

**INEQUALITY, INSTITUTIONS, AND THE RULE OF LAW:
THE SOCIAL AND INSTITUTIONAL BASES OF RIGHTS**

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ABSTRACT

This article elaborates and tests a theory connecting the high levels of inequality in many Latin American states to the failure to develop mechanisms to effectively protect and enforce formal rights enshrined in constitutions and laws. I argue that, in order to become effective, rights require the development of a network of ancillary supporting institutions, both formal and informal. Both engaging with these supporting institutions and developing them in the first place requires resources which many marginalized groups simply do not have. I apply the theory to data on the prosecution of police violence, as well as to a more general overview of legal and constitutional developments in the region.

RESUMEN

Este artículo presenta y testea una teoría que atribuye la inhabilidad de muchos estados latinoamericanos de desarrollar mecanismos efectivos para la protección de derechos formales establecidos en constituciones y leyes, a los altos niveles de desigualdad en dichos estados. El argumento es que, para volverse efectivos, los derechos formales requieren el desarrollo de una red de instituciones auxiliares, formales e informales, que los apoyen. Tanto como para crear, como para hacer uso de dichas instituciones de apoyo, hacen falta recursos materiales, políticos y sociales que muchos grupos marginalizados simplemente no tienen. Aplico la teoría a una serie de datos sobre la persecución penal de la violencia policial, y también a un repaso a grandes rasgos de desarrollos legales y constitucionales en la región.

In public discourse and academic writing, the words “democracy” and “the rule of law” appear inextricably linked. In recent years, Guillermo O’Donnell has been perhaps the most insistent on the role of the law and a democratic *Rechtsstaat* in supporting democracy. Among other things, he argues that an effective democratic legal order provides the necessary underpinning for elections to be truly free and fair, and thus for democracy to exist at all (O’Donnell 2001: 71, et seq.). Mainwaring, Scully, and Vargas Cullell also argue that the rule of law is “intrinsic to democracy” (Mainwaring et al. forthcoming). O’Donnell recently re-emphasized the centrality of the rule of law to the quality of democracy: “What is needed ... is a truly *democratic* rule of law that ensures political rights, civil liberties, and mechanisms of accountability which in turn affirm the political equality of all citizens and constrain potential abuses of state power” (O’Donnell 2004: 32).

And yet, in the nearly thirty years since the latest wave of democratization swept over Latin America (Mainwaring et al. 2007), it has become increasingly clear that Latin American democracies, along with many others in the developing world, continue to struggle to install a truly democratic rule of law (Schedler et al. 1999; Mainwaring and Welna 2003; Méndez et al. 1999; Foweraker and Krznaric 2002). Indeed, some have argued not only that there has been a decline in levels of democracy that is substantially attributable to deficiencies in the rule of law (Diamond 1996, 1999), but that democratic politics has actually played a role in undermining the rule of law, at least for certain underprivileged groups (Ahnen 2007). Central to the problem is the failure to extend the benefits of crucial democratic rights, and of the law more generally, to the underprivileged (Méndez et al. 1999; Foweraker and Krznaric 2002). The question addressed in this article strikes at the heart of this democratic dilemma: why have all the formal legal improvements that are concomitants of twenty-first-century democracy—new constitutions, better laws, improved judiciaries, more accountable security forces—failed in many respects to produce more “democratic rule of law,” especially for the underprivileged?

In this article, I use insights from the economics, sociolegal, and political science literatures on the rule of law, to offer an account of this failure. I then apply this theoretical framework to the prosecution of police violence cases in Argentina, Brazil,

and Uruguay, using the conviction rate as the dependent variable.¹ The argument has two stages. First, I will argue that what enables the holders of legal rights to effectively assert those rights is a dense network of formal and informal ancillary institutions that support those rights, providing the incentives and capacity for the duty bearers and enforcement agents to comply with the law (I will sometimes refer to this as “lateral support”). This argument is akin to one O’Donnell made earlier, in which he argues that a network of mutually reinforcing institutions is necessary for the rule of law and horizontal accountability (O’Donnell 1999b; 1999a: ch. 9). Next, I explore the reasons for the absence of lateral support for the rights of victims of police violence (in some places but not in others). I will suggest that the growth of formal supportive institutions is typically the result of extended political engagement with the state, while the pattern and development of informal institutions rests on longstanding patterns of social and economic power. As a result, substantive rights that favor politically and socioeconomically marginalized groups are unlikely to become effective, at least in the short run.

The article rests on three levels of empirical analysis—aggregate cross-system variation, intra-system variation, and individual-level process tracing—to support the argument, using the criminal prosecution of police officers as the empirical referent. Specifically, I will show (a) that socioeconomic inequality and the consequent political and social marginalization of the victim class is the strongest predictor of conviction rates—stronger than alternative explanations such as the strength and modernization of the judiciary or economic development; (b) that victim resources and the presence of lateral support predict convictions; and (c) that failures are the product of power disparities between the police and the victim’s advocates.

Despite the prominence of the problem, theoretical and empirical attention to the determinants of higher or lower levels of rule of law is rare. There are valuable contributions on particular elements that contribute to the rule of law, but rarely a consideration of the whole. Judicial independence in particular has received a great deal of attention (Iaryczower et al. 2002; Staats et al. 2005; Buscaglia et al. 1995; Caldeira 1986; Correa Sutil 1998; de Castro 1997; Gargarella 1996; Gibson et al. 1998; Larkins 1998, 1996; Prillaman 2000; Rhenan-Segura 1990; Helmke 2002; Brinks 2005). But this

literature addresses primarily intra-branch conflicts, not the effectiveness of courts in implementing rights, and often simply assumes that whatever normative guidelines are established at the top will somehow filter down to the lowest levels. As we will see, this article highlights the fact that much of the discontinuity in the rule of law manifests much further down the legal system, at the level of claimants, police, prosecutors, and trial courts, where society meets the state.

Existing studies of equality before the law and the enforcement and protection of civil and human rights at the trial level have not offered a political explanation for the persistence of unequal legal outcomes. Adorno (1995, 1994), for example, merely reports on the extent of legal inequality in São Paulo, without addressing its political construction. Several of the contributions in Méndez, O'Donnell, and Pinheiro (1999) examine the reach of the legal systems to the poorest sectors of society from a more political standpoint but do not offer a comparative and systematic look at the political roots of legal inequality. Even those who write on the success or failure of legal, judicial or police reform (Ungar 2001; Domingo 2001; Buscaglia et al. 1995; Correa Sutil 1998; Dakolias 1995; Davis and Trebilcock 2001; Frühling 1998; Hammergren 1999; Jarquín and Carrillo Flores 1998; Prillaman 2000; Popkin 2000) have not arrived at a diagnostic or causal consensus (Inter-American Development Bank 2003). In my recent book (Brinks 2008) I offer an account of the failure of judicial institutions in different contexts, but do not explicitly address the political basis for the perpetuation of these patterns. In short, all of these authors have made valuable contributions to our understanding of particular dynamics affecting the operation of courts, the police, and ultimately the rule of law, but they do not provide a comprehensive analysis of the factors that contribute to establishing the rule of law more generally.

PRINCIPAL EXPLANATIONS OFFERED

The principal contribution in this respect comes from institutional economists who are interested in the relationship between the rule of law (or some aspect of it) and economic development, and carry out large-N empirical analyses to test that relationship (see, e.g., Barro 2000; Acemoglu et al. 2001; Berkowitz et al. 2003; Acemoglu 2000). Some argue that economic development, channeled primarily through institutional mechanisms,

produces more rule of law by allowing wealthier countries to build better legal institutions, while others argue that better institutions lead to wealthier countries (Kaufmann et al. 2005: 36). In either case, there should be an empirical association between economic development and wealth on the one hand and rule of law on the other, as well as a relationship between investments in (legal) institutions and the rule of law. The first hypothesis, then, is that economic development, possibly through stronger institutions, produces higher levels of the rule of law. Barro (2000) suggests a second hypothesis, reporting that higher inequality is consistently and robustly associated with lower levels of the rule of law, but he does not hazard an explanation for the relationship. Given that third wave democracies tend to be both poorer and more unequal than most advanced industrial democracies, these material explanations could account for the weakness of the rule of law in new democracies.

We can infer a third, more political, hypothesis from arguments that governments are more likely to respect and promote the particularly democratic aspects of the rule of law when they are more exposed to democratic pressures (Moreno et al. 2003; Poe and Tate 1994; Ahnen 2007). The failure of the rule of law in new democracies, in this view, can be traced to the shortcomings in electoral competition and accountability that are characteristic of imperfect democratic governments. We thus have three broad hypotheses to work from, one that attributes a strong rule of law to better institutions (aided and abetted by economic development), one that emphasizes socioeconomic inequality rather than aggregate or per capita wealth, and one that focuses on political pluralism and competition.

In this article, I combine a close qualitative observation of the processes that should produce the rule of law with quantitative indicators for an intermediate number of cases, in order to shed light on how these variables work, and what their relationship is one to the other. This article adds to previous analyses in several ways. On the theoretical side, I offer—and empirically support—a new explanation for the failure of the rule of law in new democracies. In terms of methods, I use actual judicial outcomes to measure the degree to which the law structures judicial decisionmaking. The dependent variable is the conviction rate in criminal prosecutions of police officers for rights violations. The conclusion rests on an analysis of the impact of extralegal variables on the likelihood of a

conviction. This avoids some of the difficulties of using an opinion based measure (see, e.g., Kaufmann et al. 2005; Staats et al. 2005) or a measure based on formal institutional features (see, e.g., Herron and Randazzo 2003, using formal institutional features to measure judicial independence). While valuable in many ways, the commonly used opinion based measures are too coarse-grained and uncertain for many cross-national comparisons—for most of the countries of Latin America, for example, the scores' margins of error overlap to a substantial degree. Measures of rule of law that depend on formal institutional features, on the other hand, assume the very thing they would measure—that behavior complies with formal rules.

Moreover, I use a blend of quantitative and qualitative methods to support the argument and work at three complementary levels of analysis. I begin by comparing average conviction rates to macro socioeconomic, institutional, and political measures for each of the locations in the study. This is similar to what other quantitative analyses have done, and an important complement to the many single-case studies in the literature. But I also explore intra-system variation in conviction rates, using basic quantitative measures to see whether outcomes are associated with the theoretically predicted characteristics of the claimants in each legal case. And finally, I conduct a close qualitative examination of actual processes in individual cases, identifying the points in the process where the legal system fails, in order to see whether the processes and failures are consistent with the theory. This three-level analysis allows us to check whether broad cross-national empirical associations correspond to individual-level variation within systems, and whether these in turn rest on the sorts of processes predicted by the theory.

Third, my focus is on core democratic rights. In this paper I go beyond an evaluation of bureaucratic efficiency, the protection of property rights, or what might be called rule *by* law (Holmes 2003), which has been the concern of most previous cross-national work on the determinants of the rule of law (Berkowitz et al. 2003; Acemoglu et al. 2001; Kaufmann et al. 2005). Instead I address the construction of a *democratic* rule of law, defined as the effective protection of core democratic rights and the consistent application of formal norms congruent with a democratic political regime, without regard for social position, against incursion by state or social actors. The democratic rule of law, in this conception, includes effective restraints on both the ruler and fellow citizens (see

Magaloni 2003 for a discussion of the “horizontal” and “vertical” dimensions of the rule of law), ultimately leading to interactions in society that may or may not be rule-ordered in a direct way, but that in any event are consistent with democratic citizenship. This article builds on arguments presented in my recent (2008) work on police violence in South America. The article relies on the same data, but goes beyond that presentation, specifying more clearly the role of lateral support in supporting contested rights, extending the argument to suggest the reasons for the presence or absence of lateral support, presenting a sharper comparative analysis, drawing new implications for other newly democratizing countries, and making explicit some of the elements that are, at best, implicit in the book.

THE CONNECTION BETWEEN DEMOCRACY, INEQUALITY AND THE RULE OF LAW

As anticipated above, the argument, in its simplest form, is that a naked legal right is unlikely to be effective if it is not supported by a network of ancillary institutions that support claimants and impose costs on potential violators. Moreover, this ancillary support is unlikely to develop when the potential claimants are politically and economically marginalized. In Latin America, the movement toward greater democracy and political participation brought greater formal recognition to the set of substantive rights typically associated with liberal democracy, as well as rights for various disadvantaged groups like the indigenous, or women. But democratizers have so far failed to do the much more arduous work of creating and populating the ancillary institutions that would be required to make these rights effective. This failure is evident in the case of police violence, as we will see in a little more detail below. The lack of rule of law in Latin America, then, is not primarily a matter of inadequate legislation, but of the failure to comply with an increasingly well-developed legal framework.

As is evident across Latin America, a shift to democracy from an oligarchic or authoritarian regime, or even a move toward broader political participation within an existing democracy, implies a reallocation of lawmaking power. This *in theory* severs the link between social and economic advantage and the content of laws, and could lead to greater socioeconomic equality. This is the presupposition upon which T. H. Marshall

(1950) built his argument about the progression from civil to political to social rights. In fact, we have seen a shift in the formal domestic rights regimes in Latin America and other newly democratizing countries in the direction of previously disadvantaged sectors of society.² As these sectors begin to exercise their newfound rights, the formal rights framework begins to prescribe outcomes that challenge the normative expectations and standard practices of those who have traditionally exercised societal power. The result, predictably, is resistance and noncompliance on the part of the latter.

In the context of social and economic inequality, this shift in the legal framework creates a class of materially disadvantaged claimants whose rights have been either ignored or violated, and who must find a way to engage the enforcement structures of the state. But the process of claiming rights and securing state backing for those claims that do not generate voluntary compliance is a resource-intensive one. As I argued earlier (2008), this process is essentially a contest between the claimants and those who ostensibly owe them an obligation. Others have noted that even negative rights require substantial state support (Holmes and Sunstein 1999). Moreover, effective and enduring rights tend to be buttressed by social norms, such as those regarding private property, free enterprise, personal responsibility, promise keeping, and many more (see, e.g., Posner and Rasmusen 1999 on the relationship between norms and law).³ Formal and informal lateral support is crucial to the effectiveness of rights.

This lateral support structure can take a variety of shapes, but the basic principle is that, in addition to the substantive law prescribing the right—say, a law prohibiting torture—there must be a variety of other formal and informal institutions and organizations to assist the claimant and enforce the right. In the torture example, this would include medical examiners who have access to prisoners and can provide evidence, prosecutors and judges whose careers are advanced if they successfully and aggressively investigate, anonymous tip lines, witness protection programs, internal disciplinary mechanisms and whistleblower protections, juries who are willing to convict because the conduct in question violates their sense of correctness, procedures for moving prisoners who complain to a safe place, exclusionary rules for illegally obtained evidence, and so on.

In addition to this institutional development, the effective assertion of rights requires some investment of personal resources even in the context of state structures created for that purpose. Enlisting the help of the formal mechanisms of the law at minimum requires time, professional assistance, transportation, and patience. Even negotiating “in the shadow of the law” (Cooter et al. 1982; Mnookin and Kornhauser 1979)—that is, by reference to rights and with the implicit threat of state backing, but outside the courts—requires knowledge of rights, the capacity to articulate them, and the apparent potential to engage with formal enforcement instances. In many official and unofficial instances a Europeanized appearance and cultured accent is a prerequisite for prompt and efficient treatment of a claim. In more extreme cases, as rural land rights conflicts in Brazil make abundantly clear, demanding rights requires the capacity to resist violence (Piovesan et al. 2001). In all cases, some investment is needed to engage the machinery of the law—enough personal resources, in essence, to overcome the resistance of those who bear the burden.

Rights effectiveness, in short, rests largely on two things: a network of supportive lateral institutions that shore up the advantage of the right holder against the duty bearer, and access to the resources required to engage with this network.

What explains, then, the absence of lateral support for so many rights in Latin America today? Formal institutions of lateral support are the product of long-term political dynamics, iterated processes of trial and error, and material investments on the part of the state and society. Their development depends on class members’ own experience with the exercise of rights and their access to information about the outcomes other members of the class experience. Yashar (2005: 71, et seq.), for example, demonstrates the need for intragroup organizational capacity and communication in the context of indigenous mobilization. Developing formal lateral support requires sustained attention from legislatures and executives. On a social level, it grows by accretion, as subsidiary institutions, bodies of knowledge, and normative expectations grow up around the core formal rights in question. We should see higher levels of effectiveness and lower levels of inequality in legal outcomes, therefore, only when the claimants as a class (defined by the particular right or cluster of rights being claimed) can garner long-term, consistent public and political support for their claim.

Democracies with high levels of inequality, large informal sectors, and vast shantytown populations tend to produce “thin” citizenship for the poor, characterized by sporadic (mostly electoral) political participation and occasional protests but without a more robust integration of the marginalized into the economic, social, and political life of the country (Méndez et al. 1999; O’Donnell 1993; Karl 2003; Oxhorn 2003). This kind of thin citizenship tends to fall short of the requirements for producing lateral support. Unequal democracies are, therefore, especially prone to producing substantive legal developments that should favor the poor (by virtue of the expansion of political rights) without producing the lateral support (as a result of inequality) required to establish the rule of law.

In the case of police violence in Latin America, these material disadvantages are compounded by a further political disadvantage: the fear that violent crime is out of control. Victims of police violence struggle against the perception that to support them is to weaken the police, and to weaken the police is to leave “honest citizens” defenseless (Stanley 2004). Clearly, this political disadvantage is not independent of socioeconomic inequality. It is precisely the fact that the typical victim is poor and marginalized that allows the police and politicians to perpetuate the idea that police violence primarily targets violent criminals, in the face of abundant contrary evidence (see, e.g., Ouvidoria da Polícia 1999).

In short, to be effective formal rights need to be embedded in a network of supporting formal and informal institutions—from special-purpose state agencies to social norms. When the rights framework states formal rights in favor of marginalized groups, without a concomitant move toward greater socioeconomic equality, the most likely result is a series of deracinated rights—formal rights that have no lateral support because they are not embedded in a network of supporting rules and organizations. In this model, aggregate economic inequality feeds into the failure of the rule of law in two ways. First, it creates a large class of disadvantaged claimants, who lack the material resources to engage successfully with the system on their own. And secondly, it sets the stage for the failures of political citizenship that impede the development of adequate networks of lateral support to buttress gains in formal substantive rights. This leads to the particular failure of the rule of law that is visible in Latin American democracies today: a

marked improvement in formal rights, with little change in actual practices. The exceptions prove the rule: newly minted rights are effective when potential claimants have the capacity to generate and make use of lateral support. Environmental rights and consumer protection movements, for example, enjoy both international and domestic support and have enjoyed noticeable success in places like Brazil and Argentina, which still struggle to establish basic civil rights for the disadvantaged.

This theory accounts for the association between inequality and lower levels of rule of law that Barro (2000) notices. It also complements the argument that it is the failure of political representation that contributes to the lack of the rule of law (Moreno et al. 2003), but it offers an explanation for the failure that goes beyond institutional design. Economic development, and the consequent state capacity to create effective lateral institutional support, is, in this scheme, only a constraining factor. Development provides the resources to spend on those institutions the polity decides are important, but clearly does not provide incentives to protect the rights of marginalized populations.

This fairly abstract account of the preconditions for effective rights generates some concrete predictions for the prosecution of police officers accused of homicide. At the aggregate, system-wide level, there should be lower levels of effectiveness in locations in which inequality creates a large pool of disadvantaged potential claimants, especially when violations narrowly target this population. Moreover, higher socioeconomic inequality should be associated with (a) less political support for rights that primarily benefit the disadvantaged, and therefore, with (b) less lateral institutional development in support of those rights, and therefore (c) with high levels of legal inequality (i.e., legal outcomes that vary dramatically according to the *victim's* or *claimant's* resources). In individual cases, we should see evidence of police resistance, which victims and those who act on their behalf (prosecutors, private attorneys, relatives) cannot overcome. High levels of legal inequality should disappear, however, when low levels of marginalization mean most victims are perceived as full-fledged members of political society. Under these conditions, we should see lateral support—either from the state or from society—mobilized on behalf of even relatively poor and marginalized victims.

To test these implications I use my (2008) database of homicides committed by the police in Uruguay, in Buenos Aires and Córdoba, Argentina, and in São Paulo, Brazil (available by request). The database includes information on the characteristics of the victim, the nature of the violation, the existence of popular demonstrations around the case, the intervention of NGOs and private attorneys on behalf of the claimants, the final outcome, and the like. As noted, this provides a direct and relatively accurate measure of judicial performance. Information about individual judicial outcomes is only the starting point, however, for examining the systemic causes of impunity and inequality. To get at these I examine the institutional framework in each jurisdiction and what that implies for the resources claimants must bring to bear, and the socioeconomic and political context in which the cases arise. Next, then, is the empirical analysis. I start with a brief overview of the region, then turn to the three levels of analysis described above.

AN OVERVIEW OF THE REGION

A broad overview of legal developments in the region suggests this modified retelling of T. S. Marshall's (1950) citizenship story has some descriptive power. As noted above, in the late 1970s and early 1980s most of the region underwent a dramatic period of (re)democratization, including not only regime change but also the political inclusion of previously marginalized social groups. Notably, the wave of democratization triggered the adoption of human rights language and international human rights instruments into domestic legislation and constitutions. Thus, among the countries that are the subject of this paper, we have the 1988 Constitution of Brazil, which incorporates a great variety of rights into the formal laws of Brazil; and the 1994 reform to Argentina's Constitution, which gives human rights treaties quasi-constitutional status. In addition, these countries have enacted laws addressing torture, racial discrimination, indigenous rights, children's rights, prison conditions, and more.

Nor is this process of legal democratization limited to Argentina and Brazil. We could note any number of examples. All the countries of the region have now ratified the Convention on the Elimination of All Forms of Discrimination against Women⁴ and have made various other legal changes to benefit women in politics, the workplace and the home. Across Latin America, indigenous movements using the tools of democracy have

pushed countries to add cultural and land rights to their constitution (Van Cott 2005; Yashar 2005, 1999).⁵ Criminal procedure reforms have consistently included increased due process protections for criminal defendants, and judicial reform has paid considerable attention to access to justice issues (Domingo 2001). Twenty years of democracy have had a noticeably democratizing, progressive impact on the written laws and constitutions of Latin America. If the laws described the practice, Latin America would be approaching an egalitarian democratic utopia, and yet the de facto world of discrimination and rights violations continues to outdistance the de jure world of equal rights for all.

Police violence is one of the places where the reality does not live up to the promise of democracy. Many countries, even or especially those with a legacy of authoritarian repression, have become political democracies but continue to violate individual rights. These countries no longer target political opponents, but their police continue to torture and kill on a large scale in the interest of social order. From 1990 to the end of 2000, for example, the police in the state of São Paulo killed more than 7,500 people in the name of public safety. In 1992 alone, 1,428 people are known to have died at the hands of police officers in São Paulo.⁶ While São Paulo's vast population produces truly striking numbers of victims, this city is not alone in relying on deadly violence as a means of crime control. The per capita rate in Salvador da Bahia in the mid-nineties, over 6 per hundred thousand, was nearly three times higher than the three worst years of that decade in São Paulo. Buenos Aires, in the second half of the decade, averaged a per capita rate of police homicides (almost 2 per hundred thousand) that was just as high as São Paulo's for that same period (see Brinks 2008 for a more complete description). As we will see in a moment, the level of impunity for these violations is as striking as their number. The question is, then, how do we explain the apparent failure to respond to these violations?

FIRST LEVEL OF ANALYSIS: INTER-SYSTEM VARIATION

I begin at the highest level of aggregation, comparing conviction rates to the political, institutional, and economic characteristics of each location. According to the police homicide prosecution data, conviction rates for police officers who kill are well below 5

percent in both Brazilian cities and about 20 percent in Buenos Aires. But conviction rates climb as high as 50 percent in Uruguay and hover around 40 percent in Córdoba. As expected, these figures roughly track levels of inequality in each location. Uruguay has the lowest and Brazil the highest degree of income inequality in Latin America, with average Ginis over the course of the 1990s of 43 and 60, respectively. Argentina falls in the middle, with a Gini of 49.⁷ According to the theory, the higher levels of inequality in Brazil and Argentina contribute to the creation of large pools of disadvantaged claimants, who come from populations with “thin citizenship,” which are thus unable to generate the lateral institutional development needed to back their claims of right. At first view, the results in Córdoba appear somewhat anomalous, since conviction rates are much higher than those in Buenos Aires (despite a similar level of inequality), and almost the equal of those in Uruguay. As we will see, however, a closer examination of the within-system variation demonstrates that the apparent anomaly is entirely consistent with the theory.

None of the competing hypotheses account for the outcomes as well as inequality. As noted, it seems fairly commonsensical to suppose that economic development might produce institutional development in the justice area, and that higher levels of institutional wealth and modernization in turn will produce higher levels of rule of law. But only the first of these logical conclusions can be supported in these cases. Córdoba has a slightly higher GDP per capita than Buenos Aires (\$5,603 and \$4,979, respectively, in 1993 (Porto and Sanguinetti 2001)) and São Paulo’s per capita GDP is higher still (\$6,547 in 1996, according to Azzoni (2001)), although Brazil’s per capita GDP is lower. Uruguay has the lowest GDP of all. Uruguay habitually trails Argentina’s per capita GDP by about 20 percent, while Córdoba and Buenos Aires are well above Argentina’s national per capita GDP.

These income differences translate fairly directly into spending on courts, as São Paulo spends the most on its courts and Uruguay the least, with Córdoba and Buenos Aires in the middle. During the 1990s, Uruguayan judges earned less than half what their peers earned in Argentina. On average throughout the 1990s, Uruguay spent about 1.4 percent of its budget, or 0.35 percent of GDP, on its judiciary.⁸ Argentina spends twice that percentage (of both budget and GDP) on state and federal judiciaries (FORES and Colegio de Abogados de Buenos Aires 1999). In the state of São Paulo, Brazil spends

about 5 percent of its budget on courts, more than three times as much as Uruguay.⁹ In the early 1990s, Uruguay spent \$256 per case filed and only \$93,000 annually per judge, while Argentina spent \$760 per case and (partly because of a lower ratio of judges to administrative and other personnel) \$760,000 per judge (FORES and Colegio de Abogados de Buenos Aires 1999).

Nor is Uruguay a paragon of modern procedure and efficiency. Argentina and Brazil have both reformed their criminal procedure laws from an outmoded, written, inquisitorial system to a more agile and adversarial oral procedure. In 1997 Uruguay tried to do the same, but the reform failed and has never been implemented. In short, São Paulo spends more on its court system than any of the other locations; Buenos Aires and Córdoba do not lag too far behind, and all three have modernized their procedures. Uruguay is by far the laggard in terms of institutional funding, reform and modernization. Nevertheless, Uruguay manages to produce the highest levels of rule of law, at least in police cases.

The problem is not, of course, that wealth does not help build stronger institutions, or that wealthier, more modern institutions are actually bad for the rule of law. The problem is that wealth and institutions are simply tools to accomplish political goals, and if controlling police violence is not one of those goals, wealth and institutional development will not be dedicated to that purpose. We must turn, therefore, to the conditions that might create political demand for a more democratic legal order. According to the second hypothesis, democratic pluralism can generate both the demand and the conditions for more accountable government, and thus should lead to measures to control the police (see Ahnen 2007 for a review of this argument).

On purely political measures of democratic pluralism, at the national level Uruguay certainly outperforms the other two, which could account for its success, but Brazil clearly outperforms Argentina and still produces much worse legal outcomes, which is not consistent with this hypothesis. Altman and Pérez-Liñán (2002: Table 1), for example, rank Uruguay considerably higher in democratic quality than Brazil, and Argentina one step down from Brazil, for the relevant time period. At the provincial or state level, São Paulo is vastly more pluralistic than Buenos Aires, which has been dominated by the Justicialist Party since the transition to democracy (see Ames 2001 for

a description of state-level politics in Brazil). Córdoba fares only a little better than Buenos Aires. It was dominated by a single party (the Unión Cívica Radical, or Radical Civic Union) from democratization until the mid-nineties, but then underwent an alternation in power, when a Justicialist governor won office and secured a legislative majority. In terms of pluralism, then, it would rank above Buenos Aires, but well below São Paulo.

In short, we have the highest and lowest performers on the dependent variable, Uruguay and São Paulo, at the highest range of this possible independent variable, and both high (Córdoba) and low (Buenos Aires) performers that score relatively low on pluralism. Clearly Ahnen (2007) is correct in concluding that democratic politics do not necessarily translate into demands for more police accountability, whatever they might mean for other generally desirable outcomes. The initial cross-system evaluation of the hypotheses, therefore, supports the notion that inequality is somehow related to the presence of lateral support and, in turn, to the effectiveness of the legal system in punishing rights violations. Table 1 summarizes the results on inequality and all the alternative hypotheses (the numbers in the cells represent the rank order of the cases on the indicated variable).

TABLE 1

CROSS-SYSTEM VARIATION ON THE DEPENDENT AND INDEPENDENT VARIABLES

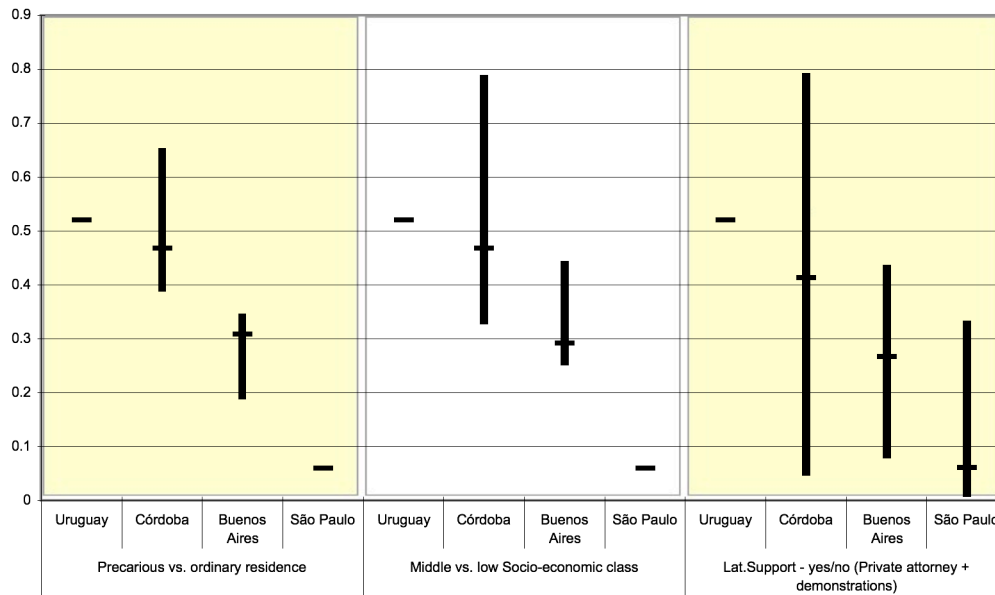
	São Paulo	Buenos Aires	Córdoba	Uruguay
Institutional strength	Strongest, most independent, most recently modernized: rank 1	Weak, non-independent, although recently modernized: rank 4	Strong, moderately independent, modern: rank 2	Weak, not modernized, but independent: rank 3
Economic development	1	2	3	4
Democratic Pluralism	1	4	3	2
Socioeconomic Equality	4	3	2	1
Resulting conviction levels	4	3	2	1

SECOND LEVEL OF ANALYSIS: INTRA-SYSTEM VARIATION

The average conviction rate, however, does not tell us whether the law protects (or fails to protect) all citizens regardless of social position. Moreover, the average conviction rate could simply reflect the mix of advantaged to disadvantaged claimants, rather than a system that performs better for all. For this we need to look inside each of the legal systems, to examine the connection between the claimant's material and political resources and the outcomes. Figure 1 graphs the disparate treatment afforded disfavored groups. The small horizontal line indicates the average conviction rate in that location. The vertical line connects the average conviction rate for persons in the favored category (e.g., those who do not live in a shantytown) with the conviction rate for persons in the disfavored category. The longer the line, then, the more legal inequality there is associated with these extralegal traits.

FIGURE 1

**CONVICTION RATES FOR VARIOUS GROUPS IN BUENOS AIRES,
CÓRDOBA, SÃO PAULO AND URUGUAY¹⁰**



The victim's socioeconomic condition is measured using two different variables. The first (precarious vs. ordinary residence) identifies whether the victim was a resident of a shantytown or favela. The second compares cases involving middle-class victims to cases in which the victim was below middle class. Both of these variables have their greatest impact in Córdoba, followed by Buenos Aires. They fade into non-significance in São Paulo and Uruguay. The results for Córdoba and Buenos Aires are self-evidently consistent with the theory. Better institutions raise the performance of the system for those with the resources to engage them—hence the conviction rates between 70 and 80 percent for better-off claimants in Córdoba. But disadvantaged claimants do not reap benefits proportionate to the institutional improvements because they lack the individual capacity and lateral support required to make use of them. Even in Córdoba, with its more independent, modern institutions, and even when the state is technically in control of the prosecution, disadvantaged claimants see conviction rates between 30 and 40 percent, compared to 80 percent for the middle class. Middle-class claimants in the

greater Buenos Aires area, in turn, purchase access to a somewhat less effective system, which pays off but not quite so handsomely.

How do we explain the lack of legal inequality tied to the victim's material conditions in both Uruguay and São Paulo, then? Uruguay's response could be characterized as equally successful for all. The system responds equally well, if not better, to the claims of the underprivileged as it does to the claims of those with more resources.¹¹ As predicted, this suggests that lower levels of inequality and political marginalization produce claimants that are more integrated into society and the state, with "thicker" citizenship and hence greater political support for police restraint and more lateral institutional support for their claims.

In São Paulo, in contrast, the results are dismal for all. The pool of claimants is dramatically limited to the underprivileged. Of more than 100 victims, only 4 were middle class, of whom 3 were bystanders, shot accidentally. Clearly the police target the marginalized, while the middle class can confidently assume police violence will not touch them except by accident. As predicted, therefore, these claims receive no lateral support, the victims are thrown onto their own extremely limited resources, and not even the relatively strong prosecutorial and judicial institutions in São Paulo produce results in these cases. And if we subdivide this already marginalized class, we find that cases involving victims who live in a shantytown, have not finished secondary school, and are unemployed are even less likely to produce a conviction.

The final set of variables measures the extent of non-state lateral support present in a particular case, regardless of the social status of the victim. Demonstrations suggest political support, while the presence of a private lawyer to accompany the prosecution indicates logistical legal support. As the longer vertical lines in this box show, lateral support has an even stronger impact than socioeconomic condition, suggesting it can overcome individual material disadvantage. In São Paulo the lack of a private advocate dooms the case. In Córdoba, the conviction rate goes from 5 percent to about 80 percent when a private advocate and political mobilization support a claim. Even in Buenos Aires, adding lawyers and demonstrations raises the likelihood of conviction from about 8 percent to about 45 percent.

The intra-system results thus strongly support the claim that lateral support and resources are crucial to effectiveness. Córdoba, which at first seems an anomaly, with a conviction rate that is too high for its levels of socioeconomic inequality, turns out to convict only in cases involving the middle class. São Paulo, which initially seems to treat everyone the same, turns out to fail universally because the victims are universally marginalized. Buenos Aires similarly convicts primarily when the victims can muster lateral support. In Uruguay, meanwhile, low levels of marginalization of the victim class generate political support and state resources to back the claims, leading to an effective and egalitarian system which does not depend on private investments to the same degree.

THE THIRD LEVEL OF ANALYSIS: QUALITATIVE EVIDENCE FROM INDIVIDUAL PROSECUTIONS

This brings me to the third layer of evidence. It is possible—indeed, the data are rather imprecise and the tool used so far a simple bivariate analysis—that these patterns are the result of a correlation between the actual merits of the case or some other third variable and the socioeconomic and lateral support variables. To double-check the results, I examine the actual process of prosecuting these cases, to see whether the reasons for failure match the observable implications of the theory laid out earlier. If the theory I have laid out is correct, we should see evidence in actual cases that (a) the victims' socioeconomic circumstances directly affect the prosecutor's and judge's ability to prosecute a case, (b) the characteristics of the victim pool affect the institutional and political resources allocated to this class of cases, and (c) lateral support can, when present, overcome the obstacles posed by the victim's circumstances. In addition, (d) we should see evidence of greater political support for this class of claims where the victim population is not as marginalized.

As to the first issue, how, concretely, do the victim's socioeconomic circumstances affect the prosecution of a case against the person who violated that victim's rights? In all the locations, it will come as no surprise, the police engage in extensive cover-up activities. Even in Uruguay, the police in one case shot holes in their own cars and in the clothing of one of the officers, and planted a gun next to the body, to simulate an armed encounter. In Buenos Aires, Córdoba, and São Paulo there is extensive

evidence of violence and intimidation directed at complaining family members and witnesses. In one case in Buenos Aires, the police threatened to remove police protection from an entire neighborhood if the neighbors continued to agitate for justice. A witness in Córdoba was murdered, as were several in Brazil and in Buenos Aires. All these examples of “everyday resistance” (Scott 1986) are easier to carry out successfully in a context of social marginalization and exclusion than in a middle-class neighborhood with access to media, lawyers, and politicians.

Moreover, many lawyers suggested that when the victim came from a shantytown the quality of the testimony against the police was often compromised: “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.”¹² In one case in Córdoba, the lawyer described how the witnesses to an execution were first intimidated by the police, then paraded into the judge’s chambers and asked a number of questions. Their answers were tentative and confused, insufficiently credible for the judge, who had little sympathy for their nervousness and hesitation.¹³ Credibility, reliability, the ability to present evidence in an articulate and forceful manner, all these essential ingredients of a successful prosecution covary with socioeconomic variables like education, income, steady employment, and a cultured appearance.

The second observable implication is the effect of the characteristics of the victim pool on the development of a lateral support structure. Here, the contrast between Uruguay and São Paulo is most telling. Uruguay’s underpaid judges, with little logistical and technical support overall, still find the time and resources to undertake field trips and extensive crime scene reconstructions in these cases. São Paulo’s highly regarded public prosecutor, while very effective in battling corruption, environmental degradation, and consumer rights violations (Sadek and Cavalcanti 2003; Sadek 2000; Bastos Arantes 2000), has done almost nothing to develop an effective response to police violence. The prosecutors in São Paulo have special divisions for education, health, children, and the aged, among other issues. And yet, in a city where, in at least one year, police homicides accounted for 27 percent of all homicides (Holston and Caldeira 1998), the prosecutor’s office has done nothing to create a special task force on police violence, or even a special protocol for pursuing these cases. Clearly police violence is not included among the top

institutional priorities for judges and prosecutors in São Paulo, while it ranks high for these officials in Uruguay.

Outside of Uruguay, the impact of non-state lateral support is clear, even where the victim comes from the marginalized classes. All the convictions in the São Paulo sample come in cases in which the Centro Santo Dias, a police violence NGO, was involved. In Buenos Aires, CORREPI (Coordinadora Contra la Represión Policial Institucional, or Coordinator Against Institutional Police Repression) takes up cases, preferably cases where the victim belongs to the popular classes, and uses a combination of legal and political tactics to change the outcome, from expert witnesses to mass demonstrations outside the courthouse. CORREPI engages experts, produces forensic reports, and seeks out eyewitnesses. It protects claimants and witnesses them from police harassment and transports them to court for the trial.

And finally, as expected, it is clear that inequality and the marginalization of the victim class is closely related to the dominant political stance on the question of police violence. In Uruguay, one police reform official stated, “our society would not tolerate [police killings]. People will tolerate moderate levels of violence but not killings.”¹⁴ The result is a judicial and prosecutorial corps that cares about these cases. In São Paulo, in contrast, public opinion tends to support, or at least is not overly concerned by, the extremely high levels of violence exercised by the police. Holston and Caldeira attribute “massive support for illegal and/or authoritarian measures of control” to the population as a whole (Holston and Caldeira 1998: 267). They argue that “shooting to kill not only has broad popular support but it is also ‘accepted’ by the ‘tough talk’ of official policy” (271). Certainly, there is a 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.¹⁵ The result, as we have seen, is a series of high-quality institutions that are not invested in finding a solution to this problem.

Similarly, prosecutors in Buenos Aires appear largely uninterested in improving their dismal conviction rate. Buenos Aires has seen provincial governors routinely call for the shooting of criminals—Carlos Ruckauf, former governor of Buenos Aires province, for example, explicitly insisted that the solution to crime was to shoot criminals, supported by polls showing that more than half the population agreed that there

was a need to put bullets into criminals.¹⁶ Córdoba falls somewhere in the middle. When public demonstrations suggest some level of support for the victims, the prosecutors snap to attention. But elected officials have been at best neutral on this issue, and have lately begun to lean in a more law-and-order direction, leading to a largely apathetic judiciary and prosecutorial corps in cases not involving demonstrations. In Argentina and Brazil, politics trumps institutional development; inequality and fear of crime rob the victims of political support and shape the legal response to their claims.

CONCLUSION

Does this mean institutional differences ultimately do not matter and all the focus on judicial and legal reform is misguided? Clearly not. The inquisitorial nature of Uruguay's system makes judges more prosecutorial, giving victims a stronger, less impartial ally (if simultaneously raising due process concerns). Institutional change can be effective precisely when it builds lateral support for the claims and the claimants at issue, taking into consideration the respondent's capacity for and modes of resistance. In the context of criminal prosecutions for rights violations, states could create more effective internal controls within the police and more protections for whistleblowers. Special-purpose prosecutorial agencies with independent investigative resources would be a dramatic improvement. In short, one can imagine a series of improvements to the state apparatus that should help; this is, essentially, the process of developing lateral support for the substantive right in question. The precise nature of the lateral support required, however, will vary with the nature of the right conferred, and with the situation of the claimant-respondent dyad.

It seems clear that neither Argentina nor Brazil would tolerate a policing strategy that included the large-scale shooting of middle-class people with no links to violent crime, no matter how significant the violent crime problem. They would develop institutions and devote resources in an attempt to solve the problem without systematic rights violations, and until new patterns of behavior took hold we would surely see the successful prosecution of many violent police officers. And yet a strategy of targeting the marginalized and protecting the violators persists, year after year. In this paper I have argued that this is a consequence of two interrelated dynamics. First, even the best

institutions require (some more than others, depending not so much on their quality as on their design) a personal investment on the part of the claimant, sufficient to overcome the resistance of the respondent. Some basic capability on the part of the claimant is a precondition for the effective exercise of rights. Secondly, institutions are the result of political struggles that also require the investment of substantial personal resources, sufficient to overcome the resistance of those who can anticipate their consequences and would be adversely affected by them. Both the development and the operation of institutions respond to the core inequalities present in society. Until those inequalities are addressed, it is unlikely that a fully democratic rule of law will take hold.

ENDNOTES

¹ The empirical evidence comes from a reanalysis of data from my recent book (Brinks 2008).

² See, e.g., Gauri (2004), Ackerman (1999), Alston and Robinson (2005), for a discussion of the increasing prominence of social and economic rights, constitutionalism, and human rights discourse in domestic and international legal developments, including a new focus on human rights as a tool for development among international financial institutions like the World Bank. This shift, of course, coexists with a movement toward shrinking welfare states and reduced social provision.

³ Berkowitz et al. (2003) provide considerable support for this claim that rights must be embedded in a system of lateral state and society support, with their finding that the level of “legality” is significantly higher in countries that have adapted new laws to their context rather than importing them wholesale without modification.

⁴ See the list of states parties to the Convention, at <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

⁵ See also Assies et al. (2000) for a discussion of the multiplicity of pressures that led to these constitutional transformations.

⁶ The source for this information is São Paulo’s police ombudsman, the Ouvidoria da Polícia. Tables available at <http://www.ouvidoria-policia.sp.gov.br/pages/tabelas.htm> (last visited August 17, 2007).

⁷ For a discussion of inequality in Latin America see Gasparini (2003) and the updated statistics that accompany the 2003 World Bank Flagship Report on inequality in Latin America and the Caribbean, available at www.depeco.econo.unlp.edu.ar/cedlas/wb (last visited Aug. 20, 2007).

⁸ See Bittencourt (1997) for 1985–96 figures, FORES and Colegio de Abogados de Buenos Aires (1999) for 1995–99.

⁹ To properly compare expenditures in Brazil’s federal system to those in Uruguay’s unitary system I combined the spending on courts of state and national governments. Brazilian and state of São Paulo data are from *Orçamento do Estado de São Paulo* [São Paulo State Budget], 2000, available at www.planejamento.sp.gov.br, and *Orçamento da União* [Federal Budget], 2000, available at www.planejamento.gov.br. To get a rough measure of total expenditures on courts in the state of São Paulo, I calculated an average of federal and state expenditures, using a share of the federal budget proportional to São Paulo’s share of the population of Brazil. Given São Paulo’s disproportionately high level of economic activity, it is likely that this significantly understates spending on federal courts in São Paulo.

¹⁰ Where the differences are not statistically significant the value is left at the average. Where a group is as a practical matter missing, as middle-class victims are in São Paulo, the value is also left at the average.

¹¹ Conviction rates are actually higher in cases involving the underprivileged in Uruguay, although the difference is not statistically significant.

¹² “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, Buenos Aires, Argentina, November 28, 2000.

¹³ Interview with Silvia Osaba, Córdoba, February 20, 2001.

¹⁴ Interview with Juan Faropa, Montevideo, December 19, 2000.

¹⁵ Interviews with: Luiz Eduardo Greenhalgh, PT national senator from São Paulo, São Paulo, April 30, 2001; Hélio Bicudo, former national congressman, vice-mayor of São Paulo, primary sponsor of the law subjecting the military police to civilian justice, and a member of the Inter-American Human Rights Commission, São Paulo, March 27, 2001; Benedito Mariano, first director of the Ouvidoria da Polícia, São Paulo, March 21, 2001; Mário Papaterra, São Paulo’s adjunct secretary of state for public security, São Paulo, March 23, 2001; Antônio Carlos da Ponte, prosecutor in the jury division (which has jurisdiction over homicide cases), São Paulo, April, 2001; and Norberto Joia, prosecutor, jury division, São Paulo, April 16, 2001.

¹⁶ *El Cronista* reported that a poll taken in the Buenos Aires area on September 8, 1999 found that 5.7 percent were more or less in agreement, 44.9 percent were in agreement, and 4.6 percent were strongly in agreement with this statement: “We have to pump bullets into criminals” (“hay que meterle bala a los delinquentes”).

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