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)

Ana lives in one of the vast poor suburbs of Buenos Aires. Her son was beaten to death after he allegedly punched a police officer. She says they were trying to teach him a lesson but things got out of hand. At least four policemen – and probably several more – locked him in a room and beat him with heavy sticks until they fractured his skull and he died. The policemen who killed him got promotions even after they were charged with the killing. At the trial, the prosecutor argued that they should be acquitted because they were just doing their job, subduing an unruly prisoner. The experts called by both the prosecution and the defense agreed.

As the law permits, Ana got some lawyers from an NGO to participate in the trial, as sort of private prosecutors. These lawyers work for free in cases like hers. They called their own witnesses and brought in experts, and argued that these policemen should not be set free after brutally beating an unarmed twenty-four year old and leaving him to die without medical attention. The NGO also organized demonstrations, bringing in many of Ana’s neighbors to march in front of the courthouse throughout the trial. Afterwards, one of the judges privately confessed to Ana’s lawyers that they had intended to acquit the defendants, but thought that if they did, the people might burn down the courthouse. So, instead, the judges imposed suspended sentences of no more than three years on each policeman. Ana says what really bothers her is that they won’t spend a single day in prison.
After the trial, Ana joined the NGO and became an activist. She led marches, attended other trials, met with other parents who had lost children, and worked to call attention to all the young people who die at the hands of the police. On a Friday night some time later, Ana told me, her son-in-law was sitting in a neighborhood pub when the bartender said there was a phone call for him. The caller, who implied he was with the police, said, “You better start checking the morgues, because we bought your son a ticket to hell.” For nearly two days, Ana and her daughter and son-in-law, armed with a homemade, handwritten, habeas corpus petition, frantically searched for the young man, checking morgues and police stations. As it turned out, Ana’s grandson had gone out of town, knew nothing about any threat, and eventually returned home, to everyone’s nearly hysterical relief.

However, on the following day, a second phone call came in, on Ana’s brand new cell phone. The phone was so new that few of her friends knew that number. This time the message was clear, and it was for her: “Stop messing around with the police, or the next time your grandson won’t be coming home!” “No te metas con la cana. ¡Dejate de joder que la próxima vez va en serio!”

Ana asked me to protect her identity. Her daughter and son-in-law do not want anyone to go to the police or to the prosecutors to report the threat. They worry because it seems clear that the police know where their family members are at any given time, have access to their phone numbers, and could harm any one of them, but especially Ana’s grandson. They would like Ana to reduce her activities and become less visible. She’s determined to do what she can to make sure young people cannot be killed with impunity, but she’s worried about her family.¹

The focus throughout this text is on courts and criminal prosecutions. But at its core this is a book about rights and the lack of rights. It is about those who in practice have rights and those who do not, regardless of what their constitution might say. It is about courts, judges, prosecutors, and investigative police – those who protect citizens from abuse and those who do not. It explores the social foundations for the effective assertion of rights, the political foundations for the effective judicial protection of rights, and the institutional mechanisms that impede or facilitate the process by which formal rights are made effective. The book has implications for our understanding of what produces higher quality democratic citizenship, a citizenship

¹ Author interview with Ana, Buenos Aires, Argentina, January 16, 2001. Ana is not her real name. Also based on interviews with Ana’s lawyers in November and December 2000 and on a review of documents relating to the case.
that comes closer to endowing all citizens with the full complement of rights guaranteed in constitutions and laws. The argument draws on and has implications for the literature on the relationship between law and politics, law and society, and law and democracy.

A. OVERCOMING RESISTANCE

The starting point for much of the analysis is the simple idea that legal rights seek to re-shape the distribution of power in a society: they shift rights/freedoms and duties/constraints away from where the market or the distribution of coercive resources might otherwise deposit them. New legal rights aspire to be, as Max Weber once said, “a source of power of which even the hitherto powerless might become possessed” (1978 [1921]: 666–67). As Weber’s own definition of power suggests, this implies assigning to those who are otherwise vulnerable to the unfettered will of another the capacity to carry out their own wishes despite the resistance of the other. When formal rights do indeed run in favor of the hitherto powerless, we should expect more resistance from the otherwise powerful. As these rights increasingly seek to change long-established patterns of domination and asymmetries of power, it will become increasingly difficult to up-end these relationships. This abstract idea becomes concrete in the details of many of the police killings I reviewed: the conflict often begins when the victim forcefully claims ownership of a (novel) right, and it ends with the ultimate negation of that right. Similarly, Ana’s demands that police be more accountable challenge the existing order of police-suspect relationships.

Even as it contemplates that lived law will continue to reflect social power, this approach presupposes a certain degree of autonomy for the written law. It assumes that legal rights might arise that do not reflect the distribution of economic or coercive resources or other sources of social power, and thus that the law and the state that enforces it are more than simply a condensation of relations of power (see O’Donnell [2004] and before him, of course, Poulantzas [1978]). Democracy ostensibly has this goal: in theory it assigns (mediated) lawmaking power to everyone equally, regardless of

---

2 Coase, for example, makes this redistributive nature of rights clear in his treatment of the problem of social cost (reprinted in Coase 1988), but it is not news to students of the law that a right in favor of one individual imposes correlative duties on others.

3 For a comprehensive discussion of the sources of social power, see Mann (1993). For purposes of this discussion, suffice it to say that social power is importantly but not exclusively constituted by and reflected in the state and its law, and that some parts of the law may purport to assign power in a way that is negated by other parts of the law.
wealth, social standing, the capacity to exercise lethal violence, or any other attribute beyond citizenship. A transition to democracy, therefore, can be expected to shift some measure of lawmaking power to new actors, producing new legal rights that clash with entrenched patterns of power.

Moreover, even when political influence perfectly reflects social power, new laws come about for a number of reasons unrelated to the “natural” distribution of power. Legislators as well as dictators very often enact laws that are meant to have more symbolic than literal effects. In many of the electoral democracies of the developing world, the commitment to universal citizenship rights is less than universally held. To put it broadly and imprecisely, especially but not only in the developing world, many laws and the institutions they conform have stronger ideational than material roots. These laws rest very lightly and uneasily on the surface of society.

The right examined in detail in this book, the right to be free from arbitrary police violence, is one of these “uneasy” rights. It seeks to upset long-standing relations of domination between the police, as representatives of the state, and ordinary citizens. It has its roots not necessarily in the distribution of economic or other resources but in the idea that, in a democracy, everyone is entitled to respectful treatment and due process of law, even those who have no social standing or choose to break the law and prey on their fellow citizens. It runs contrary to the normative expectations of many police forces, especially those that have long histories of violence and impunity like the police of Argentina and Brazil. Indeed, procedural limitations on police use of lethal violence even contradict the expectations of many of the people these limits are supposed to protect, as we will see. In this respect, this right is just one example among many: many core democratic rights, with their strong egalitarian bias, rest just as uneasily on the surface of deeply unequal societies.

To repeat, then, when law purports to change long-standing normative expectations or a deeply entrenched balance of power between the duty bearer and the rights holder (a balance sustained by many interconnected and mutually supporting resources) anyone purporting to exercise the right is likely to encounter strong resistance. But what form will that resistance take? If the original reasons for the law’s creation persist, it is unlikely that the formal structure will be abolished outright. It is much more likely that the right in question will suffer, as James Scott puts it, from everyday, prosaic forms of resistance — not, this time, on the part of the relatively powerless (Scott 1986: 29–30) but on the part of the relatively powerful and, therefore, twice as effective. We should expect such rights to die by “small arms fire”
Overcoming Resistance

(Scott 1986), in a thousand small ways, rather than by a frontal assault and institutional change.

An example should make this clear. The ordinary low-ranking police officer does not, in the overall scheme of Brazilian or Argentine society, wield a great deal of social power. The police institution as a whole wields much more power, but not enough, since the end of the authoritarian period, to formally suspend constitutional guarantees. Still, in any confrontation between an armed police officer and an ordinary shantytown resident or criminal suspect, it is clear where the "natural," historical, pre-rights, pre-democracy (but state-supported) balance of power lies. It is in large measure the work of the legal system to change this balance of power, to moderate the behavior of those who exercise the state's monopoly on the legitimate use of force. The legal system, then, becomes one arena in which the resistance of the new duty bearers is played out. Since they cannot change the formal rules of the game, this resistance is likely to come in the form of many small acts of sabotage, aided and abetted by the police corporation, rather than in a grand gesture of legal reform to eliminate due process guarantees.

In Ana's case, as we will see in later discussions of the Buenos Aires system, the initial trial of her son's killers was frustrated by the police's ability to sway judges and prosecutors in their direction, hide some information, and present expert witnesses to create an inaccurate picture of what took place. Ana was unable to completely overcome that resistance, despite the legal and political assistance of an NGO, and surely would have fared even worse without her lawyers. Her continuing claims were then suppressed by credible threats of violence against her family, threats backed by superior access to information about her and her loved ones' whereabouts and the implicit ability to replicate the near impunity of the first trial. All of this takes place without a frontal challenge to the formal rights structure that has been in place since re-democratization.

This entails that formal rights in favor of the "hitherto powerless" must be backed by a constellation of other legal, economic, social, and political resources, sufficient to overcome that resistance. It should be clear by now that even purely negative rights require a substantial social investment in a

---

4 Note that the legal system is not the only arena, as this book will make abundantly clear. The struggle also takes place in legislatures, within the police corporation itself, on the streets, in the media, and in many other places. The analysis here takes us to many of those places, although principally to show how they impinge on legal processes. In any event, although the legal system is only one arena, and a peculiar one at that, some of the lessons to be derived from analyzing it are relevant to the entire process of constituting effective rights.
supportive framework of institutions (Holmes and Sunstein 1999). But the exercise of citizenship is not cost free for the individual even when such a framework exists. Rights bearers must have the resources to engage effectively with the best-laid supportive framework, including such expensive and scarce resources as transportation, knowledge of rights, access to lawyers and other professionals, free time, freedom from violent coercion, and, sometimes, social standing, a cultured accent, a Europeanized, non-indigenous appearance, and so on. Every legal system includes its own laundry list of the extra-juridical but very much “legal” resources that claimants must invest if they wish to effectively present a claim. And once they get there, they must still overcome the resistance of those who oppose the claim. The more resistance the duty bearer exerts, the more resources the rights bearer will need.

Any society that seeks to extend universal effective citizenship, then, has a twofold task. Clearly, it is not enough to create a legal system that will equitably receive those claims of right that are brought to it and dispassionately decide them. It is necessary but not sufficient, then, to create efficient courts and to staff them with judges who understand the law and will enforce the rights inscribed in the legal system, along with all the other measures that legal reformers advocate. In addition, this society must endeavor to affirmatively endow rights bearers with the secondary, extra-juridical “legal” resources they need in order to engage the system and make an effective claim of right against the resistance of those who will oppose their claims. These resources range from education and income at the more general, agency-enhancing end of the spectrum to witness protection plans, free lawyers, and physically accessible courthouses at the more narrowly legal end. This second task requires, in short, sustained attention to what goes on outside the legal system itself, and in particular to the capabilities and resources of new rights bearers. As long as there is a severe imbalance between the legal resources of rights bearers and duty bearers, rights are likely to remain purely formal.

A society can ignore this imbalance altogether. It can simply pass universal rules and leave the rest up to private actions and resources, in effect pretending that the playing field is even. Anatole France’s irony reminds us that the perfect equality of a citizenship that ignores the material circumstances of particular citizens is a recipe for actual inequality: “Another source of pride,

---

5 These are extra-legal resources in the sense that they are not usually legally prescribed as an element of the claim. They are in a very real sense “legal” resources, however, in that they are a prerequisite for effective engagement with the legal system.
to be a citizen! For the poor it consists in... laboring under the majestic equality of the laws, which prohibit the rich and the poor alike from sleeping under bridges, begging in the streets, and stealing bread” (France 1922 [1894]: 177–178 [my translation]). The impartial application of facially neutral laws, in a deeply unequal context, tends to produce severely unequal results.

Most legal systems today, however, include various mechanisms that seek to ameliorate stark formal equality and redress the imbalance. One way to do this is through the use of procedural devices: Brazil’s ação civil pública or India’s Public Interest Litigation empower various actors to bring claims that are in the public interest; private class actions accumulate many small claims into one large one to produce the economies of scale that the wealthy and the corporate enjoy almost as a matter of course; contingency fees alleviate the need to fund legal fees in advance of recovery. Many states also create organizations to provide institutional support for private actions to vindicate rights, such as state-funded lawyers and other support institutions. Alternatively, states may create the legal and political space for claimants to organize into interest-based organizations, such as rights NGOs, to support individual claims. All of these devices by and large leave the enforcement action in the hands of private individuals, with more or less assistance from the state.

Occasionally, however, a society will constitute the state as a directly interested party in any action to enforce the right in question. Regulatory instances are one example of this. Presumably, the U.S. Environmental Protection Agency exists to protect the collective right of American citizens to a clean environment, yet it is often the sole entity legally empowered to act in this respect. The most dramatic example of giving the state ownership of the enforcement action is when the state criminalizes the violation of a right. Brazil has criminalized racial discrimination, for example. In theory at least, this places the state’s entire prosecutorial apparatus behind the right, relieving individuals of much of the burden of enforcement. At the same time, in many instances, this limits the original rights bearer’s ability to participate in the assertion of the right, screening and reshaping the claims that can be brought pursuant to that right.

When state power is truly, in fact as well as in law, placed behind the right, vindication of that right depends less on private resources, and thus social and material inequalities are less likely to translate into legal outcome inequalities. When a society depends on private resources for rights enforcement, social inequality is significantly more likely to leave its imprint on the outcome of the struggle to make formal rights effective. This simple equation
brings politics into the very center of the question of legal inequality. Politics (mostly) determines how the state will direct its resources – which claims are valued and which are not, who deserves state backing and who does not. As a result, politics and political inequalities (mostly) determine the extent to which socio-economic inequality will translate into legal inequality. Poverty matters, in part, because political decisions allow it to matter.

To test this general idea, I first reduce this abstract model of rights and their enforcement to a concrete instance, the prosecution of police officers who exceed limits on the use of lethal force. I show how legal outcomes in many systems follow predictable patterns based on the socio-economic and political resources the victims and their survivors can bring to bear. I then chronicle the everyday methods of resistance the police use in the struggle to avoid the duties imposed by these rights. I evaluate the imbalance of resources between claimants and the police, and the institutional and social mechanisms that might redress that imbalance in each of five South American cities. I show how the criminal justice system, in its ordinary configuration, has structural flaws that keep it from putting the full weight of the state behind claims of police misconduct and how, as a result, inequality springs from over-reliance on private resources. Finally, I demonstrate how politics, mediated by institutional mechanisms of appointment or promotion and discipline, affects the support given by state actors, including judges and prosecutors, to these rights.

More broadly, this book reveals how deeply embedded the legal system is in its social and political context, even when it is specifically designed to have considerable autonomy. That embeddedness is both vice and virtue. More embedding – that is, more numerous and more effective institutional ties between the legal system and society – makes the system aware of social needs, responsive to social reality, and open to information about the situations that come before it. It allows the legal order to evolve in harmony with its social, economic, and political order. At the same time, unless they are consciously designed otherwise, more often than not these social ties import social inequalities into the system and reinforce social hierarchies instead of promoting universal citizenship. On the one hand, then, the analysis in this book exposes the manifold mechanisms that cause legal outcomes to reflect deeper social structures more faithfully than they reflect the pattern of legal rights lightly etched onto the surface of society. On the other, it shows that establishing and nurturing the right institutional connections can facilitate the task of using legal rights to overcome social inequalities.

The prosecution of rights violations against the police is a good test of this model. Those whose rights are violated are typically, but not always,
weak. In comparison, the police are typically strong, especially in relation to those left on the margins of the formal society and economy, and most especially when social concern for crime reaches a fever peak. The rights in question, while not newly minted, are ostensibly meant to change long-standing patterns of behavior that go as far back as the origins of the state in Latin America. The judicial response to police violence thus brings into sharp focus many of the issues that are common to other attempts to use law to change social relations of power.

If the model is correct, we should expect to see the successful prosecution of rights violations only in those places that have solved this power imbalance by enabling the victims of police violence to overcome that resistance. We should see little or no effectiveness where the imbalance affects the entire class of victims and there is little or no attempt to solve it; when the victims are poor, the police are strong, and there are neither institutional devices that allow claimants to effectively engage the legal system nor political incentives for state actors to pick up the challenge. We should see more inequality in the outcomes, and average results that are dependent on the average level of resources in the victim class, when the state attempts to solve the imbalance with solutions that remain inside the legal system, depending on claimants to engage state structures more or less on their own. This is true when judicial institutions are strong, but there is little political support for proactive state intervention. Finally, we should see the best results, with high effectiveness and low inequality, in those places where state actors are mobilized to affirmatively engage with these claims and claimants, placing the state fully behind rights enforcement as a matter of fact as well as of law. This last result should obtain when the political conditions strongly favor the prosecution of violent police misconduct.

B. THE PROBLEM OF POLICE VIOLENCE

Legal protection from arbitrary killing by agents of the state is one of the most basic promises of the rule of law in a liberal democracy, and one of the promises of Latin America’s transition back to democracy. The regimes that tortured and killed in the 1970s in countries 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 Raul Alfonsín in Argentina and Fernando Henrique Cardoso in Brazil demonstrated a commitment to democracy and the protection of individual rights; others, such as Mário Covas in São Paulo, have done the same at the sub-national level. Argentina reformed its constitution in 1994 to grant
constitutional status to international human rights treaties. 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 often rings hollow. 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 Soveraignty” remain “untaryed” (Hobbes 1964 [1651]: 122). Over the course of the 1990s, the police in the state of São Paulo, Brazil, killed more than seventy-five hundred people. In some years, the São Paulo police killed, on average, one person every six hours. Nor are São Paulo’s police the most violent. 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 rate in the worst years in São Paulo. Many other places show equally dismal results. 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.\footnote{The 2001 U.S. State Department Human Rights Report for Venezuela notes the government’s claim that 2,000 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.}

The phenomenon, however, is not universal; there are variations even within countries. In the Argentine province of Córdoba and in Uruguay rates of killing are very much lower. Uruguay has the lowest rates, reporting two or three deaths per year at the hands of the police, and Córdoba follows with about thirty killings per year. Adjusted for population levels, Uruguay’s rate is about 0.1 per hundred thousand, and Córdoba’s about 0.3, compared to more than 6 per hundred thousand for Salvador. Still, in many countries police violence is an everyday occurrence, and the phenomenon seems to be growing.
The Problem of Police Violence

![Graph showing average annual per capita police homicides and conviction rates in various cities.](image)

**Figure 1.1.** Average annual per capita police homicides and conviction rates in Uruguay, Córdoba, Buenos Aires, São Paulo, and Salvador in the 1990s.

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 exactly a paradox: precisely in those places where the police use lethal force most indiscriminately, the justice system punishes police homicides least often, as shown in Figure 1.1.

Importantly, however, these aggregate results hide an injury to another central element of citizenship, liberal democracy, and the rule of law: equality before the law. Despite its high conviction rate, Córdoba shows the highest degree of outcome inequality of all the legal systems in this study: a police officer who kills a middle-class individual is more than twice as likely to be convicted as one who kills a lower income resident. The courts of Uruguay, in contrast, seem to hold a special place for the poor, whose cases actually produce a higher conviction rate. In São Paulo too, inequality seems to disappear; however, this is likely due to the fact that the victims are uniformly poor, so the court system rarely has the opportunity to show how it

---

7 The data used in this analysis are more fully described in Chapter 2 and the Appendix.
might treat the case of a middle-class victim. In Buenos Aires, socio-economic conditions matter little, but political factors have a greater impact on legal outcomes, as politically sensitive judges and prosecutors shift their standard in response to the pressure brought to bear in individual cases by demonstrations or public attention. And in Salvador, the police have carte blanche to clean up the streets by any means necessary. 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 rule of law.

Most analyses of Latin American court systems are plagued by measurement issues. How do we know if the courts are better or worse in Buenos Aires than in São Paulo, when close observers simply say both judiciaries are “in crisis”? How can we track the extent to which these courts actually protect civil liberties when all we have are aggregate statistics on numbers of cases processed? As the preceding discussion suggests, in designing the dependent variable for this study I begin at the level of the individual citizen and ask some very basic questions: 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 five hundred homicides committed by the police in Uruguay; in Buenos Aires and Córdoba, Argentina; and in São Paulo and Salvador, Brazil, and tracked these cases through the courts (see the Appendix and Chapter 2 for a more complete discussion of the data sources and sampling). This allows me to offer a more direct and more accurate measure of judicial performance: actual judicial outcomes in the form of conviction rates, rather than perceptions, formal rules, or other indirect measures.

Information about individual judicial outcomes is only the starting point, however, for examining the systemic causes of impunity and inequality. Why is it that Uruguay, with an outdated procedural code and a dilapidated judiciary, can do a better job of prosecuting police officers than São Paulo, with all its wealth and a relatively more modern court system? 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 approach these questions from a strongly contextual institutionalist perspective. I pay attention to formal and informal institutions. I push beyond the analysis of formal rules to examine how these rules work in practice, and
how the social, economic and political context affects the way they operate. I explore the way institutional design interacts with political currents and socio-economic structures to modify actors’ capacities and incentives. I show, for example, that the same institutional design will produce politically compromised courts in a politically hegemonic environment and strongly independent ones in a more pluralistic political context. I demonstrate that a context of exclusion and marginalization can frustrate the efforts of even high-performing courts and prosecutors. The results challenge, once again (see, e.g., Moser 2001), institutionalist approaches that limit their analysis to formal rules or assume that institutions produce the same results in any context.

I do not, of course, answer all the questions surrounding the failure of the rule of law in new democracies. Indeed, I do not answer all the questions surrounding the level of police violence observed in each society. Others have examined the police itself, its reform, and the difficulties in bringing it under civilian control, both in the United States and in Latin America (Skolnick and Fyfe 1993; Chevigny 1995; Geller and Toch 1995; Worden 1995; Lemos-Nelson 2001; Ungar 2001; Hinton 2006). My own focus is on the courts and their response to the phenomenon of police violence. It is undeniably true – in fact, it is the point of this book – that the courts are merely a small part of the apparatus that needs to be considered in reducing the number of police killings, and thus in making more effective the right to be free from arbitrary violence. More generally, it is equally true that the courts are but a small piece of what drives compliance with the law in each society. Is this an overly narrow focus, then?

I believe there are good reasons to focus on the courts’ response to police violence. In the first place, as discussed earlier, exploring the obstacles to the assertion of rights by victims inside the criminal justice system is a good test case for what happens in other areas, as formal rights clash with social reality. The courts are the one place where we might expect the rule of law to be strongest, and the criminal process is the place where the state is supposed to be most clearly behind the enforcement action. If we cannot empower rights bearers here, inside the legal system, we have little hope of doing so elsewhere. Moreover, police impunity in all cases of misconduct is a problem that deserves attention in its own right. Any lessons we might derive to address impunity in the prosecution of torture cases, corruption, and so many other police abuses, are welcome. Finally, beyond anything this discussion may contribute to social science, I hope that it will expose some of the inhumanity currently being practiced in the name of public safety and contribute to a solution.
In addition, as will be discussed more fully later, this project is located at the intersection of several streams of literature, in an area that has not received sufficient attention to date. The literature on regimes and democracy in Latin America decries the lack of attention to questions of the rule of law and basic civil rights in the new democratic era of Latin America. Authors in the field of judicial behavior, which has focused on high courts in the United States, argue that more work needs to be done on comparative judicial behavior and more attention given to trial courts. Those who write about human rights violations have neglected the systematic study of judicial responses to those violations. The literature on judicial reform is characterized by a paucity of material pinpointing the places where the courts fail and evaluating the results of reform projects. This project illuminates each of these issues.

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 (Linz and Stepan 1978; O’Donnell 1979). 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 stability and governance, especially the quality of democracy (Schmitter and Karl 1991; Valenzuela 1992; O’Donnell 1994; Karl 1995; Diamond 1996; Hartlyn 1998; Diamond 1999; O’Donnell 1999, 2001; Mainwaring and Welna 2003). One of the issues of quality that is repeatedly mentioned in these more 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. Diamond (1999) argues that the new democracies often fall shortest in terms of the rule of law. Shifter concurs: “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.

There have been many attempts to improve the level of individual rights and judicial functioning in Latin America. 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 “citizen” constitution in 1988 that guarantees a plethora of basic rights, and Argentina made fairly extensive reforms to its constitution in 1994, enhancing the status of international human rights treaties. 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 (Stotzky 1993; Hammergren 1999; Méndez, O’Donnell, and Pinheiro 1999; Mainwaring and Welna 2003).

Moreover, this issue is central to the quality and stability 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 (2001) has made the role of the legal system central to a truly comparative democratic theory. 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). The continued failure to ensure legality on the part of state actors and to protect citizens from rights violations erodes support for democracy (Mainwaring 2006) and threatens long-term regime stability (Diamond 1996).

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. Many authors examine the reasons for the failure of judicial reform projects in various countries (Buscaglia, Dakolias, and Ratliff 1995; Dakolias 1995; Correa Sutil 1998; Frühling 1998; Jarquín and Carrillo Flores 1998; Hammergren 1999; Popkin 2000; Prillaman 2000; Correa Sutil 2001; Davis and Trebilcock 2001; Domingo 2001; Galleguillos 2001; Ungar 2001). These authors have offered important insights into the process of judicial reform, but they do not offer a systematic measure of judicial performance or 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:

The main difficulty that we encountered during the preparation of this study was the lack of useful data and empirical studies on how legal systems in the region actually work. . . . There are virtually no studies that examine how courts in different countries and in different areas of the law perform their functions. (Inter-American Development Bank 2003)

An ever-expanding list of authors tackles questions of judicial independence in useful and interesting ways (Caldeira 1986; Rhenan-Segura 1990; Buscaglia, Dakelias, and Ratliff 1995; Gargarella 1996; Larkins 1996; de Castro 1997; Correa Sutil 1998; Gibson, Caldeira, and Baird 1998; Larkins 1998; Prillaman 2000; Helmke 2002; Iaryczower, Spiller, and Tommasi 2002; Staats, Bowler, and Hiskey 2005). But this literature is relatively unhelpful in explaining how lower courts do their work and the pressures to which they are exposed. 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). This project, on the other hand, highlights the manifold means of resistance lower level actors deploy in response to those guidelines.

Existing studies of equality before the law and the enforcement and protection of civil and human rights at the trial level usually avoid the close political and institutional analysis offered here. Adorno’s sociological look at the question of legal equality in São Paulo (Adorno 1994, 1995) and a similar study 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) do not focus on the political construction of legal inequality in any detail. My argument also offers a much more political account of the classic approach to access to justice (Cappelletti and Garth 1978–79; Beitzonc 1987; Vanderscheuren and Oviedo 1995; Prillaman 2000; Correa Sutil 2001), pointing out the politically endogenous nature of the institutions that ensure access. 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 institutional causes of legal inequality.

Most studies of police violence, on the other hand, focus primarily on actual violations with only a cursory glance at the judicial response (Geller and Karales 1981; Skolnick and Fyfe 1993; Geller and Toch 1995; CELS/HRW 1998; Holston and Caldeira 1998; as well as the many reports
by human rights organizations). 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, and Zaverucha’s (1999) study of military justice in the state of Pernambuco. These studies all show that we cannot entrust the oversight function to institutions that are internal to the police itself. My own argument explains this finding and shows why taking the decision-making process outside the police institution may still not solve the problem.

A few existing theoretical approaches are cognate to mine, using political or social variables to explain the varying capacity of courts to make rights, especially newly declared rights, effective. Most of these studies were done in the United States (Rosenberg 1991; McCann 1994; Scheingold 2004), but at least one takes a more comparative view (Epp 2003). All of them explore court-led broad social policy change rather than the process of making existing rights effective for particular individuals, but their arguments have strong points of contact with mine. Epp rightly pays close attention to societal support structures for rights litigation, in an analysis that resonates with the arguments I present here. Rosenberg demonstrates, as I do, the failure of judicial pronouncements to “take” when political conditions are adverse. Moreover, he too highlights the resistance of non-judicial actors whose dominance is threatened.

But my argument adds to theirs and focuses attention on previously understudied dynamics at the lowest levels of the courts. Epp’s exclusive focus on organized civil society and broad policy change misses both the efforts of individuals in engaging with existing rights and the impact of institutional design on the capacity to engage with the courts. Rosenberg emphasizes the elite level, the actions of state and federal government officials and of the leaders of civil society organizations. I show that even with support at the state level, and even when courts do not purport to announce new rights, everyday resistance and social inequalities can frustrate court oversight. I show the sources of the occasional disconnect between apex courts and elite actions on the one hand, and trial court and street-level behavior on the other. I focus more closely on the imbalance of resources between opposing claimants and on the mechanisms that might redress some of that imbalance.

In short, all of these authors have made valuable contributions to our understanding of particular dynamics ultimately affecting the operation of courts, the police, and ultimately the rule of law. In this study, however, I add new empirical material, bringing to light new information on police violence and impunity. In addition, I introduce a theory that gives a prominent place
to the influence of both politics and surrounding material conditions on trial court decision making. I test this theory systematically across and within three countries in Latin America. And I do so in 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 claimant'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 and has been attributed to inefficiency and lack of resources (FORES and Colegio de Abogados de Buenos Aires 1999), lack of access (Cappelletti and Garth 1978–79; Vanderscheuren and Oviedo 1995; Garro 1997; Batista Cavalcanti 1999), lack of independence (Larkins 1998), poorly drafted laws (Faria 1988, 1996), the failure of social support (Holston and Caldeira 1998), an intentional government policy to repress the poor (CORREPI 2004), and more, and could be blamed on the police, the prosecutors, judges, elected leaders, and even "culture" more broadly.

The advantage of beginning with the outputs of the legal system and exploring the entire process that produces them is that we can see how these various actors and factors work together and influence each other. My research suggests that the cornerstone for legal failure is the disparity between the legal and political resources of claimants and those they oppose. For some claimants, all the obstacles just listed melt away, while for others even the smallest is fatal. If my approach is correct, the foundational variables will be contextual ones, while the institutional characteristics and idiosyncrasies of the legal system will matter primarily because of how they interact with underlying social and political inequalities.

C. THE DEPENDENT VARIABLE: LEGAL EFFECTIVENESS

The main phenomenon to be explained, the dependent variable for this study, is the responsiveness of the legal system to a claim of right, or what I have called legal effectiveness. In this section I first present a way to conceptualize and measure varying degrees of legal effectiveness across the cases in my study. Then I examine the process of adjudication, to see where inequalities 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 the book.

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 that I explore in each country chapter, this right is protected by a network of substantive laws and constitutional rights that are very similar in all three countries. Broadly speaking, 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 certain specified circumstances, to protect the public order. The penalty for a violation of this right varies from three years or less in the case of an involuntary killing, to about ten years in the case of an intentional killing, to life in prison in the presence of aggravating circumstances. In addition, various peripheral rights 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.

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 1978 [1921]). For a simple shorthand, we might call this increase in probability "Δp" (delta p). Delta p implies a change in expectations attributable to the existence of the law in question and perhaps to the implicit or explicit promise that the expectation will now be backed by the coercive power of the state. As quoted earlier, Weber's definition assumes that all rights are at least to some degree effective in becoming "a source of power of which even the hitherto powerless might become possessed" ([1978 [1921]: 666-67]. 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, then, Δp approaches zero. The challenge is to estimate as closely as possible the value of Δp 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 unpopular 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.

In either event, there are two ways in which the effectiveness of a right must be supported. The first task, of course, is reducing the frequency of violations. Regardless of the effectiveness and efficiency of the legal system in providing redress, it is typically better for the individual to have his or her
rights respected than to secure a remedy for a violation after the fact. This book has less to say about this aspect of making rights effective. The second is by providing redress or punishment for violations. While this is a second-best solution from the individual's perspective, from a societal or regime standpoint the existence of 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.\footnote{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 zero, we may expect, \textit{ceteris paribus}, a greater number of violations than when it is considerably more substantial.}

The focus in this book is on this second aspect, although I also present some important findings on the incidence and distribution of violations.

How does inequality enter this mechanism for redress? In the \textit{Leviathan}, Hobbes said that the use of laws is to direct people and keep them on the path, "as Hedges are set, not to stop Travellers, but to keep them in the way" (Hobbes 1964 [1651]: 250). A well-ordered and well-functioning legal system acts as a series of signposts or barriers along a highway, marking the way to achieve valued social goals by setting universal conditions for passage. But I have alluded already to the fact that exercising rights in general, and engaging with the legal system in particular, implies the expenditure of certain resources for the rights bearer. When the system imposes extra-legal particularistic conditions, as they all do to one degree or another, laws and legal instances work less as hedges set along the way and more like toll barriers set across the way. Individual laws and legal instances become obstacles before which one must surrender some toll or be refused passage.

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. The tolls could be cash for bribes or high-priced legal representation or less tangible means of exchange like social status or personal connections. Familiar examples are the use of race to deny rights that the law purports to make universal or even the disparate financial ability of criminal defendants to put up sophisticated defenses. I repeat: every legal system has some tolls, and 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 the tolls are and whether they are distributed in such a way as to ultimately produce unequal results.

Where this is true, then, $\Delta P$ is noticeably composed of two values. One is given by the background level of effectiveness of the legal apparatus or
the state itself, and affects all equally, regardless of their resources. Even those who can pay the toll are often required to travel a poorly maintained and inefficient road. The other value is a consequence of the tolls that the individual holds or lacks: the increase in responsiveness of a system for certain and not other individuals. In a minimally functioning system, what separates users into those whose rights are made effective and those whose rights are not is the presence or lack of the toll. Indeed, a highly effective system that demands scarce and mal-distributed tolls will be marked with more legal inequality than a poorly functioning system that cannot respond to anyone’s demands.

Importantly, the tolls operate inside and outside the legal system, on both the initial violations and the response to them. 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, meets society (O’Donnell 1999). They contract 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 shantytown, whose view of the state is often limited to a police officer – more often than not, a police officer with a drawn gun.

Given the general crisis of confidence and the negative press that has attended most of the justice systems of Latin America, it is easy to 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. Even when tolls are high and their distribution very unequal, the laws still (typically) matter. Paying the toll, for most, simply buys the right to travel the road, with all its shortcomings. Certainly, a very few are above the law altogether, enjoying rights but not duties, and some are beneath the law, feeling its obligation but not its protection. 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.

It is important to emphasize that this conceptualization does not define a completely lawless system. In fact, formal rights do matter, to different

---

9 In addition to my own observations in the field, this discussion of tri-partite legal stratification owes a great deal to conversations with Guillermo O’Donnell.
degrees in different cases and in different systems. Outcomes must be phrased in formally legal terms, and possession of a formal right is important. As we will see in Córdoba and São Paulo in particular, formalism is one of the enduring characteristics of these legal systems, requiring an almost hyper-legal discursive style (for a discussion of formalism as a prerequisite for autonomy, see Lempert 1987). And the tolls are often sufficiently regularized and internalized that they acquire the status of informal institutions. The argument is simply that, while rights matter, they only gain effectiveness with the addition of something else, here called the toll, which can also respond to formal or informal rules. The analysis of individual-level data on judicial outcomes will allow us to map both the general level of effectiveness and the legal tolls present in each system.

But ultimately the more interesting task is explaining these aggregate levels of effectiveness and inequality. The question then becomes, 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. The toll imagery and the approach outlined at the beginning of this chapter suggest 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 that these groups, on average, do not possess. Next, I begin to answer this question, presenting a simplified model of legal decision making, and arguing that different tolls affect either of two dimensions of that decision-making process.

D. PROPOSING AN EXPLANATION

Simplifying the process of judicial decision making will allow us to explore the places where demand for particular claimant resources enters the system. In particular, this model of decision making is meant to highlight that judicial effectiveness depends on two separate processes. One is the construction of a procedural reality, and the other the construction and application of a rule of decision. Material resources enter primarily, though not exclusively, in the production of procedural facts, while political resources have their most direct impact on the creation of the rule of decision. At minimum, this conceptualization is useful because it highlights just how constructed both the facts and the actual rule of decision are in individual cases, and therefore how susceptible they both are to resource imbalances.

The model pushes to the forefront an important variable that is missing from most of the literature on both judicial decision making and the rule of law. Not all failures are simply the consequence of judges 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. Finally, as we will see, the model graphically shows how normative shifts at any stage in the process can affect the capacity of subsequent actors to produce the correct result, even if the latter are applying the right rule of decision.

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 $r$. An effective right, or more 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.

In practice, however, both $r$ and $o$ are unobserved, and the decision maker applies his or her understanding of the rule ($r'$, "$r$ 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 or not of murder will depend on where we place $o'$ in relation to $r'$. We can depict this schematically, as in Figure 1.2. Note that if we place $r'$ closer to the "not murder" end of the behavioral spectrum the category of "murder" *broadens*. This makes it easier for $o'$ to fall in that category, and thus easier to convict the defendant.

In Figure 1.2, then, what might have been objectively murder is classified as not murder under a lenient (mis)interpretation of $r$ and an exculpatory reconstruction of $o$. To achieve the "correct" result in this example we might

---

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 sense is being applied to the "facts" as we might ordinarily understand this term. I simplify the terms to their initials for convenience.
either shift \( r' \) to the left or \( o' \) to the right (or both). A shift away from the true position of \( o \) is what I will call an informational or information-gathering shift or failure. A shift away from \( r \) is a normative or processing failure because the information is processed according to the wrong rule or norm. In the Figure 1.2 example, the system has experienced a double shift, which combines to produce the wrong outcome. The focus of this project is on precisely these shifts and their causes.\footnote{This two-dimensional formulation is related to a notion Niklas Luhmann (1985, 1988) developed in connection with his "autopoietic" theory of law. He argued that legal systems are, first, "normatively closed." This includes the notion that any new rule or decision must be validated by standards that are internal to the system of laws, including what H. L. A. Hart (1961) called rules of recognition. But Luhmann also argued, second, that the law must be "cognitively open," which includes the ability to receive information from its environment. See Brinks (2003) for an elaboration of how Luhmann's theory might apply in this context.}

Some of these shifts are as random as the normative shift that occurs when a good judge wakes up in a bad mood. Others are more systematic but tied to individual decision makers: for instance, individual judges vary in sentencing strictness; some judges are explicitly pro-plaintiff or pro-defendant. Neither of these is, in and of itself, a systemwide phenomenon, but system characteristics such as politicized appointment processes, a weak appellate structure, or indefinite sentencing rules can create openings, making some systems more prone to these shifts than others. Outcomes in systems that evince lesser degrees of control over judicial decision making will show a greater dispersion in possible outcomes, but not necessarily a bias affecting any particular class of users (think of this as a greater standard deviation, which does not necessarily imply a bias). These shifts are problematic to be sure, since they detract from certainty, transparency, and predictability in the law, but they affect all users more or less equally.

More troubling is the effect of tolls that favor or disfavor a particular class of users across the entire system. Race-based animus in the Deep South, for instance, surely meant a normative shift for African Americans seeking to use the system to enforce their rights. The police in Salvador, in contrast, are favored users, who can count on impunity in the courts almost regardless of the characteristics of the crime or the victim. Not all such tolls are animus-based, substantive preferences for one group over another, of course. High filing fees and a lack of free legal assistance, for example, will import socioeconomic tolls into the system, producing predictable informational shifts against the underprivileged. In any event, the problem here is no longer indeterminacy in the outcomes, which can be all too predictable, but a bias in the system. Analyzing the patterns in the outcomes of individual judicial
cases will allow us to identify these biases and compare judicial effectiveness across social groups, across cities, and across countries.

From the characteristics that are associated with legal failures we can infer whether the dominant shifts in a given system are normative, informational, or both. The capacity to engage with the system and control the information that enters is the key to shaping procedural reality. Thus biases associated with socio-economic and similar "material" resources should spring from informational failures. In addition, of course, there are many resources of a more political or ideological nature that impinge on shaping the rule of decision. When these "political" variables, such as the criminal record of the victim or popular mobilization surrounding the case, matter a great deal, we can infer the presence of normative shifts. We can confirm these inferences by closely analyzing the process of decision making in individual cases, as I do in Chapter 3.

As we have seen, 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' decision making, they cause a shift in \( \mathcal{R} \) in a particular case. But the simplified model of legal decision making described in the next section suggests that any legal system's 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 might include other forms of undue influence on judicial decision making). The second dimension we might label informational autonomy, or informational competence. This dimension varies to the degree that the legal system not only is open to claims and information brought to it by many different agents (the classic concern of the access to justice literature) but also has the investigative 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.

I have argued (Brinks 2005) that true judicial independence has more to do with impartiality than with radical autonomy. Paradoxically, to have true independence, in the sense in which we value judicial independence, the courts must typically be subject to normative input from all competing sides in a dispute, as well as from lawmakers and other sources. Similarly, to achieve informational autonomy, the legal system requires something very much akin to the "embedded" half of what Peter Evans (1995) described as "embedded autonomy," in the context of the developmental state. The legal system needs multiple "institutionalized channels" for communication, "dense connecting networks" that tie it to society (1995: 12). If this
embeddedness is only partial, if some actors or groups have the resources to operate these channels while others do not, or if certain actors can block these channels at will, then the legal system becomes dependent on those actors or groups for its information. Understanding these links and the resources they demand is the key to understanding how the tolls operate in a given legal system and how they produce normative and informational shifts.

The legal system, broadly understood as the set of actors, institutions, and organizations that make, administer, and enforce the law, has been described as an iceberg that goes far beyond the judiciary, incorporating many non-state actors (Galanter 1974: 134). 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 police officers decide whether or not to arrest, prosecutors decide whether or not to indict, and witnesses and affected parties decide whether or not to engage and cooperate with the system. In addition, as we will see, in Argentina, Brazil, and many other countries, 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.

Ana, in the anecdote with which I began this chapter, had to make a decision whether to invest her own resources into the prosecution. Her decision to participate is premised on her understanding of the way in which the police, the prosecutors, and the judges in her son’s case will treat the case.

The struggle to define what I have called $o'$, the event to be judged, is a contest between competing claimants. In civil cases, two non-state actors will compete, while, in modern times, a criminal case in theory pits the state against the defendant. Given that the event to be judged is constructed by the legal process, the balance of power between claimants in that process critically affects the judicial construction of $o'$. The socio-economic condition of the claimants, 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 $o'$. Ana and her family had to overcome physical and social distances in order to engage effectively with the prosecutor in her own son’s case.

Furthermore, to the extent the state takes a hand in the proceedings (as in a criminal case, or by providing free legal assistance to certain classes of claims or claimants and not to others), broader socio-political considerations often determine the importance and legitimacy accorded to potential claims
and, thus, to the resources expended by the state to develop these claims. Both the general political climate surrounding the prosecution in Ana’s case and the specific political pressure brought to bear by demonstrations might affect the rule of decision the judges ultimately decide to apply. As a result, both the socio-economic and socio-political contexts in which the courts are inserted play a part in determining which claims and what information reach the courts.

Standing between purely social actors and the judiciary per se are various 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 (Macaulay 1979; Ross 1980; Kritzer 1990 all discuss lawyers’ roles in screening civil claims in the United States). In Ana’s case, the police heavily screened the information passed on to the courts to protect the identity of participants and skew the court’s interpretation of the events. Prosecutors, who can serve the same selective access function, also failed to correct this bias. This forced Ana to work with an NGO to overcome the shortcomings of state involvement in her son’s case—but the NGO has its own standards about which cases to engage with and performs its own screening.

The availability and nature of these institutional connections to society will crucially determine the informational autonomy of the legal system: systematic informational shifts should be more rare in systems with more effective and more varied sources of information and when contending parties have more equal resources. Under these conditions, more (and more balanced) information will enter the system. In the context of the prosecution of police violence, this means that informational shifts will occur in places in which (a) the state does not effectively investigate, and (b) there are fewer private resources for an independent investigation because victims come from a marginalized population and civil society organizations are relatively absent.

What then affects the placement of \( r \), the rule of decision? I take the view, perhaps most forcefully and most recently expressed by Maravall and Przeworski (2003), that inducing compliance with norms, including the law, is primarily a matter of ensuring that individual actors’ incentives favor compliance. I believe there is a “normative component” to rules (Brinks 2003, 2006), and it is possible, though Maravall and Przeworski deny this, that this normative component may induce, in some actors, compliance for the sake of the rule. At minimum, this normative element may lead some actors to overvalue incentives that favor norm compliance. But clearly the
best way to ensure a general tendency toward compliance is to structure incentives so that they support normative behavior. We have known this at least since Madison said, “If men were angels, no government would be necessary. If angels were to govern men, neither internal nor external controls on government would be necessary” (Federalist No. 51, Hamilton, Madison, and Jay 1961: 322).

Each actor’s preference as to the rule of decision, therefore, is affected by incentives generated from two different sources. Some of these incentives 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. 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, for example, have a quasi-prosecutorial function and therefore have been criticized for being insufficiently impartial and too quick to convict. In the language I have used here, as a consequence of their role, the rule of decision of investigative judges is systematically shifted in favor of a conviction. This point simply recognizes that prosecutors and defense attorneys, for example, have very different perspectives on the law and that these perspectives are a consequence of their function within the legal process.

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 judges or prosecutors take a more activist approach in one system than in another, we must look not only to their role in the process but also to the incentives generated by the broader political context, as mediated by institutional design. Frontline prosecutors will be more sensitive to political demands for action or inaction in a police case if their careers depend on the benevolence of elected officials. Judges will be more or less strict in particular cases depending on whether they are susceptible to public demands for a certain response. In each instance, 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.

If we take seriously the notion that the legal system is, in fact, a system, we also need to explore how all the various actors impinge on each other, given what we have established so far. Epstein and Knight (1998, 2000) make a convincing argument that judges are strategic actors. 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 believe will not be successful. Crucially, regardless of their interpretation of the rule, each claimant will seek to craft the facts in such a way as to produce the desired outcome, given the expected preferences of the key decision maker.

In this respect, we cannot overlook the fact that, while higher level actors are legally superior in creating and framing the rules that ultimately decide the case, lower level actors typically have the upper hand in the production of information. As a result, claimants with an upper hand in the production of information will introduce informational shifts into the system to ensure their preferred outcome. They will craft $o'$ in such a way as to obtain their preferred outcome regardless of the rule applied by their normative superiors. The police officers who killed Ana’s son probably anticipated that an unvarnished account of a brutal beating following a relatively trivial provocation would exceed the court’s capacity for lenience. As a result, they obscured the facts, hid the identity of some participants, and presented experts who emphasized the need to establish control over unruly individuals.

Note, in addition, that lower level actors may be able to use their informational ascendancy to blackmail higher level actors into shifting their rule of decision. In the case of the Buenos Aires courts, as we will see, the police can, and do, threaten to withdraw support in other cases if judges and prosecutors become too problematic. In Ana’s case, it is hard to imagine that even a mildly skeptical court would not have seen through the meager defense presented by the police. But the strong pressure to maintain the willing cooperation of the police in all its daily operations is a powerful incentive to not look too closely at inconvenient facts; a crusading judge will find it increasingly difficult to carry out even routine tasks. In the following paragraphs I develop the consequences of this model of the legal system for the prosecution of homicides committed by the police.

---

12 This informational dilemma is akin to the problem of hidden information described in the principal-agent literature (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. 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.” If anything, the police are typically agents of the executive, while prosecutors are, in many courts including those of Argentina and Brazil, constitutionally guaranteed independence of action. In most cases, prosecutors tend to respond more to the executive, even when they are not included in the executive branch. 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.
1. A Structurally Determined Normative Bias

Putting aside for the moment exogenous pressures on the actors, 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, the rule that marks the boundary between murder and not murder. In general, in the typical prosecution, the police are, after the victim, the party most interested in a conviction. Indeed, the system assigns them this task and depends for its effectiveness on their investigative zeal. Next to the police are the prosecutors, whose primary imperative is to prosecute cases to a successful conclusion, but who are more sensitive than the police to the nuances of the law and more prepared to abandon marginal cases. Again, every adversarial system depends on the zealous advocacy of the prosecutor. The final decision maker (who might be a judge, a panel of judges, or even a jury, but who is identified as “judge” in Figures 1.3 and 1.4) is in theory a neutral arbiter, falling somewhere between the prosecutor and the defendant in the zeal to convict. Thus, in practice, we find the police complaining that they arrest criminals only to have soft-on-crime judges let them go, and judges complaining that prosecutors are running wild and trying defendants in the press.

The line-up of actors’ preferences on a continuum from most lenient to strictest construction of the law, therefore, typically looks something like Figure 1.3: claimants/victims want to draw the category of murder as broadly as possible, exempting as little conduct as possible from criminal responsibility; the defendants are on the opposite end of the spectrum; and everyone else falls somewhere in between, in fairly predictable order.

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 not only about their colleague, who is facing punishment, but about how the rule of decision applied in this case will affect their own ability to do their jobs, and about their own prospects 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. In general,
we might expect that, the closer the investigative arm of the police is to the frontline police force, the closer it will be to the frontline police officer who occupies 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 if the courts are heavily dependent on the police for many routine tasks, as well as for information, judges may well be pulled closer to police preferences. All else being 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. One of the most consistent complaints of victims and victim advocate groups in Police Violence cases is that the entire system seems to be lined up against them, that they must struggle against each of the other actors in the system. Figures 1.3 and 1.4 clearly illustrate the source of this complaint. The victims are likely to feel as if they are looking at the rest of the actors through the wrong end of a telescope. Everyone is grouped at the far end, conspiring to deny them justice.

The crucial 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 police and prosecutors on one side and the individual defendant on the
other, while victims and their survivors remain largely outside the system. But when the system is left completely unbalanced, as in Figure 1.4, the ordinary state-supported internal actors cannot be counted on to perform their assigned task. For the reasons detailed in the next section, if prosecutors are aligned with the police – in fact, even if they affect a neutral stance – the outcome will tend to fall somewhere between the judge's preference and the defendant's, and vastly distant from the victim's preferred outcome. Even a strictly neutral judge is likely to reproduce the pro-defendant bias caused by the failure of other supporting actors. In short, without some affirmative corrective, the typical criminal justice system is structurally predisposed toward failure in these cases.

Exogenous pressures could in principle ameliorate the consequences of the endogenous incentives detailed earlier. Exogenous incentives are, as already discussed, a function of broader social and political pressures and the actors' susceptibility to these pressures. If prosecutors and judges expect that they will be held to account for failing to prosecute police officers, if there is a great social outcry with every police homicide, they will shift back toward the victims' position. On the other hand, strong social or political demands for repressive police tactics will move prosecutors and judges even closer to the defendant's preferred outcome. In each location, therefore, I will analyze the endogenous pressures produced by each institutional framework and the direction and likely impact of exogenous pressures, in light of contextual and institutional factors. The empirical discussion of the actual systems will 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.

So far I have discussed only each actor's preferred rule of decision, while Figure 1.2 makes it clear that the strictest rule can lead to an acquittal if the procedural facts are exculpatory. In the next section I show how this line-up of normative preferences affects the construction of procedural facts.

2. Predictable Informational Shifts

Decision makers must have sufficient informational autonomy to adequately oversee the production of a procedural reality that will support a conviction under their preferred rule of decision. If they are overly dependent on one of the parties for this information, their decisions will invariably reflect the preferences of that party. Acting strategically, information-dominant parties can simply supply exculpatory information and suppress any other facts, producing a version of reality that can pass muster regardless of the actual standard applied.
In our cases, the police cannot formally change the legal standards decision makers will apply, but they can affect outcomes by rationing information in the particular case. I have so far shown all the actors on the same line, but they typically act sequentially, gathering information and feeding it up to the next level. Strategic investigators who prefer a not-guilty outcome and know where judges and prosecutors will place $r'$ will seek to shift $o'$ far enough to produce their preferred outcome. To the extent that they have a monopoly on the flow of information they will be able to produce an informational shift, refracting $o'$ into the preferred normative classification. The stronger the control exercised by the police over the investigation, and thus over the construction of the procedural facts, 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 who are independent in theory from the ordinary police are, in fact, present in some of the systems. But, as internal actors, they are still subject to those same endogenous and exogenous pressures, described earlier, to be lenient in cases involving police misconduct. The closer their preferred rule of decision comes to that of the police and the defendant, the easier it will be for police-supplied facts to meet their standards, and the less likely it is that they will expend significant resources to correct the problem.

In many cases, then, it will be up to the individual claimants to make up the informational deficit. They can do so by conducting their own investigations, rounding up witnesses and presenting them to prosecutors or judges, hiring experts to produce their own forensic reports, and, of course, coming into court to tell their own stories. Claimants gain prominence in the process when procedural rules, as in Brazil and Argentina, permit interested parties to appoint an attorney to act as a sort of Private Prosecutor. Depending on the strength of this figure and its attributes, a Private Prosecutor who owes nothing to anyone but the claimant may represent the best chance victims have of correcting this informational bias. But all of this requires a certain expenditure of resources and will tie even criminal justice outcomes to the resources of individual claimants. Claimants' resources will become less critical only when strong political pressures on internal state actors cause them to identify closely with the claimants, and thus to dedicate state resources to these prosecutions.

3. Concrete Implications of the Theory

Here I summarize the expectations that can be derived from this model, and that will guide the discussion in the coming chapters. As noted, bringing the
state to bear on a claim of right entails a struggle between the purported bearers of rights and of duties. In police misconduct cases, we can expect the police generally to resist an expansive construction and strict application of their duty, and thus to seek to shut down the flow of information into the system. Similarly, endogenous factors predispose judges and prosecutors to leniency in police cases. In fact, the greater the dependence of judges and prosecutors on the police for their routine operation, the more permissive their rule of decision, and, ceteris paribus, the lower the conviction rate overall. This normatively driven lower conviction rate should cut across socio-economic lines, since it is largely unrelated to the capacity of claimants to produce their own version of events. Given this general tendency, prosecutors and investigative judges will seek to actively prosecute these cases only where there is strong exogenous pressure to do so and where the institutions to which they belong efficiently transmit this pressure.

The tighter the links between judges and prosecutors and their political environment (through appointment, advancement, and discipline mechanisms, primarily) the more susceptible these actors are to exogenous incentives. These incentives can cut either way, obviously: social and political approval of police violence will produce more permissive judges and vice versa. In either event, these links to the political context open the door to political tolls, so where the links are tighter, we should see higher inequality tied to the political construction of the case. Public demonstrations and political support for particular prosecutions, for example, should have a greater impact where these links are stronger. Socio-economic status may then take a backseat to other, more overtly political factors, since it is only imperfectly related to the politics of police violence.

On the other hand, more alternative, independent, and effective state-sponsored investigative channels should produce more convictions. But state resources generally follow social priorities, and state actors of all stripes respond to political incentives. As a result, where the political context is not explicitly favorable to the aggressive prosecution of police misconduct, these institutional ties to society will rely on a greater extent on individual initiative on the part of the claimant. Thus, where there are effective state institutions but a relatively non-supportive political environment, socio-economic inequalities in the claimant pool will lead to selective information failures and sharp socio-economic distinctions in the outcomes. Indeed, the more effective those institutions, the sharper the inequality, since an investment of private resources buys access to a better mechanism of enforcement – the toll opens the gate to a better road.
E. IMPLICATIONS FOR THE RULE OF LAW

This analysis of the difficulties of bringing the criminal justice system to bear on the problem of police misconduct opens up some questions for the rule of law more generally. These possible lessons are worth keeping in mind as we go through the empirical material. If I am correct that the dependence of higher levels on information from below is a crucial feature of legal systems, then we can state something close to an axiom: a normative shift at lower levels of the system, so that the agents who produce information uphold a different rule of decision, will produce at least an informational challenge if not a shift at higher levels. The primary limit on the ability of an actor to force an informational shift is the level of informational autonomy higher level agents can achieve. And this autonomy is not the product of isolation but of its opposite, that is, of the diversity and effectiveness of alternative sources of information routinely available to decision makers.

This axiom, moreover, has a corollary: a single channel for generating and moving information up the system will be effective only if there is a high degree of consensus within the system on the norm to be applied. And as noted earlier, the more change in existing social patterns a right purports to produce, the higher will be the degree of resistance from lower level actors, and the more they will seek to ration information. Thus it is precisely at times of social and political transformation that it is most important to have a large number of information-producing agents with a variety of interests reporting to upper level decision makers.

This has broad implications for the rule of law, which presupposes the supremacy of the lawgiver at the top of the system, and especially for the rule of law in transitional societies. The ideal of universal democratic citizenship in new and socio-economically unequal democracies will require a change in entrenched social patterns, generating a great deal of resistance along the way. Given that resistance, one critical internal mechanism for ensuring the lawgiver’s supremacy is the presence of alternative sources of information. Transparency enables top-down control.\(^{15}\) Hence the special importance of mechanisms of horizontal and social accountability in new and unequal democracies (O’Donnell 1994; Mainwaring and Welna 2003; Smulovitz and Peruzzotti 2003; Peruzzotti and Smulovitz 2006). Their failure allows for the continued application of rules of decision at variance with state standards and the perpetuation of localized social relations of power.

\(^{15}\) We should not forget, of course, that this control can serve democratic or authoritarian purposes, and that it is especially important for the latter – think of Foucault’s description of Jeremy Bentham’s Panopticon (Foucault 1980).
Moreover, regardless of the availability of horizontal accountability and other collective mechanisms, it is especially important that intended beneficiaries themselves have the capacity to engage monitoring systems effectively. The state and the various institutions that are designed to act on behalf of these intended beneficiaries may or may not share their goals, and may need extra prodding to do their work. Engaging with and navigating even the best oversight agencies, let alone prodding reluctant ones into action, as we saw, requires an investment of resources. And even then the battle is only begun. Once engaged, these venues are all arenas of contestation between those who claim rights and those who deny duties. In general, then, the rule of law will require a minimum level of citizen capability and a rough equality of resources among claimants, in addition to a variety of reporting and monitoring agencies. Greater equality, in a very direct way, reduces the likelihood that information about rights violations will be biased and maximizes the chances that lower level agents will act according to the normative guidelines laid down by upper level agents. Severe social and economic inequality is toxic to the rule of law.

In the following chapters I carry out the analysis outlined earlier. Chapters 2 and 3 are comparative chapters. Chapter 2 sets up the dependent variable, using mostly quantitative measures to analyze levels of effectiveness and inequality across and within the cases. Chapter 3 presents a first-order explanation for these levels of inequality and effectiveness, adopting a mostly qualitative approach to tie socio-economic tolls to informational failures and political tolls to normative failures. Chapters 4 through 8 examine each of the cases, using the framework described earlier to account for the presence of these tolls and the levels of effectiveness and inequality in each system. Each of the chapters concludes with some reflections on what the case can teach us more generally. Chapter 9, finally, presents a summary of the findings and some concluding reflections.