

**Collateral Costs of Violence:  
How Insecurity is Shaping Legal Institutions in Brazil\***

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**I. Introduction**

Latin America has some of the highest levels of violence worldwide; what is more, violence levels have been on an upward course in many countries in the region in recent decades.<sup>1</sup> According to some estimates, the incidence of homicide in the region is more than two times greater than the world average.<sup>2</sup> Widespread violence results in major human, social and economic losses. The *direct* costs of violence include losses stemming from criminal acts – loss of lives, emotional, and physical damages, and the resulting disincentive to investment – as well as the expenses incurred in preventing violence.

The losses attributable to violence in the region are significant. Some economists estimate that the costs of violence in Latin America reached 14% of GDP in 1997, while others claim that GDP per capita in the region would be up to 25% greater if crime rates were similar to those observed in other countries.<sup>3</sup> In particular, the costs of practical measures aimed at preventing violence are considerable. For instance, despite their smaller size, in 2001 the Brazilian subsidiaries of General

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<sup>1</sup> See Rafael Di Tella, Sebastian Edwards & Ernesto Schargrotsky, *Introduction*, in THE ECONOMICS OF CRIME: LESSONS FOR AND FROM LATIN AMERICA 2 (forthcoming, University of Chicago Press), available at <http://www.nber.org/books> ("The Economics of Crime") (analyzing the literature on the economic effects of crime in Latin America).

<sup>2</sup> Walter C. Prillaman, *Crime, Democracy, and Development in Latin America*, Center for Strategic and International Studies, Policy Papers on the Americas, vol. XIV, study 6 (2003), at 3.

<sup>3</sup> Tella et al., *supra* note 1.

Motors spent almost three dollars for every one dollar spent on security in the company's U.S. headquarters.<sup>4</sup>

This paper will not address the direct costs of violence (e.g., lost human lives) or the costs of practical measures aimed at fighting or deterring violence (e.g., security bars for windows). We will focus, instead, on the impact that violence and lack of security have had on the development of legal institutions in Brazil. The indirect costs of violence through its impact on legal institutions – which we call the “legal costs of violence” – stem from two distinct, but not mutually exclusive, types of policies: (i) *repressive policies*, which primarily aim to combat the sources of violence by creating disincentives for potential criminal actors, and (ii) *adaptive policies*, which primarily adapt an existing or proposed legal regime to a state of violence that is taken as given by increasing levels of protection to potential victims.

The costs associated with repressive policies are well known in the literature; much has been written about the risks that excessively repressive measures against violent crimes (or, elsewhere, terrorism) might pose to the rule of law and to democratic institutions.<sup>5</sup> A criminal law regime that is too strict, for instance, might be less deferential to constitutional protections of individual rights such as the presumption of innocence, the due process of law, the ban on torture, and the prohibition of cruel and unusual punishment. Repressive policies might therefore lead to a *deterioration of certain individual rights for the sake of public security*.

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<sup>4</sup> *A Conta Vai para Todos Nós*, REVISTA VEJA, June 13, 2001.

<sup>5</sup> A frequent line of argument in the existing literature is that an increase in the state's repressive powers, even if justified in a context of insecurity, may (i) pave the way for even greater, and less justified, repression (slippery slope) or (ii) make it harder to set aside these emergency measures even when the insecurity concerns no longer exist (ratchet effect). For a discussion of these arguments, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L. J., 1011 (2003); for a critique of both arguments, see Eric Posner & Adrian Vermeule, *Acommodating Emergencies*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY (Mark Tushnet ed., 2005) (“The Constitution in Wartime”).

While the potential costs of repressive policies are familiar, the same is not true for what we term *adaptive policies*, i.e., policies that take a state of violence or lack of security as a given and adapt a legal regime to this state of violence by increasing the levels of protection afforded to potential victims. Our main goal in this paper is to document and analyze the emergence of adaptive policies in Brazil. We aim to show the growing influence that the very perception of insecurity has had across different areas of Brazilian law; the result is that law adapts to violence, rather than seeks to combat it. This adaptation typically takes place by *strengthening the individual rights of potential victims, even when this is to the detriment of other public policies*.

Adaptive policies in Brazil have operated in a decentralized and widespread manner; they are shaping legal outcomes in fields that have little or nothing to do with criminal law which is generally considered the traditional realm of repressive policies. Indeed, arguments based on the lack of public security in Brazil have been used, with varying degrees of success, to shape the development of legal institutions in fields as diverse as commercial law, administrative law, and even traffic regulations. In 2009 alone, security arguments were employed to avoid or mitigate apparently reasonable disclosure requirements about the compensation of top executives of publicly-traded companies, the salaries of civil servants and the expenditures made on the President's corporate credit card.

These examples are merely illustrative rather than exhaustive. And, interestingly, in each case security arguments were used to exempt certain individuals regarded as potential targets of violence from otherwise reasonable legal duties or

burdens in a way that impairs overall government or market transparency.<sup>6</sup> Transparency is both an essential component of democracy and a condition for competitive markets and economic efficiency. Public disclosure is one of the most fundamental principles of public administration in Brazil,<sup>7</sup> as well as a key tool in the regulation of capital markets.<sup>8</sup>

Louis Brandeis's famous adage states that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>9</sup> In contemporary Brazil, however, common wisdom suggests that the victim's individual security is best served by darkness and opacity. The reasoning goes that the victim that cannot be seen, identified or in any way singled out cannot be attacked either, even if this same opacity might contribute to a general increase in unlawful behavior (ranging from more violent forms, such as life-threatening criminal acts, to less violent ones, such as corruption). In still other cases, such as the controversy surrounding the enforcement of traffic regulations at night, an individual's right to security must be weighed against public policies whose primary objective is to save lives.

These examples illustrate a distinctive way by which insecurity is shaping the development of legal institutions in Brazil. Table 1 below summarizes the distinctions between direct and indirect costs of violence and its prevention.

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<sup>6</sup> The exemption of legal duties or justification of legal violations in case of risk to life is by no means a novel phenomenon. Even the violations of the most fundamental legal rules – such as the punishment of homicides – are usually not punished if the defendant acted in self-defense.

<sup>7</sup> Constituição da República Federativa do Brasil, art. 37.

<sup>8</sup> See, e.g., Law 6,385/76, art. 3, VI.

<sup>9</sup> LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT* 92 (1914) (arguing that "[p]ublicity is justly commended as a remedy for social and industrial diseases").

Table 1: Direct and indirect (i.e., legal) costs of violence

	Costs of violence	Costs of preventive and repressive measures
<b>Direct</b>	Loss of life; physical and emotional damage, etc.	Expenses related to security measures (security bars, alarms, etc.)
<b>Indirect or legal</b>	<p>“Adaptive policies”</p> <p>Intensification of individual rights of potential victims to the detriment of public policies</p> <p><i>E.g.</i>: less transparency about the compensation of public company executives and civil servants; distortions in traffic laws etc.</p>	<p>“Repressive policies”</p> <p>Intensification of public security policies to the detriment of individual rights of potential criminals</p> <p><i>E.g.</i>: reduction of fundamental protections such as the presumption of innocence, the ban on torture, the prohibition on cruel and inhuman punishment etc.</p>

Each of the cases described in Part II point to circumstances in which the perception of violence or insecurity is leading Brazilian laws to deviate from what would probably be the optimal legal regimes. It might be easy to regard these adaptive outcomes as second-best solutions, i.e., the best possible regime given the inherent constraints (violence), but we will challenge this notion.<sup>10</sup> We suggest, instead, that these adaptive policies bring about significant legal costs by weakening important public policies and might, in the long term, ultimately hinder the country’s development and the elimination of the underlying economic and social root causes of violence.<sup>11</sup>

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<sup>10</sup> In the last few years, economists have come to challenge the assumption that a single set of international best practices can foster economic growth in all developing economies and have turned, instead, to the recognition that “second-best institutions” that better fit a country’s particular circumstances can be more effective in promoting development. See, e.g., Dani Rodrik, *Second-Best Institutions*, 98 AM. ECON. REV. 100 (2008).

<sup>11</sup> Rodrigo R. Soares & Joana Naritomi, *Understanding High Crime Rates in Latin America: The Role of Social and Policy Factors*, in THE ECONOMICS OF CRIME, *supra* note 1, argue that although the incidence of criminal activity in Latin America is extremely high, it is not too different from the predicted levels in light of its high degree of social inequality and low rates of investment in police and

We will approach the relationship between insecurity and adaptive legal developments in Brazil as follows. Part II illustrates the meaning of adaptive policies by analyzing the use of security-based arguments in Brazil to shape the outcome of different legal disputes. Part III provides a brief digression on the traditional debate on the relationship between insecurity and legal developments. Our goal is to show that the typical terms of the debate surrounding repressive policies do not adequately capture the structure and implications of adaptive policies. Part IV concludes by speculating on the distributive consequences and possible normative implications of the rising use of adaptive policies in Brazil.

## **II. Insecurity Arguments and Brazilian Law**

### **a) Insecurity and Capital Markets**

The past few decades have witnessed a growing consensus that active capital markets help promote economic development.<sup>12</sup> In the last decade, following a combination of important institutional innovations sponsored by the São Paulo Stock Exchange and a favorable macroeconomic environment, Brazil's capital markets have become among the most active equity markets worldwide and a model for other developing economies. More recently, investor confidence in Brazil's capital markets can also be attributed to the increasingly activist stance of the Brazilian Securities and

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prisons. Therefore, it is reasonable to assume that economic development and a reduction in income inequality could bring about a significant reduction of violence levels in the region.

<sup>12</sup> See, e.g., Robert G. King & Ross Levine, *Finance and Growth: Schumpeter Might Be Right*, 108 QUART. J. ECON. 717 (1993), among many others.

Exchange Commission (*Comissão de Valores Mobiliários - CVM*) in protecting minority shareholders.<sup>13</sup>

Last year, the CVM sought to remedy one of the most conspicuous deficiencies of Brazil's capital market regulations vis-à-vis international standards. In early 2009, the CVM proposed, among others things, a new regulation requiring companies to disclose the compensation amounts paid to each of a company's top executives. The CVM proposal was subjected to a public hearing and generated significant opposition from public companies and their executives. Strikingly, the main argument raised against the new disclosure requirement was precisely the high level of violence in Brazil.<sup>14</sup> As described by the local media,

“[c]uriously, in Brazil this topic [executive compensation disclosure] has been approached less from a perspective of corporate management and more from an angle of public security. Some people believe, for example, that the disclosure of this information might jeopardize the security of the executives, who would then become potential targets of criminal actions, such as kidnappings.”<sup>15</sup>

Since the disclosure of executive pay is already the rule in other jurisdictions with active capital markets (and is a familiar practice in Brazilian history),<sup>16</sup> reform opponents have focused on Brazil's distinctively poor record in public safety in order to prevent the enactment of the new regulations. The Brazilian Association of Public

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<sup>13</sup> For a review of recent developments in Brazil's capital markets, see Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the U.S. and the EU* (forthcoming 63 STAN. L. REV. \_\_\_, 2010).

<sup>14</sup> The use of security arguments to avoid disclosure requirements on executive compensation, however curious, is not unprecedented. Just like in 21st century Brazil, opponents of the introduction of new rules requiring disclosure of executive compensation in the U.S. in the 1930s raised both privacy considerations and the concern that managers could become easy target for kidnappers. See Harwell Wells, “No Man Can be Worth \$1,000,000 a Year”: *The Fight over Executive Compensation in 1930s America*, 44 U. RICH. L. REV. 689, 708 (2010).

<sup>15</sup> Joaquim Castanheira, *Ele Decidiu Revelar o Próprio Salário: A Decisão Inédita da Usiminas*, ISTOÉ DINHEIRO, April 20, 2009.

<sup>16</sup> In 19th century Brazil, the bylaws of business corporations frequently stipulated the amounts to be paid to key executives, which were in turn published in local newspapers.

Companies (*Associação Brasileira de Companhias Abertas - ABRASCA*), the main lobby group for publicly traded companies and their shareholders, argued that “even if this information [the amounts paid to individual executives] were useful to investors, it is not advisable that companies disclose it given our reality of grave security problems.”<sup>17</sup>

The strong negative reactions to its the proposed regulations reinforced the CVM’s initial concerns about security and led it to abandon its original proposal requiring the disclosure of the amounts paid to each of the company’s top executives.<sup>18</sup> The compromise solution enacted as Instruction 480 in December 2009 required listed firms to disclose the highest and lowest pay of directors and managers, without, however, providing the names of the respective recipients. This modest solution was still an improvement over existing regulations, which only required companies to disclose the aggregate amounts paid to executives, without any further specification about salaries or positions.<sup>19</sup>

Even this compromise, which falls short of international standards, became highly controversial in Brazil. Senator Francisco Dornelles (PP-RJ) publicly declared that “the greater transparency sought by the rule might endanger the personal security of these executives and their families” and might be “of great utility to criminals in

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<sup>17</sup> *Empresas São Contra Abertura de Salário*, VALOR ECONÔMICO, Jan. 7, 2009. See also *Comissão Propõe que as Empresas de Capital Aberto Informem Valores Pagos*, O GLOBO, Feb. 5, 2009.

<sup>18</sup> Vinicius Medeiros, *Nova Norma Pode Exigir Divulgação Detalhada dos Salários dos Altos Executivos*, JORNAL DO COMMERIO, Feb. 10, 2009.

<sup>19</sup> According to a recent survey, even though the top ten Brazilian firms by trading volume paid R\$ 1.2 to their executives in 2009, only the Banco do Brasil, a publicly-traded state-owned enterprise, disclosed the pay of its chief executive officer. Leandra Peres, *Empresas Pagam R\$ 1,2 Bilhão a Executivos*, FOLHA DE S. PAULO, April 6, 2009.



the selection of their victims.”<sup>20</sup> The controversy ultimately resulted in judicial lawsuits questioning the constitutionality and legality of the new CVM regulations.

In a lawsuit filed by the Brazilian Institute of Financial Executives (*Instituto Brasileiro de Executivos de Finanças – IBEF*), a district court granted an injunction to suspend the enforcement of Instruction 480. The plaintiff argued that the new regulations were at the same time illegal, because the Commission exceeded the jurisdiction conferred to it by statute, and unconstitutional, since the new rules violated the executives’ fundamental rights to privacy and to security. In granting injunctive relief to the executives seeking to avoid the new requirements, the court explicitly considered the risks posed by the new rules to their personal security:

“in a country with immense social inequalities and a high level of violence, and with sophisticated criminal agents, the online disclosure of financial data poses risks not only to the executives, but also to their families. The argument that this [the disclosure] occurs in other jurisdictions does not justify the automatic import of these rules without the necessary adjustments...”<sup>21</sup>

These collateral effects of violence on securities regulations in Brazil raise interesting theoretical and practical questions. On the one hand, the disclosure of material information plays a major role in promoting market efficiency and protecting investors and is, for this reason, the guiding principle of securities regulation in numerous jurisdictions. The lack of transparency about the amounts paid to each director or officer is potentially even more harmful in Brazil, where a large percentage of listed companies display concentrated family control. Outside investors are often eager to find out whether a given sum was paid to a talented professional manager or to a family member. On the other hand, the existence of real risks to the

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<sup>20</sup> Agência Senado, March 9, 2010.

<sup>21</sup> 5th Federal District Court of Rio de Janeiro, Lawsuit n. 2010.5101002888-5, decided on Mar. 2, 2010.

personal safety of executives could negatively affect the firm's management and, ultimately, the financial interests of minority shareholders. To the extent that the costs of enhanced disclosure are real and meaningful, the company's outside investors could come to internalize them, as higher commanded salaries and greater security expenditures ultimately reduce the firm's financial returns. Last, but not least, the increasing gap between the salaries of top executives and those paid to the average worker has become the focal point of the debate about the general increase of income inequality in the last decades.<sup>22</sup> Hence, violence in Brazil could also have the collateral effect of silencing one of the channels for such an important debate to the country's continuing development.

**b) Insecurity and the Public Administration**

**(i) Disclosure of Civil Servants' salaries**

On June 16, 2009 the city of São Paulo announced that it was going to disclose on the website "Keeping an Eye on the Budget" (*De Olho nas Contas*)<sup>23</sup> individualized data on the gross salaries of almost all of its 162,000 civil servants.<sup>24</sup> According to the official press release, the insertion of this information in the newly-launched the "Transparency Portal" (*Portal da Transparência*) would work as "a tool to enable the *paulistano* citizen's access to a host of information on the financial life of the Municipality," thus allowing for a more intense monitoring of public

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<sup>22</sup> See, e.g., Paul Krugman, *For Richer*, N.Y.T. MAGAZINE, Oct. 20, 2002 ("[t]he explosion in C.E.O. pay over the past 30 years is an amazing story in its own right, and an important one. But it is only the most spectacular indicator of a broader story, the reconcentration of income and wealth in the U.S").

<sup>23</sup> See <http://deolhonascontas.prefeitura.sp.gov.br/index.htm>.

<sup>24</sup> The City of São Paulo directly employs 147,000 civil servants, while other 15,000 are employed by public entities subordinate to the City. The only civil servants not included in the disclosure policy were the members of the City Guard – due to security reasons, according to the City.

expenditures.<sup>25</sup> Although most of this information was already available to the public, it was previously dispersed and thus not easily accessible to the public. The innovative character of “Keeping an Eye on the Budget” and the Transparency Portal was due to its effort to:

“(…) gather, in a single section of the city of São Paulo website, all the data already disclosed, as well as all information related to these [public] expenses, so that each of the citizens is able to directly audit the public budget, by accessing the lists of public contracts, with the respective payments, as well as the lists with the name, assignment, position and gross earnings of each of the City’s civil servants.”<sup>26</sup>

This new initiative drew significant public attention. The Transparency Portal had more than 70,000 visitors during its first day online.<sup>27</sup> The gross earnings data originally displayed on the website did not differentiate between the servant’s regular salary and other temporary compensation amounts paid on top of the salary (such as judicially awarded sums owed to a servant by the City and included directly in the payroll), but these nuances did not prevent the creation of a media scandal. The media coverage emphasized the fact that between 1,600 and 2,400 civil servants were apparently earning salaries in excess of the City-wide cap of R\$12,300.<sup>28</sup>

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<sup>25</sup> See the press release “Portal possibilita fiscalização dos atos da Prefeitura,” June 17, 2009, available at the City of São Paulo official website [http://www.prefeitura.sp.gov.br/portal/a\\_cidade/noticias/index.php?p=30271](http://www.prefeitura.sp.gov.br/portal/a_cidade/noticias/index.php?p=30271).

<sup>26</sup> Excerpts from the petition (Suspensão de Segurança (SS) n. 3902) filed by the City of São Paulo in the Brazilian Supreme Court and quoted by the Justice Gilmar Mendes in his preliminary ruling of July 9, 2009.

<sup>27</sup> “Site com salários de servidores municipais tem 70 mil acessos em um dia,” *Globo.com/G1*, July 18, 2010, available at <http://g1.globo.com/Noticias/SaoPaulo/0,,MUL1198680-5605.00-SITE+COM+SALARIOS+DE+SERVIDORES+MUNICIPAIS+TEM+MIL+ACESSOS+EM+UM+DI+A.html>.

<sup>28</sup> See, for example, the news stories “Prefeitura paga até R\$ 143 mil a servidor,” *Jornal da Tarde*, June 17, 2009; “Divulgação de salários pela Prefeitura de SP é legal, mas mal usada, dizem especialistas”, *Último Segundo*, June 17, 2009, available at <http://ultimosegundo.ig.com.br/brasil/2009/06/17/divulgacao+dos+salarios+e+legal+mas+esta+sendo+mal+usada+dizem+especialistas++6787907.html>.

On the one hand, some civil society organizations celebrated the measure as an effective way to promote transparency in public administration.<sup>29</sup> On the other, unions representing several different groups of São Paulo's civil servants immediately and publicly criticized the municipality's policy. Among the various arguments advanced by the unions, the media accounts singled out the union leaders' claim that the disclosure of individualized financial information could jeopardize the civil servants' personal safety. For example, Cláudio Fonseca, President of the Union of Education Workers in the School System of the City of São (SINPEEM), made the following statements about the Transparency Portal in several different media channels:

“This is an act of recklessness. We live in an era of total insecurity. I don't think this measure will do any good, and it will leave the civil servants unsafe, vulnerable to electronic scams, all that.”<sup>30</sup>

“They [the City's civil servants] will turn into bait for thieves.”<sup>31</sup>

“The Municipality has needlessly put its servants at risk, as many of the amounts displayed are the result of judicial battles fought [by the servants, against the Municipality] years ago. Plus, this measure makes the servants vulnerable to threats of robbery and kidnapping.”<sup>32</sup>

“Criminal groups follow all the administrative acts [of the Municipality] and know the exact day in which the servants will

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<sup>29</sup> For instance, Oded Grajew, coordinator of the *Movimento Nossa São Paulo* (“Our São Paulo” Movement), remarked to the news agency G1 that “the public administration is a special case, because their salaries are paid by each one of us” and “the people are shareholders of the Municipality and have the right to know what is done with their money. Having a job in the public administration has its advantages, but it also has its burdens. Whoever works as a public servant must be accountable before society” (quoted in the news story “Lista de salários na internet causa polêmica na Prefeitura de SP,” G1, June 17, 2009, available at <http://g1.globo.com/Noticias/SaoPaulo/0,,MUL1197090-5605,00-LISTA+DE+SALARIOS+NA+INTERNET+CAUSA+POLEMICA+NA+PREFEITURA+DE+SP.htm>).

<sup>30</sup> Quoted in the news story “Servidores criticam divulgação de salários na Internet,” June 17, 2009, Folha Online, available at <http://www1.folha.uol.com.br/folha/cotidiano/ult95u582178.shtml>.

<sup>31</sup> Quoted in the news story “Lista de salários na internet causa polêmica na Prefeitura de SP,” *supra* note 29.

<sup>32</sup> Quoted in the news story “Kassab divulga salários e servidores vão à Justiça,” *Último Segundo* / Agência Estado, June 17, 2009, available at <http://ultimosegundo.ig.com.br/brasil/2009/06/17/kassab+divulga+vencimentos+e+servidores+vao+a+justica+6775903.html>.

receive their salaries.” (...) “[The disclosure] does away with their [the servants’] financial privacy and makes them vulnerable to future electronic scams or even robberies.”<sup>33</sup>

At the same time they publicly criticized the Transparency Portal, the unions filed lawsuits against the disclosure of the civil servants’ salaries. They eventually obtained an injunction from São Paulo Court of Appeals (TJ-SP) to suspend the implementation of the Portal. After failed appeals against this decision at the state level, the City of São Paulo petitioned the Brazilian Supreme Court (*Supremo Tribunal Federal - STF*), asking for the immediate suspension of the TJ-SP’s injunction.

In all these judicial debates, from the trial court in São Paulo to the STF in Brasília, the unions presented a wide array of formal and substantial arguments to depict the disclosure of their salaries as a violation of the federal Constitution. For the purposes of this paper, we will only examine the arguments based on the civil servants’ fundamental rights to privacy and security provided for article 5 of the Brazilian Constitution. Indeed, these were the arguments accepted by the TJ-SP in granting the injunction against the municipality. He argued that the disclosure of financial information on a website was not admissible as it could jeopardize “*the civil servants’ personal and patrimonial safety*.”<sup>34</sup>

The City of São Paulo argued before Supreme Court Justice Gilmar Mendes – the assigned reporter (*relator*) for the case within the STF – that the injunctions granted by the TJ-SP would cause serious harm to the public order, as they violated the constitutional principle of *publicity* (article 37, *caput*, as well as items XIV e

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<sup>33</sup> Quoted in the news story “Divulgação de salários pela Prefeitura de SP é legal, mas mal usada, dizem especialistas,” Último Segundo, June 17 2009, available at <http://ultimosegundo.ig.com.br/brasil/2009/06/17/divulgacao+dos+salarios+e+legal+mas+esta+sendo+mal+usada+dizem+especialistas++6787907.html>.

<sup>34</sup> Excerpt from Justice Gilmer Mendes’s preliminary ruling, *supra* note 26.

XXXIII of the article 5 of the Constitution). According to the City, the constitutional mandate of transparency in the public administration was precisely the goal that the Portal aimed to promote. Finally, the City also argued that the Constitution contains specific rules allowing the disclosure of civil servants' salaries – rules that reflected a clear, previous decision by the drafters of the constitution to let principle of transparency prevail when this kind of conflict is at stake (art. 39, §6º of the Constitution).<sup>35</sup>

Although the issue had been taken before the STF merely for an emergency injunction (which sought only to suspend another injunction, on the grounds that it would cause irreversible harm to the public order), Justice Mendes made a foray into the soundness of the parties' arguments regarding the constitutionality of the City's policy. In making this preliminary analysis of the case's substance, Justice Mendes took seriously the fundamental rights and constitutional principle arguments raised by both parties. He asserted that, in order to issue a final ruling on this case, the court would ultimately need to:

“to determine whether the disclosure of the gross earnings associated with each civil servant's name, on a website (...) managed by the Municipality, implies: (1) the concretization of the principle of publicity (art. 37, CF/1988) and of the obligation of promoting transparency in public expenditures; or (2) the undue placement under risk of an aspect of the civil servant's life – personal data, and as such protected under the inviolability of privacy, of private life, of personal honor and of the public image of the civil servants; or (3) a violation of the society's and the State's entitlement to safety – art. 5º, XXXIII, CF/1988 ('society' being constituted, in this case, by the City's public servants and their dependants).”<sup>36</sup>

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<sup>35</sup> See, e.g., art. 39, § 6º of the Brazilian Constitution (“The Executive, Legislative and Judiciary Branches shall publicize on an annual basis the earnings associated with public jobs and employments”)

<sup>36</sup> Excerpt taken from Justice Gilmar Mendes's preliminary ruling, *supra* note 26.

Justice Mendes' phrasing implicitly frames the issue as one of proportionality. The three tests or stages that typically constitute a proportionality exam (suitability, necessity and proportionality in the strict sense) are not explicit in Justice Mendes' ruling.<sup>37</sup> Even so, it is possible to read his question (1), above, as announcing a future suitability test: is the disclosure a suitable measure to promote the constitutional goal of transparency? Moreover, his reasoning shows that an affirmative answer to this suitability question would not suffice to settle the constitutional conflict. Even a measure that promotes the constitutionally legitimate purpose of increasing transparency in the public administration can still be considered unconstitutional. The question would then be *how much* interference in the civil servants' privacy (2) and personal security (3) is constitutionally permissible.

Still, Justice Mendes' ruling did not leave these questions completely open. Even though he granted the suspension of the previous injunction, as requested by the City of São Paulo, he was receptive to arguments raised by *both* parties. On the one hand, he accepted that the data displayed on the website:

“made it possible, at first glance, to identify several gross salaries that appear to exceed not only the city-level cap on public service earnings, but also, in some cases, the federal-level cap, with some amounts almost as high as RS\$ 50,000.”

On the other hand, Justice Mendes pointed to the personal safety concerns raised by the civil servant unions, acknowledged the many flaws of the *Portal* reported by the media, and remarked that:

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<sup>37</sup> For the most typical structure of proportionality tests as applied by several courts throughout the world, see Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008); see also Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L. J. 383 (2007). Justice Gilmar Mendes himself has been one of the most enthusiastic proponents of the use of proportionality tests to solve conflicts between constitutional principles in Brazil before his appointment to the Supreme Court in 2002. See GILMAR FERREIRA MENDES, DIREITOS FUNDAMENTAIS E CONTROLE DE CONSTITUCIONALIDADE (1999).

“in this sense, the Public Administration can always seek alternative or intermediate arrangements. In this particular case, a hypothetically viable arrangement to promote the desired goal would be to replace the name of the servant by their official identification number.”<sup>38</sup>

The court will probably resort to a proportionality test to address this tension in the final ruling. In this regard, we can interpret Justice Mendes’ provisional ruling as signaling that, in his view, (a) the City’s policy reasonably suits the promotion of the desired constitutional goal, but (b) the City is required to consider alternative means that would cause less harm to the servants’ rights to privacy and personal safety.

We will return to this proportionality framework and to some of its implications in Part IV, *infra*. For now, suffice it to say that a new initiative sponsored by the City of São Paulo in order to promote great publicity, transparency and accountability of the public administration has been politically and legally challenged on the basis of a security-based argument. The union leaders claimed that, given the current state of insecurity in the city of São Paulo, the online disclosure of their names and salaries is unconstitutional as it leads to a state of affairs in which their right to personal safety will be hampered even further. As of late April 2010, the website displaying the names and salaries of São Paulo civil servants was still operating.<sup>39</sup>

(ii) “Corporate Credit Cards” and Presidential Expenditures

Security arguments have also been used to avoid disclosure of the ever-increasing payment of expenditures with the so-called corporate credit cards (*cartões*

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<sup>38</sup> See *supra* note 26.

<sup>39</sup> See <http://deolhonascontas.prefeitura.sp.gov.br/pub/listaservidores/admdireta/SGM.pdf>.



*corporativos*) held by the Presidency. The federal government corporate credit cards were introduced in 2001, by the Fernando Henrique Cardoso government, and came into use during the first year of the Lula administration. These cards, which were meant to be used only for “sporadic and emergency” expenses, were introduced to replace the previous system in which the civil servant received reimbursement after submitting proof of eligible expenses.

In the past few years, however, the expenses incurred by the federal government through corporate cards have increased exponentially. Revelations in the media of unexplained expenses in restaurants and duty free shops reaching up to R\$ 171,000 in a single year incurred by the then-Minister for Racial Equality led to her dismissal. Nevertheless, the presidential expenses in corporate credit cards has continued to grow steadily, amounting to a grand total of R\$ 5.3 million between January and December 2009.<sup>40</sup>

Even so, the exact nature of most of these expenses – which are an exception to the formal procedures that are legally required for public expenditures in Brazil – are still kept in secret by the Presidency. The main argument wielded against a more transparent arrangement is, once again, based on security – be it the personal “safety of [President] Lula, [Vice-President] José de Alencar, and their families, not only in Brasília but in all the places they live or happen to be passing by,” or even “national security.”<sup>41</sup> Therefore, the higher echelons of the Brazilian government have also benefited from the power of security arguments as a weapon against transparency – a weapon that, up to this moment, has not been sufficiently debated in Brazil.

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<sup>40</sup> Edson Luiz & Izabelle Torres, *Gastos do Planalto com Cartões Corporativos Aumentaram Quase 10% Este Ano*, CORREIO BRAZILIENSE, Oct. 27, 2009.

<sup>41</sup> *Id.*

**c) Insecurity and Traffic Rules**

*1. “Insulfilm” and Law Enforcement*

The cases described above are by no means the only examples of the use of security arguments to justify greater opacity. Another instance of insecurity justifying a decrease in transparency – here less metaphorically and more literally – is the growing popularity and progressive legalization of the use of “insulfilm” in Brazilian vehicles. The so-called “insulfilm” is the thin layer applied to a car’s windows in order to make them more opaque, thus reducing external visibility of the interior of the vehicle.

The marketing strategy for the “insulfilm” appeals largely to the driver’s personal security.<sup>42</sup> In its special issue on urban violence in Brazil, VEJA magazine recommended the darkening layer as a security device in order to “inhibit robberies, because the criminal, due to the difficulty in seeing the car’s interior, does not feel it is safe to act.”<sup>43</sup>

This anti-Brandeisian understanding of opacity as safety-promoting suggests that the decrease in visibility increases the uncertainty from the standpoint of potential criminals and discourages an attack, since they have no way of discerning the gender or physical stature of the driver, or whether the latter is carrying a gun. For this reason, the insulfilm has become especially popular among female drivers, who tend to be the most vulnerable targets of this type of crime and therefore feel more protected by the “invisibility” provided by insulfilm.

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<sup>42</sup> *Até 15% da Frota do País Usa Insulfilm*, FOLHA DE S. PAULO, Dec. 23, 2003 (noting that, although the insulfilm had been originally sold for esthetic reasons, “[the] appeal to security concerns is the main reason behind the growth of this market”).

<sup>43</sup> *O Insulfilm Reduz a Visão do Interior do Carro e Atrapalha o Ladrão*, VEJA, June 13, 2001.

The link between insulfilm and personal security has contributed not only to a quick dissemination of the darkening layer, but also to significant changes in the law in order to liberalize its use. Before 1998, insulfilm was illegal, mainly because it made it too hard for police and transit officers to screen the inside of a vehicle in order to detect possibly unlawful acts. The legally accepted levels of opacity in car windows were increased in 1998 and expanded once again in 2007, after a clash between police authorities (who claimed that the insulfilm made the task of law enforcement increasingly difficult) and drivers (who argued that the darkening layer made them feel safer in Brazilian cities that were becoming more and more violent). According to one description of the controversy in an important Rio de Janeiro newspaper, “for some drivers, the darker windows help to prevent robberies, especially when there are children in the backseat. For the police forces, the excessive darkening makes it harder to identify and arrest criminals.”<sup>44</sup> The insulfilm controversy, although superficially trivial, nicely illustrates the extent to which adaptive policies in Brazil can create a conflict between general public safety policies, on the one hand, and the protection of individual rights to security, on the other.

## 2. Red Lights and Speed Limits

Just as in the case of insulfilm, urban violence in Brazil has also shaped the content of traffic rules that would seem non-controversial in other contexts, such as drivers’ legal obligation to comply with red lights at night. The practical benefits of traffic lights to coordinate traffic and prevent accidents are intuitive enough. However, for big city drivers in Brazil, it is equally commonsensical that stopping at a

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<sup>44</sup> Jailton de Carvalho & Demétrio Weber, *Uso de Película Insulfilm no Vidro dos Carros Tem Novas Regras e Aparelho de Medição*, O GLOBO, Nov. 22, 2007.

red traffic light at night jeopardizes the driver's safety.<sup>45</sup> In a study released in 2007, for instance, a specialist from the Transportation and Transit Company of the City of Belo Horizonte (BHTRANS) stated that:

“Every day, the company [BHTRANS] receives lots of requests (...) regarding the functioning of traffic lights at night. In these requests, the users ask for the adoption of blinking yellow lights or simply turning off traffic lights at night, or for the decrease in the duration of the red lights in the late hours. With the rising feeling of insecurity at the intersections in which the traffic lights are mounted, especially during night time, such requests have been growing more and more frequent.”<sup>46</sup>

The adaptation of traffic-related legal arrangements in response to this problem has taken multiple different forms. Some cities decided to replace the traditional 3-color traffic lights with the blinking yellow light during night time, as a way of drawing the drivers' attention to the intersection without establishing any clear priority between drivers coming from different lanes.<sup>47</sup> In other municipalities, the traditional traffic lights were kept in place, but violations to red lights or speed limits were not enforced at night. For example, Law n. 4,892/2008 of the City of Rio de Janeiro provides that “the Municipal Executive Branch cannot employ electronic devices to measure driving speed in areas that pose risk to the safety of the drivers, after 10 p.m.”<sup>48</sup>

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<sup>45</sup> See, e.g., the criticism to the enforcement of traffic rules advanced in the recent editorial “Mais um alerta para a segurança do Brasiliense,” CORREIO BRAZILIENSE, Oct. 31 2010 (“[t]he law exists to protect the citizens. When it does not play this role, it loses its purpose. No one can be forced to be exposed to danger”).

<sup>46</sup> José Maurício Pinto Júnior, *Proposta de Medidas e Critérios para Adequação da Sinalização Semafórica nos Períodos Noturno e de Tráfego Reduzido 2*, available at [http://www.sinaldetransito.com.br/artigos/semaforo\\_de\\_madrugada.pdf/](http://www.sinaldetransito.com.br/artigos/semaforo_de_madrugada.pdf/).

<sup>47</sup> See, for instance, the Porto Alegre City Law n. 8,956 of July 18th 2002, which provides in its article 1 that “[the] traffic lights located in the dangerous areas of the City, as determined by the relevant authorities, can be adjusted to display only the yellow blinking light during the night.” A similar proposal – Bill n. 333/2009 – is currently under discussion in the Rio de Janeiro City Council. In explaining the reasons for the adoption of the bill, Council Member Cristiano Girão noted that “[t]he purpose of this Bill is to provide Rio de Janeiro drivers with increased security during the night, as it is a well-known fact that the electronic speed measuring devices located in dangerous areas have made drivers vulnerable to robberies, because they are forced to slow down.”

<sup>48</sup> Art. 1, Law n. 4,892, Sept. 10, 2008.

When executive and legislative authorities did not adopt deliberate policies to deal with this problem, the legal adaptation came through judicial decisions. The number of fines for crossing a red light during the night has grown exponentially in the last few years. Many drivers, in turn, have filed lawsuits aimed at invalidating these fines due to their allegedly unreasonable character in light of urban violence, with considerable success.<sup>49</sup> Indeed, this is one of the most conspicuous examples of judicial responsiveness to the use of security-based arguments in Brazil. In a recent and widely publicized decision,<sup>50</sup> the Seventeenth Civil Chamber of the Rio de Janeiro Court of Appeals (TJ-RJ) ruled as follows:

*“The situation of danger and serious risk to one’s life resulting from the uncontrolled violence that is endemic in the city of Rio de Janeiro is a public and well-known fact, which has reached levels of dead and wounded people that are comparable only to territories currently afflicted by war. The situation is particularly serious at night, when the city practically lacks any police activity and citizens are left to their own devices, being thus forced to adopt survival tactics, like cautiously crossing red lights or ignoring excessively restrictive speed limits in areas that are known to be dangerous. By doing so, the driver seeks to avoid the action of criminals who, not rarely under the effect of drugs and almost always organized in heavily armed groups, will strike by foot, motorcycle or car and are willing to practice extremely violent acts, shooting to kill even the victim that does not offer resistance. In such cases, and given the highly unique state of exception in which we live nowadays, it is necessary to set aside the presumption of legitimacy of administrative acts. The burden thus falls on the State to demonstrate that, at the time and place of the traffic violation, it was providing the citizen with reasonable conditions of security, in which case it could expect the citizen to behave differently [than crossing the red lights].”<sup>51</sup> (emphasis added)*

After these quasi-literary and extremely graphic depictions of the conditions of urban violence in the city of Rio de Janeiro,<sup>52</sup> the judge writing the Chamber’s

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<sup>49</sup> Francisco Edson Alves, *Medo da Violência Aumenta Multas*, O DIA ONLINE, Mar. 7, 2009.

<sup>50</sup> See, e.g., the news story “Multa por Avanço de Sinal Aplicada a Motorista é Cancelada,” Portal G1, Mar. 5, 2009, available at <http://g1.globo.com/Noticias/Rio/0,,MRP1030818-5606.00.html>.

<sup>51</sup> Seventeenth Civil Chamber of the Rio de Janeiro Court of Appeals (TJ-RJ), Civil Appeal n. 2008.001.66289, Judge Elton Leme, decided on Apr. 3, 2010.

<sup>52</sup> This judicial depiction of Rio as an extremely violent city is not new. For instance, in 1993, when deciding the Civil Appeal n.1993.001.00554 (decided on April 13th 1993), the Sixth Civil Chamber

opinion refers to the above-mentioned City Law 4,892/08, which, although not specifically applicable to traffic lights, and “although enacted after the relevant facts in this case, reinforces the idea that the State is not fulfilling its duty to protect the security of its citizens, and therefore cannot demand that its citizens, when facing a situation of danger, comply with rules that will increase such risk.”<sup>53</sup> That is, even in the absence of a directly applicable statute, the Court decided that, given the widespread violence in Rio de Janeiro, the State could not punish its citizens for crossing red lights during the night time in order to protect themselves.

These adaptive policies to urban violence are not without costs, however. Even moderate measures such as the blinking yellow lights create uncertainty, hinder coordination and possibly increase the number of accidents.<sup>54</sup> Indeed, some municipalities decided to revert to the traditional 3-color system after the adoption of blinking yellow lights led to a sharp increase in the number of accidents.<sup>55</sup> Still, in other cases – such as Rio de Janeiro – the perspective of the individual driver’s right

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asserted that “[g]iven the current situation of urban violence, in which criminals, ostentatiously displaying weapons in broad daylight, break into homes in order to rob, rape and murder, frightening and filling up with insecurity all of us, the placement of bars around one’s building is far from a purely esthetic improvement: it is necessary for the security of the residents.” In 1994, the Court of Appeals of Rio de Janeiro (TJ-RJ) affirmed that the construction of the scope of the State’s liability for damages causes by its police officers in discharging their duties must take into account “[the] moment of insecurity and serious social and economic disorder that Brazilian society is going through, especially in the big cities” (Civil Appeal n. 1993.001.06102, First Civil Chamber, decided on May 17, 1994). Indeed, as early as 1988 we found decisions from the TJ-RJ that explicitly took into account “the conditions of high insecurity that are presently found [in the city of Rio de Janeiro]” (Civil Appeal n. 1988.001.04130, Third Civil Chamber, decided on Dec. 12<sup>th</sup> 1988).

<sup>53</sup> Rio de Janeiro Court of Appeals, *supra* note 21.

<sup>54</sup> This risk is explicitly acknowledged even by the representative of BHTRANS who supports the adoption of the blinking yellow lights at night (arguing that “[e]ach implementation of the yellow blinking lights must be followed by an analysis of the number of accidents in that intersection, on that time of the day, as compared to previous years, for purposes of monitoring the situation before and after the adoption of the new arrangement. After a period of 6-12 months, a comparative assessment must be undertaken, followed by whatever corrections are deemed necessary. If there is an increase in the number of accidents in a given intersection with a yellow blinking light, it must be replaced by regular traffic lights”). Pinto Júnior, *supra* note 46, at 10.

<sup>55</sup> See, e.g., the case of Maringá, a city that experienced a 65% increase in the number of accidents after the adoption of yellow blinking lights in order to decrease the risk of robberies. These lights have then been replaced by the traditional ones (*Sinal Amarelo Piscante Aumenta Acidentes e Semáforos Voltam a Ser Acionados*, O DIÁRIO DO NORTE DO PARANÁ, Nov. 12, 2008).

to safety has prevailed over the general traffic safety policies. This situation is particularly striking because it involves the balancing of competing measures that aim at promoting the same set of values – namely, the protection of life and physical integrity.

Our goal in this section was to illustrate the use of security arguments and adaptive policies in Brazil rather than to provide a comprehensive account of such cases. There are certainly many other examples of adaptations of the legal system in order to accommodate a reality of urban violence beyond those discussed here.<sup>56</sup>

### **III. Insecurity and Legal Change: The Typical Narrative**

In this section, we will briefly review some of the core political and scholarly debates about the relationship between law and insecurity. Generally speaking, these controversies have focused almost exclusively on the implications of what we label repressive policies. Our goal here is neither to fully recount this major debate or to adjudicate all the complex and unanswered questions that are found in the literature, but instead to investigate the extent to which the conceptual frameworks used to analyze repressive policies would differ in structure and content from those applicable to adaptive policies.

There are numerous historical, legal and political case studies and narratives of how the law reacts to situations that are perceived as national emergencies, such as external or civil wars, natural catastrophes, economic crises or any other situation in which there is a serious perceived threat to the community's peaceful enjoyment of its

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<sup>56</sup> See, e.g., the TJ-RJ case law holding that the consumer who had her electricity supply interrupted is entitled to recover non-pecuniary damages because, among other things, she was exposed to the insecurity of the city (Civil Appeal n. 2008.8.19.0021, Second Civil Chamber, decided on Jan. 26, 2010).

rights.<sup>57</sup> The examples of deliberate legal changes that take place in contexts of extreme (real or perceived) insecurity are many and familiar.<sup>58</sup> In some extreme instances, the question arises as to whether and how to suspend legality itself so as to allow the State to implement measures that would not be acceptable in normal times.<sup>59</sup> If these radical deviations from the rule of law are controversial in extreme scenarios, their legitimacy drops to near zero in situations in which the perceived security threat is less acute and probably more permanent.<sup>60</sup>

The use of security-based arguments to justify either partial ruptures with, or transformations in, the existing legal order to increase the repressive powers of the State, however, has been both frequent and successful in the history of South America. In the case of Brazil, the most conspicuous example of this phenomenon took place during the *Estado Novo* of Getúlio Vargas (1937-1945). Although as a practical matter most of the imposed 1937 Constitution was not enforced at all,<sup>61</sup> the constitutional text did reflect a basic commitment to transform national laws in order

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<sup>57</sup> For a comparison between different types of “authoritarian legality” in the Southern Cone, see ANTHONY W. PEREIRA, *POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE AND ARGENTINA* (2005). For a specific account of the U.S. experience with changes in legal arrangements to respond to the recent threats of terrorism, see LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM* (2008); see also *SECURITY VS. LIBERTY* (Daniel Farber ed., 2008); *The Constitution in Wartime*, *supra* note 5.

<sup>58</sup> Typical historical examples of legal changes in response to emergency situations are increasing the powers of the State bodies that are considered more apt to deal with the crisis, such as the Military or the Executive Branch; the adoption of drastic repressive measures, such as the isolation of individuals that are considered dangerous or the use of methods of interrogations that involve torture; narrowing the scope of judicial review of emergency measures that are taken as necessary, such as the preventive detention of potential aggressors.

<sup>59</sup> For a normative discussion of this idea, see, for instance, Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2003); see also Mark E. Brandon, *War and the American Constitutional Order*, in *The Constitution in Wartime*, *supra* note 5, at 11.

<sup>60</sup> *The Constitution in Wartime*, *supra* note 5, at 45 (“Suspending legality during a time-limited war is one thing. Suspending it during a more or less permanent condition is quite another. The latter is the end of the rule of law itself”).

<sup>61</sup> For example, Vargas never called the national plebiscite required by articles 175 to 187, without which the 1937 Constitution could not formally remain in force after the end of Vargas’ first tenure as President.



to allow the State to tackle a supposed national emergency.<sup>62</sup> The text of the Constitution contained several important restrictions to fundamental rights and democratic institutions; its Preamble defended such measures as a fulfillment of “society’s wish” – as supposedly heard, interpreted and carried out by Vargas – to maintain “social harmony” in the country.<sup>63</sup> Moreover, Vargas introduced the first comprehensive body of specific national security statutes in the history of Brazil.<sup>64</sup>

Similarly, the military regime of 1964-1985 also sought to transform the existing legal order to accommodate greater repressive powers on security grounds. Although departures from the constitutional order through “Institutional Acts” (*Atos Institucionais*) imposed by the military regime were common, there was no *a priori* wholesale suspension of the 1946 Constitution. The military regime did not operate in a complete institutional vacuum; already in the first months after the 1964 coup, the military government resorted to the national security legislation enacted under the previous democratic government to prosecute political dissidents.<sup>65</sup> In sum, even in the most authoritarian periods of Brazilian history, there was no wholesale suspension

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<sup>62</sup> To quote just a few examples, art. 168 of the 1937 Constitution granted the President the power to suspend mailing privacy and the freedom of assembly, while art. 186 ended the constitutional text by activating all these and other emergency presidential powers (“art.186: The State of Emergency is hereby declared in the country”).

<sup>63</sup> According to the preamble of the 1937 Constitution, the main purpose of the coup and of that document itself was to, “fulfilling the Brazilian people’s legitimate aspirations of social and political peace, which is currently profoundly disturbed by well-known factors of disorder, (...) guarantee the unity, respect, honor and independence of the Nation, as well as, under a regime of social and political peace, the necessary conditions for its security, welfare and prosperity.”

<sup>64</sup> Law n. 38, Apr. 4, 1935.

<sup>65</sup> *Id.*, at 68, and chapter III in general. The Institutional Acts enacted during the military regime were para-constitutional instruments of restriction of several individual rights, and were invariably justified on security grounds. The preamble of the AI-1, for instance, which deprived more than 500 citizens of their political rights, explained that, given the threat of social instability cause by “subversive” groups, the new restrictive measures were necessary to maintain the “order, security, tranquility, economic and cultural development and social and political harmony of the country, which have been compromised by subversive and revolutionary war methods.” In the same way, the Institutional Acts n.2 and n.5, also justified on the basis of “national security” and “preservation of internal order”, transformed existing legal rules towards greater restrictions on individual rights and broader Executive powers.

of the rule of law but rather efforts to shape the existing legal order in politically controversial and more repressive directions based on security considerations.<sup>66</sup>

The threat to civil liberties and constitutional values in times of national emergencies has also been a well-known phenomenon and topic of heated debate throughout U.S. history. As recently put by a U.S. commentator, “it has become part of the drinking water in this country that there has been a trade-off of liberty for security.”<sup>67</sup> In the last decades, and especially in the aftermath of 9/11, there has been profound disagreement among scholars and politicians about which legal changes that promote national security but infringe upon individual rights are admissible. Defenders of civil liberties have generally argued that the scale on which rights and security are balanced against each other is biased against the former,<sup>68</sup> or have insisted that, even if greater rights protection means less security, the community’s constitutional commitments to the protection of civil liberties requires the State to refrain from adopting excessively harsh security measures in times of crises, even if

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<sup>66</sup> In this regard, scenarios of emergency are not qualitatively different from “calmer” moments in a country’s history. There seems to be more of a difference in degree. As Tushnet remarks, “it is not, then, that law is silent during wartime. Rather, it is that sometimes it speaks in tones that advocates of particular positions do not like. But, after all, how is that different from any other time?” Tushnet, *supra* note 5, at 42-3.

<sup>67</sup> James B. Comey, *Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REV. 403 (2003). See also MICHAEL LINFELD, *FREEDOM UNDER FIRE* 169 (1990) (“[t]he stated justification for virtually every violation of civil liberties has been ‘national security’”). Ronald Dworkin has recently remarked that “[p]eople’s respect for human and civil rights is very often fragile when they are frightened, and Americans are very frightened.” Ronald Dworkin, *The Threat to Patriotism*, NEW YORK REVIEW OF BOOKS, Feb. 28, 2002. This notion of a “trade-off” between the promotion of security and the protection of certain fundamental rights, as well as the “weighing” or “balancing” vocabulary that usually follows it, is widespread across the political spectrum, as noted by Jeremy Waldron: “We hear the talk of a balance between security and liberty from all sides. We hear it from conservatives (...); from liberals (...); and from almost everyone in between” (Jeremy Waldron, *Safety and Security*, 85 NEBRASKA L. REV. 455 [2006]). It was this same picture that led Justice Thurgood Marshall to express his concern that “[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure” (*Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 1989; Marshall, J., dissenting). In the same vein, Justice Sandra Day O’Connor stated that “It can never be too often stated that the greatest threats to our constitutional freedoms come in times of crisis” (*Vernonia School District v. Wayne Acton*, 515 U.S. 646, 1995; O’Connor, J., dissenting).

<sup>68</sup> Mark Graber, *Counter-stories: Maintaining and Expanding Civil Liberties in Wartime*, in *The Constitution in Wartime*, *supra* note 5, at 104.

those measures are considered to be the most effective option in terms of promoting security.<sup>69</sup>

The controversy surrounding legal changes that express repressive policies focuses almost exclusively on the perceived tradeoff between individual rights and security.<sup>70</sup> While these transformations in legality are certainly controversial, this disagreement is normative: it typically concerns the merits of the transformations, not their structure. Even if the result of the tradeoff between them is certainly subject to disagreement, both sides of the debate agree that ambitious measures taken in the name of public or national security tend to reduce individual rights protections.<sup>71</sup> This traditional tradeoff is, however, conspicuously absent from any analysis of the adaptive policies described above. Indeed, the security-based arguments advanced in Brazil are structurally different from those employed to support or criticize repressive policies in that (i) they take the general state of insecurity as given rather than seeking to reduce it, and (ii) the proposed adaptation in the legal order operates by reinforcing the individual rights of *potential victims* rather than by reducing the rights of potential aggressors.

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<sup>69</sup> See Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235 (2006) (asserting that “[w]hat is missing from this calculus [by the U.S. Supreme Court and the “Law on Terrorism” jurisprudence]... is a full appreciation of the value of the Constitution – as a statement of the ideals of the nation and as the basis of the principle of freedom – and even more, a full appreciation of the fact that the whole-hearted pursuit of any ideal requires sacrifices, sometimes quite substantial ones”).

<sup>70</sup> There certainly are nuances in the U.S. academic debate that we are not fully integrating in our analysis. To be sure, some scholars have questioned whether it makes sense to talk about a tradeoff between security and rights, since a minimum of security is a precondition for the enjoyment of any right. (see, e.g., Viet D. Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J. L. & PUB. POL’Y 399 (2002) (noting that “the dichotomy between freedom and security is not new, but it is false”; “security is the very precondition of freedom”). For a critical analysis of this argument, see Jeremy Waldron, *Security as a Basic Right (after 9/11)* 207, in GLOBAL BASIC RIGHTS (Charles Beitz & Robert Goodin eds., 2009).

<sup>71</sup> See, e.g., RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006); Mark Tushnet, *Defending Korematsu?*, in *The Constitution in Wartime*, *supra* note 5; Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L. J. 1011 (2003).

In this sense, the security-based arguments correlated with adaptive policies point in a direction that is completely different from the one that typically underlies fundamental rights concerns in times of crises: the policy being proposed as necessary in a scenario of insecurity represents an *increase* in the protection of some fundamental rights, even if to the detriment of other relevant state policies and constitutional values.<sup>72</sup> We will next explore some of the distributive implications of these adaptive policies in a society with significant income and social inequality such as Brazil.

#### **IV. Public Losses, Private Gains? Some Possible Implications of Adaptive Policies**

This paper identified how the high levels of violence in Brazil are being used to shape the development of the country's legal institutions. Despite the extensive media coverage afforded to instances of this far-reaching phenomenon, ranging from executive compensation to traffic rules, the collateral effects of violence on Brazilian law had not yet been identified or theorized as a single new pattern or trend in legal evolution. This paper sought to shed light on this relatively unconscious and decentralized process of adaptation of Brazilian law to a state of insecurity and to tentatively propose a theoretical framework for its analysis.

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<sup>72</sup> The possibility of such an apparently counter-intuitive legal transformation has been noted by Mark Graber, who observed how the canonical narratives in the U.S. "omit numerous instances in which military conflict inspired some government officials to increase protections for civil rights and liberties." Graber, *supra* note 68, at 96. The main examples mentioned by Graber are the protection, by the Supreme Court, of the freedom of Jehovah's Witness to refuse to salute the U.S. flag during WWII; the expansion of racial equality during the Civil War and of labor rights during WWI. None of these examples, however, match the phenomenon of adaptive policies in Brazil, which merely to adapt the legal order to a context of insecurity by expanding certain rights, but without fighting the causes of insecurity, while Graber lists examples of expansion of certain rights as an instrumental part of a broader state effort to win a war (and thus directly fight the source of insecurity).

The traditional debate about the relationship between violence and insecurity has focused almost exclusively on the risk that excessively repressive policies pose to fundamental rights and the rule of law. In sharp contrast, the adaptive policies described in this paper seek to mitigate the effects of insecurity by strengthening the individual rights of potential victims. The novel and, thus far, unanswered question lies in determining the costs of these adaptive changes – that is, what other public policies or constitutional values might be gradually expunged from the legal system in the adaptive process we have described above.

To be sure, arguments based on insecurity do not and should not always prevail in Brazil. In the lawsuit seeking to avoid the publication of the salaries of São Paulo civil servants, for example, Justice Gilmar Mendes of the Brazilian Supreme Court has signaled that security considerations will not necessarily be dispositive for the outcome of the case.<sup>73</sup> Still, even if not always a winning argument, there is little question that the security of potential victims has been taken seriously in shaping Brazilian laws by both the legislative and the judicial branches.

This transformative potential of widespread insecurity on the legal order is not surprising given the centrality of the value “security” in Brazil’s Constitution. The very term “security” (*segurança*) appears both in the preamble to Brazil’s 1988 Constitution and in the heading of article 5, which lays out the vast majority of individual rights of Brazilian citizens and foreign residents in the country.<sup>74</sup> While

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<sup>73</sup> See Part II(b) *supra*.

<sup>74</sup> Brazilian Constitution, Preamble (stating that the Constitution seeks to “establish a Democratic State, in order to secure the enjoyment of social and individual rights, liberty, security, welfare, development, equality and justice as the supreme values of a fraternal, pluralistic and prejudice-free society, founded on social harmony and committed, both internally and in the international order, to the peaceful solution of conflicts,” and art. 5<sup>o</sup>, *caput* (ensuring “the inviolability of the right to life, liberty, equality, security and property”) (emphasis added).

the notion that “the Constitution is no suicide pact”<sup>75</sup> has become commonplace in the United States, Brazilian courts and legislatures have been equally unwilling to permit the law to serve as an instrument for homicide and other violent crimes or as an accomplice to their perpetrators.

The Brazilian Supreme Court has adopted an expansive approach to the scope and effects of individual rights across different areas of public and private law.<sup>76</sup> The ample use of proportionality tests has had deep consequences on Brazil’s legal order. Once courts begin to accept the individual right to security to invalidate public policies that are perceived to be “disproportionate” or “unduly invasive,” the perception (whether empirically justified or not) of constant and serious security threats tends to bend the proportionality analysis towards individual security. The Rio de Janeiro Court of Appeals described the extreme danger to individual security in that city as a “public and well known fact” that is “only comparable to territories afflicted by war.”<sup>77</sup> This is not a purely rhetorical artifact. A piece of information which is a “public and well-known fact” does not require proof under Brazilian law.<sup>78</sup> This appeal to public perceptions about violence in urban centers in Brazil gains force

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<sup>75</sup> The metaphor “suicide pact” comes from the dissenting opinion of Justice Robert H. Jackson in *Terminiello v. Chicago*, 337 U.S. 1 (1949), and has been widely used ever since.

<sup>76</sup> See, as an example of an STF decision recognizing the so-called “direct effect” of fundamental rights and their enforceability in private social relations, despite the absence of direct state action, the Extraordinary Appeal n. 201.819-8 (RJ), decided on Oct. 11, 2005. In that case, the STF held that a private non-profit association (the Brazilian Association of Composers) could not expel one of its members without assuring him some basic guarantees of due process, as mandated by the constitutional right to an “ample defense.”

<sup>77</sup> See *supra* note 51. Art. 334 of the Brazilian Code of Civil Procedure Code provides that “[t]he presentation of evidence is not required to prove the facts that are: I – well-known (...).”

<sup>78</sup> Another example of a judicial decision depicting the violence in Rio as a “public and well-known fact” within the TJ-RJ can be found in the Appeal n. 2009.700.059332-1 (Fourth Appeals Chamber, decided on 09.09.2009), which states that “the violence in the city [of Rio de Janeiro] is a public and well-known fact.”

through the use of proportionality tests by the Brazilian Supreme Court without the necessary reflection about the empirical arguments that should be discussed.<sup>79</sup>

We do not want to suggest that adaptive policies are never justified; they might well be perfectly sensible under certain circumstances – in which case the identification of their costs will only serve as an argument in favor of better public security policies.<sup>80</sup> What we do want to suggest, however, is that these security-based arguments should not be accepted at face value without further inquiry. A well-known concern of scholars committed to the protection of the rule of law in times of widespread perception of insecurity has been that fear might impair sound, empirically grounded policy-making. We believe that there is no reason to restrict this concern to the familiar repressive policies, which restrict the rights of criminal suspects and defendants. The effects of public fear on our capacity to make necessary and justified tradeoffs should also be scrutinized in the case of adaptive policies, even if they express an increased protection to certain individual rights of segments of the population.<sup>81</sup>

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<sup>79</sup> On the empirical character of the statements that underlies the suitability and necessity prongs of the proportionality exam, *see* LUIS FERNANDO SCHUARTZ, *NORMA CONTINGÊNCIA E RACIONALIDADE* (2005); for a critical analysis of the STF's consistency and rigor in using proportionality tests, *see* HUMBERTO B. ÁVILA, *TEORIA DOS PRINCÍPIOS* (2003); Virgílio Afonso da Silva, *O Proporcional e o Razoável*, 798 *REVISTA DOS TRIBUNAIS* (2002).

<sup>80</sup> One alternative way of taking the right to security seriously while avoiding some of the pitfalls and distortions mentioned in this paper is to develop remedies and strategies for judicial enforcement that, unlike the adaptive policies we describe, do not begin and end with individual claims (made in individual lawsuits) to security. Security-based claims by residents of specific areas could trigger judicial monitoring of the state's policies regarding that community: the judicial role in this case would be to improve the general level of security in the area, not to solve an individual's dissatisfaction with her perceived level of personal safety. In this model of judicial intervention to promote rights to security, the scope of a legal decision would extend beyond the individual litigant's claim to reach an entire community, therefore engaging judges and the polity in a broader and more informed dialogue that could lead to actual changes on the level of general security policies. We are thankful to Owen Fiss for pointing out this possibility to us.

<sup>81</sup> A recent example of how the actual level of violence is not necessarily correlated to individuals' perception of (in)security can be found in the *Índice de Percepção da Presença do Estado* ("State Presence Perception Index"), prepared by the Getúlio Vargas Foundation (FGV) in Rio de Janeiro,

This is especially true if we consider that, just like the costs imposed by repressive policies are not uniformly distributed in society, impacting more strongly those groups that are more likely to be identified as potential transgressors, the costs and benefits of adaptive policies in Brazil are also disproportionately distributed across the population. In other countries, the specter of terrorism potentially affects all segments of society. In contrast, the adaptations to insecurity in Brazil have invariably and primarily served the most privileged social groups, even though, both in absolute and in relative terms, the poor are the primary victims of violence in the country. While the decrease in transparency due to adaptive policies imposes diffuse costs that are hardly noticeable at the individual level, their benefits are clearly concentrated in certain groups (top executives, highly-paid civil servants, and the higher ranks of the federal executive branch) that are hardly representative of the Brazilian population at large. Given the concentrated benefits and the diffuse costs of adaptive policies, it should not be surprising that the primary beneficiaries of these policies have been quite successful in lobbying for their implementation.<sup>82</sup>

Conservative groups tend to support both repressive and adaptive policies, even though the former favor public policies to the detriment of individual rights and the latter favor individual rights to the detriment of public policies. In the United States, the same political party that advocates for harsh repressive measures against

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under the coordination of Marcelo Simas and Fernando de Holanda Barbosa, and released in June 2010. The researchers conducted surveys both in some of the most dangerous and some of the safest areas in Rio by asking residents to rate their freedom of movement and freedom from harm in their neighborhood. The grades given by residents of the safer, upper-middle class areas on both of these issues were consistently lower than the ones given by residents of the *favelas* included in the sample. A presentation summarizing the main findings of this study can be found at: [http://www.oglobo.com.br/rio/arquivos/apresentacao\\_cidadania.ppt](http://www.oglobo.com.br/rio/arquivos/apresentacao_cidadania.ppt). A discussion of the results with experts on the field can be found at: <http://oglobo.globo.com/rio/mat/2010/06/07/para-especialistas-pesquisa-comprova-que-populacao-se-sente-mais-segura-na-area-onde-vive-916810971.asp>.

<sup>82</sup> In fact, one could argue the stronger the adaptive policies are, the fewer the elites' incentives will be to fight for other security-promoting policies of a more general character.



terrorism strongly supports the right to bear arms, which has been recently interpreted as constitutionally protected.<sup>83</sup> Likewise, in Brazil the defeat of the so-called “Disarmament Law” in a nation-wide referendum in 2005 was largely attributed to the political propaganda emphasizing the serious deficiencies in public security in Brazil.<sup>84</sup> Brazilian elites are thus resorting to security arguments both as a sword and as a shield: as a sword, in supporting repressive policies, which suppress or decrease the scope of the rights of criminal suspects and defendants; and as a shield, in supporting adaptive policies, which mitigate their own legal duties and accountability to the public.<sup>85</sup>

In light of the potential distortions in terms of allocation and distribution, security arguments in Brazil should be subject to greater scrutiny than has been the case thus far. There is reason to believe that the use of security arguments has been exaggerated and, at times, merely a pretext to achieve other objectives. A careful and detailed balancing of the interests involved in each of the cases described here requires empirical examination and is outside the scope of this paper. Our goal was to demonstrate, instead, that these questions – so far ignored – must be a part of the debate about the relationships between law and insecurity in Brazil.

Any economic analysis of criminal law and policy takes into account both the costs of crime and the costs of investigating and punishing criminal activity. This

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<sup>83</sup> *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

<sup>84</sup> Law n. 10,826/2003 prohibited, in its art. 35, “the commercialization of firearms and ammunition in all the national territory,” subject to a few exceptions and to popular approval in a nationwide referendum to be held on October 2005. The pro-prohibition movement lost by a landslide: 63.94% of the valid ballots against the rule versus only 36.06% in its favor. Most commentators attribute the defeat of the Disarmament Law to the anti-prohibition propaganda, which appealed to the perception, widespread among the middle and upper classes in Brazil, that the right to bear guns is a necessary substitute for the failure of the Brazilian State to adequately protect the right to security.

<sup>85</sup> Interestingly, for these groups, there is no perceived contradiction between claiming, on the one hand, that the criminal system is a hopeless case and that it is unable to provide citizens with minimum levels of security, while also asserting, on the other hand, that this same criminal system must be changed to incorporate harsher punishments.

paper suggested that the direct costs of violence and its repression have a parallel in the legal realm. Nevertheless, while the costs of repressive policies are well-known and debated, the collateral effects of violence on legal institutions have been left out of the equation altogether. This is unfortunate because the decrease in transparency attributable to adaptive policies might eventually weaken democratic institutions and slow down the country's economic and social development, thus preventing the elimination of the root causes of violence.