more at risk than one in Uruguay, while the risk level for one in São Paulo and Córdoba is 42 and 14 times higher than in Uruguay, respectively.

Some additional reflections on this toll are necessary. As we saw in Chapter 3, the cases in the sample are selected so that they are highly likely to include a high percentage of civil rights violations. The mere fact that a victim was involved in some sort of illegal activity clearly does not excuse taking his or her life – these are precisely the individuals for whom due process protections are created. At the same time, the higher the value of the toll for this trait, the more targeted police repression is to criminal activity. If the number is low, it means the police are killing people for reasons other than the suppression of crime. They might be shooting demonstrators, for example, using lethal force in the course of private disputes or criminal activity, shooting people in the course of the frequent document checks, or mistaking people for fleeing suspects. All of these things are present in the sample, and they are more frequent in Buenos Aires than elsewhere.

Of the cases presented, São Paulo's police clearly target perceived criminality more than any others, followed by Uruguay's. These values are consistent with the reputation of the two police forces. The low level of  $p_{\text{prior}}$  in São Paulo, coupled with the high toll, suggests that the *paulista* Military Police use deadly force almost as a routine instrument of crime control. The much higher level of  $p_{\text{law}}$  coupled with a high toll in Uruguay suggests, rather, a police that is both restrained and relatively targeted to the repression of crime, albeit with occasional excesses.

Buenos Aires shows a lower value for this toll, together with very low  $p_{\text{law}}$ . Again consistently with the reputation of the police force in this province, this suggests an undisciplined police that is prone to violent excesses that are sometimes entirely unrelated to its mission as a law enforcement agency. Finally, Córdoba's toll value for this trait is the lowest of all, a consequence of the very high number of domestic violence cases in the sample, though the high level of  $p_{\text{law}}$  means that even so, Córdoba's police is less deadly than the *bonaerense* for persons who have no involvement with crime.

Conversely, the tolls for the unemployed and shantytown dwellers are highest in Córdoba, which means that what violence there is, is highly concentrated among the very lowest classes there. The very high level of toll for the unemployed in Uruguay is surprising, but probably a result of collinearity between the sort of criminality that is likely to be targeted and unemployment. The toll for shantytown dwellers, on the other hand, is the lowest of all the cases, suggesting a more even-handed application of police force across social strata compared to other countries. At the same time, the within-country comparison still shows inequality of treatment – the probability of a violation is still about 2.5 times higher for this group than for average citizens. Buenos Aires and São

Paulo score about evenly on this last point, showing levels of violations for *villeros* and *favelados* that are about six times higher than the average. Calculating the combined effect of  $p_{\text{law}}$  and the shantytown residence toll produces very striking comparisons. A *favelado* in São Paulo is 46 times more likely, a *villero* in Buenos Aires 32 times more likely, and one in Córdoba 18 times more likely to be killed by the police than a *villero* in Montevideo.

Age has a similar, though less dramatic impact. Persons under 35 are 1.5 times more likely to be victimized than the average in Córdoba, Buenos Aires and São Paulo, but no more likely than anyone else to be killed in Uruguay. The combined effect of  $p_{\text{law}}$  and  $p_{\text{toll}}$  for this trait means that the probability of a violation for young people in São Paulo is 28 times higher than for those in Uruguay, and 22 and 6 times higher, respectively, for those in Buenos Aires and Córdoba. Because there is no variation on this trait in the other countries we cannot do a cross-country comparison, but a Black person confronting the police in São Paulo has a four times greater chance of dying as a result than a white person in the same city.

## **2. $\Delta p$ and $p_{\text{toll}}$ – the likelihood of a conviction across jurisdictions and victim class**

Calculating the effectiveness of rights at the judicial level is a similar process. Just as it is customary to speak of rates of violations, so too it is customary to speak of conviction rates (rather than non-conviction or acquittal rates). Therefore, in this section I will use  $\Delta p$  as the starting point, measured as the probability that the courts will validate a claim of right by convicting the individual that violated that right, and then calculate the effect of the tolls in each system.  $\Delta p$  for this analysis is the average conviction rate in the



sample. Of course, the average conviction rates for all homicide cases would be a better measure of  $\Delta p$  for the legal system as a whole than the average rates in this subset of police cases. But to calculate the impact of various characteristics of the victim in the main cases of interest, which are police prosecutions, it is necessary to look only at this more limited universe. In effect, then what Table 3.14 presents is the combined effect of two tolls – the presence of the “police business” toll exercised by the defendant, and the presence or lack of other tolls on the part of the victim.

The toll within the legal system is calculated in parallel fashion to the toll at the time of the initial violation (Table 3.13), to show whether cases involving victims with certain characteristics are over or underrepresented among the cases that end in a conviction. It is simply the ratio of the percentage of sample victims with characteristic  $x$  whose rights were retroactively protected by the courts by convicting the violator ( $V_{convict_x}$ ) to the overall percentage of victims with characteristic  $x$  ( $V_x$ ):

$$P_{toll} = \frac{V_{convict_x} / V_{convict_{total}}}{V_x / V_{total}} .^{42}$$

The use of the average conviction rate as the basis for calculating  $\Delta p$  causes the value of  $p_{toll}$  to be strongly influenced by the distribution of favorable to unfavorable traits among victims in the sample. If the vast majority of victims have the unfavorable trait (as is generally the case because they are also more often selected for the initial violation), then the conviction rate for these observations will be almost identical to  $\Delta p$ ,

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<sup>42</sup> In order to keep the results comparable across jurisdictions, I used only the results of bivariate analyses, rather than mixing the results of a logistic regression in Argentina with bivariate results from Brazil and Uruguay.

the sample average. Since the disfavored groups are generally overrepresented in the victim pool, the unfavorable tolls tend to be close to 1 while the favorable ones tend to be much higher than 1. This imbalance highlights just how much some results stand out from the experience of the majority of those who use the system. For purposes of comparison, I include some examples of the toll value for both the favored and disfavored group in the following table.

TABLE 3.14:

TABLE COMPARING  $P_{LAW}$  AND  $P_{TOLL}$  AT THE JUDICIAL STAGE

| Victim Characteristic     |                             | Jurisdiction |             |              |             |
|---------------------------|-----------------------------|--------------|-------------|--------------|-------------|
|                           |                             | Uruguay      | Córdoba     | Buenos Aires | São Paulo   |
|                           | <b><math>P_{LAW}</math></b> | <b>0.47</b>  | <b>0.38</b> | <b>0.18</b>  | <b>0.06</b> |
| Shantytown dweller        | yes                         | 1.63         | 0.81        | 0.53         | 0.79        |
|                           | no                          | 0.42         | 1.46        | 1.15         | 1.62        |
| Lower class*              | yes                         | 1.09         | 0.83        | 1.04         | 1.00        |
|                           | no                          | 0.57         | 1.70        | 0.91         | -           |
| Unemployed                | yes                         | 1.63         | 1.01        | 0.22         | 0.25        |
|                           | no                          | 0.24         | 0.98        | 1.43         | 2.59        |
| Crime suspect             | yes                         | 1.89         | 0.87        | 0.44         | 0.24        |
|                           | no                          | 0.44         | 1.14        | 1.32         | 2.71        |
| Lacking retained attorney | yes                         | 1.04         | 0.25        | 0.00         | 0.10        |
|                           | no                          | 0.83         | 1.55        | 1.55         | 4.59        |

\* The toll for this trait in São Paulo is 1 because there are no members of the middle class in the sample of victims of routine police violence.

The different jurisdictions rank in the same order on levels of  $p_{LAW}$  inside the judicial system as they did in terms of the probability of a violation. The differences between locations, however, are quite striking, ranging from a .47 rate for Uruguay, down to .06 for São Paulo. But in terms of many of the socio-economic tolls the courts of Buenos Aires, for example, are more egalitarian than the courts in Córdoba. While the value of the tolls is relatively high for Uruguay, note that they run in the opposite

direction, so that the likelihood of a conviction is *higher* when the case involves a victim from an ordinarily disfavored class. At the same time, we cannot make too much of this apparent anomaly since, as we saw, the differences do not achieve conventional levels of significance. Rather than classifying Uruguay unequivocally as an “affirmative action” or “reverse discrimination” case, therefore, it appears to be a case in which socio-economic tolls do not greatly affect judicial outcomes.

The tolls permit the evaluation of the impact of a particular trait. Recall that the closer to 1 the value of the toll, the lower its impact on  $\Delta p$ , thus the closer the probable outcomes for persons bearing that trait come to the overall performance of that system. The further from 1 the value of the toll, the more exceptional the claimant and the claimant’s results. The positive impact of not being in the lower class in Córdoba is much greater (nearly doubling the effectiveness of the system) than the impact of being a member of the lower class (which reduces effectiveness by only 15%). The toll may operate in both directions: lacking a retained attorney in São Paulo reduces system effectiveness to one tenth, while having one raises it more than fourfold. On the other hand, lacking a retained attorney reduces system effectiveness to practically 0 in Buenos Aires, while having one only raises its effectiveness by little more than half.

Buenos Aires and Córdoba show a higher level of average judicial effectiveness than São Paulo, but also demand much higher tolls of those who would make use of the courts. Córdoba’s courts in particular disfavor those who do not obtain judicial assistance, are members of the lower class or come from the *villas*. The courts in Buenos Aires have a very difficult time accepting the notion that the rights of an unemployed person were violated, though again that may be the result of the association between this

trait and criminality, the toll for which is also high. Uruguay, as noted, shows a greater conviction rate for individuals in what we might otherwise consider the disfavored classes suggesting, at minimum, that in these cases the courts are as effective for those who live on the margins of society as for any others.

What does this mean for individuals exhibiting a particular trait, or lacking a given resource? The combined effect of  $\Delta p$  and  $p_{\text{toll}}$  means, for example, that accompanying the prosecution with a private lawyer is almost a necessity in São Paulo and Buenos Aires. A parent whose son was killed and cannot find a lawyer to prod the courts along is 66 times more likely to obtain a conviction in Uruguay than in São Paulo; and 6 times more likely to do so in Uruguay than in Córdoba. The same parent's chances are virtually zero in Buenos Aires. A Uruguayan police officer who kills someone who just committed a crime or had a criminal record is 42 times more likely to go to jail than his counterpart in São Paulo, 10 times more likely than his Buenos Aires colleague, and twice as likely as the *cordobés* among them. Uruguayan police who kill shantytown dwellers are convicted at a rate 11 times higher than *paulistas*, 7 times higher than *bonaerenses* and 2 times higher than *cordobeses*. In São Paulo, in what may come as a surprise to many, the rate of convictions in cases involving white victims is not significantly different than the rate for cases involving Black victims.

In short, demanding the badge number of an abusive police officer is only a rational strategy in Uruguay, though there are some teeth behind the implicit threat in Córdoba as well, as long as the claimant can pay the toll to open legal barriers. The legal system is indeed quite effective and egalitarian in Uruguay, while it is effective but heavily biased in Córdoba. The most vulnerable members of society, on the other hand,

are those who not only see their rights violated most often in Córdoba, Buenos Aires and São Paulo, but cannot even count on the courts for redress after the fact. It should be no surprise that the worst off are mostly young, unemployed men, from the *villas* and *favelas* of Buenos Aires and São Paulo.

For them, democracy truly has not brought an increase in legal protection from the state, and the courts are no restraint on the power of Leviathan. Here, as Hobbes argued, “Covenants being but words, and breath, have no force to oblige, contain, constrain, or protect any man, but what it has from the publique Sword.” And when the public sword turns against them, these young men cannot expect much protection “from the untyed hands of that Man, or Assembly of men that hath the Sovereignty” (Hobbes [1651] 1964:122). The Leviathan that Hobbes envisioned as protecting life and physical integrity becomes one of the threats.

## CHAPTER 4

### BUENOS AIRES – POLITICAL INTERFERENCE AND INFORMATIONAL DEPENDENCE

*Los dos pilares de la democracia son la libertad y la igualdad;  
hemos logrado la libertad, pero no la igualdad.  
Esta democracia está renga.*

*Raúl Alfonsín, October 30, 2003.  
(La Nación, 10-31-03)*

Discussing the legal context for police homicide claims in the metropolitan Buenos Aires area poses unavoidable complexities. Homicides committed in the capital city and its metropolitan area could involve provincial or federal police forces, as well as a host of other (mostly federal) security forces. Legal claims concerning them could end up in one of two different legal systems. Events that take place in what is known as the Conurbano, outside the borders of the Ciudad Autónoma de Buenos Aires (the CBA), fall under the jurisdiction of the Provincial Courts of Buenos Aires. Events that take place within the borders of the CBA go to the National Courts of the CBA, which are a separate division of the federal judiciary.<sup>43</sup>

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<sup>43</sup> The constitutional reform of 1994 gave the city of Buenos Aires a status similar to that of the provinces, and the 1996 Constitution of the Autonomous City of Buenos Aires provides for the establishment of a City judiciary. Throughout the period of this study, however, negotiations to bring the federal National Courts under the aegis of the City itself had not been finalized, mostly due to the resistance of the judges who wish to continue within the federal system. For those familiar with the U.S. system, the National Courts of the CBA have a status similar to the courts of Washington D.C. – they are creatures of Congress but behave somewhat like a state judiciary.

The Codes of Criminal Procedure applicable in these judiciaries have both been amended during the 1990s, with consequent reforms of the relevant police, prosecutorial and judicial structures. And yet both systems constitute one legal environment, since potential claimants might find themselves in one or the other depending only on what side of city limits an incident occurs; and the statistical analysis in Chapter 3 suggests both systems produce quite similar results. One of the puzzles to be solved is precisely why so little changes over time and from one system to another, in spite of all the differences.

In order to sort all this out, I will discuss the two systems together, comparing and contrasting as the discussion progresses. As we will see, a close analysis that goes beyond formal institutional arrangements shows that the aspects of the intended reforms that could have been most important for improving performance in the cases at issue here were diluted in practice, and that what seem to be radical differences between the two systems end up being erased.

#### **A. Federal and provincial criminal procedure**

The basic lineaments of the criminal justice system flow from the Code of Criminal Procedure, which determines the course of a prosecution and thus many of the functions of the police, prosecutors and judiciary. In doing so, the code, along with certain other institutional characteristics of the actors, will determine the strength and direction of endogenous pressures (see discussion in 'The production of r' (p.28)). The National courts of the CBA follow the *Código Procesal Penal de la Nación* (CPPN), while the provincial courts of the Greater Buenos Aires area follow the *Código Procesal*

*Penal de la Provincia de Buenos Aires* (CPPBA). Both of these Codes saw fundamental reforms during the 1990s, the CPPN in 1992 and the CPPBA in 1998.

The system with which both courts began the decade was patterned after a 19<sup>th</sup> century Spanish system that had been, as Argentine jurists like to note, already thrown out there by the time it was adopted in Argentina. This system, which governed cases in the provincial courts for most of the decade, was a written, inquisitorial one. The initial investigation was entrusted to the police. The police handed over the results of this investigation to a judge, who began the process of *instrucción*, or pretrial investigation. During the *instrucción*, the judge formalized the proofs needed to decide the case by calling in witnesses who would respond to the judge's questioning, seeking documents, requesting any expert reports, carrying out crime scene reconstructions, and incorporating all the results in the form of summary reports into the *expediente*, the file.

In the written system the judge played both the investigative and the deciding roles: The judge determined, on the basis of his or her review of the police report, what information was needed and how it should be procured, essentially taking on the task of building the case against the defendant. If the defense or the prosecutors believed some additional piece of information should be included in the file, they had to submit a request to the judge, who would decide if it was necessary and appropriate. Once the *instrucción* stage was complete, the parties would be given an opportunity to present written arguments about what they thought the evidence established and how the case should be resolved. Then the same judge who carried out the investigation against the



defendant and determined what proofs were included in the record would re-examine the record and arrive at a final decision on the case.<sup>44</sup>

**The new Procedure in the National Courts of the City:** In 1991, following the path first taken by several provinces, prominently including Córdoba, the federal legislature radically reformed the CPPN to create an oral and accusatorial system for the federal criminal courts (Law No. 23,894, effective in 1992). The 1992 CPPN formally transferred responsibility for the initial investigation from the police to the prosecutors. Prosecutors are now legally empowered to receive *denuncias* (criminal complaints) directly, and are also charged with obtaining the proofs needed to build a case against the defendant. At the conclusion of the investigation they must seek an indictment from the judge. To prosecute a suspect, the prosecutor must satisfy the judge that there is reason to believe the accused has committed the charged crime. Conversely, the judge needs the accusation of the prosecutor to produce an indictment. Thus the decision to prosecute is no longer the judge's, who retains oversight simply to ensure that defendants' rights are secure. This process takes place within the *juzgado de instrucción*.<sup>45</sup> Once the investigative phase is complete, the *juetz de instrucción* sends the file up to a tribunal that will preside over the oral trial.

The trial court, or *tribunal oral federal*, is composed of three judges. The case is presented by a *fiscal de cámara*, who takes the information prepared by the *fiscal de*

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<sup>44</sup> The judge's dual function is the feature that marks an inquisitorial system as opposed to an accusatorial system. In the latter, the judge remains more of an impartial arbiter while the prosecutor and the defense vie over the construction of o', building a factual record in an adversarial manner that is ultimately presented to the judge for decision.

<sup>45</sup> This describes the procedure for cases involving a crime punishable by three or more years imprisonment. The process for lesser crimes is similar though more abbreviated, and takes place in the Juzgado Correccional.

*instrucción* and ensures that it is presented in the appropriate manner to the trial court. Since the CPPN was meant to require an oral trial, the *fiscal de cámara* is supposed to find the key witnesses identified in the investigative stage and make sure they are available at the trial, as well as call up the documentary information included in the file, so that it can be introduced at the appropriate moment. Ultimately, this information is supposed to be presented to the judges in a trial that caps the entire penal process, with live witnesses and arguments, much in the style of Anglo-American courts.

In practice, however, the new system looks much more like the old system than what one might imagine from reading the new CPPN. In the first place, the *Ministerio Público* does not have the resources to carry out its own investigations or to receive complaints, and has therefore delegated these functions right back to the police. In addition, the old practice of relying primarily on the *expediente* dies hard. One study reveals that the *juez de instrucción* and prosecutors are largely passive consumers of information produced by the police rather than – as the CPPN might suggest – actively engaged in investigating and producing information (FORES and Colegio de Abogados de Buenos Aires 1999a: 150-53).

According to attorneys who practice in these courts, the oral trial often consists of the prosecutor or defense attorney reading aloud directly from the file the summary version of witness testimonies gathered during the *instrucción*.<sup>46</sup> A more systematic study of the courts finds the same thing (FORES and Colegio de Abogados de Buenos Aires 1999a: 155). In a simple case the oral trial may be done entirely in this way, though most often it ends up being a combination of live testimony and the oral presentation of written

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<sup>46</sup> Interview with María del Carmen Verdú, Jan. 2001.

material from the record. For the convenience of lawyers and prosecutors, cases are also often resolved according to an abbreviated procedure which, again, largely resembles the old written model. In short, it is still primarily the police who carry out the bulk of the investigation; prosecutors and judges still rely heavily on the written record in judging the facts in question; and the final trial is substantially based on a recapitulation of what was produced during the *instrucción*.

**Criminal Procedure in the Provincial Courts:** The provincial procedure, in turn, followed the original written inquisitorial pattern for most of the decade, until it was reformed by Law 12,061 of December 1997 (effective in 1998).<sup>47</sup> The new provincial system also imposes an accusatorial model: prosecutors are in charge of the pre-trial investigation, the investigation is supervised by a judge (the *juez de garantías*) who intervenes only to protect the due process guarantees of the accused, a judge cannot indict unless the prosecutor requests it, and the cases are sent for trial to an oral tribunal after the investigation is complete. In the provincial system the trial courts for serious crimes consist of three judges, and appeals are taken to a new *Corte de Casación*, which entertains questions pertaining to the law and trial-stage due process violations. The new Code also calls for the creation of a Judicial Police, which would be under the administrative and functional control of the prosecutor's office.

Again, however, reality has fallen short of the promise. Prosecutors, who have no resources to do this on their own, have delegated the investigation to the police. The judicial police force has not been created, and instead an investigative division of the provincial police carries out this function, as we will see in more detail in the following

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<sup>47</sup> For an overview of the changes, see CEJA, vol.1, no.2 (copy available from the author).

section. Moreover, the Code is not applied retroactively, so cases initiated under the old CPPBA continue under the written inquisitorial process. In sum, by the end of the decade the practice of law had changed much less than the Code of Criminal Procedure, and in any event the changes came too late to affect cases in the 1990s.

## **B. Social context**

### **1. Socio-economic context**

As we saw in the introduction, the socio-economic context matters primarily because of the way it affects the capacity of the affected population to bring information to bear on the adjudication of their claim. In addition, it matters insofar as it affects potential victims' capacity to influence the construction of public policies tending toward a more proactive stance regarding these claims.

Although aggregate economic indicators differ radically for the Conurbano and the CBA, the composition of the victim population in the police homicide cases that reach these courts is quite similar. In the Conurbano cases, fully 72% of the victims of homicides that occurred in the course of policing operations were either lower class or lower working class, while 15% of the victims for whom this information is available lived in a shantytown. No less than 60% had only completed their primary education (through 7<sup>th</sup> grade). Thirty three percent were unemployed. In the cases arising within the City, the percentage of victims from a shantytown is higher (30%), while only 57% were members of the working poor or lower and 45% were unemployed; 43% of victims in the CBA cases had only completed primary school. The claimants are their family members and survivors, and share their demographic profile. In sum, the majority of complainants and the at-risk population in both systems is likely to come from among the

disadvantaged, whether the working poor or the unemployed, and the undereducated, with a large number coming from the shantytowns.<sup>48</sup>

Moreover, this at-risk population is embedded in a society increasingly marked by poverty, inequality and exclusion. Indices of inequality are quite high in Argentina as a whole. In the 1980s, the most recent decade for which there is information, the average Gini index for Argentina was 46.63 (a higher score indicates more inequality on a scale of 0 to 100; for comparison, in the 1980s Australia and the United States had an average of about 36, and Canada about 30). Within Argentina, the Buenos Aires area is marked by even higher inequality, as it has the largest shantytowns in the country, high indices of poverty and official unemployment, side by side with the most affluent neighborhoods in the country.

On average, of course, the Conurbano looks considerably worse than the CBA, but the CBA also has large included pockets of marginalized population. The *villas* inside City limits are large, growing from about 50,000 in 1992 to more than 110,000 people in 2002 (La Nación, 8/13/02), and nearly self-contained social systems. *Villas* surrounding the City are also huge, especially in various areas of Matanza and near the northern suburbs of San Isidro and Tigre. The pattern of inequality and exclusion in this area worsened during the 1990s, as unemployment rose steadily while poverty fell somewhat in the middle of the decade, only to rise again toward the end.

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<sup>48</sup> These percentages exclude cases with missing information. As discussed in Chapter 3, the victim data on these socio-economic variables is quite incomplete, and is not missing at random. There is more missing data for the underprivileged, both because the media and others are more likely to remark on the status, employment and education background of middle class victims (at least in part because they are more exceptional) and because the longer a case is in the system, the more likely it is that I will have complete information about the victim. To the extent class and resources have any impact at all, therefore, it is more likely that the underprivileged will be under-represented in the cases with complete information.

Two main consequences of the economic condition of claimants and their socio-economic context are relevant. One is a reduction in the supply of information from that context, the other a reduction in the demand for information on the part of the system. An attorney I interviewed made the first point most clearly. Gabriel Lerner has intervened on behalf of representatives of the victim in a number of police homicide cases, and otherwise represents precisely this class of working poor or unemployed individuals in criminal matters. He indicated that the principal problem he encounters in providing adequate representation to his clients is their lack of experience in interacting with the state as bearers of legal rights: “Marginalized youth cannot even imagine pressing a demand for a legal right. They don’t have the capacity to address the justice system or even to process a transaction with the state.”<sup>49</sup> Many of them are in the informal economy, and many more have the greatest difficulty in understanding and meeting the demands of the legal system. They miss appointments, and do not fully grasp what kind of information judges and prosecutors actually use in making decisions.

What is worse, Lerner notes a progressive deterioration in this respect over the last decades. The reduction in union participation, which was once a source of legal services and formalized interactions with state entities, the rise in unemployment and informal employment, all create an increasingly large population that has little or no experience making their way “downtown” to transact business with the state. A high percentage of the at-risk population, therefore, can be expected to relate poorly if at all with the legal system.

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<sup>49</sup> “Para los muchachos marginalizados está fuera de su imaginación reclamar un derecho legal. No tienen la capacidad ni para dirigirse a la justicia, ni pueden hacer un trámite.” Interview with Gabriel Lerner (11/28/2000), Buenos Aires, Argentina.

The problem is worst for shantytown dwellers. Blaustein, for example, notes “the lack of communication between the two worlds [*villa* and non-*villa*] goes to the essence of the matter” (Blaustein 2001). According to lawyers who work there, conflicts among people living in these marginal areas are not referred to the legal system. They are either resolved informally or not resolved at all.<sup>50</sup> As one human rights lawyer put it, the northern suburbs of Buenos Aires are generally more affluent, but the people from the *villas* and needy neighborhoods are just as poor there as elsewhere, and this exacerbates their isolation from the neighborhoods around them.<sup>51</sup>

The exceptions to this lack of communication are periodic, confrontational mass events – like the *piquetes* and the interruption of traffic on major thoroughfares, in which popular demonstrations make political demands for material resources of one kind or another. The key point, from the perspective of the interaction between the state and the population of these *villas* is that they constitute a nearly separate social reality within the larger polity. This population is unaccustomed to pressing rights claims through legal channels.

Public opinion surveys confirm that the working poor and the *villeros* face special difficulties interacting with lawyers and courts if they believe a violation has taken place. Lower levels of education and income are associated with a higher perception that lawyers are hard to understand, ask for too much paperwork, and only pay attention to important cases (Fucito 1999a). Respondents from lower socio-economic levels are also more likely to agree that lawyers steal from their clients (pg.871).

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<sup>50</sup> Interview Andrea Sajnovsky (11/15/2000), Buenos Aires, Argentina.

<sup>51</sup> Interview Andrea Sajnovsky (11/15/2000), Buenos Aires, Argentina.

These opinions are not simply the result of ignorance or inexperience. Among those who have had some contact with lawyers, lower socio-economic status is associated with higher indices of dissatisfaction with the services received. Since the most important source of information about lawyers is word of mouth (most respondents indicated that they selected their attorney on the basis of personal contact or recommendations) the higher indices of distrust and dissatisfaction greatly reduce the likelihood that people in this sector will easily reach out to an attorney for help with a perceived wrong.

The second consequence of these socio-economic facts is to reduce the demand for information about these claims on the part of actors within the system. There are vast socio-economic distances between the typical low-income, uneducated claimants in these cases on the one hand and lawyers, prosecutors, and judges on the other. These distances account for much of the suspicion with which claimants are greeted when they do enter the system. In one case that I observed, the judge remarked repeatedly and with distaste on the fact that the witnesses who came in from the *villa* had shared a ride, and that attorneys from CORREPI arranged the ride. Somehow, the contact with each other and with lawyers seemed to taint their testimony and make it less credible, more political, even though it was largely dictated by economic necessity. By contrast, the fact that an expert who opined favorably to the defendant knew him personally went unremarked by anyone other than the victim's representative. Both the judge and the prosecutor, in the same case, noted at different times that the events in question had taken place in the dangerous context of the *villa*, where criminal acts were commonplace.



## 2. Socio-political context

Just as the marginal condition of the typical victims and claimants affects the way they are perceived by actors within the system, it is one of the factors creating a hostile political environment for these cases. In this section I evaluate the political and social support for the use of lethal force by the police, and, conversely, the support for strict judicial control of police violence in the 1990s.

As noted in the introduction, the socio-political context affects the demand for complete information about claims of police violence in three ways. In individual cases, it is the source of exogenous incentives for prosecutors and judges to dig more deeply and prosecute more aggressively (or the opposite). More generally, it can create a demand for systemic changes to address the perceived failure of the system to address important problems, and thus affects the institutional configuration. In a secondary way, it also affects the supply of information by providing a supportive social environment for claimants who wish to pursue these claims against some institutional resistance.

One of the constant refrains heard in Argentina in recent times is the concern over “*seguridad ciudadana*” (the preferred term for addressing issues of crime and personal safety). The papers editorialize about the “*ola de inseguridad*” or wave of insecurity; parents complain that their children are not safe in the street; reports of kidnappings and violent crimes make headlines. The concern is especially acute in the Metropolitan Buenos Aires area. Headlines remark on how much more violent crime there is in the greater Buenos Aires. The Conurbano in general, and the *villas* in particular, are often presented as the source of much of this crime.

Ruth Stanley (2003) has done an extensive analysis of the rhetoric and politics surrounding the question of violent crime in Argentina. Her paper is replete with statements by elected leaders suggesting that the courts are ineffective in controlling crime, and that the only way to combat the “wave of insecurity” is to shoot those who are threatening society with anarchy. Ruckauf, governor of Buenos Aires province at the end of the 1990s, has come to symbolize this approach to law enforcement. He has repeatedly made public statements about the need to fight crime with blazing guns (his policing approach is often described as “*meta bala*”– give them bullets, or shoot ‘em up). Hugo Patti, a notorious police chief associated with kidnappings and torture during and after the last dictatorship, and Aldo Rico, the leader of a military rebellion during the first civilian administration, have capitalized on this concern to seek political office, at the municipal and provincial levels (Seligson 2002).

The *villas* play an important role in the popular imaginary as the locus and source of crime, and their inhabitants are portrayed as alien and criminalized (Stanley 2003). A statement from Ruckauf during the 1999 gubernatorial campaign highlights this perception:

It is necessary to enter into all the *villas* with all the [police] agents necessary to put an end to crime. The police are capable, it’s simply necessary to give them instructions and combat decisions. But let us give them the norms they need: we can’t have a situation where a policeman enters one of these places and kills someone and then some lawyer of the criminal appears and says it’s the policeman who is the murderer (Stanley 2003, quoting from Página 12, 8/5/1999).

The rhetoric suggests a war – and in war there is no due process. When the police kill inhabitants of shantytowns generally, or of criminals more narrowly, these acts are

repeatedly presented as the legitimate exercise of police powers in the course of open combat against crime.

Popular support for these “law and order” political figures extends to the use of violent and repressive police methods. In a poll taken in 1999, 5.7% were more or less in agreement, 44.9% were in agreement, and 4.6% were strongly in agreement when asked if there was a need to put bullets into criminals (“*meterle bala a los delincuentes*”)(El Cronista, 8/9/2000, cited in Stanley 2003).

This general political environment at times becomes quite focused on judicial and prosecutorial actions. In a northern suburb of Buenos Aires, for example, when the policeman who killed a minor was arrested, there was a demonstration in front of the prosecutors’ office demanding his release. When a judge sought to interrogate Patti in connection with the torture of two suspects, and Patti refused to obey the court order, the judge’s insistence prompted widespread popular demonstrations in support of Patti. Then-governor Duhalde later commended Patti as “the best police chief” in the country. Only rarely will a judge or prosecutor score political points by aggressively pursuing a case of police violence, and if anything, these attitudes have only hardened from the beginning of the 1990s to their end.

The failure of the most comprehensive effort at police reform is a concrete illustration of the lack of a fertile political context for restraining police violence (Ungar 2001). In 1996, after a series of police scandals and as an attempt to bolster his presidential bid, then-Governor Duhalde enacted a wide-ranging series of reforms. As “insecurity” became one of the leading issues in the 1999 gubernatorial elections the reforms came increasingly under question. During the course of the campaign, Ruckauf,

the eventual winner, and Patti both made statements graphically advocating the outright killing of criminals. Arslanian, the Minister of Justice and Security who designed and spearheaded the reform was forced to resign when even Duhalde backed away from supporting him. After winning the election, Ruckauf largely undid the reforms in response to public clamor for greater leeway for police action and a stronger hand against crime, and continued to call for a policy of “*meta bala*” – shoot ‘em up.

Importantly, social inequalities open up the political space for the continuation of repressive police practices and impunity. Increasing unemployment, urban migration and the presence of large, socially marginalized urban populations feeds the demand for more violent action on the part of the police. The *villas* and large numbers of poor unemployed urban males exteriorizes and localizes the problem of crime, magnifying the perceived threat and creating a large potential target for violent police action. At the same time, it permits society at large to define the victims as someone other than “*la gente*,” people like us. The discourse surrounding civil rights thus becomes a contest between “our” right to security, and “their” (the criminals who threaten “us”) right to due process (Stanley 2003). This is a contest with a predetermined outcome. The great social distances between the typical victims in these cases, and all the relevant actors – prosecutors, judges, even voters who might bring political pressure to bear – create an atmosphere in which high levels of violations and impunity can coexist with a democratic system and generous formal rights.

This is not to suggest that the question of police impunity can never gain political traction in Buenos Aires. The frequent disclosures that the police are behind notorious kidnappings and murders, or release state prisoners to go and rob for them, and periodic

events like police complicity in the murder of a young woman, occasionally galvanize public reaction. Smulovitz and Peruzzoti (2002) document this phenomenon, in which a community organizes to demand a response from the state, including the justice system. But this reaction has been more focused on perceived criminality and corruption in the police force than on due process and abuses in the course of policing operations. This distinction carries through to judicial outcomes, where Private Violence cases lead to twice as many convictions as Routine Policing cases.

The excessive use of force triggers a mainstream reaction only when the victim can be defined as one of “us” – that is, it requires an “innocent” victim or visibly criminal actions on the part of the police: The death in custody of Walter Bulacio, a high school student arrested at a concert, has prompted annual mass demonstrations, benefit concerts and the like. The killing of innocent bystanders can prompt a popular outcry – a schoolteacher in the Boca neighborhood of Buenos Aires in 2000, a music teacher in the northern suburbs of Buenos Aires in early 2001. The murder of three middle class youths in Floresta in late 2001 led to a neighborhood revolt. And the disappearance of two youths in La Plata in 1990 and 1993, all too reminiscent of the “dirty war” period that characterized the last dictatorship, prompted political and popular reactions that led to exhaustive forensic investigations and ultimately convictions. But the nearly daily killings and outright executions of marginalized youths do not cause an outcry.

More sustained political activity around this issue can be found in the peripheral areas of the city. Neighborhood groups and community activists in marginal neighborhoods around Buenos Aires repeatedly mobilize around individual cases they consider particularly egregious, focusing on the police station where the suspects work,

or the courthouse where the assigned judge is found. In my sample of cases, this sort of popular pressure is more likely in the blue-collar neighborhoods of the Conurbano, where 30% of the cases have prompted demonstrations of one kind or another. Only 13% of the cases in the CBA generate the same response. These demonstrations range from a group of friends and relatives around the courthouse doors at the time of trial, to neighborhood-wide marches on every anniversary of the death, organized mass demonstrations around the time of key judicial decisions, and traffic interruptions on major thoroughfares. The courts are, as we saw in Chapter 3, responsive to these demonstrations, and the marches and demonstrations suggest that people can occasionally mobilize to demand a response from the state.

In summary, police homicides are politically and socially construed as the response to violence and crime, and the victims are viewed as the casualties in an active war between the forces of crime and the forces of order. In turn, the population from which victims are drawn is at a relatively great distance from the state, both in terms of the socio-economic resources they can use to press individual claims, and the political resources they can use to press collectively for greater protection from state violence. They do have, and utilize, the power of popular mobilization to prompt results in individual cases, but there is not an organized movement with mainstream support for the strengthening of due process protections and increasing the restraint on police activities.

If anything, attempts to reform and restrain the police have foundered in the face of public demands for more effective policing – which is interpreted and presented by elected officials as a license to use “*mano dura*” or iron fisted methods of law enforcement. Electoral formulas advocating increased police use of lethal force are by far

more common and more successful than those advocating restraint in law enforcement and greater protections for crime suspects.

### **C. Connections between the legal system and the social context**

There are several channels for moving information from this hostile social and political environment to the legal system in these cases, including state and non-state entities. Foremost among the state entities are the police forces. Next in importance is the Prosecutors' office, which is also legally empowered to receive complaints directly. More secondary organizations in this respect are the *Defensor del Pueblo*, an ombudsman agency that takes complaints of police abuses along with any other complaints about state agencies, and possibly local and state legislators, principally through their Human Rights Commissions. Non-state agents include, most importantly, special-purpose collective actors such as CORREPI, COFAVI and the CELS,<sup>52</sup> and individual actors such as attorneys who take these cases on behalf of individual claimants.

#### **1. Police forces active in the Buenos Aires area**

As mentioned in Chapter 3, there are several state security agencies that operate in the Buenos Aires area: the federal and provincial police and various entities associated with the armed forces. The most important of these, in terms of number of agents, territory and population covered – and number of killings – is the Buenos Aires provincial police. *La Bonaerense*, as it is known, has a long and seamy history of corruption and violence (Dutil and Ragendorfer 1997). Attempts to reduce levels of

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<sup>52</sup> CORREPI is the Coordinadora contra la Represión Policial e Institucional, COFAVI is the Comisión de Familiares de Víctimas Indefensas de la Violencia Social, and the CELS is the Centro de Estudios Legales y Sociales.

criminality within the corporation by reforming it have, by and large, failed (Ungar 2001). The federal police force has a reputation for being both less corrupt and less violent. The information in my sample, however, suggests they both act similarly in generating or obscuring information about cases in which one of their colleagues is accused of homicide.

The discussion of Buenos Aires in Chapter 9 extensively documents police efforts to restrict access to information about these cases: The Buenos Aires provincial police threaten witnesses and lawyers, plant guns, rearrange the scene of the crime to simulate a shootout, and similarly corrupt the record in 73% of the cases in which one of their colleagues is a defendant. The number for the Federal Police is identical: there is some indication of tampering with the evidence in 73% of the cases involving a federal police officer. When the agency to which the defendant belongs is a different one than the agency conducting the investigation, the results are radically different. Of 20 cases involving off-duty police officers or other state agents providing private security services, only 20% show evidence of tampering. There are eleven cases involving the Buenos Aires penitentiary service, and in only one do advocates identify problems of tampering with the evidence. Only two cases of 12 involving the armed forces show this pattern, and those two took place on an army base, where the military obviously controls the premises. A joint project by CELS and Human Rights Watch extensively documents similar efforts at obstruction on the part of the federal and provincial police forces (CELS/HRW 1998).

It is clear, then, that the police are actively seeking to limit or slant the information that is produced and incorporated into the record. Social inequalities clear the



way for this activity. In Buenos Aires, 87% of cases in which the victim was a *villero* show evidence of tampering with the evidentiary record, for example, while only 72% of all others do (the chi2 for this two by two table is significant at the .032 level).

In addition, endogenous factors give the police considerable autonomy in this respect. As we saw in the discussion of the Code of Criminal Procedure, during most of the time period of this study the federal and provincial police were charged with both the law enforcement and judicial investigation functions. Thus the same organization to which the suspects belong is primarily responsible for gathering information about their alleged crime.

Even though the 1998 reform of the Buenos Aires provincial police separated the two functions, creating a special division of Judicial Investigations (Provincial Law No. 12,155, enacted 8-11-98), the new investigative police remain administratively within the original force, and prosecutors complain that they are not truly independent of their peers in the front lines. They are still subject to the same hierarchy in terms of discipline, promotion and compensation, the actual personnel comes directly from the law enforcement side, and they are often housed side by side with their law enforcement colleagues. Prosecutors have little influence over this investigative arm, which is supposed to be acting under its supervision and control, and they have no in-house investigative resources with which to generate their own information if the police resist or produce tainted information.

Judges are similarly indebted to the police. This very same police force carries out dozens of administrative functions for judges and prosecutors, especially at the *instrucción* or judicial investigative stage. A walk through any criminal court in the

Conurbano or the CBA shows uniformed police officers sitting at nearly every entry desk, answering phones, walking in and out of judicial chambers, delivering official papers, shepherding witnesses around, driving judges' cars and generally serving as the hands and feet of the courts during the process of *instrucción*. Witnesses who wish to describe incidents of police violence will find themselves, more often than not, doing so in the presence of a uniformed police officer, or at minimum with one standing just outside the door.

One lawyer described how, in the local prosecutors' office in Morón in the Greater Buenos Aires, police officers answer the phone, receive visitors at the door, and answer questions about the progress of the case, thus serving as the principal interface with complainants and their lawyers. To bring a witness into court to present his or her testimony, he said, he had to negotiate with the local police chief, essentially relying on his personal contacts with the police, and when that failed on threats of collective actions and media denunciations. Prosecutors, on the other hand, never leave their office, and so even though they are now technically in charge of the investigation, they are merely passive recipients of the information the police wish to produce.<sup>53</sup>

In summary, the principal official conduit into the legal system for information about claims is the same organization that is being investigated in these cases, and those who are supposed to supervise the investigation have little capacity to by-pass it. The reforms that transfer responsibility for the investigation to the prosecutor have not yet changed this.

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<sup>53</sup> Interview with Javier Merino, attorney, Matanza, on Nov.27, 2000.

Any exogenous pressures that could be brought to bear on the police have little chance to penetrate. The internal discipline of both police forces is calculated to produce strict obedience and hierarchical control. One of the most striking findings of a CELS/Human Rights Watch study is the extent to which internal disciplinary systems are used to enforce obedience and suppress dissent. There are no due process protections for police officers accused of relatively minor wrongdoings, and the few protections for those accused of more serious wrongs are not observed in practice.

In the Buenos Aires police it is a serious disciplinary infraction to anonymously report the wrongdoing of a superior officer, even if the accusation is subsequently found meritorious. Reporting such wrongdoing to outside entities such as the media or private individuals is punishable by up to 60 days in jail, a penalty that can be applied without any judicial proceeding by the offender's immediate supervisor. Reports suggest that informal practices in the federal police mirror these formal rules of the provincial police (CELS 1997:67). Internal criticism of police practices is drastically curtailed by these rules.

In addition, until 1997 the provincial internal discipline system included no provisions for receiving civilian complaints against the police. There are still none for complaints against the federal police. It is no surprise then, that this system is used primarily to enforce internal discipline and control, and that it appears to have little impact on the incidence of corruption, torture, murder or other abuses, especially among superior officers (CELS/HRW 1998:62-70), creating a militaristic internal discipline style (see, generally, CELS 1997:60-66). In a burst of misguided hyperbole, the head of the provincial police aptly summarized the overall tenor of internal discipline: in defending

the force from allegations that it continued to torture arrestees, he said he would not tolerate torture, and would personally shoot any torturers in the back (La Nación, 10/18/00, p.15). In short, “the disciplinary system makes it nearly impossible to report illicit acts that take place within the institution” (CELS 1997:65), thus ensuring that little information about internal police matters can escape.

External sanctioning mechanisms are also ineffective. The 1998 CELS report concludes that “despite including institutions especially designed to control police entities, the control that the executive power exercises is, in general, irrelevant” (CELS/HRW 1998:70). The federal police are completely outside the control of the government of the City of Buenos Aires, since they depend from the national government. And although the police are technically under the federal Interior Ministry, the national government exercises very little political control. In 1997 the Chief of Police expressed a principled objection to such control, on the grounds that it would permit political manipulation of police functions (id, p.71-72). The situation is somewhat different for the provincial police, which is subject to the Ministry of Justice and Security and was, in addition, placed under close civilian control (under a decree of *intervención*) in December of 1997. At the same time, its internal disciplinary system renders it opaque to outside oversight, so it is highly capable of resisting control. More importantly, even if there were a way there is no will. As discussed earlier, the provincial government appears quite uninterested in creating a less violent police force (Dutil and Ragendorfer 1997).

In short, in both the CBA and the Conurbano the courts are largely dependent on the police for carrying out the judicial investigation. The entity that carries out that investigation is, in practice, the same one that is charged with law enforcement activities,

and thus has a strong interest in ensuring that the way it conducts these activities is not too closely scrutinized. If individual police officers were motivated to report abuses of power, they would expose themselves to internal discipline and punishment, with little or no due process protections. There are no endogenous incentives, therefore, for the police to undertake active and aggressive investigations of incidents involving their own use of lethal force in the course of law enforcement activities.

Nor is there any outside check on this tendency. During the 1990s, political currents tended toward, not away from, the broader use of deadly force on the part of the police. Moreover, the more political agencies of control have neither their own investigative forces nor any serious disciplinary powers. At the *instrucción* level, in turn, judges and prosecutors must tread carefully in exercising control over the investigative process because they are dependent on the police not only for investigative services, but also for everyday administrative services. As a result, the police have a near monopoly on the supply of information about their own conduct, and oversight agencies have limited disciplinary capacity.

## **2. Non-state agents**

CORREPI (Coordinadora contra la Represión Policial e Institucional) is probably the most important actor in the metro Buenos Aires area for moving grievances about police homicides from the social arena – particularly from among the underprivileged – to the legal one. Not only has it defined this specific task as its mission, but also, as importantly, CORREPI has intake sites in the popular neighborhoods where many victims reside, and a formal connection to the system by which to deliver outputs into the

legal record itself. In essence, CORREPI serves as an uplink from marginal sectors of society directly into the *instrucción* and trial stages of the legal process.

CORREPI was created in 1992 as an association of relatives of victims of police violence. It includes a number of lawyers who take on cases of police abuse, offering legal assistance to those affected. They not only comb newspapers for information about cases that might otherwise go unexplored and unreported, they also contact relatives of victims offering both social and legal support. The organization holds regular meetings of relatives of victims to plan popular mobilizations, talk about the progress of legal actions, and offer encouragement and support. CORREPI has branches in such places as Matanza, just outside Buenos Aires – a populous and largely poor urban municipality – and among the poor sectors of the northern suburbs of Buenos Aires, like the Tigre area and the shantytowns beyond San Isidro, as well as in the interior of the province of Buenos Aires and in other provinces. Members and their contacts live in *villas* and poor neighborhoods. They have no shortage of experience dealing with the poor and the uneducated, and considerable credibility among them.

The lawyers involved do the sort of cause lawyering that the civil rights movement used in the United States. Recognizing the importance of both endogenous and exogenous factors, these lawyers are involved in everything from conducting a parallel investigation, to protecting witnesses, to organizing (and marching in) demonstrations, to speaking to the media. Between cases they work on educating people about their rights, present papers at human rights conferences, and carry out other public education functions. Their primary formal point of purchase in the legal system itself is the legal figure that is known as the *querellante* in the Argentine federal courts and the

*particular damnificado* in the provincial courts. A similar figure is the *Assistente do Ministério Público* configured in Art. 268 of the Brazilian Code of Criminal Procedure, more commonly referred to as the *Assistente de Acusação* in Brazil (for convenience, I will use the more descriptive term “Private Prosecutor” to refer to this entire class of legal constructs).

This figure allows persons directly harmed by the alleged crime to intervene in the prosecution, next to the state’s representative.<sup>54</sup> The specific attributes of the Private Prosecutor vary somewhat from place to place. Until late in the decade, in the province of Buenos Aires the Private Prosecutor was truly a secondary figure, dependent on the good will of the prosecutor and the judge. She could not seek a conviction, for example, if the prosecutor refused to do so; she could not independently introduce evidence that the prosecutor did not present; she could not ask for a sentence greater than what the prosecutor had requested.

Some of these limitations remain in place, but in 1998 the National Supreme Court ruled that it was unconstitutional to deny the *particular damnificado* the ability to request a conviction when the prosecutor would not do so (in the case known as *Caso Santillán*). This recent expansion of attributions brings the provincial *particular damnificado* much closer to the federal *querellante*. The latter has all the attributes of a state prosecutor, and gives the victim a much stronger voice in the proceedings. Even if the prosecutor argues in favor of an acquittal, the judge is required to rule on the *querella*’s request that the defendant be convicted.

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<sup>54</sup> There is nothing comparable to this in Anglo-American criminal procedure, though it is quite widespread in Latin America, present in all the countries with which I am familiar except Uruguay. The limited role accorded victims in the sentencing process or in crafting plea bargains in certain American states is the nearest approximation.

To return to the image of a cable uplink to the system: at one end of CORREPI is a broad and well-embedded network of social contacts in the milieu that is host to most of the instances of police violence – these contacts know the victims and their relatives, and they often know the police officers involved. That is, they are in an excellent position to know *o*. At the other end is a lawyer acting as Private Prosecutor, with standing to accuse, present evidence and demand a response from the legal system in legal language, arguing for the victim's version of *o'* and presenting legal arguments in favor of a stricter application of the law. The end result is an organization that can translate its knowledge of *o* into an *o'* that is congenial to the claimant and cognizable by the system, as well as advocate for application of a victim-friendly *r'*. CORREPI thus works on *o'* and *r'* from within the system, while at the same time mobilizing outside the system to create exogenous pressures in favor of a conviction.

In the final analysis, however, CORREPI must still persuade judges and prosecutors to adopt its views on *o'* and *r'*, if it hopes to be effective. Its ability to do so is limited by the suspicion with which it is often viewed by these two figures. As noted in the discussion of the actors' preferences, in those cases in which it is active CORREPI's position will come closest to the victim's preference for a conviction at all costs. In police cases, this will most often put CORREPI at odds with both judges and prosecutors. Moreover, its political activities, however important they might be, give the organization a strongly political coloring in the eyes of the other actors, including judges and prosecutors. Since the Argentine judiciary, and by extension, the prosecutorial corps, has an apolitical vision of the law, this tends to detract from CORREPI's credibility. Thus the



more “establishment” actors tend to view CORREPI’s actions as political and ideological, and will discount its contributions unless they are virtually incontestable.

There are other non-governmental organizations with similar missions, including the Centro de Estudios Legales y Sociales (CELS), CeProDH (Centro de Profesionales por los Derechos Humanos), the Public Interest Law Clinic of Palermo Law School, and COFAVI (Coalición de Familiares de Víctimas Indefensas de la Violencia Social). While many of these are important in educating the public and officials, and in shaping policy, it is CORREPI that intervenes in the vast majority of cases, and CORREPI is the one with the most direct impact on outcomes in particular cases.

#### **D. Prosecutors**

Many of the complaints by advocacy groups like CORREPI were directed at the prosecutors, in both the province of Buenos Aires and the CBA. In particular, in cases before the federal courts of the CBA, lawyers evaluated more negatively the performance of the *fiscal de instrucción* than that of the *fiscal de cámara* or the *fiscal de casación*. The former, in the federal courts of the CBA, is charged with supervising the *instrucción* stage, and preparing the file for trial. The latter two prosecute the cases at the oral trial on the basis of the file sent up by the *fiscal de instrucción*, and handle any appeals to the higher courts, respectively.

These results are consistent with the analysis in the introduction: endogenous pressures bearing on prosecutors at the *instrucción* stage, who depend on the police, cause them to be relatively uninterested in an aggressive prosecution of the police. While the procedural reforms should have reduced these endogenous pressures, the limited

practical effectiveness of the reforms has largely diluted their impact. And in Buenos Aires in the 1990s exogenous pressures if anything pulled in the opposite direction.

As noted earlier, the police act as the eyes, ears, hands and feet of the *fiscales* and judges working on the *instrucción*. The prosecutors at this stage are understaffed and dependent on the police for every aspect of their daily work. Thus it happens that, as one prosecutor put it, “if it does not exist in the file, it does not exist in the real world;” since the police are the ones who build the file, they largely determine what exists in the real world. The level of dependence is so acute that even judges at the *instrucción* level feel powerless to insist that the police take actions they do not wish to take. One of CORREPI’s lawyers described a case in the provincial courts in which they had, as Private Prosecutors, repeatedly requested a certain evidentiary measure from the judge who was carrying out the *instrucción*. After more than a year of CORREPI’s repeated demands, the judge’s secretary threw up his hands and said, essentially, “what do you want us to do? Our hands are tied. We’ve asked the police to do it several times, and they just won’t do it!”<sup>55</sup>

While the trial and appellate prosecutors who are more removed from the *instrucción* might be more interested in a strict application of the law, their dependence on information from below again hampers their actions. Trial prosecutors are completely dependent on the investigative prosecutors for the factual background on the case. Thus, in the absence of a second source of information such as the Private Prosecutor, they must simply work with the *o’* they inherit.

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<sup>55</sup> I should note that the judge’s secretary in these systems is less an administrative than a judicial officer, carrying out many judicial functions delegated by the judge.

They could, of course, treat these cases as exceptional and conduct their own investigation. But exogenous pressures from the prevailing political climate in the 1990s, readily absorbed by the structure of the Prosecutor's Office, made it unlikely that the *Ministerio Público* would regularly invest resources in this way. The head of each of the prosecutorial forces is a political appointee; and rank and file prosecutors are strongly beholden to the internal hierarchy for their career advancement and in their daily activities. Both of the organic laws that govern these institutions begin by stating the hierarchical nature of the organization, and that they are governed by the "principle of unity of action." Individual prosecutors are legally required to take direction from their superiors, even if their private legal judgment conflicts with those directives (Ley Orgánica del Ministerio Público de la Provincia de Buenos Aires (Ley 12,061), Art.31; Ley Orgánica del Ministerio Público de la Nación (Ley 24,946), Art.31). Thus prosecutors also face strong internal controls that tend to foster top-down policies and unified action by the prosecutor's office. In the prevailing political climate, the institution as a whole had no incentive to devote the additional resources that would have been needed to fully elucidate these cases in the face of police resistance.

In summary, given the lack of independent investigative resources and the strongly hierarchical organization of the *Ministerio Público*, federal and provincial *instrucción* prosecutors in Buenos Aires are vulnerable to (endogenous) pressures from the police and (exogenous) pressures channeled through their own hierarchy. Both of these forces tend toward a hands-off approach to police violence. The consequences are clear: when a case involving a fatal police shooting lands on a prosecutor's desk neatly packaged by the police report as a response to violent resistance by the victim, the default

position is simply to take that report as the basis for action. There is no reason in the ordinary case for the prosecutor or investigative judge to begin digging below the surface of the report in a search for inconsistencies in the evidence or gaps in the information. An overly skeptical attitude will ingratiate the prosecutor neither with her subordinates, her superiors, or the public. Nor, as we will see, does she face a strong demand from the judges in this respect.

### **E. Judges**

Assuming they decide to proceed, prosecutors must ultimately present their conclusions to a judge. The procedural reforms that affected the police and prosecutors have also changed the way the courts work, and have the potential to change the endogenous pressures to which judges are subject. Thus, as has already been discussed, in the provincial courts the Procedural Code contemplated an exclusively written process and entrusted the investigation to the judge until 1998, while this was no longer true in the federal courts after 1992. The change to a new system introduced a different dynamic, especially by bringing witnesses and the Private Prosecutor into direct contact with the judge at the trial. But practical control over the production of information remained with the police in both systems, and so the change did not go as far as its designers had hoped in terms of placing judges in contact with reality. In addition, both systems have seen important recent changes that have the potential to affect judges' sensitivity to the political climate. The reforms changed the manner of designation of judges, their discipline and removal, and their career paths. For the most part, however, the changes came too late to affect performance in the cases included in this study.

**Designation of judges.** The system that had been in place since 1853, when Argentina's original constitution was adopted, was identical in form to that of the United States. Federal judges at all levels were named by the President with the advice and consent of a majority of the Senate. As the system was applied, writes Virgolini, judges were selected on the basis of a "triple conformity criterion:" conformity to accepted jurisprudential norms, including those concerning the proper limits of judicial action, conformity to norms of professional behavior, especially those concerning respect for hierarchy and seniority, and conformity to norms of social behavior, emphasizing conservatism and abstention from public political debate (Virgolini 1988: 47-48). The Buenos Aires provincial system was essentially the same.

In an attempt to secure greater judicial independence, both systems made a transition from purely political appointments to selection by written contests, open to all who meet the formal qualifications, administered by a Judicial Council (*Consejo de la Magistratura*). Both the federal and provincial Councils are composed of a cross-section of political, judicial and society actors, and act in a more open and transparent way than the old system of discretionary appointments. Di Federico, for example, notes that the federal Council goes much further than any of its European counterparts in reducing the incidence of political considerations in judicial selections (Di Federico 1998). While Zaffaroni (1994:161-62) criticized the Council when it was in the proposal stage as merely a more fragmented political process rather than a truly merit-based one, in a personal interview he later conceded that it is the best hope for reducing the politicization of the courts (author interview, Buenos Aires, 9/21/00). Over time, we may expect that the lower courts in each of the systems will be much less politicized than they have been

to date (Ventura, Scoccia, and Arámburu 1999; Di Federico 1998; García Lema 1998). In both cases, however, the change came too late to affect many cases during the last decade.

The federal Council was contemplated already in the 1994 Constitutional Reforms, but implementing legislation did not pass the Congress until December 30, 1997, after an extensive campaign led by Poder Ciudadano and other civil society entities (Fundación para el Debido Proceso Legal 2002). By law, the Council sends the President a list of three nominees to fill judicial vacancies (for any positions below the Supreme Court), the President is required to choose from among those three, and the Senate must confirm that selection by a two-thirds majority (Ventura, Scoccia, and Arámburu 1999). By December of 2000, however – six years after the Constitution called for its creation – the Council had sent the President only 7 lists from which to select judges for appointments to 10 positions (out of a total of over 100 vacancies). While it has done much more since then, clearly its work did not affect the performance of the courts during the time period of this study.

In the Buenos Aires provincial system, a 1994 Constitutional reform also called for the creation of a Judicial Council, setting a maximum deadline of two years during which the old appointment system could continue. The Council was duly created in 1996 by Law No.11,868. Nevertheless, not enough judges had been named under the new system by the end of the decade to effect a significant change in the composition of the provincial judiciary.

**Disciplinary system:** Before the reform, judicial discipline for minor matters in both the federal and provincial systems was formally entrusted to the higher courts (the

courts of appeal for trial judges, or the Supreme Court for appellate ones), and removal was by the typical bi-cameral impeachment process. But in practice formal methods were almost never used (García Lema 1998: 83). Courts of appeal were reluctant to publicly sanction other judges, and the cumbersome nature of the impeachment process meant that it was rarely carried out to a conclusion – though complaints were lodged with some frequency. The mechanisms actually used for discipline and control were more informal. Zaffaroni, for example, details the historical pattern of total or partial removal of judges that accompanied changes of power from civilian to military administrations and back again (Zaffaroni 1994: 272). He notes that this subjection to political authority led to a pattern of judges who were “aseptic and without commitment,” arguing that judicial plasticity to political demands was enforced by partisan pressure applied to the highest judges, who in turn exercised internal discipline to secure compliance by trial judges.

In the province of Buenos Aires, responsibility for discipline over lower level judges has now been handed over to a specialized *ad hoc* jury, consisting of the president of the provincial Supreme Court, and five practicing attorneys and five legislators chosen by lot (Constitution of the Prov. of Buenos Aires, Art.182). The new jury takes the disciplinary process in serious matters away from the judicial hierarchy. Similarly, in the federal system, a division of the Judicial Council is now responsible for disciplining judges, though through the end of 2000 it had failed to institute proceedings in more than a handful of notorious corruption cases. In recent years, it appears that appellate judges have responded to their new lack of disciplinary control over lower level judges by publicly chastising them – writing highly critical opinions reversing lower court judgments and releasing them to the press. Commentators note that these open criticisms

are unprecedented. In any event, it appears that for most of the period of interest, judges at the highest levels were open to political manipulation, and judges at lower levels were subject to informal, internal top-down controls.

**Judicial career:** Moreover, until the constitutional reforms became effective, there was no formalized judicial career in either system, and any ascent – from the trial courts to the courts of appeals, or from there to the Supreme Court – required a new political appointment. As a result, even though the judges had tenure security, if they wished to advance their careers they had to continue pleasing the political powers. In short, the appointment, discipline and advancement process, for both of the systems and for most of the time under consideration, was unabashedly political. The new system, in contrast, sets up a merit-based appointment and advancement procedure, but by the end of 2000 it was still too soon to evaluate what effect this might have on actual judicial conduct in the sorts of cases at issue here.

There is considerable consensus on the consequences of this institutional configuration. Most would agree that, with notable exceptions, both provincial and federal judges were politicized in the partisan sense of the term. Paradoxically, this politicization was expressed in an expressly apolitical rhetoric, and a withdrawal from making “political” decisions. The result was, of course, that the Executive, whether constitutional or *de facto*, was afforded a great deal of discretion. Helmke (2002) finds that the National Supreme Court is highly sensitive to dominant political players. Vega (1998) offers a rich historical account of Argentine courts’ compliance with *de facto* governments.



The opinions of attorneys who use the system match these scholarly findings. In 1997, when the new appointment system was not yet under way, lawyers' opinions about the judicial appointment process and its results were abysmal, especially for the provincial judges of the *Conurbano*. Fucito, a sociologist who carried out extensive in-depth lawyer interviews and a survey on this issue, reports that lawyers used the following adjectives to describe the system and the judges it produced: "favoritism, farcical system, arbitrariness, by personal reference, political stamp, party affiliation, personal ties, and political loyalty as a result" (Fucito 1997: 1585, 1586).<sup>56</sup> In a survey that formed the other half of his research project, Fucito found that 51% of lawyers disagree that judges have sufficient legal knowledge ("*conocimiento jurídico*"), and 10% had no opinion on the question (Fucito 1999b: 1039).

According to Fucito, lawyers' opinions of the federal judges of the CBA were slightly better, but not by much. Federal trial court judges became infamous in the 1990s after President Menem expanded their numbers to meet the needs of the new oral procedures, appointing dozens of politically loyal judges. These judges became known as the "*jueces de la servilleta*" or napkin judges, after Carlos Corach, the Minister of the Interior, scoffed at the threat of judicial action against the Menem administration, allegedly penning on a café napkin a long list of judges on which the administration could unconditionally rely. The list of anecdotes in which both higher and lower court judges engaged in blatant political favoritism is endless. We might expect the judiciary, then, to be sensitive to prevailing political winds even in such relatively low-profile cases

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<sup>56</sup> Fucito simply transcribes representative adjectives used in responses, listing "acomodo, sistema farcesco, discrecionalidad, recomendación, cuña política, camiseta partidaria, vinculaciones, y lealtad política como resultado."

as the run of the mill police violence case.<sup>57</sup> In the cases in my sample there is also evidence of this sensitivity in the response, discussed in Chapter 3, to popular demonstrations and political intervention.

In addition to their responsiveness to exogenous pressures, the courts' informational dependence opens them up to endogenous pressures. Fucito's survey asked lawyers to agree or disagree with the statement that judges are out of touch with reality in deciding cases. Fully 65% of lawyers agreed with this statement (and 15% expressed no opinion). Only 28% disagreed (Fucito 1999b: 1040). For the earlier part of the decade, this should come as no surprise. The written procedure reduced the complexities of oral testimony to a few summary sentences. Moreover, even though the Code specified that the judge must preside over the questioning of witnesses, and even though reports officially note that the judge was indeed presiding over them, in practice this was almost never true, since judges simply delegated this function to staff members. Thus the judges using the written system decided cases on the basis of the recommendations of their staff, backed only by brief summaries of testimony produced by the same staff.

This arrangement set up a double information-filtering system. For most of the decade in the provincial courts, and for the fewer cases tried under the old code in federal court, the testimony on which a decision was based was first filtered by the police, who determined which witnesses would be brought into court for questioning, and then by judicial staff, who decided what was worth recording and preserving – and as

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<sup>57</sup> I should note that although the legislature exercised the disciplinary power over judges through an impeachment procedure, this procedure was seldom used and does not appear to pose a credible threat. Thus a judge could, if so inclined, carve out a politically independent path, and there is no shortage of statements indicating that one judge or another is acting independently. The context just provided marks a general tendency, but there are, of course exceptions.

importantly, what was not. As a result of these filters, the production of *o'* tended toward a monolithic rather than a nuanced and controverted view of the events, and in police cases was biased in the direction of the police version. There were few checks to this bias: prosecutors, for the reasons discussed above, were unlikely to press for the inclusion of additional material that contradicted the official police version; and the courts were heavily indebted to the police for assistance in all aspects of their daily functioning. Moreover, as noted in the discussion of the effectiveness of the 1992 federal procedural reform, actual practices changed little with implementation of the new Code. The investigation continues to be the province of the police, and courts continue to look for the real world *within* the four corners of the *expediente*.

There are other features of the judicial system in the province of Buenos Aires and the CBA that augment judges' informational dependence on the police. Judges at the *instrucción* level are among the busiest in the judicial system. One investigative judge complained that she received more than 4,000 new cases every year, so that most of the cases were destined to remain unresolved, unless the case entered with a relatively complete police file detailing the circumstances of the alleged offense. This judge is in the federal Correctional courts of the CBA, which investigate and try crimes punished by less than three years imprisonment (of the cases in this study, only those in which the police officer is charged with negligent homicide fall in this category). From 1993, the year the new CPPN came into effect, to 2000, the annual number of new cases per judge in this system fluctuated between approximately 6,700 and about 5,200 (Portal de la Justicia Argentina 2003). Of these, only about half of one percent end with a conviction and sentence (FORES and Colegio de Abogados de Buenos Aires 1999b: 150-51). The

rest are archived (that is, put on semi-permanent hold) or otherwise dismissed without a hearing.<sup>58</sup>

The investigative courts that deal with more serious crimes are also overworked, though to a lesser degree. The number of new cases per judge in the *Fuero Penal de Instrucción* doubled between 1993 and 2000, from 1,366 to 2,772 (statistics from Portal de la Justicia Argentina 2003). The judges, like the prosecutors, do not have the staff that would be required to handle 2,000 new cases a year in anything but a routinized, mechanical fashion. Clearly they are not up to conducting an independent investigation when, every so often, they are presented with a case in which a police officer is accused of homicide.

Judicial delays also disadvantage the victims of police violence. Many have remarked on the slowness of the judiciary in Buenos Aires in the typical criminal case, attributing it to inefficiency (FORES and Colegio de Abogados de Buenos Aires 1999b) or overwork (García Lema 1998: 72). But police cases are even more than typically slow. Under current rules – for obvious and good reasons – cases in which the defendant is jailed pending trial get top priority on the judicial calendar. Police officers, however, are usually released because they are charged with lesser offenses, such as an excess of self-defense or negligent homicide, or are first offenders, not deemed a threat to the community, and not considered a flight risk. In my cases, 76% of police officers with cases pending in the provincial courts and 90% of CBA defendants awaited their trial in

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<sup>58</sup> These numbers might suggest a complete abdication of the judicial function, but a vast proportion of these cases are the kind of truly minor matters that do not generate substantive judicial decisions in any system – neighbor conflicts, petty property crime, etc. Often the threat of judicial action is enough to resolve the conflict without an actual decision by the courts.

freedom. This is drastically different than the norm for civilian accused murderers, who are routinely held pending trial, according to lawyers in Argentina.

As a result of this special treatment, police cases are placed on the less urgent track. More importantly, the fact that the defendant is free creates a strong incentive for engaging in what is popularly known in Argentina as *la chicana* – the use of procedural tricks to delay adjudication. These tricks include appealing every adverse decision, filing requests of all sorts in order to appeal the denials, delaying witness interviews and opposing evidentiary requests, and requesting far off dates for every appearance. Delays in the provincial Buenos Aires cases in my sample range from a few days for cases that are dismissed immediately, to nearly 9 years, with an average of just over three years. Among cases that went to trial, the average delay rises to more than 4 years. These figures do not take into consideration post-trial appeals, which add approximately 2 more years before the decision is final. The courts of the CBA show slightly lesser delays, ranging from about one month to over seven years, for a mean delay of two years. But the lower average reflects primarily a larger number of cases summarily dismissed before trial, as the mean delay to trial is also just over 4 years.

Delay contributes to the loss of independent information, since by the time the trial courts begin to look at a file, the facts are likely to be several years old, and it becomes increasingly difficult to challenge the official version preserved in the police report. Finally, the impact of delay can be expected to be greatest for the disadvantaged population from which the average victim is drawn. The lack of steady employment or a fixed address, and other informalities of the truly marginal population, means that witnesses and complainants are more likely to disappear by the time a trial is finally

scheduled. The results are apparent. Convictions are most likely among my sampled cases in the mid-range of delay: a substantial number of cases are dismissed outright at the very beginning, then there is an increase in successful prosecutions, and at the tail end of the distribution nearly all the cases end in acquittals. A logistic regression predicting conviction using only the length of time a case has been pending and a squared and cubed term results in a bell-shaped probability curve.

The main difference in the informational dependence of judges from the beginning to the end of the decade is that in both jurisdictions the Private Prosecutor can now insist on the inclusion of additional materials in the file, and on calling witnesses at an oral trial. One of the important sources of new information at the trial stage is the result of an oral, adversarial trial procedure. The decision maker is afforded the opportunity to observe the demeanor of the witnesses and to see their testimony tested in cross-examination. Thus the action of the Private Prosecutor at trial adds a second stream of information that is not filtered by the police and is independent of the pressures brought to bear on Prosecutors. Judges can use this information to begin to second-guess the version of *o'* presented by the police and prosecutors. Unfortunately, the typical delays in these cases mean that memories have faded and witnesses are often reduced to confirming whatever their recorded testimony reflects.

Perhaps the strongest evidence of judicial informational dependence and the consequent autonomy of the police comes from my sample of cases. As discussed earlier, there is ample documentation of a pattern of obstruction and manipulation of the process on the part of the police. All the watchdog groups have raised the issue: CORREPI, CELS and others have made it a constant refrain; the Supreme Court of the province of

Buenos Aires remarked on the police's use of violence to silence youths who complained of ill treatment; and the papers occasionally report on the problem. My database includes cases relating to 172 victims in the province of Buenos Aires and another 41 in the CBA. In three quarters of these cases there is some indication of tampering with the record. And yet only seven persons have been prosecuted for covering up or obstructing the investigation in connection with these 213 homicides.

#### **F. Summary**

It should be evident by now that the low effectiveness of the courts in Buenos Aires in these cases is somewhat over-determined. The police have the inclination and the capacity to hamper investigations into these crimes. Judges and prosecutors are sensitive to a political climate that has been generally hostile to the prosecution of police violence cases, except in high profile cases with sympathetic victims. Even when they wish to act more aggressively, judicial actors depend on a single functional state-sponsored channel for introducing information into the legal system – the police. This permits the police to strictly control the information that is produced in cases that affect it directly, and limits the capacity of other legal actors to monitor its activities (both the underlying illegal acts and the obstruction of investigations). The social position of the typical victims and their distance from the state makes it difficult for them, on their own, to make effective use of alternative state-sponsored investigative arms of the justice system (prosecutors and investigative judges), who are largely passive and remote. It also makes it difficult for victim groups to create exogenous pressures that could counteract the general tendency favoring violent police action.

Since even those judges and prosecutors who might want to be more effective in these cases are hampered by their limited independent investigative capacity, much of what effectiveness there is can be attributed to private efforts and to strong political pressures in targeted cases. The crucial figure here is the Private Prosecutor, who is empowered to intervene directly in a prosecution on behalf of affected parties. The results of the quantitative analysis in Chapter 3 strongly confirm this conclusion: in either the province of Buenos Aires or the CBA, convictions are nearly non-existent in cases in which a Private Prosecutor did not participate on behalf of the victim's relatives. In a simple bivariate analysis the difference between having a Private Prosecutor or not is more important (substantively and in terms of statistical significance) in the CBA (32% conviction rate vs. 0%) than in the province (23% vs. 9%), suggesting that the greater attributes of the *querellante* in the CBA over the provincial *particular damnificado* make a real difference in the outcomes.<sup>59</sup>

The Private Prosecutor is normally a privately paid attorney, and so depends on the personal initiative and resources of an interested party. This of course creates special difficulties for the disadvantaged who are the typical claimants in these cases. But certain collective actors have emerged that connect the marginalized with the legal system by bridging social distances and translating grievances into legal claims. CORREPI, the principal NGO acting in this capacity, has an ideological bias in favor of the marginalized classes, and offsets their economic disadvantages in a large number of cases in the sample, so that aggregate outcomes appear less responsive to socio-economic variables

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<sup>59</sup> Interestingly, this figure is nearly identical to the conviction rate in São Paulo in cases in which a Private Prosecutor is involved. Despite starting at a much lower level, the conviction rate rises to 35% in those cases.



than would otherwise be the case. Beyond this, occasionally social and political pressures in notorious cases will prompt a greater investment of resources by judges and prosecutors, though even in these cases they struggle to overcome informational gaps. Overall, however, exogenous pressures keep the conviction rate low. Regardless of access to information in the particular case, judges' sensitivity to persistent political hostility to these cases, and to the police's demands for freedom of action, leads them to apply a lenient standard.

In short, over the course of the decade and within the same general geographic area these cases have encountered radical differences in institutional design. And yet these differences have had a negligible impact on actual outcomes, which remained uniformly poor across the various institutional variations. This result can be attributed to two things that remained constant in the Buenos Aires system during the entire period of the study: the dominant role of the police in the production of information, which maintained strong endogenous pressures toward acquittal in these cases; and an unfavorable political context, which created exogenous pressures in the same direction and limited institutional innovation that might have addressed the court's informational dependence on the police in these cases. As a consequence, the direction of endogenous and exogenous pressures and the line up of ideal points did not change as much as was hoped with the procedural and institutional reforms, but remains as shown in

Figure 4.1:

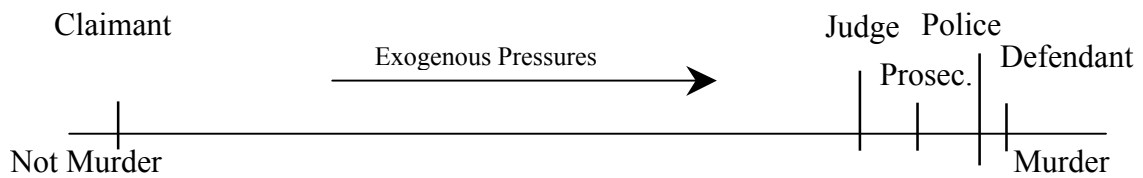


FIGURE 4.1: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN BUENOS AIRES

The result is the system's two-fold failure, laid out in detail in Chapter 9: The police ensure, insofar as they are able, that  $o'$  is shifted as far as possible in an exculpatory direction, because the openness of judges to pressure in individual cases makes them unpredictable. Meanwhile prosecutors' and judges' preferred version of the norm,  $r'$ , is on average shifted far to the right, exempting more behavior from punishment, except in cases subject to pressure. The combination carves out ample space for impunity.

At the same time, claimants have sufficient resources, at times with the help of NGOs, so that an  $o'$  that would support a conviction is in many cases within reach of the system. And  $r'$  is not so far shifted that it will permit any behavior by the police – when  $o'$  configures a sufficiently egregious violation the courts will convict. Thus we might represent the typical location of  $o'$  and  $r'$  in these cases as in Figure 4.2, with the proviso that in cases that trigger some interest,  $r'$  is shifted back to the left, and in cases that involve a private prosecutor,  $o'$  is shifted right.

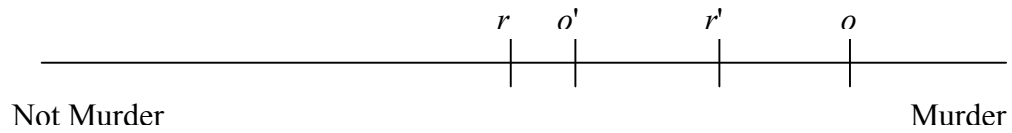


FIGURE 4.2: TYPICAL SHIFTING OF  $R'$  AND  $O'$  IN BUENOS AIRES COURTS

The double vulnerability of the system produces the low effectiveness and low inequality measured in Chapter 3: Buenos Aires claimants face relatively low levels of effectiveness that can often be attributed to a mischaracterization of  $o$  by the police. Vigorous individual efforts can at least partially redress this mischaracterization by crafting a more inculpatory  $o'$ , but have only limited success in changing the outcome because judges and prosecutors apply lenient standards in judging the actions of the police – except in cases that acquire political prominence.

The system's dependence on non-state action produces a tendency toward inequality that is masked by two separate factors: 1) lenient standards are applied on the basis of political factors that are not directly correlated with socio-economic inequality, but rather have to do with the socio-political construction of the case, and 2) the most effective civil society actors – CORREPI and a few others – participating directly in the process have a preferential option for the underprivileged and tend to equalize the latter's effectiveness with those of other private participants.

## CHAPTER 5

### SÃO PAULO – NORMATIVE AUTONOMY, UNEQUAL CONTEXT

*Então! Olhe pra você e lembre dos irmãos!  
Com o sangue espalhado, fizeram muitas notícias!  
Mortos da mão da polícia, fuzilados de bruços no chão.  
Me causa raiva e indignação  
A sua indiferença quanto à nossa destruição!*

\* \* \*

*Se eu fosse mágico?  
Não existia droga, nem fome, nem polícia.  
Júri Racional; Mágico de Oz. Racionais MC's.*

Brazilian rap artists Racionais MC's sing of society's indifference to the memory of brothers shot by the police as they kneel on the ground. They put the police squarely in the trio of ills they would eliminate if they had magical powers: no more drugs, no more hunger, no more police.

São Paulo presents a clear challenge to the notion that democracy necessarily comes all of a piece. Here, political rights are alive and vibrant, and yet the police are, largely to the indifference of the general public, largely above the law, violating some of the main tenets of democracy: that no one is *de legibus solutus* (O'Donnell 2001a), and that fundamental civil rights are respected (Mainwaring, Brinks, and Pérez-Liñán 2001). The absolute number of homicides attributed to the police in São Paulo vastly exceeds that of any other city – to the best of my knowledge, anywhere in the world. From 1990 through 2000 the police acknowledged killing no fewer than 7500 people in the state of São Paulo.

The threat of a violent death at the hands of the police is a constant presence for many of the marginal youths, especially around the capital of the state. A popular Brazilian saying goes, “*Não deve, não teme, mas corre da PM*” – “Owes nothing, fears nothing, but runs from the military police.” For these youths, fear of the state and its agents is as strong today as it might have been at any time during the military dictatorship. A book by journalist Caco Barcellos (Barcellos 1992) vividly brings that fear to life in dramatic recreations of some of the most notorious killings committed by the police. That fear is undiminished by the illusory promise of protection offered by the law. As a result, it is crucial that we understand what drives the high levels of impunity documented for São Paulo in Chapter 3.

As in the discussion of Buenos Aires, in this section I will focus on the endogenous and exogenous factors that produce existing levels of informational dependence and normative control at the various levels of the São Paulo justice system. The dominant endogenous characteristic is the complete control over the supply of information to prosecutors, judges and juries exercised by the Military Police in the cases that affect its own agents, and by the Civil Police in the (few) cases that affect its officers. The socio-political context is overall supportive of harsh and immediate police repression, opening up the necessary political space for a passive approach to these cases by prosecutors and judges. Exogenous factors channeled through career incentives trend away from a more aggressive stance, which might otherwise allow them to generate some of their own information and oversee police conduct more effectively.

The judicial apparatus is well designed to produce an independent and technically qualified judiciary, though judges appear little interested in police homicides. The

prosecutorial corps is also well qualified, and has been extremely active in promoting other social issues, but is almost completely silent on the matter of police violence – especially in cases involving victims tainted by a connection to crime. The generally passive approach of the judiciary and prosecutorial forces, combined with the radical marginalization of the targeted population, leaves the military police with a stranglehold on the flow of information about police homicides up into the legal system. In fact, the dearth of information is such that even judges and prosecutors who might otherwise be vigorous advocates for the victims are left with the impression that no rights have been violated, and hence struggle very little to deepen the investigation.

The same lack of information and the overwhelming concern with violent crime accounts for the apathy with which the politically relevant population looks at these cases. And in contrast with Argentina, the most likely victims are also the least likely to mobilize in favor of a stricter application of the law to the police. The population that is most likely to find its young men among the victims lives under the constant fear of crime, and shows a high level of support for draconian police methods. The result is continuing and tolerated impunity, with no more than sporadic political impetus for changes that might address the problem more effectively.

#### **A. Code of Criminal Procedure**

Prior to the Lei Bicudo, in 1996, any crimes committed by Military Police officers and punishable under the Military Criminal Code (which essentially mirrors the ordinary Criminal Code and adds a series of infractions related exclusively to military discipline) were the exclusive concern of the military justice system. Under this system, a police officer accused of a crime faced first an investigation carried out by the Military Police,

the *Inquérito Policial Militar* or IPM. The investigating officer would turn over the IPM report (also known as the IPM) to the *Promotoria Militar*, or Military Prosecutors, who would carry out the pre-trial investigation or *instrução*, and then take the case to trial before a military tribunal. In São Paulo this tribunal was made up of two Military Police officers who outranked the defendant plus one civilian judge from the military justice system. This tribunal represented a blend of lay and professional justice, and acted more as an internal discipline system than as a true judiciary. Complaints about this system are universal. They include extensive delays, as one judge after another requested extensions of time for hearings and other functions, and an overt emphasis on internal discipline over human rights concerns.

Enactment of the *Lei Bicudo* changed only the judicial aspects of this process, leaving the investigation in the hands of the Military Police. Moreover, it transferred responsibility to civilian courts only for intentional crimes against life (“*crimes dolosos contra a vida*”), including torture and other attacks to physical integrity short of murder, but not including less serious abuses of authority or negligent acts, including negligent homicide (*homicídio culposo*).<sup>60</sup> As a result, the *inquérito* or initial investigation is still done primarily by the Military Police, which has 60 days to turn in a report to the relevant prosecutor, though in practice the report is often late. The Civil Police can also produce their own *Inquérito Policial* (IP) if they somehow learn of the allegations, and believe that a civilian crime has occurred. In fact, in most of my cases there was both an IPM and an IP. But typically the Civil Police intervene only when the Military Police claim that

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<sup>60</sup>The original proposal presented by Representative Bicudo was much broader, but the strong lobby of the Military Police (with the support of many state governors) reduced it to this narrower scope.

the victim committed a crime. Thus, the Civil Police IP is generally focused on the victim's alleged crime – resisting arrest, theft, robbery, for example – while the IPM focuses on the actions of the military police.

In the event the IPM or the IP suggest that an intentional crime against life may have occurred, the case enters the civilian jury system. The IPM and IP are filed with the courts and with the civilian prosecutor, and the *instrução* stage begins.<sup>61</sup> The *instrução* stage is under the supervision of the trial judge, who evaluates the evidentiary and other requests made by both parties and determines what is appropriate. The judge also has the authority to ask for additional proofs, acting in this sense a little more like the traditional inquisitorial judges of the Civil Law systems than like a common law jury trial judge. The *instrução* stage can result in one of three outcomes: the prosecutor can seek, and the judge order, the dismissal of the case (*arquivamento*), the judge can summarily acquit the defendant (*absolvição sumária*), or the judge can set the case for trial (*pronúncia*). The first two are both decisions to drop the prosecution, though the first, technically, does not bar a re-prosecution, while the second would invoke “double jeopardy” protection against a second attempt to prosecute the same defendant for the same crime.

At this stage, as in Buenos Aires, it is primarily the prosecutor who takes the initiative in seeking to push the case toward a trial or pre-trial dismissal, though the judge must make the final decision. The prosecutor may limit her review to the facts alleged in the IPM and act solely on the basis of this report, or bring in the witnesses identified

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<sup>61</sup> In practice, judges note that the Military Justice system often retains the IPM long after it is supposed to be turned over to the Tribunal do Júri. And the IP is labeled with the lesser crime of the victim, and therefore does not go to the Tribunal do Júri either, but to the courts that have jurisdiction over robbery, resisting arrest and the like. As a result, the prosecutors and judges who are supposed to deal with police homicides often do not receive the file until months after they should have.



therein for further questioning, order additional forensic tests, conduct her own investigation, or send the whole report back for more investigation by the Military Police. Both prosecutors and defense attorneys can ask for the inclusion of additional information in the file, and can call witnesses to testify. As mentioned, the judge can do the same. Witnesses are questioned in the judge's offices, and the resulting testimony summarized and set down by a judicial clerk or secretary. Documents and the results of forensic tests are also incorporated into the *expediente*.

At the end of the investigation, the prosecutor must file something like a formal indictment (the *denuncia*), requesting that the judge set the case for trial. The judge must then evaluate the contents of the file for sufficient evidence that the defendant has committed the crime with which he is charged. If so, the judge will file a *pronuncia*, setting the case for trial. If the judge believes the proofs are insufficient she may refuse to set the case for trial (*impronuncia*). If this is because in her view the allegations describe merely a crime of negligence, for example, the case would be remitted to the appropriate court for further processing; alternatively, the judge may order additional proofs before making a final decision or simply dismiss the case.

Although the trial itself assembles all the characters with which most readers will be familiar – prosecutor, defense attorney, judge and jury – the way it is conducted only vaguely resembles U.S. jury trials. The attorneys have a great deal of leeway both in the scope and the manner in which evidence is presented. As in Argentina, even though the trial is indeed conducted orally, not all the witnesses are actually present and much of the testimony is incorporated by reading (or, even more remotely, describing from memory, with a citation to the appropriate file entry) what was said during the pre-trial

investigation. Moreover, attorneys typically use broad arguments about violence and crime and the character of the defendant. One prosecutor told me that he likes jury trials precisely for this reason: “juries judge the person as a whole, not just the narrow circumstances of the case.”<sup>62</sup> In contrast with the greater protagonism of the judge at the pre-trial stage, during the trial itself the judge plays a very passive role.

The trial is very condensed. Trials usually do not last longer than a few hours, and run without major interruptions until their conclusion; it is extremely rare for a trial to be continued from one day to the next. As a result, trials often end late in the night – in one of my cases, the jury was finally dismissed after three o’clock in the morning. When I mentioned this to a prosecutor, he suggested this was not unusual. While there is no systematic information on this, it appears that at least as much time is devoted to the arguments of the attorneys as to actual witnesses. According to a standard commentary on the Code of Criminal Procedure, the prosecutor and defense get a total of two and a half hours each for closing arguments and rebuttals (Renó do Prado and Mascari Bonilha 2000: 234). For trials that may not last longer than six or seven or at most ten hours, this is a vast amount of time, showing the relative importance assigned to information that has been pre-processed by legal professionals versus the unadorned testimony of witnesses or documents.

At the end of the trial, the jury, the judge and the attorneys all go into the jury room. There, the judge presents the jury with narrowly drafted questions that will determine the outcome of the case. The jury votes by secretly placing small Yes or No cards in a basket. No deliberation is allowed. Indeed, in contrast to the common law’s

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<sup>62</sup> Interview with prosecutor Norberto Joia, April 16, 2001.

tradition of juror deliberation, it is the height of misconduct and cause for a mistrial for one juror to make his or her voting intentions known or attempt to persuade another juror. The questions move from the more general (“did a death occur”) to the more specific (“did this defendant cause the death”), gradually guiding the process toward the final outcome. The results of each round are announced before the next round, so that the decision is built piece-meal, without deliberation but with information about the previous decisions made by fellow jurors. Like the secret ballot box, the voting method does not require jurors to identify, explain or justify their decisions, giving them full freedom to act on their individual judgments about the case – and on their prejudices and preconceptions. Compared to the broad-ranging debate and presentation of information at the trial, the questions are designed to focus attention very narrowly on the elements of the crime, though the legal language often includes terms like “reasonable” or “excess of legitimate defense,” which are intrinsically open to individual, subjective construction.

In addition to questions relating to guilt or innocence, the jury votes on questions that establish what the sentence will be, within the range established by law, deciding on the presence or absence of attenuating or aggravating factors. Once the jury has answered all the questions, the judge mechanically assigns a sentence on the basis of the jury’s decision by applying the rules to the answers given by the jury. Simple homicide carries a penalty of 6 to 20 years, while aggravated homicide (*homicidio qualificado*) can carry a penalty of 12 to 30 years, depending on sentencing factors. Thus, once the case is set for trial, the judge is almost completely uninvolved in the decision-making process. Prosecutors and defense attorneys manage the information presented almost without judicial interference, and the jury votes yes or no.

In 2001 I attended a murder trial that typifies many of the less objective characteristics of a trial in São Paulo's jury system. The emphasis from the opening of the trial was largely on the wave of violence afflicting society, with both the prosecutor and defense attorney making broad appeals to the social context of the crime, and emphasizing the jury's responsibility to care about the larger social questions, rather than focusing narrowly on the guilt or innocence of the accused. Even when the focus was on the accused, the inquiry ranged broadly over his character, prior conduct, and possible other criminality rather than, again, focusing narrowly on his guilt or innocence of the specific crime charged. Most shocking to U.S.-trained lawyers, the prosecutor relied heavily on the argument that the defendant was a drug dealer and had committed other crimes that had not been or could not be proven (and of which no evidence at all was presented). She emphasized the lawlessness of the *favela* where the crime occurred.

Most of the information presented at this trial was not live. Only one of the fact witnesses appeared in person to testify. The accused took the stand to give his own version of the story – though under the Brazilian privilege against self-incrimination he was exempt from swearing to tell the truth, and was not required to submit to cross-examination. The testimony of the remaining witnesses was incorporated directly by the attorneys, who simply described from memory what had been uncovered in the course of the *instrução*. In their closing arguments, attorneys made copious reference to witnesses that did not testify but had been questioned earlier in the judicial process. The prosecutor dwelled at length on what she said was discovered in the investigation of a different crime that may have involved the same defendant. The judge never interfered with the attorneys' presentation of information to the jury. In fact, in the middle of final arguments

the judge simply left the bench for more than half an hour while the attorneys continued to argue their case. The arguments lasted at least as long as the presentation of evidence.

## **B. Social context**

### **1. Socio-economic context**

São Paulo, like Buenos Aires, is the largest and most economically significant city in the country. Like Buenos Aires, but more so, it is marked by economic extremes, within a country already signed by inequality. Brazil is one of the most unequal countries in the world. In a recent study based on 1993 figures, Brazil ranks third in inequality among a sample of 119 countries worldwide (Milanovic and Yitzhaki 2001). And Metro São Paulo, despite its wealth, includes large *favelas* or shantytowns. To present a picture of the affected population and the overall socio-economic context for the cases of interest to us here, I will first describe the victim population and then present more general indicators of the context from which they are taken.

One of the clearest findings in my sample is how strictly selective the São Paulo police are in targeting lower class victims, while the middle class has almost nothing to fear. Out of 196 cases pertaining to intentional shootings occurring in the course of police activities *per se* (that is, shootings that occurred in the course of routine policing activities, including outright executions), only one is known to involve a middle class victim.<sup>63</sup> While I have less complete information about whether a victim lived in a shantytown or not, the proportion of victims who lived in a *favela* appears very high: out of 74 victims of the same routine policing shootings who can be definitely categorized as

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<sup>63</sup> In 49 of these cases there is no information regarding the socio-economic standing of the victim.

shantytown residents or not, 48 (65%) live in a shantytown.<sup>64</sup> Nearly 75% of victims of intentional police killings for whom I have employment information were unemployed (I am missing data in about 10% of the cases). Indeed, as noted in Chapter 3, middle class residents of São Paulo primarily have to worry about being caught in the crossfire, as 4 of 13 bystanders shot by mistake belonged to the middle class. Only six out of 219 cases of all kinds involve middle class victims.

If, as Blaustein argues, the *villas* in Buenos Aires suffer from a lack of communication with the rest of Argentine society, the *favelas paulistanas* are even further removed from the formal world of the “asphalt,” as it is known. In Chapter 3 I reported that a census-based estimate places about 10% of São Paulo’s 16 million people in a shantytown. Estimates that *favela* residents in the São Paulo metro area amount to between one and two million people are common, creating a separate and unequal universe within the megalopolis. The *favelas* in the state of São Paulo are characterized by territorial segregation, removal from the formal job market, a lack of state services and basic infrastructure, high insecurity and violence, high indices of infant mortality and disease – and those around the São Paulo metro area are among the worst of these (Rolnik 2001).

Lopes de Souza (2001) describes a process of increasing territorialization or fragmentation of urban spaces. In his account, *favelas* become increasingly isolated from each other because they are each under the control of rival drug gangs. And they are isolated from the formal city because the affluent classes expect and demand that “poor

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<sup>64</sup> In Chapter 3 I inferred shantytown residence from class, noting that among the lowest class victims for whom shantytown residence was known 85% lived in a shantytown. Applying the same proportion here to fill in gaps in the data leads to the same result: approximately 105 out of 160 cases with complete or inferred information – nearly two thirds – involve a shantytown dweller.

people, especially *favelados* and blacks ... be kept outside” middle class public spaces (Lopes de Souza 2001). For residents of the *favelas*, he says, the formal cities are a “no man’s land” where their security is not guaranteed. Child mortality rates, despite decreasing for São Paulo as a whole, increased in its marginal areas from 1980 to 1998 (Ferreira Antunes and Waldman 2002). Their incorporation into the legal order of the state is minimal: Boaventura de Sousa Santos (199\*) has written extensively about the parallel legal reality of the favelas in Rio de Janeiro. As the articles cited above make clear, the massive *favelas* of São Paulo are no better integrated into the social and legal fabric of the city.

These generalizations should be tempered somewhat by the variety of experiences described by Adorno, in terms of homicide rates and similar indicators of violence, across the various peripheral areas of the greater São Paulo (Pinheiro and Falcão 1998) – older, more established shantytowns tend to be less violent. At the same time, it is clear that residents of the *favelas* in São Paulo are excluded in every sense of the word from ordinary and daily interactions with the state and formal society. Indeed, NGOs that work in this context often find that residents need assistance with demonstrating their very existence to the state, by securing birth certificates and identity cards.

Nor did the lower working classes who live outside the *favelas* – and make up the other third of victims – become more integrated into the fabric of the city during that decade. As in Argentina, unemployment in general rose over the 1990s – the monthly open unemployment figure trended upward, fluctuating between 4 and 10% and ending

the decade at about 9%. Absolute unemployment ended the decade above 16%.<sup>65</sup> And for the majority of those who had jobs, the legal connection to a state that offered the protection of labor legislation and the “*carteira*” or employment certification was absent. During the 1990s employment in the informal sector grew from 40% to 51% for the four largest metro areas in Brazil, including of course São Paulo (Ramos 2003, using data from IBGE monthly job survey).

The end result is a vast urban population that is nevertheless far removed from the state. Their interactions with the state are, for the most part limited to the police who may or may not come into their neighborhood. Any communication with the legal system – contacting a lawyer, going downtown to the free legal assistance office, setting up a meeting with a prosecutor – is logistically difficult and conceptually foreign.

## **2. Socio-political context**

In recent years, the Workers’ Party (PT) has accumulated important victories across Brazil and in São Paulo, at the municipal, state and national levels. In addition to the presidency, of course, the PT runs the mayor’s office in the city of São Paulo. And yet this strong showing by the left coincides with accounts that attribute “massive support for illegal and/or authoritarian measures of control” to the population as a whole (Holston and Caldeira 1998: 267). Holston and Caldeira argue that “shooting to kill not only has broad popular support but it is also ‘accepted’ by the ‘tough talk’ of official policy” (p.271). As in Buenos Aires at the end of the decade, during the early 1990s in São Paulo electoral formulas that emphasized civil rights protection routinely lost to those that

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<sup>65</sup> Source: Portal da Prefeitura de São Paulo (<http://www.prefeitura.sp.gov.br>), citing SEP, Convênio Seade-Diese, Pesquisa de Emprego e Desemprego.



adopted explicit shoot-to-kill policies. Thus, Franco Montoro, the first governor of São Paulo after the dictatorship, preached a restrained police force and instituted various police reform measures. But he was followed by Orestes Quéricia and Luiz Antonio Fleury Filho, both of whom hindered the implementation of Montoro's reforms and adopted an approach strongly reminiscent of the "*mano dura*" discourse we saw in Buenos Aires.

A series of surveys led by José Murilo de Carvalho in 1996, exploring knowledge of and support for civil rights in Rio de Janeiro, suggest that these rights are relatively weakly rooted in Brazilian society (Murilo de Carvalho 1997). They find, for example, that the majority of those surveyed could not name three civil rights to which they were entitled. In response to open-ended questions about rights, people were much more apt to name social rights, such as the right to health, work or education, than basic civil rights like the right to freedom, equality, justice, physical integrity, life, property or security. In connection with police activities more specifically, about 70% of those surveyed agreed with the statement that criminals ("*bandidos*") do not respect the rights of others and therefore do not deserve to have their own rights respected. Fully 63% strongly agreed with this statement ("*concordo totalmente*"). Only among those with a university education did this percentage drop below 50% (to 46%). A lower percentage, 45%, agreed that the use of violence by the police to obtain confessions is sometimes or always justified. And while 46% flatly stated that those who lynch criminals ("*criminosos*") are wrong to do so, 11% thought they were right, and another 41% thought that their actions, while wrong, were understandable. These surveys consistently show more repressive attitudes among lower socio-economic classes.

There appears to be consensus among operators and observers of the justice system that the population continues to accept the use of lethal force as an instrument to fight crime. This is only a partial list of those who described public opinion this way in the course of interviews: Luiz Eduardo Greenhalgh, a PT national senator from São Paulo;<sup>66</sup> Hélio Bicudo, a former national congressman, vice-mayor of São Paulo, the primary sponsor of the law subjecting the military police to civilian justice, and a member of the Inter-American Human Rights Commission;<sup>67</sup> Benedito Mariano, first director of the *Ouvidoria da Polícia*;<sup>68</sup> Mário Papaterra, São Paulo's Adjunct Secretary of State for Public Security, a former prosecutor who was, when I spoke to him, the civilian in charge of the civil and military police forces for the state ministry of security;<sup>69</sup> Antônio Carlos da Ponte, a prosecutor in the jury division (that has jurisdiction over homicide cases);<sup>70</sup> and Norberto Joia, another prosecutor in the jury division, though he framed it rather differently, arguing that, in his experience, if the victim has a violent criminal past the police get the benefit of the doubt, while otherwise there is stricter scrutiny.<sup>71</sup>

Interestingly, all but Mário Papaterra attributed these attitudes to the population in general, but not to judges or prosecutors. Dr. Papaterra argued that many prosecutors are further to the right than many of his police officers. These prosecutors, he said, use the

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<sup>66</sup> Interview with Luiz Eduardo Greenhalgh, São Paulo, April 30, 2001.

<sup>67</sup> Interview with Hélio Bicudo, São Paulo, March 27, 2001.

<sup>68</sup> Interview with Benedito Mariano, São Paulo, March 21, 2001.

<sup>69</sup> Interview with Mário Papaterra, São Paulo, March 23, 2001.

<sup>70</sup> Interview with Antônio Carlos da Ponte, São Paulo, April, 2001.

<sup>71</sup> Interview with Norberto Joia, São Paulo, April 16, 2001.

same metric as the rest of the population to determine who is entitled to full legal protection: a *marginal* may not be, but an *homem de bem* (an upstanding person) is.

One of the roots of this support for violent police action in São Paulo is the fear of violent crime. In one São Paulo survey, Sérgio Adorno (Adorno 1998) notes that 63% of respondents expressed a fear of being murdered. Increasingly common mass executions (*chacinas*) in the periphery of São Paulo place that population under constant threat, should they find themselves in the middle of a fight between rival drug gangs or even on the wrong side of a neighborly dispute. Adorno concludes that the increase in violent crime in the city is not merely a matter of perception, media hype, or political exploitation of the issue. Violence is indeed on the rise in São Paulo, and it is one of the primary concerns of the residents, especially in marginal areas. Unfortunately, all too often this concern and the lack of faith in the justice system translate into support for violent and repressive police tactics.

This leads to one striking difference between Buenos Aires and São Paulo in connection with these cases. I have no record of any demonstrations, spontaneous or otherwise, connected with cases of routine police violence. On the contrary, what we see occasionally are lynchings, where the population rises up against a suspect and tries to beat him to death, often succeeding. In fact, people at the Centro Santo Dias suggested that complainants have to fight resistance even from among their neighbors in order to pursue claims of police abuses.

At the same time, while it may be true, as Holston and Caldeira argue, that there is a “pervasive cultural pattern that associates order and authority with the use of violence” (p.273), this pattern is not necessarily permanent nor always translated into

political representation and public policies. A series of events in the 1990s may have helped to move the political mood toward tighter civilian control of the police in Brazil generally and in São Paulo specifically. It was in part popular reaction to notorious events like the 1992 massacre at the São Paulo House of Detention (known as the *Carandiru* massacre) that led to the re-assignment of jurisdiction over police homicides from the discredited military tribunals to the (less discredited) civilian courts, and the passage of a law against torture.<sup>72</sup> The killing of street children in the *Candelárias* incident in Rio in 1993, the massacre of 21 residents of the *favela Vigário Geral* in 1993, the 1996 massacre of 19 landless peasants in Eldorado dos Carajás, the televised murder and brutality of the police against the residents of the *Favela Naval* in 1997, all had grave repercussions in the Brazilian polity.<sup>73</sup>

Elected representatives appear to reflect a shift toward a more restrained police in São Paulo after the middle of the decade. At the state level, Governors Mário Covas and Geraldo Alckmin, who took office in 1994 and 1998 respectively, did not follow the strong-arm rhetoric of Quéricia and Fleury on policing issues. In 1996, under Covas's auspices, São Paulo became the first of several states in Brazil to create an *Ouvidoria da Polícia*, an ombudsman specifically designed to address police abuses. Covas offered

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<sup>72</sup> While Holston and Caldeira note that a significant proportion of the population actually supported the violent response, an even greater percentage opposed it, and discussion of the project to subject the Military Police to ordinary civilian justice revolved in large part around this event and the *Candelárias* murder of street children. The final impetus for passage of the law against torture was provided by the *Favela Naval* incident. Interview with Hélio Bicudo, March 27, 2001; interview with Judge Dyrceu Cintra, April 4, 2001.

<sup>73</sup> Unfortunately, a series of well-publicized crimes in the early years of the current decade may be having the opposite effect, leading to increased use of the military in police activities, and renewing calls for a more effective response to crime. It remains to be seen whether, as in the past, "effectiveness" will be measured by the body count.

strong institutional and political support for the monitoring activities of the *Ouvidoria*.<sup>74</sup> Alckmin has de-prioritized the issue somewhat, but he did not completely back off on this support and has not adopted the law and order rhetoric of Covas's predecessors.<sup>75</sup> Thus from 1994 on elected officials were less supportive of violent methods than those in the province of Buenos Aires at the end of the decade, and less so than governors at the beginning of the decade.<sup>76</sup> In summary, it appears that political support for enforcing civil rights against police violence is weak in society at large, and especially weak among the lower classes. On the part of elected officials, however, it improved, and was stronger at the end of the decade than at the beginning.

### **C. Connections between the legal system and the social context**

As in the discussion of the legal environment in Buenos Aires, I will begin with a brief overview of relevant portions of the criminal procedure that applies in São Paulo, and then canvass various organizations that serve to connect the legal system with potential claims and claimants.

#### **1. São Paulo police forces**

Standing between the event in question and its presentation in a judicial proceeding is, as in Argentina, the police. São Paulo, like the rest of Brazil, has two state

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<sup>74</sup> Interview with Benedito Domingos Mariano, first director of the *Ouvidoria*, São Paulo, March 21, 2001.

<sup>75</sup> Interview with Fermino Fecchio, Director of the *Ouvidoria da Polícia*, São Paulo, April 2001.

<sup>76</sup> The municipal government does not have any policing responsibilities, but at this level there is also a shift to the left. The beginning of the decade finds Paulo Maluf (a well-known figure of the Brazilian right, governor of São Paulo during the military regime) as mayor, followed by his designated successor, Celso Pitta, also on the right. But at the end of the decade, paulistanos elected Marta Suplicy, from the PT, to the post.

police forces, the Military Police and the Civil Police.<sup>77</sup> The former carries out the public order function, known as *policimento ostensivo*, that is, patrolling the streets, conducting traffic stops, responding to calls, and generally doing all the crime prevention and repression work. The Civil Police serves a purely investigative function, and is sometimes described as a judicial police. By virtue of their function, officers involved in shootings are typically from the Military Police, while the Civil Police appear most often accused in cases of torture. Indeed, many reports suggest that the use of torture is among their standard investigative methods. Perversely, existing legislation ensures that both the Civil and the Military Police investigate their own crimes, creating the endogenous conditions that give them both ample opportunity to skew the investigation in a favorable direction.

São Paulo's Military Police have a violent past, extensively documented by America's Watch (for example, in their 1993 and 1997 reports), and by Chevigny (1995). The murders committed by one notorious task force, the Rondas Ostensivas Tobias de Aguiar (ROTA), are the subject of a book by journalist Caco Barcellos (1992), who was then forced into exile by threats to his life. The Military Police was the author of all the violent incidents mentioned earlier – the murder of 111 inmates of the São Paulo house of detention, the killing of shantytown residents in Vigário Geral and Favela Naval, the massacre of landless peasants, and the murder of street children in Rio. Off-duty police officers often participate in death-squad activity, in the employ of local merchants who

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<sup>77</sup> There is also a Federal Police, but it is small, its actions are limited to federal crimes and it does not appear very active in the São Paulo area. It does not appear even once in my database, perhaps because the source of the data is the Ouvidoria, which is a state agency.

find this an effective way to “clean up” the streets of petty criminals and other undesirables.

Early in the decade at least, there was open support by the officer corps for violent police action. Chevigny documents the rewards paid by commanders of the São Paulo Military Police to those who killed suspects (Chevigny 1995: 167-68). Although his investigation dates back to the early 1980s, Barcellos presents a riveting and persuasive account of how the military police, time and again, execute suspected criminals in cold blood and are rewarded for their valor (Barcellos 1992: 143-45).

I interviewed a judge with a long human rights trajectory, who teaches human rights courses in the Military Police Officers’ School.<sup>78</sup> He argued that he has noticed a change in the culture of the Military Police, beginning about 1996 or ’97, toward greater respect for suspects’ rights. In each class of officers, he estimates that about 20% appears truly interested in human rights, and accepts the notion that policing and respect for rights can be compatible. About 75% listen silently. As to this group, Judge Malheiros suggested they may violate rights occasionally, but with distaste, “*virando o rosto*” (turning their faces away); or they may simply look the other way while others violate rights. Finally, in every class he finds about 5% that actively voice the idea that “*direitos humanos é bobagem; bandido tem que morrer, armado ou não*” (human rights talk is a stupidity; criminals must die whether armed or not).

Whether this is an improvement I cannot say. But this evidence suggests that at least 5% of the active officers convey to their subordinates the notion that the appropriate response to suspected criminals is their execution, and another 75% are willing to look

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<sup>78</sup> Interview with Antônio Carlos Malheiros, Appellate Judge, São Paulo, April 17, 2001.

the other way. When their subordinates carry out the killings they have been explicitly or implicitly authorized to make, these same officers will oversee the investigation. This is not a recipe for an aggressive, thorough investigation.

While the Military Police are not ordinarily responsible for the judicial investigation of an alleged crime, they are often the first to appear at the crime scene – this is true by definition in the case of police homicides. In ordinary cases, they are supposed to identify and undertake initial contacts with witnesses and preserve the crime scene, so that the Civil Police can take testimony and collect physical evidence. Under existing law, however, in cases involving a police shooting they are also in charge of the *inquérito*, the complete investigation up to the pre-trial stage. Thus while in ordinary crimes there is a division of labor between the security and the investigative police, and definitely an arms-length relationship between the two, this division is voided in precisely the cases where it is most necessary – homicide cases in which a Military Police officer is the suspect. In these cases, the suspect and his colleagues not only control the crime scene but are also charged with the initial investigation.

The Military Police has an internal disciplinary body, the *corregedoria*, as well as its own Military Justice System. But, as in Buenos Aires, there is consensus that this disciplinary arrangement is mostly preoccupied with maintaining military discipline and strict hierarchical control, so that crimes against civilians are not treated with the same harshness as infractions that affect the discipline of the organization.<sup>79</sup> As in Argentina, this system makes it more difficult to resist internal pressures toward violent action. Also

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<sup>79</sup> Interview with Prosecutor Norberto Joia, São Paulo, April 16, 2001. An in-depth study of training and advancement in the Military Police also notes the strongly hierarchical culture of the institution (Cardia, Adorno, and Pinheiro 1998).



as in Argentina, whistleblowers are subject to punishment – and for officers with less than ten years of seniority, punishment can be applied summarily. This policy is often official, as when the Ouvidoria learned that the command of the Military Police had issued a *Portaria*, or directive, prohibiting police officers from reporting alleged violations to outside agencies. Thus the informational functioning of the police is nearly identical to that in Buenos Aires: The organization committing the violation is charged with investigating it, and internal controls make it exceedingly difficult, especially for rank and file members, to blow the whistle on the corporation.

The result, again, is evident. Prosecutors and judges both mentioned the practice of planting a gun (nicknamed the “*cabrito*”) by the side of a victim’s body, to justify a shooting. In my own data, it appears that the Military Police tampered with the factual record in as many as 85% of the cases involving one of their own, while the Civil Police did the same in all of the 6 cases attributed to one of their own.<sup>80</sup> As noted in the previous chapter, there are suggestions that the police will go so far as to place a gun in the hand of a dead victim and pull the trigger to produce a positive finding in gunpowder residue tests. It is the routine practice of the Military Police to remove the body of a victim, under the pretext of taking the victim to a hospital for assistance – no matter that the victim is far beyond any help. Often, victims are listed as dying in the hospital, even if they are dead on arrival. And quite often victims who leave the scene with a fair chance of recovery arrive at the hospital hours later, too late for intervention, or even with the marks of in-transit beatings and execution.

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<sup>80</sup> I should note, however, that I am less confident of my judgment on this issue in São Paulo than I was in Buenos Aires, since in many cases here I had less contact with participants, and relied more heavily on claims made in court filings by one or another of the parties or on blatant inconsistencies between physical evidence and police accounts.

Forensic evidence is also suspect, as in Buenos Aires. In several of my cases, autopsy reports contain false information, as confirmed by a second, independent report. The autopsies are produced by the Instituto Médico-Legal, which according to my sources can be influenced by the police and is suspected of covering up police misconduct in connection with homicides and torture cases.<sup>81</sup>

According to prosecutors, witnesses in these cases are often threatened and intimidated.<sup>82</sup> There is clear evidence of this in nearly 25% of all the cases in my sample – about the same figure as for the Buenos Aires sample. Academic observers (Chevigny 1995) and human rights reports also remark on the harassment and intimidation suffered by victims who complain against the police (see, for example, the 2001 U.S. State Department human rights report on Brazil, §1.a and 1.e; and the 2000 U.S. State Department report). Focusing the violations on the most excluded classes, with their limited access to attorneys, the media and other mechanisms for redress, is a virtual guarantee that this intimidation will go unpunished. And, in fact, there are virtually no reports of a prosecution for efforts to cover up violations. One prosecutor suggested that if a victim were shot because he or she intended to testify against the police, the Ministério Público would take that very seriously. But all the evidence – my own information as well as reports by the Ouvidoria and other human rights organizations – suggests that witnesses are not sufficiently protected from police intimidation.

The bifurcation of the police, however, means that the relationship between judges and prosecutors and the Military Police is not as tight as in Buenos Aires. While

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<sup>81</sup> Interview with Prosecutor Antônio Carlos da Ponte, São Paulo, April, 2001.

<sup>82</sup> Interview with Prosecutor Antônio Carlos da Ponte, São Paulo, April, 2001.

the Military Police can – and do, as we saw – restrict and falsify information about cases that involve their own misconduct, the presence of the Civil Police as the main judicial investigative organization limits the former’s capacity to pressure judicial officers into adopting a more lenient stance in prosecuting police officers. In addition, there is very little of the daily interaction between street police and judges that we see in Buenos Aires. In fact, the relationship between the Military and Civil Police in São Paulo is conflictive and competitive, and prosecutors and judges hold no high regard for the Military Police. Thus, the impact of the Military Police’s control over information is mostly limited to the case at hand, shifting the location of *o’* in an exculpatory direction, but not affecting *r’* in a significant way.

At the same time, however, the Civil Police is ill equipped to investigate its Military cousin. Judges criticize their investigations for being limited to the information that walks into the police station. In 2000 the judges of the *Primeiro Tribunal do Júri* in São Paulo conducted an investigation into the *inquérito* process.<sup>83</sup> They reviewed a sample of IPs and the quality of the investigation that went into them. They conclude: “The first and most evident problem verified is what we label investigative passivity.” They show that the Civil Police rely on the Military Police to collect information on the occurrence and the nature of a criminal event. Despite the requirements of the Code of Criminal Procedure, they do not visit or preserve the crime scene, they do not take testimony from witnesses, and they do not collect physical evidence. Any physical evidence collected is invariably brought to the Civil Police by the Military Police officers

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<sup>83</sup> This discussion is based on an internal report of the investigation given to me confidentially by an anonymous source within the court. It is available for review from the author upon request.

who intervened in the first instance. Any witness testimony is, as a rule, due to the spontaneous appearance of complainants in the investigating officer's offices.

The judges' report offers several examples of this passive attitude: one murder occurred in March 1998, the file was opened in March 1999, and the first witness, the widow of the murder victim, was interviewed in August of the same year – fully 17 months after the event. Another military police report gives the names of those who were with the victim when he was murdered, yet the Civil Police did not attempt to contact them until 5 months later. One victim was in the hospital for 8 days after the attempt, but by the time the Civil Police tried to interview him, he was nowhere to be found and the case had to be dropped. Another victim was in the hospital for 67 days, but the prosecutor was forced to rely on medical records and the recollection of treating physicians, because the Civil Police never bothered to conduct their own examination. The result, the judges say, is the loss of information, the disappearance of witnesses, and ultimately the dismissal of an increasing proportion of cases because the proofs are inadequate.

In short, endogenous factors give the Military Police investigators both the incentive and the capacity to subvert the record and strangle the supply of information in individual cases; but limit their capacity to pressure judges and prosecutors to shift  $r'$  in a favorable direction. Especially in view of their traditional rivalry, the Civil Police could in theory be used to investigate the Military Police and provide independent information about their actions. But the Civil Police are as a practical matter dependent on the Military Police for much of the information they produce, and thus unlikely to be effective guardians. At the same time, exogenous factors exacerbate the informational deficit: the poverty and social isolation of the affected population renders it vulnerable

and inhibits the investment of individual resources into the prosecution; the strict hierarchy and opacity to outside monitoring of the police forces renders their obstruction of investigations invisible to the rest of the justice system; and widespread support for repressive and violent police tactics facilitates their continuation.

## **2. Other state agencies**

The most important alternative state agency for receiving information about police violence in São Paulo is the Ouvidoria da Polícia. The Ouvidoria was created in 1996 by the Covas administration. It does not have legal standing to file claims on behalf of complainants, but it has the authority to demand information from other state agencies such as the police, prosecutors and the courts. It has played an important role in bringing to light and disseminating to the mass media information about the conduct of the police, including information about police homicides. The Ouvidoria also follows the progress of individual cases, pushing prosecutors to explain delays and decisions. In this latter context, the Ouvidoria is essentially a passive, information-receiving organ. It has a toll-free phone line, and accepts anonymous complaints. It is proactive only in that it canvasses newspapers for reports of violence involving the police, and then follows up with a request for the police report on the incident. But it does not contact victims or complainants directly, unless they reach out first.

The Ouvidoria's main impact, therefore, has been on the socio-political context. Perhaps the most important example of this was the production of a report in 2000, which examines in full detail the homicides committed by São Paulo police in 1999. In preparing that document, the Ouvidoria sought the police and prosecutorial reports, and requested autopsy reports on all the deaths. The report offered compelling evidence that

the high number of killings claimed by the police could not be explained away as the result of confrontations between the military police and armed and dangerous violent criminals. Both judges and prosecutors mentioned this report as raising important questions about the way the events are presented in the IPMs, and as prompting them to take a closer look at the police narrative in these cases. The Ouvidoria also provides annual reports to the state legislature with policy proposals intended to curb the high levels of violence by the police, including new training programs and new operational policies. Over time, then, the Ouvidoria may well change the way police violence is interpreted by state officials, as well as changing some of the institutional arrangements that lead to the current high levels of violence.

Lawyers who represent victims, on the other hand, sometimes appear frustrated by the Ouvidoria's lack of enforcement capacity. As one of them put it, the Ouvidoria is like a dog that barks but doesn't bite. This is in part because it has no legal standing to appear in individual cases of police abuses, and in part because the Ouvidoria does not second-guess prosecutors. Once a prosecutor has acted, whether recommending the dismissal or prosecution of a case, the Ouvidoria closes its files on the complaint. Its mission is to oversee police activities, not judicial ones, and so its policy is that once a matter is in the hands of prosecutors or judges it is beyond its jurisdiction. Without in any way discounting the importance of this agency, therefore, it is clear that in individual prosecutions its effects are purely indirect. The sole exception is its capacity to receive and memorialize information from complainants who take the initiative of contacting it. In a couple of instances, the Ouvidoria has taken the sworn testimony of a witness, and then offered it to the responsible prosecutor.

Elected officials are another link between the state and the victims in these cases. But legislators acting on constituent complaints have recently passed the information on to the Ouvidoria for follow up. Their actions are thus filtered through and subject to the Ouvidoria's capacities and limitations.

### **3. Non-state agents**

The most important civil society actor on this issue in São Paulo is the *Centro Santo Dias de Direitos Humanos*. Under the leadership of Cardinal Paulo Evaristo Arns, a noted human rights defender, the Archdiocese of São Paulo established the Center in 1980. It is named after a catholic worker murdered by the São Paulo Military Police while he was leading a strike in October 1979. From the beginning, its primary mission has been to work on behalf of the victims of police homicides.

Over the last 20-plus years, the Center has acted on behalf of the victims in over three hundred cases of police violence (not limited to murder). It offers legal assistance in both civil and criminal actions. In the former it files claims for compensation, and in the latter acts as the Private Prosecutor or *assistente de acusação* on behalf of relatives of the victims. This figure is the substantial equivalent of the federal *querrela* in Argentina: it can press charges even over the objection of the prosecutor, pursue appeals, present witnesses, argue to the jury and the court, and generally participate in all the ways a prosecutor might. In this capacity, and motivated by its direct relationship with the survivors of the victims, the Centro can prompt greater zeal from prosecutors, and, in its defect, perform the required tasks itself. Thus the Center's attorneys can call witnesses, obtain expert reports, and generally bring information into the courtroom that would otherwise not come to light.

They can also press state agents to dig deeper. After the adolescent Enéas da Silva was killed, the official autopsy report showed that he had been shot in the chest, consistently with the police account of a violent shootout. The case was ripe for dismissal. After speaking to his family and other witnesses, however, the Center and other national and international NGOs pushed for a more rigorous investigation. It was largely through their actions that the body of was exhumed and a second autopsy performed, showing that he was shot in the back of the head and not in a frontal exchange of gunfire. Ultimately, the case ended in a conviction which was unthinkable without the pressure from these NGOs.

While it fills the same niche in the legal ecosystem, channeling demands from society to the courtroom, Santo Dias is different than CORREPI on a number of levels. First, it is not a grass-roots organization with an extended lay membership. It is run by the Archdiocese, and has a small staff of lawyers and their assistants who do the typical work of lawyers, filing papers and requests with the courts; clients come into the office to talk to the staff. It does not organize and participate in political demonstrations in the streets of São Paulo or at the doors of the courthouse, though it has organized conferences and public acts in support of human rights, published studies and lobbied for public policy changes.

In contrast to CORREPI, the Center does not appear to suffer the suspicion and distrust of judges and prosecutors. Several reasons can be offered for this. First, of course, it is identified with the Catholic Church, an organization with a great deal of legitimacy in Brazil. More importantly, it limits its political activity to shifting  $r$ , the actual rules, rather than  $r'$ , the way the judge interprets the rules in the case at hand;



reserving traditional legal arguments and methods to the construction of  $r'$  in a given case. As a result, it is viewed as a more mainstream human rights organization than its Argentine counterpart with its Marxist rhetoric, confrontational politics, and courtroom door demonstrations.

The contrast between the Center's actions and CORREPI's is fully consistent with my diagnosis of the problem in São Paulo and Buenos Aires. In pursuing individual claims – that is, in the construction of  $r'$  and  $o'$  – the Centro Santo Dias' emphasis on traditional legal advocacy rather than political methods supports the claim that the São Paulo judiciary is less sensitive to political pressures. In its more diffuse work, the Center's focus on changing the rules of the game – that is, on changing the location of  $r$  – suggests that they have some confidence in the faithful application of the rules to particular cases. Individuals connected with the Center have been instrumental in changing the rules. Hélio Bicudo, who sponsored the legislation that would bring killer cops into the civilian system, served on the Center's Board of Directors. The center lobbied extensively for the formation of the Ouvidoria, and Benedito Mariano, the first director of the Ouvidoria, is one of the key figures in the development of the Center. The Ouvidoria, under his leadership and that of his successor Fermino Fecchio, another Santo Dias alumnus, now devotes significant attention to proposals for new rules and procedures governing the police.

The Center's results are also consistent with my diagnosis. Before 1996, while the cases were subject to military justice, Center attorneys saw a very low conviction rate even in cases in which they fully participated. They report, for example, that “even with an abundance of proofs and the confession of the military police officers, the rule was the

absolute absence of any punitive action” (Mariano and Toneto 2000: 14). After these same cases were transferred to the civilian courts, “the situation changed, to our great satisfaction.” In the civilian system, the cases received “more prompt and just adjudication” (id.).

In my sample, the vast majority of convictions represent cases decided in the civilian system in which the Centro Santo Dias was an active participant. Adding a Private Prosecutor to the case raises the conviction rate to 32%. In other words, judges and juries in São Paulo do respond when presented with a well-supported case. This suggests that, while in the military justice system the problem was a radical shifting of *r'* away from a proper definition of murder, that was no longer the case in the civilian courts. At the same time, the fact that their success is rarely if ever replicated when they do *not* participate suggests that something other than the rule of decision is wrong with the civilian system in the absence of a Private Prosecutor. The problem, in a word, is the mis-construction of *o'*, which begins with the IPM and carries through to prosecutors, judges and juries.

There are other entities in the São Paulo area that work on the problem of police violence in the context of human rights more generally. Examples are the Comissão Teotônio Vilela and the Human Rights Commission of the Brazilian Bar Association (the *Ordem de Advogados do Brasil*, known as the OAB). The Comissão Teotônio Vilela and the OAB intervened in the prosecution of Ubiratan Guimarães, the Military Police colonel in charge of the operation that ended in the *Carandiru* Massacre.

These NGOs do the important work of putting together human rights reports, bringing media attention to bear on the problem and lobbying for change, and

participating in the prosecution of high profile cases; but they rarely intervene directly in routine criminal prosecutions of rights violators. In that sense, they are more like the CELS in Buenos Aires. Their work is primarily bent on changing the legal framework, the socio-political context and the social construction of these cases and less important to the judicial construction of *o'* and *r'* in individual cases. Even their work in landmark cases is oriented toward rule change, not individual outcomes.

#### **D. The prosecutors**

The prosecutorial office, known as the *Ministério Público* in Brazil, has earned its good reputation in the years since the 1988 Constitution gave it additional independence and attributes. The question then is why it does not intervene more aggressively in the prosecution of police homicides, which at times make up 20% of all homicides in São Paulo. The answer has more to do with exogenous than endogenous factors. Endogenous pressures for impunity are less important for prosecutors in São Paulo than they were in Buenos Aires: the presence of the Civil Police and greater institutional strength means that prosecutors could, if they chose, take a more confrontational stance with the Military Police without fearing retribution in the investigation of their other cases. On the other hand, while the relative independence of the leadership of the organization renders it less subject to direct exogenous pressures, the political context still gets translated into organizational imperatives and thence into career incentives. As a result, despite its strength in other areas, individual prosecutors and the organization as a whole take a passive and reactive approach to police homicides. Given the procedural structure of the Lei Bicudo, so long as they remain passive prosecutors will receive most of their

information in these cases from the Military Police, and thus can become unwitting partners in impunity.

Article 2 of the São Paulo state prosecutor's organic law guarantees its "functional and administrative autonomy" (Lei Complementar N° 734 – 11/26/93). Even the politically appointed head of the organization, the *Procurador Geral de Justiça*, owes his or her selection as much to the profession as to elected leaders. The *Procurador Geral* is named by the Governor from among three candidates selected by the secret vote of all career prosecutors in active practice. Thus, while the Executive has a say in the ultimate designation, the list of candidates is prepared by the entity itself. Members of the governing body of the *Ministério Público* are similarly elected by all active prosecutors (art.26). Among other things, this governing body selects the members of the admissions committee, proposes candidates for advancement by reason of seniority or merit, and disciplines or removes prosecutors subject to disciplinary proceedings (art.27).

Front-line prosecutors are selected following a procedure that emphasizes technical merit. Those who survive the pre-qualifying test sit for a full-length written exam, followed by a psychological evaluation ("*exame psicotécnico*"), an oral examination, and a personal interview. An admissions committee selected by existing prosecutors administers the entire process. Applicants with the highest scores, who are approved as to character and fitness, are admitted and given their choice of appointments in order of their test scores. According to an in-depth study by the *Núcleo de Estudos da Violência* (NEV), of the University of São Paulo, despite some shortcomings (especially in terms of legal education) this rigorous admissions process generates a high quality prosecutor corps (Cardia, Adorno, and Pinheiro 1998). Once they have passed the two-

year probationary period, prosecutors have the same guarantees as members of the judiciary: life tenure and salary protections, and the right to exercise their independent legal judgment (in contrast with Argentine prosecutors, whose judgment is subordinate to that of their superiors). Prosecutors consider judges to be their peers, and are always striving to present the two positions as equals.

By law, prosecutors are guaranteed advancement on the basis of seniority and can advance more rapidly on the basis of merit. There are some criticisms of the selection and advancement process, of course, both by practicing prosecutors and by academic observers. For our purposes, the most interesting critique offered in the course of the NEV study is directed at the career advancement criteria. The prosecutors interviewed for the study argued that, although merit criteria are reasonably well spelled out in legislation, in practice they are extremely subjective. The use of subjective criteria for promotion generates a high degree of internal politics and the advancement of those who are ideologically or personally close to the governing body of the institution (Cardia, Adorno, and Pinheiro 1998: 206-208). Thus, even though prosecutors are guaranteed freedom of action in individual cases, career incentives produce a normatively coherent organization in which front-line prosecutors act consistently with prevailing internal political currents.

These internal political currents are not necessarily inconsistent with liberal democratic values, including a reduction in police violence. The same NEV study concludes that, after the constitutional reforms of 1988, “the institution was quite influenced by the constitutional changes, so that its actions became oriented toward social interests and independent of the government and political leaders” (p.207). Others reach

similar conclusions (Bastos Arantes 2000; Arantes 1999; Batista Cavalcanti 1999). In more general terms, however, NEV investigators conclude “the central preoccupation of the institution is the political struggle – internal and external – to confer *status and power* on the *Ministério Público*” (p.208, emphasis theirs).

This and other studies of the São Paulo *Ministério Público* note that there is an ongoing internal struggle to define the proper scope of action of the organization. And a repeated criticism is that the organization continues to be somewhat isolated from social reality, over-emphasizing legal-technical formalism. But from its most public actions, it appears that the Public Ministry has decided that the way to elevate its status and increase its power is to focus on high profile political scandals and corruption, environmental issues, and consumer protection (Bastos Arantes 2000; Paulina 1999; Pereira da Silva 1999; Mello de Camargo Ferraz 1997). Over the last decade, for example, the *Ministério Público* has successfully prosecuted for corruption dozens of other officials at the state and local level, including both Paulo Maluf and Celso Pitta, former mayors of São Paulo, and has intervened on behalf of the environment and consumers in many prominent actions.

However valuable its actions may be in these areas, and however proactive the institution in areas that garner a high institutional priority, its undoubtedly high qualities do not translate into effective action in the prosecution of police homicides. Reducing the number of these homicides does not appear to rank as a compelling social interest. The little political capital to be derived from an investment in controlling police violence – especially violence apparently taking place in the course of policing activities rather than outright police criminality – means that police homicides do not receive sustained

attention from the institution as a whole. Career-oriented prosecutors, hewing closely to institutional priorities, naturally de-emphasize these prosecutions.

Pereira da Silva argues that São Paulo prosecutors fall into two ideal typical categories, *promotores dos fatos* and *promotores de gabinete*: “facts” prosecutors and “office” prosecutors (1999: 103-120). The latter fit the description earlier presented of Buenos Aires prosecutors: they rarely leave their desks, limit themselves to reviewing the facts that come into their office, and find the real world within the four corners of the file. The former are the sort that I have suggested are needed, in the face of the informational deficit generated by police resistance to prosecutions: they are proactive, they conduct investigations, they go out into the community and meet witnesses, they act extra-judicially as well as within traditional legal processes. Whether because they adapt their behavior to the imperatives of the institution, or because the best prosecutors will naturally gravitate to the areas that are perceived as high priority, the institutional incentives suggest that we will find “office” prosecutors working police homicide cases. The result is a prosecutorial organization that, despite its strengths in other areas, is mostly passive in connection with police homicide prosecutions.

Interviews with judges and prosecutors support this conclusion. One prosecutor suggested that police violence is not an institutional priority. It is up to the individual prosecutor on his or her own initiative, he said, to take a strong stance in these cases, and he or she receives little institutional support. He argued that police homicides are especially difficult to prosecute – as I have suggested here – because of the difficulty in assembling proofs, and that without systematic institutional backing prosecutors are

unlikely to devote the requisite time and resources to these cases.<sup>84</sup> A trial judge also remarked that he noticed a marked difference in the way these prosecutions are treated by the Prosecutor's Office: in sharp contrast to ordinary murder cases, the least qualified attorneys are assigned to police cases, they prosecute these cases with the least enthusiasm, and give the defendant the benefit of every doubt.<sup>85</sup> Prosecutors follow the same forms, he said, but in a markedly different manner (*"formalismo igual, jeito diferente"*).

In short, despite its considerable merits, the São Paulo *Ministério Público* continues to depend largely on the Military Police for information about cases involving members of that organization, and limits itself for the most part to passively receiving information about them. The result is that prosecutors can say, with all sincerity, that "today, what we see are minor excesses, the police are more contained, institutional policy has changed ... executions are extremely rare."<sup>86</sup> This, despite the abundant indications that the police routinely execute suspects and abuse the use of lethal force in their activities. I will discuss this in more detail below, in the evaluation of alternative explanations. For now, suffice it to say that even judges disagree with this assessment, and at least one judge has had to resort to direct appeals to the *Procurador Geral* in cases in which he considers that the acting prosecutor is all too uncritical of the version of the facts presented in the *Inquérito Policial Militar*.<sup>87</sup>

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<sup>84</sup> Interview with Prosecutor Antônio Carlos da Ponte, São Paulo, May 2, 2001.

<sup>85</sup> Interview with Judge Luis Fernando Camargo de Barros Vidal, April 23, 2001.

<sup>86</sup> Interview with Prosecutor Norberto Joia, São Paulo, April 16, 2001.

<sup>87</sup> Interview with Judge Luis Fernando Camargo de Barros Vidal, April 23, 2001.



In summary, in terms of endogenous pressures, the prosecutors are not purely dependent on the Military Police for information in the majority of their cases, and thus there is no reason to suppose that their normative preferences will line up closely with those of the police (and the individual defendant) in these cases. Indeed they may well remain somewhere between the judge and the victim rather than between the judge and the defendant in the line up of preferences. Exogenous factors, however, while more remote and generalized in comparison to Buenos Aires, still get translated into career incentives that promote a passive institutional stance on police homicides. This stance permits the Military Police to retain a virtual monopoly on information about individual cases involving their own personnel, and thus to take the lead role in constructing *o'* in these cases. The result is the routine mis-construction of *o'* at the prosecutorial level.

#### **E. The courts**

It is hard to find anyone who will say anything positive about the Brazilian courts. Articles about them tend to have titles like “*A Crise do Judiciário*” (Faria 1996). Authors like to repeat a quote from Teresa Caldeira’s research, in which a Brazilian in a poor neighborhood says of the justice system “*é uma piada!*” – “It’s a joke!” (Caldeira 2000; Holston and Caldeira 1998; Chevigny 1995). Despite this apparently general consensus, I believe these criticisms underestimate the quality of the judiciary in the Metro São Paulo area. While my belief is based in part on impressions too subjective to serve as a measure of judicial merit, there are some objective indications that, in a more comparative framework, the average *paulistano* is not as poorly served as these critiques suggest. Criminal cases move more quickly than in Buenos Aires, and judges are less overworked, more independent and less corrupt than their *porteño* peers. Even the vaunted successes

of the *Ministerio Público* necessarily depend on the courts, since this is ultimately where the decisions are made on the legal proposals put forth by prosecutors.

In connection with police homicides in particular, endogenous pressures to conform to the police version of the facts are less strong than in Buenos Aires, and there is little evidence that the judges shift their interpretation of the laws against police violence to meet political pressures in individual cases. However, exogenous pressures filtered through career incentives make it likely that most judges, like most prosecutors, will not take an aggressive stance in these cases, facilitating the informational dependence that renders them ineffective. Juries in turn suffer from the same informational deficit and are, in addition, more likely to reflect societal prejudices against the claimants in these cases.

**The Judges:** On the negative side, the judicial organization is very hierarchical and dominated by an elite core of senior members, who are sometimes criticized for enforcing a rigid and formalistic view of the law and who give the entire institution a strongly conservative bent. On the positive side, this judiciary enjoys a rigorous selection process that ensures high legal-technical quality among judges, a high measure of judicial independence from political powers, and freedom from corruption. Even the excessive formalism is a guard of sorts against the informal pressures that distort judicial decision-making in Buenos Aires. In connection with police homicides, however, these exogenous characteristics ensure that the average judge will behave more or less as the prosecutors do: they will not consciously modify legal standards to accommodate societal pressures for an “effective” response to crime; but they will not go out of their way to level the

playing field either, assuming instead that their job is simply to apply the law to the facts presented to them.

In purely objective terms, the trial judges who deal with police homicides in São Paulo have a relative advantage over their colleagues in Buenos Aires. Judges' workload in São Paulo's jury trial system is much lower than that of trial judges in Buenos Aires: the *Primeiro Tribunal do Júri* in São Paulo, which boasts that it is the largest jury system in Latin America and carries out most of the trials in my sample, decides more than a thousand cases per year. It works out of an impressive, modern and massive building designed to project the full power of the state, dwarfing any judicial building in Buenos Aires. It has ten active courtrooms and trial judges (*Juízes Plenários*), and about half that number of pre-trial judges (*Juízes Sumários*).<sup>88</sup> Between 1993 and 2000, the years for which I was able to obtain data, the number of cases entering this court and distributed to its ten trial judges went from 1,560 to a peak of 4,008 in 1996 and then back down slightly to 3,980 (that is, from about 150 per trial judge to about 400 per trial judge).<sup>89</sup> Compared to the Argentine trial courts, with an annual influx of new cases that is over 5,000 for the *jueces correccionales* and nearly 3,000 for judges that try more serious cases, this is surely a more reasonable number.

Despite a growing backlog, the time to trial is not excessive. On average, from 1993 through 2000 the judges resolved 39% fewer cases than the annual number of new cases, with a consequent rise in the number of pending cases over the course of the

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<sup>88</sup> The latter carry out a role that is substantially similar to that of Magistrates in the U.S. federal system, overseeing many aspects of the trial preparation process.

<sup>89</sup> Source: Internal report prepared on the author's behalf, at the request of one of the judges, by support staff of the *Primeiro Tribunal do Júri*. Available from the author.

decade. The court began in 1993 with about 8,000 pending cases and ended 2000 with a little over 11,700. But, as noted in Chapter 3, the cases in my sample that began in the civilian courts and were not dismissed at the pre-trial stage took, on average, less than 2.5 years to go to trial.<sup>90</sup> Despite universal complaints about the slowness of the Brazilian courts, this is only about half of the mean delay in the Buenos Aires courts.

More than these functional aspects, however, it is the selection and advancement mechanism that gives São Paulo's courts their character. The selection process in particular – essentially the same as for prosecutors – is very rigorous.<sup>91</sup> It begins with a qualifying exam, which about 10% of applicants pass. The applicants who clear this initial hurdle go on to a more individualized second round that consists of an in-depth written exam focusing on technical legal issues, an extensive psychological evaluation that can take up to three days, then an oral examination, and finally a personal interview. Between 1990 and 1997, only an average of 2.6% of applicants passed this hurdle and entered the judicial service. Judges who have been through it criticize this system as excessively focused on the ability to recite accepted formulae and legal technicalisms (Cardia, Adorno, and Pinheiro 1998). Despite these criticisms this study concludes that the entry process is essentially meritocratic and open to all; clearly, it emphasizes legal preparation and technical merit.<sup>92</sup>

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<sup>90</sup> In contrast, the mean delay for cases that began in the military courts and were transferred to the civilian courts after 1996 is nearly ten years.

<sup>91</sup> By constitutional imperative, one fifth of appellate judges enter laterally, from the prosecutorial corps or the private bar. The following description applies to the career judges that make up the entire trial court bench and most of the appellate bench.

<sup>92</sup> It is the prevailing definition of merit that is criticized. The “progressive” critics of the system argue that legal education and the resulting profession is overly focused on memorization of sterile legal standards, rather than a more socially conscious “living” law.

According to the NEV study, the advancement and promotion system is more problematic: the interviewed judges describe the structure of the judiciary as authoritarian, dominated by a few of the most senior judges who sit on the highest courts (Cardia, Adorno, and Pinheiro 1998: 242). Legally, the decisions of higher courts are not binding precedent for lower courts. This suggests that trial courts are quite free to decide as they see fit. But career incentives and other pressures tend in the opposite direction. Even the Association of Judges for Democracy, which defends this freedom of decision for lower court judges as a way to democratize the judiciary, agrees that higher court opinions “although non-binding, are as a rule respected by all judges” (Associação Juízes para a Democracia 1999). They argue that this is because the opinions of the highest courts simply reflect the distilled wisdom of the lower courts, which are therefore simply following their own reflection. This may be partly true, but a more prosaic explanation surely also plays an important part.

As do prosecutors, judges can advance at a slow pace on the basis of seniority, or much more quickly, with merit-based promotions. The standards for evaluating merit, however, are subjective and ill defined. The primary qualification for merit-based promotions or reassignments, the study finds, is avoiding *demerits* and remaining in the good graces of supervising judges (Cardia, Adorno, and Pinheiro 1998: 298-302). These supervisors are the judges who sit on the appellate court above the judge in question. The NEV study finds that for trial judges advancement simply requires following and liberally citing with approval the opinions of this immediately superior appellate court. Precedent may not be binding, but it is certainly politic. Those interested in the highest courts engage in a similar though more personalized political campaign, which emphasizes

allegiance to and personal connections with senior judges in the highest courts. In short, the upper echelons of the judiciary have both the information and the sanctioning capacity to ensure a fairly high level of normative consistency within the judiciary.

What is the likely normative inclination of these upper echelons? While the subjective nature of the promotion process renders it essentially a political one, the politics are internal to the judiciary, not necessarily tied to broader social and political currents. Thus the judges at the top, who can exercise such strict control over lower court judges, are relatively insulated from elected political powers and social currents. The courts even have budgetary autonomy, though some argue that they are in practice less autonomous than the Constitution would suggest (Cardia, Adorno, and Pinheiro 1998: 237). Other than their natural affinity as members of an elite class, then, there is little incentive for judges to take direction from the executive, or even from societal demands. Though they are surely not impervious to either of these forces, they also need not follow them slavishly.

As a result, among the many jeremiads detailing the “crisis of the judiciary” in São Paulo, one does not find allegations of political subjection. Faria, a long-time observer and critic of the Brazilian judiciary noted rather that the courts are more likely to be tied to dominant economic interests, attributing this to the class make-up of the courts.<sup>93</sup> Sister Michael Mary Nolan, a São Paulo attorney with a long-standing association with the *Centro Santo Dias* and many years of working with the homeless, the landless and underprivileged criminal defendants, argues that judges in Brazil generally seek out and use technicalities to frustrate the claims of the underclass (*i.e.*,

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<sup>93</sup> Interview with José Eduardo Faria, São Paulo, July (?), 1999.

they shift  $r'$  in the direction of impunity when the claimant is from the underprivileged classes).<sup>94</sup> But she attributes this to a general conservative bent in the judiciary and not to outside pressures in particular cases.

In summary, then, these institutional features tend toward the creation of a judiciary that is hierarchical, conservative, and (likely) allied with dominant economic classes; that emphasizes legal technicisms over equity-based claims; with judges who are reluctant to take risks that might incur the disapproval of higher courts. What effect does this have on the prosecution of police homicide cases?

As we saw, these cases come into court with an exculpatory version of  $o'$  inscribed in the police report, which is unlikely to be corrected by prosecutorial activism. Individual judges with a progressive bent have the capacity to insist on a more complete investigation, because they still have many of the attributes of the civil law judge, controlling and directing the pretrial investigation (*instrução*). And the fact that precedent is not legally binding frees them to do “justice” regardless of the conservatism of higher courts. Even less-than-progressive judges are likely to be independent from political powers and subject to close appellate control, and therefore not inclined to shift  $r'$  to suit the demands of law enforcement. At the same time, the structure of the judiciary is such that we are not likely to find too many judges willing to go out on a limb on behalf of claimants that are associated with the lower classes and with criminality. Thus, the prevailing trend to simply apply the rules to the facts as presented by the police report and the prosecutor is completely consistent with institutional incentives, and likely to

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<sup>94</sup> Interview with Sr. Michael Mary Nolan, São Paulo, April 24, 2001.

produce a large measure of impunity for a police force that closely controls the construction of *o'*.

Acquiescing in an exculpatory construction of *o'* is a safe course of action for a judge, as it is highly unlikely that anyone will successfully challenge the judge's construction of *o'*. First, most of the dismissals are done at the request of the prosecutor and therefore will not generate an appeal (though a Private Prosecutor, if present, may still appeal the dismissal). Moreover, even if there is an appeal, the judge has considerable control over the facts that are placed in the record, and thus can present the appellate court with a restricted vision of *o'*, and will likely find plenty of support in the IPM for the result. Finally, stating and applying a controversial rule of law is a more political step, and more likely to incur the displeasure of higher courts, than simply acting on the basis of facts presented by the police, even if later a higher court considers that the judge should have gone beyond these facts.

**The Jury:** This account of judicial incentives and capacities explains the high percentage of cases that are dismissed by judicial decision at the pre-trial stage on the basis of the IPM – more than 80% of all the cases. But if, in the view of judges and prosecutors, the case warrants a trial, judges must turn over the ultimate decision to a jury. Brazil is one of the few countries in Latin America with a long history of jury trials. These trials go back to a law dated June 18, 1822 that created the jury to judge defamation claims. In the Federal Constitution of 1824 the right to a jury was extended to civil and criminal cases generally, but in 1967 the military regime limited them to their current reach: intentional crimes against life (Renó do Prado and Mascari Bonilha 2000). At present they remain reserved for intentional crimes against life (*crimes dolosos contra*



*a vida*), the category of crimes that was removed from military jurisdiction by the Lei Bicudo, though the 1988 Constitution would permit legislation to extend their reach yet again. Unlike oral trials in Buenos Aires, jury trials are not a new development, and patterns of behavior are well-established.

The panel of seven jurors is drawn on the day of the trial from a juror pool taken from voter rolls, employee lists of large corporations, and telephone directories. The judges, prosecutors and lawyers I spoke to on this issue all seemed satisfied that the jury selection method produced a relatively representative cross-section of society (which, as noted, is none too sympathetic to claims that the police exceeded their limits in pursuing crime). At the trial, the attorneys encourage this cross-section of society to judge the case based on the totality of the circumstances (including high levels of crime). As a result, it appears that jurors are to some extent shifting  $r'$  to create more space for impunity, in an exercise in jury nullification. In the opinion of prosecutors, as discussed at length in Chapter 4, this shifting certainly takes place if the victim was a *marginal*, and had a criminal record of some sort.<sup>95</sup> But the problem of crafting an  $o'$  that will support a conviction is more basic.

It is at the trial that the legal system must complete the construction of  $o'$ , and yet the nature of the trial ensures that it will include very little new information. As discussed earlier, much of the evidence is simply taken from the written record. As one judge put it, the jury is served a “done deal” (“*prato feito*”) that comes directly from the file. And the file, as we have seen, is based substantially on the IP or the IPM prepared by the police.

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<sup>95</sup> Nor are judges and prosecutors exempt, as we saw in Chapter 4, in cases in which the victim is perceived as a violent criminal.

Moreover, what new information does come in at the trial is also likely to be skewed in the direction of an acquittal. The few witnesses who might be called to testify that the police acted illegally are taken from the same class as the victims. They are often illiterate or have criminal records. Witnesses might be missing altogether: one prosecutor complained that the high mobility, lack of permanent employment and social marginalization of these witnesses made it difficult to actually locate them and bring them in to trial. There may be other reasons for their elusiveness as well. The same prosecutor complained that witnesses are often intimidated by the police and too afraid to tell the truth or appear at the trial.<sup>96</sup> On the other side are the police defendants, their colleagues who will support them in their claims, and even forensic evidence, all of which suggests the victim died in the course of a violent confrontation.

The case is thus presented to the jury as just another instance of the police's battle to hold back the ever-present wave of violent crime. At the end of this trial the jurors are asked to vote yes or no, whether the police officer was acting in legitimate defense of himself and society. The results are predictable. Sixty percent of the cases that clear all the pre-trial hurdles and actually go to trial end in an acquittal.

## **F. Overview of São Paulo**

### **1. Illustrative case studies**

I will begin this overview with two case studies that illustrate the way the different components of the system work together to produce results. The case studies will make the discussion in this chapter more concrete. The first example, the case of

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<sup>96</sup> Interview with Norberto Joia, São Paulo, April 16, 2001.

Júlio Cesar Antunes de Miranda, illustrates the work of the Centro Santo Dias and the jury, and the latter's willingness to convict when presented with the proper facts. In that case, two police officers chased down a "suspicious" character who fled from a routine identity check. They shot and killed him after he ran into a neighbor's backyard. The police officers claimed that Júlio Cesar had shot at them first, and was killed in the subsequent exchange of gunfire.

The Centro Santo Dias represented the victim's child and father, and was constituted as *assistente de acusação* in the prosecution. At the trial, the father testified that police officers had told him the day before the shooting that if his son was outside after dark they would execute him (he was suspected of car theft). A neighbor said she heard the victim pleading for his life and calling for his mother before the final shot was fired. When he died, the victim was wearing only shorts, and the police did not produce the gun that he allegedly used to shoot at them. Moreover, a forensic test showed the lack of any gunpowder residue on the victim's hands, suggesting he had not fired any shots. The autopsy report showed that the victim had two gunshot wounds to the back and a third to the front, substantiating the prosecutor's and Santo Dias attorney's argument that he had been wounded while fleeing and then executed as he lay on the ground.

The Santo Dias attorney participated fully in the trial and was given the opportunity to make a final argument to the jury – the combined arguments of the prosecutor and Dominguez lasted just over three hours, plus another hour for a reply to the defense attorney's argument. After final arguments on all sides the seven members of the jury voted on each of the following questions (the tally is in parenthesis):

- 1) Was the deceased the victim of a homicide? (yes, 7-0) If so,
- 2) Was the defendant the author of the injuries to the victim? (yes, 7-0) If so,

- 3) Did these injuries cause the victim's death? (yes, 7-0) If so,
- 4) Was the defendant responding to aggression? (yes, 4-3) If so,
- 5) Was it an unjustified aggression? (yes, 4-3) If so,
- 6) Was the aggression in progress at the time of the response? (yes, 5-2) If so,
- 7) Were the means of response necessary? (yes, 4-3) If so,
- 8) Did the defendant use them in the appropriate manner? (no, 4-3) If not,
- 9) Did the defendant *intentionally* exceed the limits of legitimate self-defense? (yes, 4-3).

From the answers to questions 4-7, it appears that four of the seven jurors believed the officers had acted properly in initially shooting Júlio Cesar, despite the lack of any evidence that he exchanged gunfire with the police. It is possible to read too much into a secret and unexplained vote, but the pattern suggests that the jurors validated the officers' decision to use deadly force against a fleeing suspect, simply because he disobeyed an order to stop (or they believed the account that Júlio Cesar had shot first, despite any evidence to this effect). At the same time, the jurors were unwilling to condone the subsequent execution, convicting the officer who shot Julio César as he lay wounded. For the cold-blooded execution of a young man who made the mistake of running away from the police, this police officer was convicted of ordinary murder for "intentionally exceeding the bounds of self-defense," and sentenced to 6 years in prison in a semi-open regime.

The second case study was described in an interview that seemed an anomaly at the time, but is actually the exception that proves the rule. This case demonstrates once again that the problem in São Paulo is an informational failure resting in part on the unwillingness of the prosecutors to take extraordinary measures in these cases. In the

course of the interview, Prosecutor Norberto Jóia pulled out a file on a case involving two brothers, both members of the Military Police, one of whom had been imprisoned on charges of corruption.

In the course of the *instrução* in the corruption case, the main witness against this officer was called into judicial offices to give his formal testimony. Under the rules of procedure, of course, the defendant was notified when and where this witness was to come in to testify so that his attorney could be present. After giving his testimony, in broad daylight and no more than a block from the prosecutors' office, the witness was gunned down by an assailant wearing a full motorcycle helmet. The shooter jumped off the back of a motorcycle, killed the witness and hopped back on for the getaway. A witness to the shooting provided investigators with a description of the motorcycle and the license plate number. The motorcycle was traced to the imprisoned officer's brother.

According to Prosecutor Jóia, the prosecutors' office interpreted this murder as an intolerable attack on the very integrity of the system. Jóia then described the measures that were being taken to protect this second witness and increase the likelihood of a successful prosecution. Prosecutors entered the witness in a witness protection program. They sent him out of town, arranging housing and employment under an assumed name. When he must come in to testify, prosecutors arrange for transportation and security to ensure his safety. Forensic tests are being done by federal experts, rather than the usual state police experts. And no expense is spared in tracing phone calls between the suspects before the killing, locating witnesses, and gathering all the available evidence.

This case, as noted, is interpreted by the prosecutors as an attack to the very integrity of the system, an attempt to interfere with their function. In particular, what

seems to gall the prosecutors is the fact that the suspects apparently took advantage of due process – their right to be notified and present when a witness offers testimony against them – to interfere with the prosecution and commit murder. Odds are this case will end in a conviction, though it had not yet been decided the last time I updated information. But the case rests on nearly heroic efforts, which the prosecutors will not take in routine cases involving the police.

## 2. Summary

The abysmal conviction rate in police homicide prosecutions contrasts sharply with the picture of a progressive *Ministério Público* and an independent judiciary. The data show that the police carefully target a population that is radically marginalized and unable to bring its own economic or political resources to bear in support of their claims. The police then craft an investigation that shifts *o'* drastically in the direction of exoneration. Regardless of the actual facts, the cases are presented as the legitimate use of lethal force in response to violent attacks on the police and on society. These cases are thus socially (and judicially) interpreted as a legitimate response to a wave of violence afflicting São Paulo.

Indeed, while governors in São Paulo have been less prone to repressive discourse in the second half of the decade, social support for violent police tactics, if anything, appears stronger in Brazil than in Argentina. The lack of exogenous pressures for a more effective response to police violence reduces career incentives for prosecutors and judges to be more aggressive in supplying the informational deficit themselves. As a result, judicial decisions – whether by judges or juries – are based on a radically skewed version

of  $o'$ , which offers ample support for an acquittal despite the application of a rule,  $r'$ , that is relatively faithful to the formal norm.

The creation of  $r'$  is more insulated from conjunctural and political pressures in São Paulo than in Buenos Aires. Endogenous pressures on prosecutors and judges to take a lenient view in police cases are much more attenuated in São Paulo: the presence of a separate investigative police means that prosecutors are less dependent on the Military Police in routine cases, and can resist pressures to shift  $r'$  toward impunity. At the same time, however, exogenous pressures – public support for a violent response to crime, and a general conservative bent in the judiciary, coupled with the perception that violent crime threatens the fabric of society – are strong in São Paulo. In consequence, preferences within both institutions appear to be, as a general rule, shifted quite far from the victim's preferences. The rule as applied is probably skewed in the direction of permitting repressive police tactics, though not outright executions.

The figure representing the direction of endogenous and exogenous pressures in São Paulo and their effect on actors' preferences for a strict application of the law, then, would look something like Figure 5.1:

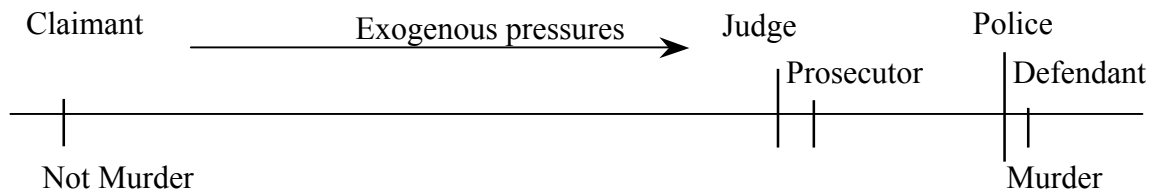


FIGURE 5.1: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN  
SÃO PAULO

Some of my interviews suggest that prosecutors are shifted further toward permissiveness than what is shown above, taking a more lenient position in these cases than judges. One judge, understandably, attributed much of the courts’ ineffectiveness in controlling the police to prosecutorial rather than judicial neglect. But so did at least two different human rights activists, and, as noted earlier, Mário Papaterra, a former prosecutor. The judge who made this comment attributed it to the prosecutors’ general tendency to rely on “crime wave” arguments in their prosecutions. It is difficult to switch, he said, from attacking criminals with purple prose and allusions to a disintegrating society, to attacking the very police who are, in theory, holding this crime wave back from civilized society.

My own analysis of endogenous and exogenous pressures suggests that there should be little difference between the tendencies of judges and prosecutors. But it may well be that prosecutors have a general tendency to identify with the police rather than with the victims in these cases, who often represent the very class they are prosecuting on a daily basis. This does not, however, change the conclusions of this chapter. The



ordering of preferences presented above – whether prosecutors are slightly to the left or the right of judges, or practically indistinguishable, as I believe – implies that the police retain the capacity to strictly ration the information on which  $o'$  is based. At the same time, judicial and prosecutorial normative autonomy means that  $r'$  is not affected by political or police pressures in individual cases, and remains somewhat close to the formal norm, if more permissive than we might prefer. The result, as the case studies in Chapter 9 suggest, is that the typical location of  $r'$  and  $o'$  in these cases looks like Figure 5.2:

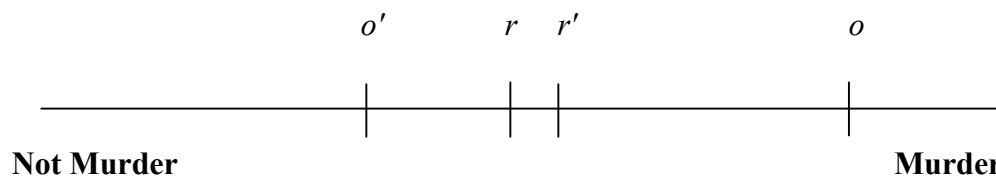


FIGURE 5.2: TYPICAL SHIFTING OF  $R'$  AND  $O'$  IN SÃO PAULO COURTS

The passive posture of prosecutors and judges also means that claimants must rely on their own resources to overcome the information deficit created by the police. Several factors make it unlikely that they will succeed: their vulnerability to harassment and intimidation, lack of material and educational resources, and lack of contact with the state. NGOs such as the Centro Santo Dias can have a strong impact on the information available to decision-makers by intervening as Private Prosecutors in individual cases. But the limited reach of this and similar organizations means that aggregate levels of impunity remain high. The Centro Santo Dias, for example, has intervened in more than 300 cases since its creation twenty-five years ago, in 1980. But in the same period, the police in São Paulo have killed almost 20,000 people. Although critically important in the

cases in which it intervenes, the Center's impact on aggregate outcomes is barely noticeable.

Given the dependence of the system on the action of the Private Prosecutor and similar investments of private resources into the prosecutorial process, we would expect severe inequality in judicial outcomes. However, the violations are narrowly targeted to a population that is almost universally underprivileged. As a result, instead of inequality we see the outcome measured in Chapter 3: a nearly complete lack of effectiveness, built on the inability of the system to see past the police report.

## CHAPTER 6

### URUGUAY – STRONG RESULTS FROM A WEAK SYSTEM

*We cannot defend our democracies if we abandon respect for due process. When a society puts security before human rights, or when public order is put over and above the civil liberties of citizens, then that democracy has adopted the tactics and principles – or lack of principles – of its enemies, and has been partially defeated.*

*Salomon Lerner Febres,  
President of the Peruvian Truth and Reconciliation Commission*

The case of Uruguay gives us considerable leverage in searching for an explanation for judicial effectiveness. It poses a sharp contrast to Brazil and Argentina in terms of the dependent variable, and offers considerable variation from the other cases on a number of independent variables.

An exhaustive search of human rights reports, newspaper archives and interviews with human rights lawyers in the country discloses no more than 23 persons killed by a police officer in the course of his or her duties during the 1990s. Even given Uruguay's small population, the odds of being shot by the police are twenty and fifteen times greater, respectively, in São Paulo and Buenos Aires, and sixty times higher in Salvador da Bahia. Conviction rates echo these results: they approach 50%, thus besting the performance of all the other cities in this study. Córdoba, its nearest competitor in judicial effectiveness, shows a markedly higher level of class-based inequalities or other tolls in

judicial outcomes. These results are entirely consistent with Uruguay's reputation as a country with a high degree of respect for human rights and a working rule of law:

O'Donnell lists it as one of two countries in which the state "long ago ... established a legal system that, by and large, functions across its whole territory, and in relation to most social categories (O'Donnell 1999c:311)."

But while these results are consistent with reputational evaluations of Uruguay, they also present a paradox. We might expect a functioning legal system to rest, however partially, on a well-funded, efficient judiciary, and on laws that are modernized and rationalized. Indeed, as we saw, these are the dominant hypotheses among judicial reformers in Latin America: courts, the arguments go, either need more resources, or they need to spend them more efficiently, or they need more modern laws – especially procedural laws. Uruguay defies each of these commonsensical intuitions.

In terms of funding, by any measure Uruguay lags behind Argentina and Brazil. As of January 2003, after the strong devaluation of the Uruguayan peso, trial judges earned between \$15,000 and 17,000 per year. Supreme Court Justices earned about \$24,000 per year. Even before the devaluation, during the 1990s, they earned less than half what their peers earned in Argentina. On average throughout the 1990s, Uruguay spent about 1.4% of its budget, or 0.35% of GDP, on the judiciary (Bittencourt (1997) for 1985-1996 figures, FORES (1999b) for 1995-1999). Argentina spends twice that percentage (of budget and GDP) on state and federal judiciaries (FORES 1999).

As with Argentina, to properly compare expenditures in Brazil's federal system to those in Uruguay's unitary system requires combining the spending by the state and national governments. Of the funds dedicated to each of the three federal branches, Brazil

devotes about 3.74% to its federal judiciary, while the state of São Paulo spent between 7 and 10% of its total budget on the judiciary.<sup>97</sup> To get a rough measure of expenditures on courts in the state of São Paulo, I calculated the share of the total and judicial federal budget that is equal to São Paulo's share of the total population of Brazil, and added this to the state budget amounts. By this measure, the total spending on state and federal judiciaries that corresponds to São Paulo is approximately 3% of the combined budgets. In São Paulo, then, Brazil spends about the same on courts as Argentina, and twice as much as Uruguay. The courts' smaller share of the total budget is reflected in the average expenditure per case. In the early 1990s, Uruguay spent \$256 per case filed – \$93,000 per judge – while Argentina spent \$760 per case, and (because of a lower percentage of judges to administrative and other personnel) \$760,000 per judge. Clearly spending more did not buy a better performance in Argentina, at least in connection with the prosecution of rights violations by the police.

Moreover, while it is true that Uruguayan courts make do with less, they are far from being paragons of efficiency. The single consistent complaint among users of the system is that they are slow, inefficient and costly. Criminal court judges in Uruguay resolve an average of 71 decisions per year, while judges in Argentina, for example, attend to over 2000 new cases per year, deciding hundreds more than their Uruguayan colleagues. In criminal cases, the average delay from the filing of an indictment (*sumario*) to the final resolution of the case at the trial level is over two years in the capital, and just under two years in the interior (Poder Judicial various years). At the

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<sup>97</sup> Source: Orçamento do Estado de São Paulo, 1996-2000 [São Paulo state budget], available at [www.planejamento.sp.gov.br](http://www.planejamento.sp.gov.br), and Orçamento da União [Federal Budget] (available at [www.planejamento.gov.br](http://www.planejamento.gov.br)), summary tables.

same time, 25% of the cases take longer than two years, and 5% take more than 5 years to decide, with half of these taking more than eight years to resolve. This does not include the time involved in the initial investigation (*pre-sumario*). While there is more than one reason for this, the fact that up to 85% of the prison population in Uruguay at any given time is being held in preventive detention awaiting trial (Bayce 1996) testifies to a certain lack of efficiency.

Nor is it the case that Uruguay is working with the latest procedural rules. Argentina and Brazil have joined the majority of countries that reformed their criminal procedure laws to move away from the cumbersome written inquisitorial system to a more agile and adversarial oral procedure. Uruguay has failed to do so, despite the 1997 passage of a law mandating this change. The courts have resisted implementation of the new law, arguing they lack the physical capacity and financial resources to accommodate the necessary changes. The changes that are supposed to improve the ability of the courts to get in touch with reality, move cases with agility, and act with more flexibility have yet to take place in Uruguay. In short, it appears that, in terms of organizational strength, funding and resources, in terms of normative modernization and efficiency, the Uruguayan courts are, at minimum, no better off than the Brazilian and Argentine ones we have examined already, and possibly worse off. And yet these courts clearly obtain better results in the cases we are examining here. How do we account for this apparently anomalous result?

As with the other case studies, I will first examine the socio-political and socio-economic context and the institutional framework within which the prosecutions take place. From the interplay of environmental and institutional factors I will derive the

exogenous and endogenous pressures on the various actors within the system, and explore the impact of these pressures on the actors' informational capacity and normative preferences. We will see that, as in the other cases, the key to the courts' performance lies in the capacity and incentives motivating judges and prosecutors to prosecute more or less aggressively, set off against the incentives and capacity of the police to restrict their access to information.

The Uruguay judiciary does not include an independent judicial investigative force. As much here as in Buenos Aires or São Paulo, judges and prosecutors rely on the police to conduct investigations in the ordinary case. As a result, as we saw in previous cases, the decision to undertake an in-depth independent investigation in a police violence case requires an out-of-the-ordinary expenditure of effort and resources on the part of judges and prosecutors.

Uruguay differs from the other cases, however, in the access judicial actors have to alternative sources of information (that is to say, in the reduced capacity of the police to drastically curtail such access) and in the exogenous incentives for judges and prosecutors. As to the first of these, sharply reduced social distances between judges and prosecutors on the one side and the typical victim of police homicides on the other give judicial actors greater access to information directly from claimants and witnesses. As to the second, judges and prosecutors are subject to political and social pressures to convict police officers who use lethal force: polls and political statements show vastly lower levels of support for draconian police actions; demonstrations and statements in the media all favor the aggressive prosecution of police officers who use excessive force.

Because of this supportive political environment, Uruguayan judges and prosecutors are more likely to take the investigation into their own hands, and more likely to be successful in that investigation, producing the information they need to obtain a conviction. The result is a higher conviction rate, because more information is available than in Buenos Aires, São Paulo and Salvador, for example; and lower levels of inequality, because the system is less dependent on private resources in generating that information than in Córdoba.

### **A. The Uruguayan Code of Criminal Procedure**

The procedural code delineates actors' roles and responsibilities, and along with certain other institutional characteristics will determine the strength and direction of endogenous pressures. The critical questions are the same here as in the other jurisdictions we have already examined – do the police investigate their own crimes, do judges rely on the police for information or is there a judicial investigative police, do claimants get an active voice, who is the ultimate decision-maker in the case? Unfortunately, in Uruguay, the formal institutional arrangements, in the abstract, do not bode well for the successful prosecution of police officers.

Uruguay has retained its traditional procedure in criminal cases. Despite an attempt to reform criminal procedure in 1997, the basic lineaments of criminal procedure are set forth in a 1980 *Código del Proceso Penal*, established by a “*decreto-ley*” (Decreto-Ley N° 15,032)<sup>98</sup> of the recent military regime. This code abolished the *Juzgados de Instrucción*, purely investigative tribunals, and transferred responsibility for

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<sup>98</sup> A *decreto-ley* or legal decree is a decree initially enacted by the military regime that has been expressly ratified by the democratically elected legislature after the transition to democracy.



the investigation to the *Juzgados de Primera Instancia en lo Penal*, ordinary criminal courts. Within these courts, prosecutors are responsible for deciding whether the state will accuse. If the prosecutor requests a dismissal (*sobreseimiento*) at the initial stages, or refuses to proffer the equivalent of an indictment (*acusación*) at the end of the investigation, the judge must dismiss the case. Moreover, the judge cannot impose a sentence more severe than what the prosecutor has requested. In this sense it is not too different to the Brazilian and Argentine models. But the Uruguayan Code also does not permit claimants to participate directly as a party in a criminal prosecution. There is no figure similar to the *asistente do promotor* we saw in Brazil, or the *querrela* or *particular damnificado* seen in Argentina. Participation by interested parties is limited to suggesting evidentiary measures to the judge, which the judge is free to disregard.

Moreover, the prosecutor is beholden to the judge for the development of the evidentiary record on which his or her case depends. What in the common law system we might consider the prosecutorial function is, in essence, split between the judge and the prosecutor, forcing these two to work closely with each other. The investigation is fully in the hands of the judge. While the prosecutor and defense attorneys (and, in limited instances, third parties harmed by the alleged offense) can request measures of proof, the judge has the final decision on whether or not to take these measures. At the same time, the Code does not provide for the creation of a purely judicial investigative force, so that the court must rely on the police for the logistics of the investigation.

As we saw, in Argentina procedural reforms have transferred responsibility for the investigation to the prosecutor, while in Brazil the judge has substantial control over the investigation but turns over the final decision to a jury. Under Uruguay's code of

criminal procedure, the judge is primarily responsible for both the investigation and the final decision on the case – the hallmark of the inquisitorial model. The danger of an inquisitorial model is, of course, that by virtue of his or her quasi-prosecutorial role, the judge tends to adopt a more prosecutorial than judicial stance.

There is no trial, as such. When the investigation is complete, the parties submit written briefs and the judge decides on the basis of the written record of his or her own investigation. This is not to say that judges never see witnesses and defendants. As in Argentina, a precondition for beginning the investigative stage is the oral declaration of the accused in the presence of the judge. Moreover, it is the judge's responsibility to question witnesses, something which in Uruguay is usually done in the judge's chambers and in his or her presence (Cisa 1994). Judges here rely much less on their staff, coming in direct contact with the parties and the witnesses much more often than in Argentina. The average ratio of non-judicial support personnel to judges is about two to one, less than half of what it is in Argentina (Bayce 1996).

The Legislature approved a new code of criminal procedure in 1997 (Ley N° 16,893, December 1997), in an attempt to modernize criminal procedure and make it more congruent with Uruguay's international obligations. (Uruguay is signatory to a UN convention that requires that the investigative, prosecutorial and judicial functions be separated, something that is clearly violated by the existing inquisitorial arrangement.) But the new text, despite its advantages in some respects, was immediately criticized by those who said it went too far and those who argued it did not go far enough. In addition, the courts pointed out that if they were now to begin conducting oral proceedings they would need additional courtroom facilities. Since that time the legislature has failed to

appropriate the necessary funds to make the new procedures applicable, and the law has been as a practical matter null and void. The effective procedural code remains the Code of 1980, with its roots in the military regime.

In summary, the investigative function is entrusted to the judge, who relies on the police to carry out most of the actual tasks required by the investigation. There is no independent investigative force that answers directly to the courts. The prosecutor is responsible for the prosecution, but depends on the judge for authority to take evidentiary measures. The defense attorney similarly suggests investigative measures but the judge has the final word. The same judge that presides over the investigation makes the ultimate decision on the merits of the case.

If we stopped here, given these endogenous incentives, the likely placement of the actors along the now-familiar continuum of normative preferences (i.e., each actors' placement of  $r'$  along the range of possible  $o$ 's) might look similar to Buenos Aires, as depicted in Figure 4.2: the police fall close to the defendant because they belong to the same force, the prosecutor may follow the police but is pulled toward the judge because of their joint responsibility for the investigation. But given their dependence on the police for logistical support, both judge and prosecutor will still tend to be pulled somewhat closer to the police. Claimants are at the opposite end of the continuum, but in Uruguay, they are unable to participate directly, so their influence is more dilute. In short, endogenous pressures to be lenient with the police are likely to be high, and the center of gravity of the entire system would tend toward the defendant in a police case.



FIGURE 6.1: POTENTIAL ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES ON THE BASIS OF ENDOGENOUS INCENTIVES ALONE – URUGUAY

But again, Uruguay makes it clear that we cannot stop with an acontextual institutional analysis. In addition to internal pressures, we must consider the resources claimants can bring to bear on their claims as well as the exogenous pressures arising from the social and political context and transmitted to the various actors through career and similar incentives. First I turn to the social, economic and political context.

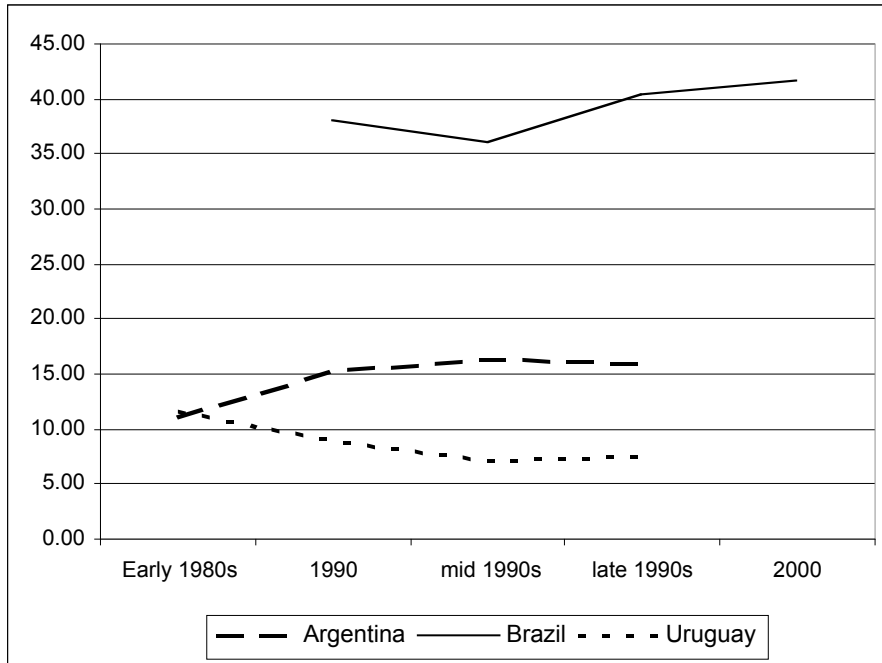
## **B. Social context**

### **1. Socio-economic context**

The socio-economic context from which claimants are taken matters primarily because it conditions claimants’ ability to influence the legal system on their own behalf. The social composition of the victim population in Uruguay is similar to that of Buenos Aires and Córdoba. Fully half were unemployed, and two thirds belong to the lower working class or below. Most of the incidents occur in what the media and the police call “conflictive” (typically lower class) neighborhoods. As discussed in detail in Chapter 3, here as everywhere, the most frequent targets of police violence and rights abuses are

young males from among the underprivileged. What is different in the Uruguayan case is the broader context in which these victims are inserted, and the distance between their immediate survivors and the state.

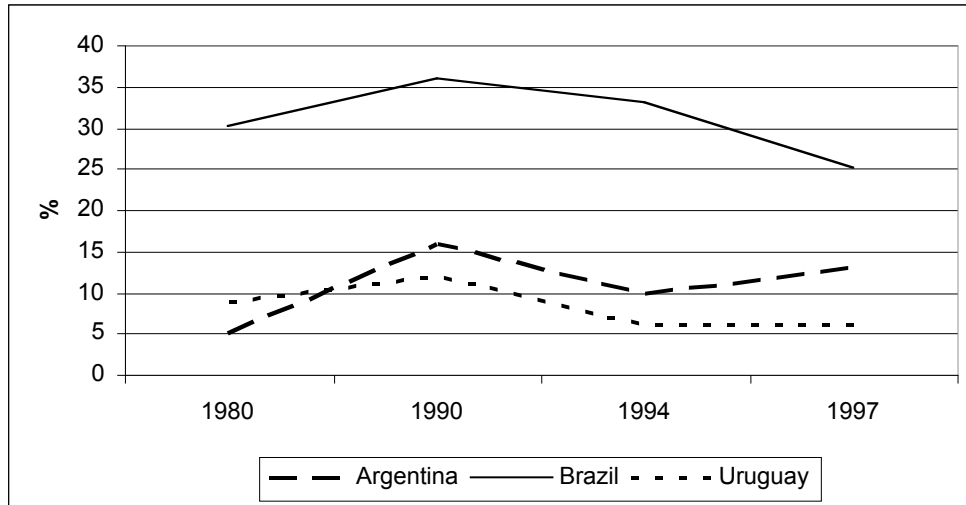
Historically, Uruguay has experienced lower levels of inequality than its Latin American neighbors. CEPAL data for the 1990s show a more even income distribution in Uruguay than in any other country in Latin America (Figure 6.2). With respect to the two reference countries in particular, Argentina and Uruguay began the 1980s with a similar income distribution, but the situation has worsened in Argentina and improved in Uruguay, leading to a substantial divergence by the end of the decade. Brazil, in turn, has always had vastly higher levels of inequality than either of the other two.



Source: CEPAL (2003), Panorama Social de América Latina 2002-2003

FIGURE 6.2: RATIO OF THE SHARE OF TOTAL INCOME EARNED BY 1ST/10TH DECILE IN ARGENTINA, BRAZIL AND URUGUAY

Moreover, as seen in Figure 6.3, the poor are a smaller percentage of the population in Uruguay than in the other two countries.



Source: CEPAL (2003), Panorama Social de América Latina 2002-2003

FIGURE 6.3: URBAN HOUSEHOLDS BELOW POVERTY LINE IN ARGENTINA, BRAZIL AND URUGUAY

As a result, on average, the poorest are not as far removed in Uruguay as they are in Argentina and Brazil: not only are they part of a smaller pool and therefore closer to the edge of the pool, but the distance between that pool and the rest of society appears less daunting.

Many have remarked on an ethos of egalitarianism that is peculiar to Uruguay, which may be a consequence of the smaller population, the narrower gap in material conditions between the underprivileged and other sectors of society, and a long history of (not yet dismantled) social welfare policies (see, e.g., Castiglioni 2002 for an analysis of state reforms in response to the Washington Consensus). Thus, while he sounds a clear warning for a future that he sees in much more dismal terms, Uruguayan sociologist Ruben Kaztman notes that Uruguay has historically enjoyed a very high level of social integration. He says “This level of integration can be seen in the functioning of its institutions, in the absence of important social distances, in the fluid and symmetrical

communication between persons of different social extraction, as well as in the many ways in which social solidarity is expressed when called upon” (Kaztman 1997, in UNDP 1998). Another Uruguayan sociologist, Rubén Bayce, in a voluminous study of access to justice, similarly concludes that the legal system, despite its cost and inefficiency, reaches the population quite well (Bayce 1996).

The key point for our purposes is that despite indices of poverty and income inequality that are only marginally better than those in Argentina, the more social democratic state in Uruguay maintains a stronger presence across social strata. As Bayce notes, “the total number of people specifically dedicated to the administration of justice ... configures a very high number such personnel on a per capita basis. ... Uruguay has the fifth highest rate of judges per capita in the world, one of the highest rates on the planet in police per capita ... which makes Uruguay one of the countries with the greatest social control capacity, enforcement and guarantee of justice ....” Whether this final conclusion is justified or not, at minimum it is clear that contacting the state and its administration of justice personnel is neither an insurmountable logistical task nor a foreign concept. The legal system is well within the reach of almost any citizen.

## **2. Socio-political context**

In addition, the critical distinction between Uruguay’s socio-political context and what we have seen in Argentina and Brazil is the lack of repeated calls on the part of the public and the leadership for more draconian and repressive responses to crime. A decade-long study concluded that while murder rates had remained stable from 1990 to 2000, armed robbery had increased almost three-fold, from just under 17 per 10,000 inhabitants to nearly 45 per 10,000. As a result, Uruguay shows much the same pattern as



all eight countries included in the 1996 Latinobarómetro: 87% of respondents felt that crime had increased, and Uruguayans were second only to Venezuelans in the percentage of respondents (8%) naming crime as the principal problem in the country. But the social and political response to these crimes is palpably different in Uruguay than in Argentina or Brazil. There is a complete absence of political platforms and public statements by elected officials comparable to Ruckauf's, Patti's or Rico's "*mano dura*" and "*meta bala*" arguments; and opinion polls and interviews find no statements comparable to the "*marginal tem que morrer*" (criminals must die) heard in Brazil.

Moderate statements are common even when we might expect the opposite. In July 2000, an armed robber shot and killed a taxi driver. The taxi drivers' association released a statement in response that read, in part, as follows: "We ask ourselves: what could lead someone to kill for a few coins, other than the most atrocious poverty, the greatest degradation of the basic values of a human being, the lack of employment, of a just wage, a fraternal education [*educación solidaria*], and dignified living conditions? ... We are convinced that this is one more murder committed by the reigning economic and social model, and that those who promote policies that marginalize and exclude the immense majority are just as responsible for this crime as the individual who pulled the trigger ending the life of this worker" (La República, July 12, 2000). This opinion, attributing crime to social conditions and the solution to social change, is widespread, as we will see.

The ideological shift in the political leadership from beginning to end of the 1990s, on questions of civil and human rights, is similar to that of São Paulo, though the range is narrower. As described in Chapter 5, São Paulo began the decade with rightist

law-and-order rhetoric on the part of elected officials, and ended it with a much more rights-oriented center-left government. Uruguay began the decade with Lacalle, continued with Sanguinetti, and ended with Batlle. The first two were center-left on most issues, resisting market reforms and the neo-liberal impetus. Both de-emphasized human rights accountability for the abuses of the previous regime (Skaar 2002), but did not openly advocate greater latitude for the police under democracy. Batlle is an old-fashioned liberal with a social democratic rhetoric when it comes to crime and a more proactive stance on the human rights question. Batlle immediately took steps to uncover information in some of the most notorious cases associated with the dictatorship (Skaar 2003).

In 1999, Batlle, then a candidate to the presidency, argued that crime was a response to social problems, which the government could and should resolve (El Observador, "Batlle pide atacar las causas del delito," March 13, 1999). He lost the first round to the Frente Amplio, a coalition of socialist and other parties on the Left, and was narrowly elected president in the second round. A year later, at a funeral honoring two police officers killed in the line of duty, Batlle returned to the same theme: these violent events, he said, "lead us to reflect that we not only need a capable and well paid police force, but that it is also essential to take strong measures in the formative area, in the educational area, to resolve problems of marginality that are the ones generating, in most cases, these situations and circumstances that are so sad and so irreparable" (La República, December 19, 2000, p.22).

While neither Sanguinetti nor Lacalle, who governed during the entire decade, were especially strong advocates of human rights, neither were they advocates of the

“mano dura” approach to crime. Meanwhile, the electorate was steadily moving to the left, as the ever-greater success of the Frente Amplio in local and national elections demonstrates. In São Paulo, the electoral success of the left was divorced from public opinion regarding the use of lethal force and due process guarantees for criminals. In 1995, polls may have suggested a similar hardening of opinions against lawbreakers in Uruguay: the Latinobarómetro suggested that for the first time a majority believed penalties for lawbreakers needed to be increased, and for the first time ever the proportion of Uruguayans in support of the death penalty (46%) exceeded those opposed (45%)(El Observador, 11/19/1995, pp.32-33). Also in 1995, more people blamed “a moral crisis in society” (35%) rather than an economic crisis (27%) for crime.

Only a year later, however, results returned to historical patterns, showing what might be termed a more social democratic view of crime and the proper response to crime: 46% blame social conditions, only 35% moral decay; and 48% oppose the death penalty compared to 43% in favor (Latinobarómetro results reported in El Observador, May 19, 1996). Bayce, relying on a series of polls by Gallup, Factum, Vox, Equipos and Marketing, also reports less support for repressive measures: in 1995, he shows only 31% favoring of the death penalty, while 61% were opposed (Bayce 1996:101).

Unfortunately, there are no polls directly addressing the question of the use of deadly force by the police. But while in Argentina and Brazil there was no dearth of statements by elected officials or the public in favor of using lethal force as the solution to crime, I was unable to find any such statements reported in the press in Uruguay at any time during the 1990s. Moreover, some of the polls reported by Bayce indirectly suggest disapproval: in 1989, 46% oppose while 36% favor a “*mano dura*” approach (the

reference is to a repressive style of policing); in 1990 only 10% favored the use of “more repression” to control crime; in 1993, only 20% agreed that “*más vigilancia*” (more vigilance) was needed on the part of the police, and only 8% agreed that more “*persecución*” (which translates as pursuit, rather than persecution) was needed. In 1995, an absolute majority of respondents (54%) stated that the solution to crime does not lie in repressive measures, whether harsh or soft, but rather in addressing the social causes of crime (Bayce 1996).

When I asked Juan Faropa, who runs a police training program established with UN and local funding, why the police in Uruguay kill so much less than the police in other countries in the region, I expected to hear something about superior training, more civilian control over the police, or perhaps even lower levels of violent crime. Instead, he said only “our society would not tolerate it. People will tolerate moderate levels of violence [moderate beatings, for example, which have been a persistent problem in Uruguay] but not killings” (author interview 12/19/00). The legislative history of a series of proposals to extend the police’s right of self-defense and protect police officers who use their guns in the course of duty backs up this assessment: every one of those proposals, introduced at different times in the course of the decade, usually after a police officer is shot, has failed.

The fact that police shootings are so much less frequent helps to focus attention on these cases. The press devotes considerable space to the stories, usually running more than one article in each case, with follow-ups on successive days and continued reporting as the courts decide whether or not to indict. In Buenos Aires and São Paulo, in contrast, as we saw in preceding chapters, if the incident is reported at all, it is usually a small

story that simply repeats the initial police position. Moreover, the press often focuses on and highlights the response by the Minister of the Interior, who is the civilian head of the police and usually a prominent member of the governing party.

The result of this political environment is clear in the aftermath of these events. After a police officer killed González Ortiz, nearly two hundred neighbors approached SERPAJ, an NGO, to press for a legal response. The Hospital Filtro case generated repeated mass demonstrations. When a police officer killed Nuñez Sellanes, the public mounted a demonstration in front of the local police station that lasted all the following day, according to press reports. These three cases involved “innocent victims,” youths with no previous connection to crime. As we saw, such a victim can prompt demonstrations in Buenos Aires too. But public reaction is not limited to the “worthy” middle class victim. Albín, the *bagayero* shot after a car chase in the midst of a smuggling operation, might have gone unnoticed in Argentina or Brazil. But in Uruguay, Albín became the subject of extensive popular mobilization demanding justice. After his death, an association of informal merchants took up his case, organizing demonstrations that gathered several hundred people, according to press reports.

At times even those public officials we might expect to be most defensive about these cases speak out in favor of a prosecution. When Valente Gómez was killed after a car chase, the Minister of the Interior promised he would get to the bottom of the incident, initiating his own internal investigation of the events and supporting a prosecution (El País, July 6, 1998).

In summary, the demographic profile of the victim pool in Uruguay is similar to the profile of victim populations in Buenos Aires or Córdoba, but the social and political

context is quite different. Uruguay shows less inequality overall, and the pools of marginal residents are smaller relative to the population. Even marginal residents are likely to have some access to and contacts with the state besides routine encounters with the police. Moreover, the political reaction to crime is not a call for giving the police more latitude in the use of deadly force, but rather a focus on resolving the perceived social causes of crime. Given this social, economic, and political context, claimants are likely to bring significantly greater economic and political resources to bear as they bring their demands to the legal system. Victims are not as far removed from the rest of society, and their deaths prompt a far greater popular outcry. Thus not only do they have more personal resources to overcome police attempts to restrict information, but exogenous pressures push judges and prosecutors in the direction of an aggressive prosecution of a police officer accused of murder.

I now turn to an examination of the police, to uncover the incentives and opportunities the police might have to counteract these demands, both in terms of restricting access to information, and by creating endogenous pressures in favor of a more lenient stance. After that we will look at the role of civil society actors and the structure of the Prosecutors' office and the judiciary to determine whether there are institutional reasons why we might expect judges and prosecutors to be especially responsive to exogenous and endogenous pressures.

### **C. Connections between the legal system and the social context**

#### **1. Police forces in Uruguay**

In Uruguay as elsewhere, the very first investigation of the crime scene is carried out by the same police officers who carried out the shooting. In addition, like Buenos

Aires but unlike São Paulo, Salvador and Córdoba, the investigative police – officially and in practice – are part of the same police structure as the front line police officers most likely to use lethal force. As a result, the courts cannot count, a priori, on an independent investigation. Given the current level of civilian control over the police, neither are exogenous pressures likely to achieve a very great shifting of the police back to the aggressive investigative stance we might see in an ordinary criminal case. At the same time, the police corporation as a whole is under far less pressure to use any means necessary to curb violent crime. The end result is a police force that will participate in a cover-up, when excesses occur, but is less willing to defend the practice of using lethal force under any circumstance.

Uruguay has a national police force, which is part of the Executive Branch under the jurisdiction of the Ministry of the Interior. As in Argentina, the same police force serves the security and investigative functions, though there are subdivisions charged with various specialized tasks, such as narcotics or smuggling. While each of these subunits responds to its own hierarchy, ultimately all the hierarchies converge. In contrast to the infamous ROTA in São Paulo, or certain strike force units in Argentina, there do not appear to be any units with an especially violent record. Only a few of the officers charged with homicide in the 1990s belong to a special unit at all. The police officers who killed Albín, the presumed smuggler, were part of an anti-smuggling task force, the officers involved in the Valente Gómez case were part of the *Radio Patrulla*, a radio-dispatched force. The defendants in the Hospital Filtro case were Coraceros and Granaderos, essentially riot police. But the majority of the defendants in these cases are members of the ordinary police force.

The *Policía Técnica* is the division in charge of technical aspects of crime investigations. They carry out DNA, ballistic and other tests, and produce the expert reports requested by judges. They are even, occasionally, referred to as the “Judicial Technical Police” but they, like all the other divisions of the Uruguayan police, report ultimately to the Minister of the Interior, not to the judicial branch. Judicial investigations are typically a joint effort of this force, for matters requiring more advanced techniques, and the ordinary police, which secures the scene, takes witness statements and produces a report.

While its reputation for misdeeds does not match that of the Buenos Aires police, there have been notorious instances of corruption and crime reported in the media. In the 1990s in particular groups of off-duty police officers became known as the “*poli-banda*” or “*super-banda*” after they committed a series of sophisticated robberies. The problems did not end after the “*super-banda*” was disbanded (see for example, “La Semana Negra: Cuatro casos policiales con policías delinquiendo,” Posdata, February 18, 2000; “Este Año Procesaron a 37 Policías,” El Observador, May 24, 2000). These continued problems, together with notorious problems of corruption in controlling smuggling at the border with Brazil, attest to the fact that, while it may be less lethal, this police force is no more transparent to civilian oversight than its counterparts in Argentina and Brazil.

Part of the problem is the similarly militaristic and hierarchically disciplined nature of the force. In May 2000, an anonymous police officer gave an interview detailing his fall into corruption (La República, May 7, 2000 (monthly edition)). He told how, throughout the 1990s, his colleagues and his superiors had gradually embroiled him in ever-greater instances of corruption. Tellingly, he says, “If you try to be clean,



everyone turns against you. ... If you, a rank and file police officer denounce a superior you get a disciplinary hearing and the superior gets nothing....” In short, it does not appear to be any easier for Uruguayan police officers than for their Argentine or Brazilian colleagues to report wrongdoing on the part of their colleagues and superiors.

The key institutional variables show very much the same results for police in Uruguay and in Buenos Aires: In cases of police violence, the police force must investigate itself; the police are the principal source of information for the system in all cases; and internal hierarchical control over legal and illegal conduct is quite strong, rendering the corporation opaque to external oversight. All of this suggests that the police have both motive and opportunity to engage in the sort of information rationing we have seen already, especially in Buenos Aires and São Paulo.

Perhaps the major difference between the police in Uruguay and the others is this: While the police are not overly susceptible to oversight – and thus show relatively high indices of crime and corruption – they do not face the same high level of social or political demand to offer a violent response to crime. Indeed, whenever one of their own appears to have exceeded certain boundaries on the use of force, they are likely to lose the support of their civilian leadership and face criticism from the population. It is surely not the case, unlike statements to that effect in São Paulo for instance, that a police officer who commits murder can say he is being prosecuted for doing what society asks him to do. In the absence of external pressure to this effect, there is unlikely to be any internal pressure on street-level police to use their weapons. What we might expect, however, are efforts to whitewash the killings that do occur, to avoid embarrassment and criticism, and a distancing of the corporation from the more egregious killings.

The data from actual cases match this prediction. We see the same pattern of cover-ups and falsified proofs in Uruguay as we do in other places. In the Albin case, the police planted a gun on the victim, and used it to shoot holes in their own clothing and in their own car. In the Hospital Filtro case, the police simply closed ranks around the individuals who pulled the trigger, so that their identity was never established. In the Gamarra case, the police chose a remote location to ambush the victim, and prepared a false police report to cover up the killing with the full collaboration of the local police chief. In the case of González Ortiz, the police prepared a report that claimed the victim struggled with the police officer over the gun and was killed accidentally, despite eyewitness accounts that say the victim was prone when the police officer placed the gun against his neck and pulled the trigger. It is not, of course, a surprise to find that the police attempt to cover up when they commit a crime, but at least we can rule out as a possible explanation the theory that the police in Uruguay are more transparent to external control, and simply will not tolerate illegal behavior on the part of their colleagues.

Thus far, the results are contrary to what we might have expected. If the problem in Argentina and Brazil is that the police, because of their privileged position as the information supplier to the courts, can deprive the system of the information it needs, then we might have expected something different in Uruguay – a judicial police, or one that is better controlled, more transparent. But, in fact, problems of corruption within the police are quite intractable, suggesting the police are not transparent to outside oversight. Moreover, they are still the main source of information and they still belong to the same corporation as the perpetrators, and so can be expected to prefer an acquittal (and

therefore to attempt to shift *o'* in that direction). Sociologist Bayce argues, as I have for each of these countries, that “the true Achilles heel of the Judicial System [in Uruguay] is the Police, not the Judiciary” (Bayce 1996:99). The difference between the outcomes in Uruguay and those in other places, therefore, must lie in the ability of the system to overcome this pattern of obstruction by the police.

## **2. Civil society actors**

First we will see whether some part of this ability can be attributed to claimants themselves. While indices of poverty are similar over all, claimants are more diverse in Uruguay, and tend to have greater political and economic resources. The Procedural Code, however, denies them the ability to participate as a Private Prosecutor – a critical tool in Buenos Aires and São Paulo for redressing power imbalances between claimants and the police. Still, there are collective actors in Uruguay that work on claimants’ behalf from the margins of the legal system. Importantly, spontaneous gatherings and demonstrations, responding to individual cases, play an important role in focusing media and judicial attention on the case. These groups typically are not organized by special-purpose NGOs, though they may ultimately resort to them. Their participation in the cases I have tracked suggests such groups are more important here than in São Paulo and Salvador in particular, though we see similar phenomena in Argentina, in particular cases.

The principal non-state organized actor dealing with issues of police violence and human rights is SERPAJ (Servicio Paz y Justicia). SERPAJ, among other things, tracks such incidents, offers a forum for those with complaints, and offers legal representation to those who wish to pursue legal avenues. It has had an important role in some of the

cases discussed here, especially the Hospital Filtro case. Its role in the prosecution of that case is illustrative. Recall that evidentiary measures are entrusted to the judge's discretion, and SERPAJ is prevented from intervening directly in the case. Nevertheless, the judge encouraged Ariela Peralta, an attorney who works with SERPAJ, to bring witnesses and documentary evidence to the court's attention, which the court readily accepted into the record. The judge also ordered police agencies to produce information that SERPAJ requested. Overall, Peralta reports, the judge was very receptive to her participation in the case, though she was conscious at all times that her activity was entirely subject to the judge's good will.

While the results in the Hospital Filtro case were positive, SERPAJ (and claimants in general) would have had no recourse at all had the judge chosen to leave them out of the process altogether. Under the existing Code, they cannot accuse, if the prosecutor chooses not to, and they have no legal right to argue the facts or the law (though the judge might, if he or she chooses, allow them to file a brief summarizing the case). As a result, collective action of this sort is a much weaker tool for influencing legal outcomes than similar avenues open to civil society in Argentina and Brazil. While claimants might have additional resources, therefore, they act at the sufferance of judges and prosecutors. To find the answer to Uruguay's greater efficacy, then, we must move up the ladder another rung or two, and examine the conduct of prosecutors and judges.

#### **D. Prosecutors**

I have already established that exogenous pressures are likely to be in favor of more aggressive prosecutions, while endogenous pressures exerted by the police on individual prosecutors in a given case will run in the opposite direction. How these

opposing forces will balance out for individual prosecutors depends on how open the institution is to exogenous pressures, and how able it is to enforce normative homogeneity within its ranks.

Prosecutors are part of the Executive Branch, like the police, but subordinated to the Ministry of Justice. They are named by the Executive with the advice and consent of the Senate, and once appointed enjoy the same tenure protections as judges. This suggests considerable individual freedom of action. At the same time, they rise in the ranks and obtain geographic assignments on the basis of seniority weighted by performance. Their immediate superiors evaluate their performance (Ley Orgánica del Ministerio Público y Fiscal (1982), Art.32), and have disciplinary authority over them. They are, therefore, subject to the displeasure of the hierarchy as much as any prosecutor in Argentina or Brazil. Interviews with attorneys confirm that prosecutors face considerable internal pressures to conform.<sup>99</sup>

The head of the agency, moreover, the *Procurador General*, is a political appointee named by the president with the advice and consent of the Senate. Unlike São Paulo, where the executive must select its nominee from a list produced by prosecutors themselves, the Uruguayan executive is free to select a congenial Procurador General, so long as he or she can survive confirmation by the Senate.

The result of this arrangement is a prosecutorial corps similar to that of São Paulo, but with a top leadership in Uruguay that is more political. Individual prosecutors enjoy considerable protection from political pressures, but their advancement is subject to the pleasure of their superiors. Their superiors in turn, are influenced by the political nature

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<sup>99</sup> Interview with Ariela Peralta (12/14/00).

of the appointed head of the office. Thus directives from the top are likely to conform to political trends, while the internal discipline and promotion regime produces a fairly high degree of normative homogeneity among front line prosecutors. In other words, the prosecutorial force is open to exogenous pressures at the top, and transfers these pressures efficiently to prosecutors down the ranks. In the favorable political context of Uruguay, this allows for the transmission of exogenous pressures to produce positive results in police homicide cases.

As noted in the discussion of the Code of Criminal Procedure and the police, endogenous pressures run counter to these exogenous ones. Not only do these prosecutors, like all others, work with the police daily to incarcerate defendants that most often fit the same profile as the claimants here, they also depend on the police for information in all their cases. They can ill-afford to antagonize the police too badly. But in Uruguay prosecutors also work closely with the judge to develop the evidentiary record. Because the Code essentially splits the prosecutorial function, judges and prosecutors collaborate very closely during the entire *sumario* stage, as they collect information. According to reports, relations between judges and prosecutors are much better than the relationship between prosecutors (and judges) and the police, which is quite conflictive. One consultant, for example, has identified the improvement of relations with judges and prosecutors as one of the most important current problems for the police (González 2003). Prosecutors hold the police in contempt as being ill-prepared and ineffective, while the police distrust prosecutors because they lack policing experience.

In the end, therefore, exogenous pressures dominate endogenous pressures, and prosecutors retain an adversarial stance with respect to the police, while endogenous pressures moderate this stance to some degree. In consequence, though they are far from zealots they are more likely to respond with a serious investment of resources when the needs of a case demand it, than their counterparts in Buenos Aires or São Paulo. This matches the perception of human rights attorneys, who in discussions of concrete cases rate do not complain of obstructionism by prosecutors. Attorneys do, however, rank the conduct of judges more favorably, to whom we turn next.

#### **E. Judges**

Scholars who simply tabulate formal institutional characteristics place Uruguay near the bottom of the pile in terms of independence (Skaar 2002), and for good reason. The Justices of the Supreme Court are named by the Legislature, by a two-thirds vote of the General Assembly (the House and Senate combined). They serve a term of only ten years, and can be re-appointed after a five-year hiatus. There is no constitutionally guaranteed budget. The Supreme Court presents a proposed budget to the Executive, to use as a guideline in preparing the budget proposal that ultimately goes to the legislature. Judges and independent observers agree that the Executive largely disregards the Court's requests, drastically trimming its proposal before sending it on. The Court is thus beholden to the Legislature for its composition, and to the Executive for its funding. Individual justices who aspire to a second term must not offend the Legislative leadership, who will approve their appointment.

And yet, for all that, informed observers agree that Uruguayan courts are far more independent in practice than nearly all their counterparts in Latin America, perhaps even

more so than the courts in Costa Rica and Chile. Indeed Staats, after reviewing and tabulating seventeen indicators derived from expert and public opinion data on courts in Latin America, places Uruguay in the very first place, followed by Costa Rica and Chile (Staats 2003). Uruguayans themselves, while they complain that their courts are slow and inefficient, uniformly maintain that their judges – at all levels – are honest and independent. While it is beyond the scope of this work to fully account for such a high level of independence given the seeming lack of institutional guarantees, the political context strongly suggests an answer.

As noted, appointments to the Supreme Court must be approved by a vote of two thirds of the General Assembly (Constitución de la República Oriental del Uruguay, §XV, Art.236). The Constitution also has a “safety valve” in the event of a deadlock: if the Legislature fails to fill a vacancy within ninety days, the most senior appellate judge in active duty is automatically named to the Court. Going back as far as 1942, neither the *Blancos* nor the *Colorados*, the two dominant parties in Uruguay, had a two-thirds majority, and thus each party had veto power over the other’s judicial candidates.<sup>100</sup> At the same time, however, they jointly controlled at least two-thirds of the General Assembly until the 1994 election, when their combined share dropped to just over 64%. By agreement, therefore, they alternated candidacies for the Supreme Court. As vacancies arose, each party would name a justice in turn, and the other party would concur, producing the two-thirds majority.

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<sup>100</sup> I am grateful to David Altman for generously sharing his data on legislative partisan composition in Uruguay.



Given a five-member court, the parties also alternated court majorities, each nomination giving the opposite party its turn at the helm of the court. Moreover, the short tenure of each justice (ten years) means that vacancies arise, on average, every two years or so. Given the choice between (a) losing control over the Supreme Court by operation of the “safety valve” clause, (b) producing a highly partisan court that would upset the juridical order every two years, or (c) a more stable and more independent institution that might provide some legal continuity and provide a neutral forum to resolve disputes, the parties opted for the latter. While individual judges are inevitably associated with the party that named them, this association is understood as an ideological affinity rather than as overt partiality to the interests of that party or the Executive, and the Supreme Court is strongly believed to be free from partisan political meddling in the outcomes of cases.<sup>101</sup>

But independence does not end with the Justices of the Supreme Court. The consensus opinion in Uruguay is that lower court judges are also honest and independent. The Supreme Court appoints lower court judges by majority vote. After a two-year probationary period they have life tenure and salary protection. The Supreme Court also exercises the disciplinary function, with four out of five votes required for removal of a judge. Similarly, the Supreme Court must approve any promotion by a super-majority of four votes. Judges begin their careers in general jurisdiction courts in remote rural regions, and ascend by moving closer to the capital and from less prestigious courts (such

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<sup>101</sup> After the 1994 election, however, the old cooperative code fell apart. The two traditional parties lost their combined two-thirds control, and the Colorados, who are either the largest (1994-1999) or second largest (after 1999) party have not reached a similar agreement with the Frente Amplio, the newly dominant force in Uruguayan politics. As a result, the last few justices to reach the Supreme Court have done so by virtue of seniority. The consequences of this pattern for judicial independence are hard to predict, though on its face it does not appear to be a threat. If anything, it might further de-link Justices from the political realm.

as the criminal courts or the juvenile justice courts) to more prestigious ones (civil trial courts, and ultimately appellate courts).

Historically, the perception was that seniority was the larger part of the advancement equation, with little regard for merit (Cisa 1994: 87). To address this perception the Supreme Court has now created an advisory committee that evaluates and proposes candidates for promotion. The committee is composed of one Supreme Court justice, an appellate judge designated by the association of judges, a practicing attorney designated by the bar association, and a law professor named by the law school (Acordada No.7192 (June 9, 1993) renewed by a new Acordada in 2000). Committee members rotate every two years and can only be reelected once. The committee receives survey forms filled out by members of the Bar Association, and a report from each judge's immediate jurisdictional superior, evaluating and recommending judges for promotion (or not). While the Supreme Court is free to disregard the recommendations of the committee, attorneys believe it carries considerable weight, especially for the less visible posts. In sum, authority is quite centralized, but the Supreme Court solicits input from various sources in making promotion decisions, essentially creating more veto players in the process of promotion.

The website of the Supreme Court is careful to state,

The Judicial Power is organized so that each of its organs is independent in the exercise of its jurisdictional function. There is no hierarchical relationship among judicial organs in relation to the exercise of its jurisdictional function. A Court of Appeals may not give instructions to a Trial Judge or Justice of the Peace regarding how to resolve a matter. The apparently hierarchical line existing between different judicial organs – the fact that one may appeal the sentence of a

Justice of the Peace to a Trial Judge, or of a Trial Judge to a Court of Appeals – is not, in reality the exercise of the attribute of a hierarchical superior ....<sup>102</sup>

Formally, then, trial judges are framed as independent actors, exercising their judicial judgment free from interference. This image is promoted by protestations regarding the internal independence of trial judges from their immediate superiors, and by the fact that, as in Brazil, the jurisprudence of the Supreme Court and the courts of appeal is not binding on lower court judges. Nevertheless it is clear that judges' career path provides powerful incentives for conformity. Judges must please not only their immediate superiors, but also the members of the Supreme Court, and to a somewhat lesser degree, the members of the bar association if they wish to be promoted or assigned to a desirable location. In fact, two of the persons I interviewed spontaneously mentioned career incentives as a factor in maintaining a conservative judiciary that is cautious and resistant to change, and very orthodox in its interpretation of the laws.<sup>103</sup>

According to human rights attorneys, these characteristics make it difficult to prevail on claims that rest on such new-fangled notions as the domestic applicability of international human rights law, new interpretations of existing laws, and other legal innovations. At the same time, in an ordinary murder prosecution, the fact that the defendant is a police officer does not, according to these and other lawyers, make any difference.<sup>104</sup> The rules applied are conventional ones, and judges' very orthodoxy and

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<sup>102</sup> Quote from <http://www.poderjudicial.gub.uy> (obtained February 6, 2004).

<sup>103</sup> Interview with A. Peralta, Human Rights attorney with SERPAJ, December 2000; interview with Herbert Gatto, Attorney and author, December 2000.

<sup>104</sup> Interview with Susana Falca, Criminal Defense attorney, December 2000.

exposure to scrutiny makes them more reluctant to bend the rules in favor of the police, despite the presence of endogenous pressures to that effect.

This presumes, of course, that their superiors are not opposed to these prosecutions and will in fact channel exogenous pressures in favor of police prosecutions. Skaar (2002), however, argues convincingly that political leaders (Presidents Sanguinetti and Lacalle in particular), appellate courts and the Supreme Court were all (at least during the 1990s) hostile to human rights prosecutions relating to the abuses of the previous regime. She discusses in some detail the case of one judge in particular, Judge Reyes, who by some accounts was transferred to punish him for his overly activist role in investigating certain disappearances during the dictatorship. But these cases clearly have a different political import than instances of police violence during the democratic period.

After the transition to democracy in 1985, Sanguinetti pushed what was essentially an amnesty law through the legislature – most believe this was pursuant to an agreement he made with the military as part of the transition negotiations. Groups on the left sought to invalidate the law by means of a plebiscite but ultimately lost the referendum (for details on transitional justice issues, see Barahona de Brito (1997) and Skaar (2002)). The amnesty law was therefore backed by the president, both of the dominant parties, and – by virtue of the plebiscite – by a majority of the population. The plebiscite in fact produced a dominant social consensus to leave the past alone. The dominant parties on the left publicly acquiesced in the results. And, importantly, victims of the prior regime and their survivors seemed to acquiesce – until the last three years or so, there were almost no cases filed by individuals seeking redress for those violations.

Given that a straightforward application of the law forecloses such investigations, given the forces for conservatism already discussed above, and given, finally, the powerful array of political forces and social consensus backing the law, it is no surprise that the courts took a hands-off approach in these human rights cases.

Police cases, however, do not raise questions related to the plebiscite or the alleged agreement between future-president Sanguinetti and the military as they pacted the transition. On the contrary, because the Minister of the Interior is in charge of and closely associated with the police, police abuses are deeply embarrassing to the ruling party. And there is no indication that the two main political parties – or by extension, the judges they appointed – are especially willing to turn a blind eye to police shootings. This is especially true since, as Faropa indicated, “the population simply will not tolerate” killings. As a result, to the extent the cases come to the attention of the political and judicial hierarchy, it is likely that a judge will be expected to carry these cases to their ultimate conclusion. In terms of incentives, then, exogenous pressures run in favor of a prosecution, and the judicial hierarchy is fully capable of transmitting these pressures to individual judges. The case of Judge Reyes suggests there is a powerful disciplining mechanism at work but not that this discipline would be exercised to restrain judges from investigating police murders.

But what of judges’ informational dependence? In the ordinary course of events, judges in Uruguay depend on the police for information, as we saw, and in our other cases this dependence was fatal. Even if we grant, therefore, that Uruguayan judges might be more motivated than those in Brazil and Argentina to dig deeper for information about these cases, how do they overcome their informational dependence? The most important

part of the answer to this question has already been set forth in the discussion of the socio-economic context: the inequality of power between the police and the claimants is simply not as pronounced in Uruguay as it is in Brazil or even Argentina, and the police are less able to impose silence on claimants and witnesses, even when the victim was a member of the underprivileged class.

The cases we have already discussed illustrate this process. In the case of Gamarra, the cattle rustler killed in an ambush, the judge heard the complaints of Gamarra's mother, ordered a re-enactment of the crime and showed he could not have been killed in an exchange of gunfire. The same was true in the Albín case, where the judge brought Albín's companion to the site, and re-enacted the shooting. In both of these cases, the police actively resisted the investigation and yet the judge ultimately came to the opposite conclusion after speaking to interested parties and witnesses. Crucially, there is little indication in Uruguay that witnesses in these cases fear for their lives, and none of the cases in the data set involve the killing of a witness in a cover up (with the possible exception of Berríos who was apparently killed to cover up some of the activities of the Pinochet regime). There is no evidence that complainants, lawyers or judges have been threatened.

Another part of the answer is that judges and prosecutors resort to fact-finding techniques and legal theories that do not require police assistance. The most important of the former is the re-enactment of the crime, which gives judges the capacity to come to conclusions that are independent of the police report. Judges in Argentina and Brazil also make extensive use of this technique, but there, in most cases, the decision-maker is a different actor than the one conducting the investigation. In Uruguay, even when these

techniques offer slender objective evidence, so that a jury or an independent panel of judges might resist convicting, the dual-role investigative/adjudicative judges can simply act on the basis of their convictions. Ironically, then, the inquisitorial nature of the judicial process in Uruguay contributes to a higher conviction rate in these cases.

Alternative legal theories are also available, though, of course, they do not always result in a very stiff sentence. In the Hospital Filtro case for example, the court opted for a legal theory that did not require identifying the actual shooter. Unable to overcome police obstructionism to identify the actual shooters, the judge indicted and convicted the officers in charge of the operation for failing to prevent the killings.<sup>105</sup>

Finally, judges in Uruguay have far smaller caseloads than their peers in Brazil and Argentina, and far fewer cases of this nature to deal with. Thus, if they wish to spend the time required to investigate a homicide committed by a police officer, they can do so without falling too far behind in all their other cases.

In São Paulo, Salvador and Buenos Aires, despite exceptionally high levels of tampering with the evidence and other forms of obstruction, there were virtually no prosecutions for obstruction of justice. In Uruguay, on the other hand, we do find prosecutions for obstruction of justice, suggesting that the level of informational dependence is not as high. In short, while the police are the main investigative arm of the judiciary, judges (and prosecutors) are more highly motivated to investigate and have

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<sup>105</sup> Interestingly, Civil Court judges in São Paulo have done the same. In the face of a lack of cooperation and information in cases for damages arising out of police shootings, they either shift the burden of proof to the police, to show the shooting was justified, or impose a legal duty on the state to protect the lives of those in its custody or control. The result is a radically more positive outcome in civil suits for damages than in the criminal prosecutions, even in the very same case.

access to alternative sources of information, thus breaking the police monopoly and permitting the successful prosecution of at least half of these cases.

#### **F. Overview of Uruguay**

In summary, exogenous pressures on all actors in the system run in favor of more aggressive investigations and prosecutions in these cases. The police are quite able to resist these pressures; judges and prosecutors, on the other hand, while independent of partisan political pressures in individual cases, can be expected to act in accordance with broader social and political demands, and thus to take these cases seriously. The police can and do resist efforts to prosecute by restricting and slanting the information they produce, but they cannot overwhelm and impose silence on claimants to same degree as the police in São Paulo or even Buenos Aires. Judges and prosecutors, who work together on criminal investigations, are able to overcome their informational dependence not only because claimants have more resources but also because they have fewer cases of this nature and more time to carry out investigations. Ironically, the inquisitorial nature of Uruguayan criminal procedure gives judges greater latitude in overcoming an information blackout, since they need only persuade themselves. The more the police obstruct the judge's efforts to investigate, the more likely it is that a frustrated judge will conclude they are hiding illegal conduct.

As a result, rather than the arrangement we saw in the previous figure, which only took into consideration the endogenous pressures, the arrangement of judicial actors on the continuum looks rather like the following figure:



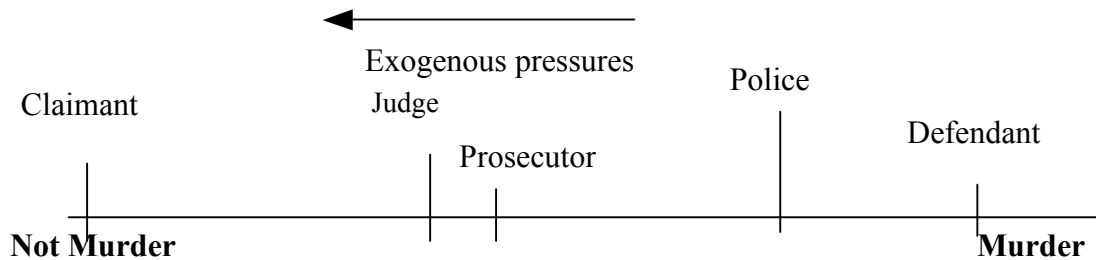


FIGURE 6.4: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN URUGUAY

The police are somewhat more divorced from individual defendants than in our other cases, because although they are colleagues of the defendant and a conviction embarrasses the whole corporation, they face less demand for draconian action, and rely less on lethal violence as a means of social control. Judges and prosecutors essentially split what we might think of as the prosecutorial function, and the latter are closely allied with the former. Both of these actors respond to public outrage and demands for an effective response when the police kill someone, and thus are shifted well toward the Claimant, though prosecutors continue to sympathize with the police to some degree. Even though the Claimant does not have a right to present evidence, the receptivity of judges and prosecutors – indeed the fact that they actively seek out information, brings that point of view into the system, shifting the balance of gravity away from the defendant.

Uruguay is an interesting case, therefore, for what it teaches us about the impact of the broader context on institutional functioning. It is primarily the broader economic and socio-political context that makes the difference in the case of Uruguay. Reduced

political tolerance for murder in the interest of citizen security heightens pressures on judges and prosecutors to respond, while reduced social inequality allows judicial actors to overcome procedural and organizational disadvantages and police resistance to secure the necessary information. This is not to say that institutional design ultimately does not matter. On the contrary, it is the design of judicial and prosecutorial careers interacting with a favorable political climate that creates incentives for these judicial actors to invest more resources in these prosecutions. A more congenial institutional design – a dedicated investigative and prosecutorial force, for example – would obviate the need for this extra effort.

Note further that some institutional features that would be nefarious in a different political climate or in different classes of cases actually lead to positive results in prosecuting police officers who exceed limits on the use of force. The permeability of judges and prosecutors to broad social demands, for example, leads to impunity in Buenos Aires, but more convictions in Uruguay. We should not, therefore, take these results to suggest that we should always ensure that judges are highly responsive to public opinion.<sup>106</sup>

The figure of the quasi-prosecutorial investigative judge in particular is prone to abuses. The ability of an inquisitorial judge to meet less exacting evidentiary standards redresses the police's greater control over the production of information in cases of police violence, and leads to more convictions. But it also leads to convictions on flimsier evidence in cases across the board, when we might want the system to meet a more

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<sup>106</sup> Though some responsiveness to political currents and external control is both inevitable and appropriate. See, e.g., Fiss (1993) for a discussion of the “proper amount” of judicial independence.

exacting standard of proof. This weakening of due process by eroding the impartiality of the decision-maker is troubling in the ordinary case, where the imbalance of power in the struggle to create  $o'$  runs against the criminal defendant. In those cases an inquisitorial court has the potential to overwhelm the defendant's capacity to respond. As a result, I do not mean to suggest that the inquisitorial model is always (or ever) the most appropriate.

In the case of Uruguay, then, judicial independence from political meddling in individual cases and broad public pressure to ensure the police do not commit egregious excesses means that  $r'$ , the rule of decision, is not too pulled too far in the direction of the defendant. Moreover, the system is open to information about these cases and successfully configures an  $o'$  that will support a conviction, given the ultimate decision maker's preferred construction of  $r'$ .

Figure 6.5 represents the typical arrangement of  $r'$  and  $o'$  in Uruguay, at the level of the final decision maker. Note that there is still some pressure on judges, and some capacity on the part of the police, to shape  $r'$  and  $o'$  in favor of an acquittal, or at least more lenient treatment (manslaughter rather than first degree murder, for example). Advocates in Uruguay complain (almost) as loudly as those in Argentina that judges and prosecutors maybe go too easy on the police. But the results in terms of both  $r'$  and  $o'$  are nevertheless clearly superior to those in either São Paulo or Buenos Aires.

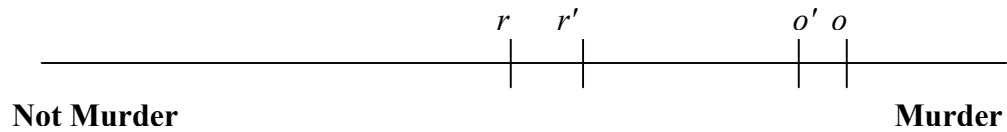


FIGURE 6.5: TYPICAL PLACEMENT OF  $R'$  AND  $O'$  IN URUGUAY

Finally, since state agents – judges and prosecutors – invest state resources and take an active role in developing  $o'$ , claimants are required to invest fewer of their own resources in that endeavor, once they have mobilized the legal system – Gamarra’s mother, for example, was able to approach the prosecutor and demand a full investigation, even though she had no resources of her own to contribute to actually developing the facts. Once activated, the prosecutor (with the judge) took control of the investigation, and developed all the necessary proofs. The result is that the socio-economic tolls so prevalent in other systems lose importance, so that there is more equality of outcomes as well as a higher level of effectiveness. The *de facto* lower standard of proof in an inquisitorial system also contributes to greater equality in these cases, since it gives judges greater leeway in weighing the evidence.

In the end the results in Uruguay suggest an important lesson for institutional analysis. The proper combination of favorable contextual variables can produce a favorable outcome, even in the presence of what might otherwise be negative institutional variables. In the case of the Violent Victim cases and many prosecutions in Salvador da Bahia I have suggested that informal institutions can be the intervening variable between similar institutions and dissimilar outcomes. In the case of Uruguay, on the other hand,

the socio-political and economic context interacts with institutional design to produce empirical regularities that are diametrically opposed to the predictions we might derive from a purely formal institutional analysis.

## CHAPTER 7

### CÓRDOBA – HIGH LEVELS OF INEQUALITY IN A STRONG SYSTEM

*La ley se hace para todos  
Mas sólo al pobre le rige.*

*La ley es tela de araña  
En mi inorancia lo esplico:  
No la tema el hombre rico,  
Nunca la tema el que mande,  
Pues la ruerpe el bicho grande  
Y sólo enrieda a los chicos.*

*José Hernández. 1878. La Vuelta de Martín Fierro, verses # 1091-92.*

In aggregate terms, Córdoba shows results that are only just behind Uruguay's. The per capita level of police killings is comparable to Uruguay's and drastically lower than the other three locations, and the conviction rate is about 45%, again very similar to Uruguay's. And yet, if we scratch just below the surface, Córdoba's results are disturbing for a different reason. This jurisdiction shows the highest level of socio-economic tolls of any of the systems examined here. The probability of a conviction when a police officer kills a middle class person is vastly higher than when the victim lives in a shantytown (see logit results in Chapter 3). Even if the families of both victims retain an attorney to accompany the prosecution (but there are no public demonstrations), the probability of a conviction is seven times higher when the victim was middle class.

How do we account for this high level of inequality? As we saw in Chapter 4, a close look at the cases suggests that the problem in Córdoba is information-gathering

rather than information-processing: prosecutorial failures happen when claimants, or the prosecution acting on their behalf, fail to build a record that will satisfy the ultimate decision-maker. In this chapter I will examine the contextual and institutional variables that lead to this result.

The problem in Córdoba is, once again, an institutional arrangement that fails to secure sufficient information in cases that affect the underprivileged. As in Uruguay and São Paulo, judges in Córdoba are willing to convict, applying a version of  $r'$ , the rule of decision, that does not impose unreasonable barriers to a conviction. Unlike Uruguay (but like São Paulo), unless prodded, state actors such as prosecutors do not actively take on the task of developing information when the police fail to do so, thus placing a greater burden on individual claimants. At the same time, the judges who serve as ultimate decision-makers are relatively high-quality, rule-oriented legal operators, who demand high-quality information in order to convict. As a result,  $o'$ , the judicial version of the facts, is skewed away from a conviction except when affected individuals have the resources to develop and bring information to bear – either directly, or by pressuring prosecutors and investigators. If this is correct, then the causal process underlying judicial failures in Córdoba is akin to the process in São Paulo – the problem is not a normative failure (judges who will not convict) but an informational failure (judges who cannot convict, given the shaky record built against the defendant).

The difference in aggregate results might raise questions about this conclusion –Uruguay and Córdoba are similar to each other in average conviction rates, while São Paulo is near the bottom of the list. How is it that the same process can lead to such different results in these two cases? The difference in aggregate results between São

Paulo and Córdoba is primarily attributable to the different mix of claimants – i.e., a substantial portion of them in Córdoba has the resources to press a claim – and to reduced social distances (compared to São Paulo) between even the most disadvantaged and the legal system in Córdoba. A secondary factor is the more frequent presence of public pressure on prosecutors to pursue particular cases more aggressively (and a greater responsiveness of both prosecutors and judges to this pressure).

The logistic regression in Chapter 3 supports this conclusion: controlling for victims' socio-economic and political resources, judicial outcomes in both places are nearly identical. The probability of a conviction in Córdoba when the victim was a shantytown resident and the survivors do not accompany the claim with a Private Prosecutor or manage to generate popular demonstrations is less than 3%. Results in similar cases are nearly identical in São Paulo, where conviction rates on average for shantytown residents are less than 5% and for those who do not have outside assistance or public pressure behind them, nearly nil.

I now turn to an analysis of the contextual and institutional variables that lie behind this causal process. As in every case, I will analyze the factors that lead to the cognitive failure (or success) of the system, on the one hand, and to the normative failure (or success) of the system on the other. I will argue, as in São Paulo, that institutional design in conjunction with a compatible political background led to a relatively independent, if conservative and risk-averse, judiciary, and thus one that applies the written law rather strictly. And I will show that uneven incentives for state investigators coupled with rather sharp social inequalities and a demand for high quality information to



satisfy due process leads to the much lower conviction rate in cases involving the disadvantaged.

### **A. The Code of Criminal Procedure in Córdoba**

How does the Code of Criminal Procedure in Córdoba assign responsibility for fact-finding and final decision-making? Córdoba was an early innovator in Argentina, introducing oral and public trials already in 1940. In 1987 a constitutional reform added a series of protections and guarantees for the accused, reinforcing or establishing many due process protections. Importantly, for example, the constitution now calls for the exclusion of coerced confessions and other evidence obtained in violation of the law, including evidence that was discovered as a result of an initial illegal procedure.<sup>107</sup> This reform also began the process of restructuring the relationship between prosecutors and judges, which culminated in the procedural reform of 1991 (though these reforms did not become fully effective until 1996).

Just as the military government did in Uruguay, the procedural reform in Córdoba removed the investigative task from the judges of the *Juzgados de Instrucción* (Investigative Courts). Rather than sharpening the inquisitorial nature of the system by transferring this function to the trial judge, however, in Córdoba the new code transfers this responsibility away from judges, to the prosecutors, setting up an adversarial system. Under the current code of criminal procedure, an investigative prosecutor (*fiscal de instrucción*) is in charge of the investigation (Art 321). The prosecutor can request the

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<sup>107</sup> While these rules may seem rather basic, they are by no means uniform in Latin America, especially historically. And even in the United States, the cognate rules known as the exclusionary rule and the “fruit of the poisonous tree” doctrine, are judge-made rules, the constitutional necessity of which is occasionally called into question. The Córdoba constitution puts these questions beyond debate.

assistance of the Judicial Police, who form part of the prosecutor's office, reporting ultimately to the Attorney General. The investigation phase remains under the supervision of a *juez de instrucción*, but in Córdoba this judge's function is primarily to safeguard the interests of the accused while the prosecutor carries out the investigation, rather than to build a case against the defendant.

Once this phase is done, the *fiscal de instrucción* may recommend that the case be elevated to trial. If the *juez de instrucción* concurs, the case is sent up to a trial court (the *Cámara Criminal*), which in murder cases is usually composed of three judges.<sup>108</sup> The prosecution is at this point taken over by the *fiscal de cámara*, or trial prosecutor. Affected parties can participate at both the investigative and trial stages. The code gives them standing to participate as what I have called the Private Prosecutor, though here it is called *querellante particular* (Art.7, and arts.91-96). There is no intermediate court of appeals for these serious cases; appeals go directly to the Supreme Court (*Tribunal Superior de Justicia*).

In short, on paper at least, Córdoba has everything we might ask for in a “modern” code of criminal procedure: extensive protections of due process rights for the accused, oral hearings, an adversarial rather than inquisitorial structure, and even a Judicial Police. The investigative function, carried out by prosecutors and judicial police under judicial supervision, is independent of both the security police (who typically commit the violations) and the final decision-makers. We will see, in the discussion of each of these actors, how they actually carry out their assigned roles, but, given this

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<sup>108</sup> Córdoba has recently begun experimenting with a jury system, but none of the cases in this study were tried to a jury.

structure, we might expect a line-up of preferences that varies considerably from what we saw in Uruguay: prosecutors should be more adversarial in cases involving the police, since they are less subject to police pressures. Judges, who are freed from investigative responsibilities and are primarily charged with protecting defendants' rights, should also be more neutral, neither adopting a prosecutorial stance (as in Uruguay) nor bowing to police pressures (as in Buenos Aires).

Given an independent investigative police that is part of the *Ministerio Público*, and a non-investigative judge, we might expect actors' preferences in police cases to be similar to the line up in an ordinary case (Figure 1.3 in the introduction), with the police and prosecutors taking a more aggressive stance, and the judge keeping his or her neutrality. At the same time, if it is too much to expect the prosecutor and investigative police to completely forget their usual allies, we might place them closer to the judge – adopting a sort of *a priori* neutrality until they are persuaded that a crime has actually been committed. Figure 7.1 represents this arrangement:

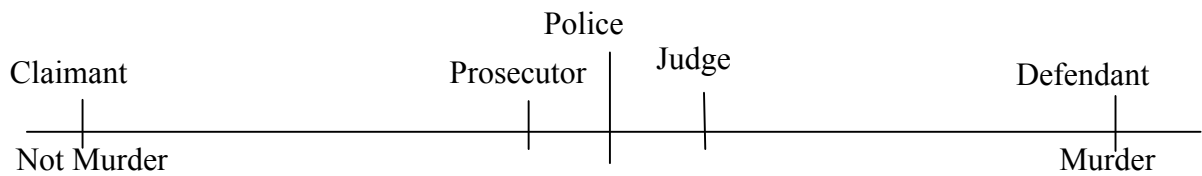


FIGURE 7.1: POTENTIAL ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES ON THE BASIS OF FORMAL ANALYSIS ALONE – CÓRDOBA

As we will see, however, the weakness of the judicial police tends to erase much of the advantage gained by placing this force directly under the control of prosecutors. Endogenous pressures essentially revert to what they were in Buenos Aires, where the police conduct their own investigation, or in São Paulo, where the Civil Police shares many of the same weaknesses. Police and prosecutors in Córdoba shift to the right of the judge, and become, once again, the weak links in the process.

## **B. The social context**

### **1. Socio-economic context**

The socio-economic context, moreover, creates difficult challenges for the legal system in Córdoba. The metropolitan area in particular has a high degree of inequality and a large marginalized population. The shantytown population in this area, where the bulk of the violations take place, grew from just under 50,000 in 1991, to 73,000 in 1994, to 103,000 in 2001 (La Voz del Interior, 2-23-04, reporting on three studies conducted by Conicet (Consejo Nacional de Investigaciones Científicas y Técnicas) and SEHAS (Servicio Habitacional y de Acción Social)). On average, then, the most marginalized

represent about 5% of the population of the metropolitan area, but to this we must add a population classified as “unsatisfied basic needs” (*necesidades básicas insatisfechas*) that can be as high as 30% in some of the peripheral areas of the city. More than 80% of the population in some of the neighborhoods surrounding Córdoba belongs to “low” or “marginal” classes.<sup>109</sup> The victim population is disproportionately taken from these classes. As many as 38% of the victims come from shantytowns (that is, victims are eight times as likely to be from a shantytown as the average inhabitant of the Córdoba metro area); about two thirds of the victims are members of the lowest classes.

More importantly, there is abundant research to show that the lower socio-economic sectors in Córdoba have limited access to the justice system. An active group of legal sociologists in that city has undertaken several studies aimed at uncovering just how removed these populations are from the legal system. In contrast to the findings Bayce reports for Uruguay, these scholars conclude that most of the underprivileged are well out of reach of the legal system. Based on extensive polling, they find the legal aid system is “little visible, scarce and fragmented” (Vilanova 2000: 273). The operators of the legal aid system work to the rules (“*a reglamento*”), repeating and reinforcing “asymmetries found in social relations” (Vilanova 2000: 275). Access to legal services is actually shrinking throughout the 1990s, and “in a context of increasing inequality, broad sectors of the poor population ... are completely unserved” (Vilanova 2000: 279).

There is evidence that this failure to reach out to the lower classes results in their marginalization from the legal system as a whole. Lista and Begala find that the poor fail

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<sup>109</sup> For population data on the Córdoba metro area and an analysis of geographic inequality in that area, see Bressan, Fernández & Atea (2003).

to regularize their legal relationships (employment, housing, etc.) in legal documents (Lista and Begala 2000: 413). Bergoglio reports that, while 50.7% of the middle and upper class respondents have had some contact with an attorney, only 28% of the lower class respondents have ever contacted one, for any reason (Bergoglio 1997) – even though litigiousness rates in Córdoba are as high as in the United States (Bergoglio 2001: 63).

Lista and Begala supplement this observation with the finding that, among the lower classes the more contact a respondent had with the legal system the more negative was his or her opinion of its operators (2000:421). Members of the lower socio-economic strata do not believe justice system operators are interested in making the system better serve their needs, or that they can themselves effect changes in the system.<sup>110</sup> The most common improvement to the legal system this population would like to see is, simply enough, the creation of legal aid offices located in the *barrios* or neighborhoods where they live.

A widely held belief in the inequality of the legal system is one consequence of legal marginalization. Attitudes toward the legal system vary widely by class in Córdoba (Bergoglio and Carballo 1997). Again as in Buenos Aires (but seemingly more so) the poor distrust all the actors associated with the legal system – lawyers, police officers, and judges (Lista and Begala 2000). While the general population tends to have more confidence in the judiciary in Córdoba than in Buenos Aires (Bergoglio 2003), an overwhelming majority believes the courts are imbued with inequality: 95% of the poor

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<sup>110</sup> Interestingly, this sector of the population believes collective action is (only) effective in forcing a response in individual cases (2000:427). The logit results from Chapter 3 suggest that they are correct in this regard, as cases that trigger popular demonstrations have a much higher likelihood of a conviction.

(and 69% of the middle and upper class) believe the laws benefit some groups and not others; 94% of the poor (and 85% of the middle and upper class) believe criminal laws are not applied in an equal fashion (Bergoglio and Carballo 1997: 50, Table 5). The latter belief is amply borne out by the results of this investigation. In summary, Córdoba has a large population living at the margin of society, in informality and out of reach of a legal system that fails to reach out, and nearly half the victims are taken from this class.

## **2. Socio-political context**

There is not a great deal of available data on the levels of social support for *mano dura* public safety policies in Córdoba. Polls show a slightly higher concern for crime than in Buenos Aires (Polling by Centro de Estudios de Opinión Pública, April 1999, reported in La Voz del Interior), but there are no polls directly addressing the use of lethal force by the police. The issue of public safety did not dominate politics in Córdoba the way it did in Buenos Aires province for much of the decade. Leaders' platforms do not include the aggressive statements we found in Buenos Aires in the middle and end of the decade, and in São Paulo at the beginning of the decade.

The Union Cívica Radical held the governorship during almost the entire decade, until 1999 when current governor De la Sota (Justicialist Party) was elected. Angeloz, a member of the Radical party, was governor from 1983 until 1995 when he resigned in a corruption scandal. Mestre succeeded him. Angeloz was later tried and acquitted in a result that many observers attributed to the fact that he had named most of the judges who sat in judgment over him. Angeloz and Mestre are both more or less in the center of the Radical party, itself a centrist party, and neither of them used strong law and order rhetoric, though neither of them were vigorous human rights advocates, either. During the

De la Sota administration, public safety became more of an issue, but the main policy proposals centered on community policing rather than more repression.

In some instances, the leadership's reaction to these events suggests less support for police officers who kill and attempt to hide the facts. In the case of Sergio Bonahora, for example, a gun was taken from a local precinct to place next to the body. Long before the case came up for trial, the *comisario* or local police chief from whose precinct the gun was taken was forced to retire, on suspicion that he participated in the obstruction of justice. Still, this is the exception, not the rule. Over all, political leaders in Córdoba have not distinguished themselves by exerting pressures too far in either direction, on the issue of police abuses.

The public does bring to bear some pressure in favor of a conviction in individual cases, though there is no evidence of a concerted social movement in favor of greater police restraint, or greater protections for criminal suspects. In the case of Miguel Angel Rodríguez, when the prosecutor proffered an indictment charging merely manslaughter, public demonstrations ensued demanding a murder charge. There have also been demonstrations in favor of prosecutions in the so-called *Precinto 5* case involving inmates who suffocated in a jailhouse fire – it is widely believed that the police goaded the youthful inmates to set their mattresses on fire, then failed to offer any assistance. In fact, in the Córdoba sample I find popular demonstrations in 33% of the cases – the highest percentage of cases involving popular mobilizations of any of the locations studied. The percentage of mobilizations is the same even in cases involving victims with a criminal past. In summary, then, the political leadership is mostly neutral, awaiting



public reaction before taking a stance, while public pressure is more common here than in either Buenos Aires or São Paulo.

### **C. The investigative police**

The Córdoba Judicial Police have a typically Argentine organizational history, in which formal rules precede by many decades the materialization of the organizations they call into being. First mentioned in the Procedural Code of 1939, this investigative force was authorized and regulated by statute in 1958, but did not see even partial implementation until 1985, when supervision over the investigative division of the Provincial Police was transferred to the Judicial Power. The procedural and constitutional reforms of 1987 later assigned responsibility for this police to the Prosecutor's Office (the *Ministerio Público*), and enshrined this arrangement in the provincial constitution. But many functions remained within the provincial police until mid-1996, when there was an agreement between the Governor, the President of the Supreme Court and the Attorney General to create the structure that permitted prosecutors and police to work together within geographically organized units.<sup>111</sup> Still, as of February 2004 Córdoba is still working on proposals to take the offices of the Judicial Police physically out of the provincial police precincts.

Unfortunately, then, for at least half the decade in question, the judicial police was not fully functioning as an independent police force under the exclusive control of the prosecutor. Moreover, according to an assistant prosecutor interviewed in Córdoba, there

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<sup>111</sup> This brief institutional history is adapted from the website of the Judicial Police, [www.justicia.cordoba.gov.ar/site/Asp/PoliciaJudicialHistoria.asp](http://www.justicia.cordoba.gov.ar/site/Asp/PoliciaJudicialHistoria.asp), last visited 2/23/04.

are a number of factors that impede their full independence from the provincial police.<sup>112</sup> In the first place, investigators' offices are physically located within the precincts of the ordinary police. Secondly, the judicial police handles the more technical aspects of the investigation – forensic tests and the like – but continues to rely (as we saw in São Paulo) on the ordinary police for most of the nuts and bolts of a criminal investigation such as locating and interviewing witnesses, securing the crime scene, delivering summons, etc. And finally, the typical career path, at least so far, is to recruit investigators from among police ranks.

The result is a less than optimal investigative force in cases involving the police. The assistant prosecutor I spoke to acknowledged that her assistants are for the most part former police officers who continue to have a close relationship to the police. From the perspective of human rights attorneys, the judicial police are no different than the regular police: “The judicial police work inside the police stations. They end up being cops.”<sup>113</sup> The prosecutor also acknowledged her office's dependence on the regular police. The investigators who report directly to the Ministerio Público are called the “Cientific Police” in the organizational law, and carry out purely forensic activities, leaving everything else to the provincial police: “Our eyes and hands are the [provincial] police,” she said. “The police are a piece of work. They won't carry out search orders [when they don't like the case].” Moreover, as of 2001, the judicial police were exclusively based in the capital city. They travel to the interior of the province only if the local police call them in on a technical issue.

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<sup>112</sup> Interview Norma Parrelo, Asistente Fiscal, Córdoba, 2/28/01.

<sup>113</sup> Interview Silvia Osaba, attorney affiliated with CORREPI Córdoba, 2/20/01.

In short, while Córdoba has made some important steps in the direction of creating a judicial police, and we should expect somewhat better results than prosecutors get from the police in Buenos Aires, the judicial police are still far from constituting an effective, independent investigative force when the ordinary police can be expected to oppose a prosecution. The continuing importance of the ordinary police to the everyday functioning of the judicial police and the prosecutor's office more generally, exposes prosecutors to the same pressures observed in places like São Paulo and Buenos Aires.

#### **D. Civil society actors**

CORREPI is active in Córdoba, as it is in Buenos Aires. CORREPI is a frequent participant in the cases that I reviewed, though there are also other attorneys such as Amalio Rey, who take on these cases and are not formally affiliated with CORREPI. There is not much to add at this point, to the role these attorneys play. The legal framework is essentially identical to what we saw in Buenos Aires, giving them full participation in the investigation and trial. Their intimate connection with victims' families gives them access to information that is often beyond the ken of prosecutors and investigative police. In the *Precinto 5* case, mentioned earlier, for example, CORREPI working with relatives rescued physical evidence that was about to be destroyed by the provincial police. In other cases (the cases of Roberto Ordoñez Salazar and Cristian Rodríguez, for example, both of which took place in a *villa*) they located witnesses and brought them downtown to talk to prosecutors. In short, the participation of the Private Prosecutor is as important in Córdoba as it is in Buenos Aires, and perhaps even more so, since judges are likely to be more consistently receptive to their claims in the former jurisdiction.

### **E. The prosecutors**

As noted earlier, prosecutors have greater responsibilities and greater latitude in undertaking an investigation in Córdoba than in Uruguay, and therefore affect judicial outcomes to a greater degree. The structure of the institution, confirmed by local interviews, suggests that exogenous political pressure enters the institution at the top and freely travels downward, to potentially affect front-line prosecutors' decisions in individual cases. In addition, the weakness of the investigative police renders prosecutors vulnerable to endogenous pressure to take a lenient stance in police cases, though perhaps less so than in the case of Buenos Aires, where they are completely dependent on the police for information. Given the neutral approach of the political leadership, endogenous pressures ordinarily carry the day, producing lackluster investigations except in highly visible cases, in which the prosecutors' responsiveness to public pressure induces more vigorous action.

The head of the office is the Attorney General, known as the *Fiscal General*. During the 1990s the Attorney General was named by the Executive, with the consent of a simple majority of the Senate (Ley Orgánica del Ministerio Público, Ley 7826, Art.7)(the Senate itself disappeared after 2001, when the bicameral legislature became unicameral). The Attorney General serves for only five years, but can be reappointed for additional terms. Thus the top leadership can be expected to reflect dominant political forces, and to remain subject to political influence, given the possibility of re-appointment.

Under Article 4 of the same law, lower level prosecutors are expressly admonished that they “owe obedience” to their hierarchical superiors. Article 13 notes that:

a prosecutor that receives instruction regarding the service or the exercise of his functions shall comply with them, though he may express his personal opposition. If he considers the instructions contrary to law, he shall inform the Attorney General by written report giving his reasons. If the Attorney General ratifies the questioned instruction, the prosecutor must obey and the Attorney General will assume responsibility for the act.

This stringent hierarchical structure contrasts sharply with the principle (formal at least) expressed in the São Paulo or Salvadoran prosecutorial structure of freedom of judgment on the part of individual prosecutors. Since the head of the agency is open to political pressure, and adherence to hierarchy is an important goal of the organization, we can expect investigations to readily respond to social and political pressures for or against more aggressive action. Indeed, local attorneys complain that these reforms have politicized the prosecutorial function to a greater degree than before.<sup>114</sup>

We have already seen that prosecutors are dependent on an investigative force that is tightly bound to the police, when they do not depend directly on the provincial police. As a result, there is (endogenous) pressure on prosecutors to take a permissive view of cases involving the police. But we can expect exogenous pressures to be more important, in those cases in which they are brought to bear, given the dominant hierarchical nature of the institution, its openly political leadership, and the presence of an (albeit weak) judicial police.

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<sup>114</sup> Interview Silvia Osaba, 2/20/01; (Ortiz 1991).

This pattern, a default position in favor of *laissez faire* combined with responsiveness in cases in which there is public demand for vigorous action, is visible in a few cases in Córdoba. In the case of Miguel Angel Rodríguez, an egregious case detailed in Chapter 9, the prosecutor decided to charge the police officer with negligent rather than intentional homicide. This decision triggered a series of demonstrations after which the defendant was charged with the more serious offense. Prosecutors initially closed the case of Vanessa Ledesma, but re-opened the investigation after a series of demonstrations and the attention of international human rights organizations. These cases demonstrate prosecutorial responsiveness to public pressure in particular cases. The other side of the coin is the number of cases discussed in Chapter 9 that ultimately failed due to a lack of public attention and prosecutorial disinterest.

Before I conclude this discussion of the prosecutors, I should temper the largely negative depiction of the institution: Córdoba still has a conviction rate that is nearly as high as Uruguay's. And given prosecutors' crucial role in the investigative process, these prosecutions could not have been successful without their participation. Weak as it is, the presence of the judicial police helps free prosecutors to pursue these cases to some degree. And public reactions to police excesses are sufficiently vocal and common that prosecutors are prodded into action more frequently than in Buenos Aires, São Paulo or Salvador. At the same time, it seems quite clear that the prosecutors need to be motivated to undertake any special efforts in these cases; and often it appears that judges take a stricter view of these cases than prosecutors. The characteristics of the judicial structure, to which I now turn, may account for this.

## F. The courts

When asked about the quality of their courts, many lawyers in Córdoba begin with a discussion of the long history of legal development in the province: they boast they have the oldest law school in the Americas, and they refer to the many eminent jurists that have come from Córdoba, including Vélez Sarsfield, the drafter of the Argentine Civil Code. Indeed, though they are not immune from criticism, Córdoba's courts have a good reputation in Argentina as a whole. A study that surveys all the provincial courts placed Córdoba in the group with the highest marks, despite the lack of institutions like a judicial council (*consejo de la magistratura*) that are currently seen as guarantors of judicial independence (FORES and Colegio de Abogados de Buenos Aires 1999b).

At the same time, there is no shortage of local critics on the question of the independence of the courts – especially after Angeloz, who was governor for the first twelve years after democratization and had named most of the sitting judges, was acquitted of corruption charges. Human Rights attorneys pick out individual judges whom they believe are strong, independent judges, but argue that the rest are for the most part subject to the reigning political powers.<sup>115</sup> One attorney described the judicial situation in Córdoba as follows: “The provincial judges are very Radical, while the federal judges are all Menemistas [after President Menem, who expanded the federal bench at the trial and Supreme Court levels and is widely considered to have packed the courts with unconditional supporters].” Vega, a frequent critic of the judiciary in Córdoba

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<sup>115</sup> Interview Silvia Osaba, Córdoba, 2/20/01; interview Amalio Rey, Córdoba, 2/23/01; interview Juan Carlos Vega, March 2001.

and Argentina in general, charges that judges in Córdoba (as in the rest of Argentina) have always been subservient to the executive power, and are now in danger of becoming slaves to public opinion (Vega 1998: 391 and personal communication). But even he concedes that certain judges act according to the law, regardless of political pressure.

Given the split in opinions, this would be a hard question to untangle satisfactorily without extensive analyses of judicial rulings. Moreover, the interviews suggest considerable variation even among judges in Córdoba in this respect. For our purposes, however, the key question is more limited: whether judges are vulnerable to exogenous and endogenous pressures to rule for or against the police in homicide cases. The question of endogenous pressures is easier to answer. The fact that judges are free from responsibility for the investigation – they are less involved in the investigation than any other judge in our study – means they are also free from dependence on the police. Even the prosecutors with whom they work closely are one step removed – by virtue of the judicial police, such as it is – from the provincial police. Since this informational dependence is the main source of endogenous pressures, we can be confident that, in a case involving a police homicide, judges are not overly concerned with offending the defendant and his or her colleagues.

The appointment and career structure of the judiciary suggests that judges might be much more sensitive to external pressures, however. Judges are appointed by the Executive, with the consent of a simple majority of the Senate. There is no judicial career *per se*. To advance in their chosen profession by moving up to the Supreme Court or a more prestigious seat – and career judges are common in Córdoba – judges must be re-appointed by the governor, and re-approved by the Senate.



We saw in Uruguay that the inability to command a two-thirds majority in the Senate led to a more independent court. In Córdoba, the party that controlled the executive also controlled the Senate from re-democratization in 1983 until 1999. At the same time, Córdoba is by no means a one-party province. The Radical Party controlled the Senate from 1983 to 1999, and was the dominant force in the 1980s. But in 1999 the *Partido Justicialista* (also known as the PJ or the Peronist party) took control of the Executive and tied for control of the Senate when De la Sota won the governorship and the PJ won 43% of the seats, equaling the Radicals' share. In the years leading up this eventual victory, the PJ was a strong force in the province, typically holding around 40% of Senate seats. In the 1990s, then, the Radicals lived under the ever-present threat that the Peronists would hold power next.

As a result, while first Angeloz and then Mestre certainly had a majority that would have permitted them to act arbitrarily in the designation of judges, in 1992 Angeloz put in place an independent advisory committee that looks much like a judicial council. The committee was established by law in 1991 (Ley 8,097, October 24, 1991, effective 1992), and was composed of seven members: a judge of the Supreme Court, a prosecutor, one representative from the chamber of deputies, a member of the Council of Political Parties representing a party with no parliamentary delegation, one delegate from the Federation of Bar Associations of the Province of Córdoba, a member of the Bar Association from the jurisdiction where the candidate practices law (or sits as a judge, if currently a member of the bench), and a full professor from Córdoba's Law School. In short, the committee brings in a number of major actors who would not otherwise have a

voice in the selection process, and potentially broadens the political spectrum that weighs in on appointments.

Judicial selection under the committee became an open and public process. Candidates presented themselves for consideration, and submitted a file with qualifications and references. The committee evaluated the formal qualifications of the candidates, conducted a personal interview and created a short list of candidates for each position, listing them in no particular order. The Executive would select a nominee from the list, and the Senate would approve the selection. Although the list was not legally binding on the governor, both Angeloz and Mestre abided by the committee's recommendations. The current Judicial Council lists the candidates in order of merit, and again Governor De la Sota has accepted the recommendations, typically selecting those candidates identified as most meritorious by the selection committee. Under either arrangement, the members of the committee have been satisfied that the Executive, despite having the constitutional latitude to disregard the recommendations, has not done so.<sup>116</sup>

The advisory council muted the overtly political tone of judicial nominations in Córdoba. At the same time, given that it was merely advisory, the committee surely had to gauge whether the candidates it proposed would prove acceptable to the governor. The institutional and political backdrop, then, produced an ameliorated political system of appointments, tempered by the presence of open and public proceedings, an advisory council and, in the 1990s at least, the lack of single-party dominance. Judges who wished

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<sup>116</sup> Interview Nelson Filippi, Defensor del Pueblo [State Ombudsman], Córdoba, and a member of the Advisory Committee from 1992 through 1994, 3/1/01.

to advance their career had to submit to this same system for every new appointment, and thus could not afford to offend any of those who weigh in on the recommendations. Finally, the close ties between the Radical Party and Córdoba's economic and social elites suggests any political bias will be in the direction of a more conservative and traditionalist court.

A research project based on a series of in-depth interviews of non-judicial officers in the courts of Córdoba city indicates that this arrangement produced a largely conservative, hierarchical, rule-oriented judiciary, free from direct political interference but attuned to prevailing political winds and the interests of powerful social and economic actors (Scarponetti et al. 2000b). The researchers conclude, in part, with a description that will be familiar to students of even the better functioning judiciaries in Latin America:

Córdoba's tribunals show a conservative structure, with bureaucratic features that are visible in the organizational culture. The dominant features are the emphasis on administrative functions, a pyramidal working structure and the priority of formalism in procedures (2000b:394).

Despite the emphasis on formalism and hierarchy, judicial staff told researchers that "complicated" cases were handled directly by the judge, with less intervention by the staff. They defined "complicated" sometimes in legal terms (white collar crimes, and similar complex cases), but more often in political terms: having to do with important interests, having public prominence, or otherwise being in the public eye.

Importantly, judicial employees unanimously denied the presence of overt corruption or favoritism, or direct political meddling in case outcomes (Scarponetti et al. 2000a)(405-06, 409). But, they noted, judges acknowledge they owe their jobs to the politicians who appointed them. They argued that political influence was more implicit

than explicit, and filtered down primarily from the Supreme Court, by way of the judicial hierarchy. They agreed that public opinion and social pressures could affect how a case was treated (p.410), so that prominent cases are treated with special care. The overwhelming impression is of a cautious, conservative judiciary, drawn primarily from elite families (p.411). Judges, they argue, are more technocratic and rule-oriented, devoted to preserving the existing order, than interested in doing “justice” (p.410). The largely negative tenor of the comments – painting the courts as rigid, rule-oriented, formalistic, and conservative – is tempered at the very end with an acknowledgement that courts that rule strictly according to the law are not necessarily a bad thing. Judges in Córdoba, they say,

exercise extreme care not to differentiate themselves too much one from another in their rulings, getting rid of complicated cases by recusing themselves, or filling files with rulings and judgments ‘taken from a mold.’ One might infer that judges’ principal preoccupation lies in reinforcing the ‘predictability’ of their decisions, a characteristic that is indispensable if one seeks to give the justice system a more democratic bent than it has had in other times (pp.410-411).

Thus, the institutional and political configuration in Córdoba in the end produced a judiciary that is not above reproach but is at least technically proficient and rule oriented. Courts are not open to corruption or direct manipulation, but do have an ear for public opinion. Importantly for the results we observed, their legal-technocratic propensity is often manifested as an obsession with legal formalities.

### **G. Overview of Córdoba**

From this discussion of the various actors we can extract the key characteristics of the legal system in Córdoba that lead to both the high effectiveness and the high inequality we have observed in this jurisdiction: The executive is not likely to actively

resist (or actively promote) the prosecution of police officers in the absence of public pressure, and therefore neither will prosecutors, who are highly sensitive to political currents. The Courts are rule-oriented and have a strongly formalistic propensity, while judges are largely free from endogenous pressures to favor the police. As a result the judiciary is, by and large, willing to convict a police officer of homicide (i.e., its version of  $r'$  will likely be quite close to  $r$ ), especially in cases that garner public attention. Because of their legalistic orientation and non-investigative role, judges will demand and expect adherence to formal rules and a high standard of evidence. For the same reasons, judges depend entirely on prosecutors (or claimants) to build the record on which they will judge the case.

Endogenous pressures, then, will tend to arrange the preferences of the various actors as in Figure 7.2, with exogenous pressures in favor of a prosecution acting especially strongly on prosecutors, moving them toward a more aggressive posture in prominent cases:

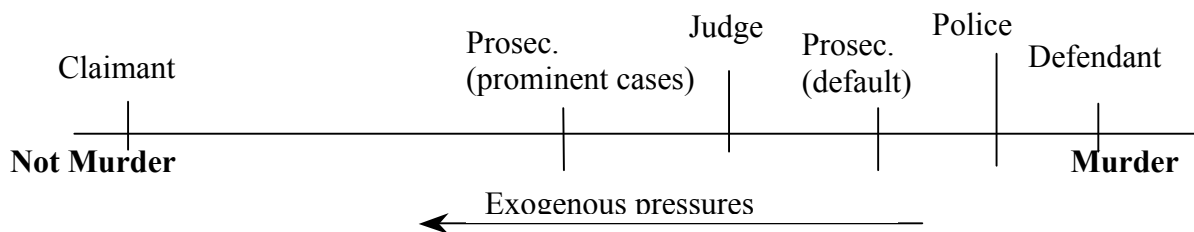


FIGURE 7.2: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN  
CÓRDOBA

When claimants – either on their own, or through the prosecutor – can supply the high quality evidence the courts demand, convictions result. Prosecutors themselves are likely to use their own resources to generate this information only in cases that have media and public attention – the logistic regression in Chapter 3 shows very clearly the positive impact of public attention to a case. Prosecutors are also more likely to get good information in cases in which the claimants have their own social, political and economic resources – again, the impact of social class and retaining a private prosecutor on outcomes in Córdoba shows up clearly in the logistic regression. Moreover, even when witnesses from the *villa* are willing to testify, the quality of the information these rough, uneducated witnesses supply is, by the standards of an elite, conservative judiciary, not “high quality.” And so we get a high percentage of convictions – driven by a judiciary that is interested in enforcing the law – coupled with abysmal failures in cases that involve the lower classes.

To put this in the language I have been using throughout, the legal system consistently produces a “good”  $r'$ , so that tolls defined by social norms (such as the

Violent Victim exception observed in Buenos Aires and São Paulo) are less important at the moment of decision. Moreover, the system has a comparatively greater chance of producing a good  $o'$  than São Paulo or Buenos Aires. But since the production of information about  $o$  depends to a great extent on the political, social and economic resources of the victims,  $o'$  is not consistent in cases involving the underprivileged. As a result, socio-economic tolls play a large role in mediating claimants' ability to obtain a positive result in the legal system. The informational failures in cases in which claimants cannot supply the toll produce the high level of socio-economic inequality in the outcomes.

## CHAPTER 8

### SALVADOR DA BAHIA – SOCIAL CLEANSING UNDER POLITICAL AND JUDICIAL INDIFFERENCE

*[Segunda-feira:] Um homem de cor parda, 1,70 m de altura, aparentando 28 anos, sem camisa, bermuda azul-clara e chinelos de couro de cor preta, foi mais uma vítima de grupos de extermínio que agem na periferia de Salvador. ... A vítima estava com as mãos amarradas para as costas e foi atingida por vários tiros de pistola na cabeça... Os peritos...detectaram oito perfurações de pistola na cabeça.*

*Nas primeiras horas da manhã de quinta-feira, seis homens, dois deles usando camisa preta com o escudo da Polícia Civil, mataram, com vários tiros na cabeça, o desempregado Edvan Nascimento Silva, 26 anos, na estrada Cia/Aeroporto, após ser espancado na presença da mulher e filhos.*

*Na madrugada de domingo, na Invasão Nova Constituinte, subúrbio de Paripe, dois homens usando capuzes, após arrancarem de dentro de casa o biscateiro Arivaldo Conceição Santos, 37 anos, executaram-no na frente do seu barraco. Sua mulher, Ducicleide Santos Bonfim, 18 anos, conseguiu escapar dos criminosos.*

*A Tarde On Line, 3/16/04.*

The report details three executions in the course of one week, by the extermination groups that routinely take the law into their own hands in Salvador. More than in any other city in this study, in Salvador the laws have been pushed aside to make way for the killing of the socially undesirable. The odds of being killed by the police in Salvador are four times higher than in São Paulo. Investigators with the Public Health Department found that in 1991 21% of all homicides were attributed to police activity in the death certificate.<sup>117</sup> A review of all the major newspapers from 1996 through 1999 by

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<sup>117</sup> Interview Dra. Adriana, Sociologist with Bahia's Public Health Department, Salvador, 5/22/01.



the Justice and Peace Commission found that 15% of all homicides in those years were committed by the police. If to this we add another 8% attributed to extermination groups engaged in social cleansing – and there is abundant evidence of extensive police participation in these groups (Oiticica 2001) – more than 20% of the homicides committed in Salvador are committed in the name of public order.

The courts, for the most part, simply stand aside. In spite of hundreds of cases every year, it is difficult to find a single instance in which a police officer is convicted of murder. I searched newspaper archives and interviewed activists and was unable to find any convictions, other than a few cases involving children.

How to account for this level of violence and impunity? In Chapter 9 I present evidence that in Salvador there is a normative failure, creating an effective rule of decision that permits the use of deadly force to control crime. When it appears that the courts are about to overcome this normative failure, an informational failure is likely to develop. That is, information about these crimes is available so long as the police are assured of impunity, but as soon as the rules appear to shift in favor of accountability they take violent measures to control the flow of information. In this chapter I will present the conditions, economic, political and institutional, that give rise to this abysmal failure of the legal system.

Both the Code of Criminal Procedure and the structure of the judiciary are essentially identical to what we saw in São Paulo – but there we saw that this produced a relatively independent judiciary. In contrast, decades of political dominance of state institutions left Bahia with a controlled and subservient judiciary throughout the 1990s. In Salvador as in São Paulo – but more so – a high level of crime and popular tolerance

for extreme measures, creates popular and political pressures to turn a blind eye to police abuses. Prosecutors and judges – the latter especially – are subject to direct and indirect pressure from the Executive to look the other way. And juries – should any case get that far – are unlikely to protect the rights of individuals who are presented to them as the source of the wave of violence that affects Salvador.

Given these endogenous and exogenous pressures, at every level of the system and in case after case  $r'$ , the rule of decision, is set to such a lenient standard that the police are assured of impunity. Since the case is classified as non-murder from the beginning, investigations never even get off the ground, and it almost makes no sense to speak of the construction of  $o'$ . But if a quixotic judge or prosecutor should attempt to carry out an investigation, he or she faces two obstacles. In the first place, there is resistance from within the institution itself – prosecutors who go after the police see their careers suffer in consequence. Moreover, in the few cases that trigger a serious investigation, the police use their control over the streets to impose a near informational blackout, by threatening or killing witnesses and complainants.

This blackout is facilitated by economic conditions. Income distribution is as bad as or worse than São Paulo; poverty, unemployment and the proportion of the population that lives in shantytowns and works in the informal economy is as high or higher. The police are unaccountable and accustomed to making their own rules, and brutally repress anyone who might be tempted to assert their rights. The marginalized population from which victims are primarily taken is ill-prepared to contend with the police in the struggle to frame these cases as violations of fundamental rights, rather than welcome and needed social cleansing.

As mentioned, the Code of Criminal Procedure, the structure of the *Polícia Militar* and the *Polícia Civil*, the *Ministério Público* (the Prosecutors' Office), and the structure of the courts are identical to São Paulo's. In the case of São Paulo, I have argued that this institutional background produced a judiciary and a prosecutorial corps that are politically independent, if somewhat conservative in the case of the former and divided on their social role in the case of the latter. I argued further that the weakness of the Civil Police and the importance of the Military Police to the entire legal system, coupled with deep social inequalities, made judges and prosecutors dependent on the Military Police for information. The fundamental problem, then, is not that judges in São Paulo enforce rules guaranteeing impunity. Rather, the problem is that the police can enforce a strict rationing of the information judges need to make good decisions, and that, given the political context, prosecutors are not likely to expend the resources required to overcome this information gap.

Given the near identity of institutional design between Salvador and São Paulo, then, the main question for this chapter is this: how is it that the same institutional configuration produces an independent and relatively insulated judiciary in São Paulo and its near opposite in the state of Bahia? A judiciary that applies the formal rules (albeit in a conservative way) with informational failures at the root of judicial ineffectiveness in São Paulo, and one that is rife with normative failures in Salvador, applying permissive informal rules to legitimize the arbitrary use of force?

### **A. The Code of Criminal Procedure**

Full details on the code of Criminal Procedure are discussed in connection with São Paulo, and will not be repeated here. To briefly summarize: the law entrusts the

investigation of crimes committed by Military Police officers to that institution. As a result, judges and prosecutors cannot count on the Civil Police to investigate crimes committed by the Military Police, but depend on the latter to investigate themselves. The *Ministério Público* is charged with bringing the results of the police investigation (*inquérito policial militar*) to the court, where the judge technically controls the judicial phase of the investigation. The final decision is given to the jury.

The allocation of roles and responsibilities gives the Military Police considerable control over the supply of information in cases in which one of their own is the defendant. But the fact that the Civil Police is the primary investigative force in ordinary crimes frees judges and prosecutors from direct pressure from the Military Police, as it does in São Paulo and Córdoba. As in those cases, however, the weakness of the judicial police gives the Military Police more ascendance than the formal institutional framework might suggest.

The end result is a set of endogenous incentives that suggests a line-up of preferences identical to São Paulo's, as depicted in Figure 8.1. In the rest of this chapter I will examine the exogenous pressures on the various actors that shift them even further to the right.

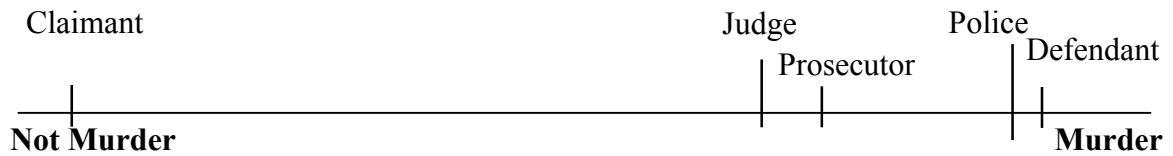


FIGURE 8.1: POTENTIAL ORDERING OF PREFERENCES ON THE BASIS OF FORMAL ANALYSIS OF CRIMINAL PROCEDURE – SALVADOR

**B. Social context**

**1. Socio-economic context**

As with the procedural environment, on most socio-economic measures Salvador is like São Paulo but more so. The population resident in *favelas* in the municipality of Salvador alone numbers 835,000, more than 35% of the total population of the municipality (IBAM - Instituto Brasileiro de Administração Municipal 2002). This is nearly three times the percentage of São Paulo’s *favelados*, who, at about 1.9 million by the count of the municipality, make up approximately 12% of the population. The percentage of residents who live below the line of indigence in the state of Bahia (the equivalent of the Argentina’s Unmet Basic Needs category) is 54.8% overall and 40.5% in the Metro Region (Fundação Getúlio Vargas 2001). This level of poverty has drastic implications. A study of mortality rate differences across different neighborhoods in Salvador shows geographic inequalities in mortality rates that are twice as great as the inequalities present in São Paulo (da Silva, Paim, and Costa 1999). In short, Brazil as a whole struggles with poverty and inequality, and Bahia and the Salvador Metropolitan

Region, while not at the very bottom, are well below the level of São Paulo on these variables.

## 2. Socio-political context

As Ames notes, “For many years, Bahia has been the strongest bailiwick of the Brazilian Right” (Ames 2001:129). It is impossible to speak of politics in Bahia without placing the figure of Antônio Carlos Magalhães (commonly known by his initials ACM), of the Liberal Front Party (PFL), at the center: “For the last two decades politics in Bahia has moved around ACM. Loved by many, hated by others, rewarded and betrayed by the electorate, ACM is at the center of the state’s events” (Souza 1997). ACM was first elected state deputy in 1954, and was named mayor of Salvador in 1967 by the appointed governor of Bahia, Luis Vianna Filho. In 1975 he was himself appointed governor of Bahia by the military regime for an initial four year term, and in 1979 the regime renewed his tenure for an additional four years. During the democratic period, he held a series of national appointed posts under Sarney, and was the elected governor of Bahia from 1991 through 1995. With the exception of the 1987-91 term, which belonged to a PMDB governor, ACM or his hand-picked candidates have controlled the Executive in Bahia from 1971 through the end of the 1990s.

Moreover, although he was not born an old-style *coronel* of Brazil’s Northeast, ACM has a reputation for an authoritarian and controlling style. He is widely credited with saying, for example “I win elections with a bag of money in one hand and a whip in the other.” Souza (1997:127-28) recounts interviews with other politicians in which they say, among other things, “ACM’s style is violent: he attacks his opponents in their private lives. To confront him you have to have nothing to hide or to fear.” This verdict was

confirmed recently in a case labeled by the media “*o caso dos grampos*” (the case of the wiretaps). The state Public Safety ministry, in conjunction with the Civil Police, tapped the cell phones of a number of personal and political opponents of ACM, ranging from national political leaders such as Senator Nelson Pellegrino of the PT to ACM’s former girlfriend and her new boyfriend. This case vividly demonstrates the control ACM continues to exercise over the state, since the wiretaps were approved and carried out – apparently at his behest – while he was a Senator in Brasilia.

Authoritarian tendencies are visible not only among the top leaders of the state, but also in opinion polls. The background for this is a very real problem with violent crime. Salvador suffers from extremely high indices of violent crime – one study based on newspaper reviews places the Salvador Metro Region’s murder rate at more than 40 per 100,000, compared to the United States at 6.3, and Berlin at 2.8 (de Oliveira, Sousa Ribeiro, and Zanetti 2000:center insert). Four murders take place in the city every day, on average; excluding deaths from illness, 55% of all deaths in the city are homicides.

The combination of high crime and low trust in the justice system leads to a high level of support for self-help measures, including police killings, lynching (a term used for any instance of popular justice, in which a group beats or kills a suspect of a crime), and extermination groups.<sup>118</sup> More than 41% of men and 38% of women in a 1997 survey agreed with the practice of “social cleansing” (*limpeza social*)(A Tarde, 6/29/03). The unidentified killers who make up the extermination groups that execute *marginais* are known as *justiceiros*, a word that might be translated as vigilante, but carries an obvious

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<sup>118</sup> A Tarde, Salvador’s major daily paper, reviewed some of the studies to this effect, including surveys done by Projeto Ativa which show a lack of confidence in the police, and high levels of approval of self-help mechanisms, including lynching. “População Armada Amplia a Violência,” A Tarde, 6/29/03.

connotation of meting out “justice.” In interviews, people, especially those of lower socio-economic standing, say “*marginal tem que morrer mesmo*” – the criminals must simply die (de Oliveira, Sousa Ribeiro, and Zanetti 2000: 35). The official crime reports for 1999 include 66 lynchings with injuries (that is, not all the lynchings ended in the death of the victim), while a yearlong study of the major newspapers finds 9 deaths attributed to lynching in 1999 (Carvalho 2001).

A three-year study in a large shantytown in Salvador, Novos Alagados, paints a stark picture of the ambivalent attitudes toward police violence among the residents (Machado and Noronha 2002). These *favelados* understand that the Military Police is violent, brutal and indiscriminate in its actions. Police tactics in the *favela* consist of periods of indifference alternating with periods in which they enter the *favela* in force, raiding, shooting and killing. Summarizing the beliefs they found, the researchers say, “obeying orders or acting on their own, the police shoot without major precautions, applying the death sentence against lawbreakers, suspects and innocent persons, without punishment.” But residents also live in fear of crime, and they continue to support the extrajudicial execution of those they consider “*marginais*” or criminals. One inhabitant of Novos Alagados voiced this ambiguous relationship to police brutality:

I find it’s alright [killing criminals], because there are people who run in, rob, rape, commit crimes, these people must be eliminated ... captured or just finished off already [*dar fim mesmo*], quickly, there is no other remedy. I am totally against violence, but in this case I am in favor (Machado and Noronha 2002: 217).

The practice of leaving the bodies of those killed in the *favela* out in the sun for many hours before sending the coroner to pick them up prompts a similar comment, from another inhabitant: “Ah! The death of a good-for-nothing is left moldering and mocking there, by the time they come pick it up it’s even stinking. Everybody is in favor of their



death – they died, leave them there.”<sup>119</sup> To the extent this resident voices any censure, it is about the impact of this sight on children: “They shouldn’t kill those good-for-nothings in the neighborhood, it’s very ugly ... the children see it. They [the police] kill them right in front of everyone. They should take them somewhere else and there the police can do us this favor” (Machado and Noronha 2002:217).

One result of this social context is that those who have lost loved ones to police violence act under the suspicion that the victim was a criminal, and thus that the killing was justified. This leaves those who are seeking justice from an unresponsive system very much alone in their quest. Relatives wander from office to office insisting that their child was not a criminal, repeating again and again that their son worked and helped the family, as described in a vivid description of one mother's pilgrimage through government offices and media venues (de Oliveira, Sousa Ribeiro, and Zanetti 2000).

The lack of interest in a prompt punitive response to police killings extends to the political class, according to Nelson Pellegrino (unpublished Dóssier by Assunção & Sousa Ribeiro 1998, on file with the author). He blames the governing party, the PFL, for a complete lack of interest in the problem, to the point of refusing to approve bills that would simply have required the police to compile more detailed information on these killings. Even the media is to some degree complicit. Commenting on the newspapers’ persistent habit of noting the criminal history of victims (even if unrelated to the incident), Espinheira says “it’s as if there is a tacit understanding that someone with a record *can be eliminated*, while another, who has never been arrested was, in fact,

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<sup>119</sup> The translation cannot do justice to this statement, so I include here, in its original Portuguese: “Ah, morte de vagabundo fica mofando aí, quando vem apanhar está até fedendo, todo mundo apoia a morte deles, morreu fica aí.”

*murdered*, with the full moral and legal import society assigns to such an event” (de Oliveira, Sousa Ribeiro, and Zanetti 2000:35).

In sum, of all the places examined so far, Salvador appears to be the one in which exogenous pressures in favor of impunity for police killings are the strongest. The population of the *favelas* – that is, the very population most affected by the problem of police violence – feels sufficiently unprotected by the criminal justice system that they condone the practice of social cleansing. There is evidence that this attitude pervades politics, at least on the part of the ruling party. And ACM’s control over radio and television in the state (Ames 2001:131) permits the government to present these killings as the legitimate use of police powers against an out of control criminal class.

In the next several sections, I will examine the institutional context that conditions the extent to which the investigative police, judges and prosecutors participate in this permissive attitude. At minimum, the evidence so far is clear that they will not win any popularity contests on the strength of aggressive attempts to punish Military Police officers who kill perceived *marginais*.

### **C. The investigative police**

The question whether the investigative police in Salvador prefer a permissive rule of decision or a strict one is not difficult to answer. Given the rules of procedure, the investigative force in cases affecting members of the Military Police is that organization itself. The frequency of the killings is already evidence that this behavior is tolerated and encouraged within the corporation. But there is additional evidence as well. Lemos-Nelson undertook an in-depth investigation of the response by the internal disciplinary agency of the police to a series of killings committed by the police in Salvador. She finds

that these killings are covered up, the perpetrators go unpunished, and the investigators do not pass the investigative report (the *Inquérito Policial*) on to the prosecutors' office. Without the *Inquérito*, prosecutors never initiate legal proceedings. The police force's own disciplinary body, therefore, ensures that these cases never come to the attention of the legal system (Lemos-Nelson 2001).

An unpublished Dossier completed in December of 1998 by twenty-seven Bahian human rights organizations (on file with the author) presents several interviews that shed additional light on police attitudes toward the killings (Assunção & Sousa Ribeiro 1998):

- Nelson Pellegrino, then a state deputy from the Worker's Party (PT) and chair of the Human Rights Commission of the state legislature, claims in the Dossier that police supervisors in the Military Police offer incentives to police officers who kill suspects, "because it's cheaper to kill than to capture."

- The investigator in charge of the homicide division in Salvador makes the point explicitly. He relates that when he arrives at a police station to investigate the killing of someone who had a criminal record "they say 'we have better things to do than to clear up the death of a criminal.'"

- Leo Ornéllas, the head of an Afro-Brazilian civil rights groups agrees: "In Bahia, before investigating, [police investigators] first check to see if the deceased victim had a criminal record, and then they decide whether or not to investigate."

- A priest who works in one of the most violent neighborhoods in Salvador relates a similar response by Civil Police investigators. In one case, the *delegado* refused to investigate the shooting of a young girl, simply because the girl's *mother* was involved with drugs.

Even when the Civil Police attempt to investigate, they are clearly overpowered by the Military Police, which not only fail to cooperate, they actively – sometimes violently – resist these investigations. In one particularly egregious case, the Homicide Division of the Civil Police went to a Military Police precinct to arrest several military police officers who were accused of having killed three minors after lighting them on fire. The entire police outpost rallied and resisted the actions of the investigative police

who came to arrest the suspects, nearly leading to an armed confrontation between the Civil and the Military Police (Assunção & Sousa Ribeiro 1998).

Nilton José Costa Ferreiro, the former police investigator who relates the story of this near confrontation between Civil and Military Police, eventually quit his position with the Civil Police. Costa Ferreiro was actively pursuing an investigation into Military Police participation in extermination groups. He had weathered various death threats and other forms of intimidation in the course of the investigation; his decision to quit came after he was warned by members of the *Ministério Público* that he himself would be prosecuted for abuse of power if he continued tilting at windmills.

There are a few cases in which there is an effort to hold the police accountable – either because the case is politically sensitive, or because it appears that the murder was committed in furtherance of a police officer’s own crime rather than in furtherance of public safety. But when an investigation appears to head in the direction of accountability, complainants are intimidated and witnesses are harassed or killed, as we will see in the next section.

#### **D. Civil society actors**

As in São Paulo, Buenos Aires and Córdoba, affected individuals in Salvador have the legal standing to participate in the investigation and trial. Moreover, there are civil society actors in Salvador – the Human Rights Commission of the Brazilian Bar Association of the Justice and Peace Commission of the Salvador Archdiocese – who assist claimants in this respect. But these actors face a difficult task, struggling against both violent police resistance to a complaint and investigation, detailed in this section, and the apparent futility of bringing these cases to the courts, detailed in the next section.

One organization that is dedicated to reducing violence against children, including police violence, is the Centro de Atendimento à Criança e Adolescente (CEDECA). In an interview, the director of CEDECA exemplified the hurdles facing claimants in these cases.<sup>120</sup> Initially, he said, it was impossible to find anyone – Civil Police, Prosecutors, or Judges – who was interested in investigating and prosecuting cases of police violence against children. In the 1980s parents would come in and CEDECA would attempt to assist, but their claims would dead-end in a non-responsive legal system. Early in the decade, however, a federally initiated procedural reform (the details of which are fully explained in chapter 4) led the system to become more aggressive in protecting the rights of children. In other words, after the change it became apparent that  $r'$  had shifted closer to  $r$  in the case of children murdered by the police.

But then a new problem arose. Since the police could no longer count on the benign neglect of the justice system, the rate of threats and violence against complainants and witnesses vastly increased. Now, CEDECA's director reports, relatives of the victims come into his office in the initial days after a killing, impelled by anger and grief at the harm to or loss of a child, asking the Center to take some action to ensure that the perpetrators are held accountable. But often they call back some days later to withdraw the complaint, citing threats of violence against them if they persist: "His father has three other children to raise," said a mother recently. "Even the judge is afraid. We will trust divine justice; they will be punished there." Witnesses also cease cooperating with

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<sup>120</sup> Interview Valdemar Oliveira, Director Centro de Atendimento à Criança e Adolescente, Salvador, 5/22/01.

prosecutors and withdraw statements made initially about police participation in the crime.<sup>121</sup>

It is not only CEDECA that has difficulty in protecting claimants and witnesses. Chapter 4 details the case of Heloisa, who was murdered with her partner for becoming actively involved in human rights organizations in the course of seeking justice for her stepson's murder. Heloisa and her partner met high levels of resistance from the police and the investigation was languishing when they began a highly public campaign to bring the killers to justice. It appeared, for a while, that the *Ministério Público* would take an active role in the case, illustrating the limits of the permissive rule – *r'*, at the level of prosecutors and judges at least, does not protect police officers who kill to enforce or protect extortion and similar illegal schemes. The investigation collapsed after Heloisa, her partner, and one other witness were murdered. Another witness has disappeared and is presumed dead. The sole remaining witness is in a witness protection plan.

Christiane Gurgel, the head of the Bahian Bar Association's Human Rights committee summarizes the control police exercise over the investigation: "What is hard is bringing the facts to light. There is a lot of violence against witnesses, their colleagues protect [the killers], and the victims have to continue living in close contact with the police."<sup>122</sup> She related one story in which the police took two youths from their home and shot them. One of them was killed while the other pretended to be dead. The survivor refuses to testify against the police, fearing for his life.

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<sup>121</sup> Interview Valdemar Oliveira, Director CEDECA, Salvador, 5/22/01.

<sup>122</sup> Interview Christiane Gurgel, Presidente Comissão Direitos Humanos OAB-Bahia, May 2001.

Even when judges and prosecutors might respond, then, the overwhelming imbalance of power between the police and claimants makes it impossible for the latter to succeed in an attempt to hold the police accountable. The flow of information is stifled at the very outset. Feeding the vicious circle, the lack of information about these cases contributes to the general perception that the victims are simply criminals killed by the police in the fight against crime.

#### **E. The prosecutors**

If any institution might redress this imbalance of power between claimants and the police, it should be the *Ministério Público*, with its impressive constitutional attributions including “the legal control of the police function.” Recall from the discussion of the São Paulo prosecutors’ office that the institution is designed so as to have considerable independence from the other branches of government. The head of the *Ministério Público* is selected by the governor, but from a slate of three candidates chosen by secret ballot by all active prosecutors. Prosecutors have life tenure and all the protections afforded judges; and organic laws decree that individual prosecutors have independence of judgment. The conclusion from the São Paulo case was that despite these attributes the organization had powerful methods for enforcing orthodoxy down the hierarchy, but that, in that state, organizational politics were somewhat divorced from the politics of the other branches of government, as the institution struggles to assert itself as the defender of the legal order.

In Bahia, however, there is evidence that the upper reaches of the institution are, at minimum, open to pressures on the part of ACM and his allies. Front line prosecutors in Salvador complain that the governor ignored their wishes in selecting a candidate to

head the organization. In fact, the governor chose from the list, but passed over the candidate with the most votes in favor of a candidate who was more sympathetic to the Executive. Prosecutors complain that state leaders are always able to ensure that at least one candidate in the top three is amenable to their control, and they select that candidate, whether or not he or she is the top vote-getter.

In a confidential interview, a prosecutor who was in charge of coordinating criminal prosecutions in Salvador suggested that prosecutors were largely political animals, though perhaps subject to less pressure than judges. “Since we are not a deciding organ [*orgão decisório*], we are ignored more than judges are.” He blamed many of the problems on investigative failures – *inquéritos* full of defects and cases that never even reach the prosecutors. But he also noted that cases involving the police, a politician or an executive are all “difficult” for the Bahian system. In these cases, he said, justice is partial. “The problem is that the *Procurador* [the head of the *Ministério Público*] is political. If there is social mobilization, sometimes a prosecutor will act, but without pressure, nothing will happen [*sem pressão, não passa nada*].”<sup>123</sup> Christiane Gurgel, of the Bahian Bar Association, confirmed that the Bahian *Ministério Público* would not “mess” with politically sensitive cases, in which she included police homicides.<sup>124</sup>

The problem, the prosecutor said, starts at the IPM stage. This is the report prepared by the Military Police, which forms the basis for the prosecutors’ decision in a case, and is typically exculpatory. “If the prosecutor does not take control, it all ends there.” There are, of course, investigators and prosecutors in Bahia who are serious about

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<sup>123</sup> Interview with anonymous prosecutor, Salvador, Bahia, May 2001.

<sup>124</sup> Interview Christiane Gurgel, Prêsidete Comissão Direitos Humanos OAB-Bahia, May 2001.



investigating police violence – including those who would talk to me about the difficulties they encounter in trying to do their job. But in a context in which impunity is the norm, they are themselves often punished and end up outside the system. Marília Veloso, a former prosecutor in the military justice system (before the transfer of jurisdiction to the civilian courts in 1996, see discussion of São Paulo for details), related that her attempts to pursue violent police officers were continually impeded by her superiors, until she quit out of frustration.<sup>125</sup>

In sum, the prosecutorial structures in both Salvador and São Paulo channel the leadership's priorities, but in Salvador interference is more direct and pressures are greater because of the extraordinary dominance of the political right over all the state institutions. In São Paulo the *Ministério Público* reflects public opinion in assigning resources to these cases – it will not go too far out of its way to prosecute them, but will treat them according to law if the facts are easily accessible. In Salvador, there is a clearer social and political directive – to which the leadership is open – to leave these cases alone as far as possible, whether the facts are accessible or not. This affects the organization's priorities, and thus individual prosecutors' decisions in individual prosecutions. In these “difficult” cases, prosecutors know to leave well enough alone, even when the facts are staring them in the face, simply asking the courts to validate the judgment of the IPM that the killing was justified. Moreover, this is not an irrational decision. As we will see in the following section, the occasional prosecutor who is tempted to take on one of these cases will find a chilly reception in the courts.

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<sup>125</sup> Interviews with Marília Veloso, Salvador, Bahia, multiple dates in April-May 2001.

## **F. The courts**

One interview I conducted with a judge in Salvador perhaps best captures the flavor of this state's judiciary – a flavor that has been peeking through already in this discussion. A judge in São Paulo contacted a Salvadoran judge on my behalf, and arranged a contact. After a few days in Salvador, and quite a few attempts to set up an interview in the courthouse, this judge finally contacted me and asked for a more private meeting.

We met in a small neighborhood restaurant, some 20 minutes from the city center, the evening of May 9, 2001. As soon as the conversation began, he insisted on anonymity (indeed, given the informant's insistence, I flipped a coin to determine whether I would use a masculine or feminine pronoun in this narrative). The judge repeatedly asked if I was carrying any recording devices. I assured him that he could speak in confidence, and that I was not recording the conversation. Still, he was so anxious to maintain the secrecy of our conversation that he would not speak when waiters were near, and continually checked to see if anyone could overhear. He said he actually feared for his safety – and certainly for his career – if it was known that he had discussed issues of judicial independence with me.

The air of intrigue continued throughout the dinner, while he explained in detail the selection, advancement and career incentives he claimed were used by ACM and his allies to produce a judiciary that would do their bidding. First, he said, the committee that conducts the extensive personal interviews of judicial candidates (also described in the discussion of São Paulo) is packed with supporters. The interview is used to screen out any candidates who appear to be problematic: known political opponents, the children of

political opponents, or candidates suspected of political unorthodoxy are simply kept off the bench.

In addition, there are several mid-career ways to discipline judges, rewarding or punishing them for their compliance. The system of transfers and promotions is quite openly used to reward judges who are politically compliant. Judges who fail to obey directives will be relegated to tiny courts of general jurisdiction deep in the interior of Bahia, or transferred from place to place, never quite making it to the more prestigious appointments in the capital or the courts of appeal. Despite constitutional salary protection, there remain ways to use remuneration as a disciplining tool. The base monthly pay for judges was, at that time, about R\$4,500. An appointment to the Electoral Court adds another R\$2,000, without adding too onerously to a judge's duties. Becoming an on-call substitute judge can add another R\$1,500, nearly doubling a judge's base pay. Judges who are politically unpopular, according to my informant, will not be named to either of these positions.

He supplemented his general discussion with a couple of anecdotes. On one occasion in particular, he recounted, he issued a ruling that was adverse to a close associate of ACM. The next day he received a phone call from a person who is highly placed in state government, but whom he did not identify. The phone call strongly suggested that he reverse his ruling. When he did not, he was taken off the rolls of electoral judges. He also related the story of a colleague who had incurred the displeasure of political elites, and been repeatedly passed over for promotion. When I followed up on this information, however, this colleague (who will also remain anonymous), would not enter into a discussion of the topic. Any question leading in that direction – I was forced

to be circumspect, to protect the identity of my first informant – prompted an evasive answer. I was given a detailed rendition of judicial statistics, the number of cases handled and the like, but no information regarding the courts’ relationship to political powers.

In short, the potential disciplining power of the mechanisms for selection and advancement identified in the discussion of São Paulo’s judiciary is, according to one judge at least, consciously employed in Bahia to create a pliable judicial corps.<sup>126</sup> Of course, the opinion of one judge is not conclusive proof, and it is entirely possible that this is all the fabrication of one malcontent. But the story this judge tells is perfectly congruent with the public consensus in Bahia on the relationship between ACM and the state’s courts. Opposition state legislators such as Moema Gramacho and Yulo Oiticica agreed that the courts are subject to political interference by ACM and his faction. The prosecutor quoted in the previous section echoed the concern that the judiciary in Bahia is controlled by ACM. Souza (1997:131) says that one of the ways ACM controls “the state’s political and economic life is through the judiciary.” It is no surprise, then, that ACM is widely believed when he himself says “In Bahia we don’t need [a formal mechanism for] external control of the judiciary; I control it already!”<sup>127</sup>

But what does this mean for police prosecutions in particular? As we have seen, there is considerable popular demand for a violent response to violent crime. The

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<sup>126</sup> In addition to the obviously deleterious consequences for the rule of law of having a judiciary that is so directly manipulated, this tale is troubling from a purely electoral perspective: if serving as an Electoral Judge is a reward for political compliance, then a crucial function guarding electoral integrity is compromised; if advancement is conditioned on subservience, then the highest courts will be the most compromised. All the elements for interfering with the democratic process are, therefore, in place.

<sup>127</sup> ACM is widely credited with making this observation in the course of a debate in the federal legislature over the need for formal mechanisms of external control over the legislature. See, for example, the discussion in the recent book by João Carlos Teixeira Gomes, a Bahian journalist who had many confrontations with ACM (Teixeira Gomes 2001).

Executive, responsible for public safety, is exposed to this demand. Moreover, the *caso dos grampos* illustrates the extent to which the police are tied to political leaders, even in furtherance of personalistic political interests. Kátia Alves, the civilian head of public safety in the late 1990s has made it abundantly clear that her sympathies lay with the police, not human rights organizations. It is all too likely, then, that the executive, monolithic and controlled by the right, will pass on the weight of popular demands for a lethal police to judges. All the lawyers I interviewed agreed: as we saw in connection with the discussion of the prosecutor's office, police cases are always included in the list of "difficult" or politically sensitive cases.

### **G. Overview of Salvador**

In conclusion, then, the legal system in Salvador is wide open to exogenous pressures. Moreover, given the high level of social demand for swift and draconian responses to crime, political demands tend strongly toward impunity for police officers who kill. These demands affect all the actors in the legal system, to greater or lesser degrees. If anything, the interviews and other research suggest that judges are exposed to greater pressures than prosecutors, so that Salvador may be the one location in this study in which the latter take a stronger stand in these cases than judges. Given this context, the direction of exogenous pressures on the actors, and the typical line-up of normative preferences is presented in Figure 8.2:

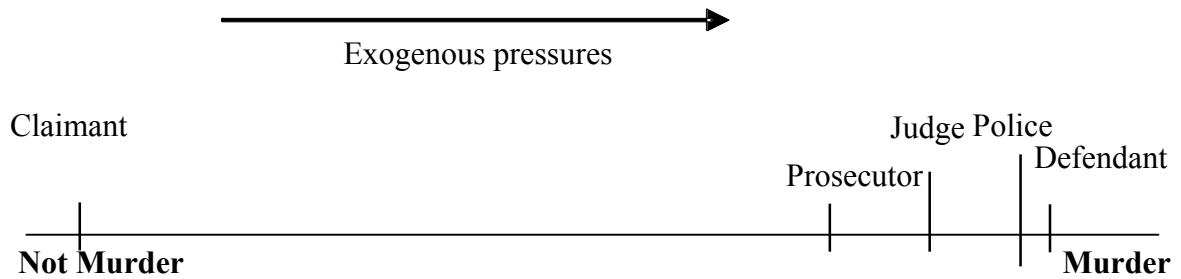


FIGURE 8.2: ORDERING OF PREFERENCES IN POLICE HOMICIDE CASES IN SALVADOR

This shifting of  $r'$  at every level of the legal system produces a top-to-bottom normative failure in the system – what I have labeled elsewhere the creation of an informal institution which incorporates the legal system itself as the mechanism of enforcement (Brinks 2003). The problem, then, is not primarily a failure of information. Informational failures appear only when police behavior exceeds the limits of permissiveness, as in the case of Heloisa and her partner, or the murder of street children. This normative failure can be represented by the following figure – that is, even when the facts are fully known, the rule of decision legitimizes the killing (so long as the victim can be portrayed as socially undesirable):

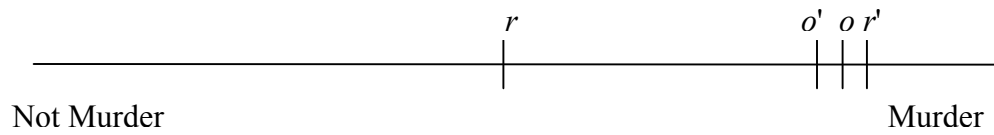


FIGURE 8.3: NORMATIVE FAILURE IN SALVADOR

The high level of violence practiced by the police in Salvador is no surprise when  $r'$  is consistently shifted so far away from the standards we might expect in a democracy. This arrangement leaves victims of police violence and those who claim on their behalf completely unprotected by the legal system. The effective rule in Salvador becomes, quite simply, that the police may kill so long as it appears to be killing good-for-nothing vagabonds in the interest of social cleansing. What is worse, their actions are *de facto* legitimized by the legal system, so that it becomes a part of their job to kill those suspected of crimes. As an inhabitant of Novos Alagados said: “The police, I know their profession is to commit abuses [*fazer ignorância*] but not against people, it should be against the thieves! And sometimes they kill many innocent people ... they run around killing people, they are very violent. They’re shooting all over, right? I find sometimes that they’re right ....” (Machado and Noronha 2002:214). The very language used by this seventeen-year-old girl is indicative: Violence should not be employed against “persons” but it may be employed against thieves: “*não é com as pessoas, é com ladrão.*” And that is how these cases are judged by the population, the police, the prosecutors, and the courts: the victims are not persons, who might therefore fall under the protection of the social contract; they are thieves, and therefore not entitled to the protection of the law.

## CHAPTER 9

### INFORMATIONAL AND NORMATIVE SHIFTS ACROSS JURISDICTIONS

In the foregoing five chapters I presented a detailed analysis of each of the legal systems that are the subject of this dissertation, and argued that in each, the combination of contextual and institutional factors produces a preponderance of normative failures, informational failures, or both. In this chapter I present detailed case studies of individual prosecutions in each of these legal systems. These case studies serve three functions: first, they make more concrete what are, at times, obscure or at least abstract discussions of general concepts. Second, they offer another source of data with which to check the conclusions of the individual country chapters. We saw that certain findings of the quantitative analysis of aggregate results in Chapter 3 supported key points of the institutional system-level analysis. The detailed case studies in this chapter should lay bare causal processes, offering another check on the conclusions of that system-level analysis.

Finally, in the clinical discussion of variables, institutional configurations, exogenous and endogenous incentives and “cases” it is easy to forget that each of these cases represents a human being. The case studies in this chapter present at least a small part of the stories of these human beings, and sometimes of those they left behind, who took up the cause of justice for their loved ones.

In Chapter 1 I argued that to effectively protect a given right, a system must apply the “right” rule ( $r'$ ) to the “right” facts ( $o'$ ). I also argued that a given system can



repeatedly fail to protect a certain right either because its decision-makers consistently apply an overly exculpatory rule of decision – that is, they shift  $r'$  too far toward the violator's preference – or because they consistently fail to construct a version of  $o'$  that demonstrates the violation. A system that is prone to the first type of failure – to normative failures – I labeled normatively vulnerable. Systems that are prone to informational failures I labeled informationally vulnerable.

In the chapters discussing each of the systems in this study, I argued that one system falls predominantly in the former category (Salvador), two in the latter to different degrees (São Paulo and Córdoba), one in both to some degree (Buenos Aires). Uruguay, for the most part, and in relation to police violence cases at least, falls in neither category. But one of the important findings of this research is that, while failures of one sort or the other may predominate in a given system, different kinds of cases may be prone to different kinds of failures, even within the same system. Thus we saw that, in both São Paulo and Buenos Aires, the courts had carved out a “violent victim” exception to the law. This chapter, therefore, is organized not according to geography, but according to the type of causal processes underlying the results in discrete classes of cases. At the end of the chapter I return to the geographical arrangement to summarize the results for each legal system.

#### **A. Open and notorious violations: normative failures in informationally open systems**

In this category, the legal system will by definition show a relatively free flow of information about potential violations up into the system, and yet fail as a result of the application of an overly lenient rule of decision. We should expect these cases to be most

common where the lenient standard is well known and accepted, so that violators can anticipate impunity. In other work, I have argued that this shift in the legal standard meets the definition of an informal institution – the application of an informal rule of decision that varies from the formal standard.

Since informal rules are not flagged by duly observed formalities at the time of their creation, they are easy to confuse with other empirical regularities. The challenge is in theorizing the distinction between mere behavioral regularities (which might not be rules) and informal rules. I have argued (Brinks forthcoming; Brinks 2003) that the crucial distinction lies in enforcement behavior. The case studies that follow, therefore, will focus on the presence or absence of enforcement behavior. Since the hypothesized informal rule in this case authorizes otherwise illegal behavior, where we do not see actual enforcement behavior I will look for evidence that the relevant agents of social control observe this illegal behavior and fail to punish it. In other words, the evidence should support a finding that the  $o'$  available to the decision-maker would have supported a conviction, given a reasonable interpretation of  $r$ , but there was, nevertheless an acquittal.

### **1. Police homicides in Salvador**

While the investigative resources of the legal system in Salvador are truly deplorable, the fate of several well-publicized cases argues against an informational failure. The most striking is the case of Robélio Lima dos Santos already described in Chapter 3: on October 11, 1999, Robélio was photographed as he was handcuffed and placed in the back of a police wagon. Between the taking of the picture and when he arrived at the Emergency Room of the local hospital he was shot in the chest with at least

two different weapons. An editorial published at the time concludes, “Policemen do not act as these Bahian ones did if they do not feel protected” (A Tarde, 10-13-99. Editorial: Mais que mil palavras [Worth a Thousand Words]). The four police officers who were in the car when Robélio was murdered were initially arrested for the crime, but in the nearly three and a half years since the event, no convictions have resulted. Clearly, the problem here is not a lack of information.

The case of Sérgio Silva Santos tends in the same direction. On January 22, 1999, one of five police officers accidentally fired a shot, wounding Sérgio in the neck. The five then took him to a remote region and executed him, with at least two officers taking part in the actual shooting. Despite witnesses to the initial shot and the fact that Sérgio was placed in a police car already wounded, despite the evidence of the victim’s physical disability and other damning evidence, despite the testimony of one of the five police officers, no one has been convicted.

Finally the cases of no less than ten journalists who were killed in Bahia during the 1990s support the same conclusion. A Tarde concluded, as noted in Chapter 3, that “in traveling through the eight cities in which the crimes occurred, A Tarde’s reporting verified – in only 7 days of investigation – that the criminals enjoy impunity purely as a result of the omissions of the Courts and the Civil Police. There are witnesses and proofs for each of these crimes” (A Tarde, 4-2-2000).

Certainly judicial results suggest that the formal rule limiting police use of lethal force is not enforced. In addition, the conduct of the police itself is evidence that they know and rely on this rule: they are especially casual and open about their killing, so long as it is within the course of their duties, and appear to expect impunity. Witnesses and

relatives often report that police officers accused of a killing openly taunt and intimidate them, to the point that neighbors and relatives discourage complainants from going forward, and the complainants themselves desist.

Sérgio's case shows that the police prefer to kill someone in cold blood, in an attempt to set up an "ordinary course of duties" killing, than to be caught having wounded someone by mistake. Moreover, it was not one panicked police officer who did this, but no less than five, after careful deliberation. Similarly, it was not one enraged police officer who shot and killed Robélio in the back of the police wagon, but at least two, while two others were in the car with them. This pattern of behavior suggests the police officers in these cases are acting in accordance with accepted and established patterns of conduct. For all practical purposes, the rule that governs is one of impunity for police officers who kill, at least so long as they are seen to be carrying out their social cleansing function.

The CEDECA information presents the exception that proves the rule. As noted, the change in the juvenile justice system upset the expectation that killing one of these children would go unpunished. Before the change, information about the crimes was available. Parents and witnesses could contact CEDECA and complain, and CEDECA could try to publicize the cases without much fear of retaliation. But once it began to look like these children's rights might become more effective – once  $\Delta p$  seemed to increase, so as to upset the conventional balance of power in the streets of Salvador, then the police started to take more extreme measures to shut down the flow of information. In regard to child killings at least, the system has converted from normative failures in the context of a free flow of information to information-gathering failures in the context of normative

success: it now would apply the correct normative framework but has little opportunity to do so. The end result is a slight improvement in outcomes but far less than what the advocates of reform had hoped.

## **2. The “Violent Victim” exception to laws against police violence**

It should perhaps come as no surprise to find that the same legal system treats different cases differently. This is often the criticism leveled by judges and lawyers at empirical studies of the legal system – in an attempt to abstract patterns they ignore important differences among the cases. One such difference became apparent in the course of this study. Case outcomes suggest the presence of an effective informal rule in São Paulo and Buenos Aires that precludes punishment for police officers who kill persons perceived to be violent criminals. There is no evidence that a similar rule operates in Córdoba, and the data suggest that it does not apply in Uruguay.

I hypothesized the rule in question from my initial observation of a few prominent cases in Buenos Aires and from comments made by various activists with whom I came in contact in the course of fieldwork. I then coded the cases to identify those that would fit within the parameters of the rule, and finally compared judicial outcomes across the categories defined by the rule. The rule, broadly speaking, frees the police to execute apprehended individuals who are perceived as being violent criminals. For ease of reference, I call this the Violent Victim exception.

In practice, of course, victims may be more or less tainted by a connection with violence, and the evidence of that involvement may be more or less firm, so that the rule works more as a sliding scale, in which the level of prosecutorial and judicial resources devoted to a case goes down, producing a lower conviction rate, as the cases approach the

extreme. For purposes of this discussion, however, I included only clear-cut cases in this category, coding as Violent Victim cases only those in which there was solid third-party evidence – in the form of third-party eyewitness reports, criminal records or extensive news coverage – that the victim had a close connection to a violent crime, whether or not the killing occurred in connection with that crime. The following table compares results in these cases to all other cases in the database:

TABLE 9.1:  
CONVICTION RATE IN VIOLENT VICTIM CASES  
IN BUENOS AIRES, SÃO PAULO, CÓRDOBA, AND URUGUAY

| City         | CONVICTION RATE (TOTAL N)                         |                         |              |
|--------------|---|-------------------------|--------------|
|              | Conviction Rate<br>in non-Violent<br>Victim cases | Violent Victim<br>Cases | All Cases    |
| Buenos Aires | 26%<br>(256)                                      | 0%<br>(16)              | 24%<br>(272) |
| São Paulo    | 11%<br>(149)                                      | 0%<br>(70)              | 7%<br>(219)  |
| Córdoba      | 44%<br>(90)                                       | 50%<br>(2)              | 44%<br>(92)  |
| Montevideo   | 30%<br>(20)                                       | 80%<br>(10)             | 47%<br>(30)  |

As expected, in São Paulo and Buenos Aires none of the cases I coded as belonging in this category led to a conviction. In Uruguay and Córdoba on the other hand, there is no evidence that this rule is driving the outcomes. If anything, the Uruguayan system shows a higher conviction rate in Violent Victim cases. In Córdoba there are simply not enough of these cases to ground a conclusion one way or the other, though the fact that one of only two cases in this category ends in a conviction is suggestive.

It appears, therefore, that in the first two locations at least, there is an informal rule operating that precludes the conviction of a police officer when the killing involves a Violent Victim. What we might interpret as a more random series of outcomes, with a conviction rate somewhere in the middle (though the proportion of cases in each category determines what rate exactly), crystallizes into higher and lower conviction rates for classes of cases defined in terms of the operative rule. In Buenos Aires and São Paulo, if the victim was involved at some point in a violent crime that presented a serious risk to society, then the victim's execution by the police is not punished even if it took place after he or she no longer posed a threat.

A closer look at individual cases in my sample suggests that this outcome is not the result of an informational failure. The killing of a person believed to have taken up arms against society often goes unpunished whether or not all the information that might be needed to produce a conviction is present. In São Paulo, it is the case of Regiane Dos Santos that makes this point most clearly. Regiane, a 20-year-old youth, and her husband attempted to rob a home. The police arrived in the middle of the robbery and she and her husband took the family hostage. An exchange of gunfire ensued during which the police killed her husband and one of the hostages, a child. When this occurred, Regiane indicated her intent to surrender and turned over her gun to the owner of the house. The police entered the house at the invitation of the owner, removed Regiane to the bathroom, and executed her. The policemen were tried and acquitted in the military courts (before the transfer of jurisdiction to civilian courts). According to the attorney who represented Regiane's children and mother, the judges blamed Regiane for the death of the hostage and ignored the testimony of the owner of the house who said she had surrendered and

relinquished her gun before they took her away to be killed. The civilian court of appeals affirmed the acquittal.

In Argentina there are several similar cases. The best known is probably one that has been labeled the “Villa Ramallo” case. In 1999, the police surrounded and incapacitated a car carrying four people away from a bank robbery. They pulled the occupants out of the car and executed all but one of them. One of those executed was a robber, but the other two were employees of the bank who had been taken hostage. The same evidence supports the conclusion that all three men were killed while unarmed and defenseless after being pulled from the car. But the prosecution apparently proceeds only as to the killing of the two bankers, not the killing of the hostage taker, who – while undoubtedly an unappealing individual – was also entitled to the benefit of due process.

As in Salvador, the behavior of the police is itself evidence that they rely on this rule. In many cases they carefully create the appearance that the victim was a menace to society. In more than half the cases in Argentina and at least that many cases in Brazil I was given some indication – either because judicial proceedings uncovered police deception or because advocates for the victim made a concrete allegation – that the police had either staged a confrontation after the death of the victim, planted a gun, threatened witnesses, produced false forensic reports or tampered with the process in some similar way.

The methods are diverse and creative: one former policeman testified that the São Paulo police occasionally place a gun in the dead victim’s hand and pull the trigger so the skin will show gunpowder residue; in one of the cases the police shot their own car to simulate a confrontation; in several they were observed transporting the victim’s body to



a different place where they could stage a confrontation. Often the evidence of tampering is irrefutable, as when a second report confirms that the shots entered the back of the head, rather than the front of the body, or when a gun attributed to the victim is traced to the *comisario* who had charge of the operation. Other times it is simply the claim of an advocate for the victim.

Sometimes the evidence is more subtle, but nevertheless persuasive, as in the case of Darcy Ferreira dos Santos and Fábio Mário Saraiva Rodrigues. The indictment against the police officer that killed them both was dismissed, on the grounds that they had entered a bar, drunk, confronted the police officer, taken out guns and started shooting. The ability of the policeman to successfully repel the aggression was somewhat surprising, since the two had allegedly pulled guns on him and started shooting first. But the exculpatory evidence was provided by the owner of the bar who claimed to witness the event and by the owner of an adjacent bar, who said the victims had indeed been in his establishment drinking and brandishing guns. That is typically as far as the investigation goes.

A closer look casts strong doubt on this version of events. The bar owner who provided the exculpatory evidence is a relative of the police officer. The victims' relatives, who talked to the police but were not called in by the prosecutor, claim that the two young men only left home fifteen minutes before the shooting, were not drunk, and were unarmed. The details of the autopsy report, which can be found in the court records but are not discussed in any of the prosecutor's filings before the judge, show that, in addition to one and two frontal wounds, respectively, each of the victims had a gunshot wound in the same spot in the middle of the back, suggesting a *coup de grace*. The

motive for the execution becomes clear when we learn that one of the two was on conditional release pending trial in the killing of a police officer. An aggressive prosecutor could have uncovered these facts, as I did, ordered expert reports and the like, and put together at least a semblance of an effective prosecution. Instead, one wonders why the prosecutor bothered to indict at all, when the indictment accepts without question and repeats the allegations that the victims initiated the shooting and makes no reference to any inconsistencies between the facts and the official story. The outcome is predictable.

In the final instance, the problem in these cases is that neither the prosecutor, nor the judge, nor the jury is prepared to convict a police officer when they consider the victim has placed him or herself outside the social contract by taking up arms against society.<sup>128</sup> In these cases, it appears, legal decision-makers simply look the other way if there is any evidence that might suggest a conviction is legally required. The main difficulty, in Violent Victim cases in São Paulo and Buenos Aires, is the normative failure of the legal system, which applies an informal norm that is directly contrary to the formal laws that are supposed to determine the outcomes.

## **B. Effective application of the law: normative and information-gathering successes**

### **1. Routine policing cases in Uruguay**

As noted in Chapter 3, the majority of cases in the Uruguay sample are Routine Policing cases. Recall that Routine Policing cases are those in which the police kill in the

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<sup>128</sup> Sergio Adorno, in a personal conversation, suggested this way of describing the withdrawal of legal protection from those perceived to be *marginais* – outlaws.

course of some routine police activity, though the victims were not involved in committing a violent crime. That the Uruguayan judicial system is capable of absorbing the requisite information in these cases is to some degree apparent from the discussion of particular cases in Chapter 3. The cases we might have expected to pose the greatest informational challenges – Albín and Gamarra – actually ended in successful prosecutions, thanks to the efforts of the judge and prosecutor, who managed to produce expert testimony and witnesses to unveil the true events. Even when the police resist the prosecution and corrupt the factual record, and the victim is a relatively marginal social character, as in the case of Albín the *bagayero*; or when the case occurs in an isolated location with few or no witnesses and the victim is decidedly lacking in social connections, as in the case of Gamarra the cattle rustler, judicial actors generate and incorporate the information necessary to convict.

The Uruguayan judiciary's record is not perfect, of course. In the Berríos case, for example, the courts are completely in the dark about what actually happened. The judge was also unable to penetrate the veil of silence surrounding the Hospital Filtro case, where the circumstances suggest that fellow rank and file police officers protected those who had actually committed the crime. In that case, however, the judge proceeded as to those who could be identified – supervisors who should have prevented the violence.

Even the cases that failed to end in a conviction do not appear to have done so because of informational failures. The judges ruled that a police officer who killed a minor carrying a toy gun acted reasonably albeit mistakenly, on the assumption that he was being threatened, for example. In the case of Albín, the judge resisted pressures from the police to obscure and cover up the crime, and pressures from a vociferous public to

“throw the book” at the defendants, taking a middle ground approach. Whether we agree with this decision or not, in the end, at minimum it seems a defensible application of the law, rather than a tailoring of the rule of decision to match external demands. In short, there seems to be considerable evidence that, on the whole, the system in Uruguay is quite proactive in generating the requisite information, and that judges seek to apply the legal framework to the best of their ability.

## **2. The innocent bystander exception**

In all the systems examined, including Córdoba and Uruguay, the courts take a very lenient view of the duty of police officers to ensure that they do not harm third parties when they are confronting criminals. No matter how reckless a police officer may be in using his gun in a crowded area, the courts tend to regard the killing of an innocent bystander as unfortunate but not illegal – what we might call the “collateral damage” doctrine in an extension of the imagery that this is a “war” against crime.

The rule is nearly universal: it applies in all the cases studied here. Moreover, the judges tend to make no secret of the fact that they are simply exonerating the police officer on this basis. They appeal to legal standards in making their determination, and their statements become part of the jurisprudence of the system. Moreover, they have not been called to account for this by higher courts or the legislature. As a result, it seems clear that, whatever our desired interpretation of *r*, we must accept that innocent bystanders are nearly unprotected by the formal rules in all three countries. It would be odd, then, to classify these cases as suffering from normative failures. Since, in consequence, there is little impediment to the free flow of information in light of this exonerative rule, clearly these cases do not suffer from information-gathering failures.

There are some limits to this collateral damage doctrine. I have coded the cases to identify those in which the victim was not (apparently) the intended target of the killing, but happened to find him or herself in harm's way. In Buenos Aires, of 37 cases that match this description only 4 (about 11%) have ended in a conviction. Of these four, two arise from the same event, in which a 16 year old named Martín Porven was caught in an exchange of gunfire between a police officer and a retired police officer serving as a security guard, and two thieves. He was shot 12 times. Both security agents were convicted. Another is the result of a confrontation between two police officers and several unarmed "suspicious" youths loitering in front of a pizza parlor, in which one of the loiterers and Daniel Duarte, who simply happened by at the wrong time, were killed. The last is the case of Juan Suarez, a 14-year-old bus passenger, who was killed when a police officer on the same bus shot at an unarmed thief. Of all these, only the first appears to be connected to a bona fide armed confrontation between the police and criminals, while all the others occurred when the police was using firearms against unarmed suspects. One limit, therefore, seems to be that the initial use of force must be actually justified.

Moreover, from discussions with some of the attorneys involved in the Porven case, it appears that in this case the youth was intentionally targeted. This is not so much a case of a stray bullet – or, rather, 12 stray bullets – but of mistaken identity. Thus this case is closer to the extra-judicial execution of an unarmed suspect than to a bystander shooting, although it occurred in the context of an apparently legitimate armed confrontation between security forces and criminals. On the other hand, there are several cases in which the police use their guns in a crowded area against a fleeing criminal who

is not responding with gunfire, killing a bystander, and there is still no conviction.

Therefore, it appears that, though the results may vary from case to case (or from judge to judge), the latitude afforded to Argentine police in the use of their weapons in crowded areas is wide but not unlimited.

In São Paulo, of 13 innocent bystander cases, the only one that ends in a conviction occurred when a police officer in a bar fight shot at his opponent and hit another patron. Note that the rule trumps the use of socio-economic resources to trigger greater protection, supporting the finding that, for the most part, the tolls in São Paulo are directed at informational shifts, not normative ones. These are the only cases in my São Paulo sample in which members of the middle class are among the victims, and the police are still acquitted. One middle class woman was killed as she walked in a prosperous shopping area, at lunchtime, when a police officer shot at a suspect running down the sidewalk, and yet the case was quickly dismissed on the grounds that the shooter had been in hot pursuit of a criminal.<sup>129</sup>

At the same time, several of my interviewees in both São Paulo and Buenos Aires suggested that this apparently class-blind rule has important implications for inequality. They argued that both the police and the courts consider marginal neighborhoods to be dangerous areas, and that they allow greater leeway for endangering bystanders in these contexts.<sup>130</sup> Thus, they argued, the law turns the neighborhoods of the popular classes into shooting galleries, undervaluing the lives of their innocent residents. But in my

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<sup>129</sup> In the Córdoba and Uruguay data there are only one and two of these cases respectively, and none end in a conviction.

<sup>130</sup> The result in the Amadou Diallo case in New York strongly suggests that this is the case in the United States: facially neutral standards permit behavior in areas considered dangerous that would never be permitted in an ordinary middle class neighborhood.

samples at least there is only some qualified evidence to this effect in São Paulo. The data from Argentina and Uruguay do not confirm this claim.

In São Paulo, 8 of 13 innocent bystanders in the sample were from a shantytown, obviously a higher percentage than a randomly drawn sample of the population would offer, and a higher percentage than what we find in the intentional cases: shantytown residents make up only 20% of routine policing cases and 50% of executions. On the other hand, the only middle class people killed by the police were innocent bystanders – in other words, as far as police shootings are concerned, the only risk to a visibly middle class person is from a stray bullet. And none of the cases, whether they involve a middle class victim or not, whether they take place in a *favela* or a crowded commercial sidewalk, end in a conviction. The data thus support the perception that the police are more likely to shoot bystanders in a *favela*, but do not support the claim that this is the result of more lenient treatment by the courts.

In Buenos Aires, on the other hand, the rule disproportionately affects the middle class. Shantytown residents account for only 2 of 22 cases in this category, while the middle class account for 18 (80%). No other kind of case draws so heavily from the middle class. Of the few cases that end in a conviction, none takes place in a shantytown, so there may be some basis to the perception that this is a “free” shooting zone. But it is hard to put too much weight on this result, given the very few cases in the sample that come from popular neighborhoods. In short, this is not a rule that either precludes the killing of middle class victims or that disproportionately affects shantytown residents. If anything, the low incidence of cases from the *villas* is more consistent with the observation that the Buenos Aires police rarely enter these places.

### **C. See no evil, hear no evil, speak no evil: normative and informational failures in Buenos Aires**

This is, in one sense, the worst combination, since it involves a failure of both requisite conditions for an effective judiciary. A system that is applying extra-legal norms will produce the “correct” result whenever the actual norms applied happen to coincide with the legal norms. If the normative failures of the system are caused by a more or less general susceptibility to political, public or other pressures, then we would expect the performance of the system to fall somewhere in the middle, between a high performing system and one that refuses to convict under any circumstances. The Buenos Aires judicial system in Routine Policing cases is the best example of this among my cases.<sup>131</sup>

The difficulties the system encounters in reading information off the social context in which police homicides occur are evident in Buenos Aires. As I have already suggested in the section on the Violent Victim Exception, the most common complaint in connection with these cases in Buenos Aires is that the police doctor the crime scene, corrupt the record, intimidate witnesses, produce false forensic results, and generally hamper the incorporation of accurate and complete information into the legal record. While these claims are usually hard to confirm, in some cases they are quite demonstrable, as when a gun found on a victim is later traced to the *comisario* in charge of the operation (the case of Luis Selaye) or when neighbors observe the body being removed from the trunk of a police car and placed at the location where the confrontation supposedly took place (the case of Gustavo Gallorini).

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<sup>131</sup> For the reasons developed more fully in Chapter 3, the Buenos Aires area was treated as one case, even though it encompasses two different jurisdictions: the federal courts of the city of Buenos Aires, and the provincial courts of the *conurbano*.



I entered markers in my database in all those cases in which advocates for the victim or court records provide detailed and specific allegations of informational tampering. According to these sources, the police in Buenos Aires added a gun to the crime scene in nearly 20% of all routine policing cases in my sample – and in 55% of the cases in which the victim was simply executed, a situation that is under greater police control than when the police shoot a fleeing suspect or a demonstrator, for example. Similarly, they staged a confrontation after the fact by moving the body, shooting into the air or at their own cars, placing a gun in the victim’s hand or similar means, in 45% of the routine policing cases and 75% of the executions. Nearly 10% of the cases include some kind of falsified forensic report produced by police experts and introduced by the defense.

The police also take more drastic measures to impede an investigation. They threatened witnesses in 22% of the Buenos Aires cases. In one case the police threatened an entire lower class neighborhood with the complete withdrawal of police protection if they did not cease protesting a certain killing.

Witnesses and activists tell harrowing stories of this harassment. The mother of one of the victims, I will call her Ana, who joined an activist organization after the police killed her son and is now a very visible advocate against police violence, related the following story.<sup>132</sup> On a weekend when Ana’s grandson was out of town, her son in law was sitting at a table in a neighborhood pub, when the bartender received a phone call for him. The anonymous caller informed him that the police (“we”) had killed his son, and they should start looking for him in the morgues.

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<sup>132</sup> Personal interview with the author, Buenos Aires, 11/16/01.

For nearly two days Ana's family searched police stations, hospitals and morgues for her grandson and was unable to find him. Finally, Ana's grandson called home, innocent of the uproar his absence had caused. Shortly after his return, another anonymous phone call, this time to Ana's brand new cell phone number, informed her that "the next time" her grandson would really be dead if she did not stop her anti-police activities. Her daughter and son-in-law are too frightened to file a formal complaint. In particular, the family members take the two phone calls as evidence that someone, presumably the police, know where the members of the family are at all times and know their cell phone numbers before most of their friends do.

Others, both lawyers and victims' relatives, told me similar stories. In fact, at the meeting where Ana's story was related to me, two of the four people present in addition to Ana told similar stories of anonymous phone calls and threats. Nor are these empty threats. Ten percent of the cases in my sample involve a victim who was most likely killed because he or she was a witness in another case. The Supreme Court of Buenos Aires in October 2001 issued an opinion in which it accused the Buenos Aires police of killing and coercing minors who complained of ill treatment while in custody (Acordada No.3012). The CELS extensively documents stories in which witnesses have been threatened, injured or killed (CELS/HRW 1998).

The police have also threatened lawyers for the victim's family in 8% of the cases, sometimes anonymously, sometimes not. One of the lawyers I spoke to related that his car was firebombed. More generally, others within the police force covered for their colleagues, by failing to cooperate in one way or another, in 35% of the cases. The

purpose of all this, of course, is to create a record that will support a ruling that the police were simply defending themselves from armed aggression.

Published studies of police violence in Buenos Aires and São Paulo support my conclusion on this point (CELS/HRW 1998; Chevigny 1995 ). In commenting on a recent case, the CELS writes:

[This case] occurred in the context of an institutional pattern that promotes complicity and covering up these facts, forging proofs and attempting to present these murders as confrontations. In addition, it makes evident the refusal of those in charge of the Buenos Aires police to investigate these events, to adopt any preventive measures as to those charged until the courts require it, or to develop any policies whatsoever to reverse the increase in police violence (my translation) (CELS 2001b)

Does this pattern of misrepresentation and intimidation produce the desired results? Of course, if it were never successful, we would not expect the police to use it so consistently. But evaluating its impact in actual cases is difficult since, if it is apparent even to an outside investigator that they have subverted the factual record, by definition they were not very successful. Still, there are numerous cases in which advocates for the victims are persuaded that the full facts of the case – facts that would demonstrate that the killing was indeed illegal – remained unknown to the courts due in large part to police activity. And a review of many of the cases makes it evident that, even when it wants to actively prosecute a case, the legal system in Buenos Aires is often handicapped by its inability to gather information about police homicides.

A typical case is that of Gustavo Pérez. He and a group of friends were walking home after a party when they were approached by the police. All but Gustavo ran away, and he was picked up. Some hours later, his body appeared next to the train tracks. The police claimed it was a suicide, but the family believes he died of ill-treatment while in

custody and was thrown on the tracks to cover up the crime; his injuries, they claim, are more consistent with a police beating than with a train accident. A number of circumstances suggest that he was most unlikely to commit suicide by throwing himself under a train, upon his release by the police. The courts, however, dismissed the case for lack of evidence. On another occasion, a police officer shot Luis Selaye as he kneeled on the ground, after a chase. A gun was found next to the body and used to argue to the court that Selaye was shot while violently resisting arrest. After the case was dismissed, however, a police officer admitted that the gun had come from the office of the officer in charge of the investigation – *comisario* Patti, a notorious police chief with ties to the repression under the military government.

In these cases and many others, the record re-created a version of the event that is most likely inaccurate. At the same time, advocates for the victim worked hard to uncover and supply the true facts surrounding the death, and the judicial system – prosecutors and judges – was somewhat complicit in its blindness. Prosecutors could have taken the arguments of the relatives more seriously in all these cases, and pursued the case on the strength of circumstantial or forensic evidence, as we saw in Uruguay. But the role of the cover-ups and subterfuge seems to be to offer the courts adequate cover to rule in favor of the police. The courts, even when they do not visibly disregard facts in the record, seem to be skewing that record to produce outcomes favorable to the police. In the case of Nestor Zubarán this is quite clear. Nestor was shot in the back by the chauffeur to the then-Chief of Federal Police. The victim's family retained CORREPI lawyers to represent them, but the court consistently refused to take the evidentiary measures they requested, and then dismissed the case for failure of proofs.

In clear support for the argument that endogenous pressures predispose judicial actors toward lenience, this evidence demonstrates that they are, in many cases, bending to pressure applied by the police. It is not uncommon for the prosecution itself to ask for the acquittal of a police officer – this occurred in the prosecution of *Subcomisario* Cutri for the killing of Gumersindo Ramoa Paredes, which I attended, and several of my contacts related similar experiences. In the Ramoa Paredes case, for example, the judge treated the high-ranking defendant police officer with the utmost respect and deference while treating witnesses from among the victim’s relatives and friends as if they were the criminals.

Many of the lawyers I talked to related that they felt as if they were swimming against the current in these cases: the entire system was pitched against a conviction so that even if one of the actors were favorable – a certain judge in La Plata, or a progressive prosecutor in San Martín – other actors would hinder their actions. The results, where the police defendant has the backing of the police corporation, are evident: the conviction rate in Private Violence cases where the police corporation, presumably, has no reason to back the police officer, is twice that in Routine Policing cases, where the police have an interest at stake.

The same lack of motivation is evident in the Bulacio case. The name of Walter Bulacio has become a rallying cry for civil rights activists in Argentina. He was a high school student who was arrested illegally at a rock concert in 1994, and died after a beating by the police. The case traveled up and down the courts for eight years, with various judges refusing to take effective measures to move the case forward, defense

attorneys filing numerous appeals, and long periods of absolute inactivity. The case was finally dismissed in 2002 when the statute of limitations ran out.

A review of the record shows that the courts were having great difficulty coming up with solid evidence of what exactly went on from the time he was arrested to the time he died. At the same time, they failed to devote much if any energy to the task of uncovering evidence, choosing instead to toss the case from one court to another like a hot potato. The Interamerican Human Rights Commission, acting on a complaint by several representatives of the victim's family, concluded that the Argentine courts had been so dilatory as to deny the family the effective access to legal redress that is guaranteed by regional human rights treaties.

These results point up the concurrent failure of the legal system in Buenos Aires to act independently of outside pressures. The default position is to give the police the benefit of the doubt; it generally takes some extraordinary pressure to move the system off that position, and to prompt effective action in these cases. Thus Smulovitz and Peruzzotti's (2001) account of "societal accountability" makes a virtue out of necessity. On the one hand, it is the story of the success of civil society in rallying around a cause and demanding a response from the state. On the other, it is the story of the failure of the legal system, which would not act without a massive outpouring of societal resources to push it into doing what it should be doing of its own accord. As we saw in Chapter 3, in Buenos Aires it is political capital more than class that affects judicial outcomes.

Many of my contacts made arguments along these lines. One of my interviewees in Buenos Aires, a lawyer who has acted in dozens of police violence cases, argued that the propensity of judges in Buenos Aires to exonerate the police is inversely related to the

extent of press coverage of police abuses and political support for restraining the police. Initially, she said, it was very difficult to get a verdict against a police officer. Then it became much easier, coinciding with certain very public cases (the so-called “*masacre de Wilde*” of October 1994, among others) and a wave of popular protests against police abuses. But then there was a reaction from politicians and others against increasing crime and violence and a consequent decline in popular support for strict limits on police violence, and it became again harder to get a conviction. All of the lawyers and activists I spoke to agreed that judges are more likely to convict if there are loud demonstrations in the street outside the courtroom.

Others among the lawyers interviewed who represented victims’ relatives, argued that the rank and standing of the police officer involved made a great difference in the way the case was treated. If the police officer in question was a “*gil*” in Argentine slang (a loser, someone of low standing, or out of favor with police authorities), they said, then the case could proceed with little difficulty. But if the police corporation stood behind the perpetrator, then the case would languish and the judge would be unmotivated or outright hostile to the prosecution. By the same token, a lawyer with political or media connections can often prevail on judicial personnel to move the case ahead, they said. In other words, political and social pressures can sometimes move the courts in the direction of a conviction.

In some of the cases, the influence of outside pressures is made explicit. The lawyers for the family of an inmate who was beaten to death by prison guards were told by one of three judges on the panel that a demonstration outside the courthouse actually changed the outcome of the case. The panel was about to acquit the defendants, when the

demonstration made them fear a riot, so they decided to convict for a lesser offense and impose a suspended sentence, hoping to appease the crowd without actually sending the defendants to prison. If it is not surprising that demonstrations could affect judges' decision-making, it should at least be surprising that one of them would openly admit it. Similarly, another source showed me a judicial opinion in which a judge, in a different sort of case, expressly referred to the pressures he had received from popular demonstrations. The judge noted that he had been inclined to keep in custody an activist who was arrested for trespassing in connection with an attempt to seize fallow land for use as a community garden. He released the defendant, however, after noting that several large demonstrations had demanded it. We can conclude, therefore, that the system, in addition to a tendency toward cognitive closure in these cases, also tends toward normative openness, modifying its rules of decision in response to extra-legal pressures, and sometimes overcoming the informational impediments created by the police when sufficiently motivated to do so. A study by Helmke (2002) comes to the same conclusion with respect to the Supreme Court.

In conclusion, in Buenos Aires, the police strive mightily to distort the record, state legal agents do little to redress the imbalance, and it is up to private individuals to correct it. This is consistent with popular views of the legal system. During the disturbances in Argentina in December 2001, television crews filmed an attack by rioters on a police officer. Three young men in a middle class neighborhood were overheard by another police officer as they apparently expressed some support for the attack, and were shot to death. An interviewed demonstrator essentially summarized the argument made here:



People are indignant with the police because they tried to pass off the three kids as thieves. This murderous policeman planted a knife on each of them to justify that he killed them because they tried to rob the service station. If the kids had not been from this neighborhood, you can bet that the police would have claimed they were thieves, and the judge would have believed the story.

La Nación, January 6, 2002, pg.15 (my translation).

In other words, the police nearly always try to present these cases as the repression of violent criminals, fabricating evidence if necessary. In those instances in which the victims do not come from a middle class context, and do not have the requisite resources and mobilization, the police are likely to succeed in that characterization – either because the judge and prosecutor have little incentive to dig deeper than the police version, or because there would be no credible witnesses available at an eventual trial to contradict the police version. It is only when civil society actors step in to make up the deficit that the courts are both willing and able to convict.

#### **D. Garbage in, garbage out: normative success frustrated by information-gathering failures**

The final category is one in which the courts tend to apply the law more strictly according to its own logic, but are for one reason or another hampered by their inability to gather the requisite information about the cases they are judging. I place the São Paulo and Córdoba courts in this category, in connection with Routine Policing cases. Here, my review of the cases suggests that informational failures are similar to those in Buenos Aires, though more common in São Paulo and less so in Córdoba, while the courts have no qualms in ruling against the police when they are actually presented with the requisite facts.

## **1. Routine policing cases in São Paulo**

Many people will argue that the justice system in São Paulo is simply at the service of repression, and lacks a commitment to effectively prosecute a violent police force – especially in connection with the popular classes. Thus it is important to establish whether the problem in São Paulo truly is a lack of sufficient information, or simply permissiveness on the part of the courts in cases involving the lower classes.

The first piece of evidence, of course, is the conviction rate itself. In São Paulo, in contrast with the Violent Victim cases in which the conviction rate is 0%, and the Private Violence cases in which it is 56%, the conviction rate in Routine Policing cases is low – 6% – but not nil. This demonstrates at least that there is not a blanket rule permitting the use of lethal violence by the police.

Interviews with key participants in the system support this conclusion. There is a core of prosecutors and judges that take these cases very seriously, and work very hard to improve the performance of the judicial system in this respect. I spoke to several judges who are aware of the information put forth by the Ouvidoria about police excesses and cover-ups. They use the initiative afforded to them by their greater control over the investigation (as compared with common law judges) to demand more thorough investigations in some of these cases than prosecutors would typically conduct. One judge has even sent cases back to the Attorney General, using an extra-ordinary legal mechanism, when the prosecutor in charge of the case refused to prosecute and insisted on dismissal of the case.

I also spoke to several prosecutors who argued that their office is doing all it can to aggressively pursue cops who kill innocent civilians, and pulled out case files to prove

their point, though these prosecutors tended to see themselves as going after a few bad apples, rather than viewing this as a pattern and practice of the police generally.

At the same time, it is clear that the system, somewhere, is failing in prosecuting the police. Nearly 65% of all these cases in São Paulo are dismissed early on by agreement of the prosecutor and the judge, ostensibly in most cases because the available evidence is insufficient to establish that the incident involved the excessive use of force. Even the few cases that go to trial fail more often than not to produce a conviction – 60% of the tried cases end in acquittals.

A look at these cases confirms that whether or not they succeed depends on the quality of the information presented in court. In 1984, for example, the police removed two *favela* residents, Valdeci Antônio da Silva (17) and Roberto Thomaz de Oliveira (18), from a gypsy taxicab run by an acquaintance. Their bodies were found hours later, in an empty lot, with close range gunshot wounds. Apparently, they were misidentified as having some involvement in the shooting of the son of a police officer, and executed by a group of police officers. The police officers who acknowledged killing them were brought to trial on September 18, 2000 before a São Paulo jury. In this case the prosecutor deemed the case worthy of prosecution, the judge agreed, but the record of the jury's vote shows that the jury acquitted the police officers on grounds of legitimate self-defense.

On the face of it, the result is inexplicable. The autopsy report shows that the wounds were consistent with an execution. The taxi driver could have confirmed that the boys were unarmed, were arrested without resistance and were last seen handcuffed in the back seat of a police vehicle. But at the trial, the only witnesses were the two police

officers. Under Brazilian rules against self-incrimination, they were able to tell their story without subjecting themselves to cross-examination. The prosecutor called no witnesses because the driver, also a resident of the favela, was unavailable, and even the lawyer who was looking after the interests of the family did not appear at the trial, feeling that there was nothing she could do. Thus the only version of events presented to the jury with any evidentiary support (albeit the self-interested testimony of the accused), was that the two young men had met the police with armed resistance under cover of darkness, and had been killed when the police responded by shooting into the overgrown lot where they were allegedly hiding. This is the story the jury accepted.

Many other cases make the same point. In some, the case fails because the only witnesses are not seen as credible – *favela* residents are seen as living on the edge of the law, and therefore cannot be trusted to testify truthfully against the police. Josevaldo Fernandes de Sousa was killed less than a block from the door of his shantytown residence. Five other favelados testified that a certain military police officer, Sérgio Chelas, had accosted him at the door of his *barraco*, inquiring after the whereabouts of another person. Not receiving a satisfactory answer, Chelas waited until Fernandes left home a few minutes later, and shot him. At trial, the jury chose to believe that these witnesses were all lying simply to get a policeman in trouble.

In other cases, witnesses fail to show up for the trial, or the prosecutor fails to note information that would be available with a little more digging. The prosecutor failed to prove Military Policemen Alves dos Santos and Batista de Lira killed José de Oliveira Rios, when he lost track of most of the witnesses to their dispute and his summary execution before trial. The case against the killers of Anderson Monteiro dos Santos was

dismissed on the grounds that they had killed him in the course of an armed confrontation. The prosecutor failed to note, in his request for a dismissal of the case, evidence that he had suffered a rather severe beating before being shot. The case against the military police officers who killed CA Santos was also dismissed after they testified that he ran from a car they had been chasing, shooting back at them. But his friends and relatives insist that he could not walk without crutches. In short, prosecutors and courts are presented with the police version of events and very little contrary evidence they find sufficiently credible.

On the other hand, in those cases in which witnesses deemed credible by the courts are able and willing to testify against the police officers, there can be a conviction. In the case of Júlio César Antunes de Miranda, outside witnesses with no connection to the victim testified that he had tried to evade police who simply wanted to check his identity, was cornered, and was heard pleading for his life shortly before he was killed. There was no evidence that Júlio César was armed, or that he had recently been involved in any criminal activity. In that case, the jury by a narrow margin convicted the two police officers of excessive use of force. According to the records, the jury was willing to approve of the use of force in general, but by a vote of 4 to 3 believed that the police officer had intentionally exceeded permissible limits on the use of force.

Along the same lines, the police officer who killed Eneas da Silva, 12, who ran away from the police when he was discovered leafing through a pornographic magazine, was convicted and sentenced to 13 years in prison. In that case, the prosecution survived a falsified autopsy report, a planted gun, false testimony from the police officer and his colleagues, and the intimidation and beating of eyewitnesses. At the trial, a second,

accurate, report was introduced, the eyewitnesses testified despite the threats, and the trial court in the end chose to believe that the child who was killed was unarmed. In this case, the prosecutor ensured that there would be an adequate factual record to support a conviction (prompted perhaps by media and international NGO attention to the case) by going so far as to exhume the body to conduct a second autopsy.

The only useful generalization about all these cases is that the prosecutions fail, when they fail, for lack of sufficient reliable and accurate information to paint the events as an abuse of rights rather than a legitimate use of force against a criminal.

Of course, *favelados* could be either victims of a classist norm or simply unable to effectively supply information about their case to the legal system. The effect of retaining an attorney suggests the latter. This factor quadruples the probability of a conviction, regardless of social class. In fact, for families who have retained the services of an attorney to accompany the prosecution the likelihood of a conviction is higher in São Paulo as in Buenos Aires. For those that do not have an attorney on the case, the conviction rate approaches 0 in both cities. This is consistent with the hypothesis that there are informational problems in both places, but, if only a legal claim is presented effectively, the courts are more likely to process it correctly here than in Buenos Aires.

There is other evidence of the proclivity of the system to informational failures. As in Buenos Aires, the police in São Paulo are adept at manipulating the record. One former police officer testified that the police will go so far as to put a gun in a deceased victim's hand and pull the trigger, then present the resulting gunpowder residue as evidence that the victim died in an exchange of gunfire with the police. Using the same approach as I described for Buenos Aires, I coded fully 25% of all the cases in São Paulo

as showing evidence that the police added a gun to the scene. At the Ouvidoria, I was told that the police in São Paulo often carry two weapons, the police-issued one that is registered and can be traced back to them, and another, sometimes with the serial number filed off, that can be used in questionable shootings or left as a decoy at the scene. Whether this is the reason or not, I often saw Military Police officers on the streets of São Paulo carrying two guns.

In my sample of cases there is evidence that the police experts produced falsified forensic reports in 5% of the cases, and engaged in other kinds of tampering in nearly 10% of the cases. The shooting is presented as a confrontation in 77% of all cases, while this can be confirmed by independent evidence in only 20% of the cases.

In conclusion, what we observe at the level of individual cases in São Paulo is a pattern in which there is either no information to contradict the police version, or the information that is available is not deemed credible when contrasted to the testimony of the police officers involved. And yet, in the few cases in which there is strong evidence to back a claim, the courts are willing to convict.

## **2. Routine policing cases in Córdoba**

Córdoba is different than São Paulo on both of the dimensions measured in Chapter 3: while the conviction rate in Córdoba is vastly higher than in São Paulo, results are much more unequal when we compare across various social groups. As a result, it might seem odd to place the two cases in the same category. And yet a careful review of the cases suggests that the courts in Córdoba, as in São Paulo, are quite serious about applying the law when all the facts are before them, but in many cases fail to secure critical information necessary to convict. If this is right, the difference between São Paulo

and Córdoba is one of degree, not one of kind, while the difference between these two and Buenos Aires, for example, is qualitative.

Many of the successful prosecutions in Córdoba are quite unremarkable – routine cases, routinely processed to a conviction. The case of Carlos Valenzuela, a working class youth in his twenties, is such a one. He was shot in the early hours of the morning, after leaving a party, in the course of a routine police operation that went out of control. His case generated little attention, and led to a conviction with little prompting from anyone outside the legal system. The Córdoba activists knew little about the case, and had not taken an active role at all in connection with it. This case was processed by the state, with little additional investment from outside actors. Still, he was apparently not engaged in any criminal activity at the time he was shot, so perhaps we could explain the conviction by showing that it targeted an “honest citizen.”

In the case of Luis Gorosito, however, this explanation will not work. He was suspected of being a thief, and was killed in an operation following a robbery. Another police officer named Cuadro was killed in the same operation, allegedly by Gorosito, though Cuadro’s family and the lawyers who worked for Gorosito’s family believe the police officer was actually killed by his fellow officers, accidentally or not. In any event, a case in which the police killed a criminal suspect after the death of another police officer is not, in most of the jurisdictions evaluated here, a prime candidate for conviction. His case did not trigger popular demonstrations or a great deal of media attention. Most of the witnesses to his execution were police officers who argued that he had been shot in an armed confrontation. And yet, on the strength of mostly forensic



evidence, the Córdoba provincial court chose to convict. The only non-routine positive factor in the case was that an attorney accompanied the victim's family during the trial.

The case of Sergio Bonahora also led to a conviction. He was driving around when the police picked him up. Instead of bringing him in to the police station, the police officers roughed him up, and began driving off in another direction. Sergio jumped out of the police car and tried to run away but was shot in the back. There was a witness to the event, and later it turned out that the gun found next to the body was from a stock of seized weapons held by the police.

The case of Ariel Lastra is almost identical. He was with a group of young men, driving around in a pickup that was intercepted by two police officers. The policemen began harassing and mistreating the mostly teenaged boys – Ariel was 19 at the time. Ariel took advantage of a momentary confusion to try to escape, but one of the police officers chased him down and shot him in the back after he had stopped with his hands in the air. This case generated quite a bit of media attention and ended in a conviction, despite some attempts on the part of the police to stage a confrontation. All these cases appear to have proceeded to a successful conclusion with very little prompting from outside the system.

Lest we think the wheels of justice run too smoothly and of their own volition in Córdoba, we should take a look at two cases in which civil society intervention seems to have been determinative. Miguel Angel Rodriguez was the son of migrants from Salta, an impoverished province in Argentina, who lived in one of the poor neighborhoods that surround Córdoba city. He was only 15 when a police officer, angry that the teenager had allegedly stolen a soccer ball from the policeman's son, shot him in front of his house. By

the time of trial, the police had raided the family's house, witnesses had been threatened, and one, an 18 year old neighbor who saw the shooting, had been murdered. In spite of all this, the prosecutor decided to charge the police officer with merely negligent homicide, a decision that triggered large demonstrations against the prosecutor. In the end, the court decided that he should be charged with intentional homicide, and he was convicted.

Sergio Pérez, the 18-year-old witness in the Rodriguez case, was first threatened, and ultimately killed by César Cruz, a colleague of the defendant in the Rodriguez case. Cruz was also convicted of homicide in spite of attempts to make Pérez look like a criminal.

So much for the convictions, but under what circumstances are prosecutions likely to fail in Córdoba? The set of cases in which a prosecution failed to produce a conviction are rather a mixed bag. From the regression analysis in Chapter 3 we know that class has a strong impact on the outcome, so I will begin by examining the cases of underprivileged victims. Cristian Rodriguez, Diego Ordoñez, and Roberto Ordoñez Salazar have this in common. They all lived, and died, in the *villas* that surround Córdoba city. Diego was killed after a brief police chase involving him and a companion, both suspected of having participated in a crime. Though people from the *villa* and the companion claim that there was no resistance, his companion was charged with armed resistance, destroying his credibility as a witness against the police. The police harshly repressed demonstrations in the *villa*, and one peripheral witness was shot, though not killed. Activists who worked on the case told me that circumstantial witnesses were afraid to testify. In the end, the prosecutor sought the dismissal of the case after a cursory

investigation, on the grounds that the police were merely responding to aggression, even though Diego was unarmed and shot in the back.

In this case there was only one direct witness to the event, and he was charged with the aggression that ultimately justified the shooting, so this might have been a defensible decision for the prosecutor. In the other two cases there are more witnesses. Roberto Ordoñez Salazar was being taken out of the back seat of a police car when he was killed before a number of other people in the *villa*. The police argued that another individual, who was then charged with armed resistance, initiated a confrontation. According to witnesses, the police planted a gun at the scene to bolster the claim that there had been a confused armed confrontation in the course of which Roberto was killed.

Despite the apparent openness of the crime and the presence of witnesses, all the accused were quietly exonerated in the course of the investigation, and no charges were filed. A lawyer who was active in the community and an activist who worked with the neighborhood suggested the reason for the inconclusive investigation. First, all the witnesses were intimidated and were not forthcoming. Second, the police sent the family of the victim a lawyer to help them with the claim – which they, oddly, accepted – and this lawyer actually obstructed the criminal investigation while assisting them with a modest claim for compensation. At the same time, the lawyer I spoke to partly blames the judge in charge of the investigation, saying that another judge might not have let the case go so easily.

The case of fifteen-year-old Cristian Rodriguez has the most shocking facts. He was fleeing from police and tried to hide in a *villa*. They caught up with him, and shot him when he was on his knees, with his hands in the air. A number of people saw the

actual shooting take place. Three police officers were charged with the crime, but the case against them was ultimately dismissed. A lawyer who had some participation in the case related that the witnesses were all from the *villa*, and had a very difficult time relating what they had seen in a way that would satisfy the judge. She said the witnesses were so afraid (both of being in court testifying, and of what the police might do once they went back to their neighborhood) when they were called in to relate what they had seen before the judge, the prosecutor and the defense attorneys that they contradicted themselves on secondary issues and could not put together a coherent story. Ultimately the prosecutor and the judge accepted the police version over theirs, and the case was dismissed.

At least the last two of these three cases, if not all three, are borderline cases. On the one hand, the courts ignore witnesses to the event, which could support a finding of normative failure. On the other, the witnesses are, by admission of the advocates themselves, not very effective and insufficiently credible for a system that demands high quality information before convicting anyone, let alone a police officer. This supports a finding of informational failure – at least in the sense that the information available does not meet the standards of quality of the system.

Other cases incline the balance in favor of the latter interpretation as a more pervasive theme in Córdoba. A lawyer close to the family of Gustavo Gallorini argues that he was killed in his own backyard, and then taken to a peripheral location where the police staged a confrontation. The policemen involved were initially charged with homicide, but the case was ultimately dismissed when the family was unable to supply sufficient evidence to support the charge. Juan Olmedo was killed while being arrested

for public inebriation. The policemen who killed him were tried and acquitted when the prosecutor could not establish with any clarity the facts that led up to the shooting. Carlos Pérez died of a gunshot to the head, shortly after the police forcibly removed him from a dance. The police claimed that he must have shot himself, and no one was able to establish anything different, even though he had no reason to commit suicide, and there was some forensic evidence that the gunshot was made from too far off to be self-inflicted. Claudio Marcelo Pino was threatened by a police officer after a public confrontation, and shortly after that turned up dead, but no one has been able to prove the connection.

Thus far, the tally of cases shows several that failed partly through lack of interest on the part of prosecutors, and partly through the lack of resources and education of the few witnesses; but we saw that when the facts are fairly easy to establish, there is a high incidence of convictions. Occasionally, however, we see among the acquittals a case that seems only explicable by a decision on the part of the judge to overlook the excessive use of force.

This is most clear in the case of Silvio Sánchez, Carlos Sarria and Luis Martín. All three were in the same cell of a local prison in which a riot broke out, but Martín was a federal prisoner imprisoned on a federal drug charge, while the other two were provincial prisoners held on provincial charges. All three were killed in the same cell at the same time. The trial relating to Sarria and Sánchez was held in provincial court, while Martín's took place in federal court. The federal court, on essentially the same facts, convicted the shooters, while the state court acquitted them. This disparate outcome seems the result of a different appreciation for the latitude that ought to be given law

enforcement in repressing prison inmates – in this case, given the circumstances of the case, nearly complete freedom.

To summarize the normative and informational tendencies of the system in Córdoba: In many of the cases that fail, the balance of the evidence points to an information gap that is not being filled by the state. At the same time, information is not completely closed off – judges are able to find the information to ground a conviction in nearly half of all cases – though it appears that this is not due to the effort of prosecutors and judges but of the affected parties.

On the normative side, in successful cases, judges often convict even when there is little civil society attention to the case or other public pressure. On the other hand, there are quite a few cases that are either borderline normative failures (judges choose to disbelieve witnesses), or in which there is little other explanation for the failure to convict other than sympathy for the defendant police officer or lenient standards for police behavior. As a result, I conclude that the system in Córdoba shows a relatively high incidence of informational failures, and a relatively low incidence of normative failures, accounting for its relative success in prosecuting these crimes.

#### **E. Overview of normative and informational failures**

In the conclusion to this chapter, I summarize and integrate the conclusions each of the sections, and connect it to the levels of effectiveness and inequality outlined in the previous chapter. The following graph summarizes the findings with respect to the cognitive and normative characteristics of the systems under analysis. To illustrate the varying degrees to which the different systems suffer from normative and informational failures, I have made an admittedly impressionistic evaluation of the performance of the

cases on a more continuous measure of both dimensions, locating the cases on a graph, below. The scores are intended more as a visual summary of the information presented than as a precise quantification of the state of rights in each case. For comparison purposes, I also included special cases – particular categories of cases discussed above that appear to merit different treatment even within the same system. When no category of cases is identified, the graph refers to the treatment of Routine Policing cases. While there may be some debate as to the exact placement of each legal system, the rank order is clear from the evidence:

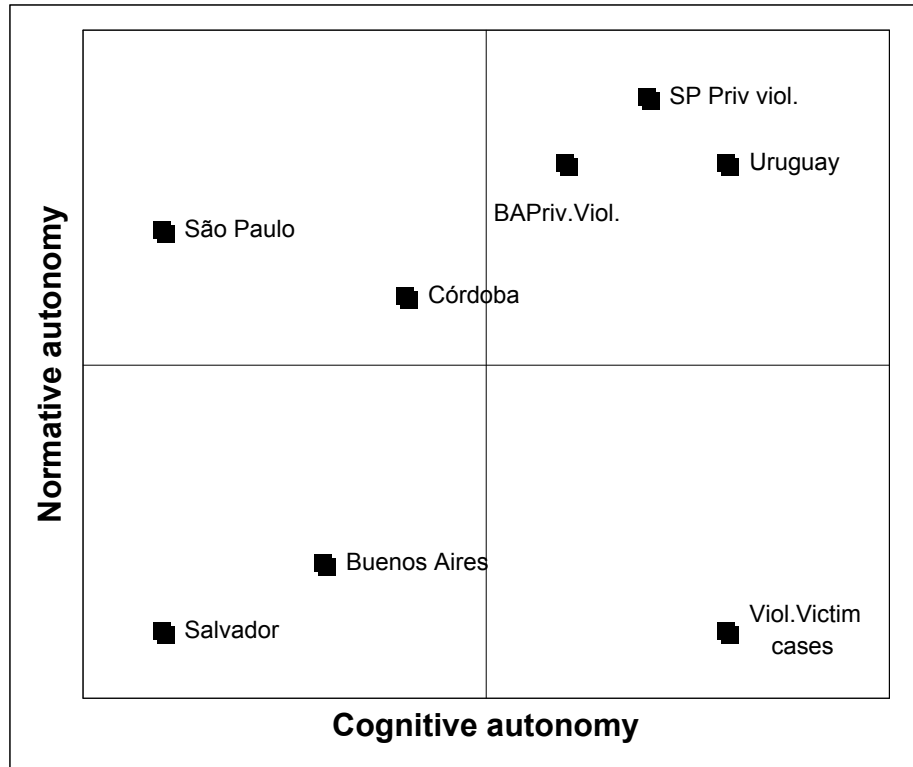


FIGURE 9.1: RANK ORDERING OF THE LEGAL SYSTEM IN BUENOS AIRES, SÃO PAULO, CÓRDOBA, URUGUAY, AND SALVADOR DA BAHIA, ON TWO DIMENSIONS

This graph reflects, for example, the difference in the potential for cognitive failures between Córdoba and São Paulo – while most of the cases that fail in both places do so for failure of proofs, this happens much more often in São Paulo than in Córdoba. And while courts in Uruguay do a creditable job of unearthing information and seriously pursuing murders committed by policemen in the course of their duties, they are far from perfect in this regard. On the other hand, while I classified Buenos Aires as suffering from both normative and informational failures, there are committed judges and prosecutors in Buenos Aires, and occasionally they wholeheartedly go after one of these cases, cobbling together the record that will support a conviction.



Similarly, São Paulo's judges are extremely professional as a whole, but there are a number of them, sometimes decried by their own colleagues, who are simply not interested in looking too closely at what they consider the police have to do to keep a semblance of order in the often-violent streets of São Paulo. Finally, while the courts in Salvador, have a very clear notion of what is going on in these cases in the aggregate, the police still offer them plenty of cover in ruling on individual cases, by keeping a tight lid on the flow of information up out of the *invasões* where they do much of their killing. The killing of Violent Victims, apparently, can be much more open than that in all three cases – Salvador, Buenos Aires and São Paulo – where the exception seems to hold.

## CHAPTER 10

### CONCLUSION – BINDING LEVIATHAN

*Sir Thomas More: ... What would you do?  
Cut a great road through the law to get after the Devil?*

*William Roper: I'd cut down every law in England to do that!*

*More: Oh! And when the last law was down, and the Devil turned on you  
– where would you hide, Roper, the laws all being flat!  
This country's planted thick with laws from coast to coast  
– man's laws, not God's – and if you cut them down ...do you really think you  
could stand upright in the winds that would blow then?*

*Robert Bolt. 1962. A Man for all Seasons.*

This dissertation grapples with one fundamental question: under what conditions does the judiciary effectively restrain the coercive power of the state? In the introduction I argued that the effectiveness of a legal system in backing individual rights can vary along two dimensions – background or general levels of effectiveness, and levels of inequality based on extra-legal characteristics of the claimants. I argued that we could understand the effectiveness of legal rights for different groups within the various systems by measuring the effect of certain legal tolls on the probability that a right will be violated in the first place, and then the effect of those tolls on the probability that the legal system would back a claim for redress after the fact.

The tolls can cause either an informational or a normative shift at the time of decision-making. That is, a decision can fail to make a legal right effective either because

it is based on biased information about the potential violation, or because it is based on a biased version of the legal rule. A given legal system can be more or less prone to either of these shifts, depending on its informational and normative autonomy. The former is a function of the availability of multiple and varied sources of information, and the consequent balance of power between claimants in the struggle to frame the facts to be judged. The latter is a function of incentives that can arise from the structure of the legal system itself and the roles assigned to various actors within it – what I have called endogenous incentives; and of incentives that arise from the broader social and political context, as filtered through the organizations to which the actors belong – exogenous incentives.

In the body of the dissertation I applied this theoretical framework to five different legal environments – the federal and provincial courts of the City of Buenos Aires and its metropolitan area, the state courts of São Paulo and Salvador da Bahia, in Brazil, the state courts of the Córdoba metropolitan area, in North-Central Argentina, and the national courts of Uruguay. In each legal system I assessed the prevalence of tolls and evaluated the contextual and institutional characteristics that opened the system up to these tolls.

In this conclusion, I gather the results from the empirical material, going from the more specific to the more general. I begin by comparing the importance of various tolls in the different systems. Then I summarize the characteristics of the various systems that led to this outcome. From these comparative analyses, I extract more general conclusions applicable to legal systems and some lessons for the enforcement of civil rights laws; and on those conclusions I base some observations that are pertinent to the rule of law more

generally. In the final section of the conclusion I present some reflections on institutions, politics, and the implications of my research for institutional analysis.

## **A. The empirical findings**

### **1. Legal tolls across systems – from tollways to freeways**

The importance of socio-economic tolls varies dramatically across different systems, as does the impact of more political tolls. The closest thing to a state-sponsored “freeway” in the cases evaluated here is the legal system in Uruguay. The others are either pay as you go, as in Córdoba, São Paulo and, to some extent Buenos Aires, or for all practical purposes closed to claims against the police, as in Salvador.

As we saw, in Córdoba economic and political tolls matter considerably, while in Uruguay neither seems to affect legal outcomes, at least in the way we might expect. In São Paulo, socio-economic tolls are so high at the level of the violations that the victim pool is essentially restricted to the lower classes. To some degree, then, it remains an open question just how much these tolls might matter in the judicial process in this city. In Buenos Aires, the impact of political tolls – that is, the normative shifts in response to punctual political pressures – and the presence of civil society actors that equalize claimants’ resources, reduce the impact of socio-economic tolls. In Salvador, the system is ineffective for everyone – the effective rule of decision is that the police may have a free hand in the use of lethal force, so long as they are “cleaning up the streets.” This means that socio-economic tolls are fairly common at the time of the initial violation, but the courts’ failure to respond to claims is almost universal.

The conclusion to Chapter 3 includes a detailed analysis of what the tolls mean for individuals belonging to different social groups. Here I briefly summarize, using the

following graphs as a sort of x-ray of each legal system (as before, because the data on Salvador is much more qualitative, it is excluded from these graphs, which are based on bivariate analyses of the sample of cases from each location). The vertical line marks the impact of the toll, spanning the distance from the probability of a violation for someone who does not have the toll to the probability of a violation for someone who does. The small horizontal line marks the location of the background level of effectiveness in the system – what I have called  $p_{\text{prior}}$  at the level of violations, and  $\Delta p$  at the level of the judicial system.<sup>133</sup> Recall that Salvador, if it were in the graph, would show a level of  $p_{\text{prior}}$ , the average probability of a violation, that is four times higher than São Paulo, with a distribution of violations that would likely be somewhat similar to São Paulo's though probably more indiscriminate (i.e., it would show lower tolls for such things as criminal history, and a similar but slightly lower concentration of violations among low-income young males).

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<sup>133</sup> The conclusion of Chapter 3 also includes a detailed explanation of how the tolls are calculated.

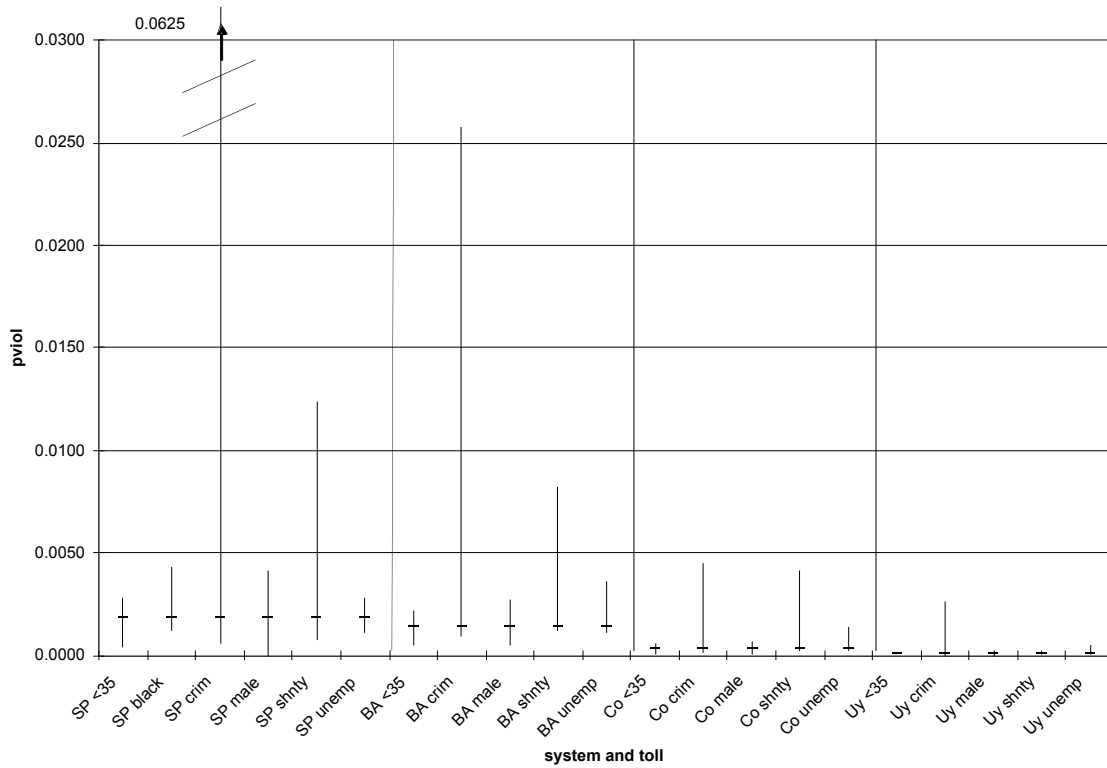


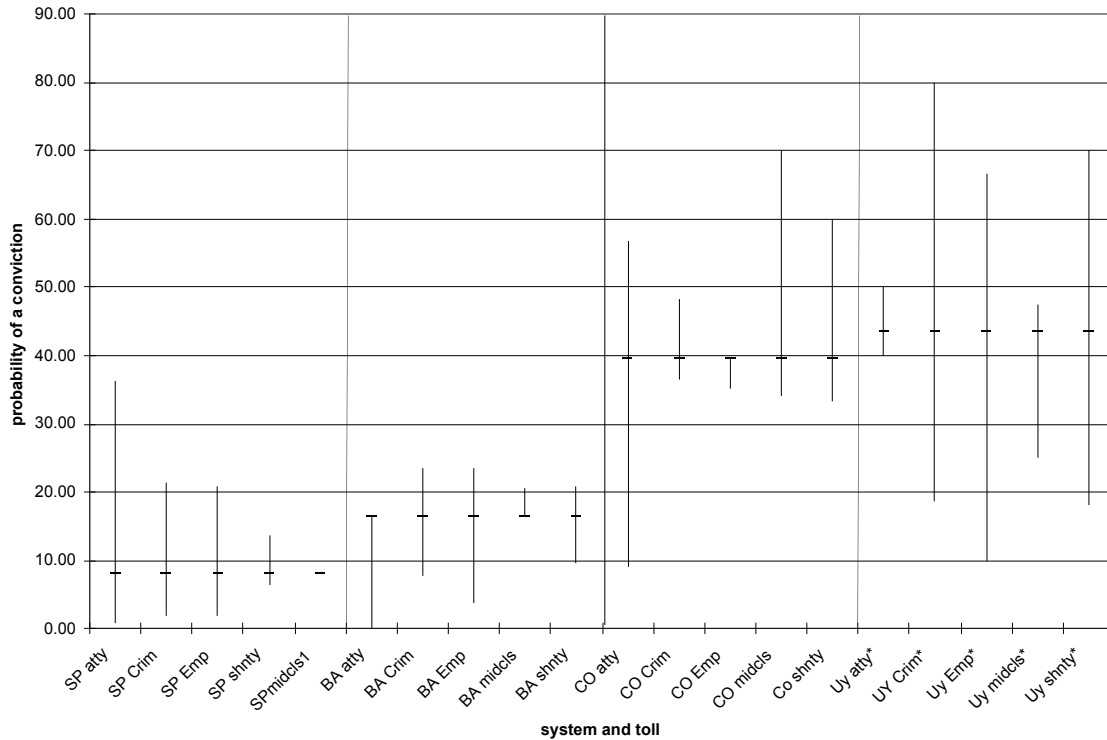
FIGURE 10.1: THE EFFECT OF TOLLS ON THE LIKELIHOOD OF A VIOLATION IN BUENOS AIRES, SÃO PAULO, URUGUAY, CÓRDOBA AND SALVADOR DA BAHIA

The astonishingly high probability in São Paulo that a person who has some criminal history will be killed dwarfs all the other categories. Uruguay, on the other hand, almost falls off the graph completely. Even though the toll for criminal involvement is almost as high in Uruguay as in São Paulo, the much higher level of effectiveness in the former means that, in absolute terms, variation in the effectiveness of rights is vastly less there. As the graph depicts, the highest risk group in Uruguay barely achieves the average levels of risk in Buenos Aires and São Paulo. Still, since it is relatively unlikely that any given individual will be killed by the police, even in São Paulo, this graph shows less

variation than the next one, which depicts the levels of effectiveness and inequality in judicial outcomes.

Figure 10.2 shows levels of  $p_{\text{law}}$  and  $p_{\text{toll}}$  within the judicial system. Uruguay, as noted in the empirical discussion, shows a relatively high impact of these variables, but they all run in the opposite direction of what we might expect – for example, there is a higher number of convictions in cases involving lower class victims than in cases involving a middle class victim. Before speculating too much on what this might mean, however, I should note that the differences are not statistically significant because of the low number of cases. A change in one or two cases could reverse the findings.

If Salvador were on the graph, given the presence of both politics-based normative shifts and resource-based informational shifts, we would expect it to fall below São Paulo on average, with tolls that are a cross between those in São Paulo and Buenos Aires. The qualitative evidence explored in Chapter 8 indicates that Salvador's judicial results show generally low tolls resulting from the overall lack of effectiveness, with some impact of political and economic variables.



\* Note that, despite the amplitude of variation in Uruguay, the direction of variation is the opposite of what is expected, and the differences graphed are not statistically significant. See Chapter 3 for details.

FIGURE 10.2: THE IMPACT OF TOLLS ON THE EFFECTIVENESS OF THE LEGAL SYSTEM IN BUENOS AIRES, SÃO PAULO, URUGUAY, CÓRDOBA AND SALVADOR DA BAHIA

The impact of certain tolls on performance is dramatic. Lacking an attorney in Córdoba reduces that system to levels of effectiveness roughly equal to São Paulo's. Belonging to the middle class doubles that system's response rate, from 35% to 70%. More details are discussed in the conclusion to Chapter 3. For present purposes, we can summarize even further by reducing all the tolls to a single evaluation of levels of inequality in the system, and placing the five systems along two dimensions – inequality and ineffectiveness – as follows:



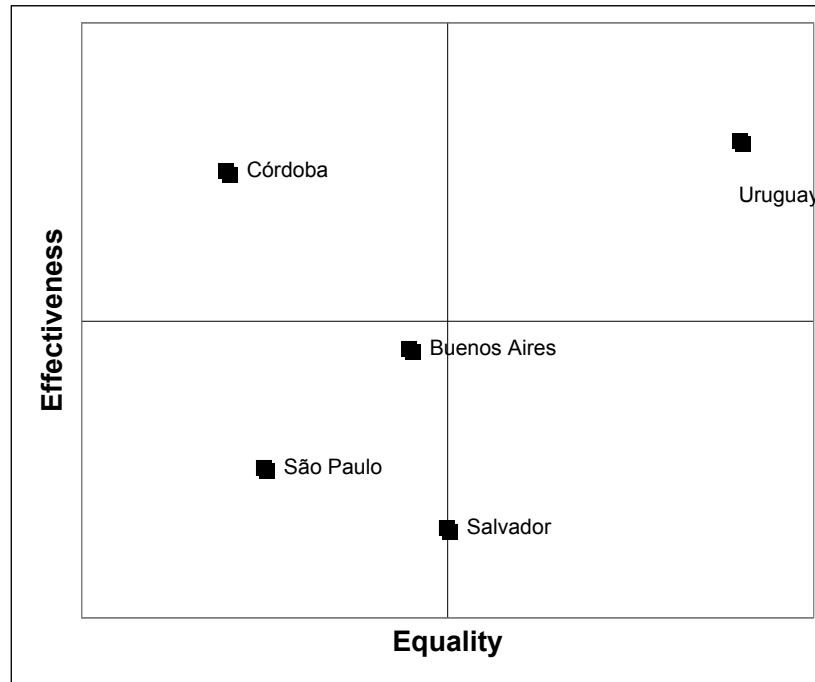


FIGURE 10.3: EFFECTIVENESS AND EQUALITY IN THE JUDICIAL SYSTEMS OF BUENOS AIRES, SÃO PAULO, URUGUAY, CÓRDOBA AND SALVADOR DA BAHIA

To some degree, where we place some of the systems on the graph is open to debate, even after all the analysis is complete. São Paulo, for example, shows very little inequality within the courts – but is that simply because of the fierce discrimination at the level of the violations, or is it, as it appears from the race-based toll, for example, because the system is relatively egalitarian? The strong impact of a Private Prosecutor on outcomes in São Paulo suggests that the police would be less able to monopolize the information available about a case involving a middle class victim. Raising the level of effectiveness by adding claimants with more resources would then also raise the level of inequality so that it is at least equal to Córdoba’s. Until we have more information,

however, this is all speculation, so I have placed São Paulo at a medium high level of inequality.

I place Buenos Aires at a low level of inequality, to emphasize the surprisingly low impact of social class on outcomes in these cases. Social class is to some extent neutralized by the presence of free non-state legal assistance and lenient standards that reduce effectiveness for everyone. But it is clear that other tolls matter – in particular, managing to organize popular mobilization around the case in what Smulovitz and Peruzzoti (Mainwaring and Welna 2003) have called societal accountability seems to matter, so that Buenos Aires ranks low on socio-economic tolls and high on political tolls. The susceptibility to political tolls suggests that the doors are open to other tolls that define influence – the ability to mobilize political support is, as discussed in the chapter on Buenos Aires, much easier for victims who fit the right demographic profile.

The other cases are easier to place. Uruguay responds well, at least in these cases, and we can at minimum say there is no evidence that the typical tolls have a detrimental effect. It scores high on both effectiveness and inequality. Córdoba is right behind it in terms of effectiveness, but the strong impact of both economic and political tolls means it must be classified as a system with a high degree of inequality.

## **2. Normative and Informational Autonomy across the systems**

As described in the introduction, the effectiveness of a legal system in translating rights on paper into rights on the ground is based on two separate dimensions of system attributes: informational and normative autonomy.<sup>134</sup> Normative autonomy results from

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<sup>134</sup> In fact, there is a third dimension of effectiveness which I do not address, because it is almost never an issue in the criminal prosecution of a rank and file police officer. That third dimension is the

the interaction between the design of judicial institutions which insulate judicial actors to greater or lesser degrees from the social and political context and that context – in Uruguay, the “wrong” design can produce the right results, given the right political backdrop, while in Salvador the exact opposite is true. Informational autonomy is also a function of institutional design and context: the legal system may be designed so that it is more or less capable of both receiving and generating information, and the social context may make that task more or less difficult.

In the separate chapters on each legal system and in Chapter 9 I evaluated the evidence that shows where the predominant failures are in each system. The following graph summarizes the conclusions from these chapters:

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likelihood that judicial decisions will be enforced. We saw a glimpse of this problem in the anecdote from Salvador, in which a Civil Police officer met armed resistance from the Military Police when he went to investigate a crime, and another in Buenos Aires, when a judicial officer complained that the police would not take evidentiary measures ordered by the court. This might pose an even greater problem if the system attempts to prosecute, for example, the head of the military, or some other figure who can marshal considerable coercive power to place him or herself beyond the reach of the law.

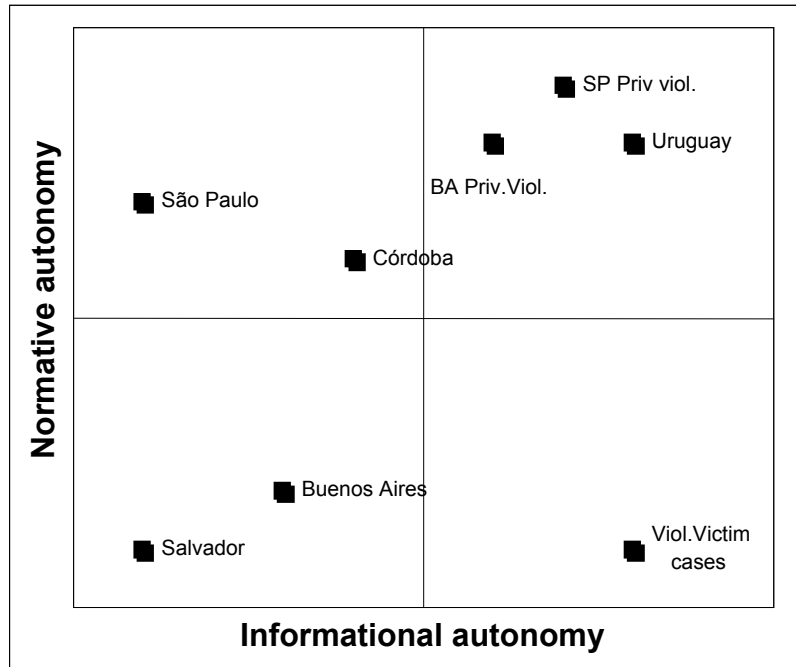


FIGURE 10.4: NORMATIVE AND INFORMATIONAL AUTONOMY IN THE LEGAL SYSTEMS OF BUENOS AIRES, SÃO PAULO, URUGUAY, CÓRDOBA AND SALVADOR IN THE 1990S

São Paulo, with an independent judicial and prosecutorial corps, ranks high on normative autonomy. A relatively “closed” judicial design – with strong tenure protections and an entry and promotions structure that is internally regulated – interacting with a moderately pluralistic political context, divorces the judiciary from everyday politics. Here the main problem is the prevalence of informational failures. The legal system is severely dependent on the police for information in these cases, both because it assigns the investigative function to the Military Police, and because there is a sharp imbalance of power between this police force and the marginal population that is the target of its violence.

Neither Salvador nor Buenos Aires, as we saw, can boast an independent judiciary. An “open” institutional design – with political nominations and promotions, and low tenure security – leads to politicization of the judiciary and makes normative shifts in response to political and popular pressure frequent in Buenos Aires. This produces uncertainty in the outcomes and a moderate to low level of effectiveness. In Salvador, a monolithic political environment makes even a “closed” judicial design (identical to São Paulo’s) permeable to political meddling. The result is an almost permanent normative shift that permits nearly complete impunity for the police.

These last two cases vary on the informational dimension more than on the normative one. In Buenos Aires, as in São Paulo, the same police force that is responsible for most of the violations is the only official source of information. But the effort of the affected population, with the assistance of groups like CORREPI, opens up the sources of information more than in Salvador. In Salvador, the police kill very openly, counting on the complaisance of the legal system. The lack of will to investigate means there is little opportunity to evaluate the informational capacity of the system. But all the indications are that this capacity is, if anything, lower than in São Paulo. When an investigation begins to take shape, as in the case of murdered children or the case of Heloisa’s stepson, the Military Police can impose a virtual information blackout, killing and intimidating witnesses and complainants.

In Uruguay we observed a normatively autonomous system, in which judges rule free from outside pressures in individual cases. While the design of judicial careers is similar to that in Buenos Aires, and thus more “open” than in São Paulo, a balanced and pluralistic political environment reduces partisan politicization and thus the ability of one

party to meddle in individual cases. This is not to say that judges and prosecutors are politically insensitive, but as we saw in the detailed discussion, they have to please a broad array of actors, so that they respond to broader political currents, making them more normatively autonomous than their peers in Buenos Aires.

As to informational autonomy, again, context trumps institutional design. Judges and prosecutors do not have their own investigative staff. But in Uruguay exogenous pressures tend in the direction of a more, not less, aggressive investigation of police homicides. This creates incentives for judicial actors to leave their offices and collect information with the means at their disposal, contributing to the informational autonomy of the system. It is simply greater motivation (than their peers in Argentina and Brazil) to overcome institutional investigative deficiencies that leads to a higher score for Uruguay on this dimension.

In Córdoba, formal institutional development has far outstripped the creation and strengthening of actual institutions. It has an independent judiciary and has taken important steps toward informational self-sufficiency. Unfortunately, the actual development of the judiciary's investigative capacity lags behind the promise embodied in the formal structures. As a result, it scores high on normative autonomy, but relatively low on informational autonomy.

I included three subsets of cases from the different systems to illustrate that there can be considerable variation within these systems, depending on the type of case. The legal system's treatment of Private Violence cases in Buenos Aires and São Paulo scores high on both dimensions. In these cases, there is no public or political resistance to a prosecution, and consequently, no pressure on Buenos Aires judges to shift the rule of

decision. The police corporation does not have as much of a stake in crafting favorable outcomes in these cases either, and therefore does not resist the investigation. The demand for a response to crime is sufficient motivation for prosecutors to expend resources on these cases. The result is adequate performance on both dimensions.

This conclusion, however, comes with an important caveat: the Private Violence cases I evaluated were cases in which the suspect was known. Unlike the police cases, in which self-attribution is the norm, most of those who kill do not take credit for the action. If we begin the analysis, as we should for a proper evaluation of the system's overall effectiveness in these cases, from the universe of murders rather than from the universe of defendants, we would find radically different results. The vast majority of murders in São Paulo (as in Salvador and in Buenos Aires) go unsolved. The problem again is informational: the opacity of the context in which crimes occur and the weakness of the investigative arm of the legal system, reduce the level of effectiveness.

### **3. Connecting the dots**

What remains, then, is drawing the line from the normative and informational failures of each system to the levels of effectiveness and inequality measured in Chapter 3. First, a general conclusion is apparent from a comparison of Figure 10.3 and Figure 10.4. The cases line up well in the two graphs, with the exception of São Paulo. Less normative autonomy, and the consequent prevalence of normative shifts, tends to reduce socio-economic inequality within the system. This is what we might expect, so long as the shift does not respond to class-based animus: in the pre-Civil Rights legal system of the American South, color surely mattered more than wealth to the outcome.

Informational dependence, on the other hand – when the state does not include multiple and varied agents for feeding information into the legal system – increases the level of outcome inequality. São Paulo escapes high levels of inequality only by limiting the claimant pool to those who have few resources, thus reducing effectiveness to near zero. To elaborate on this general conclusion, I will take each of the cases in turn.

**Buenos Aires:** In Buenos Aires, strong endogenous pressures on judges and prosecutors to cooperate with the police result in an overly lenient stance toward defendants in the ordinary case. But judges' susceptibility to outside pressures in individual cases makes the outcomes less than certain for the police. The result is a twofold failure: The police ensure, insofar as they are able, that  $o'$ , the way the facts are represented within the system, is shifted as far as possible in an exculpatory direction, because the openness of judges to pressure in individual cases makes them unpredictable.<sup>135</sup> Meanwhile prosecutors' and judges' preferred version of the rule of decision,  $r'$ , is shifted too far to the right, exempting more behavior from punishment except in politicized cases. The combination of a lenient rule and a dearth of information carves out ample space for impunity.

At the same time, claimants have enough resources, at least with the help of NGOs, so that an  $o'$  that would support a conviction is in many cases within reach of the system. And  $r'$  is not so far shifted that it will permit any behavior by the police – when  $o'$

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<sup>135</sup> This discussion is based on the graph I have used throughout to stylize legal decision-making (Figure 10.5 presents the graph for Buenos Aires). The line represents a continuum of conduct that may or may not be murder. The event to be judged is represented by  $o$ , a social object. Rule of decision  $r$  draws the line between murder and not murder, defining the two categories into which  $o$  may fall. But in actual cases, the decision-maker applies  $r_*$ , a version of  $r$  that may be more or less lenient than the ideal rule. Shifting  $r_*$  closer to the “murder” end of the continuum *narrows* the category of murder. In addition, the legal system needs to re-create  $o$  within the system. The resulting judicial version of the object to be judged is represented by  $o_*$  which again may more or less faithfully represent the “true” facts.



configures a sufficiently egregious violation the courts will convict. Thus we might represent the typical location of  $o'$  and  $r'$  in these cases as in Figure 10.5, with the proviso that in cases that trigger some public and political interest,  $r'$  is shifted back to the left, and in cases that involve a private prosecutor,  $o'$  is shifted right. It is usually the combination of these two factors that leads to a conviction.

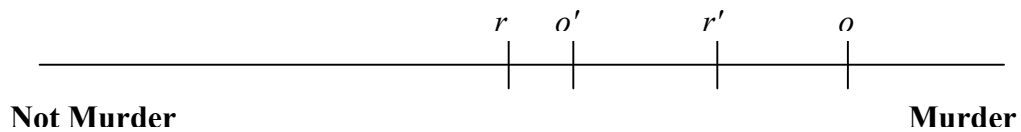


FIGURE 10.5: TYPICAL SHIFTING OF  $R'$  AND  $O'$  IN BUENOS AIRES' COURTS

The double vulnerability of the system leads to low effectiveness and low inequality in the following way: Buenos Aires claimants face relatively low levels of effectiveness that can often be attributed to a mischaracterization of  $o$  by the police. Vigorous individual efforts can at least partially redress this mischaracterization by crafting a more inculpatory  $o'$ , but have only limited success in changing the outcome because judges and prosecutors apply lenient standards in judging the actions of the police – *except* in cases that acquire political prominence.

The system's dependence on non-state action for the production of information produces a tendency toward socio-economic inequality that is masked by two separate factors: 1) lenient standards are applied on the basis of political factors that are not directly correlated with socio-economic inequality, but rather have to do with the sociopolitical construction of the case, and 2) civil society actors – CORREPI and a few others primarily – have the opportunity to participate directly in the process and tend to equalize the latter's effectiveness with those of other private participants.

**São Paulo:** The creation of  $r'$ , the rule of decision, is more insulated from internal and external pressures in São Paulo than in Buenos Aires. Endogenous pressures on prosecutors and judges to take a lenient view in police cases are attenuated by the presence of a separate investigative police. While social pressure to look the other way appear to be higher in São Paulo than Buenos Aires, the structure of the judiciary does a better job here of insulating judges and prosecutors from this pressure - they will apply a reasonable version of  $r'$  but need to be handed a sufficient  $o'$  in order to convict. Since there is little incentive for these actors to take extraordinary measures in routine police homicides, and there is a strong imbalance in the resources of the claimants and the police, the latter can typically ensure that their own version of  $o'$  carries the day. The result is that the typical location of  $r'$  and  $o'$  in these cases looks like Figure 10.6:

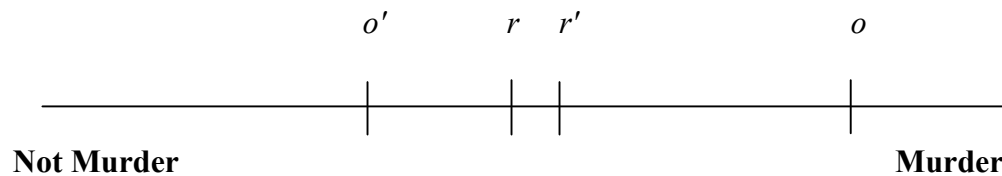


FIGURE 10.6: TYPICAL SHIFTING OF  $R'$  AND  $O'$  IN SÃO PAULO'S COURTS

The prosecutors' passive posture means that claimants must rely on their own resources to overcome the information deficit created by the police. Their lack of material and educational resources and vulnerability to harassment and intimidation makes it unlikely that they will succeed. NGOs can redress this imbalance by intervening as Private Prosecutors in individual cases. But they have a limited impact on aggregate results in the system given the sheer number of cases. The police in the state of São Paulo

killed nearly 20,000 people in 1980s and 1990s; NGOs do not have the capacity to work on more than a few hundred of these cases.

Given the dependence of the system on private resources, we would expect severe inequality in judicial outcomes. But the violations are narrowly targeted to a population that almost universally lacks the requisite resources. As a result, instead of inequality we see a nearly complete lack of effectiveness, built on the inability of the system to see past the police report.

**Uruguay:** Uruguay obtains the best results with the weakest and most outmoded institutions. In part, this is because the legal system there has the easiest task. Violations are less frequent. Exogenous pressures on all actors in the system run in favor of more aggressive investigations and prosecutions in these cases. The socio-economic context is not as daunting here as in São Paulo, for example – both in terms of the sheer size of the affected population and the levels of inequality. The police can and do resist efforts to prosecute by restricting and slanting the information they produce, but they cannot overwhelm and impose silence on claimants to same degree as the police in São Paulo or even Buenos Aires. Judges have fewer cases of this nature and more time to carry out investigations. An otherwise disfavored feature of the system – its inquisitorial nature – further redresses the imbalance between police and claimants in building a factual record. As a practical matter, it lowers the standard of proof, giving judges greater latitude in overcoming an information blackout.

The result is that  $r'$ , the rule of decision, is not pulled too far in the direction of the defendant, and the system is open to information about these cases and successfully configures an  $o'$  that will support a conviction. The next figure represents this conclusion:

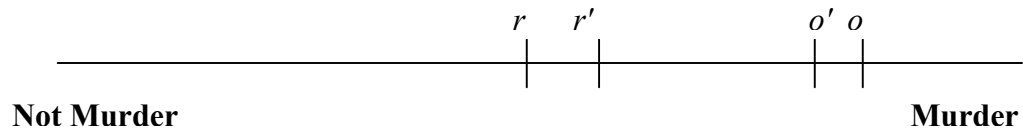


FIGURE 10.7: TYPICAL PLACEMENT OF  $R'$  AND  $O'$  IN URUGUAY'S COURTS

While judges and prosecutors are creatures of the political arena, they are relatively isolated from pressure in individual cases, so the more political tolls - demonstrations and the like -do not have as much importance. Judges and prosecutors also invest state resources and take an active role in developing  $o'$  so that claimants are required to invest fewer of their own resources. Socio-economic tolls thus also lose importance producing both a greater equality of outcomes and a higher level of effectiveness.

**Córdoba:** The legal system in Córdoba shows both high effectiveness and high inequality. Exogenous and endogenous pressures are more or less neutral in these cases: the political leadership has not spoken out strongly in favor or against the use of lethal force, and prosecutors can count on a (rather weak) investigative force that reduces their dependence on the ordinary police. The Courts are one step further removed from the investigation, rule-oriented and strongly formalistic. As a result the judiciary is, by and large, willing to convict a police officer of homicide. All of this tends to increase the effectiveness of the system.

The problems enter when the system must produce  $o'$ . While the more prosecutorial judges in Uruguay reduced the system's dependence on the claimants' own

resources, the more neutral judges of Córdoba, acting in a context of socio-economic inequality, tend to produce more unequal outcomes. Their legalistic orientation and non-investigative role leads them to demand and expect adherence to formal rules and a high standard of evidence. When claimants – either on their own, or through the prosecutor – can supply the high quality evidence the courts demand, convictions result. But prosecutors are likely to use their own resources to generate this information only in cases that have media and public attention. Prosecutors are also more likely to get good information in cases in which the claimants have their own social, political and economic resources – the impact of social class and of retaining a private prosecutor on outcomes in Córdoba shows up clearly in the logistic regression. So we get a high percentage of convictions driven by a judiciary that is interested in enforcing the law, coupled with abysmal informational failures in cases that involve the lower classes.

In other words, the Córdoba legal system consistently produces a “good”  $r'$ , so that tolls defined by social norms (such as the Violent Victim exception observed in Buenos Aires and São Paulo) are less important at the moment of decision. Moreover, the system has a comparatively greater chance of producing a good  $o'$  than São Paulo or Buenos Aires. The institutional advances in Córdoba have, therefore, produced some favorable results, so that its legal system is less prone to normative shifts than Buenos Aires or Salvador – though the qualitative analysis in Chapter 9 suggests some judges at least are willing to look the other way – and less prone to informational shifts than São Paulo or Buenos Aires. But the tolls play a large part in the configuration of  $o'$  so that we need to locate it in two different places, depending on the presence or absence of the toll. The source of the striking inequalities in Córdoba is represented in Figure 10.8:

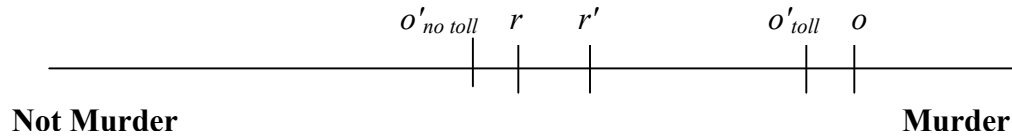


FIGURE 10.8: TYPICAL SHIFTING OF  $R'$  AND  $O'$  IN CÓRDOBA'S COURTS

**Salvador da Bahia:** Of all the cases in this study, the legal system in Salvador is by far the most open to exogenous pressures, primarily on the part of the political leadership of the state. High rates of violent crime feed public acceptance of a violent response. Political pressures affect all the actors in the legal system, though some evidence suggests that judges are exposed to greater pressures than prosecutors. This may be the only system in the study in which prosecutors are more likely to take a stand than judges. All the evidence suggests an almost universal normative shift affecting police prosecutions, so that the operative rule, in effect, is that the police can continue to kill so long as it appears they are targeting *marginais* – undesirables, criminals.  $R'$ , in other words, shields from prosecution the typical police killing in Salvador.

The fundamental problem is not a failure of information. But informational failures appear when police behavior exceeds even these lax limits, as in the case of Heloisa's stepson or the murder of street children. The experience of CEDECA is evidence that, should the judiciary begin to rule more strictly in these cases, the police would begin to take more extreme measures to shut down the information about them – and would likely succeed. For now, then, we would represent the typical shifts in Salvador as follows, with the proviso that all the conditions are present for the same kind of massive informational shift we saw in São Paulo, should  $r'$  suddenly shift to the left:

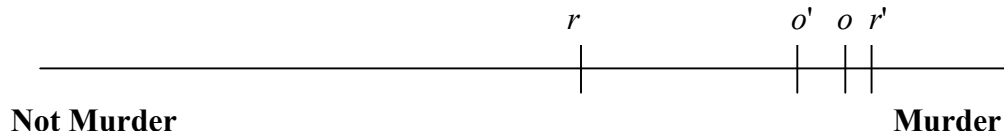


FIGURE 10.9: TYPICAL SHIFTING OF  $R'$  AND  $O'$  IN SALVADOR'S COURTS

The result is a low level of judicial effectiveness that affects all victims of police violence nearly equally. At the same time, the predominance of the underprivileged among the victims means that legal failures affect this group more often than others.

In the Introduction I advanced some hypotheses derived from the model that might account for variations in the extent to which different systems are prone to informational and normative shifting: The police will more or less universally resist these prosecutions. The greater the systems' dependence on the police for information in ordinary cases, the more endogenous pressures tend to make prosecutors and judges reluctant to prosecute and permissive in their judging. To the extent they are open to exogenous incentives, prosecutors and judges will respond to outside pressure to be more (or less) aggressive in pursuing these cases. The combination of endogenous and exogenous incentives will affect the final placement of the rule of decision ( $r'$ ) in these cases.

But the outcome of a case depends as much on the placement of the course of conduct to be judged ( $o'$ ) as on the placement of  $r'$ . A severe imbalance of power between the police and the claimants (prosecutors or survivors of the victims) will lead to lower effectiveness. Creating more channels of information will lead to greater effectiveness. This effectiveness will be more evenly distributed to the extent that it is state-sponsored – that is, to the extent it does not rely on a personal investment on the part of victim's

survivors. At the same time, however, the effect of politics on the activity of the state-sponsored channels may produce greater political tolls in the production of  $o'$ . The following table summarizes the findings on these variables across all five cases.



TABLE 10.1:

SUMMARY OF VARIABLES AND OUTCOMES IN ALL FIVE LOCATIONS

|   | Variable  | Buenos Aires  | São Paulo   | Uruguay   | Córdoba  | Salvador  |
|---|---|---|---|---|--|---|
| Construction of r' – Endogenous and exogenous incentives: | Dependence on police for information                                    | High  | Medium due to presence of (weak) investigative police         | High  | Medium due to presence of (weak) investigative police        | Medium due to presence of (weak) investigative police                       |
|   | <i>Potential Impact on r'</i>   | <i>Permissive</i>                                     | <i>Neutral</i>  | <i>Permissive</i>   | <i>Neutral</i>   | <i>Neutral</i>  |
|   | Exogenous pressure  | Against prosecution                                   | Against prosecution   | For prosecution   | Neutral  | Against prosecution   |
|   | Judicial and Prosecutorial openness to political pressure               | High (with openings for meddling in individual cases) | Low   | High (in general orientation, rather than in individual cases)                    | High (general orientation, not individual cases)             | High (with openings for meddling in individual cases)                       |
|   | <b>Final location of r'</b>   | <b>Permissive with political tolls</b>                | <b>Neutral</b>  | <b>Strict</b>   | <b>Neutral</b>   | <b>Permissive with political tolls</b>                                      |
| Construction of o': Individual and state resources:       | Imbalance of power b/t claimants  | Medium  | High  | Low   | Medium   | High  |
|   | More channels of information  | No  | No  | Yes   | Yes (but weak)   | No  |
|   | State-sponsored channels proactive?                                     | Infrequently; in response to politics                 | No  | Yes   | Frequently; in response to politics                          | No  |
|   | <b>Impact on o'</b>   | <b>Medium effectiveness with high political tolls</b> | <b>Low effectiveness (with potential for high econ tolls)</b> | <b>High effectiveness with low econ and political tolls</b>                       | <b>High effectiveness with high political and econ tolls</b> | <b>Low effectiveness (with potential for high econ and political tolls)</b> |
| <b>Outcome: r' applied to o'</b>                          | <b>Low effectiveness, moderate inequality tied to political factors</b> | <b>Universally low effectiveness</b>                  | <b>High effectiveness, low inequality</b>                     | <b>High effectiveness, high inequality tied to political and economic factors</b> | <b>Universally low effectiveness</b>                         |   |

## **B. General conclusions from these empirical findings**

### **1. On the functioning of a legal system**

Efforts to improve the functioning of legal systems have typically focused on one institution at a time, rather than looking at the entire system. This research suggests that, in order to improve results, legal reform will have to take into consideration both dimensions of legal decision-making – what I have called the construction of  $o'$  and  $r'$  – and that both require examining the relationship among the various actors in the legal system. To take one example, after the Carandiru massacre, the Candelárias killings, and the videotaped abuses in *Favela Naval*, the human rights community and broader political movements in Brazil finally noted the level of impunity the Military Police enjoyed in the Military Justice system. They correctly concluded that the problem there lay with the location of  $r'$ , and to fix the problem they passed the *Lei Bicudo* transferring jurisdiction in cases of murder to the civilian justice system.

Again correctly, they concluded that civilian judges would be less likely to use an overly lenient standard in judging these cases –  $r'$  may be as close to fixed as is possible in the Brazilian political environment. But they failed to note the gross disparity of resources between competing claimants in the construction of  $o'$ . Reformers (incorrectly) assumed that the *Ministério Público* could and would handle the investigation of these crimes and properly prepare the cases for trial. In fact, the prosecutors rely too heavily on the police for information, receiving biased and incomplete information. As a consequence, the results did not improve as much as the reformers had hoped. Fixing  $r'$  was not enough.

To improve results in actual cases, the *Lei Bicudo* needed also to redress this imbalance in the production of *o'*. One not very satisfactory solution would have been to lessen or reverse the burden of proof in these cases, as happens in many of the civil cases arising out of the same events. In cases involving inmates killed while in custody, for example, trial judges have reversed the standard of proof, requiring the state to demonstrate that the killing was justified. The result is a dramatic improvement in the outcomes. Civil awards in favor of a victim's survivors are by far more common than convictions, even in cases arising out of the same facts. But in a criminal prosecution, this would be a rather egregious violation of common standards of due process, at least if applied to the prosecution for murder of the individuals allegedly pulling the trigger.<sup>136</sup> A broader rule holding superiors responsible for the levels of violence employed by subordinates (a sort of *res ipsa loquitur* presumption that high levels of violence are evidence of improper supervision) may tend in the same direction with fewer due process implications.

A better solution, however, would be to improve the investigative capacity of the prosecutors in this category of cases, while increasing their incentives to make use of that capacity. In São Paulo, the number of killings of this nature (at least 10% of all homicides), to say nothing of the hundreds of other police abuses that take place on a daily basis in that city, clearly justifies the creation of a specialized prosecutorial corps with independent investigative capacity. If these prosecutors are evaluated on the strength of their performance in prosecuting police officers who commit abuses they would also

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<sup>136</sup> This discussion is based on conversations with the *Promotora* in charge of assisting relatives of the victims of the Carandiru massacre, and on an examination of judicial opinions and records tracking judgments in the several dozen civil cases that arose from that incident.

have the incentive to aggressively pursue these cases. This is not to suggest this would be an easy task. In São Paulo, Salvador and Córdoba we have seen just how difficult it is to wrest control of the facts from the front-line police forces, even if there is an investigative police force in place.

In addition, of course, Salvador's experience with the murder of street children teaches us that witnesses and complainants have to be protected throughout the process. There need to be effective and proactive mechanisms in place to prevent stricter enforcement from leading to more violence against witnesses and complainants. A witness protection program is one component; speedy trials another. Prosecutors and judges, as in Córdoba, should more aggressively prosecute obstruction of justice cases. Another measure, perhaps more problematic, is erring on the side of caution in pre-trial detention rulings. In Uruguay alone, the practice is to hold accused police officers pending trial. This clearly raises due process issues, but the counterpart, we saw in every other case, is the capacity of the accused to terrorize the claimants. The courts need to acknowledge the danger and balance these two concerns in deciding pre-trial release issues.

In short, if every incident of lethal use of force by the police triggered immediate oversight by a specialized task force, a prompt examination of the crime scene, access to federal forensic scientists, a witness protection plan, and accelerated trial times, the incidence of violations would almost certainly drop, and the proportion of successful prosecutions would increase.

This leads to the second general point: many of the proposed fixes for legal systems follow universal prescriptions, often applying them not only across areas of the

law, but across countries. My results strongly suggest that different categories of cases require different enforcement structures, again driven by differences in the composition of the pools of competing claimants. Thus land disputes in Northeastern Brazil, which often pit wealthy landowners against small-plot peasant farmers, need to take into consideration the disparate capacity of each of these claimants to produce evidence – real and concocted – in support of their competing claims. Rather than relying on an adversarial process and using legal documents as nearly conclusive proof of ownership, an independent fact-finding agent akin to the Special Masters sometimes appointed by courts in the United States might be better suited to discovering the truth.

In his *Sociology of Law*, Evan notes that we can envision a continuum of resistance to the policies embodied in the law – at 0% resistance, the law is unnecessary, since all would comply voluntarily; at 100% resistance the law is unenforceable because we cannot even find anyone to staff the enforcement instances (Evan 1980). Between these two extremes, of course, the more resistance there is, the stronger the enforcement institutions need to be, if the law is to have any effect at all. I would add to this observation the further comment that it is not simply a matter of polling the population to determine how much resistance there is to a certain law. We need to pay especially close attention to the power resources (that is, the resources that can be brought to bear on the legal process, whether legal or not) of those who approve and those who object to the law. The balance of power between them strongly affects the enforcement capacity of the system, since an imbalance produces an information deficit on one side or the other.

Democracy has at least the potential to shift the balance of power at the law-making stage in favor of the more generally underprivileged. But passing narrowly

tailored individual rights protections, without addressing the broader legal system leaves undisturbed the balance of power at the enforcement stage. So long as a new law (or newly enforced law) does not attempt to shift the balance of power in the social and political system too far from the current equilibrium, it can, over time, act as a magnet moving society in the desired direction. The further the law seeks to shift that balance, the more coercive and pervasive the enforcement structure needs to be – the more ancillary changes will be required to make it effective. In the end, if the law sets the goal too far from the current center of gravity for the strength of the available enforcement institutions to exert their attraction, it will have no effect at all on actual practices.

This can be seen most clearly in the case of Salvador. There the police have historically ruled the streets of the favelas with almost unbounded discretion. By seeking to make effective the right of children not to be killed by the police, the new enforcement structure created after the *Estatuto da Criança e do Adolescente* sought to radically shift the balance of power between these children and police officers. But without a strong state presence and a pervasive enforcement mechanism, the police were able to create a new strategy for leaving the existing balance of power undisturbed. Rather than counting on the courts to look the other way, they simply use their coercive power to enforce acquiescence on the part of the victims. To truly shift the balance, the state will have to invest resources in shoring up the capacity of claimants to resist this coercion.

This sets up a further observation. While the law is never a seamless whole, it is clear that we cannot use new cloth to patch an old garment, to borrow a biblical metaphor. A strong claim to equality in the context of overall legal inequality will simply tear the fabric of the law. And the rips in the fabric will often manifest as violence against

the new rights bearers. Attempting to legislate stronger rights for a dispossessed group – rights which purport to, in Weber’s words, give “power to the hitherto powerless” – without attending to the imbalance of power in the process of claiming those rights, simply exposes claimants to further violence.

The experience of the parents of murdered children in Salvador is not unique in this respect. One of my interviews in Salvador, with the head of an Afro-Brazilian rights group working on access to land, was interrupted by a phone call alerting him to a violent attack on a group of peasants that was trying to press a claim through the courts. Clearly, if the criminal justice system is not capable of protecting claimants from violence and intimidation when they attempt to assert their rights, any new rights that seek to shift power from those who hold the means of coercion will be ineffective. And it is by no means a trivial observation that these means of coercion are often supported and maintained by the state itself, so that the left hand is tearing down what the right would build up. As is clear in the case of violent police officers, the balance of power that precedes the creation of a new right is not a Hobbesian state of nature, but rather the result of where both the state and the market have allocated power resources.

Finally, an observation on judicial independence. This dissertation analyzes six very different judicial and prosecutorial institutions. And yet in every one of them, no matter how independent the institutions were meant to be, there are means of enforcing orthodoxy to one degree or another. In all six cases judges in particular are sensitive to their hierarchical superiors – whether they are subject to binding precedent or not – and to political currents – whether they are politically appointed or not – though to very different degrees. Even the most autonomous judges – I argue the ones in São Paulo

comes closest to deserving that distinction among my cases – are not autarchic. In all the cases treated here, it is clear that, in one way or another, directly or indirectly, popular sentiment bleeds into judicial decision-making.

To some degree this is a good thing. A completely autarchic judiciary would be uncontrolled and uncontrollable, and may erode the democratic nature of a regime which is, after all, supposed to respond to the *demos*. Autonomous judges that nevertheless retain some links to society – either through the appointment mechanism, disciplinary mechanisms, or otherwise – will never be completely out of step with political reality. But we saw here some less positive aspects of this responsiveness. In Argentina and Brazil, and increasingly in Uruguay, there is popular pressure to control crime by any means necessary. The judicial results of this pressure are apparent in the outcomes presented here.

## **2. On the rule of law**

As I intimated in the Introduction, the term “rule of law” is used to mean a number of different things. In this dissertation I have focused on the minimal requirement that publicly binding decisions – in particular the decisions of actors within the legal system – be made in accordance with properly enacted laws of universal application.<sup>137</sup> One aspect of this minimal requirement is normative homogeneity: Within the legal system, the rule of law demands at least that the *r'* applied by the various actors be similar if not necessarily identical.

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<sup>137</sup> We might term this the procedural component of the rule of law, to accompany substantive requirements such as due process, the right to an impartial judge and the like (O'Donnell 1999c; Raz 1979).



But the counterpart of the rule of law is not always normative *heterogeneity*. The rule of *law* requires in addition that the rules applied have been enacted by the legitimate lawgiver – that is, that  $r'$  matches, within the bounds of reason,  $r$  as given by a duly authorized lawgiver.

As we have seen throughout, one of the crucial pre-conditions for an effective rule of law is the presence of multiple alternative sources of information concerning the conduct of lower level actors in the system (including individuals in society). A single source of information allows that source to impose its normative preferences on outcomes all the way up the ladder – and there is no guarantee these preferences will match the lawgiver's. The result is a bottom-up normative homogeneity; the creation of authoritarian enclaves in which the binding rules are those imposed by actors who can restrict claimants' access to the broader normative structure.

Perfect transparency is more apt to produce the top-down normative homogeneity we might require of the rule of law. Given transparency – what I have termed the informational autonomy of the system – the lawgiver can monitor  $r'$  for the various actors in the system, and enact a solution to enforcement problems if needed. In most systems, however, there is neither perfect transparency nor an absolute monopoly on the sources of information. This gives rise to normative heterogeneity within the system – normative shifts, built on the capacity to force informational shifts.

The disparate results across social classes in Córdoba, and between Violent Victim, Routine Policing and Private Violence cases in both Buenos Aires and São Paulo clearly illustrate that there can be different degrees of normative homogeneity within the same system. The legal system produces strikingly different results in different areas of

the law, and for different classes of citizens. Different classes of claimants, different social and political pressures on decision makers, produce different combinations of normative and informational shifts. Thus, legal reform must be attuned to the special needs of each area of the law.

Broad statements that begin “The rule of law in Latin America is ...” or even “The rule of law in Argentina (or Brazil, or whatever) is...” are likely to miss as much as they describe. I have described Uruguay as having a generally egalitarian and effective legal system. But even in Uruguay, lawyers who work with street children have described a condition of arbitrary power on the part of the police who interact with these children. The capacity of these children, perhaps more than any other group in Uruguay, to access the legal system and claim its protection, is dramatically low. It may be, then, that the only general assertion that can be made in this respect is that the rule of law is built one case at a time, in one area of the law at a time, with respect to one group at a time.

### **3. Institutional theory revisited**

I conclude with some general reflections on institutionalist research. My dissertation presents two challenges to much of the institutionalist literature. The first challenge is to pay more attention to the gap between formal rules and actual practices. Far too often researchers begin and end institutional analyses with the formal rules, without too much attention to the way these rules are worked out in practice. Often, if the discrepancy is noted, it is excused on the basis of resource constraints on research, or the lack of data.

Certainly, this is a more efficient way to conduct research. And if the aim is to survey the entire world, for example, it may be the only way to proceed. The gains in

efficiency, however, are often more than outweighed by the loss of information. In the discussion of reforms to the Code of Criminal Procedure in Buenos Aires in Chapter 4, for example, I described how lawyers and judges resist, qualify and modify the rules that pretend to tell them how they should now ply their trade. A researcher that assumes that changes in the practice of law track changes in the formal rules will miss an important part of the story.

The other challenge is to theorize and explore the gap between expected institutional outcomes and actual outcomes, even when the rules are followed. Discussions of the formal attributes of Supreme Courts across Latin America invariably end up placing countries like Uruguay and Costa Rica at the bottom, in terms of the institutional attributes theoretically necessary for an independent judiciary. If we stop there – without noting that, by consensus, these same two courts are the most independent of all the Supreme Courts in Latin America – we have missed the most interesting and important part of the puzzle. The answer may be that we have simply miscalculated and misunderstood the institutional requisites for judicial independence. In that case, our theory is simply wrong. But it is more often the case that our theories rest on unspoken and unexamined assumptions about the social, political and economic context in which these institutions operate, and on the assumption that the formal rules are the (only) ones actually applied.

This gap between expected and actual outcomes generally describes the set of puzzles of which this entire dissertation is a subset – what are the reasons why an institution (or a single rule) designed to produce a certain outcome might actually produce a completely different one? The Uruguay to São Paulo comparison confounds

expectations about the relative effect of institutional strength. The Uruguayan case also contradicts the expectation that a more modern legal and procedural structure will produce better results. The identical judicial institutions in São Paulo and Salvador produce radically different levels of independence. Rather than crafting *ad hoc* solutions to these puzzles, institutionalists need to theorize these differences and account for them.

I have argued that there can be two qualitatively different kinds of failure within the courts that can cause legal outcomes to vary from what the formal rules prescribe. In this dissertation I have labeled them normative and informational shifts. More generally, we might call them input failures and processing failures. Institutional theory needs to account for the ways in which institutions perform both functions – gathering inputs and processing them according to the actual rules of decision (formal or informal) that are applied.<sup>138</sup>

There are, of course, examples of this sort of research already. Recent work on informal institutions (Brinks forthcoming; Helmke and Levitsky 2003 unpublished manuscript; Brinks 2003; O'Donnell 1994) is focused on the processing aspect of this problem. The observation that the broader partisan context affects the impact of presidentialism on regime survival (Mainwaring and Shugart 1997) draws attention to the latter. But all too often institutional analysis is acontextual and implicitly based on the assumption that all cases have the features taken for granted in the advanced industrial democracies, or that all cases are essentially like the most familiar case.

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<sup>138</sup> This classification scheme may or may not be exclusive; what we need is a broader theoretical structure to offer some guidance in this area.

Many have made this observation – the law and development scholars in particular criticized the wholesale transplantation of legal systems to other contexts; consociational democracy scholars argue that democratic institutions need to be adapted to social cleavages. Since Montesquieu we have understood, for example, that a division of functions without a division of interests will not accomplish what we want (Bellamy 1996). It is not that social scientists have failed to notice this simple fact, but that we have largely failed to translate this commonsensical observation into a better theorized and more intentional research agenda. What we need, in other words, is research that essentially holds institutions constant while examining differences in outcomes, employing all the tools at our disposal.

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To conclude: establishing an effective rule of law continues to be a challenge for Latin America and the developing world. In this dissertation I examined an especially important failure of the rule of law – the arbitrary and unpunished killing of hundreds of people, by the police, in three democracies of Latin America. Underlying this failure of liberal democracy is an institutional failure: the legal systems in Buenos Aires, São Paulo and Salvador are unable to effectively oversee the actions of the police, because the institutions that compose them are too dependent on the police for information, or too willing to accept the popular verdict that these deaths are the acceptable price of an ongoing war against crime.

Beneath this institutional failure is the social and political dimension of the problem – the politicization of violent crime, and the failure of the electorate in cities like Buenos Aires, São Paulo, Salvador, and many others to demand an end to the virtual civil

war that has been declared against certain sectors of society. The socio-political failure rests uneasily on a socio-economic reality: increasing levels of violent crime and large urban masses of the dispossessed and unemployed terrify not only the middle classes but the very people who are the most frequent victims of police violence. Opinion polls consistently show greater levels of support for draconian police actions among the lower classes. If the Civil Rights movement teaches us anything, it is that, while support in high places is important, nothing will change if those most affected by an injustice do not rise up and demand it.

The citizens of these and other cities that experience high levels of violence on the part of the police appear to have made a Hobbesian contract with the state: take any measures you wish, so long as you protect us and our property from our neighbors' depredations. The necessary institutional changes will not take place, the requisite judicial and prosecutorial willingness will not materialize, police conduct will not improve, until the voters in these cities begin to write some binding conditions into the social contract. They must demonstrate that they will no longer tolerate this level of violence on the part of the state – even in the face of continuing violence on the part of criminals. Only then will these democracies begin to create the institutional structures that can effectively tackle the problem of police violence, and move closer to delivering on their promise of legal equality and freedom from fear of the state.

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