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# Democracy and Violence in Brazil

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Democracy has expanded remarkably throughout the world during the last quarter of the twentieth century. In 1972, there were fifty-two electoral democracies, constituting 33 percent of the world's 160 sovereign nation-states. By 1996, the number had risen to 118 electoral democracies out of 191 states, or 62 percent of the total, for a net gain of 66 democratic states. Among the larger countries with a population of one million people or more, the number of political democracies nearly tripled during the same period.<sup>1</sup> If it took two hundred years of political change from the Age of Revolution to 1970 to generate about fifty new democratic states, it has taken only ten years since the mid-1980s to yield the same number again. This movement of political democratization has swept over every region of the globe, taking root in societies with very different cultures and histories, from Papua New Guinea to Botswana, Brazil, and Bulgaria. In the one region where it has not transformed the nature of national rule, the Middle East, it has nevertheless generated a plethora of local democratic projects and debates. At the end of the millennium, democracy has indisputably become a global value adopted by the most diverse societies.

Although the new democratization is overwhelmingly non-Western, the dominant theories and evaluations of democracy remain predicated on its Western experience. They remain especially focused on the transformation of political systems—on regime change, electoral competition, and their preconditions—that is a hallmark of Western democratization. Such political considerations are certainly fundamental. They establish that most countries in Latin America, for example, have indeed become democratic in the sense that they are *political* democracies. However, the problematic and at times perverse democratizations of Latin America demonstrate just as surely that the consolidation of democracy requires social and cultural changes which escape the analy-

<sup>1</sup> We derive these data on electoral democracies from the annual world surveys that Freedom House has compiled systematically since 1972. Although crucial in its own right, we are critical of the electoral approach in evaluating democracy, as will become clear below.

sis of this narrow political perspective. Their difficulties strongly suggest that, although necessary, political democracy is not enough to secure the civil rights of citizenship or produce a democratic rule of law. Without both, the realization of democratic citizenship remains disabled. It is increasingly evident in the new democracies that without this realization, political democracy loses its legitimacy and efficacy. It suffers not only as a means to frame social interaction but also as a mode of governance.

The fundamental problem is that the form, substance, and development of the new non-Western democracies usually differ significantly from the canonized Euro-American experience. It is not only that their different histories require a different approach to understand, on the one hand, the global reach of democracy and, on the other, its specificity in diverse cultural circumstances. It is also that these other histories suggest the need to revise many standard assumptions about democratization. They demonstrate, for example, both the insufficiency of democratic elections for realizing democratic citizenship, and the limitations of a democratic theory based on elections for understanding this problem. Furthermore, these other democracies show that the spread, timing, and substance of citizenship vary significantly in different historical contexts. Finally, they also reveal that the development of citizenship is never cumulative, linear, or evenly distributed for all citizens, but is always a mix of progressive and regressive elements, uneven, unbalanced, and heterogeneous—in short, what we call disjunctive.

Above all, it is the widespread concurrence of democratic politics and systematic violence against citizens in emerging democracies that reveals these limitations of method and theory, and that requires a different conceptualization. This concurrence means that many such new democracies experience a similar and defining disjunction: although their political institutions democratize with considerable success, and although they promulgate constitutions and legal codes based on the rule of law and democratic values, the civil component of citizenship remains seriously impaired as citizens suffer systematic violations of their rights. In such uncivil political democracies, violence, injustice, and impunity are often the norms. As a result, uncivil democracies undergo the delegitimation of many institutions of law and justice, an escalation of both violent crime and police abuse, the criminalization of the poor, a significant increase in support for illegal measures of control, the pervasive obstruction of the principle of legality, and an unequal and uneven distribution of citizen rights. Narrowly political definitions of democracy—those that ignore the civil component of citizenship and its constituent elements of justice and law in the real lives of citizens and states—overlook these dilemmas.

By the term “civil,” we refer not to the classic liberal separation between state and non-state, political society and civil society, public and private, or to any such dichotomies that typically derive from the state/non-state divide.<sup>2</sup> Rather,

<sup>2</sup> These dichotomies are usefully analyzed in Bobbio 1989:1–43.

we use *civil* to refer to an aspect of citizenship, and *citizenship* to refer to the prerogatives and encumbrances of membership in the modern political community. Developing T. H. Marshall's (1977) typology (but discarding his progressive and cumulative history), we distinguish civil components of citizenship from their political, socioeconomic, and cultural counterparts. We use *civil* to specify the sphere of rights, practices, and values that concerns liberty, both negative and positive, and justice as the means to all other rights. With regard to liberty, the civil component of citizenship not only secures its negative meanings in the sense of guaranteeing the autonomy of private individuals against the abuses of the state. It also secures liberty in the positive sense of rights to associate, assemble, and communicate among private individuals, who thus become associated individuals and thereby create the public sphere of society. With regard to justice, the rights, practices, and values of civil citizenship ground the democratic rule of law.

Through these principles of liberty and justice, the civil component relates and regulates both society and the state—the latter as one of society's legally constituted agents. This regulation creates a productive mediation between society and state that is ambiguous, not dichotomous: the civil sphere differentiates society from the political system by defending the former from the abuses of the latter; however, it also integrates the two by utilizing state power to confront relations of inequality and domination within society itself, and to shape people into certain kinds of citizen-subjects. In the latter sense, therefore, civil democracy depends on the state's capacity to impose sanctions. Highlighting this ambiguous mediation, our use of the *civil* embraces a paradox of modern democracy: although society needs protection from the state, it is only within the framework of a state that this is possible. Thus, citizenship is a complex regulatory regime by which the state molds people into particular kinds of subjects, and by which citizens also hold the state accountable to their interests. We use the notion of “*civil*” to emphasize this complex imbrication of state and society through citizenship.<sup>3</sup>

One of our aims in this essay is to stress the importance of the civil component of citizenship in democratic processes and, therefore, in democratic theory. We do so by looking at what happens when this component is systematically violated, not under dictatorship but under political democracy. We focus on the case of Brazil to emphasize both the lived consequences of such violence against citizens under democracy, and its theoretical significance for understanding democratic change. We consider a number of consequences in Brazil that derive from the fundamental disjunction of political democracy and the violation of civil citizenship, and that concern the individual body, public space, collective rights, and the rule of law. We want to emphasize at the outset that these consequences are found in other political democracies, including those

<sup>3</sup> For further discussion of the civil component of citizenship, see Holston, forthcoming, particularly Chapter 5.

that are established and not generally uncivil, for it is also our argument that all democracies are disjunctive in the sense suggested above, at all times and in various ways.

What makes Brazil exemplary is that it presents with particular and unfortunate clarity the disjunction of the civil component of citizenship that is characteristic of many emerging democracies. Whereas Brazil's political democratization in the 1980s—after twenty years of military dictatorship—promised individual liberty, autonomy, and security, the actualities of everyday violence against Brazilians produce continuing or even increasing vulnerability of the citizen's body. Many Brazilians feel less individual security under democracy. Whereas Brazil's democratic constitution of 1988 is predicated on the notion of a public that is open, transparent, and accessible, a culture of fear and suspicion has taken hold under political democracy that produces abandonment and lawlessness of public spaces—their conversion into no-man's land—or their enclosure, fortification, and privatization. Whereas Brazilian democracy presumes the rule of law, the institutions and practices of law and justice are discredited and undemocratic. Their delegitimation demonstrates that political democracy does not necessarily or automatically generate a democratic rule of law.

In the next section of the essay, we analyze these various violations of the civil component of citizenship in the context of Brazil's current political democracy. In the final section, we develop the concept of disjunctive democracy as a means of better understanding these contemporary forms of democratic development. The empirical basis of this investigation derives from ethnographic research in the metropolitan regions of São Paulo and Brasília, which we have, at various times, conducted separately and together. It derives especially from an anthropological concern with the performative dimension of social and institutional relations—that is, with the representative practices and exemplary particulars through which these relations are enacted, as well as with the scripts, like democracy, that are supposed to provide a calculus for many sets of relations, and that people must perform to gain the prescribed effects. Our intention, in this sense, is not just to criticize the strictly political definition of democracy, but also to suggest an anthropological perspective in its study. We do not insist on this intention by calling attention to it throughout the discussion. Rather, we try to demonstrate its force by focusing on the civil component of citizenship and the lived consequences of its violation, and by letting these social practices lead to a theoretical argument about the disjunctive nature of democratization.<sup>4</sup>

<sup>4</sup> This essay began to take shape in three presentations we delivered together in 1994 and 1995. The first was given at CEDLA (Center for Latin American Research and Documentation) in Amsterdam. The second was at the conference "Fault Lines of Democratic Governance in the Americas," sponsored by the North-South Center at the University of Miami. The third occurred at a meet-

## DEMOCRACY, VIOLENCE, AND INJUSTICE

In recent years, Brazilian society has produced numerous events indicative of a disjunctive democratization. Some point to an expansion of democratic citizenship, and others to its erosion and degradation. Some indicate the strengthening of democratic state institutions, and others the dismantling or “illegalization” of the state. Most frequently, events of contradictory meaning are coeval. The expansion of democracy is suggested by the organization of new social movements throughout Brazil during the late 1970s and 1980s, the proliferation of NGOs in the 1990s, the revitalization of trade unions, and the organization of various investigative commissions by the federal legislature, one of which provoked the 1992 impeachment of President Fernando Collor de Mello for corruption. There have also been regular, lawful, and generally unproblematic elections at all levels of government, and the creation of numerous new political parties, including the PT, the Workers’ Party. Events indicating the degradation of democracy include the rise in violent crime, police violence, and human rights abuses, all of which increased dramatically *after* the institutionalization of democratic rule. This dismal record of violence against mostly innocent and unarmed civilians includes the massacre of indigenous populations, peasants, rural leaders (like Chico Mendes), street children, adolescents in poor urban neighborhoods, and prisoners (as in São Paulo’s Casa de Detenção, where military police killed 111 unarmed prisoners in a 1992 prison rebellion). Police violence has reached unprecedented levels, and the forces of law and order are themselves one of the main agents of violence in many cities. Various police forces are plagued by corruption, entangled with organized crime, and accustomed to violent and illegal methods of action.

With the increase in criminal and police violence, public space in many cities has become characterized by muggings, assaults of various kinds, shootings, drug trafficking and addiction, violence in traffic, and a general scofflaw attitude. Violence of one sort or another is a common experience of daily life. As a result, a culture of fear and suspicion has taken root, giving support to extraordinary and often extra-legal measures for dealing with violence and crime. For example, cities such as Rio de Janeiro have enacted policies that are questionable from the point of view of democratic consolidation. One of these was Operação Rio in 1994, during which the army was sent into the city of Rio de Janeiro in an effort to control violent criminal activity. People applaud these military operations. They also support illegal and private “acts of justice,” such

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ing on “Direitos, Identidades e Ordem Pública” sponsored by the Associação Nacional de Pós Graduação e Pesquisa em Ciências Sociais (Anpocs) of Brazil. We would like to thank the sponsors of these events for their support and encouragement. Our presentation at the Miami meeting in 1995 was published in a volume of conference papers, *Fault Lines of Democracy in Post-Transition Latin America*, ed. Felipe Agüero and Jeffrey Stark (Miami: University of Miami North-South Center Press) 1998:263–96. We utilize some data and passages from these papers here.

as the extraction of confessions through police torture, and vigilante efforts to catch suspects. In all cases, the assertion of episodic order supercedes concern for the institutional order of democratic legal norms and procedures. Although people are ready to defend democratic procedures in the political system by consistently supporting trials of corrupt politicians at all levels and defending free elections and political organization, they also overwhelmingly welcome actions like Operação Rio. In the context of crime, fear, and the failure of the institutions of law, people consider discussions about the legitimacy of the military occupation in Rio or the prison assault in São Paulo—and the threat they pose to the consolidation of democracy—largely irrelevant. They also consider that suspected criminals have no human rights to safeguard, and expect the police to respond to violence with violence. In what follows, we look more closely at several key elements that define this perversity of violence under political democracy.

### *Violent Crime*

In contemporary Brazil, violence against civilians is the domain in which the disrespect of civil rights and the failure of democratization strongly shape everyday social interactions. Since the mid-1980s, Brazilians have perceived violent criminality as the main problem affecting their cities. Not only has crime increased in this period, but the type of criminality has also changed. Crime has become more organized and violent, as the example of São Paulo demonstrates. São Paulo has one of the highest rates of violent crime in Brazil. These rates are also high when compared to many cities around the world. In the early 1980s, violent crime represented around 20 percent of the total crime reported to the civil police in the metropolitan region of São Paulo.<sup>5</sup> Since the mid-1980s, this percentage has been higher than 30 percent, reaching 36.3 percent in 1996. One of the crimes that increased most in the period 1981–1996 is murder (average annual variation of 10 percent). In 1996, the rate of murder per hundred thousand population reached 47.3, a value significantly higher than the 1981 rate of 14.62.<sup>6</sup>

In the last fifteen years, the proportion of violent deaths (accidents, homicides, and suicide) in total deaths has almost doubled in the metropolitan region of São Paulo, accounting for 8.95 percent of deaths in 1978, 15.82 percent in 1991, and 14.11 percent in 1993.<sup>7</sup> Since 1989, violent deaths have been the sec-

<sup>5</sup> Although there is no official definition of violent crime, for purposes of statistical evaluation we consider it to include murder, attempted murder, rape, attempted rape, assault and battery, robbery, and felony murder (*latrocínio*).

<sup>6</sup> Rates of murder are based on the civil police records of reported crimes (*boletins de ocorrência*).

<sup>7</sup> Data on violent deaths are from the death registry. The two main sources of murder rates are those of the police (reported crime) and the health authorities (compulsory death registration, compiled according to the International Classification of Disease categories). Although the two sources register similar patterns of growth, the differences between them are high. Rates by the death registry are on average around thirty percent higher than police reports. For a complete discussion of violent crime statistics, see Caldeira (in press).

ond highest cause of death in Brazil (after respiratory diseases), while in 1980 they were only the fourth (Souza and Minayo 1995:90). Murder is responsible for the significant increase in violent deaths, since the proportion of other “external causes” in the total number of deaths has remained relatively constant. While in 1978 murder caused 1.44 percent of the deaths in the city of São Paulo, in 1994 it caused 6.57 percent, an increase of 356 percent. In 1994, murders accounted for 19.15 percent of the deaths of people between 20 and 49 years of age in the municipality of São Paulo, becoming the main cause of death in this age group. This rate is dramatically different from that of 1976, when murder accounted for only 4.9 percent of deaths in the same age group. In 1994, 44.40 percent of the deaths of people aged 15 to 24 were caused by murder. During the 1980s, murders increased 80 percent among 10 to 14-year-olds (Souza 1994:49). In addition to murder’s increasing effect on the young (males more than females), there are indications that murder victims are predominantly poor. According to Pro-aim data for 1995, most of the districts of the city of São Paulo with the highest rates of murder (rates between 75 and 97 murders per hundred thousand population) were very poor. In contrast to this, the lowest rates (between three and fifteen murders per hundred thousand population) were in middle or upper-class districts.<sup>8</sup>

The increase in violent deaths is not a pattern of São Paulo alone. Homicide rates increased in most Brazilian metropolitan regions during the 1980s (Souza 1994:53–55). As a consequence, the homicide rates for Brazil (around ten per hundred thousand), which were similar to those of the United States in the early 1980s, more than doubled American rates by the late 1980s. The U.S. homicide rate is historically quite high compared to Western European and Japanese rates. During the period from 1970 to 1990, American rates have oscillated between eight and ten homicides per hundred thousand population, while European rates have fluctuated between 0.3 and 3.5, and Japanese rates have remained at around one homicide per hundred thousand population (Chesnais 1981:471). In other words, the contemporary Brazilian homicide rates above twenty are very high indeed if compared to the American, European, and Japanese rates in the last few decades. However, national rates hide local disparities, and many urban areas have homicide rates considerably higher than the national average. In the case of Brazil during the late 1980s and 1990s, Rio de Janeiro, Recife, and São Paulo are the three most violent metropolitan regions, with homicide rates higher than forty per hundred thousand people.<sup>9</sup>

<sup>8</sup> Pro-aim (Programa de Aprimoramento de Informações de Mortalidade no Município de São Paulo) is responsible for the death statistics of the city of São Paulo.

<sup>9</sup> It should be noted that in the U.S., in 1993, some cities had much higher rates than these, while other American cities had rates comparable or lower to those of São Paulo. According to the FBI’s *Uniform Crime Reports for the United States* for 1993, some of the highest rates were in New Orleans (80.3), Washington, D.C. (78.5), Detroit (56.7), Atlanta (50.4), Miami (34.1), Los Angeles (30.5), New York City (26.5). However, the Brazilian homicide rates have oscillated much more than the American rates, and in many large American cities these numbers have decreased significantly since the early 1990s. It is hard to obtain comparable information with regard to other third world countries. National data compiled by the United Nations on causes of death are not available

Another way of evaluating the increase in violence is to look at the registration of guns and reports of illegal possession of weapons. The annual number of registered guns purchased in the metropolitan region jumped from 9,832 in 1983 to 66,870 in 1994, an increase of 580 percent. These numbers, however, are far from portraying the increase of weapons among the population, since the apprehension of non-registered guns has also increased considerably. Police reports of illegal possession of guns in São Paulo grew an average of 9.5 percent a year between 1981 and 1996. In 1996, the police registered 5,563 cases of illegal possession of guns in the metropolitan region. As reported in the media, many of the apprehended guns are smuggled into the country and some (especially those used by drug dealers) are more powerful than those used by the police. The increase of gun possession correlates with the fact that a higher proportion of homicides are committed with them. According to data of death registration, in 1980, homicides by firearms constituted 14.8 percent of the total of homicides in São Paulo; in 1989, they were 31.2 percent (Souza 1994:55), and in 1992, 29.26 percent. The increase in the possession of guns indicates not only an increase in crime and violence, but also shows how São Paulo's residents are increasingly taking the task of defense into their own hands, a practice we discuss later.

In the daily life of cities such as São Paulo, an important aspect of the increase in violent crime is what Caldeira calls "the talk of crime," a proliferation of everyday narratives, commentaries, and even jokes that have crime as their subject (see Caldeira, in press: Part I). This talk produces and circulates stereotypes, both counteracting and provoking fear. The narratives of crime that emerge in the course of the most diverse and common conversations operate with clear-cut oppositions and essentialized categories derived from the polarity of good versus evil. They help to symbolically reorder a world disrupted by experiences of crime. But they do this in a complex and particular way. Their reordering both counters disruptions caused by violence, and mediates and proliferates violence. More than maintaining a system of distinctions, narratives of crime create stereotypes and prejudices. They separate categories of people and reinforce inequalities. In addition, the categorical order articulated in the talk of crime is the dominant order of an extremely unequal society. As such, it does not incorporate the experiences of dominated Brazilians—the poor, migrants from the Northeast, women, and others. Rather, it usually discriminates against and criminalizes them. The talk of crime is a productive discourse in the sense that it helps to produce segregation (social and spatial), abuses by the institutions of order, the negation of citizenship rights, and, especially, violence itself.

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for most African and Asian countries. Latin American countries have had relatively high rates in the 1990s. Colombia has one of the highest rates in the world: 74.4 in 1990. Brazil (20.2 in 1989), Mexico (17.2 in 1991), and Venezuela (12.1 in 1989) have the next highest. Data for Latin America are from United Nations (1995:484–505) and refer to death rates compiled by health authorities. Local situations may differ considerably from national averages.

If the talk of crime generates order, it is not a democratic, tolerant, egalitarian order, but the opposite.

It is not our intention in this essay to determine the underlying causes of the increase in violent crime and the breakdown of the institutions of law over the past fifteen years. No doubt, the development of organized drug trafficking and related police corruption in Rio de Janeiro and São Paulo since the mid-1980s is an important factor. So, too, is the contradiction between Brazil's tremendous wealth (its industrial economy currently ranks eleventh among all nations), and its distribution of income, which is one of the worst in the world. Made explicit to Brazilians by modern mass media, this gross inequality is, surely, at the root of much violence. Nevertheless, our argument is not about causes, but correlations. Whatever the origins of the increase in violence, political democracy has not been able to deter it or even use its occurrence to remake relevant institutions. Rather, the violence has shown Brazilian democracy—and, perforce, Brazilian society—to be especially weak in the area of civil citizenship and the protection of civil rights. In turn, this weakness generates more opportunities for violence to proliferate. Moreover, political democracy has not been able to dispel the causal link that many Brazilians—especially those on the right—make between democracy and violence: that is, that the institution of democracy itself is responsible for the propagation of the new violence. This is not only because democracy defends human rights for criminal suspects and prisoners, thereby supposedly creating difficulties for the police and incentives for criminals; it is also, so the claim goes, because democracy has deconstructed Brazilian society by giving the masses a sense of political power that confuses their sense of social hierarchy—so much so that “people no longer know their place.” Our argument is that the response of a significant part of the Brazilian elite to this perceived destabilization has been to criminalize the poor—by campaigning against human rights, by flooding the media with narrativized crime stories, by investing in private security and private “justice,” by retreating to fortified enclaves—and that this criminalization also contributes significantly to the propagation of violence.

Although the return to democratic elections at all levels between 1985 and 1989, and the promulgation of a new Citizens' Constitution in 1988 heralded the creation of a new national public sphere with new freedoms and forms of participation for citizens, violence and the fear of violence have eviscerated public confidence. Although political democracy promised a new horizon of equality and fairness—a new sense of the future for Brazilians—its incapacity to deal with violence has eroded that horizon for many. It is interesting to note that this promise was bolstered by the Cardoso administration's successful reduction of hyperinflation in 1994 to practically zero. In theory, the end of rampant inflation should have expanded the sense of a productive future for working Brazilians. It should have created a new time-line against which to measure personal and family progress. But apparently it has not. In interview

after interview with young adults who live in the periphery of São Paulo, we found that they despaired of reaching the normalized goals of their parents, one symbolized by a family, house, and steady job. This combination of reduced horizons is the context in which both violence and political democracy develop in Brazil.

Two other elements contribute to the experience of violent crime and fear that frames the everyday life of Brazil's citizens: police violence and the inadequate response of the justice system. The failure of the institutions of law to combat increasing violence and the fact that those same institutions often add to the violence put the population under considerable stress. They contribute not only to increasing the fear of powerlessness but also to justifying private measures of protection and vigilantism.

### *Violent Police*

A dramatic indication of the role of the police in the reproduction of violence in São Paulo is the data on the relationship between the number of people killed by the police and the total number of murders. From 1986 to 1990, the police committed 10 percent of the total number of killings in the metropolitan region of São Paulo; in 1991, the percentage jumped to 15.9 percent, and in 1992 rose to 27.4 percent. A comparison indicates the absurd dimension of these rates. In New York City in the 1990s, the average percentage of police killings has been 1.2 percent, and in Los Angeles, 2.1 percent. Although police violence has diminished in São Paulo since 1993, with the rates back to the level of the late 1980s, no other city in the Americas outside of Brazil has a comparable record of police abuse in the use of deadly force (Chevigny 1995). In Brazil, the police constitute part of the problem of violence.

From its creation in the early nineteenth century, the Brazilian police's practices of violence, arbitrariness, discrimination, and disrespect of rights have been well known. Although the degree of police abuse has varied under different political regimes, during this entire period the police have never abandoned the practices of unsubstantiated arrest, torture, and battering. These practices have not always been illegal, and they have often been exercised with the support of the citizenry, even of members of social groups who have been the police's preferred victims. Throughout this period, different governments issued "laws of exception" to accommodate existing delinquent police practices, or to cover them up. Although these laws were usually issued under dictatorships, they frequently survived under democratic rule. Thus, the legal parameters framing police work have often shifted, making the boundaries between the legal and the illegal unstable, and creating conditions for the continuation of a routine of abuses. The repression of crime has targeted the working classes in particular, and has frequently merged with political repression. The formula that the elites of the Old Republic made famous has remained in place: "The social question is a matter of the police." Consequently, the poorer sectors of the pop-

ulation in particular have unremittingly suffered various forms of police violence and legal injustice. As a result, the poor have learned to fear the police and distrust the justice system.

It is not necessary to review the entire history of the Brazilian police to make these points. However, discussing a few contemporary aspects of this history will demonstrate the complicated relationship between the police and the legal order. The military regime that took power in 1964 reorganized the police. Decree 667 of 1969 unified all preexisting state uniformed police into a state military police force, subordinated to the army and charged with uniformed street patrolling. The objective was to train and organize this new police force according to a military model. At the same time, the civil police continued to exist, comprising the administrative and the judiciary police. The 1988 constitution preserved the dual structure of the police forces after the end of the military regime. Both the civil and military police forces are organized at the state level and are under the jurisdiction of the secretary of public security. However, they have different hierarchies, training, and recruitment procedures. In spite of their unified authority, this dual organization generates constant rivalries and conflicts between the two police forces. The two also seem to specialize in different types of abuses. As many human rights organizations have shown, the civil police, who are in charge of investigations, tend to torture people under arrest, while the military police are more likely to kill suspects.<sup>10</sup>

Rules governing the current military police include some laws of exception that put them above the civil justice system. Decree-Law 1,001 of 1969—still in force—establishes that all crimes committed by military bodies should be considered military crimes and judged by a special military justice, even if such offenses were committed in peacetime and in pursuit of civilian functions. In other words, since 1969 there has been a special justice for the military police. This exception became the norm with the constitution of 1988. Written under a democratic rule by a freely elected congress, the 1988 constitution maintained the military police as the institution in charge of “the ostensive policing and the preservation of the public order” (art. 144, par. 5) and the military justice as the jurisdiction for dealing with crimes committed by military policemen. In May 1996, after a massacre by the military police (in Pará, in northern Brazil), President Fernando Henrique Cardoso supported a project in Congress that proposed that military policemen be tried by civil courts. Nevertheless, this project did not win congressional approval until August 1997 (Law 9299), and then in a milder form. Its approval in this form indicates the support that the police enjoy, despite their violent nature. The new law shifts jurisdiction to ordinary courts in murders involving military policemen and soldiers. However, all other crimes, including manslaughter and physical assault, remain in the military

<sup>10</sup> See, for example, Americas Watch Committee 1987. Also see Pinheiro (1991) for one of the first analyses that demonstrates a pattern of abuse by the military police.

system. The problem is that the right to characterize a killing as murder or as manslaughter remains with military police investigators. Obviously, this limits the impact of the law. Nevertheless, it is an indication of the Cardoso administration's concern to curb human rights violations, as we discuss below.

Various human rights groups have amassed considerable evidence demonstrating that the military justice overwhelmingly acquits (or dismisses charges against) military police officers accused of crimes against civilians. This evidence confirms that the military justice is rigorous as far as internal discipline is concerned, but lax if the question is the murder of civilians.<sup>11</sup> The conclusion is clear: this record of acquittal or dismissal stimulates an explicit sense of impunity among the police, and therefore perpetuates the continuation of abuses associated especially with excessive use of force. As Paul Chevigny (1995) demonstrates in his analysis of police abuse in six cities in the Americas, a decrease of abuse is directly related to the enforcement of systems of accountability. When the police are not made accountable for their extralegal or illegal behavior, violence and abuse escalate. The legal exception that removes the Brazilian military police from the civilian justice system of accountability increases their impunity and their use of violence in dealing with civilians, and indirectly assures them of a wide margin for arbitrary behavior.

These consequences can also be demonstrated *a contrario*, by analyzing cases in which accountability provoked a decline in police abuse. There are two such examples from recent times. During the 1970s, members of São Paulo's civil police organized a famous death squad called the *Esquadrão da Morte*. Because they were under the jurisdiction of the civil police, judges and public prosecutors were able to bring them to trial—even under military dictatorship—and ultimately to dismantle the squad. In recent years, judges and prosecutors have also been able to enforce the article of the 1988 constitution that considers torture a crime not subject to bail or executive clemency. They have brought civil police officers to trial, and there are indications that torture has diminished somewhat in São Paulo's civil police precincts (Americas Watch Committee 1993:21).

In sum, although under democratic rule, the current organization of police institutions largely maintains that established by the military regime. This institutional framework in large measure assures the impunity of extralegal actions by the police—especially the military police, the principal repressive po-

<sup>11</sup> Centro Santos Dias, a human rights defense group associated with the Archdiocese of São Paulo, analyzed 380 trials at the courts of the military justice from 1977 to 1983 (unpublished data). For these years, it found that of eighty-two police officers accused of murder, only fourteen were found guilty (15.9 percent). Among forty-four police officers accused of crimes against property, fourteen were found guilty (31.8 percent). Finally, among fifty-three officers who faced trials for matters of discipline, twenty-eight were found guilty (52.8 percent). More recently, another study by the Núcleo de Estudos da Violência from the University of São Paulo found that in 1995, from a total of 344 cases that reached the third Auditoria da Justiça Militar of São Paulo, 58 resulted in convictions (16.9 percent), and 190 in acquittal (55.2 percent), while 96 (27.9 percent) were dismissed before going to trial (unpublished data).

lice force of the state. In this sense, instead of helping to curb arbitrariness and violence, the current structure allows space for these practices to proliferate. This situation reveals an especially significant point: usually, people associate abuses such as unsubstantiated arrest, torture of prisoners, and killing of suspects with authoritarian regimes. In Brazil, however, not only do police abuses continue to exist, but all data also indicate that they have reached unprecedentedly high levels under the present political democracy.<sup>12</sup>

There is, by now, a mountain of data on police torture, battering, degradation of prisoners, and excessive use of deadly force. They show that the worsening of police violence in São Paulo and other Brazilian cities coincides with the consolidation of political democracy. The number of civilians who died in confrontations with the military police in São Paulo increased considerably in the late 1980s: it surpassed 500 in 1989 and 1990, reached 1,171 in 1991, and 1,470 in 1992 (including the 111 prisoners of the Casa da Detenção). A special division of the military police called ROTA commits a significant number of these killings. Not surprisingly, ROTA was created during the military regime (1969) to fight terrorist attacks, especially bank robberies, in the metropolitan region of São Paulo. A few comparisons highlight the absurdity of the numbers of killings. In 1991, when the military police in São Paulo killed 1,171 civilians, the New York City police killed 27 people in confrontations and the Los Angeles City police killed 23. In 1992, the numbers were 24 in New York, 25 in Los Angeles (Chevigny 1995:46, 67), and 1,470 in São Paulo. The São Paulo killings suggest something more like a civil war or a regime of terror than anything resembling a democracy.

The civilian deaths in São Paulo cannot be considered accidental, or a result of the increased violence by criminals, as the military police claim. If the latter were the case, we would expect that the number of police killed would also increase. But this has not happened. Although high when compared to the U.S. statistics, the number of Brazilian military police killed in confrontations has stayed more or less stable during the 1980s and 1990s, averaging thirty-nine per year. Moreover, the proportion of civilians killed in São Paulo in relation to those wounded is completely abnormal. Usually, the police wound many more than they kill. During the 1980s and 1990s, for each civilian killed in New York, an average of three were wounded; in Los Angeles, the ratio was 1 killed to 2 wounded. Yet in the metropolitan region of São Paulo, 4.6 civilians were killed for each person wounded in 1992 by the police; in 1991, the ratio was 3.6 killed

<sup>12</sup> One might argue that this increase is artificial because censorship was effective under military dictatorship and curtailed information about police abuse. Under democratic rule, this information is readily available in the everyday media. It is true that much more of this kind of information is accessible today and statistics are better, though still far from reliable. However, according to every available comparative index, it is indisputable that not only have the victims of police abuse changed from political to civilian, but also the numbers of victims have risen dramatically in recent years. Moreover, frequent media exposure of violent police actions has usually generated not condemnation, but support among the population at large.

to 1 wounded; for other years in the 1980s and 1990s there was an average of more than two deaths for each person injured. These data indicate that the police in São Paulo and in other Brazilian cities—such as Rio de Janeiro and Recife, for which there are similar data—shoot to kill rather than to subdue. As shown below, the practice of shooting to kill not only has broad popular support but is also “accepted” by the “tough talk” of official policy.

Probably no single event more tragically exemplifies the routine association of these components of police violence than the massacre of 111 prisoners at Casa de Detenção in October 1992. Not a single police officer died; none was wounded seriously. Yet prisoners were randomly shot and summarily executed after surrendering. In a country in which human rights violations coexist with a free press, images of the massacre ended up in the mass media, revealing a concentration camp vision of piles of bullet-riddled bodies on the prison floor, naked inmates carrying corpses, and rows of open wooden coffins arranged side by side along the corridors of the Institute of Legal Medicine. Although a civilian criminal prosecutor presented charges against one of the commanders of the operation and a military prosecutor presented charges against 120 officers and soldiers for various crimes, including homicide, not a single one has been brought to trial almost five years after the massacre. Most of the accused continue to hold their jobs in the military police and to participate in public life. A few have even run for elected office on the basis of their performance in the assault.<sup>13</sup>

The massacre at the Casa de Detenção is an egregious example of what has become an accepted, if not encouraged, routine of police abuse. Some of this violence is no doubt associated with corruption. Possibly, some violence may be accounted for in terms of Brazilian judicial procedures. Especially in the precincts of the investigative civil police, the prevalence of routine torture may well be related to the fact that confession is still the central piece of judicial evidence. The hellish condition of prisons surely has something to do with restricted state budgets. Police violence has, however, even more to do with official policy and popular support. We can see the effect of the former through a contrast among the experiences of several Brazilian governors. São Paulo’s first governor after the end of military dictatorship, Franco Montoro (1983–87), and governor Mário Covas (1995–99, who has been reelected for another

<sup>13</sup> For example, in 1994, MP Colonel Ubiratan Guimarães, the commander of the Casa de Detenção operation, ran for a seat in the state assembly. Among the many shocking aspects of his campaign was his choice of the number 111 to identify himself as a candidate on the ballot, exactly the number of prisoners killed in the assault. Although he received 26,156 votes, it was not enough to be elected. More recently, in May 1996, the Eighth House of Public Law of the Court of Justice of the State of São Paulo judged the police action “legitimate” and absolved the state of all civil and financial responsibilities. The superior judge who heard the case, Raphael Salvador—also vice-president of the Paulista Association of Judges—justified his decision by blaming the prisoners for the massacre: “They started the rebellion, destroyed the prison block, and forced society, through its police, to defend itself” (*Estado de São Paulo*, 4 May 96: A1). Other courts are also hearing the case, and the decision is under appeal.

term) were particularly determined to cut down the abuses of the police, improve human rights, and enforce the rule of law. They were able to achieve their goals partially, in spite of strong opposition, not only from the police but also from right-wing politicians and the population at large, especially in Montoro's case.

In contrast, the two governors who succeeded Montoro, Orestes Quercia (1987–91) and Luiz Antonio Fleury Filho (1991–95), adopted the opposite policy.<sup>14</sup> They believed that only a “tough” (meaning violent) police force would be able to curb the rising rates of crime, and they reversed all of Montoro's measures aimed at controlling police abuses. Under their administrations, the number of deaths caused by the military police rose continuously. After the massacre at the Casa de Detenção, when the annual number of police killings approached 1,500, Fleury was forced to substitute his own secretary of public security and change his “tough” policy. As a result, the number of people killed by the military police dropped to 409 in 1993 and 453 in 1994. The numbers continued to decrease during Mário Covas's administration, reaching 250 in 1996 and 1997. The new policies adopted by Covas include stricter control of the use of deadly force, the creation of an ombudsman for the police, and the adoption of a State Program for Human Rights in 1997, which replicates the National Plan for Human Rights adopted by the Cardoso administration the previous year. Although the new policies adopted at both state and federal levels have had positive effects on efforts to control the disrespect of human rights, they are not easy to implement. This is evident in the number of civilians killed by the police, which is still extraordinarily high according to international standards. It is also demonstrated in a series of strikes and riots by the police forces of various states during the months of June and July of 1997, in response to state initiatives to reform their structure. At that moment, Congress was debating the law that would make military policemen accountable to the civil courts, the federal government (through its national secretary of human rights) was elaborating a project of police reform to be sent to Congress, and Governor Covas presented a proposal for transferring all patrolling activities to the civil police and eliminating the division between the two police forces. The aggression, strikes, and public demonstrations by the police, as well as exchanges of gunfire and aggression between the two forces, were broadly documented by the media and indicate their deep resistance to reform.

This resistance is ultimately grounded in broad popular support for a “tough” police force. The hard fact is that a significant part of the population of São Paulo supports violent police action. For example, according to various newspaper surveys conducted at the time, between twenty-nine and forty-four percent of the residents of São Paulo supported the police in the massacre of prisoners at the Casa de Detenção. Every serious study of popular sentiment shows

<sup>14</sup> For a complete analysis of São Paulo's policies of public security, see Caldeira (in press: Part IV).

widespread approval of violent police actions in dealing with criminals, including torture and killing. Thus, the police have continued to be violent, not only because of an assured impunity, but also because of the support of the population. Paradoxically, even the main victims of police violence—the working classes—support some of its forms. Given this widespread approval, it is not surprising that the majority of the population are hostile to the notion of human rights and to campaigns launched by human rights groups to enforce a rule of law that respects individual rights. Elsewhere, Caldeira (1991) has analyzed this hostility and the failure of human rights campaigns to deal with it adequately. The point we wish to suggest here is that the population's support for police violence indicates the existence not only of an institutional dysfunction, but also of a pervasive cultural pattern that associates order and authority with the use of violence, and that, in turn, contributes to the delegitimation of the justice system and the rule of law.<sup>15</sup>

This cultural identification generates a whole series of ambiguous and confusing practices because most Brazilians—particularly poor and/or black ones—also fear the police.<sup>16</sup> Most poor people have experienced police mistreatment and abuse, and their narratives about them are full of indignation. On the one hand, they consider that the police routinely mistake “workers” for “criminals” (these two being opposed local categories) and are therefore violent with them. On the other, they believe that the police are soft with real criminals, who can bribe them, but hard with honest and poor workers, who cannot. In this triangular relation, people tend to express a confusion among all vertices: the police treat workers as criminals, workers view the police as corrupt, and in some cases workers even consider criminals as protecting them against the discrimination of the police. Moreover, when both rich and poor describe the police as workers, they mean to emphasize that they are not well prepared for their jobs, because they come from the lower classes and therefore lack the requisite education, leadership, and good judgment. Even when the poor themselves express it, such criticism of the police tends to be combined with prejudice against the poor.

In this context of confusion, in which police violence is praised and feared,

<sup>15</sup> This cultural pattern is quite complex. One of its main elements, which we cannot analyze here, is a certain dominant conception of the body that Caldeira (in press) calls the “unbounded body.” It is a concept with two complementary aspects. First, the unbounded body is one around which there are no clear boundaries of separation and avoidance, a body that is permeable and open to intervention, and that can and even should be manipulated by others. Second, the unbounded body is unprotected by individual rights and indeed results historically from the lack of their enforcement. Thus, in Brazil, where the judicial system is openly discredited, the body (and the person) are generally not protected by a set of rights that bind it, in the sense of establishing barriers and setting limits to interference, intervention, or abuse by others. In Brazil, the unbounded body is evident not only at Carnival, but also in the extraordinarily high rates of caesarean births, cosmetic surgery, and physical punishment of children by parents.

<sup>16</sup> This discussion about the population's view of the police and the justice system is based on research conducted by Teresa Caldeira among residents of all social classes in São Paulo. The complete study is presented in Caldeira (in press: Part II).

desired and distrusted, people do not easily associate the police with the rule of law. The synecdoche “Here comes the law,” used to refer to the arrival of the police in American English does not exist in Brazilian Portuguese. The Brazilian identification is instead with “authority” and then with the abusive and often violent use of it. People do not consider the police in terms of law, rights, and citizenship—not to mention justice and fair treatment—but rather in terms of incompetence, corruption, injustice, and brutal force.

### *Judicial Discredit*

Caught in this combination of political democracy and violence, the vast majority of Brazilians are resigned to an undemocratic fate: they cannot rely on the institutions of state to secure their civil rights, either as positive protections or as negative immunities. Moreover, once their rights have been violated, it is equally unlikely for Brazilians to expect redress through the courts. For example, in April 1998, the state of Rio de Janeiro created a judicial ombudsman of the police (one internal to its organization) to judge citizen complaints against both civil and military police. In the first nine months of operation, this court received 1,586 complaints, including charges of torture, extortion, and abuse of authority. It decided on indictments in 20 percent of the cases and handed down convictions in 7 percent of them (112). The sentences carried various kinds of punishments, including prison, demotion, and warning. In fact, however, not a single convicted policeman remained in jail or was expelled from the police force.

This example is representative of judicial ineffectiveness: Brazilians perceive the judiciary as an institution “without teeth” in most cases, an incapacity which creates the belief that crime pays, that breaking the law goes unpunished, that citizens cannot enforce their legal rights, and that their legal disability allows criminals to act with impunity. It is not that people have no hope. Their willingness to try new inventions like the police ombudsman belie such a possibility. Nor is it that there are not adequate laws on the books. It is rather that the courts and the police cannot make the law “stick.” Just as the police do not represent the law-as-right for most people, the judiciary is so remote as a reliable resource that many residents of São Paulo did not even mention it in our interviews about violence and crime. When they did respond to a specific question about the judiciary, their reply was most often some version of “It’s a joke!” Even for educated Brazilians the judiciary is a closed, conservative, enigmatic institution, protected by practically impenetrable bureaucratic formalities and fiercely defended corporate privileges. Beyond a very narrow professional circle, remarkably little is known about its personnel and organization. Nationally, about seventy-two percent of all Brazilians involved in criminal conflicts do not use the justice system to resolve their problems, according to data gathered in 1988 (PNAD statistics, cited in Adorno 1994:136). When conflicts occur, people frequently use the phrase “Go look for your rights” (*Vai*

*procurar os seus direitos*). This phrase originated in the field of labor law, where it means that although rights exist, they are hard to realize without much struggle (typically against bureaucracy). It can also be used in a more cynical tone by someone accused of an offense. In such cases, it means that even if the accuser has rights, he or she will never realize them through the justice system. The message is to forget the law and either accept what happened or try for an extrajudicial resolution.

In the discussion that follows, we want to emphasize that our focus is on the judicial protection of the civil component of citizenship, especially on those civil rights concerned with life and liberty and effected by urban violence. In some other areas of law there have been hopeful changes in recent years. For example, the Public Ministry has developed into an proactive and sometimes effective prosecutorial institution, charged with defending the public interest.<sup>17</sup> In 1990, a national consumer protection code established effective consumer rights and continues to support their enforcement through special “pro-consumer” offices that receive and evaluate complaints in most cities.<sup>18</sup> In addition, in 1998, both federal and several state legislatures instituted parliamentary investigative committees (CPIs) on drug trafficking and organized crime, with broad powers to subpoena witnesses, review bank and telephone accounts, and issue warrants of arrest. Although in many cases the courts have voided the arrests for lack of sufficient evidence, the CPIs have nevertheless succeeded in leading an offensive against organized crime, based on judicial-like public hearings that generate much media coverage and public support. Moreover, the federal legislature opened a CPI to investigate the judiciary itself for various kinds of corruption, with the ultimate objective of formulating a comprehensive reform of the courts. Needless to say, the judiciary rebelled. Many of the highest judges simply refused to testify or cooperate. Nevertheless, after only a few months of operation, the CPI uncovered several cases of stupendous corruption, giving it public legitimacy that the judiciary could not deny. Finally, we wish to recognize that there are many honest, dedicated, and effective judges and prosecutors. They often wage what amount to heroic struggles against entrenched corporate interests and archaic legal practices and cultures that have little to do with a democratic project of justice.

Although police abuse has received considerable attention in the evaluation of Brazil’s democratization, the judiciary’s failure to achieve to a democratic rule of law has received comparatively little consideration. However, the judiciary’s prevailing inability to secure and communicate a sense of effective justice, fair and timely treatment, and reasonable access for all Brazilians not only

<sup>17</sup> Although there are to date few books devoted to the development and significance of the Public Ministry, see the volume edited by Vigliar and Macedo Júnior (1999) for a recent discussion.

<sup>18</sup> On consumer protection, see Lopes (1992) and Macedo Jr. (1998). Published by the Instituto Brasileiro de Política e Direito do Consumidor, the *Revista do Consumidor* provides consumer advocates with case studies, jurisprudence, analysis of judgments, and debates.

renders it an isolated and even irrelevant institution for most people: such failures also cripple Brazilian democracy with an undemocratic rule of law. As we discuss later, this impairment has not been well addressed, because most studies of democratization assume that political democracy automatically or necessarily produces a democratic rule of law. They presuppose that the rule of law is, by definition, democratic, without establishing what the rule of law is, and what would make it democratic.

In addition to ineffectiveness, isolation, and formalism, Brazilians view the judicial system as profoundly class-biased. Although most, if not all, judicial systems in the world better serve the rich, the bias in Brazil is particularly egregious because the overwhelming majority of Brazilians are poor. For the Brazilian rich, the courts, when needed, have been a reliable means of manipulation—especially because their staggering bureaucratic complexities tie up conflicts in formal complication to the point of exhaustion and/or extra-judicial solution (see Holston 1991). For the poor, however, the judiciary has historically been little more than a source of humiliation.<sup>19</sup> This abusive rule of law embodies a double discrimination that is a “rule of thumb” in Brazil: the poor suffer criminal sanctions from which the rich are generally immune, while the rich enjoy access to private law (civil and commercial) from which the poor are systematically excluded. This double bias pollutes the entire field of law, discrediting the judiciary and the law generally as a means to justice. Thus, the courts do not provide a genuine forum within which contemporary social conflicts can be engaged with a sense of fairness and equality befitting a democracy. The courts remain especially ineffective in arbitrating social relations in ways that would impose sanctions on the offenses of the powerful and protect citizens from abuse by the state and its agents. These incapacities produce generalized expectations of either impunity or abuse from the justice system.

Confirmations of these expectations abound in every area. Consider a few examples. Between 1965 and 1990, the Americas Watch Committee (1991) has registered the murder of 1,681 rural workers. Of these cases, there have been only twenty-six trials and fifteen convictions. It is, moreover, uncertain, whether any of those convicted have remained in jail for any length of time. The convicted murderers of rural labor leader Chico Mendes are a case in point. The conclusion is certain: hired guns murder with impunity in rural land and labor conflicts. In the case of child labor, the constitution outlaws the employment of those younger than fourteen years of age. Yet, the 1991 national census shows that there are more than three million children below fourteen employed in the formal and informal economy. Conclusion: the legislature makes laws that the courts cannot or will not enforce, employers operate with impunity in blatant violation of the law, and workers are abused. With regard to urban crime, of all incidents reported by the civil police for the municipality of São

<sup>19</sup> The one exception for the working poor is labor tribunals for peculiar historical reasons (see Santos 1979).

Paulo in 1993 (389,178 *boletins de ocorrência*), only 20.4 percent resulted in the type of police fact-finding proceedings (*inquéritos instaurados*) necessary for judicial action of any sort. For the last decade, that rate has varied between seventeen and twenty-one percent. In 1993, for crimes of murder, it was a low 73.8 percent, though for drug dealing, it reached 94.4 percent (Seade, unpublished data). Although we do not have data on the number of conflicts that actually go to trial, it is widely thought to be low. Moreover, as we have seen, conviction does not necessarily mean punishment.<sup>20</sup> In the area of white-collar economic crime, the federal government closed several large private banks, such as the Banco Econômico and the Banco Nacional, in the last few years for executive fraud, illicit enrichment, and other crimes. However, not one executive of these banks has ever been brought to trial, much less put in jail. The government bailed out the banks and repaid all depositors so that even investors who made fortunes through risky ventures (such as those who later defaulted on loans at exorbitant rates) did not have to assume responsibility. In these cases and so many others, *de facto* impunity is the result of the rule of law under Brazil's political democracy.

In evaluating the judiciary, it is also important to consider that the courts have a special responsibility in every democracy to protect citizens from the abuses of arbitrary executive action. Such protection is surely among the foundational and legitimating virtues of democracy. One of the most important barriers to this abuse is the constitutional requirement that the state may deprive an individual of basic liberties (such as life, assembly, and property) only on the basis of law and its due process. Some form of this principle of legality appears as a fundamental guarantee in every democratic constitution. However, the *application* of this principle is the greater hallmark of democracy. Historically, consolidated democracies have depended on the judiciary—especially the high court—to interpret the norms of legality so that they apply to real social problems in ways congruent with their intent. Most important, this application has depended on the judicial interpretation of liberty. In the development of Western democracy, this interpretation has entailed an expansion of the category of liberty to include not only freedom of contract and other classically liberal economic liberties, but also, and more fundamentally, the civil liberties of speech, assembly, personal security, and so forth, consistent with due process. To give constitutional norms utility and relevance, the courts must grapple with the question of what sort of procedure due process requires, and what liberty entails.<sup>21</sup>

<sup>20</sup> In addition, Sérgio Adorno found that both conviction and sentencing patterns are affected by racial biases. In his study of 297 criminal jury trials in São Paulo, he observed a conviction rate of three blacks to one white (Adorno 1994:140).

<sup>21</sup> As David P. Currie (1988) shows in his study of the American constitution, for example, the U.S. Supreme Court has tended to equate due process with fairness, going beyond common law procedure to meet that standard. It has interpreted liberty broadly to give civil rights not only the protection of due process but also to give "First Amendment liberties a 'preferred position' enti-

In Brazil, every democratic constitution since the first Republican Charter of 1891 has contained adequate provisions for due process and the fundamental rights of life, liberty, and property—provisions directly inspired, in fact, by the U.S. Constitution. In reality, however, Brazilian courts have consistently protected only property, and only certain kinds at that.<sup>22</sup> When tested, they have not given life and liberty rigorous judicial protection against the infringements of the state. It is not just that citizens have not used the high court to protect their non-economic constitutional rights. It is also that the Brazilian courts do not invite such use because they do not have a tradition of defending them. Rather than forbidding the state to deprive persons of their rights, the courts tend to acquiesce to that deprivation when they consider it at all—as the failed challenges to government censorship, illegal detention, or coerced confessions, for example, illustrate. Civil rights cases often languish for years with no resolution until they become moot. What has been almost completely missing from Brazil's judicial tradition is the sense that courts protect the rights of citizenship and the principle of legality, even though these norms have been written into every democratic constitution.

What we want to emphasize in conclusion are the consequences of judicial discredit for the democratic rule of law: not only are civil rights generally unenforced within the justice system, but they are also skewed by the double bias of impunity and exclusion discussed earlier. From the perspective of most citizens, therefore, the right to justice as a key civil right and matter of law lacks both institutional consolidation and personal practice. For example, due to this discredit, the new social movements of the 1970s and 1980s, which did so much to generate a new conception of Brazilian citizenship, ignored the courts as an arena of redress. These movements were unprecedented in their creation of new kinds of rights outside the normative and institutional definitions of the state and its legal codes. In particular, these rights addressed new collective and personal spaces of daily life in the city, especially in the residential neighborhoods of the peripheries. As these “rights to the city” expanded citizenship to new social bases, they also created new sources of citizenship rights. Yet, until very recently, these social movements bypassed the judiciary in their struggles. Instead, they have mostly worked with models of rights that tend to limit the concept of citizenship to political participation and thus political rights on the one hand, and to insertion into the system of government services and thus socio-

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ting them to greater judicial protection than ordinary economic liberties” (Currie 1988:49). Thus, to ensure a fair trial, the U.S. Supreme Court decided in 1932 that “due process entitles indigent defendant[s] to counsel at state expense though common law did not” (Currie 1988:124).

<sup>22</sup> For example, in a case of land dispute involving millions of poor families in the periphery of São Paulo, the Supreme Federal Tribunal was petitioned in 1957 (Ação Cível Originária 164-A) to sort out the property interests of the federal government, the state of São Paulo, and various private parties. By law, the Court has to hear all cases brought before it. Although this particular case involves constitutional issues that directly affect the well-being of countless citizens, it has simply languished in the court system without decision for more than forty years (see Holston 1991).

economic rights on the other. With some exceptions (such as minority and feminist movements), they have largely disregarded the courts as means of change and focused instead on securing entitlements directly from the executive and, secondarily, from the legislative institutions of government.

From the perspective of the courts, the neglect of the right of all Brazilian citizens to justice and civil rights means that the judiciary has been very slow to confront the transformations of contemporary society. Of the branches of government, it has remained the most resistant to democratic transformation. As a result, the development of Brazilian citizenship remains strikingly disjunctive, almost a decade after the successful institution of political democracy.

### *The Privatization of Justice and Security*

One of the most important consequences of judicial discredit is the privatization of justice and security.<sup>23</sup> The combination of fear of the police and distrust of the justice system leaves people feeling vulnerable. Some resign themselves to this feeling; others seek alternatives. These alternatives are usually outside the boundaries of legality and are of two types. In one alternative, people consider reacting privately and taking the law into their own hands. It is important to add that such vigilantism is usually an alternative more at the level of discourse than of practice, although lynchings have, in fact, increased considerably in the 1990s. People express their discontent by defending personal vengeance, which does not mean that they act vengefully, at least not as frequently and vehemently as they defend such responses. In the other alternative, people support the use of deadly force against alleged criminals. Both are paradoxical reactions to a delegitimated justice system, for people usually want the police—whom they fear and accuse of being violent—to be violent “toward the side that deserves it,” even though they know that the police routinely aggrive innocent people. Their intent is nevertheless clear: they want criminals killed. Given their distrust of the justice system, summary execution by the police is the only guaranteed way to remove the threat of crime. But the paradox remains: by supporting vigilantism and violent police methods, people both propagate violence and greatly increase their own chances of becoming its victims.

What we call the privatization of justice and security does not include the revenge killings that mark organized crime in Brazil, including those related to drug trafficking in the *favelas* (squatter shanty towns). Although such killings increase the annual murder rate considerably, and although they belong to the same field of violence as private security and justice, they are distinct from the protective and reactive measures considered by citizens who are victims of fear and crime. Some writers have called these organized crime killings a system of “alternative justice.” They do so to emphasize that these killings have become

<sup>23</sup> See Caldeira (in press) for a fuller discussion of this problem.

dominant in some favelas, organizing the residents' everyday lives on the basis of terror and filling the void left by the absence of state institutions, especially the justice system. We think that to consider them acts of justice confuses the important analytic distinctions between revenge, self-help, crime, and law. It also implies a misapplication of the notion of plural legal spheres to acts that in our view properly belong to the field of crime and that are recognized as such even by the *favelados* who live where they occur. To describe them as acts of alternative justice both exoticizes and depoliticizes them by removing them from the sphere of a failed national justice system.

Our research indicates that Brazilians of all classes generally think that it is too risky to take justice into their own hands because doing so may lead to a lot of trouble, especially from a moral point of view. However, they are more likely to argue that if this kind of justice were carried out by the "right" institution, such as a police force that defends innocent people, it would constitute an effective solution to crime. This type of reasoning leads people from all classes to support summary executions by the police, and to evaluate police violence positively. It is in this context that ROTA and the Esquadrão da Morte are widely admired. Poor people see these two organizations as "tough" with criminals and not corrupt. Moreover, they tend to believe that these organizations kill "the right people"—even against much evidence to the contrary—and therefore carry out justice. Poor people perceive these organizations as more efficient than a justice system in which the death penalty does not exist and the judicial process takes forever. This same reasoning leads them to admire and occasionally use vigilantes, called *justiceiros* (literally, justice makers). In an interview conducted by Caldeira, a young man who lives in a working-class neighborhood said the following about a famous police death squad:

I wish the Esquadrão da Morte still existed. The Esquadrão da Morte is the police that only kills; the Esquadrão da Morte is justice done by one's own hands. I think it should still exist. It's necessary to take justice into one's own hands, but the people who should do this should be the police, the authorities themselves, not us. Why should we get a guy and kill him? What do we pay taxes for? For this, to be protected. . . . It's not worth it for us to lynch. They should have the right, they have the duty, because we pay taxes for this. . . . The law must be this one: if you kill, you die.

People from the upper classes also defend summary executions, and may use exactly the same arguments about the failure of the justice system and the need to "kill the right person," to "solve the problem definitively." However, in a country with huge social inequalities such as Brazil, the way in which justice does not work for the upper classes is not the same as for the working classes. In fact, for the upper classes, the non-functioning of the justice system may be just another privilege.<sup>24</sup> In contrast to the working classes—who are frequent victims of police violence, constantly run the risk of being mistaken for crimi-

<sup>24</sup> See Holston (1991) for an analysis of this perverse "privilege-at-law."

nals, and suffer accordingly—the upper classes are rarely victims of police abuse or of the justice system. Rather, they have the luxury of choosing to disrespect the law. They can rely on their perception that the law does not work, or works only for them, and they have the privilege of bypassing or manipulating it. As an upper-class woman told Caldeira with considerable irony during an interview:

Normally, laws are enforced against the lower classes, the classes of small purchasing power. For them, the laws are well “respected.” They make them follow the law, obey the law. We from the middle class, from the upper class, we don’t need to respect the law because we pay for it with money. I don’t think this is just.

Thus, the everyday experience of violence and of the institutions of law leads to a pervasive and comprehensive delegitimation of the rule of law among all social classes. Poorer people are victims of arbitrariness, violence, and injustices committed by agents of the law. As a result, they feel that they are left without alternatives inside the law. In contrast, the rich find it in their best interest to take advantage of the failures of legal institutions. They have the privilege of being able to choose to ignore the law and do what they think is more appropriate. What is similar for both groups, however, is that their reactions tend to be framed in private and frequently illegal terms. In both cases, the rule of law is discredited.

If we consider the performance of the police and the justice system in a context of growing rates of violent crime, it is not difficult to understand why São Paulo’s residents increasingly adopt private measures to protect themselves and deal with violence. Because these measures are private and often violent, they can only contribute further to the delegitimation of the rule of law and the reproduction of violence. Moreover, given the structure of inequality that characterizes Brazilian society, such private measures emphasize social discrimination.

Private measures to deal with crime and to carry out justice are of various sorts. The most visible measures are the ubiquitous walls and bars that people put up in front of their houses and apartment buildings. These barriers are dramatically changing the landscape of Brazilian big cities, as well as the social interactions of their public spaces. In these cities of walls, residents are very suspicious and change their habits to avoid interactions in public, especially with people perceived as being different. The walls not only separate residences but also create semi-public enclaves, such as shopping centers and office complexes, where entrances can be controlled and social homogeneity guaranteed. In this sense, fear of crime legitimates practices of segregation and considerably changes the character of public space. In a society where people from different social groups tend not to interact or even encounter each other in public, the chances for propagating democratic practices are surely diminished.<sup>25</sup>

The walls do not stand alone. They are part of a complex of measures, in-

<sup>25</sup> See Caldeira (1999) for a discussion of how the proliferation of fortified enclaves transforms the character of public life, both in São Paulo and in Los Angeles.

cluding various technologies of security, from video cameras to identification of visitors, from electronic fences to all kinds of alarms. These measures also include the hiring of doormen and armed private guards. As in many other countries, such practices help multiply the profits of the rapidly growing private security industry. This industry has various faces in Brazil, as it adapts to serve different social classes. At some levels it mixes with the illegal actions of the police, as a significant number of private guards are off-duty policemen, frequently working with police guns. For the working classes, however, these organized private services and technologies are mostly unaffordable. At times, the poor may benefit from the vigilance of *justiceiros* hired by a local merchant, but they are also just as likely to suffer the adverse consequences.

Collectively, these measures cause deep transformations in the way people carry on their daily affairs, interact with others, and move around the city. It is possible to observe new gestures, new body postures, and new instinctive reactions of suspicion and distancing. We might call this a new culture of fear, using an expression that was used for many years to refer to everyday life under authoritarian regimes. In the present Brazilian case, however, there is no political repression, and police violence is routine and uncensored news. Thus, this new culture of fear takes shape in the context of a democratic political system with a free political organization and press. Its development is contemporary with the transition to democracy.

A common argument in discussions about violence and democratic consolidation in Brazil is that the concurrence of elements we have described—including the abuses of the police, the delegitimation of the justice system, the private measures of justice and security, the generalized disrespect for law, the culture of fear, and the related transformations of public space—constitutes an authoritarian enclave or a survival of authoritarian rule in democracy. Although this concurrence certainly represents an obstacle to the consolidation of a democratic society in Brazil, we want to call attention to its novelty as a post-democratization phenomenon, and caution against blaming the (military) past. The contemporary violence is new not only because of its unprecedented level, but also because of its publicness, disregard for ideological rhetoric, negation of the notions of a common and just future for all Brazilians, and its perverse association with the expansion of political citizenship and related notions of agency. The contemporary violence is not an invention of authoritarian rulers, but the perverse development of a deeply unequal society in which the expansion of some rights occurred simultaneously with the abandonment of modern ideas of development and progress by many Brazilians of all classes, undermining the sense of a common project for the future (see Caldeira, in press, Chapter 2).

#### DISJUNCTIVE DEMOCRACY

The coexistence in Brazil of political democracy and violence against citizens exemplifies a particular but common kind of democratic disjunction in which

the civil component of citizenship is systematically undermined and significantly weaker than other components. Thus, Brazilians vote in generally free and fair elections, have their basic rights embodied as constitutional principles, and benefit from a minimum of socio-economic rights, well-grounded in public demands. However, the vast majority cannot rely on the institutions of state—particularly on the courts and the police—to respect or guarantee their individual rights, arbitrate their conflicts justly, or stem escalating violence legally. In this sense, the killing of “marginals” described earlier is an extreme expression in Brazilian society of the everyday marginalization of the anonymous individual as citizen and bearer of civil rights. This kind of disjunctive democratization inevitably brings new forms of violence and injustice. These are forms specific to a democracy with a discredited civil sphere. As we have shown, when the civil component is discredited, social groups at all levels come to support the privatization of both justice and security, and illegal or extralegal measures of control by state institutions, particularly the police.

In effect, the development of Brazilian citizenship under political democracy has been very uneven, in a number of significant ways. On the one hand, its civil component—including, civil rights, access to justice, due process, and the application of law—is unevenly and irregularly distributed among Brazilian citizens. On the other, although systematically violated, the civil sphere of citizenship has not been a prominent concern for many of the principal forces of democratization in Brazil. These forces include the new social movements, labor unions, political parties, and universities, which remain focused on other aspects of citizenship and democracy, especially the political and socio-economic. Human rights organizations, the women’s movement, and various minority-rights groups (such as those for gays and blacks) do defend civil concerns. But they do not defend these as common rights of all citizens, of every man and woman, rich and poor, regardless of race or sexual orientation. Rather, Brazilians very often perceive these groups as defending the rights of minorities, “marginals,” and special interests—to such an extent, for example, that many oppose human rights as “privileges for bandits,” as we discussed earlier. Thus, although people complain bitterly about everyday violence and injustice, Brazilian democracy largely ignores the civil aspect of citizenship as a fundamental concern for all Brazilians. To use Marshall’s (1977) typology, this disjunction means that in comparison with social and political rights, civil rights have not been effectively woven into the fabric of Brazilian citizenship.

It is particularly difficult to analyze why civil rights are so impracticable and disregarded in Brazil without being historically reductive or culturally simplistic. It requires understanding an intersection of cultural formulations about law, citizenship, and individual autonomy that is too complex to explore here. As we stated earlier, our concern in this essay is not to establish underlying historical causalities. Rather, our focus is on both the lived and theoretical significance

of the disjunction in Brazilian political democracy where civil rights are not experienced, perceived, or appreciated as common rights of citizenship.

How can we account theoretically for a democracy in which the civil component of citizenship is systematically violated? What sense does it make to call this Brazil a democracy? It only does so if we recognize that these combinations of contradictory developments reveal a fundamental characteristic of democratization itself—namely, that it is normally disjunctive. By calling democracy disjunctive, we want to emphasize that it comprises processes in the institutionalization, practice, and meaning of citizenship that are never uniform or homogeneous. Rather, they are normally uneven, unbalanced, irregular, heterogeneous, arrhythmic, and indeed contradictory. The concept of disjunctive democracy stresses, therefore, that at any one moment citizenship may expand in one area of rights as it contracts in another. The concept also means that democracy's distribution and depth among a population of citizens in a given political space are uneven. It is in this lack of balance and unevenness that contemporary Brazil exemplifies a disjunction typical of many emerging democracies.<sup>26</sup>

The notion of disjunction we suggest is different from, but complementary to several other considerations of temporal and spatial issues in the study of democratization. For example, in the work of Barrington Moore (1966), Eric Nordlinger (1971), and Leonard Binder et al. (1971), arguments about timing focus on the sequences of various crises of national identity, state formation, modernization, and social structure as historical prerequisites of democracy. Central to other studies of political development is the problem of the penetration of the state as a central authority throughout a society and territory (for example, Joseph LaPalombara's contribution to Binder et al.). Guillermo O'Donnell and Philippe Schmitter's (1986) seminal work considers regime transition as an unfolding historical process of analytically distinct sequences, patterns, and stages. In addition, dependency theory analyzes the importance of both the timing and the spatial referents of a region's insertion into the international market as factors that relate capitalist development and democratization on a world scale. All of these studies consider time and space as dimensions of change between different kinds of political regimes, systems, or stages, which they treat as more or less comprehensive wholes.

By contrast, our notion of disjunction is specifically internal to democracy. It emphasizes that democracy entails a complexity of processes and institutions of citizenship, always becoming and unbecoming, often confusing and unstable, rather than a set stage of institutions, actors, social structures, and cultural values. The notion of disjunction suggests that although there are rules that might define an ideal democracy, such a regime has never existed. Rather, there are always various and often contradictory sets of rules and games in play in any democracy, at the same time and in the same space, some of which may be

<sup>26</sup> The concept of disjunctive democracy is developed further in Holston (forthcoming).

considerably less democratic than others. This theory of disjunction has a number of conceptual requisites, some of which we now consider in terms of the extension of democracy and citizenship beyond the political, the rule of law, and the question of alternative democratic formations.

*The Extension of Democracy beyond the Political*

The theory of disjunctive democracy depends on one's thinking of both modern democracy and citizenship as extending beyond the political to encompass the social, economic, and cultural spheres of life. Given the coincidence of democracy and violence in new democracies such as Brazil, it seems evident to us that it is only as a fraud or as a severely impaired regime that democracy can stand alone—either conceptually or actually—as a kind of political method in the context of social, economic, and cultural conditions hostile to democratic citizenship. If that is so, then democracy has to be considered as much a qualification of society as of politics. This is not to adopt a maximal definition of democracy, or to make a particular political culture its precondition. Rather, it is to insist that the extension of democracy to the social sphere is as central to the concept as its extension to the political sphere. It is to contend that both of these colonizations—of society by the state and the state by society—constitute the contemporary and enabling form of democratic development. Our argument derives from Bobbio's (1989) observations about the modern extension of democracy from the political to the social. With the criticisms already suggested, it also develops Marshall's (1977) analysis of the intersection of class and citizenship and the relations between what he defined as the three elements of citizenship: namely, the political, civil, and socioeconomic. Most modern literature on citizenship already incorporates this broader conception of citizenship.<sup>27</sup> But, curiously, the literature on democratization mostly considers democracy in terms of political rights and related electoral institutions and processes, as if the other arenas of citizenship were disconnected from them.

In our view, democracy and citizenship are necessarily and inherently connected in a much fuller sense—for the democratic state exists only through the political participation of citizens in both its organization and its articulation with civil society, and citizenship exists only through the state's application of the principle of legality and its defense of the equality, liberty, and dignity of citizens in both their public and private lives. This inherent connection means that democracy needs to be evaluated in terms of the realization of citizenship in the full sense of the term. By that, we mean not just political citizenship—i.e., electoral performance and enabling institutions of government—but also citizenship's substantive social, cultural, and economic conditions.

<sup>27</sup> Some recent work on citizenship considers its extension to the cultural as well. For example, see Taylor (1992) and Kymlicka (1997). In Canada and throughout Latin America—especially in the Andean countries and Mexico—many questions of indigenous rights, sovereignty, and legal pluralism turn on issues of cultural citizenship.

To some, the argument that political democracy is not enough both in theory and in fact may seem obvious. Indeed, one of the most astute analysts of contemporary democracy, Guillermo O'Donnell (1992:49), writes that democratic consolidation requires "the extension of similarly democratic . . . relations into other [not just political] spheres of social life." However, we would suggest that the means and modes of this extension (and frequent retraction), and their consequences for the theory of democracy, remain inadequately investigated or conceptualized. This is especially the case because most contemporary observers use a political definition of democracy that neglects to consider that the social conditions of citizenship are constitutive of its political possibilities. Such a definition excludes, therefore, democracy's extension to the social sphere out of hand. Furthermore, we argue that the democratization of state and society are mutually defining in a consolidated democracy; that is, democratic extensions between state and society are reciprocal. In an important sense, consolidation means that the state does not monopolize, in fact or claim, the sources of democracy—or of citizenship or law, for that matter.

The dissociation of democracy from society and its conditions of citizenship derives directly from the continued reign—at least in American political science—of Joseph Schumpeter's definition of democracy over the study of both new and established democracies: "The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote" (1947:269).<sup>28</sup> Our intention here is not to become embroiled in debates about competing definitions of "democratic-ness" (see Karl 1990 for an enlightening discussion). As Bobbio has wryly remarked, "Every regime is democratic according to the meaning of democracy presumed by its defendants and undemocratic in the sense upheld by its detractors" (1989:158). Rather, our intention is to suggest why the study of the civil component of citizenship, with its attributes of law and justice, does not seem to fit the predominant conceptualization of democracy; or, put in another way, to suggest that current approaches generally fail to relate their conceptions of democracy to the real extent and exercise of citizenship and that this dissociation is a serious problem.

The Schumpeterian definition privileges political democracy and the procedural minimums necessary to achieve it. When interpreted narrowly, it holds that democracy is fundamentally a means of governance, a method or technical instrument of politics, and democratization, therefore, is primarily a question of establishing adequate governmental institutions. In this minimalist version, the modern state is the locus of the democratic project. Thus, the narrow

<sup>28</sup> As Samuel Huntington (1991:6–7) observes, "By the 1970s the debate was over, and Schumpeter had won. Theorists . . . concluded that only [Schumpeter's procedural definition of democracy] provided the analytical precision and empirical referents that make the concept a useful one. Sweeping discussions of democracy in terms of normative theory sharply declined, at least in American scholarly discussions."

political definition of democracy focuses on elections and thereby eliminates all concern for the exercise of anything other than some aspects of political citizenship. For the same reason, even though the political definition emphasizes institutions, it does not consider the effectiveness of the justice system or the quality of the rule of law, even in the latter's more restrictive form as state law. Karl (1986) has convincingly criticized this view as "electoralism" and argued that Schumpeter himself would not have supported it, because he considered civil rights necessary for the operation of democracy.

Many current studies agree with Karl and go beyond mere electoral competition to include in their definitions of democracy guarantees for civil liberties through the rule of law, as well as two forms of accountability: namely, that of the governors to the governed and of the military to the civilian. For example, O'Donnell and Schmitter (1986:8) defined a broader democratic minimum as "secret balloting, universal adult suffrage, regular elections, partisan competition, associational recognition and access, and executive accountability." Similarly, for her "middle-range specification" (that is, neither minimal nor maximal), Karl (1990:2) identifies contestation, participation, and accountability of rulers, and adds civilian control over the military. Curiously, neither definition specifies the rule of law or civil rights. Although accountability, participation, and elections presume fundamental civil rights, there are many other rights, such as the right to justice, that are not so obviously included. Moreover, it is a mistake in our view to presume a democratic rule of law when the conditions of political democracy have been met. Furthermore, although this broader Schumpeterian perspective claims to include the reach of the state into civil society, the extension has to remain of secondary importance. It is so limited because it is grounded in the classic dichotomy between state and civil society (and associated divides, such as public and private) that locates the realm of the political in the former and distinguishes that realm from the social relations of the latter. Thus, if democracy is narrowly conceived as a political method, this dichotomization means that it cannot *also* be a condition of society.

The deeper dissociation of democracy from society produced by this political definition means that many studies—including those by governmental and funding agencies—examine only the political and formal components of citizenship. When justified in the literature, the principal reason given for avoiding the other, more substantive aspects is commonly the claim that to study them—and therefore the real texture of social life—would be to open the door to ideological and evidentiary confusion. Thus, the social complexity in which every democratic government must survive and with which it must come to terms to act democratically falls outside the definitional scope. To make, as we suggest, the legal, ethical, and performative dimensions of citizenship fundamental to the conception of democracy seems to make it difficult for many observers "to find any actual democracies to study" (Karl 1990:2) or "to assign a reasonable closure to the second transition process" (Valenzuela 1992:60),

because in these terms no democracy is really consolidated. But this apparent difficulty is an artifact of a classificatory scheme that insists on homogeneous categories and terminal processes. If we accept that even consolidated democracies are disjunctive then the difficulty evaporates, and we are compelled to study the full experience of democratic citizenship to understand the development of democracy.

This full experience is so unbalanced and heterogeneous in so many contemporary democracies that its traditional political definition in terms of membership in the nation-state is as unconvincing theoretically as it is unfaithful to the new empirical conditions. Divided from social considerations, the political definition generally treats citizenship in terms of abstract and uniform rights of membership in the nation-state. This treatment assumes an even distribution of these rights across national space and society. However, we know that actual democracies behave very differently. We know that there are vast, substantive differences of citizenship between social groups and regions at subnational and transnational levels, even when participatory political rights are nationally effective. If formal citizenship refers to membership in the territorial nation-state, and substantive citizenship to the array of political, civil, socio-economic, and cultural rights people possess and exercise, then much of the turmoil in contemporary democracies (both emerging and established) derives from the disjunctive relation between the formal and the substantive.<sup>29</sup> As many observers are beginning to realize, the condition of formal membership without much substantive citizenship is characteristic of many of the societies that have experienced recent transitions to democracy in Latin America, Asia, Eastern Europe, and Africa.

Focusing on such characteristics, O'Donnell (1993) makes a similar argument in his recent discussions of "low-intensity citizenship" in the "brown areas of new democracies." Moreover, he stresses the importance of an effective rule of law and the state's legal responsibility to extend and enforce citizenship rights universally. The failure of the state to do so curtails citizenship and compromises democracy. Although he maintains a political definition of democracy, O'Donnell's analysis is close to our own understanding of democracy's disjunctive nature and the importance of studying it from this perspective. As he argues "Even a political definition of democracy (such as that recommended by most contemporary authors, and to which I adhere) should not neglect posing the question of the extent to which citizenship is really exercised in a given country" (1993:1361). We would only disagree with his limiting the concept of low-intensity citizenship "specifically to the political sphere, to the *political* theory of political democracy"—a limitation that leads him to the dubious argument that "the denial of liberal rights to (mostly but not exclusively) the poor

<sup>29</sup> For further analysis of the disjunction between the formal and substantive aspects of citizenship, see Holston and Appadurai (1999).

or otherwise deprived sectors is analytically distinct from, and bears no necessary relation to various degrees of social and economic democratization" (1993:1361). Yet, as O'Donnell admits in the same discussion, the two "go hand in hand" empirically. Hence, the argument of "no necessary relation" seems driven more by the need to maintain the political definition than the need to account better for the nature of real democracies.

If we agree that contemporary democracies are significantly disjunctive in the political, civil, social, and cultural aspects of citizenship, and that such disjunctions can delegitimize political democracy, then it seems right to insist that the extension of democracy to the social sphere is as central to the concept of democracy as its extension to the political. It seems right to argue that these extensions are reciprocal and mutually defining. It then becomes unnecessary to argue that democracy's disjunctions are incidental or extraneous to the theory.

### *The Democratic Rule of Law*

One of the consequences of maintaining the political definition of democracy is that the meaning of the rule of law is seldom investigated in studies of democratization, and the crucial question of the performance of the justice system seldom posed. Rather, it is usually assumed that because the rule of law is a fundament of democracy, the institutionalization of political democracy will produce a rule of law that is inherently democratic.<sup>30</sup> However, the study of electoral democracies like Brazil that are also uncivil indicates that the relation between democracy and the rule of law is far more uncertain. It shows the need to assess, rather than assume, this relation. In Brazil, there is no doubt that violence against citizens and disrespect for law have increased after the formal transition to democracy.

When we analyze the civil sphere of citizenship in terms of its legal, moral, and performative attributes, it becomes evident that the rights, institutions, and practices which give it substance require more than formal legislation or an independent legislature to become effective. Just as the institutionalization of democratic political rights does not by itself secure the integrity or development of a democracy's civil sphere, our analysis of violence in Brazil shows that civil rights do not depend only on legislatures to draft laws. More than executive and legislative initiatives, civil rights depend on the justice system to secure their realization. Although Marshall identified the importance of the courts in this regard, the justice system entails many more elements than he recognized, all of which are crucial to the realization of the civil sphere of citizenship. The justice system includes the courts with their bureaucracy and administration,

<sup>30</sup> Thus, it is very generally presumed that political democracies guarantee a greater respect for law and human dignity than their authoritarian predecessors. Indeed, in many Latin American countries, this supposition grounded political arguments for the replacement of dictatorship with democracy. When political democracy finally came, it was thus burdened with an expectation in this regard that it could not meet in many cases. As a result, many inaugural democratic governments at the national and local levels suffered disappointments and loss of prestige.

the bar, law schools, and the police (even though some of its divisions may be part of the executive branch of government), all organized in terms of the rule of law. Basic to these elements is the right to justice, the right to all other rights. Each in its own way, these various agents of the justice system establish a reciprocity between the power of law at their disposal and the capacity of people and institutions to act according to expectations about the rule of law and their right to justice.

In emphasizing this reciprocity, however, we do not mean to say that the rule of law as a scheme of rules, procedures, principles, and institutions necessarily legitimates or secures democracy. To the contrary, uncivil democracy demonstrates that the relation between rule of law and democracy is not a given. It must be assessed in specific cases, not assumed in general. This conclusion suggests three correlates. One is that, as we have seen, political democratization does not necessarily produce a rule of law centered on democratic considerations. The second is that the rule of law is not necessarily democratic. It may be necessary for full democracy, but it is not exclusive to it. We have only to think of England's constitutional monarchy, France's physiocratic despotism, Nazi Germany's legally constituted government, and South African apartheid to realize that the rule of law can coexist with non-democratic political forms, is not necessarily just, and can be focused on non-democratic concerns. Both of these correlations contradict common idealizations about democracy and the rule of law. The third correlate is that the kind of rule of law that *is* a prerequisite for democracy needs to be gauged, as we suggest below, to the concerns of democratic citizenship.

There are a number of ways to understand the rule of law that are useful in sorting out its relation to democracy. One can view it as an amalgamation over time of essential characteristics, as do many historians of law. If we examine the nine hundred-year German tradition of *Rechtsstaat*, it becomes evident that the ancient concept of a "government of law and not of men" embodying these characteristics does not have a democratic origin. It also becomes clear that the rule of law correlates in specific ways with various political forms, though it develops most often with democracy (see Skinner 1989 for this correlation).

However, one can also consider such an essentialized specification of the rule of law impossible, and even undesirable in both a theoretical and practical sense. One can try instead to give it an abstract theoretical account, as do legal theorists Ronald Dworkin and Cass R. Sunstein. From opposed perspectives, they both analyze the nature of the legal, and the reasoning peculiar to its rule. Thus Dworkin writes:

The law of a community on this account is the scheme of rights and responsibilities that meet [the following] complex standard: they license coercion because they flow from past [political] decisions of the right sort. They are therefore "legal" rights and responsibilities. This characterization of the concept of law sets out, in suitably airy form, what is sometimes called the "rule" of law (1986:93).

With very different theoretical intentions, Sunstein (1996:12) understands the rule of law as a combination of rules that limit “untrammelled discretion” and forms of discretion that limit rule-bound justice so as to “make space for particularistic forms of argument.”

Despite other differences, both Dworkin and Sunstein draw an important distinction between law and justice in characterizing the rule of law: a rule of law can be legal but not particularly just. Dworkin (1986:97–98) proposes that law establishes which rights justify using or withholding the coercive force of the state, while justice establishes the best theory or standard of rights. Thus, justice is a matter of a moral or political theory about the rightful measures of human conduct. Although Dworkin views theories of justice as “imposed by personal convictions,” we suggest that democracy offers a more compelling consideration of justice, if not a theory. Sunstein argues that

it cannot be said that a system complying with the rule of law must be just . . . To take one example, the fundamental problem with the system of apartheid in South Africa was emphatically not that it violated the rule of law. On the contrary, the basic features of apartheid could be made entirely consistent with the rule of law. Rules do not guarantee justice (1996:193).

If we cannot assume that a rule of law is democratic, or that political democracies have a democratic rule of law, then we have to investigate the extent to which a particular rule of law engages and realizes a project for democracy. Such a rule of law is necessary for full democratic citizenship, on which the legitimacy of democracy as both a political and a social project ultimately depends. This necessity is easy to show. We can imagine fair trials occurring under non-democratic regimes and unfair trials under democratic ones. However, we cannot imagine anything other than a sham democracy without fair trials. Therefore, a democracy must secure the legitimacy of law on its own terms of citizenship. If not, it becomes discredited.

What, then, does a democratic rule of law entail and how does a democracy secure it? These are immensely important and complex questions that we cannot adequately address here. Basically, we agree with Sunstein’s proposal that the best way to secure justice befitting a democracy is not to suppose that the rule of law is intrinsically just or democratic, but to reference it to criteria of justice forged in the democratic arenas of society. In asking how a legal system supports a well-functioning democracy and vice-versa we want to know how the system responds to considerations that favor democratic outcomes and processes. One way to learn this is by focusing on how a particular rule of law realizes the values of justice that are germane to democratic citizenship. We can reference what goes on in the legal system to such criteria and evaluate its performance. We want to propose three kinds of consideration for further study. First, we can determine whether the exercise of judicial and police authority is justifiable in terms of the powers and limits established in a democratic constitution. Second, we can analyze the performance of a legal system in relation to

those aspects of a particular democratic development that are weakest and least reliable. For example, we can evaluate how the judiciary reacts when fundamental civil rights are at stake, or when a disadvantaged minority or a politically vulnerable group is at risk. Finally, we can evaluate a rule of law in terms of the degree to which citizens participate in the justice system, and to which it is accountable to their oversight. The latter has been analyzed mostly in terms of civilian oversight of the police (see Chevigny, 1995). Accountability of the courts to citizens has not received comparable study, perhaps because it is often thought that adjudication ought to be protected from democratic influence. But the problems of uncivil democracy indicate that a measure of citizen participation in the judicial process and in the oversight of judges would both broaden access to justice and encourage the judiciary to respond more directly to democratic change. The means of such citizen participation include the jury system, alternative dispute resolution, the judicial appointment process, and the external review, election, and recall of judges.

Citizens of an electoral democracy with a democratic rule of law participate not only in free elections and various forms of political association, but also in a justice system in which they are confident of fair and equitable treatment, to which they have reasonable access, to which all are liable, which is accountable to their oversight in significant ways, and which regulates according to the due process of law not only their practices but also those of the state as a legally constituted and accountable agent of society. These five sorts of considerations—fairness, access, universality, accountability, and legality—characterize a democratic project for a rule of law. That a rule of law has never existed in such perfection does not lessen the importance of an approximation. That importance becomes apparent as soon as people perceive that their right to justice lacks institutional consolidation, above all in the courts. As we have seen, citizens of an electoral democracy without a democratic rule of law find themselves in a disastrous chain reaction: the justice system and those who defend it become discredited, impunity and violence prevail, and largely as a result, a culture of vigilantism, exceptionalism, and privatized power predominates. Uncivil democracy results.

### *Other Histories, Other Democracies*

If democracy with mass citizenship has been one of the hallmarks of Western modernity, its conceptualization has rarely considered violence among citizens as a characteristic, rather than episodic condition of its development. Instead, democratic theory in the West has generally proceeded as if the problem of internal violence had already been solved. That is, it assumes the pacification of societal violence through the development of a civilizing process in Norbert Elias's sense, the modern disciplines in Foucault's sense, or the modern nation-state that combines rule of law with the monopolization of the means of coercion, in Max Weber's sense, and uses these developments to control violence.

Democratic theory has thus assumed that the problem of internal violence against citizens has been resolved—or, better, dissolved—by assigning it to the Western development of culture and the nation-state.

However, studying the new democracies like Brazil reveals the extent to which this supposed resolution of violence is an expression—even a charade—of the particular histories of a few nation-states, rather than a general or universal trait of democratization itself. In the new non-Western democratization, violence remains entangled with democracy. This entanglement is distinctive because people both engage and oppose democratization in the idioms of violent social relations that remain constitutive of societies with different cultures and histories. Many are like Brazil in that they have political democracies in which citizens suffer systematic violence from forces of public and private, organized and unorganized coercion, which act with the confidence of impunity. In these democracies, the citizen's body is not bounded and protected by civil rights. Rather, it is vulnerable to this violence and trapped in the reproduction of it that privatized justice promotes. Cultures of fear, indifference, illegality, and abuse of power characteristically proliferate within the public body of these political democracies, coexisting with democratic values of public life. In this political democratization, urban public space becomes both newly politicized and newly dangerous, is alternatively abandoned and fortified. In these political democracies, the rule of law becomes both brutally violent and ineffective to combat violence.

At this point, there are few studies of the new democracies in these more anthropological terms. Fernando Coronil and Julie Skurski (1991) show how political violence in Venezuela is regularly reenacted in democratic contexts. They argue that violence is “wielded and resisted” (289) in the terms of a society's distinctive history, in relation to which, therefore, it has to be analyzed. Contemporary violence in Venezuela, they suggest, continues to be framed “in Conquest terms,” mobilizing notions of a barbaric people and a civilizing government (of elites). Their study is an example of another type of culture and history in which modernization and democratic politics have always been entangled with violence. Taussig (1987) demonstrates a similar process for Colombia in his study of the use of violence in the rubber boom and the creation of what he calls a “culture of terror and space of death” (1987:3). His analysis also shows how the internal pacification of European states and the creation of a culture of fear in Latin America coincided.

These studies suggest that as more countries democratize, and democracy becomes more diverse, the specificities of its European and North American experience—including its relation to internal violence—become more apparent. In this context, it seems unlikely that political theories of democracy anchored in these specificities of Western history and culture are adequate for understanding democracy's global reach and its non-Western experience. But if that is the case, how do we assess the quality of democracy in such diverse situa-

tions? Are there, fundamentally, culturally different ways of being democratic? Are there, in other words, alternative configurations of democracy and different ways of reaching it? Or are claims of real difference merely excuses for undemocratic practices? To what extent can democracy be culturally relativized before it becomes unrecognizable?

How do we establish the limits of what constitutes an alternative formation of democracy and not a different order of being? This is, admittedly, a complex and difficult project. But that difficulty should not blind us to the differences of history with regard to democracy. It should not make the minimal political definition an attractive response to the increasing diversity of democracy. If that definition has the advantage of being parsimonious—and to that extent seemingly universal—we hope we have shown that it is superficial because it misses many of the principal dilemmas of contemporary democratization. At this point, however, there are too few studies of the social and cultural conditions of citizenship in the new political democracies to answer the kinds of questions just posed. We have suggested that thinking about democracy as disjunctive is useful in studying these conditions because the premise of this approach is that although all contemporary democracies are marked by disjunctions, they are not necessarily or even likely to be disjunctive in the same ways. This approach depends on the idea that different societies and cultures must, by force of their different histories, produce differences in democracy. Therefore, there is not a single model, recipe, history, or culture of democracy. Although we have not discussed the disjunctions of American democracy, for example, they are not difficult to specify in terms of the weakness of socio-economic rights for all Americans, the violent disrespect of civil rights for some, and the excessive professionalization of politics.

Specifying the disjunctive qualities of a democracy—describing Brazilian democracy as uncivil, for example—refers to and criticizes only specific aspects of what is normally a complex democratic project. It does not condemn the entire project. Moreover, it does not suppose that becoming civil means necessarily becoming just like some other democracy. Uncivil democracies are democracies nevertheless, with complex disjunctions that need to be understood as inherent to democratic development. The problem is to account for their disjunctions from within the process of democratization without disrespecting their democratic intentions, or predetermining the antidote to their problems on the basis of convergence to ideal types that are modeled on particular, and usually Western examples. If, as we think, such convergence is unlikely, then democratic theory must adapt to the development of new species.

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