Rio de Janeiro on Trial: Law and Urban Reform in Modern Brazil

by

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Dedication

To my mother, Cinthia, my father, Pedro Luiz, and my sisters, Isabela, Beanca and Samantha. To the working-class cariocas, who find time to love and laugh despite poverty, lack of access to basic rights, and the daily violence inflicted by both criminals and the state.

To the memory of my godmother, Leila Jimenez.

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Abstract

Between 1903 and 1909, the leaders of Brazil's young republic, together with a newly empowered technical elite of physicians and engineers, carried out a major urban reform project in Rio de Janeiro, envisioning the then capital city as a symbol of the nation's civilizational progress. To embellish, sanitize, and modernize the city, state authorities ordered thousands of expropriations and evictions that ultimately concentrated land in the hands of an even smaller elite and removed the poor from Rio's downtown. In this dissertation, I argue that the urban reform was a watershed in the social, intellectual, and political histories of law in Brazil. The cross-class legal mobilization of urban citizens against the reform forced actors on both sides to re-articulate concepts such as individual rights, administrative independence and discretion, judicial review, public good, and separation of powers.

By analyzing court records, legal doctrine, legislation, legislative debates, administrative documents, and newspapers, I show how legal mobilization, ideas, and institutions changed the histories of urban development, state interventionism and citizenship in Brazil. Legislators, state attorneys, and legal scholars who supported the ruling elite's nation-building project promoted administrative independence and discretion as instruments of material progress. Although they were divided by class

and race, landlords and tenants formed surprising alliances to resist expropriations and evictions by mobilizing rights claiming in courtrooms, the press, and street protest. Representing them, political activists and lawyers elaborated rights-based arguments that advanced a liberal conception of law and state power, centered on judicial review as a channel for limiting executive interference in people's properties, homes, and bodies. Some of these activists and lawyers were political opponents of the liberal oligarchs who controlled the presidency and congress. Their arguments helped create a rights consciousness among the city's residents that placed individual rights in opposition to state interventionism. While landlords relied on a conception of the absolute right to property to preserve their patrimonial power, Rio's poor invoked the inviolability of their homes to oppose violent sanitary measures such as forced vaccinations and evictions.

Overall, litigation failed to undermine the transfer of property to wealthy investors and the expulsion of the poor from the city's center. Nonetheless, the courts played a decisive role in molding how the reform plan ultimately transformed Rio's urban space. More importantly, opposition to the reform fueled the emergence of a rights consciousness and strategies of legal mobilization that allowed people who lacked political power, such as small property owners, and those who were largely excluded from political participation, such as poor tenants, to actively transform conceptions of citizenship and law in Brazil. Through consciousness and mobilization, they claimed their rights to live, work, and profit in the city, and forced elite law and policy makers – congressmen, public administrators, and legal scholars – to consider

people’s individual rights against an emerging, powerful and exclusionary,

administrative state.

Introduction

On May 16, 1904, lawyer Leopoldo de Figueiredo filed a preemptive and collective habeas corpus petition on behalf of the population of Rio de Janeiro, capital of republican Brazil, at the city's Corte de Apelação (Court of Appeals). According to Figueiredo, the recently enacted Regulamento Sanitário (Sanitary Code) threatened people's rights to property, liberty, work, trade, and to the inviolability of the home. Figueiredo argued that the code, which had gained the popular nickname "Código de Torturas" (Tortures Code), was proof of unquestionable despotism.[1] Six months later, a heterogeneous crowd stormed the streets of Rio to protest forced vaccinations, domiciliary disinfections, evictions, and expropriations. Both the petition and the Vaccine Revolt reveal that the city's residents articulated a rights consciousness to claim individual private rights against the state's intervention in their homes, properties, and bodies. From courts to barricades, people mobilized the law against a comprehensive urban reform plan aimed at transforming old colonial Rio into a modern European-like metropolis.

The recently-proclaimed Brazilian Republic, founded by a military coup against the monarchy in November 1889, was a peripheral economy politically controlled by a small group of rural oligarchs and a recently-empowered technical elite of engineers and physicians. Small

[1] "Regulamento Saniário. Habeas Corpus," *Jornal do Brasil*, May 17, 1904.

groups of strong rural landowners controlled elections through violence and fraud, and, beginning in 1898, after an unstable decade of military governments and rebellions, manipulated the political system to guarantee their alternation in the federal government. Between 1903 and 1909, political and technical elites joined forces to modernize, embellish, and sanitize the Brazilian capital, Rio de Janeiro. Their goal was to erase the city's international reputation as a disease-filled tropical hell in order to attract foreign immigrants and investors, and therefore boost Brazil's export-based economy. They envisioned the reformed capital as a symbol of national progress, which would legitimize the infant republic by showcasing its prominent future as part of the selective group of Western civilized nations.[2]

The civilized city and nation were part of an exclusionary modernization project typical of Latin America's postcolonial states. After they consolidated their power in the late nineteenth century, liberal elites across the region tried to impose visions of modernity that segregated, subordinated or eliminated the non-white majorities, deemed unfit for the civilized world.[3] In Rio, thousands of evictions and expropriations concentrated land in the hands of few, and removed roughly 37,000 residents, mostly poor workers, from the city's downtown.[4] While national elites put legal ideas, institutions, and practices into action to serve their nation-building

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[2] Margarida de Souza Neves, "Os Cenários da República. O Brasil na Virada do Século XIX para o Século XX." In: Jorge Ferreira & Lucilia de Almeida Neves Delgado, *O Brasil Republicano: O Tempo do Liberalismo Excludente* (Rio de Janeiro: Civilização Brasileira, 2013), 41.

[3] The most violent of such projects may have been the Argentine "conquest of the desert." In the 1870s and early 1880s, General Julio Roca led a campaign to eradicate the indigenous population established in the pampa "in the pursue of expanding a more urbane European-like and "civilized" way of life." Ana Igareta, "Civilization and Barbarism: When Barbarism Builds Cities," International Journal of Historical Archeology 9, n. 3 (2005), 168.

[4] Lilian Fessler Vaz, *Contribuição ao Estudo da Produção e Transformação do Espaço da Habitação Popular: As Habitações Coletivas no Rio Antigo* (MA thesis – Universidade Federal do Rio de Janeiro – 1985), 226.

project, city residents used the rights consciousness and legal mobilization that emerged among them to occasionally disrupt that segregationist project.

President Francisco de Paula Rodrigues Alves (1902-1906), a representative of the São Paulo coffee producers, trusted engineers and doctors with the urgent task of reforming the city. In 1903, he appointed two federal commissions led by engineers: the Comissão das Obras do Porto (Port Works Commission), which oversaw the port's modernization, and the Comissão Construtora da Avenida Central (Commission for the Construction of Central Avenue), in charge of opening a broad artery, which would cut across the city's downtown, facilitating the flow of people and products from and towards the new port (Image I.1). The new avenue would be similar to Buenos Aires' Avenida de Mayo, a symbol of Argentina's much-envied progress. In December 1902, Alves had appointed the engineer Francisco Pereira Passos as the capital's mayor, giving him the responsibility of implementing an urban integration and sanitation plan that broadened old streets and opened new ones to improve traffic flow and the circulation of air around Central Avenue (Image I.2). Both the federal and the municipal projects required hundreds of expropriations and demolitions of buildings in the city's downtown and adjacent areas. In December 1903, the president appointed doctor Oswaldo Cruz as the federal public health director, in charge of leading an aggressive sanitation campaign that targeted unhygienic buildings, mostly the overcrowded collective habitations that housed the urban poor. Under Cruz, public health inspectors ordered hundreds of foreclosures and evictions based on health hazards, conducted thousands of domiciliary disinfections, and forcefully vaccinated the population against smallpox.

(Image I.1 – The Avenida Central project – Paulo de Frontin, Projeto da Avenida Central e Obras Complementares (1903), Facsimile of the plan for the Avenida Central, c. 1904, originally engraved in Paris by Erhard Frès, Woodson Research Center, Fondren Library, Rice University: Rio de Janeiro Iconography – available at imaginerio.org)

(Image I.2 – Verena Andreatta, Plano Pereira Passos (1903-1906), Map of Rio de Janeiro showing the urban reforms of Pereira Passos, Fondren Library, Rice University, Houston, Rice University: Rio de Janeiro Iconography – available at imaginerio.org)

From the ruins of the condemned, expropriated, and demolished colonial buildings, emerged broad avenues and plazas, filled with neoclassical edifices projected by prominent architects, such as the Theatro Municipal (Municipal Theater), inspired by the Parisian opera house. The beautiful city staged a *belle époque* of elite cosmopolitanism based on the appropriation of English and French high culture, consumption, and taste.[5] National and international companies and banks profited from loans, land speculation, and the administration of public services, such as streetcar lines, sewage, and illumination. Many of the engineers who advocated for the city's reform and sanitation were themselves investors and speculators.[6] Meanwhile, expelled from the city's downtown, the urban poor crowded the remaining and overpriced tenements, moved to distant suburbs, or squatted on land on the nearby hillsides, striking a balance between potentially worse living conditions and proximity to work opportunities.[7]

Throughout the nineteenth century, Rio's workers had lived in the stores, shops, and stables where they worked, and in the city's collective habitations, such as the tenements. Beginning in the 1850s, and more intensively after the abolition of slavery in 1888, former slaves, who had either migrated from the countryside or no longer lived under their masters' control in the city, further crowded the capital's housing market. Access to housing became even more difficult due to the continuous arrival of thousands of poor European, mostly Portuguese,

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[5] Jeffrey Needell, *A Tropical Belle Époque: Elite Culture and Society in Turn-of-the-Century Rio de Janeiro* (Cambridge: Cambridge Univ. Press, 1987).

[6] Oswaldo Porto Rocha, *A Era das Demolições, Cidade do Rio de Janeiro 1870-1920* (Rio de Janeiro: Prefeitura da Cidade do Rio de Janeiro, 1995).

[7] Sergio Pechman & Lilian Fritsch, "A Reforma Urbana e seu Avesso: Algumas Considerações a Propósito da Modernização do Distrito Federal na Virada do Século," *Revista Brasileira de História* 8/9 (1985).

immigrants, and the lack of effective state incentives for the construction of low-income housing.[8] As a response to the perils of urban growth, doctors and engineers forged a hygienist ideology that condemned the poor's living spaces as breading places of disease, vice and crime. By ordering the demolition of tenements and small businesses, for either sanitary or street design purposes, and substituting them with modern expensive buildings, federal and municipal administrators deepened the housing crisis, forcing the poor out of the city's center. Moreover, the policing of urban space disrupted popular culture and living strategies, such as African and syncretic religious practices and street carnival and commerce, deemed to be unsanitary and dangerous.[9] In short, the reform segregated the city, shaping the initial contours of its divided social and racial geography.

During the previous presidency of Manuel Ferraz de Campos Sales (1898-1902), a political compromise among rural oligarchs and the negotiation of Brazil's public debt had created the political and financial stability necessary to reform the capital. Dominated by regional oligarchies and backed by the allegedly neutral scientific knowledge of doctors and engineers and by the pro-reform and pro-government newspapers, the National Congress largely supported the reform plan. Congress passed laws that empowered public administrators such as Mayor Passos and Public Health Director Cruz by giving them broad discretion and independence. A statute enacted at the end of 1902 allowed Passos to govern without political opposition for the subsequent six months and to authorize a substantial loan to finance the

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[8] During the Pereira Passos government, for example, the only state-sponsored housing project built was enough to house approximately 10% of the population evicted. Larry Benchimol, *Pereira Passos: Um Haussmann Tropical: A Renovação Urbana da Cidade do Rio de Janeiro no Início do Século XX* (Rio de Janeiro: Biblioteca Carioca, 1990); Lia de Aquino Carvalho, *Habitações Populares: Rio de Janeiro, 1866-1906* (Rio de Janeiro: Biblioteca Carioca, 1995).

[9] Jaime Larry Benchimol, *Pereira Passos: Um Haussmann Tropical.*

reform.[10] In 1903, a faster and cheaper expropriation procedure was established, fulfilling a longstanding request by the city's engineers.[11] In 1904, upon Cruz's request, the congress delegated to the president the power to enact the new Sanitary Code, which created a special sanitary court that would have exclusive jurisdiction over its enforcement.[12] The new laws shielded both the mayor's and the public health director's acts against judicial review. According to the new statutes, the courts could not revoke administrative orders such as domiciliary disinfections, evictions, and expropriations.[13]

State attorneys and reformist jurists advanced legal doctrines that supported state interventionism for the purposes of segregation.[14] They framed those legislative changes as part of the police power doctrine that had empowered public administrators to sanitize and reshape cities in Portugal and its colonies since the mid eighteenth century. They justified the restrictions on individual rights based on open concepts such as public necessity and utility, which epitomized the elite's idea of the public good. A strict conception of separation of powers justified the executive's independence from judicial control. Although the Brazilian Republic had been founded on the constitutional decentralization and limitation of state power, jurists who specialized in administrative law argued that administrative independence and discretion were

[10] Lei n. 939, de 29 de dezembro de 1902.

[11] Decreto n. 4956, de 9 de setembro de 1903.

[12] Decreto no 5156, de 8 de março de 1904.

[13] Lei n. 939, de 29 de dezembro de 1902, Art. 16; Decreto n. 1.151, de 5 de janeiro de 1904, art. 1, §20.

[14] Airton Cerqueira-Leite Seelaender, "Pondo os Pobres no seu Lugar – Igualdade Constitucional e Intervencionismo Segregador na Primeira República," In: Jacinto Nelson de Miranda Coutinho & Martonio Mont'Alverne Barreto Lima (eds), *Diálogos Constitucionais: Direito, Neoliberalismo e Desenvolvimento em Países Periféricos* (Rio de Janeiro: Renovar, 2006): 17-30.

necessary to fulfill the modern state's function of addressing the increasing complexities of modern life, including the reform and sanitation of large cities such as Rio. For the engineers and doctors who helped craft the new legislation, law was an instrument of material progress.

However, landlords and tenants, supported by lawyers, journalists, and political foes of the oligarchic republic, mobilized the law both inside and outside the courts, individually and collectively, sometimes in surprising alliances, against the city's reform. Collectively, this heterogeneous group forged a legal attack based on the 1891 Republican Constitution's provisions that limited state power for the protection of individual rights. They argued that the new laws had created a permanent and unconstitutional state of exception in Rio, which systematically violated individual rights such as the right to property and to the inviolability of the home. In newspapers and courts, property owners, sometimes organized in associations or represented by lawyers, advanced an absolute conception of property rights against condemnations and expropriations. Poor tenants, unable to claim property rights over the small rooms where they lived, relied on the constitutional right to the inviolability of the home against state interference in their households. During the mobilization for the Vaccine Revolt, people articulated an understanding of this right as a guarantee that protected the patriarch's power over his wife and children in the private sphere. In the press, and occasionally in the courts, political opponents aligned with both radical republican and monarchist factions used the liberal constitutional critique to destabilize the government. In 1904, they were key agitators of the revolt, and seized the turmoil caused by street protest to march toward the presidential palace in a failed attempt at a coup d'état.[15]

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[15] Nicolau Sevcenko, *A Revolta da Vacina. Mentes Insanas em Corpos Rebeldes* (São Paulo: Sapione, 1993).

Throughout the urban reform period, and for a few years afterwards, when appeals were still being tried, the courts' behavior remained for the most part unpredictable. A combination of strategic litigation and legal reasoning, the courts' own institutional dynamics, and pressures coming from the government, the press, and the streets produced contradictory results. Until July 1904, judges and courts seemed to agree that they could not halt expropriations for the purposes of urban design. However, when a group of proprietors from the Largo da Carioca appealed to the Supreme Court, a momentary change in the composition of the court due to the absence of two justices generated surprising verdicts. In an atmosphere of charged public debates, the Supreme Court decided for the first time to grant possessory injunctions against expropriations.[16] Six months later, a second decision changed the court's approach to sanitary interventions. In January 1905, three months after people violently protested the invasion of their homes, the lawyer of a wealthy businessman mobilized the press to pressure the Supreme Court in a case of domiciliary disinfection. The court eventually ruled that the disinfection violated the resident's right to the inviolability of the home.[17]

Those two landmark Supreme Court decisions were insufficient to stop the authorities. Even after the Supreme Court's decision to grant possessory injunctions to the Largo da Carioca proprietors, the expropriations and demolitions continued. The court's decision on the domiciliary disinfection was issued after the sanitary agents had already invaded the businessman's home, and agents continued to forcefully enter people's homes to disinfect them.

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[16] "Supremo Tribunal Federal," *Jornal do Brasil*, July 10, 1904; "Tribunais. Manutenção de Posse," *Gazeta de Notícias*, July 10, 1904; "Supremo Tribunal Federal," *Jornal do Brasil*, July 10, 1904. Possessory injunctions were judicial orders aimed at protecting one's possession over one's property against state and private takings.

[17] Arquivo Nacional, Fundo: Supremo Tribunal Federal – BV, Serie: Habeas Corpus, Cód. Ref. 3648, 1905.

Nonetheless, these victories sparked waves of litigation that jeopardized the continuation of the reform. Court of Appeals decisions that generally went unremarked by the press also limited the state's power to expropriate, disinfect, and evict through different interpretations of legislation and precedents.

Overall, litigation failed to undermine the transfer of property to wealthy investors and the expulsion of the poor from the city's center. Nonetheless, the courts played a decisive role in molding how the reform plan ultimately transformed Rio's urban space. More importantly, opposition to the reform fueled the emergence of a rights consciousness and strategies of legal mobilization that allowed people who lacked political power, such as small property owners, and those who were largely excluded from political participation, such as poor tenants, to actively transform conceptions of citizenship and law in Brazil. Through consciousness and mobilization, they claimed their rights to live, work, and profit in the city, and forced elite law and policy makers – congressmen, public administrators, and legal scholars – to consider people's individual rights against an emerging, powerful and exclusionary, administrative state.

Diverse and sometimes competing interests were part of the legal mobilization against the urban reform. Liberal lawyers and jurists who criticized the government's violations of individual rights did not necessarily oppose the city's sanitation and embellishment. They were part of a cosmopolitan elite who shared with the reformers the vision of a modern European-like capital in the tropics. Yet they disagreed with the violent methods adopted to carry out the reform, which they saw as a threat to the republican constitutional order. Although property owners generally portrayed reformist measures as attacks on their rights, some of them profited from the indemnifications for expropriations and even expanded their economic power by buying unused expropriated land, negotiating with state authorities, and speculating with land in distant

neighborhoods where the city's urban infrastructure was expanding. Among the government's political opponents, there were two factions. The bulk of the opposition was formed by the leaders of the failed coup d'état that had accompanied the Vaccine Revolt, army men loyal to the radical republicans who had proclaimed the republic in 1889. A smaller group of monarchists financed the coup and engaged in litigation against the reform, hoping that the republic's political instability would leave the restoration of the monarchy as the only viable option.[18]

The poor's struggles to live in the city close to work opportunities drew on a combination of litigation, strategic alliances, appeals to administrative discretion, physical resistance, and squatting. After the 1904 revolt, people threatened with fines, evictions, and imprisonment for sanitary infractions individually and collectively evoked the constitutional right to the inviolability of the home in the courts. When public health authorities sued property owners, demanding the eviction of their tenements' residents, landlords and tenants formed occasional alliances to resist evictions in courts and administrative agencies. When sanitary agents tried to forcefully enter houses, the residents sometimes locked their doors and physically fought to impede them. Financially unable to appeal judicial decisions, many of those prosecuted in the sanitary court disappeared into the urban fabric to avoid going to jail.

Just as legal ideas, institutions, and practices framed the conflicts sparked by the urban reform, the legal debates that emerged contributed to transformations in Brazilian law. The growing restrictions on property rights imposed by the urge to reform the capital, combined with the influx of reformist ideas, prompted a redefinition of property in the 1910s. Instead of an absolute right, property was now seen as limited by social and collective interests. This new

[18] Nicolau Sevcenko, *A Revolta da Vacina*.

conception of property would prevail after a group of peripheral oligarchs and military men overthrew the liberal oligarchic regime in 1930. Simultaneously, the enhancement of executive powers to implement rapid and comprehensive reforms laid the basis for an unprecedented expansion of the state under President Getulio Vargas (1930-1945). Executive empowerment would eventually degenerate into authoritarianism when, in 1937, Vargas established a violent dictatorship in the country. However, while limitations on property and executive empowerment had grounded an exclusionary vision for the city and the nation in the early twentieth century, in the 1930s and 1940s they would promote a more inclusive state-building project, which incorporated the working-class into national politics and upheld social and labor rights.

Historiographical crossroads

Since the 1980s, historians have traced Rio's early-twentieth-century urban reform to the emergence of debates about city planning and sanitation during the second half of the nineteenth century. In response to the smallpox and yellow fever epidemics that frequently killed thousands of people in the city, engineers and doctors forged the hygienist ideology that attacked the poor's living spaces. This technical elite imported and developed scientific knowledge from Europe, and raised legitimate public health concerns. Yet the elite's underlying interest was to profit, alongside international companies and banks, from state contracts for infrastructural improvements, the expansion of streetcar lines, and the construction of housing projects, as well as from land speculation.[19] Some historians have highlighted the racialized feature of the hygiene

[19] Sergio Pechman & Lilian Fritsch, "A Reforma Urbana e seu Avesso"; Jaime Larry Benchimol, *Pereira Passos: Um Haussmann Tropical*; Lia de Aquino Carvalho, *Habitações Populares*; Oswaldo Porto Rocha, *A Era das Demolições*; Sidney Chalhoub, *Cidade Febril: Cortiços e*

ideology, which focused on the eradication of diseases that predominately affected white European immigrants, purposefully ignoring tuberculosis, a "social disease" that killed the city's poor and black population.[20]

Historians agree that public administrators imposed the reform, justifying their actions based on their allegedly apolitical scientific expertise. In the existing historiography, law is presented as an unproblematic and transparent tool of urban transformation. Scholars have suggested, at least implicitly, that administrators either enforced the new statutes without much opposition or violated them whenever these laws became obstacles to their interests. Moreover, there was apparently no need to forge deeper legal justifications for their interventions.[21]

Epidemias na Corte Imperial (São Paulo: Companhia das Letras, 1996); Teresa Meade, *"Civilizing" Rio: Reform and Resistance in a Brazilian City, 1889-1930* (University Park: The Pennsylvania State University Press, 1997).

[20] Regina Cele de A. Bodstein, "Práticas Sanitárias e Classes Populares do Rio de Janeiro," *Revista Rio de Janeiro* 1, n. 4 (1986): 33-43. In the early 2000s, a few historians argued that, as opposed to the functionalist federal plan to facilitate the influx of people and commodities towards the port, Mayor Pereira Passos' reform was an organicist project aimed at integrating the working-class to the city's modern downtown, therefore imbuing them with "civilized" values and habits. André Nunes de Azevedo, "A Reforma Pereira Passos: Uma Tentativa de Integração Urbana," *Revista Rio de Janeiro* 10 (2003): 39-79; Maria Isabel Ribeiro Lenzi, "Francisco Pereira Passos – Possibilidade de um Outro Olhar," *Revista Rio de Janeiro* 10 (2003): 133-141. However, the mayor's initiative to build low-income housing in the downtown area, one of his alleged urban integration policies, may be interpreted as a result of pressures coming from proletarian movements. Moreover, the housing project was clearly insufficient to accommodate the thousands of people evicted from the downtown tenements. Romulo Costa Mattos, *Pelos Pobres! As Campanhas pela Construção de Habitações Populares e o Discurso sobre as Favelas na Primeira República* (PhD dissertation – Universidade Federal Fluminense – 2008), 75.

[21] My reading of the historiography indicated on footnote 19 is inspired by Blank and Rosen-Zvi's take on the "spatial turn" in legal theory. Although the idea of urban planning may suggest that there is a transparent relationship between law and urban space, the law is often both a tool of urban transformation and a channel of resistance to it. The law is also non-transparent because there is a constant dispute for the meaning of law, which does not end in the passing of legislation, but rather continues in the courts and other arenas of interpretation. Yishai Blank &

However, by looking at legal scholarship and practice, I show that the new legislation was not sufficient to provide the reform with a legal basis. Reformist legal scholars drew on the police power tradition to justify state interventionism into people's individual private rights. Although the mayor and the public health authorities employed violent and illegal methods, they often resorted to the courts whenever property owners and tenants refused to agree to the terms of expropriations, domiciliary disinfections, and evictions. In courts, state attorneys tried to convince the judges that these measures fell outside their jurisdiction because they belonged to the realm of discretionary administrative power. Like the scientific discourse of doctors and engineers, legal arguments were relatively independent from politics. State attorneys and legal scholars reasoned based on national and comparative legislation, doctrine, and precedents in order to empower the administration with the tools deemed necessary to reform the capital.[22]

Historians have argued that opposition to this authoritarian project of exclusionary modernization came from a few voices in congress, part of the press, and the people who stormed the streets during the 1904 revolt. The oppositionist politicians and journalists' portrayal of Passos and Cruz as dictators was a political attack, part of the strategy to destabilize the Rodrigues Alves government. However, I demonstrate in this dissertation that legal scholars and trial lawyers provided a legal framework for this critique. In law reviews, legal treatises, newspapers, and courts, their portrayal of the public administrators' arbitrariness was based on

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Issi Rosen-Zvi, "The Spatial Turn in Legal Theory," *HAGAR Studies in Culture, Polity and Identities* 10, n. 1 (2010).

[22] I have drawn on Gordon's definition of "relative autonomy." According to Gordon, "relative autonomy means that they [legal forms and practices] can't be explained completely by reference to external political/social/economic factors. To some extent they are independent variables in social experience and therefore they require study elaborating their peculiar internal structures with the aim of finding out how those structures feed back upon social life." Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36, n. 57 (1984), 101.

interpretations of the 1891 Republican Constitution through the lens of liberal constitutionalism. For them, the courts were constitutionally empowered to control administrative acts whenever they violated individual rights. Although many of these legal professionals worked for or were themselves political oppositionists and property owners, some in fact defended the urban reform, nonetheless criticizing the government's unconstitutional excesses.

Historians have contextualized the Vaccine Revolt to refute the early-twentieth-century press' accounts of the rioters as disorganized and irrational groups of criminals. While most scholars claim that the participants rebelled against the overall negative impact of the reform on their lives, historians such as Sidney Chalhoub and Leonardo Pereira emphasized the popular opposition to the vaccine itself, highlighting the role of African and Afro-Brazilian medicinal practices and religious beliefs in condemning vaccinations.[23] The political scientist José Murilo de Carvalho divided the rioters' motivations into two groups. According to him, while the property owners and professional elites revolted to demand the protection of their individual rights, poor workers participated to defend the traditional value of the home as the space of the patriarch's control over his wife's and daughters' bodies. These two separate values, one "inherent" to the elite's modern ideology and the other "inherent" to the popular sectors' traditional ideology, were nonetheless compatible. Therefore, an "informal pact" about what consisted illegitimate state interference in people's lives emerged.[24] Like Carvalho, I also highlight the role of individual rights in the revolt. However, my research shows that Rio's poor

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[23] Nicolau Sevcenko, *A Revolta da Vacina*; Teresa Meade, *"Civilizing Rio"*; Chalhoub, *Cidade Febril*; Leonardo Pereira, *As Barricadas da Saúde: Vacina e Protesto Popular no Rio de Janeiro da Primeira República* (São Paulo: Editora Fundação Perseu Abramo, 2002).

[24] José Murilo de Carvalho, *Os Bestializados: o Rio de Janeiro e a República que Não Foi* (São Paulo: Cia das Letras, 2011), 136-138.

workers shared the individual rights consciousness that Carvalho attributes only to the elites. The dispossessed relied on the constitutional right to the inviolability of the home to protect the patriarchal control over the household. Moreover, patriarchal values were hardly exclusive to the poor. It was in the momentary convergence between those different groups against the reform that traditional values gained a modern constitutional form.

The historiography on Brazil's First Republic (1889-1930) has emphasized both the high levels of election fraud and abstentions and the emergence of myriad workers' movements led by trade unionists, socialists, and anarchists. From this perspective, Rio's poor alternated between being passive observers of political decisions made by the military, rural oligarchs, and technical administrators, and being active participants in social movements, such as strikes and the Vaccine Revolt, outside of institutionalized politics and law.[25] More recently, in analyzing judicial records, historian Gladys Sabina Ribeiro and others concluded that Rio's poor transformed the courts into spaces of citizenship struggles. According to this historiographical revision, people went to court to claim the rights that were daily denied to them in interactions with state authorities such as the police.[26] Eneida Quadros Queiroz analyzed the records produced by the sanitary court, concluding that people prosecuted for sanitary infractions actively resisted authoritarian reformist measures and advanced their own conceptions of

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[25] Angela de Castro Gomes, *A Invenção do Trabalhismo* (Rio de Janeiro: Relume-Dumará, 1994). During the First Republic (1889-1930), socialists, anarchists, communists, and other groups organized innumerous proletarian strikes in Rio de Janeiro and other large cities, such as São Paulo. Goldmacher explored how some of the organized associations and trade unions also recurred to institutional channels, such as the courts, to advance their interests. Marcela Goldmacher, *A "Greve Geral" de 1903: O Rio de Janeiro nas Décadas de 1890 a 1910* (PhD dissertation – Universidade Federal Fluminense – 2009).

[26] Gladys Sabina Ribeiro, "Cidadania e Lutas por Direitos na Primeira República: Analisando Processos da Justiça Federal e do Supremo Tribunal Federal," *Tempo* 13, n. 26 (2009).

rights.[27] I contribute to this revision by further analyzing the cases that reached Rio's Court of Appeals and the Brazilian Supreme Court, and highlighting the role of the courts' institutional dynamics, as well as legal arguments and strategies in the judicial resistance to the reform. Furthermore, I show that the active pursuit of rights in courts, the political and legal attacks in congress, newspapers, and legal doctrine, and the Vaccine Revolt mutually fueled one another.

Scholars have portrayed Rio de Janeiro as a city where law was either an instrument of social control, or the product of social interactions negotiated on the streets and in the courts. On the one hand, historians have argued that the elites shaped and controlled the application of law, especially criminal law, to keep the labor force under control and repress political dissidence. The daily enforcement of vagrancy laws, in addition to the persecution of religious, economic, and leisure practices, contributed to the exclusionary civilizational project of forcing people into segregated spaces and an exploitative labor market.[28] Political persecution through criminal law, aimed mostly at immigrants accused of being anarchists, kept the early-twentieth-century urban social movements under strict control to guarantee the oligarchic rural domination.[29] After the Vaccine Revolt, the government mobilized the police and the military to purge the city of what they saw as a "human excess," to borrow Nicolau Sevcenko's analytic term, of potentially dangerous and undesirable people, which included both poor workers and political agitators.

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[27] Eneida Quadros Queiroz, *Justiça Sanitária – Cidadãos e Judiciário nas Reformas Urbana e Sanitária – Rio de Janeiro (1904-1914)* (MA thesis – Universidade Federal Fluminense – 2008).

[28] Sidney Chalhoub, *Trabalho, Lar e Botequim: o Cotidiano dos Trabalhadores no Rio de Janeiro na Belle Époque* (São Paulo: Brasiliense, 1986); Gizlene Neder, *Discurso Jurídico e Ordem Burguesa no Brasil* (Porto Alegre: Sergio Fabris, 1995).

[29] Lená Medeiros de Menezes, *Os Indesejáveis da Modernidade. Protesto, Crime e Expulsão na Capital Federal (1890-1930)* (Rio de Janeiro: EdUERJ, 1996).

Hundreds of them were deported to the distant Amazon territory of Acre without proper criminal prosecution.[30]

On the other hand, more recent historiographical accounts have revealed that even poor workers and women, excluded from the ballots and the legal profession, participated in the production of law through negotiations with policemen, politicians, and judges. Sueann Caulfield showed how working-class women pushed both legal scholars and judges to change their conceptions of honor, virginity, and morality by occupying the male-dominated public space and negotiating their rights in courts.[31] Cristiana Schettini showed that Rio's prostitutes negotiated their rights to work and live wherever they wanted both in courts and with policemen on the streets, through the mediation of lawyers and influential clients.[32] Amy Chazkel argued that the illegal lottery game *jogo do bicho* (animal game), created in the late nineteenth century and still present on Rio's streets, survived because the daily negotiations among sellers, customers, and the police created an informal law, which was confirmed by judges' verdicts acquitting virtually everyone charged with crimes related to the game.[33] In all these accounts, instead of being solely an elite-made instrument of social control, the law was also a space of negotiations, produced in the interactions between the elite and the lower classes.

In this dissertation, I connect the social historians' portrayal of law as a negotiated space to the legal history of doctrine and judicial reasoning in the First Republic, and to the socio-legal

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[30] Nicolau Sevcenko, *A Revolta da Vacina*, 53.

[31] Sueann Caulfield, *In Defense of Honor: Sexual Morality, Modernity and Nation in Early-Twentieth-Century Brazil* (Durham: Duke University Press, 2000).

[32] Cristiana Pereira Schettini, *Que Tenhas teu Corpo – Uma História Social da Prostituição no Rio de Janeiro das Primeiras Décadas Republicanas* (Rio de Janeiro: Arquivo Nacional, 2006).

[33] Amy Chazkel, *Laws of Chance: Brazil's Clandestine Lottery and the Making of Urban Public Life* (Durham: Duke University Press, 2011).

literature on rights consciousness and mobilization. Negotiations on the streets, such as those between sanitary agents and property owners, were not the expression of informal law, but rather part of the regular functioning of an emerging administrative state based on administrative discretion and independence. Legal historians have showed that although the Brazilian oligarchic republic was fundamentally based on liberal ideas such as equality, the rule of law, and limitations on state power, Brazil's tradition of police power and administrative law justified the empowerment of public administrators who treated people unequally and pushed the boundaries between legally-based and arbitrary decisions.[34] Discretion, legally justified by a particular notion of separation of powers and the openness of concepts that referred to the public good, triggered both negotiations and violence. The lines between discretion and arbitrariness were constantly debated in legal doctrine, judicial petitions and decisions, as well as newspapers, which frequently published legal opinions.

The lower classes' participation in the production of law went beyond daily negotiations on the streets and in the courts. In 1904, mobilization in the press, public meetings, and courts created a rights consciousness that opposed the individual right to the inviolability of the home to state interventionism in people's households and bodies. Political leaders, lawyers, civil society organizations, trade unions, and common people mobilized litigation against reformist measures for different reasons, sometimes in strategic alliances. Even though most cases were not part of concerted litigation strategies, they reveal a momentary convergence of legal mobilization against policies that people perceived to be violations of their constitutional rights. This rights consciousness and the legal mobilization it motivated ultimately changed the terms of the

[34] Airton Cerqueira-Leite Seelaender, "Pondo os Pobres no seu Lugar."

relationship between the administrative state and its citizens, forcing legal scholars, courts, and public administrators to reflect on and adapt administrative independence and discretion to rights-based arguments.[35]

Chapter outlines

Chapter One introduces the history of urban modifications and resistance to them in Rio de Janeiro. From the city's founding in 1565 to the mid eighteenth century, urban expansion and enhancement were based on a combination of the private initiative of individual landowners and religious orders and the colonial state's modest investments. In the 1750s, the emergence of an Enlightened conception of city and the transformation of the police power tradition into an instrument of state modernization in Europe spread to the colonies. Although the Portuguese crown enacted regulations aimed at improving sanitary conditions in the colonial capital, entrenched interests and customs frustrated their implementation. When, in 1808, the crown moved the center of its empire to Rio, the king's impetus to create a European city in the tropics generated the first substantial restrictions on the rights of property owners, and, in response, the first collective opposition to urban transformation. After independence in 1822, police power

[35] Among the extensive literature on rights consciousness, I was particularly inspired by Hartog's definition of "constitutional rights consciousness": "That consciousness is, I believe, an intense persuasion that we (and here the first person plural is of indeterminate and changing breadth) have rights – that when we are wronged there must be remedies, that patterns of illegitimate authority can be challenged, that public power must contain institutional mechanisms capable of undoing injustice." Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All'," *The Journal of American History* 74, n. 3 (1987), 1013-1034, 1014. For legal mobilization, see Michael McCann, "Law and Social Movements: Contemporary Perspectives," *Annual Review of Law and Social Science* 2 (2006): 17-38.

regulations became part of the Brazilian monarchy's nation-building project. Throughout the nineteenth century, and more intensively after the 1850s, official attempts to sanitize and reshape the capital faced harsh opposition from the city's property owners. Although Brazilian jurists recognized that the state's police powers limited the rights attached to property ownership, property owners claimed property as an absolute right, the basis of Brazil's slaveholding society. Official efforts intensified after the proclamation of the republic, in 1889, especially regarding the sanitary war on tenements. However, under both the monarchy and the early republican governments, up until the first decade of the twentieth century, proprietors' resistance was ultimately stronger than the resolve of a weak state, thus undermining comprehensive urban reforms.

Chapter Two shows how the rural oligarchs and technical elites who ruled the country built a legal framework to enhance administrative independence and discretion aimed at facilitating the urban reform. At the end of 1902, by introducing the term *ratione imperii* in statutes, legislators prompted a heated and politically charged debate on state power and individual rights. The term shielded administrative acts from judicial review, opening a discretionary space for expropriations, domiciliary disinfections, and evictions. State attorneys drew on the history of administrative law to argue that this shield was part of a long tradition of police power in Brazil.

Rejecting the state's defense of the *ratione imperii* doctrine, many politicians, jurists, and trial lawyers argued that it created an unconstitutional permanent state of exception in the city. Part of the criticism came from opponents of the liberal oligarchic government, particularly positivists, who had recently lost power, and monarchists, who envisioned a return to the old regime. The oppositionist press popularized criticism of the reform's legal basis, translating this

complex legal concept into a language that could mobilize popular dissent. The courts faced the institutional problem of interpreting the limits of their own power amid tensions with the press and the executive. The *ratione imperii* doctrine was part of the emergence of a modern administrative state in Brazil. Although it would be gradually normalized as an argument to identify administrative acts that fall outside of judicial control, during the early twentieth century it was at the center of judicial quarrels and political conflicts that shaped both the capital's reform and Brazilian politics.

Chapter Three focuses on the judicialization of expropriations ordered by mayor Pereira Passos (1902-1906). Despite Passos' notoriously arbitrary methods, expropriations often followed judicial procedures that opened space for individual gains, such as higher compensations, and collective ones, such as the judicial prohibition on expropriations of entire zones of the city. At the Municipal Treasury Court, the engineers who determined compensation values worked within the constraints of legal interpretations and judicial praxis. In court, while property owners evoked absolute property rights, municipal administrators and attorneys appealed to notions of public utility. Although they were based on public utility, expropriations concentrated land in the hands of national and international elites. Auctions of expropriated land, eventually prohibited by the Court of Appeals in 1906, benefited proprietors with connections to government. Moreover, judicial expropriations allowed creditors, both individuals and banks, to claim rights over compensations. However, the courts did not merely mediate the terms of expropriations. Despite the *ratione imperii* prohibition, a handful of property owners from the Largo da Carioca successfully appealed expropriation orders all the way to the Supreme Court. Their judicial battles reveal how legal mobilization, the court's institutional dynamics, and external pressures influenced the outcome of cases central to the city's future.

Chapter Four turns to the role of law in the Vaccine Revolt. Opposition to forced vaccinations took place in the broader context of debates about the 1904 Sanitary Code's empowerment of sanitary agents and policemen to forcefully enter residences to disinfect them. Shortly after the code's enactment, people contested its constitutionality based on, among other arguments, the constitutional protection of the inviolability of the home. In the months leading up to the revolt, oppositionist newspapers and politicians – including monarchists and positivists plotting a coup d'état – mobilized people by invoking the home as the sacred space of patriarchal power, and its inviolability as a constitutional right, thus combining religion, morals, and tradition with modern liberal discourse. A few months after the revolt, the Supreme Court decided that a domiciliary disinfection violated the constitutional right to the inviolability of the home. People of different social backgrounds used this case as precedent in attempts to obtain court orders that prevented sanitary agents from entering their houses. This legal mobilization gained collective form when a trade union representative filed a collective habeas corpus petition on behalf of Rio's proletarian classes. In those cases, lawyers and common people alike expressed the sentiment that, although vaccination had been revoked and state repression intensified, a rights consciousness and the willingness to resist persisted in the city.

Chapter Five focuses on the judicialization of sanitary evictions ordered by the public health authority. Like the engineers at the municipal court discussed in Chapter Three, doctors and hygienists who determined the evictions were constrained by law and judicial praxis. The cases were initially heard by the Sanitary Court, a body created to interpret and enforce the 1904 Sanitary Code. The code empowered sanitary agents with administrative discretion, which opened space for both leniency and violence against property owners and tenants, occasionally driven by agents' personal interests. Many landlords contested evictions up to the Court of

Appeals, where lawyers on both sides articulated progressive concerns with the health of the poor and liberal arguments about procedural and property rights, concealing the sanitation project's segregationist features. Although most landlords were either silent regarding their tenants or actively worked to evict them, a landmark case in 1907 reveals how landlords and tenants could cooperate to block evictions. Most displaced tenants, however, unable to finance litigation, disappeared into the city to avoid prison sentences, undermining the sanitary court's disciplinary attempts. These cases show that landlords and tenants, divided by class and race, resisted evictions in different ways, but also occasionally actively cooperated in the judicial battles that shaped the sanitary plan.

Chapter six turns to the urban reform's impact on Brazilian law in two areas. First, I explore the transformation of property law. In 1910, the administrative law scholar Augusto Olympio Viveiros de Castro justified the expropriations in Rio de Janeiro based on the idea that property had a social function, thus anticipating the 1920s and 1930s reconceptualization of property as being inherently limited by social considerations. Therefore, Castro's work indicates that the limitations on property rights during Rio's reform contributed to the development of this social conception of property. In 1934, four years after a revolution had overthrown the liberal oligarchies, this conception was inserted in the text of the new constitution. It has survived constitutional changes up to the present day. Second, I argue that the legislative delegations, such as the one that authorized the president to enact the new Sanitary Code in 1904, along with the *ratione imperii* doctrine's limitations on the judicial power, became permanent instruments of the authoritarian state after 1937. They were part of a transformation in administrative and constitutional law that increasingly empowered the executive power in Brazil.

Notes on archival research

This dissertation is based on trial records, administrative documents, legal doctrine, legislation, legislative debates, and newspapers. The administrative documents were found both in online repositories and at the Arquivo Público da Cidade do Rio de Janeiro (Public Archive of the City of Rio de Janeiro). They provide yearly updates of the federal and municipal plans' implementation, as well as occasional petitions brought by property owners and tenants before the administration of mayor Pereira Passos. All legislation and legislative debates are currently housed in an online database maintained by the Brazilian national congress. While my research on statutes and decrees expanded to a century before and a three decades after the urban reform, given the volume of legislative debates, I focused on discussions regarding the most important pieces of legislation, such as the 1902 law that shielded the mayor's acts against judicial review and the 1904 Sanitary Code. The limited dissent that these statutes raised in congress suggests both the political elites' substantial investment in the capital's reform and how the dissenters participated in the formulation of the liberal constitutional attacks on the plan.

The search for law reviews and legal treatises led me to different libraries such as the library of the University of São Paulo Law School (USP), created in 1827, and that of the Instituto dos Advogados Brasileiros (Institute of Brazilian Lawyers) in Rio de Janeiro, an organization that has existed since 1843. Both institutions were part of the small elite circle that controlled the production of legal doctrine throughout the monarchical period (1822-1889). In the early 1890s, the republican government expanded this circle with the creation of institutions such as the Faculdade Livre de Direito do Rio de Janeiro (Free Faculty of Law in Rio de

Janeiro), current Federal University of Rio de Janeiro Law School (UFRJ), whose library I also consulted. Much of the late-nineteenth and early-twentieth-century legal doctrine is also available in various online libraries. While the treatises provided systematizations of legal fields such as administrative law, the law reviews contained articles that analyzed specific problems and published the judicial decisions that their editors deemed relevant. Both forms of publication reveal their editors' and authors' partial normative arguments about how the law should be interpreted. Nonetheless, they also contribute to the evidentiary chase of historical research. In several occasions, I started the search for court records based on what the law reviews had published.

The need to occasionally start with what the legal scholars considered to be the most important decisions of their time derived from the fact that I was looking for court records organized under various themes, collections, years, and names at the Arquivo Nacional (Brazilian National Archive), in Rio de Janeiro. I eventually concluded that the cases relevant to the early-twentieth-century urban reform had been tried by the Supreme Court, the Court of Appeals, the Municipal Treasury Court, and the Sanitary Court, each of which has its own collection in the judicial repository. I searched those collections using various strategies. Mostly, I looked for types of judicial procedures, such as expropriations, evictions, and sanitary infractions, and names, such as the names of property owners and sanitary inspectors. In total, I digitized approximately 240 case records, adding up to thousands of pages.

However, these cases represent only part of the litigation related to the urban reform. They refer to Mayor Passos' municipal plan and to the federal sanitation plan. From reading the administrative reports, I concluded that the federal commissions' projects to modernize the port and open the Central Avenue faced much less litigation than the municipal and sanitary plans.

Nonetheless, cases were brought to the federal courts, which also heard and dismissed many of the property owners' attempts to halt municipal expropriations. Yet for two years I tried accessing those court records in the archives of the Tribunal Regional Federal da 2ª Região (Federal Circuit Court of the 2nd Region), in Rio de Janeiro. Twice, changes in the court's administration moved the archives from an unorganized warehouse to the Federal Justice Cultural Center, in a building built on the Central Avenue from 1905 to 1909 to host the Supreme Court, and then back to the warehouse. These changes left the court records constantly in the process of reorganization, and therefore unavailable.

I initially intended to use the most popular early-twentieth-century newspapers, available online at the Biblioteca National's (Brazilian National Library) database, as merely complementary sources. However, my research revealed an unexpected function of the press. In a world where court records never left the courtrooms and legal doctrine circulated only among a restricted circle within the legal profession, the newspapers served as key disseminators of the most recent judicial decisions. This was confirmed by the newspaper clips hand cut by lawyers or their assistants that I found attached to judicial petitions. Furthermore, the press frequently published petitions at lawyers' request, discussed judicial decisions regarding pressing issues, pressured the courts in different directions, and actively used simplified legal vocabulary to mobilize people against reformist measures. Finally, the newspapers were key for finding connections among people, such as lawyers and property owners, and organizations, such as proprietors associations and trade unions.

Chapter One

The City's Memories

Writing in the 1930s, Sérgio Buarque de Holanda portrayed the Portuguese colonization of the New World as a rural enterprise that left urban development to chance. As opposed to the Spaniards' emphasis on well-ordered cities as symbols of successful conquest and colonization, "the city the Portuguese built in America was not a mental product." While Spanish colonizers quickly adopted the grid plan in the many cities they founded throughout the sixteenth century, the Portuguese American city "never managed to contradict the framework of nature." Left to spontaneous, unplanned growth, Brazilian cities' "silhouette merged with that of the landscape."[1] The early urban development of cities such as Rio de Janeiro, founded in 1565, therefore could be described as lawless. Yet, while lawlessness meant the lack of a master plan for the city, the colonizers brought legal instruments and forged customs that regulated the expansion of urban space. Following its bloody founding moment, Rio de Janeiro developed based on a combination of spontaneity and order.[2]

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[1] Sérgio Buarque de Holanda, *Raízes do Brasil* (São Paulo: Companhia das Letras, 1995), 93-137; Richard M. Morse, "Brazil's Urban Development. Colony and Empire," *Journal of Urban History* 1, n. 1 (1974): 39-72.

[2] Other historians of urban development highlight the role of Portuguese urbanism in the colony, therefore contradicting Holanda. Morse, "Brazil's Urban Development. Colony and Empire," 40-41.

Throughout the colonial period (1500-1808), the modification of nature for the purpose of building Rio de Janeiro's urban space was based on a combination of efforts. The Portuguese crown, colonial administrators, individuals, and institutional landowners, such as religious orders, invested in the landfilling of swamps, the opening of streets, and the construction of water supply systems. Although conflicts between landowners and local administrators emerged, there was little state control over the city's maintenance, modification, and expansion. Yet, in the late eighteenth century, the articulation of a police power tradition justified the state-led implementation of reforms in Portugal and its colonies. When the Portuguese royal family moved the center of its global empire to the tropical city, in 1808, the state's police power framed official initiatives to enhance and sanitize Rio in the first attempt to transform the city into a "civilized" European capital. From its earliest days, the crown's measures to accommodate the royal court and sanitize and embellish Rio created conflicts with local property owners.

After independence in 1822, when Rio became the capital of the Brazilian monarchy, urban sanitation and reform projects were proposed in times of emergency, such as when yellow fever epidemics struck the city. Throughout the second half of the nineteenth century, the city's proprietors employed political lobbying and judicial strategies against the control of collective habitations proposed by hygienist doctors and the expropriations to widen and open new streets proposed by engineers. While property was defined in absolute terms in mid-century, legal scholars of the time recognized that the police power tradition that framed numerous sanitary and expropriation laws posed significant restrictions on the usage of urban property. These restrictions, especially those regarding the control of what Brazilian elites perceived as the "dangerous classes" and their living spaces, culminated in a war on tenements that reached its peak in the 1890s, under the republican government established in 1889.

By the time President Rodrigues Alves, Mayor Pereira Passos, and Public Health Director Oswaldo Cruz joined forces to reform the capital city in 1903, Rio de Janeiro had thus had a long and conflictive history of state interventionism. Law was part of this history as both an instrument to justify interventions and a channel to resist and adapt to them. The eighteenth-century police power tradition had framed the state's investments in urban sanitation and enhancement, justifying limitations on individual rights. Property owners had resisted inside and outside courts, evoking an absolute conception of property. Beginning at the end of 1902, the Rodrigues Alves government would successfully pressure congress to enact new laws that changed the Federal District's administration, expropriation procedures, and sanitary regulations. This new legislative framework expanded executive independence and discretion for the purposes of reforming the capital. It was part of the emergence of a modern administrative state created to address the problems generated by unprecedented urban growth. However, people of different social backgrounds would draw on a liberal conception of individual rights, which had protected the two fundamental sources of privilege, wealth and authority in colonial and monarchical Brazil: landownership and slave ownership.

1. The conquest of hills and swamps

Founded in 1565, after Portuguese troops forcefully expelled the French colonists who had occupied the region known as Guanabara since 1555, Rio de Janeiro was first structured for defense purposes. The hills around Guanabara Bay were perfect for strategic military posts.[3]

[3] The efforts to create an infrastructure of defense in Rio were renewed in the eighteenth century, after the French tried to take back the city in 1710 and 1711. Nireu Cavalcanti, *O Rio de Janeiro Setecentista. A Vida e a Construção da Cidade da Invasão Francesa até a Chegada da Corte* (Rio de Janeiro: Jorge Zahar, 2004), 48-54.

Beginning on the hills and spreading down to the riversides, occupation was initially legally based on *sesmarias*, a medieval form of land tenure conditionally and precariously granted by the Portuguese crown. *Sesmaria* grants were conditional and precarious because the king could revoke them at any time based on the *sesmeiro*'s (holders of *sesmarias*) failure to produce and collect the taxes that drained wealth from the colony and delivered it to the metropolis.[4] Beginning in 1565, large portions of the city were granted as *sesmarias* to the leaders of the military victory over the French, and to noble families, religious orders, and the city chamber, which controlled the rural outskirts, where farmland supplied the city with food, and the metropolis with sugar, and later coffee. Because the Portuguese crown did not exercise close control over demarcation and distribution, squatting and land speculation were common.[5]

For the next two centuries, individual *sesmeiros*, institutions such as the religious orders, the city chamber, and the crown invested in the modification of nature through deforestation and the landfilling of lagoons and swamps. The latter, more expensive, required larger public investments. Because the chamber had scarce resources, the Portuguese crown loaned some of the taxes collected locally to urban development projects. Yet much of the urban expansion was carried out by private residents who either took the initiative or complemented the crown's efforts to fill the swamps with land and to open streets. Colonial urban enhancement also included the construction of aqueducts and fountains. These combined efforts created a practice

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[4] Laura Beck Varela, *Das Sesmarias à Propriedade Moderna: Um Estudo de História do Direito Brasileiro* (Rio de Janeiro: Renovar, 2005).

[5] Efforts to control the demarcation and distribution of land in the city emerged in the seventeenth century, after several conflicts over the occupation of the chamber's land. Fania Fridman, *Donos do Rio em Nome do Rei: Uma História Fundiária da Cidade do Rio de Janeiro* (Rio de Janeiro: Garamond, 1999); Thalita de Moura Santos Maia, *Terras e Poderes: Redes de Solidariedade, Conflitos e os Domínios Territoriais da Câmara do Rio de Janeiro entre 1700 e 1763* (MA thesis – Universidade Federal do Estado do Rio de Janeiro – 2012), 47-78.

of urban expansion and enhancement based on both concerted and spontaneous associations among the crown, city administrators, and landowners.[6] Occasionally, conflicts between landowners and administrators had to be settled by courts, especially when individuals took the initiative to build without asking for a license from the city chamber.[7]

Religious orders, such as the Benedictines and the Jesuits, were especially active in opening, paving, and maintaining streets. Sometimes, they contributed to the city's expansion in exchange for land. Land granted by the crown, donated by individual owners, and acquired through purchase made Rio's religious orders owners of a large part of the urban soil. They became landlords in the housing market, and providers of basic services such as health, education, and leisure for the city's population.[8] Together with royal ordinances that generally governed urban construction and the city chamber's orders, ecclesiastical recommendations regarding the usage of their buildings were some of the first rules to regulate Rio's urban space.[9] Religious brotherhoods formed by slaves and freedmen expanded the city's religious urban order to the rural outskirts, where they were allowed to build. In addition to providing some of those

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[6] Cavalcanti, *O Rio de Janeiro Setecentista*, 31.

[7] Cavalcanti, *O Rio de Janeiro Setecentista*, 340, 350.

[8] In the mid eighteenth century, the Jesuits rented 71 buildings across the city. When, in 1759, they were expelled from Brazil due to conflicts with the crown, the Church and local landowners, the Jesuits' properties were taken and auctioned. Many of their tenants bought and could finally own the properties where they lived and sub-located. Cavalcanti, *O Rio de Janeiro Setecentista*, 65-72.

[9] Both the Ordenações Manuelinas (1565) and the Ordenações Filipinas (1603) mandated that the city chamber must oversee every construction of edifices and streets, and established basic rules for construction. Nireu Cavalcanti, *O Rio de Janeiro Setecentista*, 339. Fridman, *Os Donos do Rio*.

same services for Rio's black population, brotherhoods such as the Irmandade do Rosário e São Benedito loaned money to slaves who sought to purchase their freedom.[10]

Although the Portuguese crown had commissioned a plan for the city in the mid-seventeenth century, the first substantial urban transformations appeared only a century later, after Rio became the colonial capital.[11] In the late seventeenth century, the metropolis shifted its commercial focus from the colonial capital of Salvador to Rio, much closer to the new, and very prosperous, mining region of Minas Gerais. By the second half of the eighteenth century, Rio had surpassed Salvador as the colony's main port, connecting different parts of the empire. In 1763, the crown finally moved the capital of the Brazilian colony to Rio de Janeiro.[12]

Simultaneous public and private investments in the city's urban expansion continued throughout the second half of the eighteenth century. However, developments in European ideas about cities, and the rise of a new conception of state and law changed the terms of the relationship between the Portuguese state and landowners. According to the new ideas that spread across Europe, rationalized, embellished, and sanitized cities had the civilizational function of creating rational, polite, and hygienic individuals. The reconstruction of Lisbon after an earthquake in 1755 was the first urban development project based on this "Enlightened idea" of city. It was the product of architectural design and legislation that allowed the state to interfere with private property, restricting owners' freedom to build, based on a reconstruction plan.[13]

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[10] Fania Fridman & Valter L. Macedo, "A Ordem Urbana Religiosa no Rio de Janeiro Colonial", *Urbana: Revista do Centro Interdisciplinar de Estudos sobre a Cidade-UNICAMP*, v. 1, n. 1 (2006).

[11] Maia, *Terras e Poderes*, 47-78.

[12] Kristen Schultz, *Tropical Versailles: Empire, Monarchy, and the Portuguese Royal Court in Rio de Janeiro, 1808-1821* (New York/London: Routledge, 2001), 44.

[13] Cavalcanti, *O Rio de Janeiro Setecentista*, 293.

After Lisbon, the Portuguese crown extended urban rationalization, embellishment, and sanitation to metropolitan and colonial cities.[14]

In the colony, regal orders regulated the construction of new *vilas* in the Northern regions of Grão-Pará and Maranhão. Despite the existence of local practices that created obstacles for the transplant of the European model, older colonial cities were also targeted. In the new capital, the crown's concerns focused on sanitation, based on scientific assessments that associated Rio's geography of hills and swamps and its hot and humid climate with the spread of diseases. The major projects to fill the wet areas with land, as well as the construction of aqueducts, were ordered by the crown's Vice-Reis (colonial governors), designed by military engineers, and executed by enslaved Africans and Afro-Brazilians, who made up around 35 percent of the city's 45,000 to 60,000 residents.[15]

Legal justifications for state interventionism in urban enhancement and sanitation were based on the notion of police power. In the early eighteenth century, Portuguese jurists conceived the state's police power as a royal prerogative to regulate private and social life. The state's function was to preserve the "good Christian order," then threatened by modern vices such as gambling and prostitution. Throughout the second half of the century, the king's police power gained an instrumental meaning. Competition among European states had triggered the Portuguese king's concern with territorial control, population growth, and tax collection. In sum, a concern with the Portuguese state's political and economic prosperity in comparison to its competitors. The notion of police power therefore provided a legal framework for administrative

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[14] Marieta Pinheiro de Carvalho, *Uma Ideia Ilustrada de Cidade: As Transformações Urbanas no Rio de Janeiro de D. João VI (1808-1821)* (Rio de Janeiro: Odisséia, 2008), 46-54.

[15] Carvalho, *Uma Ideia Ilustrada de Cidade*, 58. The numbers were taken from Schultz, *Tropical Versailles*, 45.

reforms that rationalized and concentrated power in the king's hands to invest in economic and population growth, tighter colonial control, and manufacturing.[16] This new conception of state and law was part of the Portuguese monarchy's efforts to expand absolute power while upholding an enlightened order.[17]

In cities on both sides of the Atlantic, the king's police power was conceived as an instrument to maintain order and promote residents' well-being. It justified the regulation and active transformation of urban space, for example, with restrictions on construction, such as those regarding the height of edifices, and expropriations for the widening of narrow streets. Both shorter buildings and wider streets were thought of as urban features that facilitated the circulation of air, and therefore contained the spread of diseases. In the colonial capital, sanitary improvement also required removing some of the city's hills, which obstructed the circulation of air. Moreover, medical science recommended not burying the dead close to densely populated areas. In Rio, a regal order from 1801 prohibited the custom of burying people in churches, transferring the practice to the city's outskirts.[18]

During the late colonial period, restrictions on the freedom of individual proprietors and religious orders were piecemeal and curtailed by long-established customs. Yet the legal framework to justify them was already in place. The combination of the development of a police

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[16] Airton Cerqueira Leite Seelaender, "A "Polícia" e as Funções do Estado – Notas sobre a "Polícia" no Antigo Regime," *Revista da Faculdade de Direito – UFPR* 47 (2008), 77-78.

[17] The Marquis of Pombal, chief minister of King José I of Portugal between 1750 and 1777, implemented reforms in areas such as the empire's economy, the state's relationship with the Church, and education, and led the reconstruction of Lisbon, in 1755. Pombal was the representative of the simultaneous strengthening of royal power and implementation of reforms, known as "enlightened despotism," in Portugal. Kenneth Maxwell, *Pombal, Paradox of the Enlightenment* (Cambridge: Cambridge University Press, 1995).

[18] Carvalho, *Uma Ideia Ilustrada de Cidade*, 61-62.

power tradition in legal doctrine and the regulations frequently enacted by the crown and its representatives in the colony legally framed state interventionism in the usage, maintenance, expansion, and enhancement of urban space. In 1808, when extreme circumstances in Europe forced the Portuguese royal family to flee to Brazil, a new urban ideal, and the legal conflicts it fueled, would radically change Rio de Janeiro.

2. "P.R."

The Napoleonic invasion of the Iberian Peninsula in 1807 triggered a series of events that contributed to the success of independence movements in Latin America throughout the first two decades of the nineteenth century.[19] Rio de Janeiro was affected by the Peninsular war more than any other city in the region. In a surprising move, the Portuguese royal family and its court fled the imminent attack on Lisbon, crossing the Atlantic to install the center of its global empire in the colonial capital of Brazil. The first problem created by the arrival of noble refugees was where to house the newcomers. Even before the ships anchored in Rio, colonial administrators painted the doors of several houses with the acronym "P.R.," short for "Príncipe Regente" (Regent Prince), meaning that these properties had been requested for the usage of Dom João VI of Portugal. Rio's residents ironically translated this acronym to "Ponha-se na Rua!" (Throw Yourself on the Street!), summarizing what they believed to be the arbitrary taking of properties and homes by the Portuguese crown.

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[19] After the Napoleonic forces invaded the Iberian Peninsula and deposed king Ferdinand VII, the Spanish state lost its central legitimating authority, thus becoming vulnerable in the colonies. There, different developments depended on the class dynamics between Creole elites and Indian and mixed race peasants. George Reid Andrews, "Spanish American Independence: A Structural Analysis," *Latin American Perspectives* 12:1 (1985).

From 1808 to 1822, when Brazil became independent from Portugal, Rio de Janeiro was the capital of a European empire. Immediately, Dom João VI lifted colonial restrictions, opening the Brazilian ports to "friendly nations" such as England, and allowing the development of manufacturing in the colony. Now, in addition to connecting different parts of the Portuguese empire, Rio would receive an unprecedented number of foreign products and delegations. The city's elites increasingly sought luxury products from England and, after the end of the Peninsular war (1808-1814) and the waning of anti-French patriotism, France. Diplomats, artists, and travelers converged to the new metropolitan center. Yet, the Europeans who arrived in Rio following its status upgrade described the city as a dirty, unplanned, unsanitary, dangerous, and uncivilized tropical hell, which did not reflect its new political and economic importance.[20]

To install an imperial capital in the tropic, the Portuguese monarch reproduced in Rio all the administrative institutions necessary for governing his possessions. Within this institutional apparatus, the crown created the Intendência Geral de Polícia da Corte e do Estado do Brasil (General Intendancy of the Police for the Court and the State of Brazil), modeled after the institution that had overseen the reconstruction of Lisbon after the 1755 earthquake. To make Rio into a "new Lisbon," and erase its colonial appearance, the monarch and the General Intendancy adopted measures intended to "civilize" the city's urban environment and its residents' habits. These included the reshaping of urban space, the policing of the poor, the regulation of hygiene, and the promotion of European culture. However, as the popular translation of the acronym "P.R." suggests, some of these measures were met with resistance.

[20] Carvalho, *Uma Ideia Ilustrada de Cidade*.

Moreover, despite attempts to police the increasing presence of slaves in the city, the racial differentiation and violence of slavery were a reminder of Rio's colonial urban setting.

In Portugal, the requisition of property for noble usage was known as *aposentadoria*. A few months before the royal court's arrival in Rio de Janeiro, Portuguese officials began to apply them to accommodate the noble exiles. Their targets were two-story houses, the *sobrados*, considered to be aesthetically pleasant, comfortable, and hygienic. Between 1808 and 1818, when the *aposentadorias* were extinguished, Rio's proprietors frequently complained about the distortions created by this practice. Although the nobles who were assigned the requested houses had to pay rent for them, the proprietors deemed the amounts unsatisfactory, and stories of abuses proliferated in the city.[21] For example, noble families sublet requested houses they did not need for habitation, and a count even appropriated the slaves of a proprietor, maintaining the latter's house and servants under his dominium for a decade.[22] The editor of a London-based newspaper described the *aposentadoria* as an oppressive and feudal practice, a "direct attack on the sacred rights of property."[23]

Property owners developed strategies against the abuses of requisitions. Some simply refused to build new houses or dragged on unnecessary improvements, worried that their buildings would end up in someone else's hands.[24] A June-1808 regulation, part of the General Intendancy's plan to embellish and sanitize Rio, prohibited the construction of one-story houses to promote a uniform, beautiful, hygienic, and comfortable urban space.[25] Nonetheless, owners

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[21] Schultz, *Tropical Versailles*, 106.

[22] Carvalho, *Uma Ideia Ilustrada de Cidade*, 82-83.

[23] Schultz, *Tropical Versailles*, 106.

[24] Carvalho, *Uma Ideia Ilustrada de Cidade*, 131.

[25] Carvalho, *Uma Ideia Ilustrada de Cidade*, 132.

continued to build one-story houses to bypass requisitions. The *aposentadorias* and the strategies to avoid them reduced the city's housing availability. Between 1808 and 1821, Rio's new economic and political standing created an unprecedented growth in population, which doubled to 80,000 people. Population growth and the lack of new construction generated the city's first housing crisis.[26]

In July 1808, the crown extended the Portuguese custom of collecting a 10 percent tax on urban property in times of emergency (*décima*) to Rio de Janeiro. To increase tax revenue, the city chamber immediately expanded the city's urban perimeter from the Southern area of Laranjeiras to the Northern area of Rio Comprido. The royal order that created the *décima* also mandated the registration of all properties in the city, and their classification according to the number of residents and floors, their use, and state of preservation. The *décima* was therefore an early attempt to make the colonial city legible, and thus controllable for the purposes of rationally extracting revenue. As the property owners transferred the tax costs to rent prices, the *décima* contributed to the aggravation of the housing crisis.[27]

Nonetheless, the *décima* was also part of a short-term solution to the crisis. In March 1811, the police intendant (chief of the General Intendancy) proposed that the crown invest in the area outside downtown, then covered by swamps, known as Cidade Nova (New City). The idea was to exempt those who built there from the *décima* for 10 to 20 years, and mitigate the enforcement of building regulations in the area. These incentives would encourage people to dry and fill the swamps, and therefore embellish and sanitize the city, as well as increase the housing availability, and thus decrease the rent prices. Although the plan worked well for several years,

[26] Schultz, *Tropical Versailles*, 106.

[27] Cavalcanti, *O Rio de Janeiro Setecentista*, 95-105 and 259-283.

speculation and property disputes in the New City followed. After this short-term strategy to solve the housing crisis failed, the crown finally abrogated the *aposentadorias*, in 1818.[28]

The New City was one of several areas that developed following the arrival of the Portuguese crown. The Northern area of São Cristóvão was a rural space, occupied by many individuals who lacked *sesmaria* titles. After one of them donated land to the crown, the area started to attract noble families. The same happened in the Southern areas ranging from Glória, near downtown, to Botafogo, where the newly arrived nobles attracted urban development. In its efforts to reshape and sanitize urban space, the General Intendancy recommended the widening of streets, the construction of squares, the opening of channels to drain water, and the policing of building conditions. In 1816, the intendant created the office of building inspector, in charge of stipulating deadlines for improvements and ordering demolitions and fines for the property owners who failed to improve their buildings.[29] The General Intendancy also started the construction of a new aqueduct, and in 1817 and 1818 the crown appropriated the land on the riverbanks to prevent the environmental issues that had been contributing to the city's long-term problem of insufficient water supply.[30]

In addition to leading urban sanitation and improvement, the General Intendancy led the crown's efforts to transform Rio de Janeiro into a safe and politically loyal city. It oversaw the policing of the city's streets, enforcing anti-vagrancy laws, and arresting those deemed to be "suspicious men," mostly slaves and former slaves, and "scandalous women," accused of

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[28] Schultz, *Tropical Versailles*, 107.

[29] Pinheiro de Carvalho, *Uma Ideia Ilustrada de Cidade*, 138.

[30] Carvalho, *Uma Ideia Ilustrada de Cidade*, 146.

prostitution.[31] Investments in illumination and the imposition of curfews were part of the plan to diminish crime rates.[32] Yet, the poor and their common crimes were not the Intendancy's only concern. As capital of the Portuguese empire, Rio was supposed to provide a haven both for Dom João VI and the institution of the monarchy itself.[33] The shadow of late-eighteenth century anti-colonial conspiracies, and the new influx of foreigners carrying revolutionary ideas required constant policing based on "counterespionage" and the control of immigration. The regular policing of slaves and political repression intersected in the Intendancy's concern with the influx of revolutionary ideas coming from the former French colony of Saint Domingue, recently overtaken by a slave revolution.[34]

Since the mid-eighteenth century, the Portuguese crown had been applying its police power to the control of master-slave relations in the colony. In Rio, where the slave population increased 200 percent between 1808 and 1822, state interference with slavery was paramount to the mitigation of the city's colonial appearance. To attenuate the "shocking" image of slavery-related violence in the city, the General Intendancy took on the role of controlling the slave population by administering punishments upon the master's request. It also established new hygiene standards for the Valongo slave market, where slaves were now to be quarantined and clothed, as well as buried in more orderly and sanitary ways in the nearby cemetery. Finally, the police intendant proposed that the Intendancy, the Church, and the courts should ensure that masters provide their slaves with a "moral education." These were some of the efforts to either

[31] Schultz, *Tropical Versailles*, 108.

[32] Carvalho, *Uma Ideia Ilustrada de Cidade*, 147.

[33] Schultz, *Tropical Versailles*, 110.

[34] Schultz, *Tropical Versailles*, 111-112.

hide the practice of slavery, or to make it less brutal and more decorous, and therefore adequate to a civilized city.[35] Although the crown and the intendant were careful in maintaining the slave owners' support, these measures ultimately restricted the masters' private power over their slaves.[36]

In 1808, the Portuguese physician Manuel Vieira da Silva claimed that the arrival of the royal court would make Rio de Janeiro "enter the history of policed Nations."[37] Da Silva evoked the police power tradition that had dominated Europe throughout the eighteenth century, according to which the king's police power was an instrument for civilizational measures akin to those enforced in Rio after the court's arrival. Even before the ships anchored, accommodating the nobility and civilizing the city required restricting the rights of property owners. Based on the state's police power, crown authorities forced owners to rent their properties and pay extra taxes; occasionally took their land for the purposes of urban enhancement; promoted tighter control of building usage and conditions; and interfered with the masters' power over their slaves. Although proprietors adopted strategies to resist and adapt to this new reality, it is currently unknown whether they used collective mobilization or the courts to contest police measures. After independence, in 1822, Brazil's monarchical government would consolidate and strengthen police power legislation and institutions as part of its nation-building effort. As had happened under the Portuguese crown, the city's proprietors would resist and adapt.

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[35] Schultz, *Tropical Versailles*, 122-128.

[36] Airton Cerqueira-Leite Seelaender, "A Longa Sombra da Casa. Poder Doméstico, Conceitos Tradicionais e Imaginário Jurídico na Transição Brasileira do Antigo Regime à Modernidade," *Revista do Instituto Histórico e Geográfico Brasileiro* 178, n. 473 (2017): 327-424.

[37] Schultz, *Tropical Versailles*, 120.

3. The empire of property

In 1815, the Portuguese crown incorporated Brazil into the United Kingdom of Portugal, Brazil, and Algarves, thus formally ending its colonial status. Since the late eighteenth century, planters, intellectuals, and members of the urban middle sectors and the military had led local separatist movements based on liberal ideas and their dissatisfaction with the crown's attempts to tighten its control over the colony. The influx of those ideas grew with the arrival of foreigners after the Portuguese court's transfer to Rio de Janeiro. Simultaneously, in Rio, colonial merchants used their economic influence and networks of patronage to buy titles and privileges, and therefore access the highest political circles.[38] These elites would play a decisive role in the independence process. In 1817, the crown's troops violently repressed rebellions led by planters, traders, intellectuals, and military men in the north and northeast.[39]

However, beginning in 1820, a liberal revolution in Portugal would change the balance of power. While the Portuguese local chambers evoked ideas about constitutionalism, liberalism, and republicanism, Dom João VI returned to Lisbon hoping to save his throne, and left his son, Dom Pedro, in charge of Brazil. But those same ideas also crossed the Atlantic, triggering the rebellion of Brazilian political elites who controlled local chambers. Dissatisfied with the Portuguese revolutionaries' intention to keep control over the former colony as a strategy to economically regenerate Portugal, and worried that social unrest could open space for a slave revolution, the local elites decided to support Dom Pedro's leadership to unify and control the political rupture. In 1822, after announcing that he would not return to Portugal despite the

[38] Jurandir Malerba, *A Corte no Exílio. Civilização e Poder no Brasil às Vésperas da Independência (1808 a 1821)* (São Paulo: Cia das Letras, 2000).

[39] Iara Lis C. Souza, *A Independência do Brasil* (Rio de Janeiro: Jorge Zahar Ed., 2000).

Portuguese chambers' orders, and committing to a constitutional government, Dom Pedro traveled to southeastern villages to forge ties with local chambers. Yet, while the prince finally peacefully proclaimed independence in September near São Paulo, there were bloody conflicts in the north and northeast. The building of a Brazilian nation began with the new monarch's participation in public festivities and rituals that presented and legitimized Dom Pedro I to the popular sectors.[40] In 1823, provincial elites elected a constituent assembly. Nonetheless, unhappy with the assembly's work, Dom Pedro I dissolved it, and promulgated a constitution written by a committee of his trust in 1824.

For Rio de Janeiro, then transformed into the capital of independent and monarchical Brazil, rupturing the colonial tie to Portugal meant strengthening cultural and economic ties to nations such as France and England.[41] Although its internal market had been on the rise since the late eighteenth century, Rio continued to be a port city, structured for the export of primary goods such as coffee, produced in the Southeastern slave-based plantations.[42] Despite British pressure, slave resistance, and the enactment of gradual abolition laws throughout the nineteenth century, the transition from slavery to free labor would be completed only in 1888, with general emancipation. Master-slave relations structured Brazilian society, and Rio continued to be the

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[40] Iara Lis C. Souza, *Pátria Coroada: o Brasil como Corpo Político Autônomo, 1780-1831* (São Paulo: UNESP, 1998).

[41] Richard Graham, *Independence in Latin America: A Comparative Approach* (New York: McGraw-Hill, 1994).

[42] Analyzing the operations of commerce and finances in Rio de Janeiro, Fragoso highlights the works of an elite group distinct from traditional land and slave owners. They were *negociantes de grosso trato* who engaged in slave trading, the supply of internal markets, and financial transactions. Their inventories and property records, and the documents used to register port transactions in Rio reveal the city's dynamic commercial plaza during the early nineteenth century. João Luís Ribeiro Fragoso, *Homens de Grossa Aventura: Acumulação e Hierarquia na Praça Mercantil do Rio de Janeiro, 1790-1830* (Rio de Janeiro: Editora Arquivo Nacional, 1992).

most important port for the legal and, after 1831, illegal slave trade in the continent. In Rio, slaves worked as domestic servants, used their free time to work for wages that were partially transferred to their masters, and provided the manual labor necessary for opening streets, fixing buildings, distributing water, and collecting garbage and sewage. Yet, as a cosmopolitan urban center, Rio also increasingly became the home of poor free and freed people of color, and European immigrants, who crowded the city's tenements. By mid-century, a "middle sector" of white-collar employees and professionals, who did not engage in manual labor, would also emerge.[43] Rio's housing market and infrastructure remained insufficient to accommodate a population that nearly doubled to 200,000 between 1821 and 1849.[44]

Slaves used Rio's narrow alleys and small rooms as "hiding places." While manumissions provided legally sanctioned freedom, the colonial urban structure, still untouched by comprehensive reforms, was perfect for disappearing.[45] Throughout the second half of the nineteenth century, the slaves who obtained legal freedom or fled joined the masses of poor laborers, including European immigrants, who lived in the city's overcrowded and unsanitary tenements – old colonial houses divided into several small units. Slaves who continued under a master's formal dominium, but were allowed to live by themselves and work for wages in their free time, also lived in these collective habitations. There, like everyone else, they had to face the economic and sometimes personal pressures of property owners and managers, who often overcharged, evicted without justification, and tried to control their tenants' personal lives. Yet,

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[43] Zephyr L. Frank, *Dutra's World: Wealth and Family in Nineteenth-Century Rio de Janeiro* (Albuquerque: University of New Mexico Press, 2004).

[44] Jeffrey D. Needell, "Making the Carioca Belle Epoque Concrete: The Urban Reforms of Rio de Janeiro under Pereira Passos," *Journal of Urban History* 10, n. 4 (1984): 383-422, 388.

[45] Sidney Chalhoub, *Visões da Liberdade: Uma História Das Últimas Décadas da Escravidão na Corte* (São Paulo: Companhia das Letras, 1990), 219.

in the tenements, living side-by-side freed people, those slaves found networks of solidarity, which could help them save money to purchase their freedom. Rio's tenements were therefore spaces of relative freedom, and part of slaves' struggles against bondage.[46]

Land and slave owners dominated Brazilian politics through networks of patronage that connected them to the highest legislative and administrative positions in government.[47] These slave-owning liberals upheld property as a sacred individual right. In the 1850s, they led a transition from the old colonial *sesmarias* to modern and market-distributed property. The centrality of property, protected by the 1824 Constitution "in all its plenitude," frequently contributed to the failure of attempts to reshape and sanitize the capital.[48] Alongside the political and judicial commitment to the preservation of property at all costs, the lack of state planning for Rio until the 1870s, the weakness of police institutions, and the emergency, personal, and private characters of urban interventions undermined the possibility of comprehensive reforms.

Nonetheless, nineteenth-century institutional, political, and legal developments would lay the basis for the success of the early-twentieth-century urban reform. Despite being apparently absolute, the constitutional protection of property opened space for expropriations based on the "public good," provided that legislation regulated the case and previous indemnification was paid. In the 1850s and more intensively during the 1870s, reacting to yellow fever and smallpox epidemics in the city, the monarchical government created institutions in charge of sanitizing and beautifying the capital, which would be transformed and further empowered by the republican government in the 1890s and early 1900s. These institutions were led by an increasingly

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[46] Chalhoub, *Visões da Liberdade*, 26-29.

[47] Richard Graham, *Patronage and Politics in Nineteenth-Century Brazil* (Stanford: Stanford University Press, 1990).

[48] Constituição Politica do Imperio do Brazil, de 25 de março de 1824, art. 179, XXII.

influential professional class of physicians and engineers, who began to dominate political debates in the 1870s, legitimizing their power through technical-scientific discourses of material progress applied to the city. Despite the prominence of property as an absolute right that protected the rural landowners' dominium over land and persons, by the 1860s Brazilian jurists already recognized the limitations that the policing of urban space imposed on individual property rights. Finally, the technical elites who occupied public offices in the last three decades of the nineteenth century claimed greater administrative discretion and independence, and expedited and cheaper expropriation procedures.

With independence, the *sesmarias* were officially extinguished. Between 1822 and 1850, when the Brazilian Land Law was enacted, colonial law based on the European *ius commune* promoted the acquisition and transfer of land through possession.[49] Access to land was therefore legally available to everyone who effectively possessed and cultivated it. Both large and small landowners expanded their dominium throughout this period.[50] In the mid nineteenth century, however, Brazilian politicians and jurists led the transition to a system of modern property rights, individually held, secured by title deeds, and market-distributed. The transition was part of the monarchy's efforts to modernize the Brazilian economy by transforming land into a commodity and incentivizing its maximum exploitation by individual owners. While the *sesmaria* system

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[49] Colonial ordinances and regulations were based on the European *ius commune*, an amalgam of interpretations of canon and Roman law that had regulated territories under European jurisdiction since approximately the end of the eleventh century. António Manuel Hespanha, *Como os Juristas Viam o Mundo, 1550-1750: Direitos, Estados, Pessoas, Coisas, Contratos, Ações e Crimes* (Lisboa: António Manuel Hespanha, 2015), 3-24; Wim Decock, *Theologians and Contract Law: The Moral Transformations of the Ius Commune (ca. 1500-1650)* (Leiden/Boston: Martinus Nijhoff Publishers, 2013), 30-31.

[50] Márcia M.M. Motta, *Nas Fronteiras do Poder. Conflito e Direito à Terra no Brasil do Século XIX* (Rio de Janeiro: Arquivo Público do Estado do Rio de Janeiro, 1998).

was replaced, the 1850 Land Law and the 1864 Mortgage Law undermined non-titled forms of access to land, such as possession. In practice, that meant revoking the tenure of small landowners, and making access to land exclusive for those who could afford to buy it. Therefore, the modernization of ownership in Brazil largely contributed to the concentration of land in the hands of few. In legal doctrine, the transition relied on translations of the possessive individualism of European liberal legal scholarship.[51] Although the Brazilian agricultural frontier continued to expand through possessions, the national legal system now prioritized titled property.[52]

The extinction of the *sesmaria* system, the legislative transition to modern property, the liberal-constitutional framework, and the prominence of possessive individualism in legal doctrine apparently made property ownership an absolute individual right in Brazil. Property's absolute character helped shield the political and economic power of large landowners, as well as the power of masters over slaves. However, in urban centers such as Rio de Janeiro, state interference with property had been on the rise since the late-eighteenth century transfer of the "Enlightened idea" of city to the colony. The legal framework of police power justified these interferences based on the need to rationalize, sanitize, and embellish the city.

The earliest centralized effort to police Rio de Janeiro after independence was the 1830 urban code that compiled and consolidated previous decisions of the municipal chamber regarding the city's major problems. The code became a permanent set of rules that regulated Rio's urban space, and occasionally changed whenever new piecemeal decrees were enacted. In

[51] Varela, *Das Sesmarias à Propriedade Moderna*.

[52] Other efforts to create a national and modern legal system included the enactment of the 1850 Commercial Code and the 1871 Free Womb Law, discussed below.

many areas, it maintained private responsibility over the city's conservation. The code mandated, for example, that building owners were obliged to preserve the integrity of public goods, such as sidewalk pavements and water supply systems. Owners also had to pay for demolitions when their properties were condemned for being in "ruins."[53] The state policed the city by overseeing the population's usage of urban space, without committing to comprehensive interventions.

Moreover, the effectiveness of urban regulations was contingent upon the balance of power in disputes between local property owners and businessmen, and the municipal chamber. The former often complained about the chamber's attempts to disrupt long-lasting privileges, petitioning all the way up to the monarch, who had the power to mediate these disputes. Occasionally, owners and businessmen joined forces to pressure for the enforcement of urban regulations and services. In 1839, for example, 38 residents of the rural area of Irajá petitioned to the chamber asking for the removal of a local inspector who, according to them, had lost the moral authority to enforce municipal regulations in the area, which had been left unprotected and vulnerable to criminals.[54]

In 1849, a yellow fever epidemic triggered the first monarchical effort to institutionalize sanitary interventions in the capital. The next year, the government created the Junta Central de Hygiene, an administrative agency in charge of the city's medical policing. The Junta consolidated the 1830s and 1840s developments of social medicine in Brazil. Incorporating the social scientific knowledge of geography, economics, history, and statistics, this institution was

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[53] Posturas da Câmara do Rio de Janeiro, de 4 de outubro de 1830, in *Colleção das Decisões do Governo do Imperio do Brasil* (Rio de Janeiro: Typographia Nacional, 1875).

[54] Lea Maria Carrer Iamashita, "A Câmara Municipal como Instituição de Controle Social: o Confronto em torno das Esferas Pública e Privada," *Revista do Arquivo Geral da Cidade do Rio de Janeiro* 3 (2009): 41-56.

designed to promote medical security, and the consequent population growth and prosperity. The doctors who composed the Junta believed that Rio's urban chaos and agglomeration were at the roots of the city's physical and moral degeneration. The causes of epidemics, and of immoral and criminal behavior, were the humid and hot tropical climate, the geography of swamps and hills, and the city's overcrowded collective habitations.[55]

Policing the city's living conditions required interfering with property rights, patriarchal values, and slavery. Tenements proliferated during the 1850s and 1860s to house the burgeoning poor. The city's proprietors failed to comply with the new rules of hygiene for the construction and maintenance of properties. Because landlords rented rooms without proper ventilation, illumination, toilets, sewage disposal systems, and water supply, the hygienist doctors accused them of speculating with human lives. According to the doctors, women confined to humid, dark, and unventilated homes were the weakest link in the unhygienic chain that deteriorated the city. The presence of domestic slaves inside the households was also deemed unsanitary.[56] The wet nurses who took care of the city's rich were portrayed as dangerous carriers of diseases. In the 1880s, this discourse would culminate in attempts to register and regulate domestic servants.[57]

The rise of the "hygiene ideology" in academia, government, and the press prompted attempts to regulate the city's tenements. In 1853, the secretary of police proposed to the municipal chamber a set of regulations for the *estalajadeiros* – owners and managers of

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[55] Jaime L. Benchimol, *Pereira Passos: Um Haussman Tropical: A Renovação Urbana da Cidade do Rio de Janeiro no Início do Século XX* (Rio de Janeiro: Secretaria Municipal de Cultura, Turismo e Esportes, Departamento Geral de Documentação e Informação Cultural, Divisão de Editoração, 1992), 115-121.

[56] Benchimol, *Pereira Passos*, 115-121.

[57] Sandra Lauderdale Graham, *House and Street: The Domestic World of Servants and Masters in Nineteenth-Century Rio de Janeiro* (Cambridge: Cambridge University Press, 1988), 113, 123.

collective habitations. To facilitate the policing of immoral and criminal activities, the *estalajadeiros* would have to keep a list of residents and a record of the entry and exit of guests. They would be also required to keep the property in the best sanitary conditions possible. Inspectors would visit frequently, making sure that "suspicious" people were not around, and that the sanitary conditions satisfied municipal standards. Yet, for unknown reasons, the proposal was never adopted. In 1855, an inspector proposed further regulations to the chamber. Drawing on the ideology that constructed the collective habitations as foci of disease, vice, and immorality, he suggested, among other rules, that the tenement owners should be obliged to implement all improvements mandated by the local hygiene authorities. Of all the inspectors' suggestions, the chamber adopted one. Now, the construction of new tenements was contingent upon a municipal license, and the Junta de Hygiene's approval of its sanitary conditions.[58]

During the debates regarding the creation of the Junta, congressmen had raised concerns about the municipal judges' systematic dismissal of health-related cases. Parallel to what happened in France around the same time, Brazilian authorities believed that only professional doctors and hygienists could fully assess the gravity of those cases. Moreover, health issues were often emergencies that required fast responses if an epidemic was to be prevented or contained. In 1881, engineer Luiz Rafael Vieira Souto, who would integrate the monarchy's Conselho Superior de Saúde Pública (Superior Public Health Council) in 1886, argued that "the pernicious devotion to individual liberty" had generated a Junta that lacked the power to enforce sanitation

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[58] Sidney Chalhoub, *Cidade Febril: Cortiços e Epidemias na Corte Imperial* (São Paulo: Cia das Letras, 1996), 32.

measures.[59] The Junta had been a weak emergency measure; it lacked uniformity, human and financial resources, and the institutional power necessary to overcome private interests and sanitize the city.[60]

Although the official policy for urban sanitation focused on emergency measures, the quality of hygiene in the city's households did slightly improve. However, there was no comprehensive urban plan in place capable of radically changing the situation. The most important urban improvement efforts of the 1850s and 1860s were public concessions for the expansion and modernization of Rio's streetcar system. Consortiums administered by engineers, rural property owners, businessmen, speculators, banks, and foreign companies disputed these concessions through their economic, political, and personal ties to the monarchy's bureaucracy. The concession decrees and contracts often granted the power to expropriate to private companies, conceded them exclusive economic rights for up to 30 years, and established deadlines for the construction of new lines.[61] The expansion of Rio's transportation system to the South and North zones of the city during the 1870s was followed by both urbanization and land speculation in those areas. Yet, while the concessions were responsible for the exponential growth of neighborhoods such as Vila Isabel, in the North zone, most of them lasted fewer than 10 years.[62]

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[59] L. R. Vieira Souto, *Organização da Hygiene Administrativa. Estudos de Direito Administrativo e Legislação Comparada* (Rio de Janeiro: Typographia Nacional, 1881), 110-113.

[60] Benchimol, *Pereira Passos*, 114.

[61] Benchimol, *Pereira Passos*, 58 and 98.

[62] Oswaldo Porto Rocha, *A Era das Demolições: Cidade do Rio de Janeiro, 1870-1920* (Rio de Janeiro: Prefeitura da Cidade do Rio de Janeiro, 1995), 31.

In the 1870s, an emerging professional class of engineers began to forge its participation in the debates about the city. Drawing on social medicine, philosophical positivism, the ideal of a rational city based on uniform and rectilinear streets, and a conception of civilization that privileged material progress, the engineers debated and proposed plans to reform the capital.[63] These "doctors of the city" competed with the medical doctors who had gained prominence during the previous decades for the role of protagonists in urban enhancement and sanitation.[64] In 1874, the monarchical government created Rio de Janeiro's Polytechnic School, separating the study of engineering from military education. That same year, again reacting to devastating yellow fever epidemics in the capital, the minister of the empire João Alfredo de Oliveira, an enthusiast of urban reforms, created the Comissão de Melhoramentos da Cidade do Rio de Janeiro (Commission for Improvements of the City of Rio de Janeiro), led by the engineer Francisco Pereira Passos.[65]

Pereira Passos had started his mathematics, physics, and engineering studies in the Military School in 1852. Between 1857 and 1860, as a diplomat in France, he had attended the

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[63] On the influence of philosophical Positivism on Brazilian engineers see Simone Petraglia Kropf, "O Saber para Prever, a Fim de Prover – A Engenharia de um Brasil Moderno". In: Micael M. Herschmann and Carlos Aberto Messeder Pereira (eds.), *A Invenção do Brasil Moderno – Medicina, Educação e Engenharia nos Anos 20-30* (Rio de Janeiro: Rocco, 1994): 202-223. On the ideal of uniform and rectilinear streets that represented "Reason" see Simone Petraglia Kropf, "Os Construtores da Cidade: o Discurso dos Engenheiros sobre o Rio de Janeiro no Final do Século XIX e Início do século XX," *Projeto História* 13 (1996): 179-187. On the late-nineteenth century transition from the concept of civilization to the concept of progress, associated to material and technological developments, see André Nunes de Azevedo, *Da Monarquia à República: Um Estudo dos Conceitos de Civilização e Progresso na Cidade do Rio de Janeiro entre 1868 e 1906* (PhD dissertation – Pontifícia Universidade Católica do Rio de Janeiro – 2003).

[64] Azevedo, *Da Monarquia à República*, 120.

[65] Janaína Lacerda Furtado, *Os Dois Lados da Moeda: A Comissão de Melhoramentos da Cidade do Rio de Janeiro e o Discurso de Higiene e Saneamento no Século XIX* (MA thesis – Universidade do Estado do Rio de Janeiro – 2003), 44-47.

École de Ponts et Chaussés in Paris, where he studied hydraulics, ports, canals, and railroads. There, he had been a first-hand observer of the comprehensive urban reform led by Georges-Eugène Haussmann, prefect of the Seine between 1853 and 1870. Haussmann's aggressive plan to demolish overcrowded and unsanitary tenements, open new streets and boulevards, and build parks, squares, and fountains, became a model for the world. In 1872, Friedrich Engels criticized what he called the "Haussmann method." According to Engels, the reform of Paris had merely expelled the poor from the city's center, transferring the unsanitary tenements where they lived to the outskirts. The "Haussmann method" could never solve the housing question while the capitalist mode of production continued to force workers into "the breeding places of disease, the infamous holes and cellars" that proliferated in European cities.[66]

The Commission for Improvements of the City of Rio de Janeiro, led by Pereira Passos, drew on the European experiences of cities such as Paris, London, and Vienna to design the first comprehensive urban reform plan for the Brazilian capital. The Commission's 1875 report focused on Northern neighborhoods such as Andaraí and São Cristóvão, and Southern ones such as Catete and Botafogo, purposefully leaving out the city's downtown. Because these neighborhoods contained large areas for expansion and urbanization, the Commission's engineers planned the opening of streets, tunnels, water supply systems, Parisian-like boulevards, and even the construction of a zoo and a university in Vila Isabel. They also planned the construction of the Mangue canal, in the New City, which would address the area's sanitation problem.[67]

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[66] Friedrich Engels, *The Housing Question* (Moscow: Foreign Language Pub. House, 1955).
[67] Benchimol, *Pereira Passos*, 54-55.

Property rights were paramount to the engineers' geographic choices. The old colonial downtown was too expensive, therefore making the payment of compensation before expropriating properties, as mandated by the 1824 Constitution and regulated by royal decrees, an unsustainable financial burden. In contrast, peripheral neighborhoods were much more affordable. Considering the respect for property and the costs it created, the minister who oversaw the Commission instructed them to avoid demolishing "the public and the most important private properties."[68] As for who should carry out the improvements, the Commission recognized that although a state-led project would be more effective, resistance to excessive public expenditure required relying on private companies instead. To attract them, the Commission argued that the companies would profit from the selling of expropriated land, new buildings and demolition materials, and from the revenues produced by the new railroad stations, the canal, and institutions such as the zoo.[69]

In 1876, responding to the critics who argued that the city's center required urgent transformations, the Commission's engineers focused on the downtown area, suggesting the opening of streets and avenues and the demolition of the Castelo and Santo Antônio hills, which would require the expropriation and demolition of several buildings. They believed that the existing expropriation laws were an obstacle for the execution of their plan. According to the 1845 decree that regulated expropriations for public utility in the capital, when the proprietor did not accept the amount offered as compensation, a jury had the final word. Although the jurors could not be directly interested in the expropriation in question, all seven of them were chosen

[68] Furtado, *Os Dois Lados da Moeda*, 141.

[69] Primeiro Relatório da Comissão de Melhoramentos da Cidade do Rio de Janeiro, *Relatório do Ministério do Império* (Rio de Janeiro: Typographia Nacional, 1875), 13.

from a list of local property owners. The decree also allowed the proprietor to file administrative complaints in the municipal chamber and the ministry of the empire, and to judicially appeal to Rio de Janeiro's Tribunal da Relação, equivalent to a court of appeals.[70] For the engineers, because the procedure was excessively long and burdensome, it discouraged private companies.[71]

In 1855, king Dom Pedro II had enacted a decree aimed at facilitating expropriations for the purposes of building railroads. Railroads required the expropriation of large extensions of land, and the king and his cabinet recognized the need for new procedures. The decree precluded administrative complaints and judicial appeals, and gave the final word on compensation values to a committee of arbitrators, instead of a jury of local property owners. Although this procedure expedited expropriations, the Commission's engineers argued that it could not be applied in the city because it could lead to "humiliating confiscations of property." Moreover, the railroad decree established that compensation amounts could not be lower than 20 times the building owner's annual profits. Thus, in profitable renting areas such as Rio's downtown, companies would have to pay many times the building's actual value. The Commission therefore urged the government to create a procedure that facilitated expropriations, though preserving some of the proprietors' prerogatives. According to the engineers, the new procedure should also allow the expropriation of land that was outside street rectification plans, but indispensable for the demolition of old and unsanitary buildings.[72]

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[70] Decreto n. 353, de 12 de julho de 1845, articles 8, 17, and 29.

[71] Segundo Relatório da Comissão de Melhoramentos da Cidade do Rio de Janeiro, *Relatório do Ministério do Império* (Rio de Janeiro: Typographia Nacional, 1876), 27.

[72] Segundo Relatório da Comissão de Melhoramentos da Cidade do Rio de Janeiro, *Relatório do Ministério do Império* (Rio de Janeiro: Typographia Nacional, 1876), 27-28.

The Commission's requests were never attended to, and most of the improvements they proposed were not implemented. As the engineers had predicted, the monarch was not willing to invest in a comprehensive reform of the city. Despite the incentives proposed, private companies did not show interest in the projects either. The lack of public money, and the overreliance on private initiative contributed to the failure to transform Rio de Janeiro. Like other smaller projects presented to the municipal chamber throughout the second half of the nineteenth century, the Commission's plan turned out to be the personal initiative of a few engineers, without substantial official support.

Skeptical about the Commission's work, and critical of what he depicted as a greedy proprietary class, the engineer Vieira Souto predicted the property owners' resistance to the plan. He argued that because the calculation of compensation values was based on rent values, dishonest proprietors would raise rent once they learned that their buildings were marked for expropriation. Souto also anticipated that owners would recur to courts against some of the Commission's proposed measures.[73] Finally, the engineer disagreed with Pereira Passos and his team's original emphasis on the North and South zones, arguing that the efforts should be directed toward the city's center and the New City, where sanitary conditions were worse. Realizing that the project was costly and controversial, king Dom Pedro II eventually spoke against the city's "Haussmannization." In 1875, the monarch fired minister João Alfredo de Oliveira, and the Commission was extinguished.[74]

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[73] L. R. Vieira Souto, *O Melhoramento da Cidade do Rio de Janeiro* (Rio de Janeiro: Lino C. Teixeira & C., 1875), 64-65.

[74] Furtado, *Os Dois Lados da Moeda*, 74; Azevedo, *Da Monarquia à República*, 114.

The protection of property rights in almost absolute terms contributed to the drastic failure of urban reform plans that required numerous expropriations and restrictions on property ownership. Nonetheless, Brazilian jurists acknowledged the late-eighteenth century police power tradition, and the restrictions it imposed on property owners. Throughout the nineteenth century, Brazilian administrative law scholars were primarily concerned with legitimizing the monarch's power in a still fragile national state.[75] Although that meant prioritizing discussions about the king's political powers and the structure of the national administration, these scholars also timidly recognized the state's role in limiting individual rights for the purposes of promoting security and sanitation.[76] Professor Vicente Pereira do Rego's administrative law treatise, published in 1860 for "usage in the Empire's law schools," argued that, as the material basis of the family, property should be a legal priority. Yet, every organized society demanded the sacrifice of private interests, which legitimized expropriations based on "the social interest." The reasons and procedures for expropriations were regulated by the 1845 general decree applicable to urban improvements and sanitation, and by the 1855 decree, which created a special and expedited procedure for the construction of railroads.[77]

While administrative law was a modern version of the late-eighteenth-century police power tradition, scholars of civil law, the field of legal scholarship focused on private relations,

[75] Walter Guandalini Junior, "Espécie Invasora — História da Recepção do Conceito de Direito Administrativo pela Doutrina Jurídica Brasileira no Século XIX," *Revista de Direito Administrativo* 268 (2015): 213-247.

[76] Visconde do Uruguay, *Ensaio sobre o Direito Administrativo* (Rio de Janeiro: Typographia Nacional, 1862), 87; José Rubino de Oliveira, *Epitome de Direito Administrativo Brasileiro* (São Paulo: Leroy King Bookwalter, 1884), 228.

[77] Vicente Pereira do Rego, *Elementos de Direito Administrativo Brasileiro para Uso das Faculdades de Direito do Imperio* (Recife: Typographia Commercial de Geraldo Henrique de Mira & C., 1860), §469 and §170.

studied the transition from the colonial *ius commune* framework to the modern property system. As part of this transition, the Brazilian monarchy commissioned scholars to produce projects for the codification of civil law in the country. Codification, based on the idea of an exhaustive and harmonious set of rules, was supposed to both strengthen national imagination through state-centered law, and rationalize private relations for the benefit of economic modernization. Augusto Teixeira de Freitas, who wrote the first civil code projects for Brazil between the late 1850s and the late 1870s, presented property as an "inviolable" right. Nonetheless, Freitas introduced a distinction that justified restrictions on this right. According to him, while civil law "explained" property, the restrictions that "harmonized it with the demands of social good" belonged to the sphere of "Police Laws." In Brazil, these restrictions were regulated by the royal decrees that established expropriation procedures.[78] This artificial separation between private and public law allowed legal scholarship to present a supposedly harmonious legal system that protected property in absolute terms, while recognizing the need for limitations on property rights.

Legal and political debates about slavery also opposed the need for state interventionism to the private domain of property rights. Since the 1831 and 1850 statutes that had outlawed the slave trade, the slave population had been declining in Rio de Janeiro. While the illegal slave trade thrived, the influx of trafficked Africans relatively diminished, and slaves continued to flee, die, and acquire freedom through manumission and self-purchase. Additionally, the lower market supply would increase the price of slave property, thus stimulating the sale of urban slaves to the

[78] Augusto Teixeira de Freitas, *Consolidação das Leis Civis* (Rio de Janeiro: B. L. Garnier, 1876), cvi.

lucrative coffee-producing plantations. From the late 1860s to 1885, Rio's slave population dropped from 100,000 to 30,000, reaching approximately 8,000 in 1887.[79]

The 1871 Free Womb law freed all children henceforth born to slave mothers, and mandated the registration of all slaves in Brazil. Although the statute and the slave registry it helped create were part of the transition to modern and titled-based property, they were also instruments of state intervention with the private domain of masters. On the one hand, they made ownership over people more clear and secure by conferring public recognition to slave property, and clarifying ambiguous situations such as the unilateral manumission of slaves held in condominium.[80] On the other hand, the 1871 statute was the first of a series of gradual abolition laws that increasingly restricted property over slaves in Brazil, and would culminate with the 1888 general abolition law.[81]

Although both the 1830 Criminal Code and the 1830s municipal regulations were primarily instruments of control over slaves, they created spaces of relative freedom and of state interference with the masters' power. The municipal regulations prohibited slaves to walk on the streets without their master's written authorization, repressed African and Afro-Brazilian cultural and religious manifestations, and punished slaves accused of disorderly conduct with imprisonment and lashes. Yet, the regulations also mandated municipal inspectors to report and suggest methods to prevent the ill treatment and cruelty of masters against slaves, and recognized the slaves' right to work for wages, provided that they carried a municipal chamber's license

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[79] Graham*, House and Street*, 108.

[80] Legal doctrine and courts did not have a uniform answer for whether a slave should be free when one of multiple owners decided to free him or her. The 1871 law determined that a slave freed by one owner was free. Mariana Armond Dias Paes and Pedro Jimenez Cantisano, "Legal Reasoning in a Slave Society (Brazil, 1860-1888)," forthcoming in *Law & History Review*.

[81] In 1885, a statute freed all slaves who were 60 years of age or older.

number, engraved in a metal plate. Moreover, these municipal orders indicated in which trades slaves could participate, and when they could chant "to facilitate the work."[82] According to the Criminal Code, when slaves were convicted of less grave crimes, they were whipped and then turned on to their masters, who had to chain them for the time established by the judge.[83] In case of insurrection, slaves could be sentenced to death, which prompted masters to hire lawyers to defend their slaves and thus avoid a loss of property.[84]

Those police laws did not substantially disrupt the private sphere of maters' dominium. It was rather through the judiciary that the slaves themselves promoted the delegitimation of slavery in Brazil. Since the eighteenth century, under the colonial government, people had been filing lawsuits against their alleged masters to obtain freedom. The practice expanded throughout the nineteenth century, reaching its peak when abolitionist lawyers adopted litigation as a strategy to undermine the legitimacy of slavery in the 1880s.[85] Although colonial ordinances and administrative and judicial practices constructed slaves as property, slaves were legally capable of going to court, provided that a guardian represented them. Throughout the nineteenth century, the monarchical government's interference with master-slave relations opened new avenues for judicial resistance. For example, the 1831 law that abolished the slave trade generated a series of

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[82] Juliana Teixeira Souza, "As Câmaras Municipais e os Trabalhadores no Brasil Império," *Revista Mundos do Trabalho* 5, n. 9 (2013): 11-30.

[83] Lei de 16 de dezembro de 1830, arts. 60-61.

[84] Lei de 16 de dezembro de 1830, arts. 113-114. Chalhoub, *Visões da Liberdade*, 33.

[85] There is extensive historiography on the role of freedom suits in the delegitimation of slavery. Chalhoub, *Visões da Liberdade*; Hebe Maria Mattos de Castro, *Das Cores do Silêncio: os Significados da Liberdade no Sudeste Escravista – Brasil Séc. XIX* (Rio de Janeiro: Arquivo Nacional, 1995); Keila Grinberg, *Liberata: A Lei da Ambigüidade* (Rio de Janeiro: CEPS, 2008). On the use of law and courts by the São Paulo abolitionist movement, see Elciene Azevedo, *O Direito dos Escravos: Lutas Jurídicas e Abolicionismo na Província de São Paulo* (Campinas: Editora da Unicamp, 2010).

lawsuits brought by Africans who claimed to have been illegally transported as slaves into Brazil.[86] In urban centers such as Rio de Janeiro, alleged slaves who used their free time to rent their services could save money to hire guardians and lawyers to sue their alleged masters for freedom. The masters' dominium was fundamentally based on the idea that manumission was their exclusive prerogative. However, freedom suits put that prerogative into question, thus disrupting the powers attached to property over people.[87]

The 1824 Constitution allowed expropriations for "the public good" provided that legislation regulated the case, and previous indemnification was paid. This constitutional exception was the basis for the expropriations of land regulated by the 1845 and 1855 decrees. In his Consolidation of Civil Laws, which compiled and structured the laws applied to private relations in Brazil, Teixeira de Freitas discussed the possibility of expropriating slave property. The Phillipine Ordinances, a set of colonial regulations enacted in 1603 and still applicable, though with modifications, in nineteenth-century Brazil, established that "in favor of liberty many things are declared against the general rules of law."[88] Lawyers often cited this sentence when arguing for an alleged slave's liberty in court.[89] In the Consolidation's 1865 edition, Freitas addressed the question of whether this provision could legally sustain forced manumissions, and therefore the expropriation of slave property, when the slave or a third party offered to pay a just

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[86] Beatriz Gallotti Mamigonian, *Africanos Livres: A Abolição do Tráfico de Escravos no Brasil* (São Paulo: Companhia das Letras, 2017).

[87] Chalhoub, *Visões da Liberdade*, 100.

[88] Book 4, title 11, paragraph 4 of the Phillipine Ordinances, 1603.

[89] Keila Grinberg, *O Fiador dos Brasileiros: Cidadania, Escravidão e Direito Civil no Tempo de Antonio Pereira Rebouças* (Rio de Janeiro: Civilização Brasileira, 2002), 121.

price.[90] According to him, the Brazilian courts had considered that possibility abusive. Nonetheless, Freitas indicated that Brazilian laws contained a few cases of forced manumission. For example, a 1779 law permitted the slave members of the Irmandade do Rosário e São Benedito, the religious brotherhood that had helped expand Rio's urban perimeter in the eighteenth century, to force their own purchase when they were mistreated by their masters.[91]

Despite Freitas' narrow interpretation of the Ordinances, people's efforts to contest their statuses in courts pushed for more expansive understandings of liberty. Slave owners evoked the sanctity of property rights, drawing on the liberal institution that maintained social hierarchies in Brazil. Yet, the Ordinances, the Constitution, and national legislation opened a broad interpretative space. In 1864, for example, Fortunata sued her alleged master in Rio de Janeiro's civil court arguing that her former master had ordered her manumission just before dying. The judge ruled that Fortunata had the right to compensate the current master for her freedom, reasoning that the gradual abolition of slavery was a matter of "public utility," and therefore lawful under the constitutional exception to the right to property. On the appeals level, however, Fortunata lost. There, the judges reasoned that constitutional expropriations must be regulated by the legislature. The appeals justices found the "public utility" argument was too expansive, and suggested that it may have been motivated by the judge's abolitionist politics.[92] Yet although the lower court's ruling was eventually overturned in Fortunata's case, the accumulation of similar

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[90] In Cuba, after 1842, masters could not deny manumission when a slave offered at least fifty pesos more toward his or her price. Alejandro de la Fuente, "Slaves and the Creation of Legal Rights in Cuba: *Coartación* and *Papel*," *Hispanic American Historical Review* 87:4 (2007): 659-92.

[91] Augusto Teixeira de Freitas, *Consolidação das Leis Civis* (Rio de Janeiro: Typhographia Universal de Laemmert, 1865), 47-50.

[92] Chalhoub, *Visões da Liberdade*, 106.

cases was part of slavery's decline. Eventually, the 1871 Free Womb Law clarified the controversy, mandating that the slave who could pay for his or her freedom had the right to manumission.[93] In the Consolidation's 1876 edition, Freitas added this hypothesis to the list of cases in which the expropriation of slave property was legal in Brazil.[94]

Slaves who purchased their freedom or conquered this right in court joined the urban poor in the city's tenements. The presence of former slaves and other free people of color, alongside other impoverished residents, led to a shift in the urban administrators' position. By the 1870s, the official approach to the city's collective habitations had changed. In 1866, José Pereira Rego, the Barão do Lavradio, president of the Junta Central de Hygiene, argued that the municipal chamber should prohibit the construction of new tenements in a large area of the city. As opposed to the 1850s proposals, which had focused on the improvement of the poor's housing conditions through the policing of landlords, Rego inaugurated an emphasis on the complete elimination of tenements. The previous license system created by the municipal chamber in 1855 had not been effective in controlling the construction of new tenements. The press, now clearly espousing the hygienist ideology, frequently denounced the unregulated erection of new tenements in the city. Builders often did not ask for licenses, hoping to create a *fait accompli* that made it hard for the municipal and hygiene authorities to remove the residents. When asked, they never used the word "*cortiço*" (tenement), referring instead to rooms, or small houses.[95] In 1873, the municipal chamber prohibited the construction of tenements in part of the city. In 1876, when Rio was victim of yet another yellow fever epidemic, the chamber reinforced the prohibition,

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[93] Lei n. 2040, de 28 de Setembro de 1871, article 4, paragraph 2.

[94] Freitas, *Consolidação das Leis Civis* (1876), 73.

[95] Chalhoub, *Cidade Febril*, 42-44.

clarifying that it applied even when the owners insisted in calling their buildings "small houses or equivalent names."[96]

During the 1880s, the attack on the city's tenements intensified. In December 1879, the monarchical government ordered the district sanitary commissions to condemn the collective habitations that were deemed to be "in ruins" or a public health hazard.[97] The new strategy to rid the city of tenements included the private sector's participation. In 1882, the government constituted an industry for the construction of state-subsidized popular housing. Several companies applied for the public contracts, asking for tax exemptions, and for the right to expropriate. In 1885, three companies were selected, including one that had Vieira Souto, the engineer who had criticized both the 1850 Junta and the 1874 Commission, as a major partner. In the contracts, the state conceded 20 years of tax exemptions, and required the companies to expropriate and compensate tenement owners. In transferring the power to expropriate to private parties, the monarchy hoped to both save money, and reinforce its commitment to property rights.[98]

Between 1882 and 1883, the Junta and the sanitary commissions intensively attacked tenements, ordering several condemnations. Tenement owners resisted by demanding that the commissions indicate their properties' specific sanitary problems. With that information in hand, the owners went to the municipal chamber to ask for licenses to make the necessary improvements. When police forces tried to enforce the condemnations, they occasionally found

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[96] Chalhoub, *Cidade Febril*, 34.

[97] Chalhoub, *Cidade Febril*, 45.

[98] Benchimol, *Pereira Passos*, 155.

tenement owners carrying judicial orders that protected their property rights.[99] Despite the legislative and doctrinal transformations that promoted limits on property rights for the purposes of urban sanitation and enhancement, the judiciary seemed to be a stronghold for Rio's property owners. Judicial and political resistance based on the sacredness of property, the monarch's lack of interest in comprehensive urban reforms, the moroseness produced by state bureaucracy, and the late 1880s turmoil of the republican proclamation postponed the construction of popular housing to the 1890s and early 1900s.

The 1870s and 1880s were decades of intense legal disputes in the capital city. Slaves brought suits against their masters to obtain freedom, opposing a right to liberty to the supremacy of property rights. Tenement owners went to court seeking to halt the sanitary condemnations, evoking their property rights against state interventionism. In January 1880, law and urban politics intertwined after public demonstrations against the new one-*vintem* tramway tax erupted. The Vintem Revolt inaugurated a new kind of politics in the city. For the first time, people dislocated politics from the parliament to the streets. After the monarch responded with violence, the protesters mobilized courts and newspapers to articulate their demands as rights, with the help of lawyers.[100]

The tram tax was an attempt to increase state revenue in a time of financial crisis. It applied only to the city of Rio; and was to be collected directly from the passengers, instead of the tram companies, as originally proposed. In late December 1879, approximately 5,000 people gathered in a spacious park near the monarchical palace, in São Cristóvão, where the militant

[99] Chalhoub, *Cidade Febril*, 45.

[100] Sandra Lauderdale Graham, "The Vintem Riot and Political Culture: Rio de Janeiro, 1880," 60 *The Hispanic American Historical Review*, n. 3 (1980): 431-449.

republican journalist José Lopes Trovão gave a speech. From there, the crowd tried to deliver a petition to Dom Pedro II, asking the monarch to revoke the "unjust and vexatious" tax. However, instead of listening to the movement's leaders, the king sent his police forces to threaten and disperse the petitioners. On January 1, the day the new tax began to be charged, a heterogeneous crowd of 4,000 people, including members of the city's middle sectors and poor workers, marched in protest through Rio's dense commercial center, toward the Largo do São Francisco square, from where all downtown trams departed. A block from there, the march divided into two groups. Before reaching the Largo, the groups tore up tram tracks, stabbed the mules, fired pistols, beat up conductors, and overturned several cars, which were transformed into barricades. The police and 600 army infantry and cavalry confronted the rioters, attacking the barricades. At eleven o'clock at night, the streets were clear. Over the next several days, only isolated disturbances took place.[101]

In response to the violent repression, a group of city residents, including lawyers, legislators, doctors, former government officials, and businessmen, formed a peace committee to treat the injured and mobilize the law against arbitrary arrests. The committee nominated pro-bono lawyers, such as Carlos Augusto de Carvalho, a prominent politician and jurist, to quickly publicize that alleged organizers of the protest, such as José do Patrocínio and Lopes Trovão, had been denied their due process rights. After the pressure, the chief of police eventually agreed to recognize their petitions for habeas corpus. Although the committee lost its bid to suspend the tax, it was effective in mobilizing legal language and institutions to free the people who had been illegally arrested, and to even turn conservative newspapers against the government.[102]

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[101] Graham, "The Vintem Riot."

[102] Graham, "The Vintem Riot," 443-444.

Both José do Patrocínio and Lopes Trovão advocated republican ideals. They were part of a heterogeneous political movement, which included planters, factions of the military, and urban professionals, who successfully overthrew the monarch and instituted a republican government in 1889. In Rio de Janeiro, the transition created expectations regarding municipal autonomy, the destruction of privileges, and the democratization of the access to civil and political rights. However, faced with political and economic instability and the renovation of urban problems such as the lack of housing and sanitation, the first republican governments tightened their control over the capital city's administration and population.

4. The "Pig Head"

Brazilian republicans had been organized around common ideas, such as the decentralization of power and federalism, at least since their official manifesto published in 1870. Yet, although the republicans managed to elect a couple of parliament members, the planter elite supported the monarchy up until 1888. Since 1822, the monarchical government had existed to preserve the interests of slaveholders. Thus, its fall was directly associated with the abolition of slavery, in May 1888. After Princess Isabel signed the general abolition law, planters joined a heterogeneous group of abolitionists, military officers, students, liberal professionals, and small traders in their support for the republican cause. Emperor Dom Pedro II was sick, and his immediate successor was Isabel, now unpopular among the powerful landowners. Adding to the increasingly strong republican propaganda and to the animosity between the planters and the monarchy, the military resented the politicians' disparaging treatment of them. Mostly composed of middle-class men, military officers felt that the political elites treated them as inferiors, and paid unjust wages, despite their victory in the Paraguayan War (1864-1870). On November 15,

1889, a military movement led by Marshal Deodoro da Fonseca overthrew the monarchy, installing the first republican government in Brazil. Although military officers portrayed their corporation as a representative of the lower classes, the poor's participation in the movement was modest and arranged at the last minute.[103]

The first nine years of the Brazilian Republic were highly unstable. Successive military governments suppressed with state of siege and violence numerous rebellions led by various political factions. In 1893, admirals of the navy rebelled against President Floriano Peixoto, who had failed to call new elections after Deodoro da Fonseca's resignation. Their ships bombed the city of Niterói, across the Guanabara Bay from the Federal District, and threatened to bomb Rio de Janeiro. Between 1893 and 1895, a civil war between regional factions in the Southern states, which included some of the navy rebels who had attacked the shores near the capital, left approximately 10,000 casualties. In 1897, after years of failed military campaigns, the republican forces eventually defeated and exterminated a community of 30,000 people in the Northeastern hinterland, led by a messianic leader who was accused of being a monarchist.[104]

Political instability aggravated Brazil's economic crisis. During the final years of the monarchy, the government had created financial incentives for plantations to begin a transition from slave to wage labor. A lot of this effort to modernize the economy was based on the

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[103] Margarida de Souza Neves, "Os Cenários da República. O Brasil na Virada do Século XIX para o Século XX". In: Jorge Ferreira & Lucilia de Almeida Neves Delgado, *O Brasil Republicano: O Tempo do Liberalismo Excludente* (Rio de Janeiro: Civilização Brasileira, 2013), 13-44; José Murilo de Carvalho, *Os Bestializados: O Rio de Janeiro e a República que Não Foi* (São Paulo: Companhia das Letras, 2011), 48-50.

[104] Jacqueline Hermann, "Religião e Política no Alvorecer da República: os Movimentos de Juazeiro, Canudos e Contestado". In: Jorge Ferreira & Lucilia de Almeida Neves Delgado, *O Brasil Republicano: O Tempo do Liberalismo Excludente* (Rio de Janeiro: Civilização Brasileira, 2013), 121-160.

emission of money that lacked any real basis. In 1890, the republican government pushed this irresponsible policy even further by multiplying the banks allowed to issue currency, and by incentivizing the creation of new companies. While these incentives were supposed to generate a modern and dynamic economy, they in fact promoted a speculative bubble. In 1892, inflation was at its peak, and the cost of living in the capital city became unbearable. Although the revenues of coffee exports started to generate modest industrial development, the economy remained highly dependent on foreign markets, and a recession in Europe and the United States in 1893 deeply affected the new republic. Besides the reduction in exports, more limited imports decreased the state's main tax revenue, thus making the country incapable of paying its foreign debt.[105] The first republican governments' agenda was therefore to guarantee their own political survival and to reestablish foreign credit and economic expansion.

The abolition of slavery and the incentives for European immigration changed the capital's population. In 1890, out of the 522,000 people who lived in Rio, 28,7 percent had been born abroad, 26 percent came from other parts of Brazil, and only 45 percent had been born in the city. Former slaves migrated to the capital, joining a mass of poor people working for low wages in temporary and precarious jobs in a city with increasingly high living costs. Rio's elite, press, and administrators portrayed the poor as criminals, gamblers, prostitutes, and vagrants, the "dangerous classes" that cultivated moral vices. Criminal law punished vagrancy, and policemen and judges violently controlled a population that was considered a threat to the public order. The population boom renewed old problems regarding the city's water and housing supplies, and

[105] José Miguel Arias Neto, "Primeira República: Economia Cafeeira, Urbanização e Industrialização". In: Jorge Ferreira & Lucilia de Almeida Neves Delgado, *O Brasil Republicano: O Tempo do Liberalismo Excludente* (Rio de Janeiro: Civilização Brasileira, 2013), 191-230.

sanitation. In 1891, smallpox and yellow fever epidemics, in addition to the usual tuberculosis and malaria problems, aggravated Rio's public health problems.[106]

In the capital, the proclamation of the republic created high expectations regarding access to civil and political rights among different social sectors, including poor workers. However, the government's successive usage of violence to repress political dissent that contributed to the political instability, coupled with high levels of disenfranchisement and troubled elections, ultimately frustrated those early expectations. Workers organized unions, political parties, and strikes, hoping to survive the spiking inflation rates caused by economic turmoil. There were socialists who fought for reforms and better living and work conditions, and more radical groups of anarchists, mostly led by European immigrants. Yet, the socialists were never allowed to officially organize their own political party, and the foreign anarchists were systematically deported as threats to the public order. Politics also flourished in cultural arenas, such as the music clubs, and the popular festivals that had animated the city's streets since the nineteenth century, and in ethnic communities, such as those of Portuguese and British immigrants, and that of the neighborhood known as Little Africa, where Afro-Brazilians and former slaves cultivated African and mixed religious practices and music.[107] Rio's property owners and landlords, mostly Portuguese, also joined forces in the Sociedade União dos Proprietários (The Union of Proprietors Society), an organization that would coordinate resistance in the press and the courts against the enforcement of rigid sanitary measures, condemnations, and expropriations. Nonetheless, despite the organization of civil society, the exclusion of minors, women, the illiterate, and foreigners meant that only 20 percent of the city's population could vote. In the

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[106] Carvalho, *Os Bestializados*, 15-19.

[107] Carvalho, *Os Bestializados*, 22, 38.

elections for the Constituent Assembly, in 1890, only 5,5 percent of the population voted, and in the first direct presidential election, in 1894, this number dropped to 1,3 percent. Election fraud and the violent threat posed by armed groups hired to guarantee results discouraged people from voting, reinforcing the exclusionary pattern of nineteenth-century politics.[108]

While the republican electoral politics excluded the majority of the population, people of all social backgrounds found in the courts a space to claim their rights. Liberal lawyers such as Rui Barbosa advanced an expanded conception of habeas corpus that applied to all kinds of civil and political rights violations and even to restrictions of liberty ordered during moments of declared state of siege. These lawyers defended the military government's political oppositionists, including the navy admirals who had been arrested for their rebellious acts in 1893. Politicians appealed to the courts whenever they were physically barred from taking office because of personal and political quarrels. Activists of socialist, anarchist, and other repressed political groups or philosophies hired lawyers to petition the courts for their rights to freedom of expression, association, and press. Common people, even the poorest such as low-wage workers and immigrants, used habeas corpus petitions against arbitrary police violence, arrests, and deportations. The judiciary was not always responsive to those claims, and judges generally rejected the expanded interpretation of habeas corpus, applying it only in cases of restrictions to freedom of movement in times of peace. Nonetheless, Rio's population articulated their own conceptions of citizenship in the courts.[109]

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[108] Carvalho, *Os Bestializados*, 85-87.

[109] Gladys Sabina Ribeiro, "O Povo na Rua e na Justiça, a Construção da Cidadania e Luta por Direitos: 1889-1930". In: Sampaio; Branco; Longhi (eds), *Autos da Memória: a História Brasileira no Arquivo da Justiça Federal* (Rio de Janeiro: Justiça Federal da 2ª Região, 2006); Gladys Sabina Ribeiro, "Cidadania e Lutas por Direitos na Primeira República: Analisando Processos da Justiça Federal e do Supremo Tribunal Federal," *Tempo* 13, n. 26 (2009).

Marshal Deodoro, chief of the Provisional Republican Government (1889-1891), signed a series of decrees organizing the nation's hygiene services. In December 1889, the general hygiene inspector gained "immediate freedom of action" in all "urgent or regulated" matters pertaining public health.[110] In January 1890, the inspector's broad and unspecified powers were mitigated by detailed regulations, and by the creation of a Conselho de Saúde Pública (Public Health Council). The Council was formed by various state doctors and engineers, a municipal representative, and an engineer of the City Improvements Company.[111] Since the earliest years of the republic, this Company, presided by Vieira Souto, would be highly influential in debates about the capital's sanitation and reform.

In 1890, in one of the first efforts to decentralize power, the Provisional Government dissolved Rio's municipal chamber, and replaced it with an intendancy council, with more autonomy to legislate about the city's issues. The council's first action was to enact a municipal code that regulated the hygiene conditions of tenements and other collective habitations. Similarly to what the secretary of police had unsuccessfully proposed in 1853, the code mandated landlords to register all residents, and send the list to the police. The intendants justified this list arguing that the health and moral sanitation of housing required avoiding the presence of suspected, drunk, vagrant, and generally disorderly people. After the Union of Proprietors Society protested against the code, the federal government suspended its enforcement, and reduced the council's autonomy by subjecting its decisions to the minister of the interior's sanction. The intendants resigned in protest.[112]

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[110] Art. 1, Decreto n. 68, de 18 de dezembro de 1889.

[111] Art. 3, Decreto n. 169, de 18 de janeiro de 1890.

[112] Carvalho, *Os Bestializados*, 33.

In 1892, the Federal District's first general organizational law established that intendants would be elected by popular vote, but the mayor was to be appointed by the president. This arrangement, which empowered an unelected executive official, persisted until the 1930s.[113] The initial political instability of the republic was reflected in the capital, which had 19 different mayors between 1889 and 1902, when Pereira Passos was appointed. This constant change of administrators made it almost impossible to conclude urban reform and sanitation projects.[114]

Marshall Deodoro and his Provisional Government attended to an old request of the capital's engineers. In July 1890, a decree finally modernized the expropriation procedures applied to public utility projects in Rio de Janeiro. However, instead of laying out an entirely new procedure as the 1874 Commission had suggested, the decree extended to the capital-city the procedure created in 1855 for the purposes of building railroads. The only modification was the introduction of a balancing factor in the committee of arbitrators that determined the indemnification values. According to the new decree, the fifth arbitrator was to be appointed by a judge.[115] Although the procedure would be modified again in 1903, the expropriations that Mayor Pereira Passos ordered to reform the city between 1903 and 1906 were based on this model of arbitrators appointed by the state, on one side, and the property owner, on the other, plus a tie-breaker arbitrator appointed by a judge.

The laws applied to eminent domain were not the only point of continuity between the monarchical and the early republican periods. Many of the plans designed by the 1874

[113] Carvalho, *Os Bestializados*, 33-36.

[114] Furtado, *Os Dois Lados da Moeda*, 66.

[115] Art. 1, Decreto 602, de 24 de julho de 1890.

Commission, such as the demolition of the Castelo hill, would remain relevant.[116] Yet, the most striking continuity was the influence that private interests exerted over the city's sanitation, conservation, and reform. Although the republicans exhibited a rhetorical commitment to the public good, their governments reinforced the previous pattern that combined public utility and necessity projects with the private profit of businessmen and speculators. Vieira Souto's City Improvements Company, for example, was authorized to widen and pave streets, excavate dumps, and develop garbage collection.[117] In the 1890s, the city's expansion to neighborhoods such as Copacabana, located in the southern area by the beach, was based on this association of private companies and public power. In short, company owners used their influence in government to acquire public concessions for services such as the streetcar system. Simultaneously, different private groups bought cheap land in the peripheral areas, such as Copacabana. Thus, when the companies expanded the streetcar lines to those areas, attracting other forms of urban improvement and therefore land valorization, the original investors obtained tremendous profits.[118]

Floriano Peixoto's rise to power in November 1891 marked an intensification of the official war against the city's tenements. In January 1892, the minister of the interior ordered the hygiene inspector to condemn all the city's tenements in 48 hours. According to the minister, the government was willing to use the most rigorous and energetic coercive methods to make sure that these disease-infected houses were only re-opened after substantial renovations. In March, after the residents of a tenement refused to leave their homes upon an inspector's order, the

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[116] Furtado, *Os Dois Lados da Moeda*, 61.

[117] Teresa A. Meade, *"Civilizing" Rio: Reform and Resistance in a Brazilian City, 1889-1930* (University Park: The Pennsylvania State University Press, 1999), 79.

[118] Chalhoub, *Cidade Febril*, 52-53.

minister sent the police to enforce the condemnation, and declared that inspectors were authorized to request police backup themselves whenever they deemed necessary. Similar situations multiplied in the city, prompting individual landlords and the Union of Proprietors Society to protest to the minister. According to the landlords and their society, the deadlines for improvements were too short, and there was nowhere to relocate the tenants, which left them in a vexatious situation, sometimes having to live on the streets. More importantly, the property owners claimed that the hygiene inspectors' orders violated property rights and due process. Finally, the condemnations and evictions created disturbance to the public order because the landlords were incapable of placating the sometimes-violent impetus of their tenants.[119]

In December 1892, while the conflicts between property owners, tenants, and hygiene authorities were escalating, Floriano Peixoto appointed Barata Ribeiro the capital's mayor. Ribeiro was a professor at the Rio de Janeiro Medical School whose doctoral dissertation had addressed the sanitary measures necessary for eradicating yellow fever in the city.[120] The next year, he would be one of the protagonists in the landmark demolition of Rio's most famous tenement, the Cabeça de Porco (Pig Head).

In 1893, the tenement, located between the port area and the Providência hill, housed between 2,000 and 4,000 people in an "architectural labyrinth" of narrow alleys, small rooms, storage houses, stables, henhouses, a barbershop, and several shoemaker shops.[121] Assuming that the Pig Head was Aluísio Azevedo's inspiration for his naturalist novel *O Cortiço* (The Tenement), published in 1890, this collective habitation functioned like a small "republic inside

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[119] Sidney Chalhoub, *Cidade Febril*, 46-49.

[120] Sidney Chalhoub, *Cidade Febril*, 50.

[121] Lilian Fessler Vaz, "Notas sobre o Cabeça de Porco," *Revista Rio de Janeiro* 1, n. 2 (1986): 29-35.

the republic," where residents joined in solidarity, despite their landlords' authoritarianism, against "external threats" such as the police.[122] Since 1880, under the monarchical government, hygiene authorities had been issuing orders to condemn the tenement. Yet, the political influence of its proprietors, especially Dona Felicidade Perpétua de Jesus, the heir of a landowning family, and of local politicians who hired some of the tenement's residents as bodyguards, had supposedly prevented the Pig Head's demolition.[123]

In 1891, the municipal intendancy signed a contract with the engineer Carlos Sampaio, Vieira Souto's business partner and future mayor of Rio (1920-1922), to build a tunnel through the Livramento hill. The project required Sampaio to pay for the expropriation and demolition of the Pig Head, but the ministerial approval remained pending. In 1892, the hygiene authorities ordered the condemnation of a whole section of the tenement, and reinforced the threat of demolition if the owners failed to make structural improvements. However, the proprietors accused the municipal intendancy of refusing the licenses that were required to initiate the works. In January 1893, the municipal intendancy issued an ultimatum, claiming that the tenement was "in ruins." The property owners complained, arguing that the order served Carlos Sampaio's interest in seeing the indemnification values reduced, and that it therefore violated their property rights. Nonetheless, a few days later, Mayor Ribeiro himself took command of the operation to demolish the Pig Head. Ribeiro led an "army" of municipal employees and policemen to bring down the houses, while families ran to save their belongings, and begged the

[122] Carvalho, *Os Bestializados*, 39.

[123] Vaz, "Notas sobre o Cabeça de Porco," 31.

authorities for more time. Carlos Sampaio, Vieira Souto, and 40 employees of their City Improvements Company were present at the scene.[124]

The Pig Head's demolition was a landmark because it combined many of the factors that would characterize similar expropriations, condemnations, and demolitions throughout the next three decades, and especially during the comprehensive urban reform of 1903-1909. The hygiene authorities and the local press portrayed the Pig Head as the quintessential tenement, an unsanitary shelter for the city's criminals, prostitutes, and vagrants, and thus a focus of disease, vices, and crime. The alleged public interest in ridding the city of this hazard was combined with the private interest of businessmen who profited from public contracts. The mayor's order to shut down and demolish the Pig Head was carried out with violence, disregarding the residents' fate. Finally, the people forcefully evicted from the tenement likely settled nearby on the Providência hill, where Rio's first favela (squatter settlement; slum) developed during the last decade of the nineteenth century.[125]

Although the Pig Head's property owners were unable to halt its demolition, they later sued the municipality for damages. In 1888, Dona Felicidade Perpétua de Jesus had gone to court claiming that upon a hygiene authority's order of eviction, many of her tenants had left the tenement without paying their rents.[126] When a few members of her family made the same argument before a republican court in the late 1890s, after the demolition, the damages they cited referred not only to their immediate material losses, but also to the rents they had been prevented from collecting. Successive unanimous Supreme Court decisions confirmed that the municipality

[124] Vaz, "Notas sobre o Cabeça de Porco," 33-35; Chalhoub, *Cidade Febril*, 15-17, 54-55.

[125] Vaz, "Notas sobre o Cabeça de Porco," 30.

[126] Chalhoub, *Cidade Febril*, 189, footnote 42.

had to pay high indemnification values to the former owners.[127] As João Marques, lawyer of the Union of Proprietors Society, wrote in 1896, "above the Council, and above the Mayor, stand the Law and the Courts…".[128]

Conclusion

During the presidency of Manuel Ferraz de Campos Salles (1898-1902), the Brazilian republic finally reached a moment of economic and political stabilization. As minister of the treasury under the previous regime, Salles had renegotiated a massive loan of 10 million pounds with Brazil's main creditors, and signed a commitment to fulfill several conditions. In the 1898 elections, Salles beat Lauro Sodré, member of a radical republican faction loyal to Marshall Floriano Peixoto. As president, Salles implemented some of the conditions he had agreed upon, such as a tax increase, cuts in public investments, control of public employees' salaries, and a general reduction of public spending. In the political arena, with the radical republicans almost completely out of the picture, Salles negotiated a political compromise among regional rural oligarchs that guaranteed peaceful and controlled transitions. Salles' successful plan of economic and political stabilization allowed President Rodrigues Alves (1902-1906), chosen by the São Paulo coffee producers, to direct the federal government's efforts toward the capital's urban reform without much financial struggle or political opposition.[129]

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[127] Vaz, "Notas sobre o Cabeça de Porco," 33.

[128] João Marques, "Sociedade União dos Proprietários. Ao Conselho Municipal," *Jornal do Commercio*, May 30, 1896. Although there is no evidence that the Union of Proprietors participated in the trials regarding the Pig Head, Marques' statement summarizes Rio's property owners' strategy to resist expropriations and demolitions in courts.

[129] Arias Neto, "Primeira República: Economia Cafeeira, Urbanização e Industrialização"; Benchimol, *Pereira Passos*.

When President Rodrigues Alves, Mayor Pereira Passos, and Public Health Director Oswaldo Cruz began to implement the first comprehensive urban reform of Rio de Janeiro in 1903, the city's collective memories drew on a history of resistance and adaptation to state interventionism associated with private gains. Passos and Cruz were part of the professional class of engineers and doctors who had been claiming their space in politics and public administration since the 1850s. Many of the plans to reshape the city's downtown, such as the widening of its main streets, had already been proposed by the 1874 Commission. The public health authorities' war on tenements was a culmination of the hygiene ideology that had become hegemonic in the late nineteenth century. Property owners' resistance against expropriations and condemnations continued to rely on a combination of civil society organizing, political lobbying, attempts to influence public opinion through the press, and the strategic use of institutional channels such as administrative agencies and courts. At the same time, judicial resistance to oppression and exclusion by Rio's poor had transitioned from the late-eighteenth and nineteenth-century freedom suits to the republican period's habeas corpus petitions against police repression. The 1880 Vintém Revolt against the tram tax had inaugurated a new form of politics in which people occupied public spaces and attacked the city's infrastructure to claim better and affordable living conditions.

To carry out their comprehensive reform plan, Alves, Passos, and Cruz would have to convince the congress to change the laws that regulated sanitary measures, the Federal District's administration, and expropriation procedures. Yet, the bases for the legislative modifications that increased administrative discretion and independence, while restricting individual rights such as the right to property, were already in place. In the late nineteenth century, Brazilian administrative law jurists had incorporated the police power tradition that had legally framed

urban reform projects in Portugal and its colonies in the late eighteenth century. They evoked the state's police power to justify interventions for the enhancement and sanitation of cities. Both administrative and private law scholars recognized that although property was abstractly conceived as an absolute right, there were myriad legislative limitations on its usage, especially in large cities such as Rio de Janeiro. Finally, some of the old laws that regulated the usage of urban space were still enforceable. For example, in the earliest days of his administration, before the new legislation was available, Mayor Passos ordered the reestablishment of the 1830 urban code, one of the earliest attempts to regulate the city under the independent monarchical government.[130]

Part of the legal framework for resistance was also already in place. The 1891 Republican Constitution protected individual rights such as the rights to property and to the inviolability of the home, and empowered the judiciary to enforce them. The courts, including the Supreme Court, had been sensitive to the claims of property owners, which is evidenced by the indemnifications granted to the Pig Head's proprietors. Although legal scholars recognized the limitations on property rights, the modern conception of property introduced in the mid nineteenth century could be evoked as an argument for the protection of property against state interventionism. Furthermore, the city's poor had transformed habeas corpus petitions into instruments of rights-claiming. Finally, the 1880 Vintém Revolt had also inaugurated the participation of lawyers, and the usage of legal claims inside and outside the courts to protest the government.

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[130] Sérgio Pechman & Lilian Fritsch, "A Reforma Urbana e seu Avesso: Algumas Considerações a Propósito da Modernização do Distrito Federal na Virada do Século," *Revista Brasileira de História* 8/9 (1985), 155.

Chapter Two

"The Pickax is a Reason of State"

"I asked the Senate which acts are exercised *ratione imperii*," repeated Senator Bernardo de Mendonça Sobrinho, speaking before his peers on Christmas Eve, 1902. For the previous four days, the senator had been waging a fierce campaign against Bill 138, which reorganized Rio de Janeiro's administration. At the project's core, Article 16 prohibited judicial authorities, federal or local, from "modifying or revoking measures or administrative acts, or granting possessory injunctions against acts of the Municipal Government that are exercised *ratione imperii*."[1] In a nutshell, Bill 138 shielded the mayor's acts exercised *ratione imperii* against judicial review, but without defining what *ratione imperii* meant. Mendonça Sobrinho worried it could mean virtually anything. His speeches opposing the bill were so long and intense that the Senate even considered amending its internal regulations to avoid future obstructions. On Christmas Day, the senator took the floor one last time to defend his political freedom to speak and to declare that he had "surrendered" the cause only out of respect for the institution to which he belonged.[2]

For the next century, Brazilian jurists would use variations of the *ratione imperii* doctrine to frame discussions about the circumstances under which the judiciary could revoke

[1] Lei n. 939, de 29 de dezembro de 1902, art. 16.

[2] Annaes do Senado Federal, Terceira Sessão da Quarta Legislatura, Volume III, Sessão de 24 de Dezembro de 1902, p. 686; Sessão de 25 de Dezembro de 1902, pp. 711-712.

administrative acts. Legal scholarship gradually normalized the distinctive character of *ratione imperii* acts, depicting them as state prerogatives, such as expropriations, that naturally fell outside the courts' jurisdiction.[3] In 1902, however, this doctrine was introduced in legislation as part of a legal framework especially designed to empower local and federal administrators to reform the capital city. Together with new eminent domain laws and a new Sanitary Code, the *ratione imperii* legally framed the wave of expropriations, sanitary disinfections, condemnations, evictions, and demolitions between 1903 and 1909.

For the ruling coalition between political oligarchies and a technical elite of physicians and engineers, law was an instrument of material progress. State attorneys and legal scholars aligned with the ruling class' nation-building project inserted the *ratione imperii* doctrine into a long legal history of police power and administrative law, dating back to the colonial period. Oppositionist politicians and legal scholars, lawyers, property owners, and tenants contested the doctrine on the basis of liberal principles regarding the judiciary's role in protecting individual rights. They portrayed the empowerment of administrative authorities as the creation of a despotic and exceptional regime in the Federal District. This heated legal debate, staged in Congress, law reviews, newspapers, and courts, was politically charged. Legal scholars and lawyers who represented both proprietors and tenants often used legal scholarship and litigation as means to destabilize the Rodrigues Alves regime. Covertly, some of them plotted a coup

[3] As it will become clear throughout this Chapter, people used variations of the original expression, including "*jus imperii*" and the Portuguese expression "*atos de império.*" Despite the criticisms that emerged in those early republican years, at least until the early 2000s, Brazilian treatises classified administrative acts as either "*atos de império*" – the heir of "*ratione imperii*" – or "atos de gestão" – managerial acts. Hely Lopes Meirelles, *Direito Administrativo Brasileiro* (São Paulo: Malheiros, 2005), 165.

d'état, deploying the language of rights and limitations to state power to mobilize street protest in November 1904.

In their attempt to empower administrators, Congress unintentionally created a conceptual arena that opened space for resistance through the courts. Judges interpreted the *ratione imperii* in a variety of ways. They usually refused to hear cases in which plaintiffs contested evictions or expropriations. Yet, in several groundbreaking rulings, the courts not only accepted such complaints, but interpreted the *ratione imperii* in ways that established judicial intervention on what was supposed to be the terrain of discretionary state authority. In July 1904 and January 1905, the Supreme Court ruled expropriations and forced domiciliary disinfections unconstitutional, propelling a wave of litigation that stalled and occasionally halted the reform. Although courts did not play a uniform role in the process of urban transformation, they curtailed the impact of the technical elite's plan on the city's geography. Their decisions meant that the advocates of enhanced administrative power, which had been on the rise since the late nineteenth century, would have to consider questions of individual rights and procedural guarantees.[4]

1. How the *ratione imperii* became law

There was something odd about the way in which Bill 138 became Law 939. Both Mendonça Sobrinho and his colleague Augusto Gomes de Castro accused the Senate of not

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[4] For a parallel story of the role of lawyers and courts in creating an autonomous, yet procedurally constrained, administration in the United States, see Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940* (Oxford: Oxford University Press, 2014). According to Jeremy Kessler, "the most striking methodological aspect of Ernst's history is its sensitivity to the ceaseless interplay of law and politics." Jeremy K. Kessler, "The Struggle for Administrative Legitimacy," 129 *Harvard Law Review* 718 (2016): 718-773, 728. In this Chapter, I take this interplay seriously, connecting doctrinal changes to dramatic political events.

having read its text – during discussions, several senators admitted that they had not. Because 1902 was almost over, the senators were too busy with the following year's federal budget, and therefore unable to carefully analyze the bill. In fact, Gomes de Castro believed that its text was never printed for the senators to read. Mendonça Sobrinho suggested that President Rodrigues Alves considered the project a "closed deal," as a matter of "political trust." Thus, silence had permeated the Senate, and senators had disappeared from their benches.[5]

For Mendonça Sobrinho, the bill had been crafted to hide its true meaning. It changed little or nothing of the Federal District's previous administrative structure. Among numerous articles that merely repeated or slightly re-worded the 1892 law that it replaced, the bill contained clauses that created a special civil law regime for the District.[6] More importantly, for the senator, Article 16, which contained the expression *ratione imperii*, essentially undermined the use of possessory injunctions, legal remedies that guaranteed the possession of one's property against state interference. Furthermore, the problem far exceeded just the vulnerability of property rights. On December 23, Mendonça Sobrinho argued that the *ratione imperii* empowered the mayor to arbitrarily expropriate, demolish, fine, arrest, and evict, therefore effectively creating a dictatorship in the capital city.[7]

On December 24, the newspaper Correio da Manhã published an article in which Souza Bandeira, city fiscal attorney since 1893 and an active participant in the bill's elaboration,

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[5] Annaes do Senado Federal, Terceira Sessão da Quarta Legislatura, Volume III, Sessão de 20 de Dezembro de 1902, 564, 582-583; Sessão de 23 de Dezembro de 1902, 642-649.

[6] For example, in contrast to national civil law, article 26 determined that husbands did not need their wives' endorsement to cede their real estate property for the purposes of building and improving streets and public areas, thus facilitating the city's access to land deemed necessary for urban enhancement.

[7] Annaes do Senado Federal, Terceira Sessão da Quarta Legislatura, Volume III, Sessão de 23 de Dezembro de 1902, 642-645.

defended the *ratione imperii* provision. Bandeira argued that Article 16 simply reproduced the legislation and precedents of "cultured" nations, including Germany, France, Italy, and the United States, which distinguished *ratione imperii* acts from "*atos de gestão*" (managerial acts). Whereas managerial acts referred to cases in which the state functioned as a private entity, such as when it rented or sold public property, *ratione imperii* acts referred specifically to "administrative police functions." It was thus only the mayor's authority over these police functions, which included public health and urban planning, that was shielded against judicial control. That distinction and its consequence, according to the city fiscal attorney, were perfectly compatible with current legislation, and had already been accepted by the Court of Appeals and the Supreme Court.[8] The next day, the newspaper O Paiz subscribed to Souza Bandeira's legal explanation, though simultaneously admitting that the bill was anti-democratic because it clearly attributed dictatorial powers to the mayor. Nonetheless, the editors believed that the new law was necessary and urgent for the District's political, moral, and sanitary "regeneration."[9]

On that same day, December 25, 1902, Mendonça Sobrinho "surrendered" and the bill passed, with only two other votes against it. On December 29, President Alves signed the bill, which became Law 939, and immediately called the engineer Francisco Pereira Passos to the Cattete presidential palace to officially offer him the mayor's office.[10] On December 30, Passos was appointed, and his term began on January 3, 1903. The man later known as "The Mayor of Demolitions" would therefore start his tenure armed with a legal framework that expanded administrative discretion and independence, enabling him to implement comprehensive and rapid

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[8] Souza Bandeira, "A Reforma Municipal," *Correio da Manhã*, December 24, 1902.

[9] "Reforma Municipal," *O Paiz*, December 25, 1902.

[10] Afonso Arinos de Melo Franco, *Rodrigues Alves: Apogeu e Declínio do Presidencialismo, Vol. I* (Brasília: Senado Federal, 2001), 410.

urban transformations. For the first six months, Passos would also rule without a Municipal Council, hence free from political opposition. Moreover, the federal government was authorized to take a six-million-pound loan for the capital's reform.[11] A little more than a year later, in early January 1904, and under similar criticisms raised by a few minority voices in Congress, a federal decree extended the shield against judicial control over acts exercised *ratione imperii* to the Diretoria Geral de Saúde Pública (Public Health Authority), led by doctor Oswaldo Cruz.[12]

2. The backdoors of liberal constitutionalism

2.1 Republicans, monarchists, and positivists

President Alves, Mayor Passos, and Public Health Director Cruz understood that a legal framework was critical in publicly justifying the wave of expropriations, evictions, and demolitions about to come. The *ratione imperii* arguably created a legitimate shield against the obstacles and delays of judicial intervention. However, the concept was a controversial one, raising questions that haunted Brazil's infant republican regime. Juridical criticism of the *ratione imperii* doctrine was highly politicized, involving the three major factions of early-republican political life. Liberal constitutionalist ideas about constitutional normalcy, separation of powers, and individual rights framed both liberal republicans' and monarchists' attacks on reformist measures. Positivists – a group that had recently lost power to liberal oligarchs such as Alves - critiqued the reform's association with private interests, which undermined the republican duty to act for the public good. In publications and courts, monarchists and positivists used the legal debate to broadly attack and destabilize the government. In November 1904, they mobilized

[11] Lei n. 939, de 29 de dezembro de 1902, Disposições transitórias, arts. 1, 2, and 5.

[12] Decreto n. 1.151, de 5 de janeiro de 1904, art. 1, §20.

people against Oswaldo Cruz's forced vaccination campaign, and took advantage of street turmoil in a failed attempt at a coup d'état.

Drafted after the fall of an imperial state, the 1891 Constitution, heavily influenced by United States and Argentinian constitutionalism, had established republican and liberal principles. While separation of powers and the protection of individual rights had been part of the Imperial Constitution (1824), republicans sought to institutionalize mechanisms to protect these principles, such as judicial review. Their critique of the monarchy had focused on the concentration of powers in the emperor's hands, based on the accumulation of the executive and the moderating powers and the unitary political system.[13] Yet, since November 1891, nine months after the constitution was approved, presidents had extensively invoked the provision of *estado de sítio* (state of siege), which concentrated power in executive hands and suspended individual guarantees. Especially during the military governments of Deodoro da Fonseca (1889-1891) and Floriano Peixoto (1891-1894), this exceptional instrument had been used to suppress political dissidence, stabilize the republic, and push it towards authoritarianism.[14] Although president Campos Sales (1898-1902) had managed to stabilize republican politics through a peaceful compromise with rural oligarchs, in 1902 the state of siege remained very much alive in constitutional and political discourse, and as a real alternative in Brazilian politics.

Throughout and after the urban reform, lawyers repeatedly accused Mayor Passos and Public Health Director Cruz of acting as dictators in an undeclared, permanent, and localized state of exception, in violation of the 1891 Constitution. In law reviews, newspapers, and court

[13] Margarida de Souza Neves & Ada Heizer, *A Ordem é o Progresso: o Brasil de 1870 a 1910* (São Paulo: Atual, 1991), 51-53.

[14] Christian E. C. Lynch, "O Caminho para Washington Passa por Buenos Aires: A Recepção do Conceito Argentino do Estado de Sítio e seu Papel na Construção da República Brasileira (1890-1898)," *Revista Brasileira de Ciências Sociais* 27, n. 78 (2012), 152.

petitions, they described the city's administration as "arbitrary," "absolutist," "tyrannical," "dictatorial," "oppressive," and "dangerous."[15] They argued that the *ratione imperii* created imbalance between two constitutional powers by weakening the judiciary on behalf of executive discretion, thus opening a door to violations of civil liberties, such as the rights to property, commerce, and to the inviolability of the home. Liberal constitutionalism, and the shadows of recent military governments, declarations of emergency, and authoritarianism, provided a strong argument against the means chosen to bring about urban transformation.

As part of this argument, lawyers constructed narratives of continuity and frustration within the new republican government. In July 1904, defending his clients against the expropriation of buildings located at the Largo da Carioca, lawyer and republican politician Carlos Augusto de Carvalho argued that Passos' exceptional regime betrayed the "dignity of the Republic."[16] In January 1905, reacting against a violent sanitary disinfection in the Rio Comprido neighborhood, Pedro Augusto Tavares Jr. emphasized that his client, a Portuguese immigrant, probably regretted having applied for naturalization to support the republican cause.[17] In a 1912 law review article, jurist Astolpho Rezende noted that republican law had been filled with old "wreckages," associating the *ratione imperii* doctrine to the monarchy's allegedly despotic features, particularly in its undermining of separation of powers and individual rights.[18] Criticisms such as these ruptured from within the republican self-legitimizing teleology of progress, which portrayed the 1889 proclamation and Rio's reform as steps forward on the

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[15] These words appear in several law review and newspaper articles, as well as in trial records.

[16] Aggravo n. 555, Supremo Tribunal Federal, 1904. Published in *O Direito* 95 (1904), 218.

[17] Arquivo Nacional, Fundo: Supremo Tribunal Federal, Serie: Habeas Corpus, Ref: BV.HCO.2046, p. 3.

[18] Astolpho Rezende, "Os Actos de Império e a Defesa dos Direitos Individuaes," *Revista de Direito Civil, Commercial e Criminal* 23 (1912), 251.

civilizational path of advanced nations.[19] They implied that technical progress, in the form of urban beautification and sanitation, was accompanied by backwardness regarding constitutional limitations to state power.

Politicians, lawyers, and legal scholars who supported the republic and its civilizing project widely articulated the liberal constitutional discourse to contest the *ratione imperii* doctrine. However, some of the critics opposed republican values. Both in a 1903 possessory injunction petition to guarantee the commercialization of milk on the streets and in a 1913 law review article retrospectively evaluating the *ratione imperii* doctrine, monarchist jurist Cândido de Oliveira wrote that Congress had irresponsibly and subtly included an institution of the Roman dictatorship into Brazilian liberal legislation.[20] Oliveira, a supporter of the monarchy, did not trace the doctrine's roots to imperial law; the *ratione imperii* were rather a republican appropriation of exceptional Roman law.

As many of the prominent figures among early-republican legal elites, Oliveira had been an influential jurist and politician during the monarchical period. By November 1889, when a civil-military coup removed the monarch, he was minister of justice, under the Viscount of Ouro Preto's cabinet. On November 15, the day of the coup, Marshal Deodoro da Fonseca, one of the movement's leaders and soon to be first president of the republic, ordered Oliveira's arrest and deportation to Europe. The former minister was only freed after Marshal Floriano Peixoto, who

[19] Republicans envisioned time as a continuum towards the civilizational telos, opposing republican science and democracy to imperial religion and authoritarianism. Margarida de Souza Neves, "Os Cenários da República. O Brasil na Virada do Século XIX para o Século XX," In: J. Ferreira & L.A.N. Delgado, *O Brasil Republicano: O Tempo do Liberalismo Excludente* (Rio de Janeiro: Civilização Brasileira, 2013), 23.

[20] Cândido de Oliveira, "Sociedade União dos Estábulos," *Gazeta de Notícias*, January 23, 1903; Cândido de Oliveira, "A Restauração do Jus Imperii," *Revista de Direito Civil, Commercial e Criminal* 28 (1913), 15.

would later become Brazil's second president, intervened.[21] Ousted from national politics, monarchist Oliveira opened a law firm in 1891 to dedicate his time to private advocacy and legal scholarship.

Oliveira engaged in intense legal resistance and criticism of the republican urban reform project. Not only did he represent clients in cases against the municipality and the public health authorities, and wrote critical essays for law reviews, but Oliveira was also an editor of a publication distributed by the Association in Defense of Proprietors, one of the civil society organizations that voiced concerns with the impact of urban reform on property rights. In 1905 and 1906 eminent domain cases, Oliveira's son, Cândido de Oliveira Filho, also a lawyer, argued on behalf of the property owners, which suggests that the family's law firm was fully engaged in using litigation against the reform.[22] Another monarchist lawyer, albeit not as influential as Oliveira, Accacio de Aguiar also attacked the *ratione imperii* doctrine while defending his client's property against condemnation.[23] For Aguiar, with Passos, Rio could become a "dictatorship under the shadow of a normal regime."[24]

Monarchists were not the only political opposition to the victorious republican faction, and liberal constitutionalism was not the only ideology used to frame criticisms towards reformers. Raimundo Teixeira Mendes and the members of the Brazilian Positivist Apostolate articulated a harsh critique based on Comtean positivist philosophy. Active participants in the

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[21] Joaquim Jose de Carvalho, *Primeiras Linhas da Historia da Republica dos Estados Unidos do Brazil* (Rio de Janeiro: Joaquim Jose de Carvalho ed., 1889), 103-104.

[22] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Conselheiro Francisco de Paula Mayrink, 1906, n. 72, caixa 619, gal. A; Arquivo Nacional, Fundo: Corte de Apelação – 20, Serie: Apelação Cível – ACI, 1907, n. 1585, gal. C.

[23] A note on the Jornal do Brasil indicates that Aguiar was a monarchist, and "did not make a mystery out of it." V. de Algerana, "A Nota," *Jornal do Brasil*, April 2, 1903.

[24] Aggravo n. 501, Supremo Tribunal Federal, 1903. Published in *O Direito* 93 (1904), 47.

movement that defeated the monarchy in 1889, the positivists had lost political influence in recent liberal regimes. Nonetheless, they continued to be a powerful intellectual force, which guided opposition to liberal oligarchs. Moreover, their own headquarters – the "Humanity Temple," located at Benjamin Constant street – was targeted by city agents who ordered the substitution of wooden fences for a concrete wall. In May and August 1904, when Teixeira Mendes asked for possessory injunctions to protect the Temple's structure, both the Court of Appeals and the Supreme Court denied it, indicating that they could not intervene because the order had been a municipal government's act exercised *ratione imperii*.[25]

In their official publication, the positivists argued that Alves, Passos, and Cruz had imposed a medical-sanitary despotism of arbitrary inspections, vaccinations, and medical internment in the city. Positivist ideology upheld dictatorship as mean to economic and moral progress. Yet, according to the Apostolate, the republican dictatorship should not degenerate into the despotic form that now misruled Rio de Janeiro. They argued that the reform plan's despotism resulted from the bourgeoisie's economic interests, the state bureaucracy's political interests, and the doctors' and hygienists' scientific interests. The Brazilian state was therefore serving private interests, hidden under an alleged public interest in reshaping the capital. The positivists claimed that social demands for order and progress should overcome those individualistic and selfish concerns. Thus, their critique was not based on individual rights associated with liberal constitutionalism, but rather on the political duty to preserve the public good, a republican guarantee of Brazil's social and moral order.[26]

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[25] Recurso Extraordinário, Supremo Tribunal Federal, 1904. Published in *O Direito* 97 (1905), 241.

[26] This is a synthesis of the arguments advanced in the volumes of the *Boletim do Apostolado Pozitivista do Brazil* published in Rio de Janeiro between 1903 and 1905.

Although the positivists' arguments did not resonate in lawyers' petitions or in judges' decisions in courts, they were a leading force behind the November 1904 revolt against forced vaccination, which almost led to a coup d'état.[27] The coup had been planned by a radical republican faction known as Jacobins, supporters of early-republican president Floriano Peixoto. Throughout 1904, they had been using the newspapers to mobilize people against sanitary measures. Despite denying their participation, the Apostolate also participated in the promotion of social unrest. On November 14, seizing the unstable moment created by popular revolt in the city, positivist politicians and army men marched towards the presidential palace in a failed attempt to overthrow Alves. Covertly, monarchists such as the Viscount of Ouro Preto and Cândido de Oliveira financed the movement. By promoting agitation and anti-government conspiracy, the monarchists expected to inherit power as the only viable option to restore order.[28] As the cases of the Oliveira law firm and the "Humanity Temple" suggest, courts were arenas for political struggles and destabilization as much as Congress and the streets.

2.2 A latent legal tradition

If, on the one hand, attacks on the *ratione imperii* doctrine in courts, periodicals, and legal scholarship articulated a version of liberal constitutionalism committed to separation of powers and individual rights, on the other hand, defenders of the *ratione imperii* did not choose to deny these principles. Instead, city attorney Souza Bandeira and other supporters of the

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[27] Robert G. Nachman, "Positivism and Revolution in Brazil's First Republic: The 1904 Revolt," *The Americas* 34, n. 1 (1977): 20-39; Jeffrey D. Needell, "The Revolta Contra Vacina of 1904: The Revolt against "Modernization" in Belle-Époque Rio de Janeiro," *The Hispanic American Historical Review* 67, n. 2 (May 1987): 233-269.

[28] Nicolau Sevcenko, *A Revolta da Vacina. Mentes Insanas em Corpos Rebeldes* (São Paulo: Brasiliense, 1984), 20-21.

ratione imperii drew on a long history of police power, a doctrine which had coexisted with liberal constitutionalism since its inception. When, in response to Mendonça Sobrinho's speeches, Souza Bandeira wrote that *ratione imperii* acts were only those related to "administrative police functions," he was framing the debate differently from the critics. While the constitutional law lexicon relied on the contradiction between the arbitrary state of siege and the regular functioning of individual guarantees, there was an emerging field of Brazilian law that provided a different framework: the field of administrative law.

In the early eighteenth century, Portugal had been part of a broader European, notably Prussian and Austrian, tendency of conceiving the "police" as the king's power to regulate private and social life for the purposes of maintaining the "good order." The "good order" was a traditional Christian one, then threatened by modern vices, such as gambling, drinking, and prostitution, and by the disruption of social hierarchies. In cities, the "police power" was used not only to restrain these vices and disruptions, but also to conserve street pavement, water supply, cleansing, fire prevention, and unified trade measurements.[29] Across the second half of the eighteenth century, disputes among European powers had raised royal concerns with territorial control, population growth, and tax collection. Within this context, Portuguese jurists had begun to apply the concept of police power to state action aimed at transforming reality. To transform reality meant maximizing state power through population and economic growth, cultural progress, the colonization of empty regions, and incentives to manufacturing. For the administration of cities, transformation meant the active enhancement of safety and sanitary conditions.[30]

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[29] Airton Cerqueira Leite Seelaender, "A "Polícia" e as Funções do Estado – Notas sobre a "Polícia" no Antigo Regime," *Revista da Faculdade de Direito – UFPR* 47 (2008), 77.

[30] Seelaender, "A "Polícia" e as Funções do Estado," 78.

In post-revolutionary European legal discourse, the concept of "police" – closely associated with the Old Regime – was gradually replaced by terms such as "public administration" and "administrative science." Beginning in post-1789 France, European legislators introduced mechanisms to control the use of administrative power. However, jurists specialized in administrative law advanced a "defensive" agenda aimed at preserving an autonomous space of administrative action, then threatened by the revolutionary emphasis on individual rights. Administrative law doctrine articulated the defense of administrative discretion, limitations on individual rights such as the right to property, and the administration's autonomy vis-à-vis the courts.[31] Therefore, the field of administrative law became a somewhat inconvenient area of liberal juridical thought. While the emergence of liberal constitutionalism advanced limitations on state power, administrative law was committed to empowering public administrators to regulate a variety of situations, such as the enhancement of cities.[32]

Postcolonial Brazil had inherited this administrative law tradition from Portugal. After independence in 1822, Brazilian jurists sought to adapt it to the new political reality of a sovereign monarchy. Administrative law was therefore translated with a different function. Instead of an instrument of social discipline, mid-nineteenth-century treatises conceived the new field as a conceptual legal framework to legitimize national unity under the emperor's sovereign power, in a recently independent state that still struggled with issues of national identity and

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[31] António M. Hespanha, "O Direito Administrativo como Emergência de Um Governo Activo (c. 1800-c. 1910)," *Revista da História das Ideias* 26 (2005), 119-159.

[32] Seelaender, A "Polícia" e as Funções do Estado," 29-64. In the United States, the concept of police power was vital to the founding and early American years, and to the construction of a "well-ordered society" throughout the early nineteenth century. Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993), 35-50. William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill/London: The University of North Carolina Press, 1996).

territorial control.[33] Authors such as the Viscount of Uruguay, a prominent conservative figure in monarchical politics, dedicated their administrative law writings to the organization of national administration, and to legitimizing the moderating power – a harmonizing constitutional branch of government personified in the monarch, who was also head of the executive power.[34]

During the late monarchical and early republican years, this field of law moved away from discussions about the centralization and justification of national power and towards the police power framework, concerned with, among other areas of social discipline, the sanitation and rationalization of cities.[35] The problems generated by mid-century growing urbanization, such as the yellow fever epidemics in Rio, had prompted a reorganization of the monarchical state around administrative agencies dedicated to city planning and sanitation, which was accompanied by this stream of legal scholarship. By the 1900s, after the republican state had expanded its reach through new and stronger agencies, such as the federal Public Health Authority, administrative law books addressed the legal bases for intervention in a wide variety of dimensions of social, cultural, and economic life, such as public security, public health, public works, public assistance, public education, labor, and railroads.[36]

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[33] Walter Guandalini Junior, "Espécie Invasora — História da Recepção do Conceito de Direito Administrativo pela Doutrina Jurídica Brasileira no Século XIX," *Revista de Direito Administrativo* 268 (2015): 213-247.

[34] Visconde do Uruguay, *Ensaio sobre o Direito Administrativo* (Rio de Janeiro: Typographia Nacional, 1862).

[35] Gustavo Zatelli Correa, *Poder de Polícia e a Construção Jurídica do Estado – Analise das Obras de Direito Administrativo da Primeira Republica* (LLB thesis – Universidade Federal de Santa Catarina – 2013); Walter Guandalini Junior, *Gênese do Direito Administrativo Brasileiro: Formação, Conteúdo e Função da Ciência do Direito Administrativo Durante a Construção do Estado no Brasil Imperial* (PhD dissertation – Universidade Federal do Paraná – 2011), 196-209.

[36] Augusto Olympio Viveiros de Castro, *Tratado de Sciencia da Administração e Direito Administrativo* (Rio de Janeiro: Imprensa Nacional, 1906).

The issue of judicial oversight emerged in tandem with the rise of state interventionism. While for monarchist, positivist, and liberal republican critics the *ratione imperii* could only mean a blank check for unconstrained manifestations of power, the administrative law framework provided different answers. As Souza Bandeira argued, acts exercised *ratione imperii* were those of "administrative police function," meaning precisely those acts that in the eighteenth-century European tradition and in the emerging Brazilian scholarship referred to the state's role in disciplining and enhancing societies, which at that moment meant sanitizing, beautifying, and rationalizing the city of Rio. But, even if this definition were accepted, the question remained of whether, and why, the judiciary could not control such acts.

Influenced by French law and concerned with the creation of national unity under the emperor, nineteenth-century Brazilian administrative law scholars had naturalized a conception of separation of powers that preached almost absolute independence. In 1862, defending the development of an administrative jurisdiction in Brazil, the Viscount of Uruguay argued that the judicial power should not hear cases between the state and private persons. First, because that would violate separation of powers, by allowing the judiciary to annul executive acts. Second, because the judiciary was not well suited to review "reasons of State" or "public interest," being naturally designed to rule over private conflicts instead. Finally, because it was bound by certain formalities, the judiciary worked slowly and with inflexible rigor, which would benefit neither private parties, nor the government.[37]

The practice of administrative jurisdiction had been a contested matter during the monarchical period. Conservative jurists such as Uruguay proposed that the Conselho de Estado (State Council), an institution created, presided, and appointed by the monarch, functioned as an

[37] Uruguay, *Ensaio*, 120-121.

instance of administrative jurisdiction. Yet liberal jurists and politicians, concerned with the monarch's excessive powers, argued that the 1824 Constitution did not authorize the Council to exercise jurisdictional functions. Although the councilors had tenure, the liberals worried that they would serve the monarch's interests. Furthermore, the unelected Council could undermine the parliament's power. Nonetheless, in practice the Council only exercised political and administrative functions, producing opinions and suggestions to guide the monarch's decisions, and never effectively exercised jurisdictional powers.[38]

Influenced by United States constitutionalism, the makers of the republican state unified jurisdiction under the judiciary, therefore extinguishing the possibility of an administrative jurisdiction such as the one proposed by Uruguay. Formally, the decrees that organized the judiciary and the 1891 Constitution allowed federal judges and courts, including the Supreme Court, to hear constitutional cases against the government.[39] During the 1903-1909 urban reform, cases regarding expropriations and sanitary infractions would be tried by specialized courts. The Municipal Treasury Court had been authorized to rule over infractions of municipal ordinances in 1892.[40] The Sanitary Court was created in 1904 with comprehensive jurisdiction over public

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[38] Themistocles Cavalcanti, "O Nosso Conselho de Estado," *Revista de Direito Administrativo* 24 (1951): 1-10; Christian Edward Cyril Lynch, "A Ideia de um Conselho de Estado Brasileiro," *Revista de Informação Legislativa* 42, n. 168 (2005): 45-63; Rafael Soares Souza, *Justiça Administrativa: O Sistema Brasileiro* (MA thesis – Universidade de São Paulo – 2014), 65-67.

[39] Constituição da República dos Estados Unidos do Brasil, de 24 de fevereiro de 1891, art. 60. The Provisional Government had introduced these modifications before the Constitution (Decreto n. 848, de 11 de outubro de 1890). Although the earlier decree continued to be relevant for questions regarding the federal courts' organization and jurisdiction, the 1891 Constitution superseded it.

[40] Lei n. 85, de 20 de setembro de 1892, arts. 32 and 33.

health matters.[41] Although they were not part of the administration, both courts' independence from the executive would be put into question.[42]

Despite the unification of jurisdictions, even the most devoted liberals, such as senator and jurist Rui Barbosa, seemed to agree that there were certain acts of government that escaped judicial control. For Barbosa, the "*jus imperii* [was] the ancient denomination of the moral terrain where discretionary State action [was] exercised."[43] If the matter was indeed an act exercised *jus imperii*, the judiciary could not intervene. However, this discretionary space ceased to exist whenever individual rights were at stake. Barbosa's liberal interpretation was an attempt to secure individual rights through legal remedies such as habeas corpus and possessory injunctions amid political turmoil, such as in cases of imprisonment during the early republican states of siege. Liberal jurists like him did not believe that judicial intervention to protect individual rights in such cases violated separation of powers.

Politicians and federal and municipal employees were not alone in their defense of the *ratione imperii* doctrine. In February 1905, after a controversial Supreme Court decision, the newspaper O Paiz, which had supported Souza Bandeira's legal argument in 1902, published an editorial article titled "The True Doctrine." Founded in 1884, O Paiz circulated widely, and had been active in the abolitionist and republican campaigns. During the Alves and Passos administrations, the newspaper showed its conservative pro-government position, defending the republican reform plan despite its authoritarian features. Drawing on a federal judge's decision,

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[41] Decreto n. 1151, de 5 de janeiro de 1904, art. 1, §10.

[42] I discuss the debates around these specialized courts' independence in chapters three and five.

[43] Rui Barbosa, "Posse de Direitos Pessoais." In: *Obras Completas de Rui Barbosa*, 1896, Vol. XXIII, Tomo III (Ministério da Educação e Cultura, Fundação Casa de Rui Barbosa, Rio de Janeiro), 21-22.

the 1905 piece argued that shielding administrative action against judicial control in fact protected separation of powers. Instead of an executive dictatorship, the editors worried about an institutional imbalance that would create a "judiciary dictatorship," allowing the Supreme Court, the nation's highest judicial authority, to reign over the political branches.[44]

Astolpho Rezende later argued, in 1912, that the problem was that, after the unification of jurisdiction under the judiciary, there was no administrative jurisdiction in place to hear cases regarding the mayor's and the public health director's violations of constitutional rights. To him, Brazilian legal culture had not been able to eliminate the "residues" of authoritarian Napoleonic French law introduced during the monarchical period. In France, the distinction between acts exercised *ratione imperii* and managerial acts – which Souza Bandeira defended in 1902 – was perhaps the only criterion to distinguish which administrative acts the judiciary could review. However, for Rezende, that criterion was "absolutely uncertain" and "lacking legal consistency," essentially leaving individual rights unprotected.[45]

Even though the European police power tradition and French administrative law provided lexicons to sustain the *ratione imperii* doctrine, its translation in Brazilian legal scholarship was part of a complex net of political disputes, complicated by the intricacies of a mixed legal culture that had recently translated United States constitutional ideas as well. By 1902, the doctrine was already part of Brazilian law's vocabulary, though it had never been put into written legislation before. When Congress suddenly inserted the expression in statutes designed to boost rapid and effective transformations in the capital city, different conceptions of separation of powers, executive discretion, individual rights, and judicial review framed a highly politicized debate,

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[44] "A Doutrina Verdadeira," *O Paiz*, February 23, 1905.

[45] Rezende, "Os Actos de Império e a Defesa dos Direitos Individuaes," 251-261.

which put in question not only the reformers' methods, but the republican government's fundamental values.

3. "Poor devil!"

Those who defended the *ratione imperii* doctrine argued that despite the controversy, individual rights were still guaranteed by previous legislation, and by the reform's legal framework. The laws that launched Rio's urban reform contained provisions that allowed people affected by expropriations, evictions, sanitary inspections, and demolitions to claim damages whenever the state acted illegally or abused its power.[46] It was just a matter of timing. Because *ratione imperii* acts were presumably legal and in the public interest, they could not be revoked by judicial authorities. If, however, a judge or court later found that there had been illegalities or abuses, they could sentence the state to pay damages. Yet, when illegalities and abuses meant eviction or demolition, timing was not a simple matter. In practice, the *ratione imperii* shield prohibited judicial orders that could prevent evictions and demolitions, giving administrative authorities enough time to remove people from and bulldoze old colonial Rio, thus leaving permanent marks in the city's geography and population. By the time any individual challenge was heard, it would be too late.

In December 1903, during legislative deliberations around the reorganization of federal hygiene services, which granted the public health director the power to act *ratione imperii*, the legal and political debates restricted to elite circles gained popular expression. A cartoon with the title "The Hygiene's Reform Project," and the subtitle "Ratione Imperii" appeared in the Jornal

[46] Lei n. 221, de 20 de novembro de 1894, art. 13; Lei n. 939, de 29 de dezembro de 1902, art. 17; Decreto n. 1.151, de 5 de janeiro de 1904, art. 1, §20.

do Brasil (Image 2.1). Since 1894, under new management, this newspaper had moved from taking part in political controversies among different monarchist and republican factions to focus on the popular sectors. The new editor, Fernando Mendes de Almeida, emphasized themes such as carnival, police chronicles, and the living conditions of the urban poor. As the Jornal do Brasil gained popularity among the working class, it opened unprecedented space for Rio's poor to voice their concerns. Literate or not, anyone could go to one of the newspaper's dozens of agencies spread across the city to register their complaints for free. The "People's Complaints" column was published daily, and included concerns with access to and conditions of housing in the city.[47] In tune with the newspaper's character, the cartoons also depicted problems of interest to working class residents, and were an effective channel of communication with the illiterate and semi-literate majority.

On December 5, 1903, following a series of reports on those legislative debates, the editors highlighted amendments proposed by congressman Barbosa Lima, one of the fiercest opponents of the empowerment of public health authorities, and particularly of forced vaccination. His proposals included respect for medical privacy, the end of forced vaccination, and the construction by the state of housing for low-income residents. Barbosa Lima was also concerned with compensation. Based on the constitutional article that mandated compensation for expropriations, he proposed that both proprietors and tenants be indemnified for their losses.[48] According to the constitution, indemnification was supposed to be paid before

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[47] Eduardo Silva, *As Queixas do Povo* (Rio de Janeiro: Paz e Terra, 1988), 50.
[48] "A Reforma da Hygiene,"*Jornal do Brasil*, December 5, 1903.

expropriation.[49] However, similarly to the 1902 law that had reorganized the district, the draft legislation only included a provision of damages after the harm had been done.

On the December 5 morning edition's first page, the cartoon depicted a poor man tied to a wooden post, burning in a fire. Three figures dressed in black gowns are present at the scene. The figure in the middle represents the sanitary authority, holding a stick that carries what looks like a vaccine syringe on its top. The other two wear judicial robes, representing two branches of the judicial power. On the left, the Sanitary Court – which the federal hygiene project created to hear all cases regarding sanitary infractions, evictions, demolitions, expropriations, and building improvements – looks on helplessly at the burning man. On the right, the robed figure representing the federal courts – constitutionally authorized to hear cases against federal authorities – is blindfolded and stands with his back to the victim, unable to see what is happening.

At the bottom, a caption revealed the cartoon's goal: to "translate" an article of the bill. Article 24 precluded the Sanitary Court, and any other federal or local judicial authorities, from granting possessory injunctions against or revoking the sanitary authorities' acts exercised *ratione imperii*.[50] While in the elite circles of Rio's political chambers, law schools, and courts this expression was framed as part of the erudite lexicons of constitutional and administrative law, the Jornal do Brasil understood that, to its core public, the city's working class, it needed "translation."

In what the cartoonist imagined to be a comprehensible translation of legal language, *ratione imperii* became "*por imperiosas razões*" (for imperative reasons), which was further

[49] Constituição da República dos Estados Unidos do Brasil, de 24 de fevereiro de 1891, art. 72, §17.

[50] In the final text, it became Decreto n. 1.151, de 5 de janeiro de 1904, art. 1, §20.

translated into popular language with the colloquial expression "*cortar o mal pela raiz*" (to root out an evil). The caption states that if, "to root out an evil," the sanitary authorities deemed necessary to burn a sick man to get rid of the bacillus he carried, there was nothing the sanitary or the federal courts could do. The figure representing the Sanitary Court faces the burning man, thinking that it would be more convenient to drown him, which suggests that the cartoonist envisioned this court as an arbitrary institution committed to the federal government's sanitary despotism. The figure representing the federal courts, however, passively murmurs, while looking the other way: "Poor devil!... Hope to God he doesn't forget to file a lawsuit!" – a clear reference to the possibility of claiming damages. If not actively involved in the violent sanitation project, in the artist's eyes, the federal courts at least appeared to be a quiet accomplice.

(Image 2.1 – "O Projecto de Reforma da Hygiene," *Jornal do Brasil*, December 5, 1903 – On top: "THE HYGIENE REFORM PROJECT". On the bottom: "TRANSLATION OF ARTICLE 24 – If, for imperative reasons, i.e., if 'to root out an evil', the 'sanitary authority' believes it must burn a sick man to more conveniently destroy the microbes that fill him, - neither the federal justice, or even the sanitary justice (despite believing that it is more convenient to drown the patient) will have the right to intervene with a bucket of water to extinguish the fire. The most each one can do is to turn their backs to the supplicant and murmur with compassion: - 'poor devil!... God wishes he doesn't forget to claim judicially!...'")

Instead of appealing to conceptions of separation of powers and individual rights found in the constitution and foreign legal culture, the cartoonist used irony to criticize the *ratione imperii* doctrine. For the newspaper's audience, sanitary measures such as the condemnation of tenements, and consequent eviction of residents, produced permanent damages. The burning man could represent those removed from their homes and forced out of the city's downtown. In fact, the burning also represented how far the sanitary authorities were willing to go to sanitize the city, and the fact that there were no real legal limits to their actions. The irony, therefore, is in the "Federal Courts" character's line: "Hope to God he doesn't forget to file a lawsuit!" It reminded Rio's poor that the law uselessly allowed them to sue for damages, even after they had already "burned" in the Public Health Authority's "fire."

Congressman Barbosa Lima and part of the press played central roles in the agitations that led to the 1904 revolt against forced vaccination. Barbosa Lima was among the group of positivist politicians who marched to the presidential palace intending to overthrow the government. Popular interpretations of the law published in oppositionist newspapers, such as the Jornal do Brasil's cartoon, helped frame mobilizing efforts. When legal concepts left the inner circles of the juridical field, vernacular language and irony not only "translated" them for common people, but also fostered popular rebellion against reformist measures.

4. Can the judiciary define its own limits?

While out on the streets people read and likely talked about the new laws, inside the courts the *ratione imperii* doctrine had created an institutional problem. In June 1905, the city's Union of Proprietors Society, engaged in opposition against expropriations and demolitions,

complained that the *ratione imperii* was "indeterminate in its juridical limits."[51] In his administrative law treatise's 1906 edition, Augusto Olympio Viveiros de Castro wrote that, because of "momentary circumstances," recent statutes had imposed on the courts the extremely difficult task of identifying *ratione imperii* acts without any scientific criteria, or uniform precedent, in Brazil or abroad.[52]

There is no linear story that connects judicial interpretations of that controversial expression. Not bounded by precedents, though sometimes using them in their reasoning, Brazilian judges constantly redefined the limits of what *ratione imperii* meant. The concept's indeterminacy produced uncertainty for both state and private actors. The courts' behavior depended not only on the specificities of each case, or on judges' views about the reform. Because of the *ratione imperii* doctrine, judging reformist measures also meant deciding on how much power the judiciary held in face of the executive.

On several occasions during earlier military governments the republican judiciary had been put in a vulnerable position. Lawyer Rui Barbosa had frequently pushed cases to defend persecuted political dissidents, even when they had been arrested during a state of siege, as a strategy to amplify the scope of judicial review through habeas corpus. Amid military rule and political crises, Barbosa advanced the judiciary's role of protecting individual rights and guarantees against state intervention. In certain moments, these pushes backfired, creating animosity between executive and judicial authorities. In 1892, when Barbosa petitioned the Supreme Court to grant habeas corpus to oppositionist admirals who had been arrested after a failed attempt to overthrow the government, President Floriano Peixoto allegedly declared that if

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[51] "A Propriedade Perseguida," *União dos Proprietários*, June 1905.

[52] Castro, *Tratado* (1906), 519.

the Supreme Court justices granted habeas corpus against his acts, "he did not know who would grant them habeas corpus, when they need it."[53]

Ten years later, when Rodrigues Alves took office, threats such as Peixoto's did not seem plausible anymore. The defeat of the radical republican factions that had ruled the country by imposing military force, and Campos Sales' stabilizing compromise with competing oligarchies favored judicial independence. Yet, as a project designed to remake the nation's image abroad, and supported by Brazilian elites, politicians, intellectuals, and part of the press, the urban reform would put that independence to test. Whereas at first the courts may have accepted the limitations imposed by the *ratione imperii* doctrine, there were moments in which the judiciary asserted its role in protecting individual guarantees against executive discretion.

When, in December 1902, Mendonça Sobrinho argued that the *ratione imperii* could be found nowhere in legislation, judicial practice, or legal doctrine, he ignored, intentionally or not, the fact that jurists and the Supreme Court had already expressed themselves regarding the judiciary's limits in controlling the executive exercise of police power. Rui Barbosa's definition of *ratione imperii* as a terrain of "discretionary State action" had been given in 1896. Within Barbosa's liberal framework, which supported judicial intervention when such discretionary acts violated individual rights, judicial remedies could come in the form of habeas corpus – expanded to protect not only freedom from prison, but all civil liberties -, or of possessory injunctions, frequently described as a "habeas corpus for property rights."[54]

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[53] The phrase is widely cited in bibliography on the Brazilian Supreme Court history. Even if it was a rumor, it encapsulates the executive's attitude toward the court in those early republican years. Emília V. da Costa, *O Supremo Tribunal Federal e a Construção da Cidadania* (São Paulo: UNESP, 2006), 30.

[54] In a case published in the *Revista de Direito Civil, Commercial e Criminal*, Barbosa was cited in the comparison between habeas corpus and *interdictos possessorios*, two instruments indispensable to the guarantee of individual freedom and property. *Revista de Direito Civil,*

In April 1900, just a couple of years before the insertion of the expression in legislation, Godofredo Xavier da Cunha presented a report at the American Juridical Congress, held in Rio, entitled "Are there administrative or governmental acts that escape the judicial power's oversight?" Cunha, who was a federal judge in Rio, and would reach the Supreme Court in 1909, argued that the executive exercised two different powers: *jure jestionis* (managerial power) and *jure imperii* (political power). Citing Barbosa, Cunha reinforced the liberal thesis that executive acts of a purely political character (*jure imperii*) escaped judicial interference, but only if they did not violate individual rights.[55]

At the Supreme Court, this liberal interpretation did not gain traction. Three months after Cunha's presentation, in August 1900, the Court heard a case brought by tenement owners who sought a possessory injunction to halt a sanitary agent's order to shut down their property. The decision was clear: the judiciary could not grant possessory injunctions against administrative police acts legitimately exercised. Otherwise, it would subvert the administrative order and separation of powers, by unconstitutionally subjecting the executive to another power. All the proprietors could do was to sue for damages if there had been illegalities or abuses.[56] Two months later, in October 1900, the Supreme Court confirmed this interpretation, adding that state intervention was indispensable for the preservation of society.[57] Although neither ruling referred

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Commercial e Criminal 31 (1914), 135. The same comparison appears in an expert opinion published in a later edition of the review. *Revista de Direito Civil, Commercial e Criminal* 45 (1917), 24.

[55] Manuel Alvaro de Souza Sa Vianna (ed.), *Congresso Juridico Americano*, *Volume II* (Rio de Janeiro: Imprensa Nacional, 1904), 224. Published earlier in *O Direito* 85 (1901), 18-23.

[56] Supremo Tribunal Federal, *Jurisprudencia – Accordaos Proferidos em 1900 e Compilados pelo Presidente do Tribunal* (Rio de Janeiro: Imprensa Nacional, 1903), 107-109.

[57] Supremo Tribunal Federal, *Jurisprudencia*, 116-117.

to the *ratione imperii* doctrine, both were transformed into precedents for cases after 1902, when the expression became written law.

The *ratione imperii* doctrine applied to all levels of the judiciary. First instance courts, such as the Sanitary Court – which ruled on acts of the sanitary authorities -, the Municipal Treasury Court – which heard eminent domain cases -, and federal courts – in charge of cases based on violations of the Constitution -, were generally deferential to the prohibition on reviewing administrative acts. They either cited the Supreme Court's previous rulings, or laconically rejected cases based on the new statutes. At first, the Court of Appeals and the Supreme Court also followed this tendency. But attacks on the *ratione imperii* doctrine's violations of separation of powers, judicial independence, and individual rights paid off. Although not consistently, by mid-1904 higher courts started to find ways around the statutory prohibition to rule on federal and municipal measures related to the urban reform.

Three months after Oswaldo Cruz took office as public health director, in June 1903, Anselmo Barbeito went to federal court seeking possessory injunction against a hygiene deputy's order to condemn two of his properties. According to the petition written by monarchist lawyer Accacio de Aguiar, the hygiene deputy had threatened Mr. Barbeito's tenants, forcing them to move all their furniture, without justifying the eviction. Two days after the petition was filed, Federal Judge Cunha, who had publicly espoused a liberal view at the American Juridical Congress, denied the injunction, based on the Supreme Court's October 1900 decision. For Cunha, the Supreme Court had already decided that a "sanitary authority act exercised in the high interest of public health" did not violate one's property rights. In his appeal, Aguiar argued that the right to claim damages did not preclude the right to prevent them, and that the federal judge was not bound by Supreme Court decisions. Moreover, while Law 939 explicitly protected

the mayor's acts exercised *ratione imperii* against possessory injunctions, there was no such prohibition in place regarding the public health authority yet. A week later, the Supreme Court rejected the appeal, laconically citing both 1900 precedents.[58]

In July 1904, however, when Cunha was called to substitute a Supreme Court justice, both he and consequently the court had a change of heart. Property owners had gone to federal court asking for possessory injunctions to halt the expropriation and demolition of several buildings located in the Largo da Carioca, one of Rio's oldest squares. After federal judges refused to hear their case, they appealed to the Supreme Court. In trials that received wide media coverage, the Supreme Court's composition made a difference. In the first case, although lawyer Carlos de Carvalho tried to convince the justices that the *ratione imperii* doctrine was unconstitutional for "mutilating" and "inhibiting" the judicial power, the court decided that the federal judge had correctly followed precedent. In the second case, however, acting justice Cunha declared that while as a first instance judge he had been bounded by Supreme Court precedents, at the Supreme Court he could rule following his conscience. Thus, he cast the deciding vote in favor of the property owners, ordering the federal judge to review the expropriations.[59] A temporary change in the court's composition, which opened space for Cunha's liberal interpretation, had apparently defeated the absolute ban on the judicial review of the mayor's acts.[60]

In January 1905, in another case intensively covered by the newspapers, the Supreme Court granted habeas corpus against the sanitary disinfection of Manuel Fortunato Costa's house

[58] Aggravo n. 501, Supremo Tribunal Federal, 1903. Published in *O Direito* 93 (1904), 41-49.
[59] "Desapropriações," *Jornal do Brasil*, July 13, 1904.
[60] I discuss the cases in detail in chapter three.

in Rio Comprido, also overcoming the ban on the judicial control of the Public Health Authority's acts.[61] Two months before, mobilized by positivists, monarchists, and part of the press, a heterogeneous crowd had stormed the streets of Rio to protest forced vaccination, believing that the sanitary authorities' interference with their homes and bodies violated their constitutional right to the "inviolability of the home." Although forced vaccination had been revoked and state troops had violently repressed the revolt, the forceful invasion of people's houses to disinfect them remained a problem. Costa's lawyer, Pedro Tavares Jr. allegedly told the Supreme Court that he was confident that the remedy would be granted "to avoid a revolution," because "there was a lot of people willing to repel their home's violators with bullets."[62] Perhaps influenced by social unrest, the court found a formal argument to strike down the disinfection. According to the decision, the constitution only allowed exceptions to the home's inviolability that were authorized by law. Because the 1904 Sanitary Code, which regulated disinfections, was an executive decree, it violated this constitutional right. O Paiz reacted to the decision denouncing the fact that people were now reaching for the judiciary, despite the statutory prohibition on the judicial review of acts exercised *ratione imperii*.[63]

Those two cases represented crucial changes in the judiciary's involvement with the urban reform. Nonetheless, the Supreme Court did not provide a clear interpretation of *ratione imperii*, and daily judicial practice did not change much. In cases from 1909, assessing petitions against public health authorities' orders to condemn, repair, disinfect, and sanitize buildings, the court reinforced the impossibility of granting possessory injunctions against such administrative

[61] Arquivo Nacional, Fundo: Supremo Tribunal Federal – BV, Serie: Habeas Corpus, Cód. Ref. 3648, 1905.

[62] "Contra os Expurgos," *Correio da Manhã*, February 1, 1905.

[63] "A Nova Doutrina," *O Paiz*, February 14, 1905.

acts, citing precedents from 1903, 1905, and 1908. As devoted liberals, justices Pedro Lessa and Godofredo Cunha – now occupying a permanent seat – registered their dissents. Cunha voted in favor of injunctions every time he considered that there had been excesses or abuses of power. For him, the possibility of compensation did not preclude resistance aimed at maintaining possession of one's property.[64]

In their constant attempts to change the courts' attitude, lawyers invoked separation of powers and judicial independence. They advanced versions of the liberal thesis, arguing that administrative acts lost their *ratione imperii* character when they violated individual rights.[65] For them, the judiciary's role was to verify whether the administration acted legally, within the constraints of statutory formalities, without abusing its power. Therefore, courts had to intervene to prevent illegal or abusive acts from producing violations of individual rights.[66]

In August 1905, the Court of Appeals heard a case regarding the expropriation of Maria Feydit Ribeiro's property for the improvement of Assembleia Street, in downtown Rio. Five out of seven judges ruled that the city could only expropriate the parts of the building that were necessary for the street's improvement, thus rejecting the expropriation of entire zones without decrees and plans specifying each expropriated location. They also ruled that it was the proprietor's choice to request full expropriation, in case partial expropriation substantially reduced the building's value. In an uncommonly long majority opinion, the court decided that

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[64] In the Agravo 1192 (cited above), Cunha voted for the injunction. In the Agravo 1211, he voted against the injunction. Agravo 1211, Supremo Tribunal Federal, 1909. Published in *O Direito* 115 (1911), 553.

[65] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Augusto Barthel, 1906, n. 73, caixa 619.

[66] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Augusto Barthel, 1906, n. 73, caixa 619, 1906; Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Antonio Manuel Fernandes da Silva, 1908, n. 75, caixa 620.

"the inviolability of individual rights [was] incompatible with administrative arbitrariness, even in acts exercised *ratione imperii*."[67] In similar cases heard over the following year, lawyers used the Ribeiro verdict as precedent against unnecessary total expropriations, prompting citations in legal doctrine later.[68] The court's interpretation of the *ratione imperii* doctrine asserted judicial intervention whenever the administrative act did not follow statutory formalities, such as providing a clear indication of what parts, and for what reasons a building should be expropriated and demolished.[69]

Despite judicial interventions such as these, lawyers continuously referred to the imbalance between executive and judicial authorities, and to the mayor's and the public health authority's disdain for the judiciary. In 1905 eminent domain cases, lawyers stated that the new laws "suppressed the judicial power," reducing it to "a mere endorser of the administration," and that "the judicial power [did] not exist for engineer Passos."[70] Also in 1905, after Passos broke a compensation deal with property owner José Pacheco; used the Municipal Treasury Court to offer much less than originally agreed; and, while the case was still pending, ordered the damaging of the building, Pacheco's lawyer expressed his outrage in court. In a "protest" petition, he provided a grim picture of executive-judicial relations during the urban reform:

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[67] I used the newspaper publication of the Ribeiro case attached to the records of a 1906 case. Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Augusto Barthel, 1906, n. 73, caixa 619.

[68] I discuss the mayor's strategy of zone and total expropriation and the Ribeiro case's impact on jurisprudence scholarship in chapter three.

[69] The court confirmed this view in a 1906 case, cited in Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Antonio Manuel Fernandes da Silva, 1908, n. 75, caixa 620.

[70] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Joao Leopoldo Modesto Leal, 1905, n. 54, caixa 619, gal. A; Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Joaquim de Sousa Maia, 1905, n. 42, caixa 618, gal. A.

> The mayor's office does not tolerate those matters of justice. For the mayor's office, the city attorney and the municipal judge are '*figuras de encher*' [air balloon dolls]. Above the honorable magistrate's gown, above the lawyer's professional integrity, lies the mayor's arbitrariness, arbitrariness that he exercises with the demolishing pickaxe.[71]

(Image 2.2 – *O Malho*, n. 131, March 18, 1905 – Pereira Passos holding the pickaxe, a symbol of the urban reform. On top: "RUSH! RUSH!" On the bottom: "Passos – I'm going crazy! I'll stick the pickaxe in the Uruguayana Street traders, and in everyone else who doesn't move out in five days! If I don't do it like that, Frontin [Paulo de Frontin, head of the federal Commission for the Construction of the Central Avenue] will take me down…")

The pickaxe, a rustic demolition tool, had become a symbol of the reform (Image 2.2). Chronicler Olavo Bilac, who led the intellectual support for the transformation of old colonial Rio into a modern, cosmopolitan, European-like capital, used the expression "*picaretas do progresso*" ("pickaxes of progress") to exalt Passos' demolishing crews. In a March 1904 chronicle, Bilac wrote that the "filthy" and "retrograde" colonial city "cried" and "hiccupped," but the "pickaxes' clear sound hampered its useless protest."[72] Before the municipal court, Pacheco's lawyer critically merged this symbol with the politics that justified its unbounded usage: "To the Governor of the city of Rio de Janeiro, the law is dead letter; *the pickaxe is a Reason of State*."[73] The mayor's illegal maneuvers, and his intolerance towards the judiciary had

[71] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Jose Dias Ferreira Pacheco, 1905, n. 36, caixa 618, gal. A.

[72] Olavo Bilac, "Chronica," *Kosmos*, March 1904.

[73] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Jose Dias Ferreira Pacheco, 1905, n. 36, caixa 618, gal. A.

put the reform outside of the legally framed discretionary realm of *ratione imperii*, and into the completely politicized arena of state reasons, a term conservatives had used to defend executive acts during declarations of state of siege in the initial republican years of military rule.[74]

In Sanitary Court cases, there was an additional problem. This special branch of the judiciary had been created by the same decree that shielded the Public Health Authority's *ratione imperii* acts, and laid the bases for the 1904 Sanitary Code. In 1907, after sanitary agents ordered the condemnation of a building near the port area, the owner's lawyer argued that, according to that decree, condemnations were either friendly or judicial; which meant that, if there was no agreement between government and proprietor, they had to go through the Sanitary Court. Therefore, condemnations could not be administratively ordered *ratione imperii*. Otherwise, the judiciary's independence would be jeopardized. Yet Sanitary Court Judge Eliezer Tavares had simply refused to hear their case based on the *ratione imperii* doctrine.[75]

In his appeal, the lawyer accused public health authorities of not accepting the existence of the Sanitary Court, and trying to usurp its prerogatives, because the court had been created for the "salvation of the victims of medical arbitrariness" – a sentiment corroborated by news on "general cries" against the Public Health Authority's violence. In its majority opinion, the Court of Appeals stated that the judiciary had the power to decide whether an act had been exercised *ratione imperii*, and whether it had violated constitutional rights. Nonetheless, the condemnation

[74] Defending Marshall Floriano's acts during the *estado de sítio* declared between 1894 and 1895, senator Quintino Bocaiúva argued that extrajudicial killings, arbitrary imprisonments, expropriations, etc. had been ordered "in the name of supreme necessity, in the name of reason of State, for the salvation of the Republic." Christian E. C. Lynch & Cláudio P. de S. Neto, "O Constitucionalismo da Inefetividade: a Constituição de 1891 no Cativeiro do Estado de Sítio," *Quaestio Iuris* 5, n. 2 (2012), 128.

[75] Arquivo Nacional, Fundo: Juízo dos Feitos da Saúde Pública do Rio de Janeiro – 40, Manuel João Fernandes, 1907, n. 1218, caixa 484, gal. A.

was in fact an administrative act exercised *ratione imperii*.[76] Thus, while the court denied the owner's appeal, it also upheld the judiciary's power to define what *ratione imperii* meant, and hence define its own limits.

The decisions proffered by the Court of Appeals and the Supreme Court beginning in 1904 did not create consistent jurisprudence or provide a definitive interpretation of *ratione imperii*. Although lawyers, judges, and courts frequently cited previous decisions in their arguments and justifications, the non-binding character of precedents, various interpretations of the *ratione imperii* doctrine, different takes on the judiciary's role, and the specificities of each case left results, at least on the appeals level, open. The expression that had raised widespread concerns for being indeterminate and obscure gained new life in people's struggles to own, live in, and profit from Rio de Janeiro.

5. *Ratione imperii* and modern state power

Municipal Treasury Judge Moura Carijó, in charge of processing judicial expropriations, refused to assess the substance of eminent domain decisions because public administration, not the judiciary, had the power to determine which improvements served "public utility."[77] Although in his 1900 lecture, Federal Judge and later Supreme Court Justice Cunha had equated the *ratione imperii* with a "political power," the shield against judicial intervention was not thought of as a political matter. To the contrary, administrative decisions were supposed to be

[76] Arquivo Nacional, Fundo: Juízo dos Feitos da Saúde Pública do Rio de Janeiro – 40, Manuel João Fernandes, 1907, n. 1218, caixa 484, gal. A.

[77] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, João Leopoldo Modesto Leal, 1905, n. 54, caixa 619, gal. A; Arquivo Nacional, Fundo: Corte de Apelação – 20, Irmandade da Candelária, 1905, n. 805, maço 272, gal. C; Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, João Gonçalves Ferraz, 1905, n. 52, caixa 619, gal. A.

technical, outside of political quarrels. Federal and municipal judges, and even the specialized Sanitary Court, could not assess their substance because they were not equipped with the technical knowledge of doctors, such as Oswaldo Cruz, and engineers, such as Pereira Passos. In a 1906 memorial, defending executive monopoly over the meaning of public utility, City Attorney José de Miranda Valverde, Souza Bandeira's immediate substitute, added that courts could not produce a uniform definition for the concept, and that individual cases risked subjecting public utility to private interests.[78] Even the most liberal interpretations, such as Barbosa's and Cunha's, focused on whether those measures violated individual rights, instead of questioning their actual necessity or utility for the public good.[79]

Since the late nineteenth century, sanitary concerns had led to proposals of strong state interventionism. In 1881, engineer Vieira Souto, who would become a strong supporter of Passos and Cruz, had argued that the utility of sanitary administration depended on how powerful it was. Souto was among the technical elites that invested and profited from urban reform contracts, but nonetheless criticized the politicians who upheld "a pernicious devotion to individual liberty." According to him, those were members of ultra-conservative forces who blocked the nation's progress in order to advance selfish private interests. Civilizational progress, led by nations such as England and the United States, required giving sanitary agents increasing levels of freedom

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[78] José de Miranda Valverde, *Saneamento e o Embellezamento da Cidade e as Desapropriações* (Rio de Janeiro: Typhografia da Gazeta de Notícias, 1906). Valverde published this memorial to legally support the municipality's strategy of zone expropriations, which I discuss in chapter three. I found a copy of Valverde's brief attached to the records of an expropriation appeal from 1906. Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Juan Rodrigues Alvares, 1905, n. 48, caixa 618.

[79] In a 1908 dissenting opinion, Court of Appeals Judge Montenegro argued that there was no "public utility motive legally verified" for a building condemnation. *O Direito* 107 (1908), 324. Although there were similar affirmations, lawyers' and judges' central arguments did not touch on the merits of public utility or necessity.

and authority. The goal was "to multiply the State's productive forces and augment social capital," prolonging life, and therefore "the nation's prosperity and wealth." Yet, Souto also warned against the dangers of excessive administrative independence. According to him, this could generate administrative irresponsibility, and thus a "perennial threat to individual rights."[80]

In his 1906 treatise, Viveiros de Castro provided political-philosophical justifications for state intervention. For him, the "individualistic school," which defined the state in negative terms, had started with the true principle of liberty as the foundation of the political order, but reached the exaggerated conclusion that liberty was an end in itself. On the other end of the political-philosophical spectrum, socialism went too far in its calls for state intervention, reproducing the imperialistic and autocratic characteristics of an omnipotent state. In-between the two, Castro provided his reformist conception of the state as "an extremely powerful factor of social welfare (…) at the same time conservative and enhancing, unceasingly promoting social progress."[81]

Castro did not advocate for the prevalence of the state over individual action. The respect for private initiative and individual rights was paramount to him. But despite their prominence, state intervention was particularly beneficial regarding the "economic, physical, and intellectual enhancement of the population." In subsequent chapters of the treatise, Castro suggested that the state could intervene in public security, health, assistance, education, the promotion of wealth, and the protection of labor, heavily drawing on the police power tradition, which, according to him, corresponded, albeit with limits and profound differences, to present-day administration.[82]

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[80] L. R. Vieira Souto, *Organização da Hygiene Administrativa* (Rio de Janeiro: Typographia Nacional, 1881), 77, 108, 111-113, 161-163.

[81] Castro, *Tratado* (1906), 14.

[82] Castro, *Tratado* (1906), 22-23 and v.

In the 1914 edition, despite criticizing violations of individual rights due to incorrect applications of the *ratione imperii* doctrine, Castro praised Pereira Passos for his "unforgettable services" to the city of Rio de Janeiro.[83]

While, in 1881, Souto had focused on state intervention as a mean of boosting the monarchical state's wealth and the nation's civilizational progress, Castro's early-twentieth century perspective emphasized "social welfare" and "social progress." His progressive thinking was confirmed later in his 1920 work "The Social Question," in which he elaborated on the critique of socialism, reinforcing his reformist view, and advocating the use of police power to regulate and improve the living and labor conditions of Brazilian workers.[84]

What Souto's and Castro's views had in common was the idea that the state should play an active role in shaping society. Despite the resistance of self-proclaimed liberal constitutionalists such as Rui Barbosa, who condemned state intervention and emphasized the protection of individual private rights, the tradition of police power remained strong among Brazilian scholars, especially those dedicated to administrative law and administrative science.[85] Their work became particularly prominent when Congress introduced new legislation to support the reform plan. Scholarship on administrative law and science provided a lexicon to frame the state's impetus to reshape and sanitize the city.

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[83] Augusto Olympio Viveiros de Castro, *Tratado de Sciencia da Administração e Direito Administrativo* (Rio de Janeiro: Jacintho Ribeiro dos Santos, 1914), 298.

[84] Augusto Olympio Viveiros de Castro, *A Questão Social* (Rio de Janeiro: Livraria Editora Conselheiro Candido de Oliveira, 1920). By the 1920s, Castro's reformism was already informed by two decades of social unrest, strikes, and demands for social rights mobilized by proletarian organizations in Rio and elsewhere.

[85] There was no strict separation between administrative law and the science of administration. Engineers such as Souto and lawyers such as Castro wrote about both, revealing that questions of law and the social-scientific attempts at reading and thus controlling the population were intertwined.

City planning and sanitation are common responses to problems created by increasingly populated cities. They are both a recognition of the state's responsibility to improve social and collective life, and tools for the expansion and consolidation of state power. The proximity created by old colonial Rio's narrow alleys and crowded tenements, and the scientific belief that this spatial organization facilitated the spread of contagious diseases, had prompted state authorities to engage in an exclusionary project of social cleansing, which ordered and sanitized the city by purging it of undesired characters.[86] This project was carried out through the enlargement of state powers, institutionalized in municipal organization and in the federal Public Health Authority. It was part of a larger process of state-making that, since the mid nineteenth century, had propelled the creation of state agencies, such as the Junta de Hygiene Publica (for public hygiene, in 1850) – which became the Public Health Authority in 1896 –, and the Diretoria Geral de Estatística (for statistics, in 1871).[87]

As in other parts of the world, such as in France and the United States, in Brazil, urban planning and sanitation required a reformist legal vocabulary that privileged open concepts, such as "public necessity," "public utility," and "public good."[88] These concepts' function was to legally justify state interventions in people's liberties, properties, homes, and bodies.

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[86] Hochman argues that proximity and its contagious consequences developed a sense of social interdependency that led Brazilian elites to promote national sanitation policies in the 1910s. Gilberto Hochman, *A Era do Saneamento: As Bases da Politica de Saúde Publica no Brasil* (São Paulo: Hucitec Editora, 2013), 59-61.

[87] Together with urban planning, they constituted efforts to make Brazilian society "legible." James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998).

[88] Daniel Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge and London: Belknap Press of Harvard University, 1998); Ann-Louise Shapiro, "Private Rights, Public Interest, and Professional Jurisdiction: The French Public Health Law of 1902," *Bulletin of the History of Medicine* 54, n. 1 (1980): 4-22.

Expropriations, for example, were framed as matters of public utility. Both the Viscount of Uruguay, in 1862, and Judge Moura Carijó, throughout the early 1900s, believed that the judiciary was incapable, or unauthorized, to determine what "public utility" meant. That determination was trusted to administrative state agencies in charge of designing intervention plans, under executive control. In his 1906 memorial to defend the mayor's expropriations, City Attorney Valverde claimed that the ever-increasing complications of modern civilization required the expansion of state power, therefore broadening the notion of public utility to adapt it to new necessities. *Ratione imperii* was another of those indeterminate, open concepts. Its function, however, was not to justify state intervention, but to make it more efficient by shielding administrative decisions from judicial control.

While the technical discourse of engineers and doctors depicted their choices as purely scientific, outside of a corrupted political field, executive empowerment created two genuinely political problems. First, with such open legal tools in hands, an empowered executive, free from judicial control, could attribute any meaning to them. In a 1905 eminent domain case, the proprietor's lawyer stated that the judge understood public utility as being "nothing more than the Mayor's will."[89] While Viveiros de Castro's progressivism may have pushed for conceptions of the public good that benefited the working class and the poor, ideas of national civilizational progress, such as in Vieira Souto's perspective, could encompass exclusionary visions of modernization. Alves' and Passos' reform relied more on Souto's nineteenth-century perspective, than on Castro's twentieth-century progressive views. Nonetheless, while overall the

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[89] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Maria Christina de Alcantara Santos, 1905, n. 53, caixa 619, gal. A.

reform plan created exclusion and segregation for the sake of progress, the reformers' discourse ambiguously navigated between social progressivism and exclusionary modernization.

Second, executive empowerment often led those in charge to break with the legal limits that originally empowered them. Although Passos and Cruz generally ordered city planning and sanitation measures within the statutory constraints laid out by Congress, the discretionary space opened by the *ratione imperii* doctrine was often used arbitrarily and violently. Sanitary inspections, disinfections, and demolitions were carried out with the support of policemen and other state and private forces, regardless of judicial orders against them, and sometimes with threats to owners and tenants. Municipal agents often damaged roofs and walls as a strategy to make buildings uninhabitable, and therefore more vulnerable to expropriation. In actions that seemed to be coordinated, the city denied proprietors the licenses needed to make structural improvements, so the Public Health Authority could condemn buildings, and evict their residents, for being outside of required sanitary standards. The idea that empowerment led to abuses was clear both in lawyers' denunciation of a de facto state of exception, and in the newspaper cartoon that showed a limitless sanitary agency burning someone for "imperative reasons."

Conclusion

A backdoor to undeclared exception, an ironic way to sanitize the city, or a modern manifestation of the police power tradition, the *ratione imperii* doctrine was at the center of legal and political debates about Rio de Janeiro's reform. It framed the ways people thought and spoke of the republican government's urge to transform the capital city. Originally intended to preclude

the courts' interference, the doctrine became a contested arena of interpretation in the judiciary, but also in congress, newspapers, and on the streets.

In July 1904, Mayor Passos and President Alves met to discuss the obstacles that a negative Supreme Court decision in the Largo da Carioca expropriation cases could pose to their reform plan.[90] Less than two years after Congress had furtively transformed the *ratione imperii* into law, the ruling alliance of oligarchs and technical elites felt threatened by a group of small proprietors and their lawyers. By delving into judicial quarrels such as those involving the Largo da Carioca, the following chapter reveals details of how property owners used the courts to criticize the government and conserve their economic power in the city. They sometimes did so by circumventing the *ratione imperii* doctrine, but frequently they interpreted it as a precarious shield, insisting that the doctrine implicitly incorporated the principle that state interventionism was conditional on the respect of individual rights.

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[90] "Noticiário," *Jornal do Brasil*, July 21, 1904.

Chapter Three

From the Ruins of Property

By July 1904, Rio de Janeiro was a construction site. Demolitions to open and broaden avenues, streets, and squares were in full motion. In a ten-minute walk from the Largo da Carioca, one of Rio's oldest plazas, to the Supreme Court building, located at the corner of Rosário and Primeiro de Março streets, one would see, hear, and smell the debris, noise, and dust produced by the "pickaxes of progress." In March, Paulo de Frontin's federal commission had started working on the new Avenida Central (Central Avenue), which cut across the city's downtown to connect it to the port area, as part of President Rodrigues Alves' ambition to boost Brazil's export-based economy. Mayor Pereira Passos' demolitions, aimed at reshaping old streets and opening new ones to improve traffic flow and urban integration, had also begun. The constantly crowded Largo da Carioca, a commercial center and mandatory stop for the city's streetcars, was his next target.

The urban reform was a victory for the engineers of the Clube de Engenharia (Engineering Club). Since the late nineteenth century, the Club had been an influential actor in debates about the city. As Brazil's capital and one of its main ports, Rio represented the nation. The engineers, in turn, represented a nation-building project that envisioned material progress as a path towards higher civilizational standards. In their ideal city, straight, uniform, proportional,

and visible streets facilitated the organic movement of people and goods, and symbolized human reason, therefore working as instruments of a civilizational pedagogy. For the engineers, the visibility of rectilinear streets would produce moral and reasoned citizens.[1]

The engineers' scientific vision had political connotations. The Club's members sought to legitimize their own professional field and therefore their participation in government. Alongside advancing their nation-building project, the engineers used their connections to government to promote their own private economic interests. Throughout the First Republic (1889-1930), engineers who invested in construction and infrastructure companies benefited from public contracts for the purposes of urban enhancement.[2] Paulo de Frontin, who became famous for temporarily solving the city's water supply problem in 1889, epitomized the engineers' political and economic prominence. Frontin profited from public contracts with his Companhia de Melhoramentos do Brasil (Brazil Improvements Company) in the 1890s, and was both elected president of the Engineering Club and appointed chief engineer of the federal commission for the construction of the Central Avenue, in 1903.[3]

Like the 1824 Imperial Constitution, the 1891 Republican Constitution safeguarded property "in all its plenitude," but allowed expropriations based on public necessity and utility, conditional on prior compensation.[4] Roughly, public necessity referred to situations of

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[1] Simone Petraglia Kropf, "Os Construtores da Cidade: o Discurso dos Engenheiros sobre o Rio de Janeiro no Final do Século XIX e Início do século XX," *Projeto História* 13 (1996): 179-187.

[2] André Nunes de Azevedo, "A Cura pela Técnica: o Clube de Engenharia e a Questão Urbana na Cidade do Rio de Janeiro na Virada do Século XIX ao XX," *Locus* 19, n. 2 (2013): 273-292.

[3] Janaína Lacerda Furtado, *Os Dois Lados da Moeda: A Comissão de Melhoramentos da Cidade do Rio de Janeiro e o Discurso de Higiene e Saneamento do Século XIX* (MA thesis – Universidade do Estado do Rio de Janeiro – 2003), 66.

[4] "O direito de propriedade mantém-se em toda a sua plenitude, salva a desapropriação por necessidade ou utilidade pública, mediante indenização prévia. As minas pertencem aos proprietários do solo, salvas as limitações que forem estabelecidas por lei a bem da exploração

emergency, such as disasters and war, and public health hazards, as in the case of unsanitary tenements. Public utility referred to urban and rural enhancement, such as the construction of bridges, aqueducts, ports, and hospitals, and the opening, broadening, and extension of streets and avenues. The two concepts intersected when urban enhancement was implemented for the purposes of public sanitation.[5] The scopes of public necessity and utility, as well as the meaning of "prior compensation," and by whom and how they should be determined, were contested arenas of interpretation.

In 1874, the Commission for City Improvements, led by Pereira Passos, had recommended new and expedited expropriation procedures. The existing procedures opened too many opportunities for appeals. A jury composed of property owners determined the compensation values. Like what had happened in France during the mid-nineteenth-century reforms, these juries tended to inflate compensations, thus making large-scale expropriations impossible.[6] In 1890, a presidential decree extended an 1855 decree, which emperor Dom Pedro II had issued to facilitate the construction of railroads as part of his national integration project, to municipal expropriations in the Federal District. Instead of a jury, the decree empowered five engineers to act as arbiters in the determination of compensations.[7] At the turn of the century,

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deste ramo de indústria" (Constituição da República dos Estados Unidos do Brasil, de 24 de fevereiro de 1891, art. 72, § 17).

[5] Decreto n. 4956, de 9 de setembro de 1903, arts. 1, 2, and 3.

[6] Ann-Louise Shapiro, "Private Rights, Public Interest, and Professional Jurisdiction: The French Public Health Law of 1902," *Bulletin of the History of Medicine* 54, n. 1 (1980): 4-22, 10.

[7] Decreto 602, de 24 de julho de 1890, art. 1.

members of the Engineering Club suggested that the law should be further modified to fit the District's budgetary reality.[8]

In his May 1903 message, President Alves urged Congress to enact legislation simplifying the procedures to speed up the urban reform.[9] In August, Congress extended the 1855 regulations to federal expropriations.[10] In September, a detailed procedure was laid out. In a nutshell, the basis for calculating minimum compensation values was reduced from 20 to 10 times the amount paid in annual property tax.[11] If municipal authorities deemed the building to be "in ruins," compensation could be set below this statutory minimum.[12] If property owners did not accept the city's initial offer, the new laws mandated judicial expropriation. A *procurador dos feitos da fazenda municipal* (city fiscal attorney) initiated procedures before the *Juízo dos Feitos da Fazenda Municipal* (Municipal Treasury Court) to determine the compensation value.[13] Three arbiters, usually engineers – one appointed by the city attorney, one by the proprietor, and one by the judge – evaluated the property.[14] Previous legislation prohibited possessory injunctions – a judicial remedy against illegal seizures – against the mayor's acts exercised *ratione imperii*.[15]

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[8] Oswaldo Porto Rocha, *A Era das Demolições: Cidade do Rio de Janeiro, 1870-1920* (Rio de Janeiro: Prefeitura da Cidade do Rio de Janeiro, 1995), 61.

[9] Rodrigues Alves, Mensagem ao Congresso Nacional, 3 de maio de 1903, 21.

[10] Decreto n. 1021, de 26 de agosto de 1903; Decreto n. 816, de 10 de julho de 1855.

[11] Decreto n. 4956, de 9 de setembro de 1903, art. 31, §5º.

[12] Decreto n. 4956, de 9 de setembro de 1903, art. 31, §9º.

[13] Decreto n. 4956, de 9 de setembro de 1903, art. 15.

[14] Decreto n. 4956, de 9 de setembro de 1903, 21, §1º.

[15] Lei n. 939, de 29 de dezembro de 1902, art. 16.

From the municipal treasury court's decision, city fiscal attorneys and owners could appeal to the Court of Appeals. Challenging the statutory prohibition, some owners asked the federal judges and the Supreme Court for possessory injunctions. Throughout the urban reform period, these courts staged a "conflict between property rights and planning."[16] As a device of state-sponsored capitalist development, urban planning required the destruction of old property rights over the city's soil. As the pickaxes moved forward, clearing Rio's downtown and adjacent areas of buildings that served both speculation and the renting market for housing, commerce, and small industries, part of the city's owners saw their privileges under attack. While fractions of local, national, and international elites profited from public contracts, loans, growing rent prices, and speculation, others questioned whether the project was in fact to their benefit.

Proprietors' resistance had been partially responsible for the imperial government's failure in reshaping the capital. In the 1890s, when republican mayors waged campaigns against unsanitary tenements, the city's owners organized, wrote to newspapers, and litigated to protect their patrimonial power. When Alves and Passos put in motion a more comprehensive and effective reform plan, the conflict was therefore part of the city's memory. A heterogeneous group, which included old proprietors, such as religious orders and traditional landholding elites, and newer ones, such as European immigrants, joined forces to mobilize the law against the reform. They hired lawyers such as Solidônio Leite, who specialized in eminent domain procedures, Cândido de Oliveira, a monarchist politically committed to opposing the republican state, and the Conde de Diniz Cordeiro, who was himself, as a property owner, affected by

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[16] According to Rodgers, "In the contest between property rights and planning, the odds were loaded differently in the United States and in Paris". Daniel Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Harvard University Press, 1998), 173.

expropriations. Following the Union of Proprietors Society's late-nineteenth-century tactics, the Associação em Defesa da Propriedade (Association in Defense of Property), created in 1906, advanced three major strategies to defend its members' property. They used the press to mobilize public opinion, pressured politicians, and sponsored judicial cases of interest to the protection of private ownership in the capital.[17]

The judicialization of expropriations at the Municipal Treasury Court reveals that although Passos often used illegal and extralegal maneuvers to advance his plan, there was space for resistance. At the court, the technical-scientific power of engineers, who understood law as an instrument of material progress, could be expanded by the city attorneys' legal strategies or mitigated by the defense lawyers' arguments. When virtually all landownership in Rio was insecure, property owners' resistance made Alves' and Passos' plan similarly frail. Yet, conflict emerged not only between the state and private owners. Despite the civil society associations, lawyers, and court cases that brought them together against expropriations, this was also a moment of intense competition among Rio's property owners for the preservation and expansion of their dominium over the city. Some of them expanded their proprietary power by fostering good relationships with public administrators. Others used judicial expropriations as opportunities to claim their credits. In mid-1904 and early-1906, judicial disputes over properties located at the Largo da Carioca gained widespread media coverage, revealing how the courts' institutional dynamics and external pressures influenced the outcome of cases.

[17] "A Propriedade Individual," *Jornal do Brasil*, March 9, 1906.

1. Expropriations with(out) law

Lawyers and political oppositionists accused Mayor Passos of ruling the city as a dictator. They drew on liberal constitutionalism to portray the expropriations for urban enhancement as part of a state of exception in which the right to property had been suspended. In June 1905, the Union of Proprietors Society claimed that property owners were being persecuted by a "despotic" and "cruel" public power.[18] In its March-1906 inaugural manifesto titled "Individual Property," the Association in Defense of Property argued that the constitutional right to property had become "fictional" in the District, and that Passos' emphasis on collective interests was "socialism," portrayed as an oppressive regime that undermined individual property ownership, and its main guarantor, the judicial power.[19]

Legislation encouraged cooperation between public administrators and owners, and mandated judicial expropriations when there was no agreement between them. Nonetheless, negotiations and judicial procedures were only part of Passos' strategies in his relationship with the city's property owners. The lawyers, politicians, and civil society associations' discourse that depicted the mayor as a dictator was grounded in his frequent disrespect for previous deals and his use of violence outside and regardless of judicial procedures. At the Municipal Treasury Court, property owners could not ask for injunctions to halt or suspend expropriations. However, they transformed the court into a public arena to denounce the mayor's arbitrary and violent actions.

Cooperation was the reformers' priority because it made expropriations faster and cheaper. To incentivize cooperation, the new legislation determined that expropriated owners

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[18] "Expediente," *União dos Proprietários*, June 1905.

[19] "A Propriedade Individual," *Jornal do Brasil*, March 9, 1906.

had preference in buying land on renovated streets, and that husbands no longer needed their wives' consent to gratuitously cede property for the purposes of urban enhancement.[20] The Central Avenue federal commission was quite successful in establishing agreements. Created in September 1903, the commission released an official call in November inviting proprietors to negotiate compensations and conditions. In his 1904 report to president Alves, Lauro Muller, minister of industry, transportation, and public works, attributed the commission's success to the property owners' "good will."[21] In 1905, he highlighted the commission's ability to "avoid judicial questions" through "friendly agreements."[22]

In 1904, as the commission advanced over land owned by the Mosteiro de São Bento (Saint Benedict's Monastery), a powerful religious order established in 1585, negotiations unraveled. Religious orders had played a central role in the colonial city's organization and expansion. Despite the republican commitment to secularization, since the 1889 republican proclamation, the state's relation with the Church had been one of pragmatic negotiations and accommodations, especially regarding religious property.[23] Although they had lost most of their grip over institutions of social control and assistance to the state, religious orders, such as the Mosteiro, still owned considerable parcels of urban land. The Benedictines were particularly rich, and therefore able to offer the commission the renovation of old buildings and construction

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[20] Decreto n. 4956, de 9 de setembro de 1903, art. 13; Lei n. 939, de 29 de dezembro de 1902, art. 26.

[21] Relatório do Ministério da Industria, Viação e Obras Públicas, 1904, p. 651.

[22] Relatório do Ministério da Industria, Viação e Obras Públicas, 1905, p. 680.

[23] An important compromise was reached, for example, in the 1890 Constitutional Assembly, when propositions to include the confiscation of Church property in the first Republican Constitution were defeated. Maurício de Aquino, "Modernidade Republicana e Diocesanização do Catolicismo no Brasil: as Relações entre Estado e Igreja na Primeira República (1889-1930)", *Revista Brasileira de História* 32, n. 63 (2012).

of new ones in exchange for a plot of land in the new, and predictably valuable, Central Avenue.[24] Throughout that year, newspapers published innumerous reports of similar deals.[25] Among the new avenue's property owners were the Benedictines and other religious orders, as well as the Engineering Club.[26] Working fast and with virtually no judicial opposition, the commission inaugurated its majestic avenue on November 15, 1905, celebrating the 16th anniversary of the republican proclamation.

Passos also reported on his cooperation initiatives and successes. In April 1905, he told the municipal council that almost all buildings necessary for broadening Uruguayana street had been acquired "through friendly agreements."[27] A year later, he reported a total of 375 friendly expropriations.[28] Some property owners petitioned directly to the mayor's office to negotiate settlements.[29] Nonetheless, as opposed to the Central Avenue commission, Passos could not brag about being able to avoid judicial questions. In that same April 1906 message to councilors, the mayor informed them that the city attorney had initiated 162 judicial expropriations.[30] According

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[24] Fania Fridman, *Donos do Rio em Nome do Rei: Uma História Fundiária da Cidade do Rio de Janeiro* (Rio de Janeiro: Garamond, 1999), 74.

[25] For example, in the Jornal do Brasil's editions of January 14 and 24, February 2, 6, 12, 18, and 24.

[26] "A Avenida Central," *Kosmos*, ano 1, n. 11, November 1904.

[27] Mensagem do Prefeito ao Conselho Municipal, 4 de abril de 1905, 27.

[28] Mensagem do Prefeito ao Conselho Municipal, 3 de abril de 1906, 75.

[29] In April 1905, for example, João Manoel Fernandes wrote to Passos that he had terminated a renting contract after having been promised a fair expropriation deal. Nonetheless, the city did not expropriate his building, and now Fernandes needed the documents required to sign a new contract (Arquivo Geral da Cidade do Rio de Janeiro, Codex 42.2.25). In September, José Ferreira Guimarães petitioned the mayor asking him to pay what had been agreed upon for the transfer of his property to the city. However, Passos responded that the land was not yet in accordance with the terms of their deal (Arquivo Geral da Cidade do Rio de Janeiro, Codex 32.2.24).

[30] Mensagem do Prefeito ao Conselho Municipal, 3 de abril de 1906, 75.

to city attorney José de Miranda Valverde, a total of more or less three hundred such procedures were necessary to implement the reform plan.[31] Passos claimed that most of these judicial expropriations led to agreements between the city and owners. However, lawyers frequently accused the mayor of lacking respect for extra-judicial deals.

To expedite expropriations and demolitions, the mayor sometimes proposed extra-judicial agreements, and even signed them, while court cases were still pending.[32] Yet, some of the judicial expropriations indicate that property owners were in fact forced into litigation after the mayor and municipal agents broke previous deals. In 1904, to expropriate Theofilo Ottoni street 20, for the purposes of enlarging Marechal Floriano street, Passos offered proprietor Luiza Soares an agreement, and even sent a telegram to Portugal, where Soares lived. But the mayor later refused to honor their deal, sending agents to violently seize her property.[33] In 1905, Maria Christina Santos, owner of three buildings at Camerino street, accused the mayor of immorally starting an eminent domain suit despite the existence of an agreement.[34] In 1906, after the heirs of a deceased owner were called to the mayor's office and accepted a deal for Sete de Setembro street 18, Passos stalled his signature for five months, forcing the proprietors to give up on the

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[31] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Rita Masson, 1906, n. 74, caixa 620, gal. A.

[32] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Alfredo de Queirós, 1905, n. 37, caixa 618; Arquivo Nacional, Fundo: Corte de Apelação – 20, Irmandade da Candelária, 1905, n. 805, maço 272, gal. C; Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, João Gonçalves Ferraz, 1905, n. 52, caixa 619, gal. A.

[33] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Luiza Antonia Soares, 1904, n. 414, caixa 617.

[34] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Maria Christina de Alcantara Santos, 1905, n. 53, caixa 619, gal. A.

agreement, and ask for a judicial arbitration.[35] In cases such as these, lawyers portrayed Passos as a crook, ready to deceive owners in order to take their property.

Inflicting damage on property targeted for expropriation was part of Passos' illegal tactics. Even when eminent domain judicial procedures were underway, the mayor's agents removed roofs and demolished walls to make buildings uninhabitable, and therefore more vulnerable to condemnation and expropriation, or to devaluate them, thus reducing compensations. At Uruguayana street 127, not only did the mayor not honor his agreement with owner José Pacheco, but he also ordered agents to demolish a wall shared with the neighboring building, to dump demolition materials in Pacheco's property, and to damage its roof.[36] In 1905, municipal agents demolished the Marechal Floriano 24 building before the municipal treasury judge could confirm the arbitrators' decision. Lawyer Pedro Tavares Jr. called this an act of confiscation and theft.[37] In the case of Visconde de Inhaúma 10, lawyer Cândido de Oliveira Filho, son of monarchist oppositionist lawyer Cândido de Oliveira, suggested that removing roofs for deterioration purposes was part of the municipality's habitual violence.[38]

Breaches of agreements and arbitrary demolitions sometimes resulted in suits for damages. In 1905, Salvador Gonçalves da Cunha Bastos, proprietor of Acre street 42, denounced what he called a "well-known trick" of the municipality. The mayor had ordered the partial demolition of his building, forcing him to ask the city for a license to rebuild it. But city officials

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[35] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Manuel Antonio Ferreira Vilaça, 1906, n. 64, caixa 619.

[36] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, José Dias Ferreira Pacheco, 1905, n. 36, caixa 618, gal. A.

[37] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Joaquim de Souza Maia, 1905, n. 42, caixa 618, gal. A.

[38] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Conselheiro Francisco de Paula Mayrink, 1906, n. 72, caixa 619, gal. A.

conditioned the license on the proprietor's concession of space for the street's broadening, leaving him in a lose-lose situation. Either Bastos gratuitously ceded land to the city, or, without a license, waited for his building's total condemnation and demolition. For this violence against his property rights, the proprietor urged the municipal treasury judge to convict the city to paying him the property's value plus damages and interest. The city attorney complained that every time the city ordered demolitions, a damages suit like this one was initiated. After the judge denied Bastos' request, he appealed, but the Court of Appeals' decision is, for now, unavailable.[39]

While outside courts Passos acted freely, signing and breaking agreements, and ordering illegal demolitions, inside, city attorneys worked within the constraints of legal texts and procedures. While Passos' arbitrariness reinforced the liberal constitutional critique that portrayed him as a dictator in an undeclared state of exception, judicial expropriations reveal how judicial practice and legal interpretations framed the urban reform. The Municipal Treasury Court could make the reform faster and cheaper. Nonetheless, judicial interference opened space for resistance, equally articulated within legal constraints. Thus, Passos' authoritarian impetus coexisted with a space that mediated the conflict between property and planning in legal terms. Although the Municipal Treasury Court could not halt or suspend expropriations due to the statutory limitation on the judicial review of acts exercised *ratione imperii*, owners used it to denounce some of the mayor's illegal maneuvers.

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[39] Arquivo Nacional, Fundo: Corte de Apelação – 20, Série: Apelação Cível - ACI, Salvador Gonçalves da Cunha Bastos, 1905, n. 1553, maço 308, gal. C. For unknown reasons, the trial records end with a document that proves that the Court of Appeals received the case. In another similar damages suit, the plaintiff also appealed after the municipal treasury judge denied his request. But the case was frozen for ten years, between 1906 and 1916, when the proprietor withdrew from the appeal (Arquivo Nacional, Fundo: Corte de Apelação – 20, Série: Apelação Cível - ACI, José Elias Soares do Amaral, 1912-1916, n. 1468, maço 304, gal. C).

2. Engineers and lawyers

Engineers opposed their scientific and instrumental knowledge to the rhetorical and abstract thinking of the jurists who had led the nation since its early monarchical years. Alongside doctors, they believed themselves to be the leaders of Brazil's progress.[40] At the Municipal Treasury Court, however, the engineers' power necessarily intertwined with the jurists' legal reasoning. At first glance, the court's proceedings removed power from the law's usual decision makers, such as judges and juries, in favor of arbiters, usually engineers. It thus epitomized the preeminence of this technical elite in Rio's modernization process. Even Paulo de Frontin, influential engineer and president of the Central Avenue commission, participated in judicial arbitrations as a representative of the court. Nonetheless, legal arguments crafted by city attorneys and lawyers played crucial roles in defining how arbiters were chosen, the scope of their technical evaluations, and how compensations were paid. When judicial procedures were set in motion, the scientific "despotism" denounced by oppositionists of the regime found limits in the law's conflictive arenas of interpretation.

On July 28, 1905, Municipal Treasury Judge Carijó, a scribe, three arbitrators, city attorney Valverde, and a court-appointed representative of the proprietor, entered the building at Assembleia street 20 to assess its value. Two months earlier, Valverde had initiated an eminent domain action for the purposes of demolishing the building, as part of the city's plan to broaden Assembleia street. Inside, Carijó presented the three arbitrators – appointed by Valverde, the

[40] Simone Petraglia Kropf, "O Saber para Prever, a Fim de Prover – A Engenharia de um Brasil Moderno". In: Micael M. Herschmann and Carlos Aberto Messeder Pereira (eds.), *A Invenção do Brasil Moderno – Medicina, Educação e Engenharia nos Anos 20-30* (Rio de Janeiro: Rocco, 1994); Simone Petraglia Kropf, "Os Construtores da Cidade: o Discurso dos Engenheiros sobre o Rio de Janeiro no Final do Século XIX e Início do século XX," *Projeto História* 13 (1996): 179-187.

proprietors' representative, and the judge himself – with the building's internal blueprint, the city's offer of 25 *contos de reis*, and the municipal plan for the renovated street (Image 3.1). The arbitrators discussed the proposal and proceeded to inspect the property. When they were done, the group had to move to a private office three blocks away, at Rosário street. At Assembleia street 20 there was nowhere to sit or write. Not only was the building empty, but according to municipal officials it was in a state of ruin and abandoned. Because the three owners were "absent and in an uncertain and unknown location," the judge had appointed a representative for them.[41]

Yet, on November 28, four months after Carijó had confirmed a consensual arbitration of 36 *contos de reis*, Antonio de Souza Valle filed an appeal. Valle carried a document produced by the Brazilian consulate in Vigo, Spain, which indicated that he legally represented Leandro Otero, guardian of the three minors who had inherited the property. Now aware of the expropriation procedures, represented by Valle and lawyer Miliciades Freire, Otero sought a new evaluation for the building. According to him, the first assessment was null and void because the municipality had forged a "pseudo-justification of absence" to expedite the process. Moreover, the city had dishonestly auctioned parts of the property that were not used for street broadening, and had deposited the compensation in its own safes, thus violating the constitutional requirement of prior indemnification.[42]

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[41] Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio de Gonçalves Miranda Queirós [reference name], 1905, n. 44, caixa 618.

[42] Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio de Gonçalves Miranda Queirós [reference name], 1905, n. 44, caixa 618. Reproducing the 1824 Imperial Constitution, the 1891 Constitution allowed expropriations for public utility or necessity as long as indemnifications were paid in advance. Constituição da República dos Estados Unidos do Brasil, de 24 de fevereiro de 1891, 72, §17.

(Image 3.1 – Plan for the broadening of Assembleia street showing building number 20, where the group of men led by judge Moura Carijó conducted a value assessment on July 28, 1905. All expropriation trial records contain a plan like this one, attached to the city attorney's petition that initiated procedures before the Municipal Treasury Court. Plans are preceded by copies of expropriation decrees. Together, they provided evidence for the public utility in expropriating parts of or entire buildings)

Although after almost a decade of litigation the plaintiffs eventually withdrew from the lawsuit, the case of Assembleia street 20 encapsulated key aspects of judicial practice in Rio's Municipal Treasury Court. Judicial expropriations were fast and with little room for defense. Since the *ratione imperii* doctrine precluded injunctions to halt expropriation, their only objective was to determine the conditions and amount of compensation.[43] But rejecting the city's initial offer and going to court paid off. Otero and the three minors received an indemnification 44% higher than what had been offered to them. On average, proprietors who went to treasury

[43] Decreto 4956, de 9 de setembro de 1903, art. 15.

court received over 100% more than the original offer.[44] Even the municipality's arbitrators evaluated properties above what the city had initially offered.

In his April 1905 message to the Municipal Council, Passos urged councilors to legislate about buildings that were abandoned, in ruins, or burned. According to the mayor, more than a thousand inspections had been made in 1904, finding more than seven hundred of these buildings in the city. As a rule, they belonged to people who resided abroad and used their properties for merely speculative purposes. Because they were old and not under strict maintenance, these buildings constituted threats to the city's aesthetics and sanitation.[45] In one third of eminent domain court cases, city attorneys claimed that owners lived abroad.[46] They were either immigrants or members of traditional landholding elites who had invested in the real estate and renting markets. Either way, some of them had recently moved to Europe, likely fleeing the political and economic turmoil of the early republican years. Besides being a political statement against pernicious speculators, Passos' and his city attorneys' absence claim was a strategy to make judicial expropriations faster and less expensive.

To expedite cases, city attorneys produced testimonials that allegedly proved proprietors' absence from the city. Most of the time, their witnesses were the court's officials in charge of finding and notifying defendants. Their testimonials were presented in the formula "said that

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[44] I calculated the difference based on 58 trial records, after eliminating those that did not have the complete information, those in which circumstances such as the shift from total to partial expropriation changed the values, as well as the lowest (-34%) and the highest (+1,100%) differences. The highest difference occurred in a case where the initial offer was 1 *conto*, and the arbitrators determined 12 *contos* of indemnification for a relatively cheap building on Cattete street.

[45] Mensagem do Prefeito ao Conselho Municipal, 4 de Abril de 1905, 79.

[46] I worked with 71 court records, divided between the first instance Municipal Treasury Court and the Court of Appeals, available at the Brazilian National Archive, in Rio de Janeiro.

knows from hearing someone say that the defendant is absent from this capital, in an uncertain and unknown place." Case after case, the court officials signed variations of this vague statement as proof that property owners were nowhere to be found. To give owners one last chance to appear in court, judge Carijó requested the publication of a 30-day call in the newspaper Gazeta de Notícias. If the defendant did not respond to the call, he or she was declared absent, and the judge carried on procedures without his or her knowledge, assigning representatives, such as in Otero's case. The representative appointed the arbitrator, who then evaluated the property, all without the owner's knowledge. An arbitrator not appointed by the owner did not have the same commitment to the defendant's interests. In Otero's case, the representative's arbitrator simply agreed with the compensation proposed by the city's arbitrator.

When property owners who lived abroad somehow heard that their properties were about to be expropriated, they appointed their own local representatives, such as Antonio de Souza Valle. Consular documents produced in places such as Vigo, Paris, and Lisbon proved their legitimacy. With these representatives, procedures could follow the usual path. But owners and their lawyers viewed the absence claim, and its alleged testimonial evidence, as an unfair practice that restricted their ability to participate in trial. Otero's lawyer called it the forgery of a "pseudo-justification." In another case involving the Assembleia 20 heirs, the lawyer argued that the testimonial formula did not prove absence because it was based on the officials' unreliable assertions about what they had heard from unspecified subjects.[47] In Luiza Soares' case, after the mayor ordered a violent seizure breaking his promise of friendly settlement, the owner's lawyer argued that nobody read the city's calls in the Gazeta de Notícias. Moreover, it would be

[47] Arquivo Nacional, Fundo: Corte de Apelação – 20, Juan Rodrigues Alvares, 1905, n. 48, caixa 618.

particularly hard to access a copy of the newspaper in Portugal, where Soares lived.[48] Finally, because a mere formulaic statement proved absence, the city could use the absence claim against proprietors who actually lived in Rio. In the expropriation of Uruguayana street 25, owner Antonio Maran proved the court officials wrong, producing evidence that he resided in the capital, despite testimonies that affirmed the opposite.[49]

Legislation that consolidated the district's new expropriation procedures, passed after Alves' 1903 message to congress, indicated that when properties were deemed "in ruins," arbitrators could set compensation values below minimum legal standards.[50] In eminent domain cases, the state of ruins was invoked either by the city attorney, to justify low compensation offers, or by the city's arbitrators, to justify lower assessments of buildings' values.[51] The concept of ruins was supposedly a technical one, which guided the engineers' authoritative evaluations of the buildings' structural conditions. Yet, as a vague statutory expression, the concept was also prone to legal interpretations. This technical term was, therefore, subject to

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[48] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Luiza Antonia Soares, 1904, n. 414, caixa 617.

[49] Aquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Antonio Francisco dos Santos Maran, 1905, n. 242, caixa 617.

[50] Decreto n. 4956, de 9 de setembro de 1903, art. 31, §9. The minimum value was 10 times the property tax paid in the previous year (art. 31, §5). The "ruins clause" was part of modifications inserted by Decree 1021 (August, 1903), which mandated the application of 1855 rules for the construction of railroads in Rio's expropriations.

[51] Benchimol argues that the ruins claim gave the mayor a broad margin for maneuvers to reduce compensation values. But despite criticisms of the mayor's alleged widespread use of the ruins claim, the pro-government newspaper Gazeta de Notícias defended Passos arguing that the number of buildings deemed in ruins was insignificant. The newspaper mentioned that out of 109 expropriated buildings at Rua Estreita São Joaquim, only 21 were classified as being in ruins. Jaime L. Benchimol, *Pereira Passos: Um Haussman Tropical: A Renovação Urbana da Cidade do Rio de Janeiro no Início do Século XX* (Rio de Janeiro: Secretaria Municipal de Cultura, Turismo e Esportes, Departamento Geral de Documentação e Informação Cultural, Divisão de Editoração, 1992), 248.

uncertain reasoning and conflicting interests. Although engineers, as arbitrators, had the final word regarding compensation values, lawyers and judges could draw limits on their decisions by expanding or restricting what meant to be "in ruins." In court, law and science intertwined, showing that the city's modernization was not an exclusive product of technical-scientific discourses and practices.

As Passos claimed in 1905, some of downtown Rio's buildings were indeed quite old and in bad condition. At Marechal Floriano street 66, the judge had to call a carpenter to break the door lock so the arbitration crew could enter. Because the building had no roof, and was falling apart, the crew then had to move to Rosário street, as the Assembleia 20 group had.[52] In the Assembleia 20 case, the city attorney argued that none of the heirs cared about the property precisely because it was in a state of ruin. On the opposite side, Otero's lawyer claimed that if the building were in ruins, the municipality would have ordered an inspection, and immediate demolition.[53] In the case of Ouvidor street 141, lawyer Augusto Maia, representing the Lisbon-based Bregaro family, vehemently contested the ruins claim, stating that the building "stood there heavy, solid, challenging the action of time and willing to resist the demolishers' pickax."[54]

Through the concept of ruins, law framed the engineers' technical assessments, supposedly limiting the municipality's power over people's properties. Nonetheless, the legal framework itself enabled what could be perceived as violations of property rights. City attorneys broadened the concept to encompass buildings that were in relatively good shape. This is what

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[52] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Rodrigo Teixeira da Silva, 1904, n. 561, caixa 617, gal. A.

[53] Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio de Gonçalves Miranda Queirós [reference name], 1905, n. 44, caixa 618.

[54] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Fernanda Maria Pilar Bregaro, 1905, n. 33, caixa 618, gal. A.

Valverde did in the expropriation of 106 Assembleia Street. Against the city attorney's ruins claim, proprietor José de Moraes proved that a municipal inspection had recently deemed the building in perfect and solid state. A specialist of the city's exclusive choice and trust therefore contradicted the city attorney's assessment. To guide the arbitrators' deliberation, Moraes' lawyer finalized his defense asking them if, why, and to what extent the building could be considered in ruins. The city's arbitrator agreed with the municipal inspector, and set the compensation in 54 *contos de reis*, 54% more than the city's initial offer.[55] While the ruins claim may have been used to reduce compensations, whether it was accepted depended on more than Passos' arbitrary impulse. Not only was the concept of ruins prone to interpretation, but within the city's complex administrative structure, city officials produced divergent assessments. In court, owners advanced limited conceptions of ruins and used those institutional disagreements to secure higher compensations.

Once judge Carijó confirmed the arbitrators' decision, the municipality acted fast to deposit the compensation in its own safes. City attorneys considered this deposit sufficient to meet the constitution's "prior indemnification" requirement, and the judge accepted it as basis for ordering the building's seizure. Yet, the deposit did not guarantee that owners would receive the money even years after their property had been already demolished. For example, a 1903 expropriation to enlarge Carioca street developed into disputes between owners and renters, which stalled the owners' right to withdraw the compensation deposit until the end of 1906, after his death. While the widow's lawyer invoked constitutional violations, the city attorney claimed

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[55] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, José Marcelino Pereira Morais, 1904, n. 375, caixa 617, gal. A.

that the municipality was not responsible for private quarrels, which had to be resolved before someone could withdraw the money.[56]

It took on average four months for former owners to collect compensation after their property had been transferred to the city's dominium.[57] In the 1905 case of Marechal Floriano street 24, the owner's lawyer suggested that the municipality stalled compensations because it lacked the resources to finance expropriations. He added that because the mayor also lacked respect for the rights of the city's residents, and hoped to enter history as an "American Haussmann," he dishonestly deposited compensations in his own safe, violating laws that mandated deposit in the National Treasury, and effectively undermining the constitutional right to prior indemnification, all with the municipal treasury judge's acquiescence.[58] In 1906, when judge Carijó ruled in favor of Rita Masson, ordering the municipality to immediately pay compensation instead of depositing it, city attorney Valverde complained that Carijó was changing court practice. According to him, it was too late to dismiss the deposit now that the last 15 out of approximately 300 judicial expropriations were near closure.[59]

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[56] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Antonio Arnaldo de Moura Ruas, 1905, n. 32, caixa 618.

[57] Average time spam between the date of the *auto de imissão* (seizure act) and the date of the document that attested the withdrawal of the compensation deposit. I calculated the average based on the 52 trial records that provided complete information.

[58] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Joaquim de Souza Maia, 1905, n. 42, caixa 618, gal. A.

[59] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Rita Masson, 1906, n. 74, caixa 620, gal. A. The deposit praxis seems to have continued after Passos' term. In a 1908 case, lawyer Cândido de Oliveira Filho urged municipal officials to confess their incapacity of paying for expropriations, instead of stalling the situation with judicial maneuvers (Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Adelaide Augusta de Almeida Brito, 1908, n. 79, caixa 620).

The absence, ruins, and deposit claims were part of the Municipal Treasury Court's daily work. They developed as judicially accepted practices that mitigated the reformers' lack of time and resources. But, as legal claims, they were subject to contestation. Testimonial proof of absence was unreliable, the supposedly technical concept of ruins was subject to competing interpretations, and the deposit in the city's safe was portrayed as an unconstitutional maneuver. When Otero's lawyer complained that the city had auctioned parts of the building not used for street broadening, he was referring to another equally common and highly controversial practice. Auctions of expropriated excess land raised questions about the scope of public utility and the city's shady relations with powerful property owners.

3. Public utility, private interests

The expropriation of Otero's Assembleia Street building was based on a 1903 decree that ordered the opening of two avenues, and the broadening and rectification of twelve downtown streets, including Assembleia, Carioca, and Uruguayana. This comprehensive decree encompassed most of Passos' plan, and was the legal basis for 65% of judicial expropriations. It mandated the expropriation of all land "necessary for the execution of works."[60] On December 29, 1905, Passos enacted a different decree to open Gomes Freire street. The new street would facilitate the connection between the city's noble southern neighborhoods, such as Botafogo and Laranjeiras, with the central railroad station. According to the decree, the streets that currently made this connection were too narrow, and therefore insufficient. Technical studies had proved that opening a new vein, instead of broadening the old ones, was cheaper. Moreover, the area was full of unhygienic buildings, which had to be demolished for the purposes of sanitation. The

[60] Decreto n. 459, de 19 de dezembro de 1903.

language of the Gomes Freire decree was different from other similar instruments. Instead of referring to land necessary for the opening and enhancement of streets and avenues, it ordered the expropriation of buildings located in an entire zone, where the new street was to be built.[61]

Since the first moments of his term, Passos had been searching for means to finance his expensive reform plan. Even the large loans he was authorized to take were not enough, and compensations for expropriations took a considerable part of the budget. One solution was to push for much lower compensation rates, using the ruins claim. The other was to sell parts of expropriated land that were not used for street enhancement.[62] Decrees that ordered the expropriation of all land necessary for enhancement, without specifying which plots, and of entire zones, such as the Gomes Freire one, facilitated this practice. They often resulted in the expropriation of more than what was later used, and excess land was auctioned to refinance public works. Auctions often took place in the buildings' ruins. Excess land was divided while the demolitions' debris was still being removed.[63]

In the late 1850s, during his studies at the École de Ponts et Chaussés, in Paris, Passos had observed the Baron of Haussmann's usage of "excess condemnation" or "zone expropriation" to finance his reforms.[64] As ideas about city planning circulated in the Atlantic world, this practice had reached the United States. There, however, state courts deemed excess condemnation illegal because it forcefully transferred property from one set of owners to

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[61] Decreto n. 575, de 29 de dezembro de 1905.

[62] On April 4, 1905, Passos informed the Municipal Council that selling expropriated land from five different projects had reduced in 4% the cost of expropriations. Mensagem do Prefeito ao Conselho Municipal, 4 de Abril de 1905, 26.

[63] Rocha, *A Era das Demolições*, 67.

[64] Rodgers, *Atlantic Crossings*, 167.

another.[65] The same had happened in Buenos Aires, where a Haussmann-inspired urban reform had been implemented in the 1880s. There, the city's government applied zone expropriation to open the Avenia de Mayo, which cut across the city's downtown, connecting it to the port – a symbol of Argentina's progress, envied by Brazilian elites, and an inspiration for the engineers who projected Rio's Central Avenue. However, in 1886, a property owner affected by the avenue's project took her grievance to the Argentinian Supreme Court. In 1888, in one of the first cases of judicial review in the neighboring country, the court decided that zone expropriations were unconstitutional. To justify their decision, Argentinian justices referred to eminent domain cases decided in New York, Missouri, Louisiana, and other American states.[66]

Back in Rio, in August 1905, Maria Feydit Ribeiro appealed a decision that had expropriated parts of her Assembleia street building that were not necessary for the street's enhancement. The Court of Appeals decided in favor of Ribeiro's claim, stating that the *ratione imperii* doctrine could not justify arbitrary violations of individual rights, such as when the city expropriated land without a clear indication of what parts and for what purposes it would be used. The case became a major precedent for Rio's property owners' resistance against expropriations. It was later cited by owners' lawyers in courts and by jurists in administrative law treatises. According to the Court of Appeals, Brazilian eminent domain law was aligned with the Argentinian Supreme Court's decision, and its interpretation of United States precedents and jurisprudence. In these jurisdictions, public utility was a restrictive concept, which authorized only the expropriation of land directly used for the purposes of street opening and enhancement. Late-nineteenth and early twentieth-century constitutional law debates in Brazil often referred to

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[65] Rodgers, *Atlantic Crossings*, 172-173.

[66] *Municipalidad de la Capital v. Elortondo* (Corte Suprema de Justicia de la Nación, 1888).

United States concepts and practices that had already been translated in Argentina.[67] The Court of Appeals' decision reveals how law inserted Rio's urban reforms in a network of circulating ideas that went beyond Paris and France. When it came to zone expropriations, the Brazilian judiciary's inspiration in North and South American constitutional law trumped Passos' praise for Haussmann's Parisian practice.

On June 11, 1906, city attorney Valverde published a report in which he tried to change the appeals judges' minds on the matter. He argued that the executive power had the prerogative of determining what was public utility. At any given moment and place, public utility included "all of society's legitimate necessities," which evolved with the increasing complexity of modern civilization. Now, in the capital city, these legitimate necessities required not only direct usage of expropriated land to broaden and open streets, but also the substitution of ugly and unhygienic buildings for the purposes of beautification and sanitation. For this reason, Valverde continued, recently passed legislation authorized the mayor to sell expropriated land not used. To achieve those desired objectives, the transfer of property came with obligations regarding the new

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[67] I used the newspaper publication of the Ribeiro case attached to the records of a 1906 case (Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Augusto Barthel, 1906, n. 73, caixa 619). The association between Argentinian and U.S. case law is not a coincidence. In other areas of jurisprudence, representations of U.S. legal thought and practice passed by Buenos Aires before reaching Brazil. In 1915, writing about judicial organization, powers, and review, Brazilian jurist and Supreme Court Justice Pedro Lessa recognized this influence, stating that he often drew on Argentinian jurisprudence, "a nation that preceded us in organizing the main lines of Hamilton's, Madison's, and Jay's work" (Pedro Lessa, *Do Poder Judiciário* (Rio de Janeiro: Livraria Francisco Alves, 1915), Preface). Political scientist Lynch recently called attention to this intellectual route, tracing the circulation of doctrines about state of siege. Christian Edward Cyril Lynch, "O Caminho para Washington Passa por Buenos Aires: a Recepção do Conceito Argentino do Estado de Sítio e seu Papel na Construção da República Brasileira (1890-1898)," *Revista Brasileira de Ciências Sociais* 27, n.78 (2012).

buildings' structure, hygiene, and aesthetics.[68] But Valverde's attempt was unsuccessful. A few weeks later, the Court of Appeals confirmed its original take on the issue, deciding against zone expropriations based on the Gomes Freire decree.[69]

From the property owners' perspective, the practice of expropriating more land than necessary, and later auctioning the excess, was not only illegal, but also corrupt. In March 1905, Cândida Teixeira's lawyer called the selling of unused land an act of speculation.[70] That same month, the Candelária religious brotherhood's lawyer accused the mayor of having made shady deals with people interested in acquiring the order's property on Visconde de Inhaúma street. In response, the city attorney argued that such deals were impossible given the publicity of auctions.[71] For Teixeira's lawyer, however, the city's auctions were nothing but a circus spectacle staged to legitimate state speculation with private property. The mayor used them to finance his reforms, while transferring property to fractions of the proprietary elite that had good relationships with government and were committed to the city's beautification.[72] Later that year, in the Maria Feydit Ribeiro decision, the Court of Appeals noted that when public utility

[68] José de Miranda Valverde, *Saneamento e o Embellezamento da Cidade e as Desapropriações* (Rio de Janeiro: Typhografia da Gazeta de Notícias, 1906). Lei n. 1101, de 19 de novembro de 1903, art. 3, d.

[69] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Augusto Barthel, 1906, n. 73, caixa 619.

[70] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Cândida Campos Teixeira, 1905, n. 38, caixa 618.

[71] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Irmandade da Candelária, 1905, n. 805, maço 272, gal. C.

[72] Benchimol refers to the auctions as part of an "operation of valorization executed by the State," thus confirming the property owners' claims. Benchimol, *Pereira Passos*, 244.

coincided with the transfer of property from one person to another, public authorities could get involved in "complicated and arbitrary negotiations."[73]

A 1906 zone expropriation case involving the Visconde de Moraes reveals the ambiguous role of law and courts in mediating conflicts between property owners and the city. José Julio Pereira de Moares, the Visconde de Moraes, was one of the city's most powerful landowners. His fortune was based on, among other investments, banking and public contracts. He was president of the Cia Cantareira de Viação Fluminense, a company responsible for the boats that connected Rio to the city of Niterói, capital of Rio de Janeiro state, located across the Guanabara bay, where Moraes also owned plots of land. In 1891, the republican government had granted Moraes' bank, the Banco de Crédito Rural e Internacional, a concession to build housing for Rio's working class. Thus, similarly to businessmen such as Vieira Souto, Moraes had financial interests in the urban reform and the demolition of the city's tenements. In 1903, when Passos was looking for resources to finance the reform, Moraes loaned 200 *contos de réis* to the municipality, enough to expropriate at least a couple of buildings in the expensive downtown area.[74]

However, despite Moraes' good relations with government, in June 1906, the city attorney initiated a judicial expropriation procedure to seize part of his building located at Lavradio street 186. This tenement, which was divided in seventy small units, rented to low-income workers, partially occupied the zone where Gomes Freire street was to be constructed (Images 3.2 and 3.3). For Moares, partial expropriation would undermine the building's usage as a collective habitation, and therefore reduce its market value. Completely disregarding his

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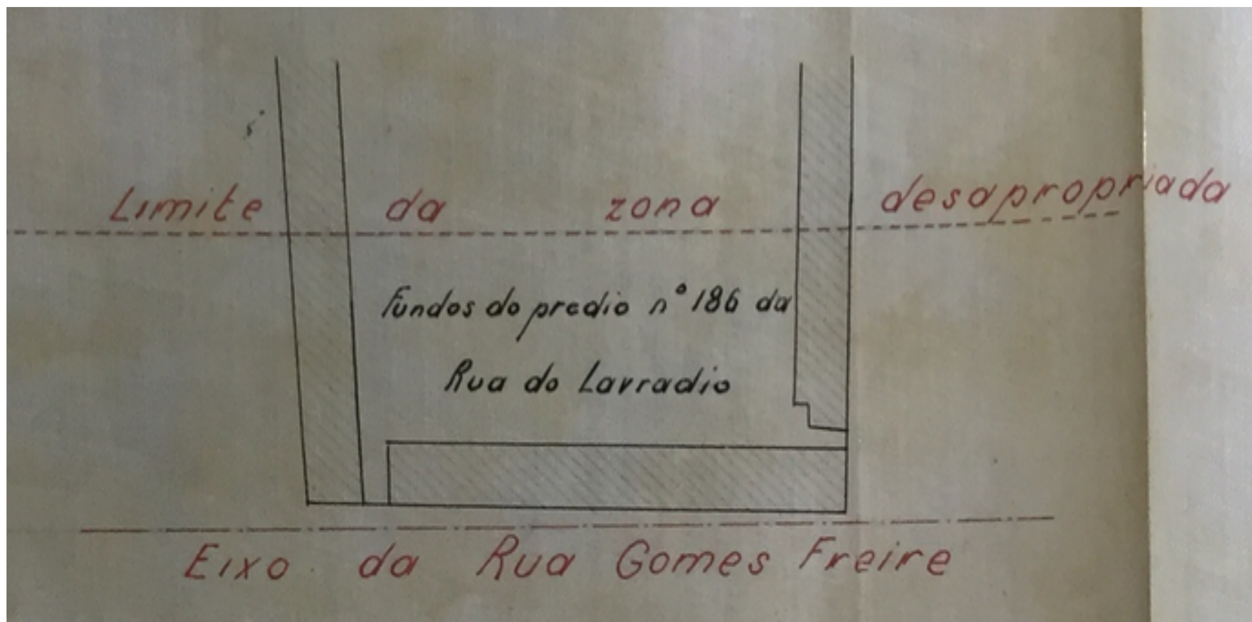
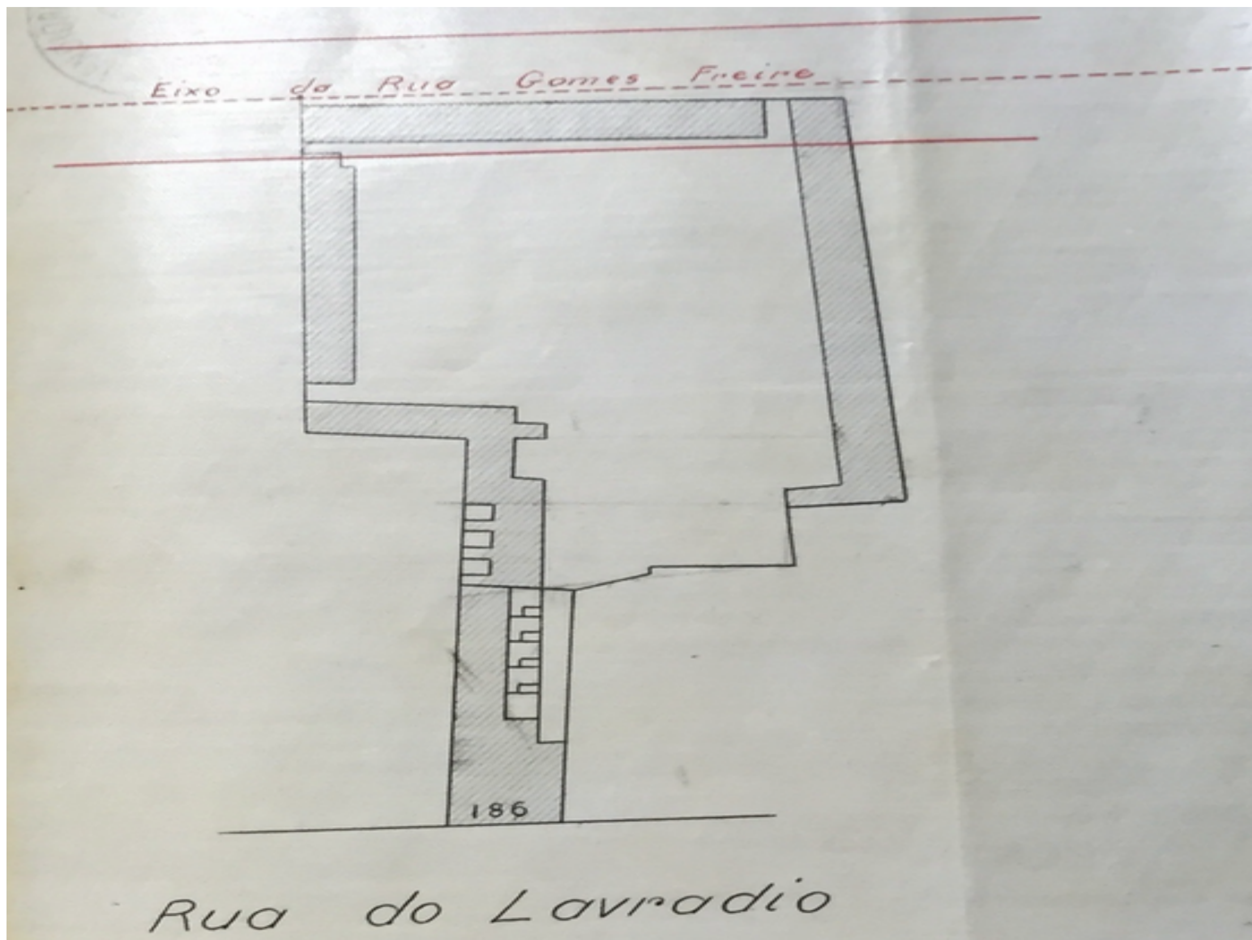
[73] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Augusto Barthel, 1906, n. 73, caixa 619.

[74] *Correio da Manhã*, September 9, 1903.

tenants' tragic fate, he asked the city to expropriate, and thus compensate him for, the whole building. To support this request, his lawyer, Theodoro da Silva, evoked the Court of Appeals' precedents that rejected zone expropriations. According to those decisions, it was the owner's prerogative to ask for total expropriation when partial seizure substantially reduced the property's economic value.





(Images 3.2 and 3.3 – The two plans produced in the Visconde de Moraes' case, showing how the zone for the opening of Gomes Freire street – in red – affected Moraes' property on Lavradio street 186)

Throughout the case, though Moraes insisted that the municipality was disrespecting his constitutional right to property, he constantly reinforced his friendly relationship with the mayor. In May, Passos had personally written to Moares proposing a deal for part of Lavradio street 186 and other buildings. However, as he frequently did, the city attorney initiated the judicial procedure despite the pre-existing offer. Nonetheless, for Moraes, maintaining good terms was more important than denouncing the mayor's arbitrariness. Lawyer Silva opened his first petition to the Municipal Treasury Court with the following statement:

> The plaintiffs start by stating that in no way they oppose the material improvement that our dignified Mayor wants to bring to this Capital (...) it is public and notorious that the plaintiff Visconde de Moraes hasn't spared efforts to support the improvement and beautification plans executed by the municipality, having directly served it, and that he, in difficult occasion, promptly rebuilt recently broadened streets, thus proving to be the great proprietor he is[75]

Despite Moraes' request for total expropriation and praises to the reform plan, judge Carijó maintained the partial expropriation, and arbitrators were appointed. The municipal arbitrator evaluated sixteen of the seventy units that composed the tenement in 34 *contos de réis*. Moraes' arbitrator raised the value to 67 *contos de réis*, but the court's appointee agreed with the city's evaluation. Following court procedures, judge Carijó confirmed that much lower value, which was, nonetheless, 13% above the municipality's original offer. In a final move to simultaneously denounce what he portrayed as a violation of property rights and preserve his client's good relations with the mayor, Moraes' lawyer closed his argumentation before the court stating that

> … in no way had been observed the criterion, basis, and other conditions that the statute and respective regulation had created as guarantees to the right to property – nonetheless, as a sign of the respect that your honor's decision, which confirms the arbitration, deserves, and as proof that he does not want, nor has ever intended to create even a minor obstacle to the enhancement plan carried on by Mr. Dr. Municipal Mayor, the defendant hereby waves his right to appeal…[76]

Moraes was one of the small number of property owners who managed to keep and expand their dominium over the city's soil. In 1906, his lawyer invoked precedents that had ruled

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[75] Aquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Visconde de Moraes, 1908, n. 75, caixa 620.

[76] Aquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Visconde de Moraes, 1908, n. 75, caixa 620.

zone expropriations to be illegal, based on a restrictive conception of public utility. Yet, Moares was among the beneficiaries of the municipality's practice of expropriating and selling excess land. In July and October 1905, he had bought plots of land in municipal auctions. Probably using his good relationship with the city's government, he acquired land on Uruguayana and Carioca streets, at the city's valuable commercial hub, which had been expropriated, but not used for urban enhancement.[77] While the constitutional basis for expropriations was public utility and necessity, which Passos portrayed as the "interests of the general well-being of the capital's entire population," only a small group directly benefited from the reforms.[78] As owners' lawyers suspected, the winners of those auctions were close to Passos' government. Despite momentary setbacks, Moraes' extensive ownership in the city was preserved due to his financial strength and the political capital it could buy (Image 3.4).

(Image 3.4 – José Julio Pereira de Moraes, the Visconde de Moraes, was such a powerful and influential property owner in early-twentieth-century Rio that he left marks on the city's architecture. This carved ornament with the initials V. M. (Visconde de Moraes) was made in 1906 and put on top of the Cine Ideal's entrance, a movie theater

[77] "Prefeitura," *Correio da Manhã*, July 28, 1905; "Prefeitura," *Correio da Manhã*, October 8, 1905.

[78] Mensagem do Prefeito ao Conselho Municipal, 3 de abril de 1906, 28.

inaugurated in 1909. Source: Luiz Eugenio Teixeira Leite & Nelson Porto Ribeiro, *O Rio que o Rio não vê: Os símbolos e seus significados na arquitetura civil do centro da cidade do Rio de Janeiro* (São Paulo: Aori Produções Culturais, 2012))

In the conflict between public utility and property, the Court of Appeals chose to restrict the former and preserve the latter. According to the court's reasoning, later repeated by owners' lawyers, "all beautifications that cities need cannot restrict private property more than what is indispensable."[79] Beginning with the Ribeiro case, the prohibition on zone expropriations was a victory for Rio's owners in their contest against reformers. Conceptually, this victory was based on the translation of Argentinian and United States narrow interpretations of public utility. In practice, it was achieved through the owners' insistence in forcing judicial expropriations. But, as the Visconde de Moraes case shows, the conflict between property and planning was not a zero-sum game. While Moraes lost his property on Lavradio street for a compensation much lower than what he wanted, he profited from the reform with public contracts and auctions. Like Moraes, all property owners were, at some point, threatened by the reforms. But part of them, especially those with less financial resources, faced a double threat. Judicial procedures opened space for dormant credit claims, which generated private conflicts between owners and creditors. When such conflicts emerged, even compensations were at risk.

4. Public projects, private conflicts

At the Municipal Treasury Court, after the judge confirmed the arbitrators' decision, he ordered the publication of a call for "uncertain creditors." Circulating in a major newspaper, this call gave alleged creditors thirty days to show up before the expropriated owner could collect the

[79] Cited in Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Condessa de Santa Marinha, 1908, n. 80, caixa 620.

compensation. When they did, the treasury court became an arena of disputes between private parties. Originally intended to mediate the state's interest in expropriating owners, the court then had to rule on who had the right to be compensated. The disputes that emerged reveal that part of Rio's proprietary elite heavily depended on credit to maintain their economic power. Through the call for creditors, state intervention opened space for the transfer of wealth from debtors to creditors, further restricting this indebted elite's ability to participate in the city's real estate market.

Traditional landowning elites, such as religious orders and coffee planters, were affected by this process. Because Passos partially valued Rio's cultural history, and because the republican government accommodated the Catholic Church's claims over property, churches were not targeted.[80] Yet, many of the religious orders' properties, which covered a considerable part of the city's terrain, were marked for expropriation and demolition. While rich and influential orders, such as the Mosteiro de São Bento, negotiated to maintain ownership over parcels of urban land, poorer ones lost both property and compensations due to existing debts. In 1905, the Irmandade do Rosário e São Benedito, founded as Rio's first slave brotherhood and less powerful than the city's elite orders, was supposed to receive 213 *contos de réis* for the expropriation of three buildings on Moreira Cesar street. After inspections, the three arbitrators had agreed upon this amount. Yet, the court's call opened space for four different claims brought by alleged creditors. After the compensation was deposited in the municipal safe, it became judge Carijó's responsibility to determine who had the right to withdrawal it.

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[80] On Passos' concern with preserving the city's cultural tradition, see André Nunes de Azevedo, "A Reforma Urbana do prefeito Pereira Passos e o Ideal de uma Civilização nos Trópicos," *Intellèctus* 14, n. 2 (2015): 72-87. During the central Avenue's Construction, Paulo de Frontin changed the avenue's original axis to preserve the Conceição e Boa Morte Church, a religious brotherhood that also had some of its buildings expropriated. Rocha, *A Era das Demolições*, 63.

Pedro Moacyr and Manoel do Carmo had pending cases against the Irmandade at the district's civil court. But the order's lawyer argued that their claims over the indemnification lacked legal basis. They did not produce documents that proved their credit, and were in fact using the civil court in bad faith, as a maneuver to grab part of the order's compensation. The lawyer's claim was confirmed when the Court of Appeals dismissed Moacyr's and Carmo's cases. Nonetheless, two other alleged creditors, Arthur Watson and Joaquim Pinto, had petitioned to the Municipal Treasury Court. Watson, an English trader who imported hats and shoes from his home country to fulfill Rio's elite's desires for European fashion, held a 60 *contos* mortgage over one of the order's properties. Pinto claimed 22 *contos* of credit over a contract that involved the three buildings. The Irmandade did not oppose their claims. It rather negotiated to pay its debts, which amounted to 38% of the compensation value.[81]

The same applied to rural landowners who had thrived during the mid-nineteenth century coffee boom. Slave-based plantations in the Vale do Paraíba region, which extended from the Northern areas of São Paulo state to the Southern areas of Rio de Janeiro state, had sustained this landholding elite for decades. But the structural changes demanded by the late-nineteenth century transition from slavery to free labor had generated an economic crisis. As a strategy of diversification in investments, planters used accumulated agricultural capital to buy, sell, and rent property in the city. The urban reform had an ambiguous impact on their economic power. On the one hand, the reform was part of Alves' political alliance with rural oligarchs. City sanitation and beautification, coupled with the port's modernization, aimed at stimulating Brazil's exports, thus salvaging this elite's fortune from the recent crisis. On the other hand, the

[81] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Irmandade do Rosário e São Benedito, 1905, n. 266, caixa 617, gal. A.

reform required expropriations and demolitions that affected their urban patrimony. Although some of them made deals with the state to reduce losses, others suffered considerable economic defeats, especially when their patrimonial power depended on credit and mortgages.

One of the losers was the Baronesa do Rio Negro, the Barão do Rio Negro's widow, both heirs of coffee plantations. In 1906, she lost part of her land located on Lavradio street 60 to the Gomes Freire zone expropriation project. As usual, judicial procedures opened space for credit claims. In this case, the arbitrators themselves attributed two thirds of the compensation to a tenant, Joaquim Mendes, for mortgages and improvements he had made in the building. Expropriation left the Baronesa and her children with only one third of the property's value.[82] Mortgaging property to tenants, as the Barão and Baronesa do Rio Negro did, seems to have been a common financing strategy for Rio's proprietors. Like Watson, Mendes invested in the luxury business, selling carriages and wine to Rio's cosmopolitan elite.[83] They were part of a newer commercial elite who guaranteed property as a form of investment, and used the Municipal Treasury Court's procedures to collect their credits.

Improvements made by a tenant also caused conflict in the expropriation of building number 141 at Ouvidor street, Rio's famous elite cultural and nightlife hub. The property, nearby Watson's clothing shop, was owned by the Lisbon-based Bregaro family, an influential lineage of landholders who owned several other buildings across the city. The Bregaros' current tenant was the successful Italian entrepreneur Paschoal Segreto, who also profited from the city's *belle époque* taste. Segreto was known for the nickname "minister of entertainments" because of his

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[82] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Barão do Rio Negro, 1905, n. 77, caixa 620, gal. A.

[83] I found Watson's and Mendes' businesses listed in the Almanak Laemmert, a publication that compiled the city's commercial houses and services.

investments in theaters, cafes, cinemas, and the dubiously legal lottery *jogo do bicho*.[84] Despite the municipality's claim that the property was in ruins, Ouvidor street 141 seems to have been both Segreto's office and one of his cinemas. When the city attorney initiated the judicial expropriation, the Bregaros had to hire local representatives to fight both for a higher indemnification and against Segreto's claim. The tenant argued that he deserved part of the sum due to his high investments in the building's improvement. Although both the city attorney and the Bregaros' lawyer understood that Segreto had no right to compensation, the arbitration committee granted him 10% of what the city was bound to pay.[85]

Creditors did not always win before the municipal treasury judge. At Uruguayana street 25, João Quintana ran one of his two bakeries, the Padaria Popular. When, in April 1905, the city initiated a judicial expropriation against the building's owner, Antonio Maran, his tenant Quintana responded the call for creditors. Because the building was in good conditions and located in one of the city's most important commercial areas, the arbitrators determined that the city should pay 55 *contos de réis* to compensate Maran. But Quintana claimed the right to be compensated because he was also Maran's mortgagee, and the building's expropriation would cause him to lose both his business and 36 *contos de réis*.

Yet, Maran was unwilling to give up on 65% of the building's attributed value. He argued that the expropriation was a case of "*força maior*" (*force majeure*), something unpredictable that, therefore, could not generate debt between the contractual parties.[86] In

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[84] William de Souza Nunes Martins, *Paschoal Segreto: "Ministro das Diversões" do Rio de Janeiro (1883- 1920)* (MA thesis – Universidade Federal do Rio de Janeiro – 2004).

[85] Aquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Fernanda Maria Pilar Bregaro, 1905, n. 33, caixa 618, gal. A.

[86] *Force majeure* clauses relieve the parties from contractual obligations when situations out of their control emerge.

response, evoking the mortgage he held against his landlord, Quintana claimed to be a quasi-proprietor, and argued that the "*força maior*" exception only applied when the owner had exhausted all available judicial remedies and appeals against expropriation. In the case, however, Maran's ambition had led him to accept the lower court's decision, hoping to "transform the building into money." In January 1906, the municipal treasury judge allowed Maran to withdraw the full amount, leaving Quintana without his bakery and without compensation. After the tenant complained, suggesting that the court's erratic decision making left the law to chance, judge Carijó justified his ruling by stating that conflicts between private parties could not stall expropriations indefinitely. At least momentarily, given that Quintana could still sue in civil court, the property owner had won over his creditor.[87]

Most alleged creditors who manifested themselves in judicial expropriations were individuals.[88] Watson, Mendes, Segreto, and Quintana were businessmen, with diverse investments and enough resources to guarantee properties for interest. In one case, however, the creditor was part of a larger international financial network. In December 1904, to broaden Assembleia street, the mayor ordered the expropriation of three of José Marcelino de Moraes' buildings. Moares was a powerful landowner, with multiple properties across the city. However,

[87] Aquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Antonio Francisco dos Santos Maran, 1905, n. 242, caixa 617. The decision, nonetheless, opened space for Quintana to ask for his part in a civil suit against Maran.

[88] According to Triner, Brazilian banks found difficulty in guaranteeing property because of, besides institutional factors, the fluctuation of commodities' prices. Yet the circumstances favored the mortgaging of urban property because it was easier to value, and because possession was more certain when compared to rural property. Therefore, I still do not have an explanation for why most creditors where individuals. One hypothesis is that mortgages were a usual part of renting contracts. Gail D. Triner, *Banking and Economic Development: Brazil, 1889-1930* (New York: Palgrave, 2000), 276-277, note 45.

his power as a real estate investor and landlord was sustained by a large loan that had placed mortgages on several of his properties, including the three Assembleia street buildings.[89]

Moares had taken a loan of £5,500 with the Banque Belge des Prêts et Fonciers, an Antwerp-based financial institution recently created with capital from various European public and private banks, and which held a foreign office in Rio to operate mortgages in major Brazilian states.[90] When the mayor decided to expropriate Moraes, the bank claimed its credit. Five months later, with the municipal treasury judge's sanction, the Banque Belge received the full compensation value for the three buildings. Moraes' double loss was significant. Judicial expropriation left him without the properties, the profits, and compensation.[91] Like the Irmandade do Rosário and the Baronesa do Rio Negro, he lost power to own, invest in, and profit from the city.

Private conflicts at the Municipal Treasury Court reveal how state intervention contributed to the transfer of wealth to fractions of Brazilian and international elites. But while the auctions of unused expropriated land raised suspicion about the state's relations with those who benefited from them, the treasury court's call for creditors was accepted as a mechanism to avoid future litigation against the municipality. In general, property owners' grievances were against those who presented themselves as creditors in bad faith, not against the court's practice itself. Only in the Maran versus Quintana case was an argument about the illegitimacy of

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[89] Two months earlier another of his properties had been expropriated on Uruguayana street (Aquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, José Marcelino Pereira de Moraes, 1904, n. 383, caixa 617, gal. A).

[90] International Union of American Republics, *Monthly Bulletin of the Bureau of the American Republics, January 1900* (Washington, D.C.: Government Printing Office, 1900), 574.

[91] Aquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, José Marcelino Pereira de Moraes, 1904, n. 375, caixa 617, gal. A.

compensating creditors made. Coupled with speculation, auctions, and new building requirements, the compensation of creditors, mediated by the judiciary, helped create an increasingly restricted real estate market. An emerging class of businessmen, investors, and financial institutions were fast replacing traditional landholding elites in this market.

5. The Largo da Carioca

The Largo da Carioca is an early seventeenth-century square, originally occupied by the Ordem Terceira de São Francisco da Penitência, a Franciscan religious order that built its church and convent there. Throughout the colonial, imperial, and early republican years, the square's fountain, which pumped water from the Carioca river, had supplied the city. In the early twentieth-century, the Largo was an intersection for Rio's most important commercial streets, such as Uruguayana, Assembleia, Carioca, and the new Central Avenue, and a mandatory stop for the city's streetcars. It was a place of intense circulation of people, who worked and shopped in the area, and commuted to other parts of Rio. Broadening the square and the streets surrounding it was, therefore, paramount to Passos' urban integration plan. Furthermore, hygiene agents considered the properties around the Largo to be unsanitary, making them targets of the sanitation campaign.

During the Passos administration, the square was affected by multiple municipal plans, as well as by the construction of the Central Avenue. Threatened with expropriations and demolitions, the proprietors of the Largo da Carioca resisted. In mid-1904 and early-1906, their judicial disputes against the city gained widespread press coverage. In 1904, three controversial Supreme Court cases changed the judiciary's approach to the statutory prohibition on possessory injunctions against the mayor's acts. In 1906, the judicial expropriation of the Franciscan order's

hospital raised questions about the reforms' benefits to the city and the Municipal Treasury Court's independence. The Largo da Carioca stories reveal how judicial practice, the courts' institutional dynamics, and public opinion shaped the conflict between property rights and urban planning in Rio.

In May 1904, the mayor approved a project to enhance the Largo, opening space for pedestrian and vehicle circulation. Not surprisingly, the plan required the expropriation and demolition of several of those allegedly unsanitary buildings.[92] A month and a half later, the first property owners, Arthur de Alencar Araripe, an engineer and employee of the Central do Brasil railroad, and Balthazar Alves da Costa, partner in a sugar refinery, deposit, and bakery located at the Largo, went to court. Despite the bar that the *ratione imperii* doctrine placed on possessory injunctions against executive decisions, some property owners insisted on this litigation strategy. While the courts were partially receptive to the possessory injunctions requested by meat and milk traders against the municipality's attempts to restrict their businesses, real estate proprietors did not have the same luck.[93] After the municipal judge refused to hear their case, Araripe and Costa sought the remedy in federal court.

Araripe, Costa, and their lawyer, Carlos Augusto de Carvalho, a renowned politician and jurist, must have felt optimistic when their case was assigned to federal judge Godofredo Cunha. Four years earlier, Cunha had defended a liberal position towards state interventionism at the American Juridical Congress, held in Rio. In his lecture, he had argued that the judiciary could

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[92] Giovanna Rosso del Brenna & Solar Grandjean de Montigny, *O Rio de Janeiro de Pereira Passos* (Rio de Janeiro: Index, 1985), 185.

[93] The milk and meat traders' cases had different results. On the one hand, the first instance judge denied the injunction asked by the milk traders, but the Court of Appeals and the Supreme Court reversed the verdict. On the other hand, while the meat traders won in the first instance, the Supreme Court understood that there was no violation of property rights in their case. "Carnes Verdes," *Jornal do Brasil*, August 28, 1904; "Contencioso," *O Paiz*, September 4, 1904.

indeed control acts exercised under *ratione imperii* when they violated individual rights, such as the right to property. However, at the beginning of July, Cunha refused to hear the case, claiming lack of jurisdiction over municipal acts.[94]

Araripe, Costa, and Carvalho then appealed to the Supreme Court. On July 6, 1904, property owners from all over the capital flocked to the court's building, at the corner of Rosário and Primeiro de Março streets, to watch the trial alongside their lawyers.[95] In a newspaper note, the Union of Proprietors Society declared to be "peacefully" waiting for a decision. The Society's members also suggested that, if the court decided in favor of the owners, President Alves would be convinced that despite Passos' recognized technical skills, the mayor's "dictatorial desires" were not compatible with government.[96] Before the court, Carvalho drew on the liberal constitutional discourse to argue that the city's "special" regime undermined "the dignity of the Republic."[97] Applying a common strategy in the property owners' resistance against expropriations, Carvalho asked newspapers to publish his arguments on July 5 and 6.[98] In the lawyer's introductory note, published in A Notícia, he claimed to be giving publicity to efforts to prevent the courts from becoming complicit with the mayor's "forceful acts."[99]

The case involved both procedural and substantive questions. Supreme Court justices had been asked to decide whether the federal judge should hear the case, and whether he should grant

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[94] "Manutenção de Posse. Demolições," *Jornal do Brasil*, July 3, 1904.

[95] "Tribunais. Manutenção de Posse," *Gazeta de Notícias*, July 10, 1904.

[96] "Sociedade União dos Proprietários. Demolições," *Jornal do Brasil*, July 6, 1904.

[97] Although I could not find the court records, Carvalho's arguments appeared in newspapers, and in the law review *O Direito* 95 (1904), 216.

[98] Carlos de Carvalho, "Secção Livre," *Correio da Manhã*, July 5, 1904.

[99] Carlos de Carvalho, "A Pedidos," *A Notícia*, July 6, 1904.

the injunction.[100] If they ruled against Araripe and Costa, the case would be sent to Moura Carijó's Municipal Treasury Court, where eminent domain procedures took place. Therefore, as justice Oliveira Ribeiro argued, time was justice's enemy. If the case were sent to the municipal judge, it could not reach the Supreme Court again without an appeal to Rio's Court of Appeals first. Knowing how much the Largo da Carioca meant for Passos, and aware of how little patience the mayor had towards judicial procedures, Ribeiro acknowledged that the buildings would be demolished before a final decision could be made.[101] The time of progress, materialized in Rio's aggressive modernization plan, was much faster than the time of justice. A careful deliberation and rationalization of decisions was not compatible with the political and economic interests in radically and quickly transforming the capital-city.

Despite Ribeiro's warning, the justices reached a five to five tie. Voting against the owners' appeal, justice Lucio de Mendonça cited the court's recent decision in the Positivist Apostolate's temple case, when a similar possessory injunction had been denied.[102] Following protocol, the court's president, Aquino de Castro, untied the vote, denying the appeal, and thus sending the case down to the municipal court. Newspapers reported that Carlos de Carvalho loudly protested this verdict, causing "great scandal" inside the courtroom (Images 3.5 and 3.6).[103] Nonetheless, the Largo da Carioca story was not over yet. In less than two weeks, the

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[100] Article 60, section (a) of the 1891 Constitution established that the federal courts had jurisdiction over cases based on the constitution. In 1915, Pedro Lessa interpreted this article as saying that federal courts should hear claims "directly or immediately and exclusively" based on constitutional text. Lessa, *Do Poder Judiciário*, 130-131. The problem in 1904 was that Law 939, from 1902, prohibited possessory injunctions against the mayor's acts exercised *ratione imperii*.

[101] "Supremo Tribunal Federal," *Jornal do Brasil*, July 10, 1904.

[102] "Tribunais. Manutenção de Posse," *Gazeta de Notícias*, July 10, 1904.

[103] "Supremo Tribunal Federal," *Jornal do Brasil*, July 10, 1904.

Supreme Court would rule on two other similar cases of possessory injunctions against expropriations in the square's area. What happened next reveals how owners' insistence, public opinion, and the court's institutional dynamics changed the judiciary's role in the urban reforms.

A 1902 decree mandated that the Supreme Court's final rulings had to be decided by at least ten justices.[104] Therefore, when numbers were down, for reasons of absences and recusals, federal judges were called in as substitutes. In 1904, there were two of these judges in Rio de Janeiro: Pires e Albuquerque and Godofredo Cunha. In the Araripe and Costa trial, because Cunha had heard the case at the federal court level, Albuquerque had been called, and voted against the possessory injunction. In the second Largo da Carioca case to reach the Supreme Court, the situation was reversed. Because Albuquerque had heard the case before the appeal, Cunha was called to the bench.

When Cunha had ruled in the Araripe and Costa case as a federal judge, he contradicted his own liberal view, denying possessory injunctions to protect the plaintiffs' property rights. Surprisingly, however, siting as a substitute Supreme Court justice, Cunha decided to speak up, and voted in favor of the property owners. He explained his change of heart to a newspaper. As a federal judge, he had felt obliged to follow recent Supreme Court precedents on state intervention. But as a Supreme Court justice he could decide according to his conscience, and thus apply the understanding that upheld judicial remedies against the mayor's acts whenever there was a violation of individual rights.[105]

In a matter of days, the five to five tie, which had been untied against Araripe and Costa, turned into a six to four verdict in favor of the second property owner. The same happened in the

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[104] Decreto n. 938, de 29 de dezembro de 1902. The Supreme Court was composed of 15 justices, and it is unclear why 6 of them were absent in those trials.

[105] "Desapropriações," *Jornal do Brasil*, July 13, 1904.

third case, when justice Belfort Vieira, returning to his bench, voted for the appeal. According to these new decisions, federal judges should hear the cases and grant the injunctions to halt Passos' expropriations. The second and third plaintiffs were apparently luckier than their peers. More importantly, the Supreme Court had signaled to all Rio's property owners that the judiciary could stop the mayor's demolishing pickaxes. A Notícia reported that the most recent verdicts broke with "tradition" and "continuity" in the court's decision making, thus creating "doubt and uncertainty." The newspaper argued that the possessory injunctions were "a weapon with which judges and courts [were] rendering municipal administration impossible."[106] For the first time, this "weapon" had succeeded in the Supreme Court, opening a gate to other injunction claims, which could undermine Alves' and Passos' modernization plan.[107]

However, the plaintiffs' celebration lasted less than 24 hours. The day after the third case was decided, justice Macedo Soares returned to the Supreme Court to rectify his vote. According to Soares, there had been a confusion in the vote's registration. What should have been a vote against the proprietor's claim had been registered as a vote in his favor. Soares' rectification turned the verdict into a six to four against the property owners. A "pure mistake," and a "painful

[106] "Jurisprudencia Oscillante," *A Notícia*, July 14, 1904.

[107] I was unable to find other cases due to the impossibility of accessing the Federal Justice Archives. During my research in Rio, the archives' location moved twice, following contradictory decisions made by different presidents of the federal judiciary. Even when the documents were stored in one of these places, I could not access them because they were being organized. Nonetheless, I did have access to a list of cases available, with some indicators regarding their subject matter, parties, and legislative basis. A relevant group of 12 cases referred to expropriations related to the port's modernization project. Two conclusions can be drawn from their existence. First, that while the federal commission for the construction of the Central Avenue was able to make deals that avoided litigation, the federal commission in charge of the port faced some degree of judicial resistance. Second, these cases are different from the Largo da Carioca cases because the federal courts allegedly had jurisdiction over the federal government's acts. I relied on the widespread press coverage of the Largo da Carioca case, which also indicate that other similar cases were being adjudicated.

disappointment," reported the Jornal do Brasil.[108] A "judicial mess," a July 24 article declared, had been installed.[109] The newspaper went even further to suggest that "powerful interests" and "irresistible conveniences" had prompted that last minute change.[110] A few days earlier, Mayor Passos had had a long meeting with President Alves to discuss the obstacles that a negative judicial precedent could create to their reform plan.[111] Had they pressured Soares to change his vote? Although an answer is unavailable for now, the political and economic stakes of a judicial setback, coupled with accusations that Passos used illegal maneuvers to advance the plan, suggest that Soares' move may have been motivated by more than a clerical mistake.

Yet another turnaround developed in the Largo da Carioca's judicial drama. The property owners had one last chance to reverse the Supreme Court's updated decision. Their lawyers filed an "*embargos de declaração*," a procedural instrument aimed at questioning Soares' vote change to clarify the court's decision. Three months after a judicial mess had shaken the Supreme Court's image, the justices decided not to accept their colleague's rectification. Thus, the previous decision was maintained, sustaining the federal judge's obligation to hear and grant the possessory injunctions. "Justice's decorum" had been saved, argued the Jornal do Brasil.[112] This time, the Largo da Carioca's property owners' mobilization of lawyers and public opinion defeated Passos' and Alves' plan for the city.

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[108] "Chronica do Foro," *Jornal do Brasil*, August 25, 1904.

[109] "Demolições. Trapalhada Judicial," *Jornal do Brasil*, July 24, 1904.

[110] "Chronica do Foro," *Jornal do Brasil*, August 25, 1904.

[111] "Noticiário," *Jornal do Brasil*, July 21, 1904.

[112] "Desapropriações," *Jornal do Brasil*, October, 16, 1904.

(Images 3.5 and 3.6 – Lawyer Carlos Augusto de Carvalho and the Supreme Court building where he defended the Largo da Carioca proprietors, in 1904 – Almanaque Brasileiro do Garnier, n. 8, 1907 and Banco de Imagens, Imprensa, Supremo Tribunal Federal – www.stf.jus.br)

A little more than a year later, in January 1906, the iconic square's judicial battles would gain renewed press attention. Now, Passos' target was the massive hospital that had occupied the Largo since the late eighteenth century. Run by the Ordem Terceira de São Francisco da Penitência, one of Rio's most prosperous religious orders, the hospital had been paramount to the city's health. Throughout its existence, it shared the responsibility of attending to the ill with other similar religious institutions. Between 1900 and 1904, the Ordem's hospital had taken care of more than eighty thousand people, in consultations and admissions.[113] However, according to the mayor, demolishing the hospital served a dual purpose. It both opened space for the intense traffic of people that congested the city's most central area and followed hygiene recommendations. The concentration of infected patients right in the middle of Rio's crowded downtown was a hazard, raising the risk of the spread of diseases.[114] Moreover, the hospital's simple architecture did not fit the city's elite's taste for eclectic styles.[115]

[113] "A Veneravel Ordem da Penitencia. O Hospital – Historico," *Gazeta de Notícias*, February 10, 1906.

[114] Mensagem do Prefeito ao Conselho Municipal, 3 de abril de 1906, 27-28.

[115] Sonia Gomes Pereira, "O Hospital da Ordem Terceira de São Francisco da Penitência e a Estruturação Urbana do Rio de Janeiro nos Séculos XVIII e XIX," *Cepese Publicações* (available at www.cepesepublicacoes.pt - access on February 28, 2018).

In January 1906, the city attorney initiated a judicial expropriation at the Municipal Treasury Court. The mayor intended to expropriate only part of the building, and the Ordem had considered his initial offer of 60 *contos* too low (Image 3.5). On February 7, a controversial judicial evaluation of the property took place. At around eleven o'clock at night, after more than five hours spent inspecting the hospital, the religious order's arbitrator suggested more than 1,000 *contos* of indemnification. Yet, the third arbitrator, appointed by the court, settled the value in only 320 *contos*, which was confirmed by judge Carijó on the next day. In the press debates about the case, the Ordem's property rights were only part of the question. Critics of that low compensation amount also highlighted he hospital's social value and the Municipal Treasury Court's apparent lack of independence.

An article published in the Gazeta de Notícias on February 7 argued that the land over which the hospital had been built did not actually belong to the Ordem Terceira. It had been temporarily ceded to them as an emergency measure following an epidemic. Therefore, the municipality should not pay compensation before the question of ownership was settled.[116] Nonetheless, most newspapers sided with the religious order's interests. Leaving aside its traditionally pro-government position, O Paiz claimed that the city's offer was excessively low. In an editorial article, which was reproduced by two other newspapers, O Paiz praised Passos' reform plan, but called the hospital's expropriation for such a low price a violation of property rights. For the editors, the Largo da Carioca's renovation was necessary, but if the city did not have the resources to pay a just compensation, it should postpone the project until it could offer what the building was worth.[117] On February 8, after the arbitrators' report was published, the

[116] "Desapropriação do Hospital da Penitencia," *Gazeta de Notícias*, February 7, 1906.

[117] "A Ordem da Penitencia," *O Paiz*, February 7, 1906. The editorial was reproduced the next day in the Jornal do Brasil and A União.

Correio da Manhã, a fierce critic of the sanitary measures, stated that "if the building is an attack on good taste, the evaluation was an attack on someone's property."[118]

Several newspapers reminded the public of the hospital's social value. The Gazeta de Notícias, despite the previous article contesting the Ordem's ownership over the hospital's land, published a history of the Ordem Terceira's services to the city's poor.[119] On February 10, the Jornal do Brasil reported that because of its anticipated financial losses, the order had preemptively suspended the pensions it paid to more than one thousand families in need.[120] A União argued that if the city paid only the low amount the arbitration had established it would advance a "false conception of public interest." For the newspaper's editors, the religious order's services, now at risk, were in the city's true "social interest."[121]

In a harsh critique of the Municipal Treasury Court, an article published in the Jornal do Commercio suggested that the arbitration's result had been known even before the arbitrators had inspected the building's electric installations. It argued that the court's arbitrators were chosen among Passos' former employees, men of the mayor's trust. Therefore, the arbitrators' "independence," one of the guarantees judicial expropriations supposedly granted property owners, was threatened. The engineers' technical work was certainly not neutral. Given this scientific elite's interest in the urban reform, arbitrators were likely to push compensation values down. But, according to the newspaper, choosing men who had recently worked under Passos was unacceptable. The municipal judge, who appointed these men, could not act as a city

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[118] "A Ordem da Penitencia," *Correio da Manhã*, February 8, 1906.

[119] "A Veneravel Ordem da Penitencia. O Hospital – Historico," *Gazeta de Notícias*, February 10, 1906.

[120] "V. O. 3[a] da Penitencia. Avaliação Homologada. Pensões Suspensas," *Jornal do Brasil*, February 10, 1906.

[121] "A Ordem Terceira da Penitencia," *A União*, February 12, 1906.

employee. He was a tenured member of the judicial branch, and thus had the independence necessary to treat the municipality like any other party in litigation.[122]

In his April 1906 message to the municipal council, Passos argued that the Ordem's arbitrator had exaggerated in proposing that the sections of the hospital affected by expropriation were worth more than 1,000 *contos*.[123] A month earlier, the Ordem Terceira had appealed the decision confirming the 320 *contos* figure. At the Court of Appeals, their lawyer accused city officials of disappearing with the court records, in a desperate attempt to undermine judicial procedures. Despite the mistrust this illegal move caused, or precisely because of the municipality's extralegal pressures, the conflict was finally settled in an agreement. Passos offered 180 *contos* more to help with the construction of a new hospital. Although the total amount was still much lower than what the first arbitrator had suggested, the religious order dropped the appeal. On August 20, the newspapers announced the transfer of the Ordem Terceira da Penitência hospital to Conde de Bonfim street, at the northern neighborhood of Tijuca, far from the city's downtown, but connected to it through the streetcar system, where it still exists.[124] On August 26, the demolitions started, giving the Largo da Carioca most of its current landscape (Image 3.6).[125]

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[122] "Varias Noticias," *Jornal do Commercio*, February 9, 1906.

[123] Mensagem do Prefeito ao Conselho Municipal, 3 de abril de 1906, 28-33.

[124] "Veneravel Ordem 3ª de S. Francisco da Penitencia," *Gazeta de Notícias*, August 20, 1906.

[125] Untitled note, cover, column 8, *Gazeta de Notícias*, August 25, 1906.

(Image 3.7 – Plan for the enhancement of the Largo da Carioca, showing the *São Francisco da Penitência* religious order's hospital. Arquivo Nacional, Fundo: Corte de Apelação – 20, Ordem Terceira de São Francisco da Penitência, 1906, n. 1700, maço 316, gal. C)

(Image 3.8 – The demolition of the *São Francisco da Penitência* hospital at the Largo da Carioca. Photograph by Augusto Malta, 1906. Available at http://www.ermakoff.com.br/)

Conclusion

In the contest between property and planning in Rio de Janeiro, proprietors achieved partial and occasional victories. Because of the judicialization of expropriations, city attorneys, lawyers, and judges shared with the engineers the arena of debates regarding the city's future. Proprietors forced the municipality to raise compensation values, struck down excess condemnation in the Court of Appeals, and momentarily interrupted expropriations at the Largo da Carioca. A strategic combination of litigation and press coverage, in addition to contingencies created by the courts' institutional dynamics, help explain those victories. Nonetheless, the reform plan moved forward and the Municipal Treasury Court contributed to the concentration of urban land in the hands of an increasingly small fraction of the Brazilian and international elites.

In the next chapter, I introduce the disputes created by the government's sanitation plan. Pereira Passos's urban enhancement plan intertwined with the sanitary measures imposed by the public health authorities, led by doctor Oswaldo Cruz. According to the scientific knowledge that informed the city's reform, demolishing old buildings to open and broaden streets addressed the lack of air circulation and illumination that facilitated the spread of diseases. Simultaneously, the public health authorities adopted domiciliary disinfections to contain yellow fever and forcibly vaccinated residents against smallpox. Throughout 1904, people of different social backgrounds and political opponents of the Rodrigues Alves administration mobilized the law inside and outside courts against these sanitary measures. In November 1904, a rights consciousness based on the right to the inviolability of the home sparked an unprecedented popular revolt in the city. After the revolt was violently suppressed by government troops, the president revoked forced vaccinations and the Supreme Court ruled domiciliary disinfections unconstitutional. The court's

decision inspired people to mobilize the judiciary against what they perceived as authoritarian measures that violated their individual rights.

Chapter Four

Rights and Barricades

"The resented and ridiculous forced vaccination law, unconstitutionally decreed by the federal Congress, opened space for this capital's residents, aware of the Republican Constitution's violations and conscious of their natural rights, to refute it, and engage in vivid protest."[1] Using these words, on February 13, 1905, lawyer Anselmo Torres da Silva asked Federal Judge Godofredo Cunha to issue a writ of habeas corpus on behalf of more than four hundred men and women who had been deported from Rio de Janeiro to the distant Amazon territory of Acre. Between November 10 and 16 of the previous year, a heterogeneous crowd had stormed the capital's streets to protest the recently passed forced vaccination law. While people of different social backgrounds fought the state's intervention in their homes and bodies, political oppositionists conspired to overthrow President Rodrigues Alves. On the 16th, Alves had declared *estado de sítio* (state of siege) in the city, and revoked forced vaccination. What followed was an intense policing campaign, which used the insurgence as an excuse to purge Rio of "unwanted" and "dangerous" elements with arbitrary arrests and deportations.[2] Common

[1] Arquivo Nacional, Cód. Ref. BV.0.HCO.2535.

[2] Sevcenko portrays the moment as a purge of the city's "human excess." Nicolau Sevcenko, *A Revolta da Vacina: Mentes Insanas e Corpos Rebeldes* (São Paulo: Sapione, 1993), 53.

crimes, such as vagrancy and *caftismo* (exploiting prostitutes), had been treated as political ones, argued Torres da Silva.[3]

Although Silva's petitions were unsuccessful – he tried another one to Federal Judge Pires e Alburquerque in March -, they indicate that, following the tradition inaugurated by the Vintém Revolt in 1880, law was part of mobilization for the 1904 Vaccine Revolt, and of later attempts to guarantee people's rights against state violence.[4] As Brazil's capital, Rio hosted local and federal courts, and the Supreme Court, all of which the city's poor had long used to claim their rights. From nineteenth-century freedom suits brought by slaves against their masters to post-emancipation habeas corpus petitions against police violence, Rio's slaves, former slaves, and poor immigrants had transformed the city's courts into channels of resistance, inclusion, and citizenship.[5] In this chapter, I show how the active pursuit of rights in courts, the political and legal opposition against the reform in congress, newspapers, and legal doctrine, and the Vaccine Revolt mutually fueled one another.

In December 1903, President Rodrigues Alves had appointed Oswaldo Cruz, a doctor who had studied at the Pasteur Institute in Paris and was developing research for an anti-plague vaccine in Rio, to be the Diretor-Geral de Saúde Pública (Public Health Director). Three months later, based on a legislative delegation of powers, Alves decreed the new Regulamento Sanitário (Sanitary Code), which empowered public health agents to invade people's homes in order to disinfect them against the mosquitos that transmitted yellow fever. The enforcement of strict

[3] Arquivo Nacional, Cód. Ref. BV.0.HCO.2535.

[4] I introduce the Vintém Revolt in Chapter One.

[5] Sidney Chalhoub, *Visões da Liberdade: Uma História Das Últimas Décadas da Escravidão na Corte* (São Paulo: Companhia das Letras, 1990); Gladys Sabina Ribeiro, "Cidadania e Lutas por Direitos na Primeira República: Analisando Processos da Justiça Federal e do Supremo Tribunal Federal," *Tempo* 13, n. 26 (2009).

sanitary measures was part of Cruz's ambitious plan to sanitize the city.[6] People summarized the arbitrariness and violence of these measures with the code's popular nickname "Tortures Code." In May 1904, Leopoldo de Figueiredo filed a collective habeas corpus petition on behalf of the city's population against the threats to individual rights created by new code.[7] Although judicial strategies such as his were unsuccessful before January 1905, legal language permeated the streets in political campaigns against forced vaccination, in the press coverage of lawyers' arguments, and likely in daily conversations around the downtown area, where the courts were located.

The mobilization and prominence of courts in the city and the circulation of legal ideas fostered a rights consciousness against perceived state violence. According José Murilo de Carvalho, property owners and professional elites revolted to claim their individual rights, whereas poor workers participated in the Vaccine Revolt to defend the traditional value of the home as the space of patriarchal control over wives and daughters. These two separate values, "inherent" to the elite's modern ideology and to the popular sectors' traditional ideology, were nonetheless compatible. Thus, an "informal pact" about what constituted illegitimate state interference in people's lives emerged.[8] I also emphasize the role of individual rights in the revolt, however showing that poor workers shared the individual rights consciousness that Carvalho attributed to the elites. Among the city's dispossessed, who were unable to evoke property rights, this consciousness was framed by article 72, paragraph 11 of the 1891

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[6] In early-twentieth-century Brazil, the terms "hygiene," "sanitation" and "public health" were used as synonyms.

[7] "Regulamento Saniário. Habeas Corpus," *Jornal do Brasil*, May 17, 1904. I present Figueiredo's petition in the Introduction.

[8] José Murilo de Carvalho, *Os Bestializados: o Rio de Janeiro e a República que Não Foi* (São Paulo: Cia das Letras, 2011), 136-138.

Republican Constitution, which stated that "the home is an individual's inviolable asylum."[9] Mobilization for the revolt appealed to the inviolability of the home as a liberal constitutional argument that protected the private space of patriarchal power. Moreover, patriarchal values were hardly exclusive to the poor. It was in the momentary convergence between different social groups against the reform that traditional values gained a modern constitutional form.

The Vaccine Revolt left its mark on law and judicial practice. In January 1905, while federal troops still persecuted alleged insurgents, the Supreme Court decided that the sanitary disinfection of a wealthy Portuguese immigrant's house violated his right to the inviolability of the home. This decision sparked heated debates in the press, became a precedent cited by lawyers throughout the country, and motivated further litigation against domiciliary disinfections and other sanitary measures. In courts, lawyers and common people alike invoked the constitutional right to the inviolability of the home and showed that although vaccination had been revoked and state repression intensified, the rights consciousness and the willingness to resist persisted in the city.

As it will become clear at the end of this chapter, the sanitation campaign's results prove that Oswaldo Cruz was on the right path towards the eradication of smallpox and yellow fever in the city. However, the public health authorities' reliance on violent and arbitrary measures had triggered fierce opposition on the streets and in the courts. The legal mobilization against these measures shows how the poor, excluded from both formal politics and the field of professional

[9] In the original: "A casa é o asilo inviolável do indivíduo; ninguém pode aí penetrar de noite, sem consentimento do morador, senão para acudir as vítimas de crimes ou desastres, nem de dia, senão nos casos e pela forma prescritos na lei." Constituição da República dos Estados Unidos do Brasil, de 24 de fevereiro de 1891, art. 72, §11.

law, exercised citizenship and contributed to the re-interpretation of legal concepts through their actions.

1. The inviolability of the home

A post-emancipation and deeply patriarchal society such as early twentieth-century Brazil in many ways preserved the colonial view of the home as a space protected from state intervention, the realm of the patriarch's power over his dependents, including wife, children, and domestic laborers. Nonetheless, throughout the eighteenth and nineteenth centuries, the relationship between the state and the home had changed. Mid-eighteenth century efforts to rationalize the colonial state and thus maximize territorial control and the extraction of wealth had expanded the Portuguese Crown's interference with the slave owners' home-based power. The Old Regime's police power tradition – the same legal framework that rationalized the state's intervention on the usage of urban space and sanitation – had increasingly justified the regulation of master-slave relations.[10] After independence in 1822, instead of rejecting the home as a representation of antiquated social structures, Brazilian liberals re-read it through the lens of individual rights vis-a-vis the state.[11] As an individual right, the home could be incorporated into constitutional discourses that opposed state interventionism, without losing its traditional function of preserving an autonomous sphere of patriarchal power.[12]

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[10] I discuss the police power tradition in chapters One and Two.

[11] Airton Cerqueira-Leite Seelaender, "A Longa Sombra da Casa. Poder Doméstico, Conceitos Tradicionais e Imaginário Jurídico na Transição Brasileira do Antigo Regime à Modernidade," *Revista do Instituto Histórico e Geográfico Brasileiro* 178, n. 473 (2017): 327-424.

[12] Sarah Chambers notices a similar phenomenon in postcolonial Peru, where, according to her, "While lawyers would help people claim their new rights, it is no coincidence that those most often invoked – such as the right to one's reputation or the inviolability of the home – coincided with long cherished values." She argues that independence and republicanism moved the role of

In this context of adaptations and translations of liberalism, the inviolability of the home was inserted in article 179 of the 1824 Monarchical Constitution, which listed the civil and political rights of Brazilian citizens.[13] Analyzing the constitutional text in 1857, Pimenta Bueno, an influential jurist and politician of the monarchical period (1822-1889), clearly articulated the intertwinement of the home as a traditional value and the home as a constitutional individual right. For him, the inviolability of the home was a right that protected the individual from police searches and seizures, with few exceptions, such as the entrance during daytime when there was evidence of a crime. But the inviolability of the home was also "a moral obligation of every civilized government." The home was "the sanctuary of the family, of its peace, its honesty," and therefore only "the family head's consent or a call for help" could legitimize entrance in someone's home.[14]

Constitutionalists of the First Republic (1889-1930) argued that the drafters of the 1891 Republican Constitution did not have to innovate regarding the inviolability of the home. Thus, the text of article 72, paragraph 11 was very similar to that of article 179 of the monarchical constitution. In legal scholarship, the prominence given to United States constitutional law introduced new points of reference to root the right to the inviolability of the home. Commenting on the republican constitution, jurist João Barbalho claimed that this principle protected "domestic tranquility and peace" against "arbitrary domiciliary visits, searches, and seizures." Barbalho saw the home as a "fortress," evoking the English principle "my house is my castle"

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distributor and guardian of honor from the king to the constitution. Sarah Chambers, *From Subjects to Citizens: Honor, Gender, and Politics in Arequipa, Peru, 1780-1854* (University Park: The Pennsylvania State University Press, 1999), 180-182.

[13] Constituição Política do Império do Brazil, de 15 de março de 1824, art. 179, VII.

[14] José Antonio Pimenta Bueno, *Direito Publico Brazileiro e Analyse da Constituição do Imperio* (Rio de Janeiro: Typographia Imp. e Const. de J. Villeneuve & C., 1857), 414.

and the Fourth Amendment of the United States Bill of Rights.[15] Republican legislation protected homes against nighttime entries, except when residents authorized them and in the case of disasters, such as fires or floods. During daytime, entry was permitted in the case of a disaster and for the purposes of arrests, searches, and seizures, as well as investigations connected to crimes, following criminal legal procedures.[16]

As both Bueno and Barbalho emphasized, "public houses" such as various forms of collective habitations were not protected by the right to inviolability of the home.[17] Thus, by the time of the urban reform, the housing arrangements of Rio de Janeiro's working-class population were arguably outside constitutional protection. The 1890 Criminal Code's protection against home invasions explicitly excluded *estalagens* and *hospedarias*, both popular forms of collective living.[18] Based on the hygiene ideology that had demonized the poor's living spaces since the 1850s, the 1904 Sanitary Code added further insecurity to people's homes by expanding sanitary agents' discretion to assess the necessity of entering and disinfecting buildings, ordering improvements, and requesting evictions and demolitions.[19] In November 1904, when the forced vaccination law was enacted, Brazilian authorities fully supported medical-sanitary and legal discourses that constructed working-class homes as unworthy of protection.

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[15] The text of the Fourth Amendment states "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[16] João Barbalho, *Constituição Federal Brasileira: Commentarios* (Rio de Janeiro: F. Briguiet e Cia, Editores, 1924), 428. Legislation protective of the home included the Criminal Code (Decreto n. 847, de 11 de outubro de 1890) and a 1898 decree about federal procedures (Decreto n. 3084, de 5 de novembro de 1898).

[17] Bueno, *Direito publico brasileiro*, 414; Barbalho, *Constituição Federal Brasileira*, 428.

[18] Decreto n. 847, de 11 de outubro de 1890, art. 203.

[19] Decreto no 5156, de 8 de março de 1904, art. 123, 175 and 303.

Opposition to the official argument about the need to access poor people's homes for the purposes of maintaining public order and health had existed since the early republican years. In April 1893, three months after Mayor Barata Ribeiro ordered the demolition of the Pig Head tenement, an anonymous denunciation in the newspaper O Paiz claimed that Rio's police had breached the inviolability of the home by entering someone's house disrespectfully and without permission.[20] The writer stressed that many families sublet rooms in their private residences to cope with the city's spiking rent prices. But these houses were different from the "public" collective houses that "received all sorts of tenants."[21] The argument was therefore based both on the constitution and on an attempt at social differentiation that portrayed a particular form of collective habitation as worthy of protection. As opposed to the tenements that housed the poor, elite homes, even when they housed more than one family, should be respected.

The inviolability of the home also framed more inclusive claims against state violence. In January 1901, A Imprensa, a newspaper edited by prominent liberal jurist and politician Rui Barbosa, published an article that anticipated the debates around the 1904 Sanitary Code. According to the author, sanitary agents' home invasions violated the constitution. Evoking the influence of Anglo-Saxon constitutional law, the article stated that the nation would only be strong and rich in civic pride "when the humblest worker could recite the English principle: *My house is my castle*."[22] Since the late nineteenth century, lawyers had been evoking the inviolability of the home against police orders to evict and remove prostitutes from central areas

[20] I discuss the demolition of the Pig Head tenement in Chapter One.

[21] Ignotus, "Pequenas Demandas. Casas de Pensão," *O Paiz*, April 24, 1893.

[22] A. Azamor, "My Castle," *A Imprensa*, January 28, 1901.

of the city.[23] In habeas corpus petitions, they defended their clients' worthiness of protection by mitigating their image as "public" women. In October 1900, for example, lawyer Coutinho Cintra argued that prostitutes had the same freedoms of movement and habitation, and the right to the inviolability of the home, as "honest women."[24] The conflict between the state's power to uphold public order and morality by determining prostitution-free zones and the prostitutes' right to reside and work wherever they wanted persisted in the city, and became even stronger later, when Aurelino Leal, who defended the constitutionality of police powers, became Rio's Police Chief in 1914.[25] In January 1907, Evaristo de Moraes, a lawyer known for defending the city's workers and prostitutes, evoked the inviolability of the home when the police raided the headquarters of a workers' association, comparing the association's building to an individual's house.[26] Finally, positivist opponents of the liberal oligarchic regime evoked the inviolability of the home throughout the early 1900s to criticize the forced conscription of men into the military.[27]

The mobilizing power of the inviolability of the home was directly connected to the

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[23] Cristiana Pereira Schettini, *Que tenhas teu corpo – Uma História Social da Prostituição no Rio de Janeiro das Primeiras Décadas Republicanas* (Rio de Janeiro: Arquivo Nacional, 2006).

[24] Arquivo Nacional, Cod. Ref. BV.0.HCO.2376.

[25] In 1915, Leal sent a statement to a criminal judge clarifying the police's position on the restriction of the prostitutes' right to reside in central areas. He argued that the lawyers' interpretation of article 72, §11 omitted its last part, which allowed exceptions to the inviolability of the home. Aurelino Leal "O Meretrício pode ser Localizado?", *Gazeta de Notícias*, April 1, 1915.

[26] Evaristo de Moraes, "Coluna Operária," *Correio da Manhã*, January 11, 1907.

[27] Peter M. Beattie, "The House, the Street, and the Barracks: Reform and Honorable Masculine Social Space in Brazil, 1864-1945," *The Hispanic American Historical Review* 76, n. 3 (1996): 439-473. The inviolability of the home was also used as an argument against the press' intromission in people's private lives ("Ideias e Fatos," *Gazeta da Tarde*, March 27, 1901) and against police invasions of gambling houses in the city ("A Polícia e o Jogo," *O Século*, August 26, 1908).

protection of the home as a space of autonomous patriarchal power. However, men did not monopolize the role of protecting the household. Despite being legally considered "amorphous entities" incapable of defending themselves and representing their families, women were often more invested than their husbands in guarding the family's honor. This happened, for example, in cases of deflowering, when mothers often interrogated the accused, demanded settlement, went to the police, and spoke for their daughters in courts.[28] A December 1903 cartoon, an effective media for popular mobilization, depicted a reporter interviewing a woman in front of her house. The headline referred to a group of "republican ladies" who, performing their roles as guarantors of the inviolability of the home, were going to petition President Alves to reject the legislative reform of the capital's hygiene services because it violated "female dignity." The Jornal do Brasil generally opposed the state's intervention in people's homes, and participated in the mobilization that led to the 1904 revolt. Therefore, as the reporter and the interviewee finished each other's sentences, the cartoon depicted the newspaper's alignment with the women's petition.

[28] Sueann Caulfield, *In Defense of Honor: Sexual Morality, Modernity and Nation in Early-Twentieth-Century Brazil* (Durham: Duke University Press, 2000), 130-133.

(Image 4.1 – "O Protesto," *Jornal do Brasil*, December 3, 1903 – "The Protest. We've been told that a commission of republican ladies will ask the president of the Republic to reject the bill to reform the hygiene services, which they deem a threat to female dignity. The reporter – You, therefore, understand… – That there are certain matters in which nor even the hygiene… The reporter – Understood, - hasn't the right to interfere with, understood!")

While the inviolability of the home could serve the defense of patriarchal values, its mobilizing force cannot be exclusively explained by this dimension. As a constitutional right, the home served the liberal constitutional discourse that portrayed the city's administration as "medical-sanitary despotism." It was part of a broader attack on Alves' government for violating the 1891 Constitution. Thus, the inviolability of the home was a legitimizing tool for those who followed Lauro Sodré and other positivist politicians in their attempted coup d'état. Yet, as lawyer Torres da Silva argued in his habeas corpus petition, people who had no involvement with the conspiracy had stormed the streets conscious of their rights. Before the November 1904 revolt, the inviolability of the home had been evoked in the city's courts and press as a constitutional right. As a language of negative rights against the state, liberal law was part of a shared belief that authorities were not allowed to enter people's homes. Whether people upheld exclusionary ideas about female virtue and socio-economic worthiness, or more progressive perspectives that included prostitutes and the working class, the constitutional right of article 72, paragraph 11 gave their claims judicial and political strength. Moreover, courts and streets, where popular politics was practiced, mutually fueled one another.

2. Mobilization

Throughout the year leading to the Vaccine Revolt, opponents of government and of forced vaccination waged a fierce mobilization campaign in the city's newspapers and public spaces. In their mobilizing efforts, the inviolability of the home was part of a broader discourse that articulated different conceptions of law and freedom from state interference. The home served a dual purpose. As a patriarchal value, it appealed to people's concerns with state agents' invasions of their residences, for the purposes of disinfections and evictions, and of their bodies, to forcefully vaccinate them. As a constitutional right, the home empowered the popular opposition against sanitary measures. Moreover, it was part of the liberal constitutional discourse that legitimized attacks on the Rodrigues Alves administration, accused of installing an exceptional regime in the city, systematically violating individual rights.

Covertly, a group of positivist politicians and army men plotted a coup d'état. Monarchists, such as Cândido de Oliveira, former monarchical minister and now private lawyer representing many of those who went to court against reformist measures, funded the plot. During legislative debates about the reform of hygiene services and after the Sanitary Code became law in March 1904, newspapers such as Correio da Manhã and Jornal do Brasil published articles and cartoons that criticized the sanitary authorities' interference in people's homes, and reported on petitions that evoked the constitutional right to the inviolability of the home. The Apostolado Pozitivista – the organization of those who espoused positivist ideas – used their publication to attack what they described as a medical-sanitary despotism based on the private interests of state bureaucrats, doctors, and economic elites.

Vigorous organizing began three months before the Sanitary Code was enacted. On

December 1, 1903, yellow and green pamphlets with the headline "In defense of the home" were posted and distributed to the public on Ouvidor and Gonçalves Dias streets and at the Largo do São Francisco and the Largo da Carioca squares. The pamphlets announced a meeting at four o'clock in the afternoon at the Largo do São Francisco to discuss the "anti-republican" and "unconstitutional" reform of the capital's hygiene services. At four-thirty, Francisco de Sá spoke to the crowd and read a petition addressed to Congress that defended the rejection of the reform bill. The petition held that the new hygiene services would violate several constitutional guarantees, the most important of which protected the inviolability of the home and the right to property. According to the petitioners, the new law would cause "disorder" in the family and in the "sanctuary of the home," especially the proletarian family and home.[29] On December 4, Francisco de Sá was received by President Alves, who cordially heard his grievances and promised to consider them out of respect for the "Brazilian family's well-being."[30]

However, Alves' cordiality did not produce the results Sá had expected. On January 5, 1904, Congress passed the reorganization of the city's hygiene services, which authorized the government to enact a new sanitary code.[31] On March 8, President Alves enacted the 1904 Sanitary Code by decree. Although the code mandated that sanitary inspectors should "invite" people to be vaccinated, it gave inspectors broad discretionary powers to conduct residential disinfections aimed at eradicating the mosquitos that carried yellow fever. Public Health Director Oswaldo Cruz had decided to reproduce the successful model adopted by the United States military in 1901, during the intervention in Cuba. There, the attack on the mosquitos, combined

[29] "Defesa do Lar," *Jornal do Brasil*, December 2, 1903.

[30] "Defesa do Lar," *Jornal do Brasil*, December 5, 1903. This is the same edition that published the cartoon translating the *ratione imperii* doctrine to popular terms.

[31] Decreto n. 1151, de 5 de janeiro de 1904, art. 1º, §3º.

with the isolation of infected persons, had produced optimistic results in just a few months. In 1904, the United States military would repeat this method in Panama, where yellow fever and malaria, also transmitted through mosquitos, were a threat to the construction of the Panama Canal. In both cases, the choice to control yellow fever and malaria was due to these diseases' disproportionate impact on foreigners, especially United Sates troops and workers. Like in Rio, the public health campaigns in Cuba and Panama gave less attention to the diseases that mostly affected the local populations, such as tuberculosis.[32]

In Rio, based on the 1904 Sanitary Code, Cruz's agents isolated houses using large cotton sheets and "disinfected" them with sulfur (Image 5.2). The code mandated that the police provided all support necessary to "the interest of public health."[33] According to Rui Barbosa, who initially criticized domiciliary disinfections and forced vaccinations but eventually commemorated Oswaldo Cruz for his accomplishments, in the capital city, Cruz had faced incredibly larger obstacles than the ones overcome by the United States military in Cuba and Panama. Rio was a huge metropolis where yellow fever had endemically existed for the past 60 years. More importantly, whereas the United States military ruled both Cuba and Panama under formal or virtual martial law, in Brazil, the "normal conditions of legality and justice" imposed limitations on the public health authorities' discretion based on individual guarantees.[34]

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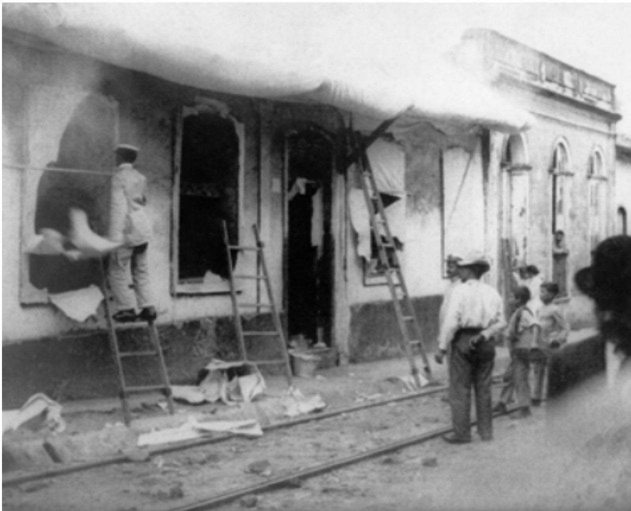
[32] Nancy Stepan, "The Interplay between Socio-Economic Factors and Medical Science: Yellow Fever Research, Cuba, and the United States," *Social Studies of Science* 8 (1978): 397-423; Alexandra Minna Stern, "The Public Health Service in the Panama Canal: A Forgotten Chapter of U.S. Public Health," *Public Health Reports* 120 (2005): 675-679.

[33] Decreto n. 5156, de 8 de março de 1904, art. 303.

[34] Rui Barbosa, *Oswaldo Cruz / Rui Barbosa* (Rio de Janeiro: Fundação Casa de Rui Barbosa, 1999), 40-42. Barbosa may have exaggerated regarding the difficulties related to Rio's size and the longevity of its problem. Havana was also a large city that had had problems with yellow fever since the late nineteenth century. There, the Cuban doctor Carlos Finlay had been the first scientist to propose that the mosquito was the independent agent that carried yellow fever, in 1881. However, Barbosa seemed to be right regarding the lack of legal limits imposed on the



(Image 4.2 – This picture of the hygiene services in action during a residential disinfection was taken by Torres in 1913, but is representative of the procedure between 1903 and 1906. It is available at the Fundação Casa de Oswaldo Cruz (Fiocruz) archive, in Rio de Janeiro, and was published by Jaime Benchimol together with other very detailed pictures of the Serviço de Profilaxia da Febre Amarela (Services for Yellow Fever Prevention). Jaime Larry Benchimol, *Febre Amarela: A Doença e a Vacina, Uma História Inacabada* (Rio de Janeiro: Editora Fiocruz, 2001), 46)

A cartoon published in the Jornal do Brasil during the December 1903 campaign depicted a disinfection with the image of a soldier, representing the state, prohibiting members of a household – the white patriarch and his dependents, wife, child, and an Afro-Brazilian domestic servant – from entering their home (Image 5.3). The representation of the family reinforces the situation of Afro-Brazilian women in Brazil's post-emancipation society. Denied access to the labor market by laws and social practices that had privileged white immigrant workers since the 1880s transition to wage labor, former slaves and free women of color often continued to live under conditions of servitude as domestic laborers.[35] But the newspaper's concern was not the

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United States military. The Platt Amendment to the Cuban Constitution (1901), which the United States had imposed on Cuba as the price of independence, authorized the United States to intervene in the country whenever United States life or property were under threats. Stepan, "The Interplay between Socio-Economic Factors and Medical Science," 413.

[35] Lorena Féres da Silva Telles, *Libertas Entre Sobrados: Mulheres Negras e Trabalho Doméstico em São Paulo (1880-1920)* (Bogotá: Universidad Distrital Francisco José de Caldas, 2014).

racial divide that structured the Brazilian home. As part of a campaign against domiciliary disinfections, the cartoon shows an orderly and honorable household, which included the Afro-Brazilian servant, being violently removed from their house by the state. Even when they were not explicitly arbitrary or violent, disinfections required people to stay outside their houses for hours or even days, and damaged their belongings.

(Image 4.3 – "Cousas da Hygiene," Jornal do Brasil, December 29, 1903 – Things of the Hygiene – Home owner: Would the fellow allow me to enter my home? Soldier: It's prohibited. The hygiene is inside. Home owner: But it's raining, I can't stay on the street. Soldier: Accept it, my friend, or move to the Sugar Loaf)

Two months after the Sanitary Code became law, lawyer Leopoldo de Figueiredo filed a collective habeas corpus petition in the Court of Appeals on behalf of the population of Rio de Janeiro. According to Figueiredo, the code's enforcement created an imminent threat to the city's residents' rights to property, freedom of commerce, freedom of profession, and the inviolability of the home. In several passages of this long petition, published by the Jornal do Brasil on May 17, the lawyer articulated the role of the 1891 Constitution in protecting traditional values. For him, the Sanitary Code violated the constitutional right to the inviolability of the home, which protected the "sanctuary of the home," "the sacred law of the family," and "the laws of

morality." Against sanitary measures, Figueiredo presented this moral and religious conception of family under the liberal shield of republican law. The claim failed both at the Court of Appeals and at the Supreme Court because it was too broad, lacking clear indication of whose rights were under threat. Nonetheless, the Jornal do Brasil gave it wide coverage, contributing to the circulation of the constitutional argument based on the inviolability of the home.

In June, the government sent congress its forced vaccination bill, triggering a harsher opposition campaign. Vaccinations were even more invasive than disinfections because they required access to people's bodies, arms or legs. Syringes were long, caused pain, and left marks on the body, and their indiscriminate use facilitated the spread of other diseases. Both elite and popular science contested vaccinations. In November 1901, for example, Miguel Couto, a member of the National Academy of Medicine, wrote to Oswaldo Cruz that he was against vaccinations because of their side effects and the likelihood of them causing death. Similar opinions were widely publicized by oppositionist newspapers.[36] African religious and medicinal practices also disapproved of the vaccine, contributing to the population's suspicion of the method.[37]

On August 22, the socialist umbrella labor organization Centro das Classes Operárias sent a petition stating their position to Congressman Barbosa Lima, a fierce opponent of forced vaccination. This petition was signed by various other proletarian organizations, including the associations of railroad workers, bakers, navy sailors, and wood sculptors, as well as by six

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[36] Jorge Augusto Carreta, "Oswaldo Cruz e a Controvérsia da Sorologia," *História, Ciência, Saúde – Manguinhos* 18, n. 3 (2011).

[37] Sidney Chalhoub, *Cidade Febril: Cortiços e Epidemias na Corte Imperial* (São Paulo: Companhia das Letras, 1996).

thousand individual workers.[38] Workers' organizations would send many other petitions to congress throughout the campaign, totaling almost fifteen thousand signatures.[39] The Centro's petition connected forced vaccination to recent sanitary agents' invasions of people's homes for the purposes of disinfection, arguing that violent sanitary measures against collective habitations aggravated social inequalities in the city. In this widely signed petition, law was presented ambiguously as a powerful argument and as a limitation for working-class struggles.

Evoking the home against forced vaccination, the petitioners started with the moral language of patriarchal values. Forced vaccination was dangerous because it forced "the Brazilian family, the daughter, the chaste young lady, the wife and the mother" to reveal their arms and pelvis. But the text quickly turned to strategic arguments that depicted the republican state as a democracy protective of its citizens' "individual liberty," based on "principle," a "fundamental law" – synonym for the constitution –, and "codes." The petitioners concluded that, given the sanitary authorities' actions, "the home hasn't been for a long time the inviolable asylum that moral, good custom, and even Brazilian laws recognized." Although it did not explicitly cite article 72, paragraph 11 of the Constitution, the petition used the constitutional language of "inviolable asylum," and made various references to the Brazilian legal system. Even when they evoked an "animalistic defensive instinct" to protect one's home, petitioners interpreted it as "self-defense," and clarified that it was sanctioned by Brazilian law.[40] Although not explicitly cited by the petitioners, the 1890 Criminal Code exempted from criminal responsibility someone who committed a crime in the legitimate defense of one's own or other

[38] "Vacinação Obrigatória," *Jornal do Brasil*, August 29, 1904.

[39] Carvalho, *Os Bestializados*, 120.

[40] "Vacinação Obrigatória," *Jornal do Brasil*, August 29, 1904.

person's rights.[41]

Yet, Rio's workers were aware of the limitations of their legal struggles. Although they used law as a language of resistance and the courts as channels for claiming citizenship, the petitioners acknowledged that their socio-economic disadvantage limited these strategies:

> If the capitalist and bourgeois social classes come to the field in legal protest, within constitutional law, because they are afraid of this bill that the Senate sent to you; if those classes are the *privileged* and the *exempt*; what shall we say, workers, proletarians, and their delegates, living in the Republic as we did under the Monarchy, the pariahs of the West?![42]

In hindsight, we know that three months later a significant number of the city's workers participated in the Vaccine Revolt. This early petition to Congress indicates a paradox. Workers had cultivated a rights consciousness against sanitary measures and forced vaccination. However, they knew that the law's reproduction of inequalities limited their options. When they stormed the streets, they revealed how law as a language empowered action outside the judicial system. It was only after the revolt that courts would become a viable channel against the violence and arbitrariness of sanitary authorities.

On November 5, more than two thousand people gathered at the Centro das Classes Operárias to hear Senator Lauro Sodré and the Centro's president, Vicente de Souza, speak against the forced vaccination law. Surrounded by the police, the meeting marked the foundation of the Liga Contra a Vacinação Obrigatória (League Against Forced Vaccination). Sodré, involved in plotting the positivist-military coup d'état, used the moment to voice broad criticisms to the government, hoping to mobilize the crowd. The senator argued that the republic was

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[41] Decreto n, 847, de 11 de outubro de 1890, art. 32, §2º.

[42] "Vacinação Obrigatória," *Jornal do Brasil*, August 29, 1904.

controlled by oligarchs who had separated it from the people, and had been violating their rights. Part of this broad picture, the forced vaccination law was unconstitutional and violent, and it was therefore necessary to resist force with force.[43]

As both the Correio da Manhã and the Jornal do Brasil reported, Vicente de Souza called for resistance both "inside and outside the law."[44] Souza was a political activist who had supported abolitionism and republicanism, and now led a socialist organization. At the meeting, he reinforced the traditionalist criticism of the state agents' interference in men's homes and violation of women's bodies. Souza claimed that he would not appeal to the constitution because it was "polluted" and "rotten." Nonetheless, he appealed to the language of rights by claiming that resistance to forced vaccination was based on "a right to self-defense."[45] Between November 7 and 14, positivist congressman Alfredo Varela published in his newspaper, funded by the monarchists, articles evoking a "right to resist" forced vaccinations.[46] Although their proponents portrayed them as rights, the concepts of "self-defense" and "resistance" evoked violent action, outside of courts. As the Centro's petition to Barbosa Lima had stressed, self-defense was part of Brazilian law. Yet, in liberal constitutional thought, both self-defense and resistance also referred to rights that preceded the state, available to the people every time the state degenerated into despotism.[47]

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[43] "Liga Contra a Vaccinação Obrigatoria," *Correio da Manhã*, November 6, 1904.

[44] "Liga Contra a Vaccinação Obrigatoria," *Correio da Manhã*, November 6, 1904; "A Vaccinação," *Jornal do Brasil*, November 6, 1904.

[45] "A Vaccinação," *Jornal do Brasil*, November 6, 1904.

[46] Carvalho, *Os Bestializados*, 97.

[47] For example, for John Locke, "the primary enforcement mechanism of the social contract was the people's collective right to legitimately revolt against the government should it violate the terms of the contract." Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, "When to

Back at the Centro's November 5 meeting, while leaders Sodré and Souza used law as a language to mobilize violent action against what they portrayed as the illegitimate use of state force, Mr. Suzano, representing the League Against Forced Vaccination's organizing committee, informed the crowd about a different strategy. Without his colleagues' effusive tone, Suzano declared that the League would promote "the revocation of this unconstitutional law through the judiciary." If the courts failed, he continued, people were willing to use bullets.[48] Suzano, who was then appointed one of the League's secretaries, revealed that opponents of forced vaccination did not view law only as a language for mobilization. Litigation was a deliberate strategy in organized resistance against the sanitation project.

It was during the mid-November meetings at the Centro's headquarters, in the Largo do São Francisco, that police violence propelled popular reaction. Since the November 5 gathering, the Correio da Manhã had been publishing working-class organizations' declarations of support for the League Against Forced Vaccination. On November 11, the Associação de Resistência dos Marinheiros e Remadores (Sailors and Oarsmen's Resistance Association), represented by its general secretary José Joaquim da Silva, sent the newspaper a note declaring its solidarity with the associations of cigar makers, hat makers, and carpenters, among others.[49]

According to the note, because the Association had been created to "liberate us from the dominium of slavery," it could not remain silent regarding the "monstrous attack on individual liberty" and the "illegal act" sanctioned by government. Lower ranks of the Brazilian Navy, most of whom were forcefully recruited among the poor Afro-Brazilian population, still suffered

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Overthrow your Government: The Right to Resist in the World's Constitutions," *UCLA Law Review* 60 (2012), 1202.

[48] "A Vaccinação," *Jornal do Brasil*, November 6, 1904.

[49] "Liga Contra a Vacinação Obrigatória," *Correio da Manhã*, November 12, 1904.

corporal punishments associated with slavery.[50] Thus, the recent memory of slavery, abolished only 16 years earlier, also framed workers' resistance against sanitary measures.[51] In this case, however, the inviolability of the home did not seem particularly useful. Freedom from slavery was also freedom from the masters' home-based power. Nonetheless, as writer Lima Barreto (1881-1922) – a fierce critic of Rio's reform – argued, the republican *estado de sítio* (state of siege) was nothing more than a *estado de fazenda* (state of plantation), where the public forces had extended the violence previously exercised within the private sphere of the masters' home to everyone, and especially the poor.[52] Therefore, for the sailors and oarsmen, liberty from state violence was equivalent to liberation from slavery.

The sailors and oarsmen's reference to "individual liberty" was part of the rights language that mobilized people against forced vaccination and the enforcement of sanitary measures such as domiciliary disinfections. Other concepts, such as the right to self-defense and the right to resistance, also contributed to the mobilization. Nonetheless, the inviolability of the home was at the center of mobilizing efforts. While the comparison between freedom from state intervention and freedom from slavery appealed to Rio's large Afro-Brazilian population, patriarchal concerns appealed to virtually everyone. As opposed to the rights to self-defense and to resistance, the inviolability of the home had textual ground in the 1891 Constitution. It therefore served to both mobilize people on the streets and bring suits against the government.

The revolt started on November 10 at the Largo do São Francisco square, in downtown Rio, where the opposition had called another meeting at the Centro das Classes Operárias to

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[50] In 1910, the navy sailors would revolt against this practice, threatening to bomb the republican capital. The revolt came to be known as the Revolta da Chibata (Revolt of the Lash).

[51] "Liga Contra a Vacinação Obrigatória," *Correio da Manhã*, November 12, 1904.

[52] Sevcenko, *A Revolta da Vacina*, 80-81.

discuss the forced vaccination law. At the Largo, police violence propelled popular reaction. From there, manifestations escalated and spread to other parts of the city, reaching distant neighborhoods such as Tijuca and Copacabana. Students and workers of various trades, including a large group from the Morro da Favela, attacked symbols of Rio's urban reform, such as brand-new streetlamps and streetcars. The police counterattacked with violence and arbitrary arrests, but local forces were unprepared to deal with what followed. On the 14th and 15th, spontaneous insurgency gained two organized fronts. At Saúde, an Afro-Brazilian neighborhood representative of the city's history as the Americas' major slave port, a group of port workers and nearby residents, including members of the Sailors and Oarsmen's Resistance Association, built barricades, raised rustic weapons, and waved the colors of Obaluiaê, the smallpox *Orisha* (African god). The barricaded area became known as Porto Arthur – a reference to the recent Port Arthur battle of the Russo-Japanese War (February, 1904). At the city's south zone, General Silvestre Travassos, accompanied by senator Lauro Sodré, led army cadets towards the Catete Palace to overthrow the president. The army and the navy quickly suppressed both Porto Arthur and the military insurgency. The revolt left an uncounted number of dead bodies, bloodstains, broken cars and lights, trenches, and bullet holes throughout the city.[53]

[53] Sevcenko, *A Revolta da Vacina*; Teresa Meade, *"Civilizing" Rio: Reform and Resistance in a Brazilian city, 1889-1930* (University Park: Penn State, 1997); Carvalho, *Os Bestializados*; Jaime Benchimol, "Reforma Urbana e Revolta da Vacina na Cidade do Rio de Janeiro," in J. Ferreira & L.A.N. Delgado (eds), *O Brasil Republicano: O Tempo do Liberalismo Excludente* (Rio de Janeiro: Civilização Brasileira, 2013). For the participation of residents of the *Morro da Favela* and the influence of *Obaluiaê* in the Port Arthur barricades, see Leonardo Pereira, *As Barricadas da Saúde: Vacina e Protesto Popular no Rio de Janeiro da Primeira República* (Rio de Janeiro: Editora Fundação Perseu Abramo, 2002). For the popular and African origins of anti-vaccination sentiments in the city, see Chalhoub, *Cidade Febril*.

3. After the dust settled

In January 1905, the military campaign to purge the city of "undesired" subjects who had allegedly participated in the revolt was still underway. Simultaneously, although the forced vaccination law had been revoked, the public health authorities continued to disinfect houses across the city. On January 17, sanitary inspector Oliveira Borges notified Manuel Fortunato Costa, a wealthy Portuguese immigrant and businessman, that his house was going to be disinfected soon. Borges' notification was part of an aggressive sanitation campaign in the Rio Comprido neighborhood. Four days later, after another notification, lawyer Pedro Augusto Tavares Jr. filed a preemptive habeas corpus petition in federal court on behalf of Costa.[54] The Costa case would frame the debate about the sanitary disinfections and the inviolability of the home in a city recently shattered by revolt. Although state authorities had made it clear that they would not tolerate popular dissent on the streets, both people's rights consciousness and their access to courts kept resistance against violent sanitary measures alive.

In an effort to mobilize public opinion in favor of Costa's claim, lawyer Tavares Jr. published the habeas corpus petition in the oppositionist newspapers Jornal do Brasil and Correio da Manhã.[55] Nevertheless, on January 24, Federal Judge Pires de Alburquerque denied Costa's request, arguing that although the sanitary inspector's notification seemed exaggerated, the remedy of habeas corpus was not suited for the case.[56] Albuquerque thus took sides in an ongoing controversy about the scope of habeas corpus in Brazil. Since the late nineteenth

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[54] Arquivo Nacional, Fundo: BV – Supremo Tribunal Federal, Série: HCO – Habeas Corpus, 1905, Cód. Ref. BV.0.HCO.2046.

[55] "Contra os Expurgos," *Correio da Manhã*, January 22, 1905; "O Foro," *Jornal do Brasil*, January 22, 1905.

[56] "Contra os Expurgos," *Correio da Manhã*, January 22, 1905.

century, liberal jurists such as Rui Barbosa had been advancing habeas corpus as an instrument for the protection of individual rights broadly conceived. However, the dominant jurisprudence and doctrine held that habeas corpus applied only to the protection of freedom of movement.[57] Following this dominant stream, Albuquerque ruled that he could not grant habeas corpus because Borges' notification did not threat Costa's freedom of movement with imprisonment.[58]

Tavares Jr. immediately filed an appeal at the Supreme Court. Nonetheless, on January 28, after deliberations among the minister of justice, the chief of police, and Public Health Director Cruz, the public health authorities notified Costa that the disinfection would take place on the next day, at ten o'clock in the morning. Hopeless, Tavares Jr. sent a message warning his client: "My dear friend, violence will be inflicted upon you." Punctually, on January 29, while the court case was still pending, Costa's house was invaded by an "army" of deputies, inspectors, disinfection agents, policemen, and even an alleged street gang informally hired by the authorities. They easily broke into the house, and finished their work of fumigating sulfur to kill the mosquitoes that transmitted yellow fever.[59]

On January 31, after the individual harm had already been inflicted on Costa, the Supreme Court finally issued a decision that could change the city's residents' collective fate. In a majority opinion, the court ruled that the sanitary disinfections authorized by the 1904 Sanitary Code were unconstitutional. According to the Court, article 72, paragraph 11 of the constitution, which protected the inviolability of the home, accepted exceptions. However, the article

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[57] Andrei Koerner, *Judiciário e Cidadania na Constituição da República Brasileira (1841-1920)* (Curitiba: Juruá, 2010).

[58] Arquivo Nacional, Fundo: BV – Supremo Tribunal Federal, Série: HCO – Habeas Corpus, 1905, Cód. Ref. BV.0.HCO.2046.

[59] "Contra os Expurgos," *Correio da Manhã*, January 29, 1905.

explicitly established that exceptions to the inviolability of the home could be only created through legislative acts. Although congress had previously authorized the president to enact a new Sanitary Code, the code was an executive decree instead of a law passed by the legislative power. Congress could not have delegated its power to lift the constitutional protection. Moreover, overturning Federal Judge Albuquerque's decision, the court ruled that habeas corpus applied to the case because the disinfections could result in physical constraints.[60]

Throughout February, administrative authorities, lawyers, and newspapers on opposite sides of the political spectrum engaged in a fierce debate about the meanings of the Supreme Court's decision. In the Correio da Manhã's report on Tavares Jr.'s oral arguments before the court, the lawyer's and the journalist's words blended. According to the newspaper, which had been active in the mobilization for the revolt, Tavares Jr. argued that the "respect for the domestic home" was the last bastion for the protection of individual rights in a city where freedom and property had been already lost. Tavares Jr. equated the home with a person's "more intimate" space, highlighting that the inviolability of the home protected intimacy, though the right to privacy was not a part of constitutional discourse.[61] The lawyer had also reminded the justices of the latent sentiment that had led people to violently revolt on the streets:

> Armed with legal means, the petitioner resorted to this eminent Court. And he expects with confidence that his request will be granted to avoid a revolution, because a lot of people are willing to repel the violators of their homes with bullets[62]

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[60] Arquivo Nacional, Fundo: BV – Supremo Tribunal Federal, Série: HCO – Habeas Corpus, 1905, Cód. Ref. BV.0.HCO.2046.

[61] "Contra os Expurgos," *Correio da Manhã*, February 1, 1905. As opposed to France, in Brazil, the right to privacy was not part of constitutional debates about public sanitation. For France, see Ann-Louise Shapiro, "Private Rights, Public Interest, and Professional Jurisdiction," *Bulletin of the History of Medicine* 54, n. 1 (1980): 4-22.

[62] "Contra os Expurgos," *Correio da Manhã*, February 1, 1905.

After the dust had settled, the lawyer of a privileged businessman suggested that people were still willing to protect their rights with violence. There were various accounts of people physically resisting residential disinfections. For example, the wife of a military officer had allegedly taken up a shotgun to defend her home against a disinfection crew.[63] Although the idea that people were willing to resist with bullets had some ground, most people seem to have adopted less violent means. For example, on Correia Dutra street, Laura Pereira closed her doors to prevent the sanitary agents from entering her home.[64] Nonetheless, according to Tavares Jr. "a revolution" might even be on the horizon. It is uncertain whether the Supreme Court responded to the street protests when they ruled that sanitary disinfections were unconstitutional. Yet, the Correio da Manhã's conclusion was triumphal: "Thus the disinfections have fallen, and the Supreme Court has thrown the final strike."[65]

The pro-government newspaper O Paiz reported the ruling with pessimism. According to the newspaper, the decision would generate dangerous consequences for the city's administration and sanitation.[66] On February 4, Public Health Director Oswaldo Cruz sent a message to the minister of interior arguing that if the disinfections were suspended, a major yellow fever epidemic would break out in the city. Cruz asked the minister to trust the health authorities' "scientific criterion," which had prevented the spread of the disease in the summer of 1903-1904. The next day, Tavares Jr. published an article in the Correio da Manhã accusing Cruz of being a

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[63] Barbosa, *Oswaldo Cruz*, 59.

[64] "Vida Forense. Resistência ao Expurgo," *O Paiz*, September 2, 1905. I found other similar cases in the newspapers.

[65] "Contra os Expurgos," *Correio da Manhã*, February 1, 1905

[66] "A Doutrina do Accórdão," *O Paiz*, February 4, 1905.

contradictory despot. For the lawyer, the recent return of yellow fever despite innumerous disinfections had proven the doctor wrong. Moreover, public administrators had been contributing to the epidemic by digging holes and opening the sewage system across the city, and by stimulating the arrival of thousands of immigrants who carried diseases.[67]

O Paiz framed the legal debate without much reference to the inviolability of the home. Instead, the newspaper argued that existing municipal laws authorized residential disinfections, thus rendering the Supreme Court's decision innocuous. These hygiene laws, according to O Paiz, aimed at defending "a collective right," which was being threatened by an "overwhelming wave of individual rights." From the perspective of those who defended extreme sanitary measures, the Supreme Court's decision created precedent for the protection of individualized interests that undermined the collective good. To confirm this hypothesis, the newspaper reported that the Costa case had sparked a "rain" of habeas corpus petitions against sanitary measures throughout the city.[68] On February 15, the local chief of police issued a memorandum instructing policemen to continue assisting sanitary agents with disinfections, unless the resident produced a habeas corpus order against it.[69]

The liberal constitutional discourse against sanitary measures referred to individual rights opposed to the state. Reproducing the official reformist argument articulated in political forums, legal scholarship, and courts, O Paiz equated the judicial resistance against the reform with the individualistic self-interest of a few. Vieira Souto had done the same when, in 1881, he supported a powerful administration able to advance "progressive measures" against selfish

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[67] Pedro Tavares Junior, "Os Expurgos Domiciliarios," *Correio da Manhã*, February 4, 1905.

[68] "A Doutrina do Accórdão," *O Paiz*, February 4, 1905; "A Nova Doutrina," *O Paiz*, February 5, 1905; "A Nova Doutrina," *O Paiz*, February 14, 1905.

[69] "Os Expurgos," *Correio da Manhã*, February 15, 1905.

private interests. According to him, public health required the public health agents to act as "permanent sentinels" empowered to enter people's homes.[70] In eviction cases before the Sanitary Court, public health attorneys evoked the collective interest in sanitation against the pernicious exploitation of poor tenants by greedy landlords.[71]

Yet, resistance to sanitary measures was not exclusively individualized. It took collective forms both when people stormed the streets in November 1904, and when they presented petitions to congress with thousands of signatures. On February 20, 1905, during the alleged habeas corpus "rain" prompted by the Costa decision, judicial opposition to the reform also took a collective form. Augusto Queirós, a member of the União Operária do Engenho de Dentro (Proletarian Union of the Engenho de Dentro), asked the Supreme Court for a collective and preemptive habeas corpus on behalf of "Rio de Janeiro's oppressed proletarian and working classes."[72] As opposed to Leopoldo de Figueiredo, who had claimed to represent the whole city in his May-1904 collective petition, Queirós claimed to represent an entire class, undivided by craft or occupation – something novel, perhaps unprecedented in the history of the republic.

Figueiredo's petition had been framed in liberal individualistic terms. Saying that everyone's rights were being threatened was the same as saying that each individual in the city was being threatened regarding their own individual right. Thus, the city's residents could be collectively represented only because they were all under the Sanitary Code's jurisdiction.

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[70] L. R. Vieira Souto, *Organização da Hygiene Administrativa. Estudos de Direito Administrativo e Legislação Comparada* (Rio de Janeiro: Typographia Nacional, 1881), 112.

[71] I analyze these cases in the next chapter.

[72] AN, Cód. Ref. BV.0.HCO. 2293. Queirós appears in newspaper reports of preparations for the celebration of May 1st in the city ("Operariado. União Operaria do Engenho de Dentro," *A União*, April 26, 1905) and presiding on the União Operária's assembly in July 1908 ("Operariado. União Operaria do Engenho de Dentro," *Gazeta de Notícias*, July 17, 1908).

Figueiredo referred to various constitutional rights, including the right to property, which applied only to property owners, and the right to freedom of commerce, which applied only to people who worked in commerce. The petition written on behalf of the proletarian class, on the other hand, focused on Rio's workers' most pressing concern: the inviolability of the home. While the home was useful in the defense of patriarchal values, another equally important reason made it relevant to working-class struggles. While patriarchal values were shared across class lines, the property argument was not available to everyone. In the public and judicial debate about the reforms, while tenement owners evoked their property rights, the city's dispossessed, working-class tenants, could evoke the home as an alternative against invasive and violent sanitary measures.

The Proletarian Union of the Engenho de Dentro was a labor organization formed mostly by workers of the Central do Brasil railroad. The Union emphasized the gradual and orderly struggle for workers' rights, focusing on petitions and litigation, mediated by politicians and lawyers, as opposed to direct action through strikes.[73] The language used by Queirós in the habeas corpus petition suggests that he was not a trained lawyer. First, he did not sign it as a lawyer, but as a "citizen." Second, the text presented excessive deference to the court, which was unusual in petitions written by practitioners. For example, Queirós stated that each Supreme Court justice "personified Law and Justice." Finally, the petitioner made various simple grammatical mistakes that a trained lawyer presumably would have avoided.[74]

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[73] Because of its gradual strategy, the União Operária had been against the 1903 general strike. Marcela Goldmacher, *A Greve Geral de 1903: O Rio de Janeiro nas Décadas de 1890 a 1910* (PhD dissertation – Universidade Federal Fluminense – 2009), 153.

[74] AN, Cód. Ref. BV.0.HCO. 2293. Among the grammatical mistakes, Queirós referred to a thousands of families ("*milhares de famílias*") using the singular form of the verb to be expelled ("*seja expulsa*").

Queirós' petition reveals how Rio's workers strategically used the favorable moment created by the Supreme Court's decision on the Costa case to claim their rights. According to the petitioner, the court had already prohibited the sanitary disinfections when it "granted this beneficial legal recourse to a wealthy capitalist."[75] Citing the Correio da Manhã's columnist Gil Vidal, Queirós claimed that, after the court's decision, "violence would affect only the poor who don't find a charitable soul to petition on their behalf."[76] Thus, the poor's access to the same justice granted to Manuel Costa depended on representation. Claiming to represent all the capital's workers, Queirós stated that the Supreme Court justices now had a chance to "make the Proletariat bend before their robes."[77]

The petition also contained a precise argument based on the Supreme Court's recent decision, which suggests that although he was not trained in law, Queirós may have had help from someone who was. Lawyers such as Evaristo de Moraes and Caio Monteiro de Barros frequently represented labor organizations in court.[78] Whether it was drafted in collaboration with a lawyer or not, the result was a petition that clearly reproduced the formal claim that had sustained Costa's judicial victory: Only a legislative act could create exceptions to the constitutional right to the inviolability of the home. Congress could not have delegated its power to create exceptions to the executive. Despite the previous legislative authorization, the Sanitary

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[75] AN, Cód. Ref. BV.0.HCO. 2293.

[76] AN, Cód. Ref. BV.0.HCO. 2293.

[77] AN, Cód. Ref. BV.0.HCO. 2293.

[78] Evaristo de Moraes was a socialist militant, with strong ties, for example, to the longshoremen union and the society of coffee workers. Caio Monteiro de Barros was a lawyer for the association of workers of the printing industry. Goldmacher, *A Greve Geral de 1903*, 80 and 188. Romulo Costa Mattos, *Pelos Pobres! As Campanhas pela Construção de Habitações Populares e o Discurso sobre as Favelas na Primeira República* (PhD dissertation – Universidade Federal Fluminense – 2008), 145.

Code was an executive decree, and therefore it violated article 72, paragraph 11 of the constitution.[79]

Surprisingly, Queirós' petition did not present the inviolability of the home as a patriarchal value. Instead, it raised practical concerns with the disinfections' impact on people's health and patrimony. According to Queirós, the public health agents did not respect people's infirmity or even women's pregnancy. They also broke doors, removed roofs, and threw furniture onto the streets. As evidence, Queirós attached a newspaper report on the recent disinfection of a tenement on Barão de São Felix street, where once stood the iconic Pig Head tenement, demolished in 1893. According to the report, after sanitary agents had requested police support to break in his house, a resident named Paradas had petitioned to a federal court to suspend the disinfection because his wife was in an advanced stage of pregnancy. As in other cases, various newspaper reports, including one on the Supreme Court decision in the Costa case, were attached to the petition (Image 4.4).[80] The circulation of information about court cases and legal arguments in the press was not only constitutive of a rights consciousness, but also useful in courts as evidence of the public health authorities' violent methods and the judiciary's response to them.

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[79] AN, Cód. Ref. BV.0.HCO. 2293. My analysis of Queirós' petition draws on James Sanders' work on popular liberalism in nineteenth-century Colombia. Sanders analyzed petitions that represented the interests of indigenous and Afro-Colombians, mostly landless workers and tenants, before state authorities. According to him, these petitions reflected both their writers and the people represented by them. Four arguments support this claim. First, there was no generic template, thus the petitions show different concerns from different groups. Second, to assign all content to the writer's consciousness would be to make him omnipotent and able to design a specific discourse. Third, we cannot simply assume that the writers were members of the elite. Finally, plebeian actions also revealed their political thoughts. James E. Sanders, *Contentious Republicans. Popular Politics, Race, and Class in Nineteenth-Century Colombia* (Durham: Duke University Press, 2004), 23.

[80] AN, Cód. Ref. BV.0.HCO. 2293.

Queirós' petition reproduced the argument that had supported the Supreme Court's decision on the Costa case with precision. However, Brazil's constitutional order and justice system did not have space for collective and diffuse claims such as his. The habeas corpus "remedy" was supposed to protect a specific person against an imminent threat or on-going violence. Therefore, like Figueiredo's, Queirós' petition was denied for being too general, lacking reference to a clearly identified individual plaintiff.

(Image 4.4 – Hand cut newspaper clip attached to Augusto Queirós' petition on behalf of Rio's proletarian classes to the Supreme Court. Common people and lawyers without access to extensive libraries often resorted to the newspapers to find the latest judicial precedents. Queirós used the newspaper clip to show the Supreme Court that their own recently issued decision supported his argument)

Manuel Costa's case circulated in the press more than any other case related to the urban reform. The Supreme Court's interference in the sanitation plan was so remarkable that lawyers and common people alike interpreted the decision broadly. The court had deemed the disinfection of Costa's house unconstitutional because the Sanitary Code could not create exceptions to the inviolability of the home. The Supreme Court's decision said nothing about the

code as a whole, nor did it discuss other provisions, unrelated to disinfections. Yet, influenced by the press coverage that portrayed the decision as an overwhelming defeat for the sanitary authorities, lawyers and common people evoked the Costa "precedent" in courts as an overarching declaration of the Sanitary Code's unconstitutionality.

In April 1905, the National Guard surgeon, Dr. João Lima, asked a federal court for a habeas corpus against a Sanitary Court's order to fine and possibly arrest him for sanitary infractions. Dr. Lima had failed to communicate with the public health authorities about a sick patient, thereby violating the Sanitary Code.[81] To support his case, Lima's lawyer evoked the Manuel Costa "precedent." Federal Judge Godofredo Cunha denied the habeas corpus, reasoning that the "precedent" did not apply because this was not a case of disinfection. In his appeal to the Supreme Court, Lima's lawyer argued that communicating to health authorities about a sick patient could generate an order to disinfect the patient's home. Thus, the lawyer tried to convince the court that even though his client's home was not the one under threat, the Costa case supported his claim. Although this argument was certainly an excessively broad construction, the lawyer added that the "precedent" indicated that the Sanitary Code as a whole was unconstitutional. The Supreme Court dismissed the case because of a procedural error. The Court of Appeals, not the federal court, was the appropriate instance for hearing appeals from Sanitary Court decisions.[82]

In September 1905, the Sanitary Court sentenced 102-year-old "African" João da Rocha to a fine, which could be converted into jail time, because he had failed to report to the public

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[81] AN, Cód. Ref. BV.0.HCO.2529. Article 137, Decreto n. 5156 de 8 de março de 1904.
[82] AN, Cód. Ref. BV.0.HCO.2529.

health authorities about a vacancy in a tenement located in the distant rural district of Inhaúma.[83] Rocha was likely the tenement's owner, maybe a former slave member of the city's "middle sectors," which had experienced some level of prosperity in the mid nineteenth century.[84] A newspaper report from 1907 informs that Rocha was a religious leader at an African religious site located on Senador Pompeu street, one block away from Barão de São Félix street. "Pai João," as he was known in the religious circle, charged two hundred *réis* for "easily" preparing a charm that would make someone fall in love. Selling charms, he could invest in a distant and therefore much cheaper neighborhood.[85]

In Rocha's appeal to the Court of Appeals, his lawyer, Augusto Lima, argued that the Supreme Court had already declared the Sanitary Code unconstitutional several times. Lima therefore advanced a broad interpretation of the Supreme Court's decision on the Manuel Costa case. The court's restrictive argument about the need for a legislative act to create an exception to the inviolability of the home was transformed into an overarching claim against the code's constitutionality. Both the Court of Appeals and the Supreme Court denied Rocha's habeas corpus, stating only that they agreed with the Sanitary Court's decision.[86]

In 1906, the Costa case was published in the first volume of the *Revista de Direito Civil, Commercial e Criminal*, a Rio de Janeiro-based law review that contributed to the dissemination of doctrine, judicial decisions, and legislation.[87] Although the *Revista*'s summary of the case was

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[83] AN, Cód. Ref. BV.0.HCO.2955. Article 87, Decreto n. 5156 de 8 de março de 1904.

[84] Zephyr Frank, *Dutra's World: Wealth and Family in Nineteenth-Century Rio de Janeiro* (Albuquerque: University of New Mexico Press, 2004).

[85] "Feitiçaria," Correio da Manhã, December 6, 1907.

[86] AN, Cód. Ref. BV.0.HCO.2955.

[87] "Jurisprudência Nacional," *Revista de Direito Civil, Commercial e Criminal* 1 (1906), 329.

clear regarding the limitation of the Supreme Court's argument, lawyers continued to cite the case as evidence of the Sanitary Code's absolute unconstitutionality.[88] Furthermore, the decision continued to be cited as a paradigmatic example in legal doctrine.[89] In 1911, federal judge and politician José Tavares Bastos included the Costa case in his long treatise on habeas corpus, quoting the Supreme Court's decision where it reasoned that the habeas corpus was applicable because the sanitary disinfection could generate physical constraints.[90] In 1912, citing yet another doctrinal work, Macedo Soares' commentary on the Criminal Code, lawyer Fernando Machado evoked the Costa case to ask for habeas corpus against an eviction in the city of São Paulo. Defending both the building's owner, João Baptista, and his tenants, Machado argued that the Supreme Court's "precedent" protected the owner's property rights. According to him, property was hierarchically superior to the inviolability of the home, and therefore if a sanitary inspector could not violate the latter, he could not interfere with the former either. The Supreme Court denied habeas corpus, reasoning that the São Paulo state executive power could enact decrees regulating public health, and that any provisions regarding disinfections could not be considered violence against a citizen or against property. Albeit referring to the state-level, the court effectively denied what it had decided in the Costa case.[91]

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[88] For example, in a habeas corpus petition filed in September 1909 on behalf of Francisco Carneiro, a tenement owner accused of sanitary infractions, the lawyer argued that the Sanitary Code had been declared unconstitutional by "various Supreme Court decisions." AN, Cód. Ref. BV.0.HCO.1632.

[89] The decision is cited up to the present day, and was included in the short selection of the Supreme Court's "historical cases" available at the court's website. http://www.stf.jus.br/portal/cms/verTexto.asp?servico=sobreStfConhecaStfJulgamentoHistorico (accessed on February 23, 2018).

[90] José Tavares Bastos, *O Habeas-Corpus na República* (Rio de Janeiro: H. Garnier, 1911), 138.

[91] AN, Cód. Ref. BV.0.HCO.1670.

Conclusion

The resistance against forced vaccinations had disastrous consequences. In 1908, more than 9,000 people died of smallpox in Rio de Janeiro.[92] Despite the Supreme Court's decision in the Manuel Costa case, domiciliary disinfections aimed at containing yellow fever continued, eventually producing beneficial results. From 1904 to 1905, when the court declared the disinfections unconstitutional, the number of domiciliary visits increased by approximately 5 percent.[93] In March 1905, O Paiz celebrated the second consecutive summer free of yellow fever claiming that while the sanitary agents' excesses and violence could be easily corrected, the deaths caused by an epidemic had no remedy.[94] By 1909, yellow fever had been virtually extinguished in the city.[95]

In the 1910s and 1920s, sanitary interventions became national policy, expanding from Rio de Janeiro to the vast Brazilian rural areas. The scientific discoveries about transmissible diseases such as yellow fever had created a sense of social interdependence that connected rich and poor alike, thus generating sensitivity to collective interests. To address the country's rural public health issues, doctors advanced a campaign to sanitize the *sertões* (hinterlands), which contributed to the construction of a national identity. The expansion of public sanitation was

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[92] Esmeraldino Olympio de Torres Bandeira, *Relatório do Ministério da Justiça e Negócios Interiores* (Rio de Janeiro: Imprensa Nacional, 1910), Anex report of the Directoria Geral de Saúde Pública, page 3.

[93] There were 7,211 visits in 1904 and 7,596 in 1905. J. J. Seabra, *Relatório do Ministério da Justiça e Negócios Interiores*, *Vol. 3* (Rio de Janeiro: Imprensa Nacional, 1905), Annex A, page 19; J. J. Seabra, *Relatório do Ministério da Justiça e Negócios Interiores*, Vol. 5 (Rio de Janeiro: Imprensa Nacional, 1906), Annex 1 of Annex A, page 4.

[94] O Paiz, 27/03/1905.

[95] Esmeraldino Olympio de Torres Bandeira, *Relatório do Ministério da Justiça e Negócios Interiores* (Rio de Janeiro: Imprensa Nacional, 1910), Annex report of the Directoria Geral de Saúde Pública, page 4.

framed by legal-political conflicts that opposed federal sanitary agents to rural property owners. Nationalization required the centralization of powers in federal executive agencies, which contradicted the prominence of the local political leaders, rural oligarchs who relied on the 1891 Constitution's federalist system to maintain their political and economic power. The enhancement of executive powers also expanded the limitations on individual rights, including the right to property, another liberal institution that shielded the oligarchs' local dominium.[96]

During this period of expansion, accounts of the 1904 revolt celebrated Oswaldo Cruz for the capital's sanitation, nonetheless portraying the conflict between collective interests and individual rights differently. In 1917, when Oswaldo Cruz died, Rui Barbosa, a devoted liberal committed to the defense of individual rights, praised Cruz for his genius and the social significance of his accomplishments. Barbosa claimed that the "popular resentment" against the "Tortures Code" had awaken the "civic energy," the "love for individual liberties," and the "zeal for human dignity" that national crises usually promote. Yet, at that moment of "singular irony" this civic energy based on individual rights had opposed the "scientific sanitation of the city." At the Municipal Theater, one of the symbols of Rio's urban reform, Barbosa commemorated Cruz as the representative of a civilized, sanitized, and modern Brazil.[97]

In 1929, jurist Almachio Diniz published a short pamphlet that praised Oswaldo Cruz for his brilliant and victorious sanitation campaign in the capital. As a law professor, Diniz claimed that his short study on "The State, the Law, and Public Health" aimed at "constitutionalizing the actions of our sanitary authorities" against the sometimes violent "misunderstood and unjustified

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[96] Gilberto Hochman, *A Era do Saneamento: As Bases da Política de Saúde Pública no Brasil* (São Paulo: Hucitec, 2012).

[97] Barbosa, *Oswaldo Cruz*, 43, 60.

clamors" in opposition to "wise men" such as Cruz.[98] "SALUS POPULI SUPREMA LEX ESTO," the people's welfare shall be the supreme law, wrote Diniz. His pamphlet was filled with references to "general necessity," "public salvation," and "general need," all of which indicated that the collective interest in public hygiene and sanitation should supersede individual private rights. As for the inviolability of the home, Diniz argued that "democratic countries" did not uphold the rigorous English principle "my house is my castle." In those countries, the rights of the collectivity were always above the rights of individuals. Yet, Diniz agreed that the Manuel Costa case decision had been a valid reaction to the invasion of homes based on nothing but executive decrees.[99] As opposed to Barbosa's devoted liberalism, Diniz represented the modern legal thinking that justified the state's expansion for the advancement of collective interests, which would predominate in Brazil during the 1930s.

The Vaccine Revolt and the Manuel Costa case were not isolated incidents that momentarily obstructed a generally successful public health campaign. What the ruling elites portrayed as the protection of collective interests had been widely perceived as illegitimate state violence. The mobilization of law on the streets and in courts was part of a rights consciousness that inspired people from different social backgrounds. It reveals that Rio's residents – including the mass of Afro-Brazilians recently freed from captivity, still bound by social conventions and economic misery, and excluded from formal politics – were capable of collectively, though not necessarily in an organized fashion, claiming their rights. In the next chapter, I explore how landlords and tenants used judicial and extrajudicial strategies against the evictions ordered by the public health authorities. While these two classes had joined forces, and shared a rights

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[98] Almachio Diniz, *O Estado, o Direito e a Saude Publica* (Rio de Janeiro, 1929), 19.
[99] Diniz, *O Estado*, 9-16.

consciousness during the Vaccine Revolt, the court records reveal the social divide that property ownership produced in the resistance against the urban reform. Nonetheless, they also show how landlords and tenants occasionally collaborated in their struggle to profit from and live in the city.

Chapter Five

Evictions, Silences, and Disappearances

From 1904 to 1909, doctor Oswaldo Cruz's Diretoria Geral de Saúde Pública (Public Health Authority) evicted thousands of people in Rio de Janeiro. Sanitary agents largely targeted working-class collective habitations, thus removing the poor from the city's downtown. The ambitious project was based on an instrumental approach to law that conceived administrative discretion and independence as tools for the city's sanitation. Opponents of the project described it as a medical-sanitary despotism and arbitrary state interventionism. They evoked constitutional rights to property, liberty, and the inviolability of the home to protest sanitary agents' actions. The 1904 Regulamento Sanitário (Sanitary Code) established sanitary rules and empowered an army of health professionals to enforce them. However, it also created the local Justiça Sanitária (Sanitary Court), in charge of all health-related matters, where landlords and tenants were prosecuted for sanitary infractions. From there, one could appeal to the capital's Corte de Apelação (Court of Appeals). Between 1904 and 1911, when it was extinguished, the Sanitary

Court ruled on more than four thousand cases.[1] A yet unknown number of those cases reached the Court of Appeals.[2]

The sanitation project's judicialization reveals that sanitation engineers and doctors – the "enlightened" technical elite trusted by President Alves – shared the public arena of debates about the city's future with state attorneys, defense lawyers, and judges. Technical reports and legal interpretations produced different narratives about the city's material conditions. While judicial procedures cast doubt over whether buildings needed to be condemned, they also show that even upper-class edifices did not escape sanitary law enforcement. Sanitary inspectors, members of that technical elite empowered by expanded administrative discretion, enforced the Sanitary Code capriciously against landlords and tenants. The inspectors were not distant bureaucrats, but rather part of the city's social fabric, and occasionally acted in sentimental and vengeful ways, using their discretion for personal reasons.

Against inspectors' orders, people refused to sign notifications, to make structural improvements in buildings, and to pay fines. When that happened, the *procurador dos feitos da saúde pública* (public health attorney) would initiate a lawsuit against them at the Sanitary Court. There, different avenues of resistance opened. Property owners and *arrendatários*, managers who rented buildings and sublet them, were financially able to defend themselves up to the appeals level. At the Court of Appeals, state attorneys and defense lawyers articulated

[1] Eneida Quadros Queiroz, *Justiça Sanitária. Cidadãos e Judiciário nas Reformas Urbana e Sanitária – Rio de Janeiro (1904-1914)* (MA thesis – Universidade Federal Fluminense – 2008), 28.

[2] Court of Appeals trial records are organized according to topics and parties in Rio de Janeiro's National Archives. In my research, which focused on the topic "evictions" and on records that listed the "Sanitary Court" as one of the parties (given that appeals were filed against the Sanitary Court's decisions), I found 23 of those appeals. Nonetheless, it is possible that many more exist listed under other topics and parties.

progressive and liberal arguments that concealed the sanitation project's segregationist features. Owners and managers were mostly silent regarding their tenants, hoping to stall eviction and keep collecting their rent. Tenants usually appeared in those cases only as passive recipients of notifications for removal. Nonetheless, one paradigmatic case from 1907, in which the Court of Appeals mitigated the state's power to evict, shows that successful alliances between landlords and tenants were possible.

When public health attorneys prosecuted tenants without citing their landlords, judicial avenues were much narrower. Unable to pay fines or appeal, Rio's workers could petition directly to the Public Health Authority, asking for a pardon based on the same discretion that opened space for the Sanitary Code's arbitrary enforcement. When fines were neither paid nor pardoned, the sanitary judge converted them into jail time. Displaced from their homes, the poor used the city as a hiding place to escape prison. From the perspective of judicial authorities, they officially disappeared. In hindsight, we know they colonized the city's suburbs and hills.

Between 1850 and 1860, collective habitations had proliferated in the city to house the burgeoning poor, including former slaves and immigrants. European immigrants, mostly Portuguese, dominated the housing market as proprietors and managers. The easiest way to multiply their profits was to subdivide cheap old buildings into several units. One very small room at a *casa de cômodos* (collective house), so small one could barely sleep in it, cost between 20,000 and 25,000 *réis* per month. Larger units, in *cortiços* (tenements), cost between 50,000 and 60,000 – too much for the average worker, who earned between 3,000 and 12,000 *réis* daily.[3]

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[3] Everardo Backheuser, *"Habitações Populares" – Relatório Apresentado ao Exm. Sr. Dr. J.J. Seabra, Ministro da Justiça e Negócios Interiores* (Rio de Janeiro: Imprensa Nacional, 1906), 107.

The 1870s and 1880s population boom and housing shortage had benefited tenement owners and managers. However, they also gained a shady reputation in the city for charging increasingly high rents and mistreating their tenants. As portrayed in Aluísio de Azevedo's 1890 novel *O Cortiço* (*The Tenement*), proprietors and managers of collective habitations often exercised tight control over tenants' usage of space and private and work lives. Without legislation that regulated contracts, they arbitrarily raised rents and threatened residents with forced eviction.[4] In Azevedo's novel, Portuguese João Romão is a crook, who accumulates wealth by scheming everyone around him and runs his tenement as an authoritarian leader.[5] After the proclamation of the republic in 1889, landlords' already bad reputation was worsened by an anti-Portuguese sentiment that associated them with the colonial and imperial old regimes.[6]

Since the 1870s, after a series of devastating yellow fever epidemics, imperial authorities had been waging campaigns against collective habitations in the city.[7] Their efforts to eliminate tenements were framed as measures to sanitize and thus "civilize" the imperial capital.

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[4] Ribeiro points out to the role of conflicts between tenants and tenement owners in the construction of an anti-Portuguese imagery in the city. According to her, since the 1890s, when Portuguese immigrants established a massive presence in Rio, their control over the housing market largely contributed to the resignification of racial and national prejudices against them. Gladys Sabina Ribeiro, "Por que Você Veio Encher o Pandulho aqui? Os Portugueses, o Antilusitanismo e a Exploração das Moradias Populares no Rio de Janeiro da República Velha," *Análise Social* 29, n. 127 (1994): 631-654.

[5] Aluísio de Azevedo, *O Cortiço* (Rio de Janeiro: B.L. Garnier, 1890).

[6] June E. Hahner, "Jacobinos versus Galegos: Urban Radicals versus Portuguese Immigrants in Rio de Janeiro in the 1890's," *Journal of Interamerican Studies and World Affairs* 18, n. 2 (1976): 125-154.

[7] In 1849-1850, more than four thousand had died of yellow fever. After equally deadly cholera and smallpox epidemics in the late 1850s and 1860s, yellow fever came back in 1868, and killed more than six thousand people in 1873. José Pereira Rego, *Esboço histórico das Epidemias que tem Grassado na Cidade do Rio de Janeiro desde 1830 a 1870* (Rio de Janeiro: Typographia Nacional, 1872); José Pereira Rego, *Memória Histórica das Epidemias de Febre Amarella e Cholera-morbo que Têm Reinado no Brasil* (Rio de Janeiro: Typographia Nacional, 1873).

Tenements had become symbols of free and unfree Afro-Brazilians' relative autonomy in the urban environment, the archetype buildings of the "black city." Slaves often blurred the lines between free, unfree, and conditionally manumitted by disappearing into the city's narrow alleys and hidden rooms.[8] Lack of control over the city was equated with lack of vigilance over what the elites deemed to be "dangerous classes." Adapted European ideas about hygiene and sanitation added a new dimension to the problem. The poor were not only dangerous because of their propensity to criminality, but also because they lived and reproduced in overcrowded and unhygienic spaces that were responsible for the spread of diseases and immoral conduct.[9]

In law and medical schools, lawyers and doctors increasingly espoused anti-popular politics and scientific racism. Doctors openly connected interventionist sanitation policies to racial and social evolutionism. Lawyers, in turn, defended a liberal state, nonetheless similarly embracing evolutionist thought. In law schools, liberal ideas about freedom and equality coexisted with deterministic approaches to criminal law. Even when they believed that race or environment determined a group's fate as degenerate criminals, lawyers argued that there was still space for perfecting the population through laws and education. Like the medical doctors,

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[8] Conditional manumission left people in an ambiguous state in-between slavery and freedom, contributing to the precariousness of freedom in nineteenth-century Brazil. Sidney Chalhoub, "The Precariousness of Freedom in a Slave Society (Brazil in the Nineteenth Century)," *International Review of Social History* 56 (2011): 405–439. Chalhoub argues that slaves transformed Rio in a "*cidade-esconderijo*" ("city-hiding place"), and that "the city that hides is, at the same time, the city that frees." Sidney Chalhoub, *Visões da Liberdade: Uma História das Últimas Décadas da Escravidão na Corte* (São Paulo: Companhia das Letras, 2009), 219.

[9] Sidney Chalhoub, *Cidade Febril: Cortiços e Epidemias na Corte Imperial* (São Paulo: Cia das Letras, 1996), 20-35.

law school graduates saw themselves as missionaries, whose mission was to drive the nation towards higher civilizational standards.[10]

Anti-tenement campaigns had continued under the republican government. Yet, despite the military operation that demolished the infamous Pig Head tenement, which inspired Azevedo's novel, in 1893, these campaigns never succeeded in completely "cleansing" the city. The early-twentieth-century sanitation project, based on the federalization of the capital's hygiene services, was an intensive effort to control, sanitize, and moralize the city's poor. Because decades of epidemics had affected poor and rich alike, Brazilian elites had developed a concern with the lower classes' health conditions. Their concern did not emerge out of a sense of social justice, but rather out of the perception that there was were invisible threats in the air, which affected everyone regardless of their social standing.[11] Removing tenements from downtown Rio was, therefore, an exclusionary measure to segregate and contain the "dangerous," "immoral," and "unsanitary" elements of society, creating elite immunity against their perils.[12]

Since the 1880s, engineer Luís Rafael Vieira Souto, who had been a member of the monarchy's Conselho Superior de Saúde Pública (Superior Council of Public Health), had called for a "dedicated and energized administrator," bold enough to defeat proprietors' and speculators' resistance to the implementation of "progressive measures." According to him,

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[10] Lilia Moritz Schwarcz, *O Espetáculo das Raças: Cientistas, Instituições e Questão Racial no Brasil, 1870-1930* (São Paulo: Cia das Letras, 1993); Nancy Stepan, *The Hour of Eugenics: Race, Gender, and Nation in Latin America* (Ithaca/London: Cornell University Press, 1991).

[11] Gilberto Hochman, *A Era do Saneamento: As Bases da Política de Saúde Pública no Brasil* (São Paulo: Hucitec, 2012), 52.

[12] Oswaldo Porto Rocha, *A Era das Demolições: Cidade do Rio de Janeiro, 1870-1920* (Rio de Janeiro: Prefeitura da Cidade do Rio de Janeiro, 1995).

strong hygiene authorities and sanitary courts should be created to protect the population's health, and ultimately save lives, despite property owners' resistance.[13]

Yet although he claimed to defend "progressive measures," Souto's concerns stood somewhere between public health and private gain. Throughout the 1880s, the imperial and, after 1889, republican government had entrusted private companies, such as Souto's Empresa de Melhoramentos do Brasil (Brazil Improvements Company), with the construction of *vilas operárias* (proletarian housing complexes), mostly located near factories, on the northern part of town. The alliance between government and capital aimed at generating three immediate benefits.[14] First, the construction business was part of an increasingly modern and dynamic urban economy, creating jobs and profits. Second, the housing complexes would substitute unsanitary tenements, thus addressing Rio's long-term sanitation problem. Finally, these complexes were supposed to contribute to the control of the city's working class. By fostering a controlled living space, they educated and regenerated poor Brazilians and immigrants to create and reproduce an obedient and healthy workforce, necessary for the city's and the nation's capitalist development.[15]

In 1906, mayor Pereira Passos announced the construction of 120 proletarian houses on Salvador de Sá avenue, which would be built with the demolition materials of buildings expropriated for the avenue's enlargement project. What Passos did not reveal was that his project was enough to house only around two thousand people, ten percent of those who had

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[13] L. R. Vieira Souto, *Organização da Hygiene Administrativa. Estudos de Direito Administrativo e Legislação Comparada* (Rio de Janeiro: Typographia Nacional, 1881), viii-ix.

[14] For Chalhoub, this "alliance between Science and Capital" was central to early-twentieth-century urban transformations. Chalhoub, *Cidade Febril*, 54.

[15] Lia de Aquino Carvalho, *Habitações Populares: Rio de Janeiro, 1866-1906* (Rio de Janeiro: Prefeitura da Cidade do Rio de Janeiro, 1995), 147-169.

been evicted to open space for new avenues and streets.[16] As evictions, expropriations, and demolitions aggravated the city's housing crisis, people increasingly crowded the city's remaining tenements, moved to distant suburbs, where access to work was extremely difficult, and squatted land on the hillsides, expanding the late-nineteenth-century hillside communities, to live in shacks under even worse sanitary conditions. Toleration of unsanitary living conditions on the hills and suburbs solved the elite's problem of removing the poor from downtown, while keeping them close enough to serve as available sources of cheap labor.[17]

1. Rio's Sanitary Court

"Crooked [*torto*], as in non-law, against the law, and torture [*tortura*] – torment caused to the accused." For lawyer Cunha Lobo, defending his client in a 1908 sanitary eviction suit, that was the double meaning of the Sanitary Code's popular nickname "*Código de Torturas*" (Tortures Code).[18] In May 1904, two months after the code became law, Leopoldo Duque Estrada de Figueiredo, author of a collective habeas corpus on behalf of Rio's citizens, had described it as an imminent threat to the city's population. According to the decree's detailed provisions on sanitary policing, Rio's residents could be subjected to vigilance, disinfection, isolation, vaccination, fines, prison, and eviction. To enforce these measures, the Public Health Authority counted on an army of deputies, inspectors, doctors, demographers, engineers, and

[16] Rocha, *A Era das Demolições*, 96.

[17] Carvalho, *Habitações* Populares; Sergio Pechman & Lílian Fritsch. "A Reforma Urbana e seu Avesso: Algumas Considerações a Propósito da Modernização do Distrito Federal na Virada do Século," *Revista Brasileira de História* 5, n. 8/9 (1985): 139-195.

[18] Arquivo Nacional, Fundo: Corte de Apelação – 20, Paschoal Segreto, 1908-1913, n. 1872, maço 326, gal. C.

pharmacists, in addition to the city's police forces.[19] Despite criticism that denounced its authoritarian character, the code also created the Juízo dos Feitos da Saúde Pública (Public Health Court), popularly known as Justiça Sanitária (Sanitary Court).

The Sanitary Court was an institutional experiment that lasted eight years. Its broad jurisdictional power included evictions, demolitions, condemnations, expropriations, fines, taxes, sanitary crimes, and "any action that could involve public health."[20] Nonetheless, like other courts, the Sanitary Court was prohibited from granting possessory injunctions against the sanitary authorities' acts exercised *ratione imperii*.[21] Questions about its cost, location, and functions were constantly raised throughout the Sanitary Court's existence. The central issue was whether the court had been created to expedite procedures, by restricting judicial guarantees, or to protect individual rights against the abuses of public health interventionism. In the 1903 cartoon representation that "translated" the *ratione imperii* doctrine to popular sectors, the Sanitary Court had been portrayed as an arbitrary institution committed to sanitary despotism. However, for eight short years, Rio's Sanitary Court both restricted and protected individual rights. Although reasons remain uncertain, the criticism it received since its creation, aggravated by pressure coming from the public health authorities, may explain why the court was extinguished.[22]

Debates about jurisdiction over health-related matters had existed in Brazil at least since the 1850s. Similarly to what happened in France around the same time, Brazilian politicians

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[19] Decreto n. 5156, de 8 de março de 1904.

[20] Decreto n. 5156, de 8 de março de 1904, arts. 280 and 281.

[21] Decreto n. 5156, de 8 de março de 1904, arts. 288 and 291.

[22] Queiroz, *Justiça Sanitária*,142-143.

discussed the necessity of a professional agency in charge of hearing sanitary infraction cases.[23] In 1850, during debates about the creation of the Junta de Hygiene Pública, an administrative agency in charge of public hygiene, congressmen had raised concerns about municipal judges' systematic dismissal of those cases. They had argued that only professionals, meaning those trained as sanitation engineers and doctors, could fully assess the gravity of health issues. Furthermore, those issues were often emergencies that required fast responses, if an epidemic was to be prevented or contained.[24]

In 1881, Vieira Souto criticized the "pernicious devotion to individual liberty" that had generated a Junta that lacked powers to enforce sanitation measures. Twenty years later, after the Junta had become the Public Health Authority, arguments for the creation of a sanitary court drew on those earlier debates. Members of the Rodrigues Alves government believed that the capital needed an institution capable of providing fast and well-informed responses to sanitary infraction cases.[25] However, under the 1891 Republican Constitution, administrative jurisdiction had lost space to the judicial power. Therefore, the powers previously thought of as being exclusive to the professional class of hygienists were attributed to a public health attorney and a judge, both trained in law. The resulting institution worked to balance technical and judicial procedures and arguments. While scientific expert reports were extremely important for the outcome of cases, there was space for claims about individual rights and procedural guarantees.

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[23] Ann-Louise Shapiro, "Private Rights, Public Interest, and Professional Jurisdiction," *Bulletin of the History of Medicine* 54, n. 1 (1980): 4-22.

[24] Souto, *Organização da Hygiene Administrativa*, 110-113.

[25] "O Processo Urbino," *O Século*, February 1, 1907. Throughout February 1907, the newspaper O Século published a series of reports on the controversies around the Sanitary Court, in defense of Portuguese Urbino de Freitas, deported from Brazil after being convicted for the illegal exercise of medicine.

People affected by the health authorities' often arbitrary and violent measures constantly pushed for the expansion of that space.[26]

The sanitary judge and the public health attorney were directly appointed by the President. They both earned high salaries, but only the former had tenure, renewable every four years.[27] For the judgeship, by suggestion of Minister of Justice J. J. Seabra, President Alves appointed Eliezer Gerson Tavares, a former lawyer and public employee in the northern states of Maranhão and Amazonas (Image 4.1). The public health attorney's office was led by Primitivo Moacyr, a close friend of influential doctor Afrânio Peixoto, and of Carlos Peixoto, Alves' government leader in the chamber of deputies (Image 4.2).

(Image 5.1 – Eliezer Gerson Tavares, sanitary court judge, appointed in 1904. "Dr. Eliezer Gerson Tavares," *Revista da Semana*, February 18, 1906)

[26] Eneida Queiroz, who wrote the only existing work on Rio's Sanitary Court, argues that people's success in transforming the court into an arena for the protection of their rights was an unintended consequence of the court's creation. Queiroz, *Justiça Sanitária*, 80.

[27] The judge earned twelve *contos de réis*, and had a renewable four-year tenure, while the attorney earned seven *contos* and 200,000 *réis* and could be replaced at any time. Decreto n. 5156, de 8 de março de 1904, art. 283 and Annex.

(Image 5.2 – Primitivo Moacyr and his sons in Geneva. "Fon-Fon na Suissa!", *Fon-Fon*, número avulso, 1909)

Congressman Barbosa Lima, part of the political opposition that mobilized the Vaccine Revolt in 1904, attacked the creation of a sanitary court on the basis of its cost. According to Lima, the judge's and public health attorneys' salaries, in addition to those of scribes and other costs, made the court excessively expensive. Its creation quadrupled the public health's budget during an economic crisis that had required large foreign loans. Furthermore, for the congressman, the court's jurisdiction was complicated, and it symbolized mistrust of the existing judicial system.[28] In fact, because the new decrees did not annul laws that attributed jurisdiction over sanitary infractions to criminal courts, the Sanitary Court's creation produced jurisdictional overlaps.[29] After the court was extinguished in 1911, those infractions were regularly tried by criminal judges.

The court's location was also disputed. Newspapers announced that it would be installed in the Public Health Authority's headquarters, but the opposition press complained that this

[28] "O Processo Urbino," *O Século*, February 1, 1907.

[29] "O Processo Urbino," *O Século*, February 7, 1907.

would subordinate the sanitary judge to Public Health Director Oswaldo Cruz, resulting in the court's loss of impartiality. To appease public opinion, the government changed the court's location to a building on Lavradio street. There, judge Tavares and his scribes shared space with a stable, where disinfection cars, pulled by horses, were parked daily. In November 1905, the court and stable building was destroyed in a fire, and the Sanitary Court moved to the República square, not far from Lavradio street (Image 4.3).

In eviction cases, lawyers demonstrated diverse attitudes towards the Sanitary Court. In a 1910 appeal, one lawyer argued that his client was not even aware that such a court existed.[30] Nonetheless, lawyers had to adapt to institutional innovation. On one hand, they attacked the court's jurisdiction and functioning for being subordinated to the executive power. In 1907, a lawyer suggested to the Court of Appeals that the sanitary judge was not exactly a magistrate because he lacked some of the office's privileges. According to him, the Sanitary Court was a special and purely administrative agency, part of an executive decree, the "Tortures Code," which violated citizens' rights.[31] On the other hand, however, lawyers also praised the court's existence, and reminded judges that its function was to protect individual rights against the public health authorities' abuses. Also in 1907, a lawyer urged the Court of Appeals to consider that the Public Health Authority resented the Sanitary Court's work, and tried to usurp its prerogatives.[32]

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[30] Arquivo Nacional, Fundo: Corte de Apelação – 20, Abel P. Guimarães, 1909-1912, n. 2074, maço 337, gal. C.

[31] Arquivo Nacional, Fundo: Corte de Apelação – 20, Maria T. F. e Souza, 1907-1909, n. 1755, maço 319, gal. C.

[32] Arquivo Nacional, Fundo: Juízo dos Feitos da Saúde Pública do Rio de Janeiro – 40, Manuel J. Fernandes, 1907, n. 1218, caixa 484, gal. A.

Throughout the Sanitary Court's existence, defendants were acquitted or obtained reductions in fines in almost half of the cases.[33] Fears that the court would be subservient to the public health authorities' interests, therefore, did not concretize. People's insistence in defending themselves, and the Court of Appeals' rectifying function, kept the new court in check. While liberal lawyers and oppositionist politicians and journalists accused Oswaldo Cruz of installing a medical-sanitary despotism in the city, the sanitation plan's judicialization opened space for resistance.

(Image 5.3 – A picture of what was left of the building on Lavradio street that hosted the Juízo dos Feitos da Saúde Pública after the November 1905 fire. "O Incêndio da Rua do Lavradio," *Revista da Semana*, November 19, 1905)

[33] Queiroz, *Justiça Sanitária*, 30. The newspaper O Século confirms this estimate, stating that the judge ruled many times against the Public Health Authority. "O Processo Urbino," *O Século*, February 8, 1907.

2. "Half of the city"

"It would be necessary to demolish at least half of the city of Rio de Janeiro (...) to satisfy all the sanitary and construction codes' requirements."[34] With these words, quoting an expert report he had ordered, sanitary judge Eliezer Tavares denied eviction against Antonio Gonçalves Reis, in December 1909. Even the judge charged with enforcing the Sanitary Code recognized that its goals were unrealistic. The gap between law and the city's material reality was too large. Rio's old colonial buildings, whether working-class collective houses or upscale residences and businesses, rarely fit the new standards. They lacked illumination, ventilation, and proper kitchens and bathrooms. Many were internally divided by wooden walls, a cheap solution to transform spacious colonial rooms into several small rental units. The science that had become law in the Sanitary Code indicated that these crowded, dark, airless, and ill-equipped buildings promoted the spread of bacilli, constituting focuses of epidemics.

Nonetheless, the code's mandates were subject to interpretation. Sanitary agents routinely inspected the city, producing reports that ordered improvements, imposed fines, and requested evictions. When cases reached the Sanitary Court, defendants who disagreed with the sanitary inspector's assessment had the prerogative to request a judicial inspection. This court-ordered inspection was conducted by experts who represented each party – similarly to the Municipal Treasury Court's arbitrations that determined indemnification values in eminent domain procedures. Sanitary agents and judicial experts were members of the city's technical elite of doctors and sanitary engineers. Despite their aspiration toward objectivity, different expert reports reached different conclusions, producing conflicting narratives about the city's hygiene

[34] Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio Gonçalves dos Reis, 1910, n. 2083, maço 338, gal. C.

conditions. Moreover, Sanitary Court decisions did not depend exclusively on scientific expert opinions. Public health attorneys, on one side, and defense lawyers, on the other, drew on reports to state their cases, adding yet another interpretive layer to those narratives. To the formers' description of old, unsanitary, and disease-filled buildings, the latter opposed a picture of edifices that were indeed old, but fully functional to the city's housing needs.

In November 1908, a sanitary inspector, an engineer, a health deputy, and a representative of the proprietor had inspected Reis' building at 337 Cattete street, between the city's center and its increasingly upscale southern areas. The resulting report stated that the building needed improvements in sanitary installations, the kitchen, room ventilation and illumination, the ceiling's height, and the floor's impermeability, among other details, such as the quality of wall paint. The public health attorney had relied on this report to ask judge Tavares for eviction. Yet, a year later, when Tavares ordered the judicial inspection, things seemed to have changed. The new inspection report was clear: the building did not constitute a threat to public health or to its residents. Sure, some minor renovations were needed. But everything could be done without removing the tenants. The building, like many others, was merely old, erected before the current legislation was passed. To satisfy the detailed and demanding sanitary inspector's report, it would have to be demolished and replaced with a new one. But if this fully functional building had to be evicted and demolished, "half of the city" would also have to fall.[35]

In Reis' defense, his lawyer argued that the sanitary agents and attorneys had acted out of "aesthetic prejudice." To acquit the defendant, judge Tavares stated that the Public Health

[35] Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio Gonçalves dos Reis, 1910, n. 2083, maço 338, gal. C.

Authority did not have power over matters concerning the city's beautification.[36] In legislation and legal doctrine, the difference between beautification and sanitation was translated into the concepts of public utility and necessity. While utility referred to the enhancement of streets, squares, and buildings, necessity referred to emergencies, including sanitary hazards. In the capital city, various municipal and federal authorities oversaw different projects of urban enhancement and sanitation. It seemed clear nonetheless that the federal Public Health Authority oversaw matters of public necessity. Yet, in Rio's urban reform, beauty, urban integration, and sanitation intertwined. Prevalent ideas indicated that broad avenues, streets, and squares were aesthetically pleasant, improved traffic flow, and enhanced the circulation of air to contain the spread of diseases. High ceilings and open patios – both recommended by the November 1908 report – addressed aesthetic standards and facilitated internal ventilation and illumination, understood as crucial features against contaminations.

Based on the distinction between utility and necessity, lawyers accused sanitary agents of acting on issues that were outside of their authority. This happened, for example, when reports such as that of 1908 were written using both the federal Sanitary Code and the municipal Constructions Code, which detailed standards for new edifications, as frames of reference. In the judicial eviction of 154 Senado street, the defense lawyer argued that there was "a unique anomaly in the report, which proves the appellee's despotism and incoherence. (…) It [the Public Health Authority] convicts based on the infringement of principles that are none of their business, which belong to a different public agency!"[37]

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[36] Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio Gonçalves dos Reis, 1910, n. 2083, maço 338, gal. C.

[37] Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio Augusto da Silva Carvalho, 1906-1913, n. 3150, maço 394, gal. C.

Another common complaint concerned what seems to have been a coordinated strategy between federal public health agents and city officials. As we have seen, when sanitary inspectors ordered improvements, city officials denied the licenses necessary to execute them. With their hands tied, proprietors failed to comply with sanitary inspectors' demands, thus opening the path towards eviction. According to another defense lawyer, this strategy was a "true iniquity and an illegal restriction on the usage of property."[38] The intertwinement between sanitation and beautification produced these administrative contradictions, and lawyers denounced them as legal inconsistencies in the state's intervention on property rights.

Although the sanitation campaign aimed largely at ridding the city of historically low-income collective habitations, federal and municipal administrators applied those controversial methods to all kinds of buildings. Close to Reis' tenement, also located on Cattete street, stood the Hotel Victoria. Newspaper advertisements for this hotel indicate that it hosted members of the Brazilian elite. The hotel was very well located, near downtown, next to the Largo do Machado streetcar station, and close to the ocean, which in the early twentieth century began to be associated with a high-class lifestyle. The ads highlight that the most influential families from the states of Minas Gerais and São Paulo, whose oligarchies alternated in the federal executive power, were frequent guests at the Victoria (Image 4.4). Yet, since at least 1905, health authorities showed concern with its sanitary conditions. A health inspector's report from June 1906 indicated that the hotel had wooden divisions between rooms – a common structural feature of the city's tenements – and recommended their removal. In January 1908, the public health attorney finally asked the Sanitary Court to order the hotel's eviction. The defendant was owner

[38] Arquivo Nacional, Fundo: Corte de Apelação – 20, Paschoal Segreto, 1908-1913, n. 1872, maço 326, gal. C.

Carlos Moraes de Almeida, who had rented the building from Rosa Amelia Gomes Bastos. Although judge Tavares initially ordered eviction, after a defense motion, he reconsidered, acquitting Almeida. Nonetheless, the public health attorney was determined, and thus appealed to the Court of Appeals.[39]

(Image 5.4 – Advertisement for the Hotel Victoria, published in the city of Juiz de Fora, state of Minas Gerais – "Great Hotel Victoria. Cattete Street, 184. Rio de Janeiro. This respected establishment is the prime destination for the families from São Paulo and Minas and the best located of the capital. It is next to the Largo do Machado, streetcar station to all points of the city and its proximities, near the Parque Fluminense, and with all resources at its door. Streetcars every minute. Sea bath in the neighboring beaches Flamengo and High-Life. Doctors, pharmacy, cars, and *tylbures* at any time of day or night, finally, everything that one desires. Its proprietor receives the best wines directly from Europe, and has everything that a good table requires. Has just made renovations to make the establishment worthy of its guests, being therefore able to give them treatment with all comfort, for reasonable price, and offer all guarantees of safety and tranquility. Cold and hot showers whenever. The proprietor. Carlos Moraes de Almeida" – "Grande Hotel Victoria," *Pharol*, September 4, 1900)

Since the first sanitary inspections, Almeida had been asking the city for licenses to undertake renovations. City officials frequently denied those licenses, insisting that the building had to be reconstructed, not renovated. In turn, Almeida's lawyer argued that the reports only recommended minor improvements, such as the removal of wooden divisions, which did not affect the building's structure. The hotel had, for instance, a large uncovered central area, with intense penetration of air and light, the two main conditions for good hygiene. Furthermore, later

[39] Arquivo Nacional, Fundo: Corte de Apelação – 20, Carlos M. de Almeida, 1908-1909, n. 3301, maço 401, gal. C.

inspections indicated that the improvements could be made while the hotel's permanent and itinerary guests used its facilities. In April 1908, before the Court of Appeals, the lawyer suggested that it was the public health authorities' responsibility to convince municipal agents that they had made a mistake in not granting those licenses. Yet, caught in this allegedly concerted institutional scheme, Almeida was powerless, and the hotel doomed. In October 1910, the Court of Appeals finally decided, reverting the sentence to confirm the eviction. They found both the sanitary report and the denial of licenses valid, and not contradictory, given the buildings' conditions.[40] Because they considered the building a sanitary hazard, the appeals judges turned a blind eye to the fact that city officials had prevented Almeida from bringing it up to code.

The Victoria case reveals that, in a city where "half" of the buildings were in violation of sanitary and construction codes, eviction and demolition could potentially affect anyone. Sanitary laws and policies were products of racially biased scientific beliefs and anti-popular political predispositions that had been demonizing the poor's living spaces since the 1870s. The "Tortures Code" contained an annex that, to "avoid divergent interpretations," defined collective habitations, and several articles that specifically targeted them.[41] One of the most common questions directed at experts in charge of judicial inspections was whether the building was an

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[40] A Public Health Authority memorandum from August 1909 informed the Court of Appeals that the hotel had been demolished "a long time ago," but the circumstances of that demolition are for now unknown. Nevertheless, the trial continued because there were other effects at stake. For example, the determination of who would have to pay for judicial costs. Arquivo Nacional, Fundo: Corte de Apelação – 20, Carlos M. de Almeida, 1908-1909, n. 3301, maço 401, gal. C.

[41] The seven types were *avenida*, *estalagem*, *cortiço*, *albergue*, *hospedaria*, *casa de commodos*, and *casas de pensão e hotéis*. Decreto n. 5156, de 8 de março de 1904, Notas Explicativas. Although these types had different structures and rent prices, and receive slightly different treatment by the sanitary authorities, they were all "collective habitations." Therefore, to simplify, I refer to them as "collective habitations" or "tenements."

habitação coletiva (collective habitation).[42] In a 1910 eviction suit against João Jacintho Cordeiro, the public health attorney summarized the Public Health Authority's explicit interest in shutting down tenement-like buildings by arguing that regarding collective habitations the "authority had to be more rigorous than the law."[43]

Yet, since hotels were also considered to be a type of collective habitation, the upscale Hotel Victoria was equally targeted by public health agents. In his attempt to save his business, Almeida offered to produce the "trustworthy testimonials of the most eminent politicians, judges, doctors, lawyers, etc., who had lived there with tranquility." In response, the public health attorney stated that it was unfortunate that in a hotel that received "diplomats, political figures, and magistrates," "the cream of Brazilian society," the bathrooms – the "basis of hygiene" – were incomplete and in poor condition.[44] It turned out that, as public health attorney Moacyr suggested in another case, "the distinction between edifice and collective habitation" was "foolish."[45] Although tenements were depicted as the most problematic feature of Rio's sanitary environment, according to the new Sanitary Code's standards, even part of the city's and nation's elites lived in unhygienic spaces.

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[42] The question was asked, for example, in Cordeiro's case. Arquivo Nacional, Fundo: Corte de Apelação – 20, João Jacintho Cordeiro, 1910-1913, n. 2059, maço 337, gal. C.

[43] Arquivo Nacional, Fundo: Corte de Apelação – 20, João Jacintho Cordeiro, 1910-1913, n. 2059, maço 337, gal. C.

[44] Arquivo Nacional, Fundo: Corte de Apelação – 20, Carlos M. de Almeida, 1908-1909, n. 3301, maço 401, gal. C.

[45] Arquivo Nacional, Fundo: Corte de Apelação – 20, José Pereira da Silva, 1910, n. 2061, maço 337, gal. C.

3. Discretion, sentimentalism, and vengeance

Legislation had granted administrative agents high levels of discretion and independence. For scientists, administrative law jurists, and politicians, administrative empowerment was a necessary feature of the modern state's responsibility toward people's health and living environment. In theory, discretion was a space of mediation between the state – an abstract political entity – and its citizens and residents – abstract individual beings. On the ground, however, discretion, which created flexibility regarding which buildings were targeted and how their conditions were assessed, could be the space of personal disputes. Because Rio was also the capital, federal sanitary agents were not distant bureaucrats, but rather neighbors, acquaintances, enemies, and friends. Therefore, their roles as reformers often intertwined with their relationships with proprietors, managers, and tenants. While liberal lawyers accused Passos and Cruz of ruling the city as tyrants, agents in charge of enforcing codes used their discretionary powers in the most intimate ways.

In October 1905, Maria Theodora Ferreira e Souza, widow and mother of nine underage children, begged the Public Health Authority to wave the fine she had received for sanitary violations in her building on General Caldwell street, one of several old tenements located there.[46] In a dramatic request, Souza asked not to be "unjustly and inhumanely forced into disgrace." She claimed that the building was her children's only, and still insufficient, source of income. After sanitary inspector Luna Freire had notified her, she had pawned her jewelry and taken a loan to pay the "enormous sum" of two *contos de réis* for the building's renovation. Nonetheless, inspector Sá Pereira, who substituted Freire in the case, had arbitrarily decided to make further demands. According to hygiene deputy Barroso do Amaral, who denied Souza's

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[46] Carvalho, *Habitações Populares*, 144.

request, Freire had been soft on the code's enforcement for "sentimental reasons." Was the inspector lenient out of sympathy for the widow's struggle to raise her children? Amaral further blamed the delay in sanitizing the region on the federal government. Souza's and other unsanitary tenements and collective houses had been expropriated in 1894 for the enhancement of the area around the Casa da Moeda (National Treasury) headquarters, but no compensation or seizure had taken place.[47]

Complaints about sanitary agents' unconventional methods, which included dishonesty, intimidation, and violence, were common. In Souza's own account – she signed all Sanitary Court petitions, initially dispensing with a lawyer - deputy Barroso do Amaral frequently threatened her and the building's residents to the point that he had disrespectfully invaded her tenants' homes and yelled at them to move out. Sanitary inspector Sá Pereira was "violent, disrespectful, and vengeful." Furthermore, after Souza contested the initial report, Amaral, Pereira, and their close friend, a young and unexperienced engineer, had amicably forged a new report that confirmed the old one. For Souza, the three friends had schemed to preserve Pereira's professional reputation as an unbiased scientist.[48]

Souza's case is important not only because of its detailed account of how the sanitary inspectors' discretion, as well as conflicting governmental interventions, determined the Sanitary Code's impact on the city. It was also a jurisprudential landmark in the relationship between the Sanitary Court and the Court of Appeals. Lawyers articulated the liberal constitutional narrative, claiming that evictions were part of the city's exceptional regime of arbitrary and violent attacks

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[47] Arquivo Nacional, Fundo: Corte de Apelação – 20, Maria T. F. e Souza, 1907-1909, n. 1755, maço 319, gal. C.

[48] Arquivo Nacional, Fundo: Corte de Apelação – 20, Maria T. F. e Souza, 1907-1909, n. 1755, maço 319, gal. C.

on individual property rights. They argued that eviction necessarily reduced one's patrimony, therefore constituting a form of expropriation not sanctioned by the 1891 Constitution.[49] When they appealed, owners asked the Court of Appeals to immediately suspend the effects of the sanitary judge's eviction order. According to the Conde de Diniz Cordeiro, a property owner and lawyer deeply engaged in the proprietors' resistance against the reforms, "once the eviction is executed, the rent contract can never be reestablished."[50] The legal fine print of this debate was the question of whether evictions were criminal penalties. If they were, as the health attorneys argued, based on criminal procedure guarantees, they could only be enforced after the appeals decision.

This interpretation, which benefited proprietors and slowed down the sanitation project, gained traction in September 1907 when the Court of Appeals suspended Souza's eviction until a final decision was made. It is unclear why they did it, but the case's idiosyncrasies, and especially the proprietor's vulnerable condition, may have influenced them. Did the court act out of sentimental reasons, as Luna Freire allegedly had? The court's justification, based on arguments made by Souza's appeals lawyer Cicero Freire, was that eviction was a criminal penalty that reduced patrimony, and therefore its immediate application violated both criminal procedure and the constitutional right to property.[51] A product of sentimentalism or not, the

[49] The 1891 Constitution protected property in "all its plenitude," with the only exception of expropriations for public necessity or utility (Constituição da República dos Estados Unidos do Brasil, de 24 de fevereiro de 1891, art. 72, §17).

[50] Arquivo Nacional, Fundo: Corte de Apelação – 20, Narciso F. da S. Neves, 1907-1909, n. 1569, maço 309, gal. C.

[51] Arquivo Nacional, Fundo: Corte de Apelação – 20, Maria T. F. e Souza, 1907-1909, n. 1755, maço 319, gal. C. Court of Appeals judge Enéas Galvão, who would reach the Supreme Court in 1912, consistently registered his dissent opinion in later similar cases, arguing that evictions did not violate property rights.

court's decision became precedent and was subsequently cited by other property owners' defense lawyers to avoid immediate evictions.[52] Finally, in 1909, the Court of Appeals acquitted the widow, annulling the eviction order. If they had not suspended the eviction two years before, Souza would have lost her precious income, and her tenants would have lost their homes, without legal cause.

In the 1906 case of Antonio Pinto de Almeida, the Sanitary Code's enforcement intertwined with personal disputes about money and family. The same discretion that allowed Luna Freire to be lenient with a struggling widow for "sentimental reasons" opened space for arbitrary actions. A refusal to loan money and a failed attempt to remove a sick child led health deputy França Rangel to order improvements in several of Almeida's properties in the port area of Gamboa, nearby the Ladeira do Livramento, where once stood the famous Pig Head tenement. Although the buildings' improvements may have been necessary, Rangel's deadlines were incredibly short, and he denied all requests for extensions. Unable to meet the unrealistic requirement of improving multiple buildings on short notice, Almeida was fined and had to defend himself in court. For that, he contacted the Centro de Assistência Judiciária (Center for Judicial Assistance), which provided legal services for a small monthly rate.[53]

Almeida argued that he had been fined because he had refused a money loan to Augusto Cunha, the health station's scribe. Cunha had sent Almeida a note asking his "friend" for the "favor" of 10,000 *réis*, to be paid back a couple of weeks later (Image 4.5). To support his case,

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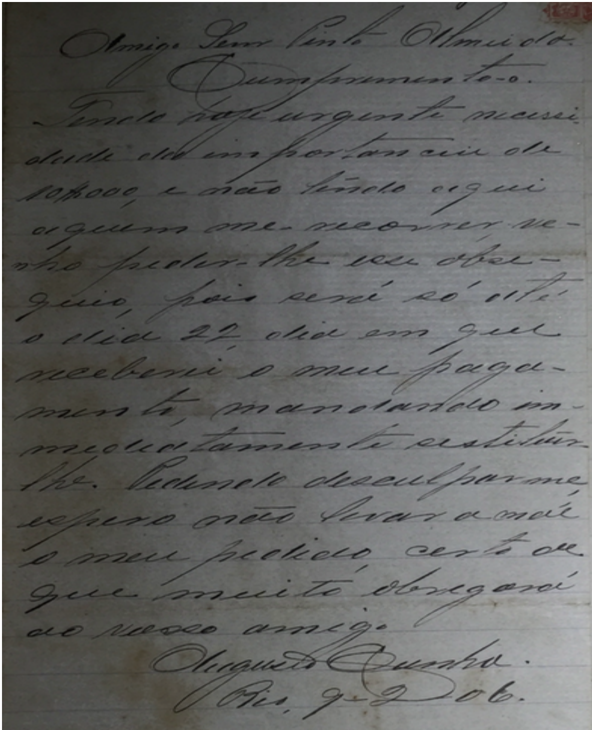
[52] For example, in Arquivo Nacional, Fundo: Corte de Apelação – 20, Manuel P. A. de Moraes, 1905-1911, n. 3149, maço 394, gal. C; Arquivo Nacional, Fundo: Corte de Apelação – 20, Narciso F. da S. Neves, 1907-1909, n. 1569, maço 309, gal. C; Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio A. da S. Carvalho, 1906-1913, n. 3150, maço 394, gal. C.

[53] Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio P. de Almeida, 1906, n. 1190, maço 289, gal. C.

Almeida brought two Portuguese painters and a construction worker as witnesses. Joaquim Baptista, Manuel Correa, and Albano Montenegro had been hired to undertake the buildings' improvements. Their testimonials confirmed that their work had been completed, but none of the witnesses knew whether they had met the notification's deadline. Painter Baptista declared that he had seen a local health station's employee delivering Cunha's note. However, when inquired by public health attorney Moacyr, he confessed that he only knew that because Almeida had told him. Montenegro, who also said he had seen the note, lived nearby, on Monte street. As a member of the neighborhood, he could confirm that Almeida's personal quarrels with health deputy França Rangel were notorious, and went beyond Almeida's refusal to loan the scribe money. As described in the defendant's petition, Rangel had tried to forcefully remove Almeida's son from his house under allegations that the child was infected with smallpox. The removal had been prevented because the father managed to pay for his son's home treatment. Yet, when the child was already cured, Almeida had to prohibit Rangel from entering his house. The proprietor's lawyer described Rangel's acts as persecution based on a vicious decree – the "Tortures Code" -, which proved that, in Brazil, "force overcame law."[54] The judicial records do not contain the Court of Appeals' final decision, which makes one wonder whether Almeida and Rangel settled their disputes outside of court.

[54] Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio Pinto de Almeida, 1906, n. 1190, maço 289, gal. C.


Amigo Senr Pinto Almeida.
Cumprimento-o.
Tendo hoje urgente necessidade da importancia de 10$000, e não tendo aqui a quem me recorrer venho pedir-lhe esse obsequio, pois será só até o dia 22, dia em que receberei o meu pagamento, mandando immediatamente restituir-lhe. Pedindo desculpar-me espero não levar a mal o meu pedido certo de que muito obrigará ao nosso amigo.
Augusto Cunha.
Rio, 9-2-06.

(Image 5.5 – Note from health station's scribe Augusto Cunha asking defendant Antonio Pinto de Almeida for a loan, attached to Almeida's defense in the trial records. Arquivo Nacional, Fundo: Corte de Apelação – 20, Antonio Pinto de Almeida, 1906, n. 1190, maço 289, gal. C – "Friend Pinto de Almeida. I salute you. Having an urgent need for the sum of 10$000, and not having anyone to ask, I hereby ask you for this favor, given that I will immediately pay you on the 22nd, when I receive my salary. I apologize and expect that you don't take this request the wrong way, given that it will burden you, my friend. Augusto Cunha, Rio, 9-2-06")

The Sanitary Code's daily and discretionary enforcement was filled with instances of sentimentalism and vengeance. Yet, when cases reached the Sanitary Court and the Court of Appeals, the parties had to articulate legal arguments. In judicial practice, public health attorneys expressed the sanitation project's progressive concerns with the poor's living conditions. Property owners, represented by defense lawyers, advanced liberal arguments about the protection of individual rights and procedural guarantees. When read against the grain, however, their petitions reveal the coexistence between liberal and progressive thinking and ideologies of racial and social exclusion, as well as a blunt silence regarding the fate of those evicted.

4. Progressive and liberal silences

Before the courts, public health attorneys made progressive arguments about the "collective" or "public" interest in the poor's health. Drawing on and reinforcing tenement

owners' and managers' bad reputation in the city, Moacyr and his team accused them of exploiting human lives for profit by forcing tenants into overcrowded and unsanitary living conditions. In the words of public health attorney André de Faria, defending the eviction of Paschoal Segreto's building near Tirandentes Square, it was "unacceptable that the high interests of Public Health remained subjugated by the economic caprices of proprietors."[55] The Italian businessmen personified a class of greedy immigrants who exploited the city's workers. In the health attorneys' discourse, public concerns with the poor's health led to the weakening of property rights. From this point of view, pushbacks, such as the Court of Appeals' decision in favor of property owner Maria Theodora Souza, were conservative defenses of proprietors' and speculators' private power. According to the attorneys, theirs and the hygiene agents' mission was to protect Rio's inhabitants from the blight that had made so many fall sick and die.

Alfredo Pinto do Carmo took the managers' bad reputation even further. This tall, blonde, and charming young man, who sometimes used the last name Bastos, gained notoriety in the press for running a housing market scheme. According to reports published in May, 1905, Carmo – or Bastos, nobody could tell his real name for sure – was a con man. He had rented more than a dozen buildings across the city, divided them into small units, and sublet those units to poor individuals and families. After having collected their rents, Carmo had disappeared without paying the buildings' owners.[56] One of those buildings was located at 977 Conde de Bonfim street, in the Tijuca neighborhood, on the northern part of town.

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[55] Arquivo Nacional, Fundo: Corte de Apelação – 20, Paschoal Segreto, 1908-1913, n. 1872, maço 326, gal. C.

[56] "Rocambolesco. Um Velhaco. Os Bens da Viuva," *Gazeta de Notícias*, May 28, 1906; "Queixa Grave," *Correio da Manhã*, May 28, 1906.

Between 1909 and 1911, Carmo defended himself in an eviction suit regarding the Conde de Bonfim tenement. Before the Court of Appeals, public health attorney Moacyr claimed that the manager was a "greedy exploiter of poor people," and that the eviction was based on both law and "piety towards the unsanitary building's poor tenants, unashamedly exploited by usurers." But, despite Moacyr's efforts, in June 1911, the Court of Appeals decided in Carmo's favor based on a formal mistake, hence annulling the Sanitary Court's eviction order.[57] A couple of months after winning the appeal, Carmo disappeared without paying rent, insurance, or taxes, and thus leaving the building's proprietors no choice but to sue him in civil court. There, Carmo was sentenced to pay them six *contos de réis*.[58] Nonetheless, given that he was known for ingeniously avoiding the police, the proprietors may have never seen him again. As for the building's tenants, they were left in an even more vulnerable standing, without any guarantees to their current living situation. After all, they had paid rent to an illegitimate, and now missing, landlord.

The hygienist ideology that had been justifying tenement removal since the late nineteenth century equated the urban poor with disease, immorality, and crime. Yet, attorneys on both sides showed a public commitment to progressive and liberal ideas. When they asked for eviction, public health attorneys did not rely on the deterministic associations between biology,

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[57] The court decided based on the lack of the judge's signature on the decision appealed. The public health attorney used one last internal appeal to question the court's approach to this technicality, but the records end with this request, without a decision on the matter. Arquivo Nacional, Fundo: Corte de Apelação – 20, Alfredo P. do Carmo, 1909-1911, n. 2087, maço 338, gal. C.

[58] "Tribunaes e Juízos," *A Imprensa*, October 24, 1911.

environment, and crime that penetrated Brazilian law schools.[59] Nor did they focus on the prevalent hygienist image of tenement residents as unsanitary and dangerous people. Their seemingly progressive arguments were coupled with an implicit belief that the Sanitary Code was an exemplary piece of liberal legislation, protective of the public good and applicable to all without distinction. Despite the clear targeting of working-class houses, the eviction of establishments such as the Hotel Victoria seemed to confirm the code's potentially unbiased application. To contest evictions, proprietors' lawyers also rarely mentioned tenants. Their defense was based on the equally liberal notion of individual property rights. In their petitions, they evoked a sacred conception of property, absolutely shielded against state interventionism. Nevertheless, both public health attorneys and defense lawyers occasionally revealed dominant elite perceptions towards tenement residents. When they did, progressive and liberal ideas intertwined with the anti-popular and racialized thinking that characterized elite-made science and liberal politics in early-twentieth century Brazil.

In April 1910, Moacyr was eager to evict the occupants of Carmo's building on Conde de Bonfim street. To him, health authorities had been tolerant towards the manager, who had been exploiting the building's residents so torpidly. Although he claimed to speak in favor of Carmo's tenants, the exploited "poor people" who suffered the consequences of insalubrity, Moacyr specifically mentioned just one of them. While walking into one of the wooden "huts" during the judicial inspection – the health attorney recollected - he had seen a poor woman, who paid Carmo 20,000 *réis* monthly for the "stable" where she lived. In Moacyr's words, the woman

[59] Schwarcz, for example, argues that the politically dominant São Paulo law school was the site of a rhetorical and façade liberalism, which coexisted with social evolutionism and anti-popular authoritarianism. Schwarcz, *O espetáculo das raças*, 180-182.

"was a true culture of the tuberculosis bacillus."[60] Because she remained silent in the court records, it is hard to tell whether that woman was aware that the men she encountered inspecting her home sought to condemn the building and evict the residents. But the way Moacyr incidentally described her reminds us that the public health attorneys' progressive concerns could go hand in hand with the biological association of the poor with the spread of diseases. The woman appeared as an embodiment of the bacillus, and therefore a living threat to the city's health. She was simultaneously the victim of poor sanitary conditions and a sanitary hazard herself.

In August 1911, defending Paschoal Segreto against another eviction in the Tiradentes square area, lawyer Cunha Lobo revealed how he and his client, owner and administrator of several tenements, viewed tenants. As he developed an argument about the difference between eviction – targeted at residents – and notification – directed at the landlord -, Lobo stated that the only thing Segreto and his tenants had in common was to "belong, in the Zoological scale, to the class of homo sapiens."[61] Lobo, therefore, made a social distinction to support his legal claim about the existence of two different procedures. From the standpoint of liberal law, the differences between tenants and landlords were based on rights and obligations attributed to each equally capable party in a rent contract. There was no place within this line of thinking for social differentiations among abstract legal subjects. However, the lawyer's petition associated legal differences to deeper inequalities between two distinct classes of human beings. Segreto was not only white, but also European, thus reinforcing the racial schism that separated him from his

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[60] Arquivo Nacional, Fundo: Corte de Apelação – 20, Alfredo P. do Carmo, 1909-1911, n. 2087, maço 338, gal. C.

[61] Arquivo Nacional, Fundo: Corte de Apelação – 20, Paschoal Segreto, 1909-1912, n. 2071, maço 337, gal. C.

tenants. Although lawyers presented themselves as liberal thinkers, liberalism and the idea of racial and social superiority were not contradictory in Brazil. In law schools, and occasionally in courts, they coexisted in the discourse of an elite that connected the "civilized" nations' taste for liberal principles to their social and biological traits.

Apparently progressive concerns with the poor's sanitary living conditions did not translate into concerns with the city's housing crisis and relocation. Public health attorneys insisted that if a proprietor repeatedly failed to meet the sanitary inspector's recommendations, the Sanitary Code mandated eviction, even if the building in question was habitable and suitable for sanitation. Eviction, together with a 200,000 *réis* fine, was thus a penalty for infraction.[62] Attorneys often reminded the judge that this penalty should be enforced even when it was possible to save the building. "It doesn't matter," "we don't want to know" – they confessed.[63] Rio's buildings were indeed old and in precarious sanitary conditions. But expert reports indicated that, on many occasions, renovations without eviction were possible. Nonetheless, despite their progressive arguments, public health attorneys were not interested in saving people's houses, but in punishing proprietors and managers, and consequently displacing their tenants.

Defending his obviously dishonest client, Carmo's lawyer claimed that the "inquisitorial" Sanitary Code should be interpreted not as "a weapon against the citizen," but as a "guarantee of the houses' sanitation." Yet, sanitary inspector Julio da Silva Maia had decided that Carmo had to be "sacrificed for whoever wanted to make Conde de Bonfim street into an Avenida

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[62] Decreto n. 5156, de 8 de março de 1904, arts. 91 and 98.

[63] Arquivo Nacional, Fundo: Corte de Apelação – 20, Carlos M. de Almeida, 1908-1909, n. 3301, maço 401, gal. C; Arquivo Nacional, Fundo: Corte de Apelação – 20, Abel P. Guimarães, 1909-1912, n. 2074, maço 337, gal. C.

Central."[64] With this subtle reference, the lawyer evoked the association between public projects and private interests that had been present in Rio since the late nineteenth century. In the eviction of Abel Guimarães' pharmacy, located at a valuable commercial area near the new Avenida, the owners' lawyer made a similar point, rhetorically asking "What is behind all this? Simple caprice, or the provision of a service to someone who is interested in the building?"[65]

Similarly to the Avenida's project, the demolition of tenements served a dual purpose of promoting the public good and benefiting land speculators and construction companies, such as Vieira Souto's. Since they first appeared, the proletarian housing complexes, which were supposed to substitute tenements, had been sources of profit, instead of actual solutions to the housing crisis. Just as Passos remained silent regarding his Salvador de Sá housing project's insufficiency to house the enormous contingent of displaced persons, public health attorneys stated their cases in court without acknowledging the problem. While Moacyr and others seized every opportunity to denounce property owners' greed and exploitative gains, they eclipsed the fact that there was no articulated governmental plan in place to relocate the evicted population. As a consequence of public health attorneys' judicial victories, people lost their homes and were forced into even worse living conditions, far from work, crowded in remaining tenements, or in precarious shacks on the city's hillside.

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[64] Arquivo Nacional, Fundo: Corte de Apelação – 20, Alfredo P. do Carmo, 1909-1911, n. 2087, maço 338, gal. C.

[65] Arquivo Nacional, Fundo: Corte de Apelação – 20, Abel P. Guimarães, 1909-1912, n. 2074, maço 337, gal. C.

5. “Indeterminate people”

The woman who Primitivo Moacyr saw in the Conde de Bonfim street “hut” was presumably sick and powerless. Like a large part of the city’s population, she lived between two dangers. On one side, terrible hygiene conditions. Collective houses lacked sanitary bathrooms and kitchens, illumination, and air. Epidemics were common, and the poor suffered the most. On the other side, the sanitation project’s evictions. Presented in courts as a progressive measure, eviction removed people from their homes, without much alternative. Although evictions affected both landlords and tenants, only the former contested them to the law’s full extent, taking cases up to the Court of Appeals. Outside the racialized stereotypes occasionally portrayed by health attorneys and lawyers, tenants appeared in those court records only at the moment of eviction. It was as if they were not there, until it became necessary to forcefully remove people from inside their homes. The landlords’ attitude towards their tenants’ fate varied from strategic silence to active confrontation and unexpected collaboration.

Even with judicial intervention, procedures moved fast, creating further insecurity in housing. When public health inspectors deemed it necessary, their reports prompted the Public Health Authority to order eviction. The usual deadline was thirty days, followed by shorter ones, from eight to fifteen days, when new notifications were issued. Judicial evictions, which resulted from successive failures to comply with those notifications, were harsher. First, judge Tavares issued an eviction notice, ordering the defendant – either proprietor or manager – to evict the building in twenty-four hours. When this order was disobeyed, Tavares issued a second notification, which ordered the *oficiais de justiça* (court officials) to forcefully evict residents and remove their belongings in twenty-four hours. According to the Sanitary Code, police forces

were obliged to provide "all direct and indirect support requested in the interest of public health," and court officials often requested police backup for evictions.[66]

In the eviction of Paschoal Segreto's building at Tiradentes Square, Segreto's lawyer made a procedural argument, claiming that the property owner's and manager's notifications were different from the residents' eviction. For him, evictions were brought against "indeterminate people," meaning the building's occupants. In response, the public health attorney argued that "indeterminate people" meant proprietors, managers, and tenants. In October 1908, following the judge's order, court official Augusto Carlos Sousa went three times to the square to notify residents Cacilda Moreira Freire, Mathilde da Conceição, Candido Nazarette, Julio Cezar, Antonio Kock, and others. These were some of the tenants Segreto's lawyer referred to as socially different, and implicitly inferior, to his client. Tenants' names also appear in other similar eviction reports, always powerless, unable to contest their fate. Owners and managers were often notified in their homes or workplaces, located in the upscale areas of town. Segreto, for example, was notified on the city's new elite boulevard, the Avenida Central, a few weeks after the notification of his tenants.[67]

To comply with the first notice, and avoid forced eviction and further fines, proprietors could obtain an order to evict their tenants from a civil court judge. That was what the Barão de Vasconcelos, heir of a noble Portuguese family, did in 1907. The Barão owned a house on Senador Pompeu street, in the working-class and historically Afro-Brazilian port area of Gamboa. According to his defense, he had rented the building to manager Antonio Pinto Cardoso, who, without the owner's authorization, transformed it into a tenement. Because

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[66] Decreto n. 5156, de 8 de março de 1904, art. 303.

[67] Arquivo Nacional, Fundo: Corte de Apelação – 20, Paschoal Segreto, 1909-1912, n. 2071, maço 337, gal. C.

Cardoso lacked a collective habitation permit, the Barão de Vasconcelos was fined, and the health attorney sued him for not evicting the building's residents. Nevertheless, represented by the Conde de Diniz Cordeiro, the owner managed to prove that the residents had been already evicted.

Two months earlier, the proprietor had gone to civil court against tenants Sebastião Benjurema and Engracia "de tal" – an expression indicating that Engracia's last name was unknown. Under the Barão's request, the civil court judge issued an order to collect rents from them. But Benjurema and Engracia resisted by locking their doors upon the court official's arrival. Given that the Barão was unaware that Cardoso had turned the house into a tenement, the two tenants must had been paying their rents to the manager, probably without having ever met the owner. Therefore, they were likely surprised and outraged by the latter's attempt to collect rent. The next day, without considering Benjurema's and Engracia's position, the civil judge issued a second order to force open the building, and requested that the local police deputy provide the "necessary force" for carrying it out. According to the Conde de Diniz Cordeiro, this police action had resulted in the tenants' eviction. Based on the owner's compliance, sanitary judge Tavares acquitted the Barão.[68] Differently from most owners, who stalled eviction to keep profiting from rent, the Barão de Vasconcelos – allegedly unaware that his building had been turned into a tenement – decided to cooperate with the public health authorities. Without much ceremony, and backed by a court order and the police, he got tenants evicted, under suspicious allegations that they had not paid rent.

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[68] Arquivo Nacional, Fundo: Juízo dos Feitos da Saúde Pública – 40, Barão de Vasconcelos, 1907, n. 2332, maço 72, gal. F.

While most proprietors remained silent regarding their tenants, Maria Theodora Souza, the struggling widow whose case became precedent, spoke up on their behalf. When denouncing hygiene deputy Barroso do Amaral's arbitrariness, Souza claimed to be scandalized by the deputy's invasion of her tenants' "family home," yelling at them to move out because building renovations were underway. The "family home" had been on the forefront of popular resistance against sanitary measures since 1904, when the constitutional right to the "inviolability of the home" framed popular mobilization for the Vaccine Revolt, and the habeas corpus petitions against sanitary measures that followed. Through her lawyer, Souza broke the judicial silence, and exposed Rio's working class's most pressing concerns. It was absurd, according to her, to require families to move out on such short notice, especially considering that "all classes" were agitated regarding the city's current housing problem, and how hard it was to provide enough cheap, comfortable, and hygienic housing for those in need.[69]

In contrast to the distance between the Barão de Vasconcelos and Benjurema and Engracia, Souza, who struggled to provide for her children, empathized with her tenants' similarly delicate situation. Like their landlord, Roza Corsozimo and Marcolina Roza de Jesus were both widows. In January 1906, they had been notified to leave their homes. But, in defiance of the public health authorities, Corsozimo and de Jesus had refused to leave, and thus were fined by a sanitary inspector. The residents then wrote to Public Health Director Oswaldo Cruz asking him to pardon their fines. A month later, sympathetic to the widows' request, and using his administrative discretion, Cruz personally pardoned them. A year after that, in a Sanitary Court petition she signed, proprietor Souza listed Corsozimo and de Jesus' successful plea as one of the

[69] Arquivo Nacional, Fundo: Corte de Apelação – 20, Maria T. F. e Sousa, 1907-1909, n. 1755, maço 319, gal. C.

reasons why the eviction suit should be dropped. As we know, the Court of Appeals suspended immediate eviction, and Souza was later acquitted. With her judicial victory, the two poor widows got to keep their homes.[70] The combined efforts of three women, an unexpected alliance between a proprietor and two tenants, was effective in containing the public health authorities' impetus to evict them.

6. Displacement and disappearance

In an eviction suit that reached the Court of Appeals in 1909, the managers of a stable on Riachuelo street claimed they had not made the improvements requested by the sanitary inspector because they "struggled with the difficulties of proletarians."[71] Yet, as similar cases indicate, proprietors and managers were often rich investors or members of the city's middle sectors, albeit some, such as Souza, struggled to pay their bills. While these defendants were financially able to contest evictions up to the appeals level, first instance Sanitary Court cases reveal a different fate for Rio's low-income workers. When they refused to leave their homes upon notification, as Corsozimo and de Jesus did, these tenants, and sometimes home owners, were fined. Since they were unable to pay, judge Tavares converted their fines into jail time.[72] Therefore, poor defendants' struggle was not only to avoid eviction, but also to escape Rio's

[70] Arquivo Nacional, Fundo: Corte de Apelação – 20, Maria T. F. e Sousa, 1907-1909, n. 1755, maço 319, gal. C.

[71] Arquivo Nacional, Fundo: Corte de Apelação – 20, Matias & Macedo, 1907-1908, n. 3186, maço 396, gal. C.

[72] The decree that established the Sanitary Court's procedures allowed for such conversion. Decreto n. 5224, de 30 de maio de 1904, art. 4, §10.

crowded Casa de Detenção (Detention House). Although some fought for habeas corpus petitions all the way to the Supreme Court, disappearing seemed like a better option.[73]

In July 1906, sanitary inspector Santos Moreira went to Visconde de Sapucahy street, in the Afro-Brazilian neighborhood around Onze square, to notify Gustavo Bosseshy of his eviction. Bosseshy worked for the Central do Brasil railroad, and struggled to provide for a numerous family, which included a sick sister-in-law. According to him, the railroad company owned building number 43 on Visconde de Sapucahy, and allowed them to live there rent-free. But the sanitary inspector believed that the house's hygiene conditions were irreparable, and therefore notified its residents to leave their home in twenty days. Bosseshy, however, refused to sign the inspector's notice. Tenants such as him often did not sign these notices, either because they refused to or because they were illiterate. Bosseshy knew how to sign his name. Although he may have had help to write or formulate them, he signed all his petitions to the Sanitary Court.[74] Yet, like other tenants, he probably believed that by not signing the inspector's notification he could undermine its legal force.

Nonetheless, with or without a signature, procedures against tenants moved forward. After a second notification, and upon Bosseshy's refusal to leave his home, the public health attorney initiated a suit to penalize him with a 200,000 *réis* fine. In similar cases, fines varied between 125,000 and 200,000. Unable to hire a lawyer and take his case to the Court of Appeals, Bosseshy appealed to the sanitary judge's compassion. In another common move for those fined,

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[73] For example, in 1906 the Portuguese Alfena de Jesus, who had already been arrested, asked for habeas corpus at the Court of Appeals and the Supreme Court. Yet, both courts denied her petitions. Arquivo Nacional, Fundo BV – Supremo Tribunal Federal, Série: Habeas Corpus, Cód. Ref. BV.0.HCO.2234, ano 1906.

[74] Arquivo Nacional, Fundo 6Z - 3ª Pretoria Criminal, Série: infração sanitária, notação 6Z.21910, ano 1907.

but unable to pay, he asked judge Tavares to waive his fine. He claimed that he earned 4,500 *réis* daily working at the railroad, which meant that the fine would take away one and a half month worth of his labor. Moreover, Bosseshy had already figured out where to move, but had to wait for a doctor's permission to remove his sick relative from the house.[75]

In January 1907, judge Tavares dismissed Bosseshy's arguments and ordered him to pay the full amount. In other cases, Tavares even carried out trials without the defendants' presence. That same year, Amélia Machado was prosecuted for not leaving the collective house where she lived on Riachuelo street. Differently from Bosseshy, she did not sign the sanitary inspector's notice because she did not know how to read or write. Nevertheless, the public health attorney brought her case to court, and when Machado finally got hold of a lawyer to represent her, judge Tavares had already sentenced her to pay a 200,000 *réis* fine.[76] Both Bosseshy and Machado were notified two or three times to pay their fines. But because neither of them did, judge Tavares ordered the Sanitary Court's final measure against the city's poor. Not only were they to be evicted, but their fines were to be converted into jail time.

To convert fines into jail time, the Sanitary Court requested the services of two "evaluators." Their task was to assess how much a defendant earned daily based on his or her "belongings, employment, industry, or profession." In Bosseshy's case, the Barão de Mendes Totta, a proprietor, investor, and diplomat, served as one of the evaluators. According to the evaluators' report, they had gone to Viconde de Sapucahy street and collected information indicating that Bosseshy could earn 12,500 *réis* per day. The evaluators, therefore, attested that

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[75] Arquivo Nacional, Fundo 6Z - 3ª Pretoria Criminal, Série: infração sanitária, notação 6Z.21910, ano 1907.

[76] Arquivo Nacional, Fundo 6Z - 3ª Pretoria Criminal, Série: infração sanitária, notação 6Z.21908, ano 1907.

the defendant's earnings were more than double what Bosseshy had claimed. Given the circumstances, that overassessment in fact benefited him. Because the number of prison days was calculated based on the number of days necessary to make the fine's amount, instead of a month and a half, Bosseshy was convicted to serve sixteen days in jail.[77] Machado, believed to earn 20,000 daily, was sentenced to ten days.[78]

All arrest warrants issued by the Sanitary Court mandated that the convicted were to be locked up in the city's Detention House for lack of space in the city's Casa de Correção (Correction House). The Correction House hosted prisoners convicted to forced labor. Throughout the early twentieth century, vagrancy laws and police arbitrariness were widely used to maintain the workforce under control and "cleanse" the city's downtown of its "dangerous classes."[79] As the Sanitary Court records reveal, the 1904 "Tortures Code" could serve the same purpose. Therefore, it is not surprising that the Correction House was crowded by 1907, forcing judge Tavares to order imprisonment in the Detention House instead, where short-term prisoners were usually held.

Bosseshy, Machado, and many others' final move, nonetheless, effectively undermined the Sanitary Court's attempt to discipline them in jail. In case after case, defendants convicted to serve time in the Detention House disappeared. The court's officials conducted several searches before they reported back to judge Tavares, admitting that they were unable to find the

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[77] Arquivo Nacional, Fundo 6Z - 3ª Pretoria Criminal, Série: infração sanitária, notação 6Z.21910, ano 1907.

[78] Arquivo Nacional, Fundo 6Z - 3ª Pretoria Criminal, Série: infração sanitária, notação 6Z.21908, ano 1907.

[79] Sidney Chalhoub, *Trabalho, Lar e Botequim: O Cotidiano dos Trabalhadores no Rio de Janeiro na Belle Époque* (São Paulo: Brasiliense, 1986); Thomas H. Holloway, *Policing Rio de Janeiro: Repression and Resistance in a 19th-century City* (Palo Alto: Stanford, 1993); Gizlene Neder, *Discurso Jurídico e Ordem Burguesa no Brasil* (Porto Alegre: Sergio Fabris, 1995).

convicted.[80] According to the officials' report, Bosseshy, like several other defendants, was in "an uncertain and unknown place."[81] Since the second half of the nineteenth century, the city's lower classes had been using its narrow alleys and hidden rooms to disappear. Urban slaves had actively blurred the lines between slavery and freedom by transforming the city into a hiding place. This strategy continued in the face of sanitation-based persecution. Streets and buildings were, after all, not only sanitary hazards, but also effective hiding places for those displaced and threatened with prison. Gustavo Bosseshy could have found housing through his neighborhood's networks of solidarity, or his employer, the railroad company, which seemed to have wanted him around.

Displaced people such as Bosseshy and Machado also went uphill to the city's *favelas* or far from the city's center, to distant northern suburbs. The booming squatters' communities on hills near downtown, such as the Morro da Favella, hosted many of those forced to leave traditionally Afro-Brazilian neighborhoods, such as the Onze square. Both the hills and the distant suburbs were mostly out of the health inspectors' and the police's reach. The hygienists' allegedly progressive concerns with the poor's health stopped at the civilized city's invisible frontiers, and people such as Bosseshy and Machado took advantage of this limitation. Years after failed attempts to arrest defendants, criminal courts – in charge of sanitary infractions after the Sanitary Court's extinction – ruled that cases were closed based on *prescrição* (statute of limitations). Bosseshy's case was closed in May 1912; Machado's in March 1914.[82]

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[80] Among the 42 Sanitary Court eviction cases I used, only one defendant was arrested.

[81] Arquivo Nacional, Fundo 6Z - 3ª Pretoria Criminal, Série: infração sanitária, notação 6Z.21910, ano 1907.

[82] The Criminal Procedure Code mandated prescription after one year. Decreto n. 847, de 11 de outubro de 1890, art. 83. However, cases were only closed when the public attorney decided to ask for closure.

Conclusion

When they refused to leave their homes or to sign notifications, and when they disappeared into the city's urban fabric, Rio's poor showed that they were willing to resist the administrative and judicial procedures aimed at evicting them. But resistance against evictions also took place within institutional channels. Petitions to the Public Health Director, such as the one written by widows Roza Corsozimo and Marcolina Roza de Jesus, appealed to compassion and discretionary powers. Before disappearing, people such as Amélia Machado and Gustavo Bosseshy tried to defend themselves at the Sanitary Court. The two widows also likely collaborated with their landlord, Maria Theodora Souza, in her victory at the Court of Appeals. Their collaboration was based on the alignment of their interests, and likely on personal ties among the three widows. Yet, most landlords sought to differentiate themselves from their tenants, and even when their interest in stopping evictions momentarily aligned, the conditions of access to the judiciary were unequal. Landlords used the civil courts to evict their tenants and avoid fines, and appealed to the Court of Appeals, where property-based arguments prevailed, and the evicted were silenced.

Aware of the fragile and temporary character of the alignment between tenants' and landlords' interests, the cigar maker, journalist, and proletarian leader Mariano Garcia had founded the Sociedade União dos Inquilinos (Union of Tenants Society) in 1896. The society's objective was to represent the city's tenants in their struggles against the "greedy" landlords. Among other strategies, the society aimed at proposing bills to the municipal and federal legislatures, maintaining active propaganda in the press and public spaces, and promoting

criminal suits against exploitative landlords.[83] The tenants' organization had been formed to oppose the Union of Proprietors Society, created a few years before. In May 1904, the Union of Tenants Society called an open meeting to discuss the new Sanitary Code, highlighting the fact that the tenants were victims of both property owners and hygiene agents.[84]

However, the tenants' society did not seem to have succeeded. In 1896, Garcia and his organization had been accused of disingenuously promoting politicians.[85] In 1905, the society's proposal to the municipal council for the state-financed construction of low-income houses failed.[86] In 1908, Garcia called a meeting of the Congresso dos Inquilinos (Tenants' Congress) to reorganize the Sociedade dos Inquilinos (Society of Tenants), former Union of Tenants Society. The congress' objectives seemed less radical, calling for measures of "the tenants' just interests, without harming the proprietors." This meeting also anticipated the organization of "auto-construction" initiatives among the city's evicted and displaced. The new society was supposed to organize cooperatives for the construction of homes for the city's poor.[87]

During the 1910s, led by Garcia, residents of Rio's suburbs, proletarian neighborhoods located in the northern zone of town, waged a campaign for the right to "auto-construction." Many of those evicted from the downtown tenements had moved to the suburbs, thus extending the housing shortage and consequent rent inflation to those areas. Garcia and other suburban leaders organized proletarian meetings, wrote to newspapers, and pressured the legislatures to

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[83] "União dos Inquilinos," *O Paiz*, May 26, 1896.

[84] "Sociedade União dos Inquilinos," *Jornal do Brasil*, May 19, 1904.

[85] "União dos Inquilinos," *O Paiz*, May 26, 1896.

[86] Romulo Costa Mattos, *Pelos Pobres! As Campanhas pela Construção de Habitações Populares e o Discurso sobre as Favelas na Primeira República* (PhD dissertation – Universidade Federal Fluminense – 2008), 87-88.

[87] "Congresso dos Inquilinos," *Correio da Manhã*, August 24, 1908.

exempt the suburban builders from licenses, taxes, and building regulations.[88] In the Epilogue, I discuss the alternative path taken by those who were evicted. People who squatted land on the hillsides near the downtown to remain close to work opportunities also largely relied on auto-construction to build their homes.

[88] Cristiane Regina Miyasaka, *Os Trabalhadores e a Cidade: A Experiência dos Suburbanos Cariocas (1890-1920)* (PhD dissertation – Universidade Estadual de Campinas – 2016), 149-166.

Chapter Six

How the City Transformed the Law

Legal mobilization inside and outside courts changed the city by altering the pace and the terms of expropriations, domiciliary disinfections, and evictions. The efforts of property owners, tenants, lawyers, and political oppositionists slowed down the urban reform, occasionally blocked reformist measures, and forced state authorities to consider people's individual rights while exercising discretion and autonomy. In this chapter, I explore the other side of the early-twentieth-century entanglement between the law and the city. I focus on how the legal conflicts sparked by Rio de Janeiro's urban reform contributed to transformations in Brazilian law. Although the legal framework that expedited expropriations and enhanced administrative discretion and independence was specially crafted for the Federal District's reform, the conflicts regarding individual rights and state power that emerged would contribute to legal transformations that characterized the nation's transition towards an interventionist state in the 1930s.

In the first section, I argue that the urban reform challenged the nineteenth-century conception of absolute property, opening space for a definition of property that incorporated limitations based on collective interests. Since the late nineteenth century, legal scholars had recognized the limitations imposed on the right to property by the state's police power,

especially in urban settings. During Rio's reform, these limitations reached their peak. In the reformers' legal and political discourse, property owners were portrayed as exploiters of human lives and speculators, whose individualistic goals harmed the common good. Reformers defended limitations on property rights as a way to protect public health. At the time, jurists and state attorneys understood the concepts of public utility and necessity, which legally justified expropriations and condemnations of property, as external limitations. However, the massive state intervention in the capital, combined with the influx of a sociological approach to legal thinking and the prominence of administrative law, would promote the emergence of a new conception of property, inherently limited by social and collective interests.

In the second section, I argue that the enhancement of executive powers during the urban reform contributed to the legal architecture that sustained the Brazilian interventionist, and eventually authoritarian state of the 1930s and 1940s. Beginning in 1930, after oligarchs who had been excluded from the political compromise that controlled federal elections joined forces with military officers to overthrow the oligarchs in power, legal instruments that had been used to reform the capital city would be appropriated by the new anti-liberal regime. While the new state used its enhanced authority to uphold social rights, such as labor rights, and the new social definition of property, executive empowerment degenerated into a violent dictatorship that persecuted political dissidents from 1937 to 1945.

1. The transformation of property

In its March-1906 inaugural manifesto entitled "Propriedade Individual" ("Individual Property"), the Associação em Defesa da Propriedade (Association in Defense of Property) raised concerns with the impact of government's "collectivist tendencies" on property rights. For

the Association, the right guaranteed by article 72, paragraph 17 of the 1891 Constitution had become fictional in the Federal District. A new conception of state power, inscribed in the most recent republican legislation, exposed a systematic mistrust of the judiciary, which oversaw the protection of individuals against "socialism." Evidence came from the urban reform's legal architecture: the regeneration of the *jus imperii* tradition, and the new, exceptional and violent, expropriation procedures.[1]

In eminent domain and eviction cases, property owners recurrently referred to the sacredness of property rights. They advanced an individualistic and absolute conception of property to protect their patrimony and the social status it entailed. However, in early-twentieth-century Brazil, property law was transitioning towards a new idea of property, increasingly limited by what state authorities deemed to be the public good, utility, or necessity. On both sides of the debate, property owners, lawyers, judges, administrative officials, and legal scholars appropriated ideas about individualism, collectivism, and socialism to advance financial, political, and scholarly interests. Conflicting conceptions of property appeared in disputes over expropriations and condemnations, as well as in intellectual quarrels about the episteme of law, both of which left open the future of Brazilian property law.

As we saw in Chapter One, during the second half of the nineteenth century, under a constitutional monarchy, Brazilian property law had undergone its first transition. As part of an effort to modernize Brazilian law and economy, the monarch, his cabinet, and parliament sought to replace the old colonial system of *sesmarias* with a modern system of property ownership. Although rich and poor alike continued to rely on squatting and possession to access land, the

[1] "A Propriedade Individual," *Jornal do Brasil*, March 9, 1906. The Association also mentioned new and increased taxes over property ownership.

idea of property that prevailed in legislation and legal doctrine leaned toward titled, absolute, individual, and market-distributed property ownership. In a country that was overwhelmingly rural and economically dependent on the export of primary goods, the politics behind this modernization process was attached to rural land and slave ownership. Nonetheless, since 1808, when the Portuguese royal family moved to Rio de Janeiro, there had been increasing restrictions on property rights in the city. Although comprehensive urban reform plans had failed throughout the nineteenth century, official concerns with urban sanitation and enhancement had prompted isolated initiatives, which culminated with the demolition of the iconic Pig Head tenement, in 1893.

Legal scholars recognized the limitations on property rights that accompanied the transition to a modern property system. In 1857, analyzing the 1824 monarchical constitution, constitutionalist Pimenta Bueno argued that property rights entailed broad and exclusive faculties, nonetheless recognizing that "because men live in society," the state could limit the use of property for the purposes of "State defense" and other "common good relations."[2] In 1876, private law scholar Teixeira de Freitas, who wrote the first drafts for a national civil code, defined property as an absolute right, but also recognized that the state's police power created restrictions in order to harmonize this right with the "social good."[3] Although these jurists justified external limitations to property ownership, they never changed the concept of property.

However, early-twentieth-century legislative innovations created further restrictions on property owners' rights. The basis for their compensation was lowered and they could not resort

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[2] José Antonio Pimenta Bueno, *Direito Publico Brazileiro e Analyse da Constituição do Imperio* (Rio de Janeiro: Typographia Imp. e Const. de J. Villeneuve e C., 1857), 429-430.

[3] Augusto Teixeira de Freitas, *Consolidação das Leis Civis* (Rio de Janeiro: B. L. Garnier, 1876), cvi and 70.

to *interditos possessorios* (possessory injunctions) to halt expropriations. Yet, instead of advancing radical transformations of the concept of property ownership, the early-twentieth-century reformers evoked the existence of broad external limits, based on collective considerations. Their legal arguments relied on expanded conceptions of public, collective, and common interests, utility, good, and necessity to restrict property ownership. Nonetheless, when property owners went to court against expropriations and evictions, they argued that those external limits had grown to a point in which the idea of individual and absolute property itself was under threat. Defending his clients' interests in the 1905 expropriation of 178 and 180 Frei Caneca Street, lawyer Pedro Tavares Jr. summarized this argument by claiming that the new legislation "affected the right to property in its essence."[4]

In their defense of property rights, organizations such as the Association in Defense of Property, a couple of owners' lawyers, legal scholars, and even a judge, portrayed the reformers' arguments based on collective interests as "socialism." In the 1905 expropriation of 141 Ouvidor Street, owned by the Lisbon-based Bregaro family, for example, the lawyer argued that the city's eminent domain claim was a confiscation of property in the "red and Jacobin" sense.[5] Later, in 1908, Court of Appeals Judge Montenegro wrote a minority opinion citing a 1905 article by prominent jurist and politician Lafayette Rodrigues Pereira. According to Montenegro, Pereira argued that the levels of administrative interference with property rights in the Federal District were comparable to those of a "socialist state." The municipality had reduced individuals to "pupils of the state," and property was "entirely administered by government." For Pereira, this

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[4] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, João Leopoldo Modesto Leal, 1905, n. 54, caixa 619.

[5] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, Fernanda Maria Pilar Bregaro, 1905, n. 33, caixa 618.

was clearly illegal as the 1891 Constitution guaranteed the "plenitude of property rights," and therefore did not uphold such a "socialist" system, despite allowing expropriations for public necessity and utility.[6]

By the early twentieth century, there were several organizations and publications that identified themselves as socialist in Rio de Janeiro. In 1902, the Centro das Classes Operárias (Proletarian Classes Center), a socialist umbrella organization that brought together powerful trade unions, was created. As we saw in Chapter Four, the Center had a decisive participation in the November 1904 Vaccine Revolt, organizing opposition to forced vaccination in petitions and meetings. While this scenario may have influenced liberal lawyers, judges, and jurists, their portrayal of Mayor Pereira Passos' measures as "socialist" fit neither the reformers' explicit and implicit commitment to capitalist ideas and interests, nor the idea of socialism circulating on the streets.

President Rodrigues Alves explicitly defended the reform as a way to boost Brazil's export-based economy, thus improving the nation's position in international capitalism. At the same time, state contracts, loans, and speculation benefited both foreign and national investors, and urban segregation and policing were part of official efforts to discipline a labor force recently freed from slavery.[7] Furthermore, Rio's socialist organizations did not claim to fight for

[6] Appellação crime n. 509, published in *O Direito*, Vol. 107 (1908): 322-324. The case was an appeal against a criminal conviction for sanitary infraction in the Sanitary Court.

[7] L. Benchimol, *Pereira Passos: Um Haussman Tropical: A Renovação Urbana da cidade do Rio de Janeiro no Início do Século XX* (Rio de Janeiro: Secretaria Municipal de Cultura, Turismo e Esportes, Departamento Geral de Documentação e Informação Cultural, Divisão de Editoração, 1992); Sidney Chalhoub, *Trabalho, Lar e Botequim: o Cotidiano dos Trabalhadores no Rio de Janeiro na Belle Époque* (São Paulo: Brasiliense, 1986); Thomas H. Holloway, *Policing Rio de Janeiro: Repression and Resistance in a 19th-century City* (Palo Alto: Stanford, 1993); and Gizlene Neder, *Discurso jurídico e Ordem Burguesa no Brasil* (Porto Alegre: Sergio Fabris, 1995).

the extinction of private property. Instead, they focused on better salaries, and better living and labor conditions for the working class.[8] In fact, their participation in the 1904 Vaccine Revolt was partially due to the reform's negative impact on workers' access to housing in the city. Therefore, when the lawyers and judges who defended absolute property rights referred to "socialism," they strategically employed an idealized conception of the term that did not resonate with the claims of Brazilian socialists.

Instead of a socialist approach to property ownership, the urban reform's legal architecture contributed to the development of a reformist stream in Brazilian legal scholarship. As opposed to socialist and communist ideas of state or collective ownership, the concept of property that emerged was one limited by a "social function." The concept of social function, and its variation applied to property ("property's social function") had been used by Brazilian intelligentsia at least since the 1870s. It was part of Comtean positivism's vocabulary that transposed biological organicism to social analysis. Like organs of a body, social institutions such as property fulfilled certain functions. Within this framework, the use of property entailed duties and responsibilities, and therefore required regulation.[9]

Late-nineteenth and early-twentieth-century jurists such as Clóvis Bevilacqua, Pedro Lessa, Sílvio Romero, and Tobias Barreto led a "naturalist turn" in Brazilian legal thinking. Drawing on authors such as Herbert Spencer, they sought a juridical science opposed to what they portrayed as the nineteenth-century classical legal thought. They applied to law social scientific methods that dictated empiricism and experimentation over conceptualism and

[8] Angela Maria de Castro Gomes, *A Invenção do Trabalhismo* (Rio de Janeiro: Relume-Dumará, 1994), 53.

[9] Alisson Thiago Maldaner, *De Expressão a Conceito: Função Social e Função Social da Propriedade no Brasil de 1870 a 1934* (MA thesis – Universidade Federal Rural do Rio de Janeiro – 2015), 30.

deductive reasoning. Their method required substituting normative categories, such as justice, rights, and obligations, for empirical ones, such as causes, effects, and functions.[10] This scientific approach was receptive to social and biological determinism, and therefore compatible with the hygienists' project to sanitize cities by segregating the poor. Jurists were complicit with elite discourses that constructed the lower classes as dangerous and unsanitary, sometimes subscribing to the belief in the Afro-Brazilians' racial inferiority, and the necessity to regenerate the nation.[11]

In 1910, drawing on authors such as Auguste Comte and Herbert Spencer, the French legal scholar Henri Hayem argued that the theory of absolute property "had been born dead." The definition given by the 1804 French Civil Code was absolute only in its intentions. In the modern state, which had to intervene to promote social justice without adopting "socialist doctrines," property had become less "individual," and more "social."[12] Hayem was part of a network of scholars who redefined property rights in France, and impacted the development of legal scholarship in Latin America. Among them, there was Léon Duguit, widely read by the Brazilian "naturalist" authors. In a 1911 lecture series in Buenos Aires, Duguit defined property *as a social function*.[13] This definition encapsulated the interdependence of urban and industrial

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[10] José Reinaldo de Lima Lopes, *Naturalismo Jurídico no Pensamento Brasileiro* (São Paulo: Saraiva, 2014), 44-45.

[11] Lilia Moritz Schwarcz, *O Espetáculo das Raças: Cientistas, Instituições e Questão Racial no Brasil, 1870-1930* (São Paulo: Cia das Letras, 1993).

[12] This was Hayem's doctoral dissertation, defended at the University of Dijon. Henri Hayem, *Essai sur le droit de proprieté et ses limites* (Paris: Arthur Rousseau, 1910), 322 and 439. On the academic exchanges between Hayem and Duguit, see Matthew C. Mirow, "The Social-Obligation Norm of Property: Duguit, Hayem, and Others," 22 *Florida Journal of International Law* 191 (2010).

[13] Kennedy describes the Western turn to social law – in which we may include both the Brazilian "naturalists" and the French authors – as a "second globalization of law." This trend was the result of late-nineteenth-century urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of interdependency. The social turn had a variety of influences, from Comtean positivism to social Christianism, but the emphasis was on

societies, where property could no longer be conceived as an abstract right of isolated individuals. Claiming to draw empirical conclusions from the observation of French law, Duguit argued that property was no longer thought of as a subjective right. French legislation and courts already sanctioned numerous limitations on property usage. For example, if a proprietor let his or her house "fall in ruins," he or she failed to preserve its social function, thus justifying state intervention. Infrastructural improvements that required numerous expropriations, such as the installation of telegraphic and electric lines, were also part of a world in which property had ceased to be absolute.[14]

Although Duguit would later become a reference for Brazilian translations of the concept of property *as a social function*, the idea that property *had a social function* appeared in Brazilian legal scholarship before Duguit's lectures, and directly related to Rio's urban reform. In 1900, when "naturalist" Clóvis Bevilacqua joined the codification efforts that had been unsuccessful since Teixeira de Freitas' 1876 attempt, a limited conception of property, influenced by French law, was already on the rise. In his comments on the final version of the code approved in 1916, Bevilacqua indicated that the removal of references to legal limitations had left the first Brazilian Civil Code's definition of property incomplete. These limitations could be found within the Civil Code, which had a section on expropriations, but also outside of it, in "taxes and municipal prescriptions, for reasons of hygiene, utility, and embellishment."[15]

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reforms programs that regulated areas such as labor and the enhancement and sanitation of cities. Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000". In: D. Trubek and A. Santos (eds.), *The New Law and Economic Development* (Cambridge: Cambridge University Press, 2006), 37-40.

[14] Léon Duguit, *Les Transformations générales du Droit privé depuis le Code Napoléon* (Paris: Librairie Félix Alcan, 1912).

[15] Clóvis Bevilacqua, *Código Civil dos Estados Unidos do Brasil Comentado* (Rio de Janeiro: Editora Rio, 1975), 1004.

Legal historians have described the 1916 Civil Code's definition of property as a consolidation of the mid-nineteenth-century transition from *sesmarias* to modern property ownership.[16] The code that congress approved in 1916 defined property in absolute terms as the "right to use, enjoy, and dispose."[17] However, according to the code's drafter himself, the concept of individual and absolute property was out of tune with the limitations that had been imposed on urban property. Given the growth of those limitations from the early nineteenth century to the early twentieth century urban reform, the 1916 Civil Code's concept of property had been born outdated.

Bevilacqua may have been the most influential Brazilian jurist of the twentieth century. However, it was in Augusto Olympio Viveiros de Castro's work that the capital's urban reform left its most explicit mark. Castro graduated in 1888 from the Recife Law School, where "naturalists" Romero, Barreto, and Bevilacqua taught. During his career, he was a law professor and a Supreme Court justice (1915-1927). Castro was a progressive reformist who defended the application of the state's police power to the improvement of workers' living and labor conditions.[18] He believed that the urban reform was necessary to remedy the capital's sanitation problems, and praised Pereira Passos' efforts. In 1906, while Passos was still in office, Castro published the first edition of his administrative law treatise, the *Tratado de Sciencia da*

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[16] Laura Beck Varela, *Das Sesmarias à Propriedade Moderna: Um Estudo de História do Direito Brasileiro* (Rio de Janeiro: Renovar, 2005), 6. According to Grinberg, the code was substantially delayed by the persistence of old regime social structures such as the intertwinement between Church and state and slavery. Keila Grinberg, *Código Civil e Cidadania* (Rio de Janeiro: Jorge Zahar, 2002).

[17] Lei n. 3071, de 1 de janeiro de 1916, art. 524.

[18] In 1920, Viveiros de Castro wrote a comprehensive treatise defending workers' protection in Brazil as a way to address the "social question" without resorting to socialism and communism. Augusto Olympio Viveiros de Castro, *A Questão Social* (Rio de Janeiro: Livraria Editora Conselheiro Candido de Oliveira, 1920).

Administração e Direito Administrativo. In that edition, likely written before it was possible to fully assess the juridical questions raised by the on-going urban reform, Castro gave little attention to the Federal District's organization, and only briefly mentioned nineteenth-century expropriations for the construction of railroads.[19]

However, four years later, Castro published a law review article about public utility expropriations. In this 1910 article, published a year before Duguit made his definition of property public in Buenos Aires, Castro analyzed judicial quarrels that had resulted from the recent widespread use of expropriations to reform the capital city. While considering the extent to which the new state, based on a "sociability duty," could intervene to protect collective and common interests against "individual egoism," Castro argued that it would be absurd if individual property kept its *form* whenever it became "an element of anti-sociability." According to him, expropriation was a result of the impossibility of harmonizing property's "social function" with its "individual form" in a particular case.[20]

Castro would repeat this definition in another article, a year later, and again in the 1914 edition of the treatise, in which he included a whole chapter on expropriations, discussing all the major legal questions that had emerged during the 1903-1909 urban reform.[21] Although Castro praised Passos for his "unforgettable services," he also criticized the mayor's excesses and the

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[19] Augusto Olympio Viveiros de Castro, *Tratado de Sciencia da Administração e Direito Administrativo* (Rio de Janeiro: Imprensa Nacional, 1906).

[20] Augusto Olympio Viveiros de Castro, Desapropriação por utilidade pública, segundo a doutrina e a legislação brasileira, *Revista de Direito Civil, Commercial e Criminal*, Vol. XVIII (1910), 411.

[21] Augusto Olympio Viveiros de Castro, Conceito da obra pública; e a sua execução, *Revista da Faculdade Livre de Direito da Cidade do Rio de Janeiro*, Vol. VII (1911), 92; Augusto Olympio Viveiros de Castro, *Tratado de Sciencia da Administração e Direito Administrativo* (Rio de Janeiro: Jacintho Ribeiro dos Santos, 1914), 281.

judicial decisions that had sanctioned them. For example, he criticized the 1905 Court of Appeals' decision that had authorized Passos to demand that a property owner partially demolish his building to conform with new rules of street alignment without indemnification.[22]

In the abovementioned 1905 Frei Caneca street case, lawyer Tavares Jr. argued that property had to be exclusively regulated within the field of private law.[23] Yet, the emerging importance of administrative law in debates about city improvement and sanitation had brought the writings of scholars such as Castro to the forefront of legal debates. As private law scholar Freitas had argued in 1876, the harmonization between property and social demands belonged to police laws. In the late nineteenth and early twentieth century, administrative law scholars dominated the doctrinal discussions about the state's police power. Dislocating debates about property from private to public law was also part of the transformation. It meant that property was increasingly thought of not only as a subjective right pertaining to the private sphere of individuals, but also as a social good, which should be regulated by the state to preserve collective interests, such as hygiene and economic development.

Castro's use of property's social function to justify the expropriations in Rio may have been a transitional one. In his definition, property had a dual dimension, social and individual, which could be harmonized. Duguit's 1911 concept was more radical because it dismissed property's role as an individual right; property did not *have*, but *was* a social function. Although in a contested arena, Duguit's theory would shape later efforts to redefine property in Brazil. In the 1920s and 1930s, Brazilian scholars mixed his theory with diverse intellectual influences. Duguit's own work had been likely influenced by the Catholic social doctrine based on Pope Leo

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[22] Castro, *Tratado* (1914), 301.

[23] Arquivo Nacional, Fundo: Juízo dos Feitos da Fazenda Municipal – 3Y, João Leopoldo Modesto Leal, 1905, n. 54, caixa 619.

XIII's 1891 encyclical *Rerum Novarum*. This encyclical, known for its contribution to the intellectual history of workers' rights, had been enacted to urge workers not to adhere to violent protests and socialist conspiracies. Rejecting communism and socialism, the encyclical upheld property as an inviolable right, the condition for order, nonetheless stating that property should be "considered in relation to man's social and domestic obligations."[24] In addition to Duguit's work and Catholic social thinking, Brazilian constitutional and property law would be influenced by the 1917 Mexican and the 1919 Weimar constitutions, which introduced limited conceptions of property into the vocabulary of world constitutionalism. Especially in the 1930s, within the context of the emergence and consolidation of an anti-liberal state in Brazil, property's social function gained a more dynamic connotation, which opened space for social transformation, replacing the nineteenth-century Comtean idea of functions as static roles within an organic society.[25]

A few years after federal and municipal authorities had joined forces to implement the comprehensive urban reform that expelled the poor from Rio's downtown, Viveiros de Castro justified these measures based on the social function of property. Like concepts such as public interest, necessity, and good, the social function of property could serve the interests of reformist administrators and businessmen who defended an exclusionary modernization project for Rio de Janeiro, and the nation. Although the concept was not part of the reform's legal framework, the expansion of administrative powers and the increasing restrictions on the rights of property owners led Castro to publish his pioneer definition of property in 1910. Ironically, as we will see

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[24] Matthew C. Mirow, "Rerum Novarum: New Things and Recent Paradigms of Property Law," 47 *The University of the Pacific Law Review* 183 (2016).

[25] Maldaner studied this bundle of influences in the debates of the 1933-1934 Constitutional Assembly. Maldaner, *De Expressão a Conceito*, 48-75.

in the Epilogue, throughout the twentieth century, the residents of Rio's hillside communities, which proliferated during the urban reform, would evoke the social function of property, a concept that had been used to justify urban segregation policies, against removals.

2. The rise of the executive power

In 1917, Rio de Janeiro's Chief of Police Aurelino Leal defended the state's police power in a series of lectures at the Conferência Judiciário-Policial (Judicial-Police Conference), held in the capital. Drawing both on his legal education and practical experience on the field, and asserting his conservative hardline take on issues such as gambling and prostitution, Leal argued that the police power was not arbitrary, capricious, or indifferent to law. Instead, it was a discretionary power, exercised within legal constraints, which emerged from the need to regulate social coexistence.[26] By legally justifying the use of discretionary power, Leal hoped to harmonize the relationship between police authorities and the judiciary. He believed that a detailed regulation of the usage of police power would reduce the risk of the courts revoking administrative acts.[27]

Although Leal was primarily concerned with the police, meaning the institution in charge of public security and law enforcement, his approach to the legality of discretionary acts may be

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[26] Aurelino Leal, *Policia e Poder de Policia* (Rio de Janeiro: Imprensa Nacional, 1918), 80, 143.

[27] Gustavo Zatelli Correa, "“A Rua é a Polícia Toda Inteira”: Poder de Polícia e a Atuação de Aurelino Leal na Chefia de Polícia do Rio de Janeiro (1914-1919)". In: Alfredo de J. Flores (org), *Temas de História do Direito: o Direito como Instrumento de Controle Político, Econômico e Social na Primeira República e na Era Vargas* (Porto Alegre: Instituto Histórico e Geográfico do Rio Grande do Sul, 2017): 189-225.

extended to other areas of state action.[28] As we saw throughout this dissertation, during the previous two decades, the courts had reacted unpredictably when faced with the questions of whether they could and should revoke administrative acts related to public health and urban reform. Even after congress passed laws prohibiting judicial review of acts exercised *ratione imperii*, the Supreme Court and the Court of Appeals had occasionally sanctioned liberal interpretations that privileged individual rights over state interventionism.

The Brazilian Republic had been founded in 1889 based on conflicting ideologies. Rural proprietors advanced United States liberalism, urban professionals led a Jacobinist front, and sectors of the military espoused Comtean positivism. The 1891 Constitution represented a victory for the rural oligarchs. They used the constitution's United States-inspired federalist system as an instrument to maintain their political and economic privileges.[29] Within the new constitutional framework, the federal executive gained prominence only in exceptional moments, when the state and society were in danger. During the highly unstable early-republican years, military governments had made widespread use of the state of siege, approximating the republic to a dictatorship. However, by the early twentieth century, the military had lost power, and the republic was ruled by a liberal elite, which nonetheless relied on networks of patronage and violence to guarantee their perpetuation in power.

This elite of rural oligarchs advanced a conservative liberal state, protective of individual guarantees and the free market. Yet, the protection of their own private economic and political interests, sometimes intertwined with legitimate concerns for the poor majority, occasionally

[28] Leal himself stated that the police power in Rio de Janeiro was distributed among several public services, including public health and the municipal administration. Leal, *Polícia e Poder de Polícia*, 108.

[29] José Murilo de Carvalho, *A Formação das Almas: O Imaginário da República no Brasil* (São Paulo: Companhia das Letras, 1990).

required state interventionism. The state intervened to protect coffee producers with both the port reform that intended to boost the export economy, and more direct measures, such as buying and storing coffee to inflate the prices.[30] The public health campaigns, such as the one led by Oswaldo Cruz, were part of an elite hygiene ideology and benefited private contractors. But they also addressed legitimate social problems, such as the poor's living conditions. As we saw in Chapter Four, Cruz's campaign was ultimately successful in virtually eradicating yellow fever in Rio. Nonetheless, the public health authorities neglected tuberculosis, the capital's "social disease," and government failed to relocate those evicted and displaced.[31] The segregationist character of the urban reform prevailed, showing that state interventionism in public health was an elite instrument of social control and exclusion.[32]

State interventionism during the First Republic (1889-1930) provided the foundations for the unprecedented expansion of the state that followed the overthrow of the liberal oligarchic republic in 1930. During the 1920s, jurist and intellectual Oliveira Vianna criticized the gap between the "legal" and the "real" Brazil. For Vianna, the 1891 Constitution was the result of the Brazilian elite's utopian idealism, completely dissociated from any sociological knowledge about the country's reality. Everything that the jurists and politicians who created the constitution had borrowed from France, England, and the United States could not survive in Brazil, where the

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[30] Elisa Pereira Reis, "Interesses Agro-exportadores e Construção do Estado: Brasil de 1890 a 1930". In: B. Sorj, F.H. Cardoso & M. Font (eds), *Economia e Movimentos Sociais na América Latina* (Rio de Janeiro: Centro Edelstein de Pesquisa Social, 2008): 169-190.

[31] Regina Cele de A. Bodstein, "Práticas Sanitárias e Classes Populares do Rio de Janeiro," *Revista Rio de Janeiro* 1, n. 4 (1986): 33-43.

[32] Airton Cerqueira-Leite Seelaender, "Pondo os Pobres no seu Lugar – Igualdade Constitucional e Intervencionismo Segregador na Primeira República". In: Jacinto Nelson de Miranda Coutinho & Martonio Mont'Alverne Barreto Lima (eds), *Diálogos Constitucionais: Direito, Neoliberalismo e Desenvolvimento em Países Periféricos* (Rio de Janeiro: Renovar, 2006): 17-30.

"clan spirit" of rural oligarchs and public employees predominated, and there was no real public opinion or collective interest.[33] In addition to Vianna's sociological legal thinking, the 1920s brought nationalist expressions in the arts and politics, the rebellions of military lieutenants who demanded the expansion of political representation and social reforms, and the 1929 economic crisis, which substantially lowered the global demand for coffee, thus reducing its price and damaging Brazil's export-based economy.

In 1928, President Washington Luís, a representative of the São Paulo oligarchs, broke the oligarchical compromise by supporting another São Paulo candidate instead of someone from the state of Minas Gerais. In response, the Minas Gerais political leaders made an alliance with peripheral oligarchies, such as those of Rio Grande do Sul and Paraíba. In 1929, they indicated Getulio Vargas, a politician from the Rio Grande do Sul with a background that combined oligarchic power and military experience, as their candidate for the 1930 presidential election. After Vargas lost the election, the dissident oligarchies allied with rebel lieutenants to forcefully depose the president. Vargas was chosen leader of the revolutionary provisional government.

In 1934, a democratically elected constituent assembly enacted a new constitution, which reflected a compromise between old liberal principles, such as federalism, and the emerging social state, based on the nationalization of natural resources, the protection of labor rights, and the social conception of property. During the constituent assembly, some deputies invoked Léon Duguit's definition of property as a social function. Although the deputies eventually removed the expression "social function of property" from the final text, the 1934 Constitution mandated

[33] Diego Rafael Ambrosini & Gabriela Nunes Ferreira, "Os Juristas e o Debate sobre "País Legal" e "País Real" na República Velha". In: Carlos Guilherme Mota & Gabriela Nunes Ferreira (eds), *Os Juristas na Formação do Estado-Nação Brasileiro*, 1850-1930 (São Paulo: Saraiva, 2010): 271-280.

that the right to property could not be exercised against the social or collective interest.[34] Finally, the assembly also chose Vargas to be the first president of the new republic.

Under Vargas (1930-1945), the state directly invested in and regulated strategic economic sectors, such as coffee, oil, and metallurgy. Striking the typical compromise of Latin American populist leaders, Vargas balanced his support for rural oligarchs, the military, and the emerging industrial elites with a remarkable political ability to mobilize the working class.[35] State interventionism in areas such as labor relations, pensions, and public health, all of which had been on the rise since the 1920s, promoted social inclusion for those who conformed to Vargas' labor ideology.[36] The now constitutionally-protected social and labor rights were fully available only to registered workers who upheld state-sanctioned virtues, such as morality, traditional family values, and patriotism.[37] For the rural and urban poor who did not conform to the official ideology, access to social rights was limited and the police continued to violently enforce vagrancy laws.[38]

[34] Constituição da República dos Estados Unidos do Brasil, de 16 de julho de 1934, art. 113, par. 17. Maldaner, *De Expressão a Conceito*, 73.

[35] Robert M. Levine, *Father of the Poor? Vargas and his Era* (Cambridge: Cambridge University Press, 1998).

[36] Gilberto Hochman & Cristina M. O. Fonseca, "O que Há de Novo? Políticas de Saúde Pública e Previdência, 1937-1945," In: Dulce Pandolfi (ed), *Repensando o Estado Novo* (Rio de Janeiro: Ed. Fundação Getulio Vargas, 1999): 73-94.

[37] These exclusions did not preclude excluded people from using the official ideology in their favor. Brodwyn Fischer, *A Poverty of Rights: Citizenship and Inequality in Twentieth-century Rio de Janeiro* (Palo Alto: Stanford, 2008), 116-142.

[38] The police in fact contributed to the creation of the boundaries between worthy and unworthy workers. Olivia Maria Gomes da Cunha, *Intenção e Gesto: Pessoa, Cor e a Produção Cotidiana da (In) diferença no Rio de Janeiro* (Rio de Janeiro: Arquivo Nacional, 2002).

In 1936, visiting Rio de Janeiro, the President of the United States Franklin Delano Roosevelt praised Vargas for being one of the two creators of the New Deal.[39] However, the Varguist state grew beyond the economic interventionism and social welfare policies parallel to those advanced by Roosevelt in the United States. In 1935, the government suppressed a series of uprisings led by communist and socialist military men who opposed imperialism and fascism. Drawing on an anti-communist rhetoric and with the support of generals who disapproved of the uprisings, Vargas decreed a state of war to address alleged internal threats in 1936, and closed the congress and forcefully guaranteed his continuation in power in 1937. What followed was the Estado Novo (New State - 1937-1945), a violent dictatorship that arbitrarily arrested and tortured people accused of disseminating communism in Brazil, and borrowed fascist elements, such as the investment in state propaganda to build a personalist cult around Vargas, despite the Brazilian participation on the ally side in World War Two.[40]

The legal framework that sustained the Varguist state was partially rooted in the legal framework that had empowered Rio de Janeiro's mayor and the federal public health director with independence and discretion to reform the capital city in the early twentieth century. The use of legislative delegations of power, such as the one that had authorized President Alves to enact the Sanitary Code in 1904, and the *ratione imperii* doctrine, introduced in the 1902 law that empowered the mayor, had promoted a dislocation of power from the legislative and judicial branches to the executive. Political arrangements among rural oligarchs, represented by Alves

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[39] Franklin D. Roosevelt, "Remarks at a Banquet Given by President Getulio Vargas of Brazil at Rio de Janeiro," November 27, 1936. Online by Gerhard Peters & John T. Woolley, *The American Presidency Project* (http://www.presidency.ucsb.edu/ws/?pid=15237).

[40] Elizabeth Cancelli, *O Mundo da Violência: A Polícia da Era Vargas* (Brasília: Edunb, 1993); Maria Helena Rolim Capelato, *Multidões em Cena: Propaganda Política no Varguismo e no Peronismo* (Campinas: Papirus, 1998).

and congress, and between them and the technical elite of engineers and doctors, represented by Pereira Passos and Oswaldo Cruz, had generated interventionist legal instruments that would survive the 1930 Revolution. Although the new constitutions enacted in 1934 and 1937 also contributed to the centralization of powers in the executive, these older instruments, sometimes used despite constitutional prohibition, were paramount to the new centralized, and eventually authoritarian, state that emerged.

The ideologues of the new institutional order portrayed pre-1930 Brazil as a weak state controlled by the private interests of regional oligarchs. According to jurists such as Oliveira Vianna and Francisco Campos (1891-1968), the mastermind behind the 1937 Constitution that institutionalized Vargas's coup d'état, the liberal democratic principles that shaped both the 1891 and the short-lived 1934 constitutions had been responsible for political instability and misgovernment. Congress, overly empowered by these constitutions, represented the egoistic interests of partisan groups who were in constant disagreement, thus blocking important political decisions and undermining national unity. Furthermore, they lacked the technical expertise necessary to rule the nation. Both Vianna and Campos represented an authoritarian political thinking based on the transfer power to the executive.

The executive, formed by the president and technical councils, epitomized a new form of democracy, national unity, and the technical capacity for solving modern social and economic problems. Authoritarian thinkers claimed that their model was democratic because, parallel to what European anti-liberal constitutionalists defended, the powerful executive would call plebiscites to mobilize the masses.[41] The executive would also unify the nation under a

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[41] Campos' political thinking approximated, for example, that of the German philosopher Carl Schmitt, who criticized the European liberal democracies in the 1920s. Rogerio Dultra dos

corporatist state, modeled after European fascism, by bringing diverse organized interests and classes together in administrative decision-making.[42] Finally, the executive was technically capable because the councils empowered a technical elite that would reform the nation's economy to generate development. Yet, the plebiscites authorized by the 1937 Constitution never happened, and the New State became a dictatorship that controlled the interest groups and class organizations, and promoted social and economic reform through executive acts.[43]

The March 1904 Sanitary Code had resulted from a legislative delegation of power. As we saw in Chapter Four, in January 1904, congress had enacted a decree that laid the basis for the new sanitary services, including the protection of the public health authorities' acts exercised *ratione imperii* and the creation of the Sanitary Court. The legislative act also authorized "government," meaning the executive power, to promulgate a new sanitary code.[44] Formally, the code was an executive decree that drew its legal force from that previous legislative authorization. Congress had effectively delegated its power to regulate the capital's sanitary services to the Rodrigues Alves administration.

The Sanitary Code's formal origins were central to the January 1905 Supreme Court decision that ruled the domiciliary disinfection of Manuel Fortunato Costa's home unconstitutional. The revolt that took place just a few months before had revealed a cross-class legal consciousness based on the right to the inviolability of the home. But the Supreme Court's

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Santos, "Francisco Campos e os Fundamentos do Constitucionalismo Antiliberal no Brasil," *DADOS – Revista de Ciências Sociais* 50, n. 2 (2007): 281-323.

[42] Rogerio Dultra dos Santos, "Oliveira Vianna e o Constitucionalismo no Estado Novo: Corporativismo e Representação Política," *Sequência* 61 (2010): 273-307.

[43] Marco Antonio Cabral dos Santos, "Francisco Campos: um Ideólogo para o Estado Novo," *Locus: revista de história* 13, n. 2 (2007): 31-48.

[44] Decreto n. 1151, de 5 de janeiro de 1904, art. 1º, §3º.

decision, albeit likely influenced by the revolt, did not uphold the inviolability of the home as an absolute right. The 1891 Constitution allowed exceptions to this right provided they were created by the legislature. However, the Supreme Court considered that the Sanitary Code, which regulated the disinfections, was an executive act, regardless of the previous legislative delegation. The court explicitly stated that congress could not have "sub-delegated" the power to regulate domiciliary entries to the executive.[45]

The oppositionist newspaper Correio da Manhã praised the Supreme Court's decision arguing that legislative delegations created confusion among powers, and the right of one branch to exercise the functions of another.[46] On the other side of the debate, O Paiz claimed that the constitutional separation of powers did not mean that there was hostility among them. The 1891 Constitution had established that the three branches were independent, though harmonic. According to O Paiz, the congress could never regulate scientific, "rigorously technical" subjects, such as the city's sanitation. Because the executive was "equipped" to deal with these problems, the January 1904 legislative delegation had been a constitutional act, which harmonized the two branches by sustaining the executive's function of "developing," "applying," and "regulating" legislative acts to make them effective.[47]

During the 1910s and 1920s, the Supreme Court reinforced its position against the legislative delegations of power to the executive. Yet, in a somewhat contradictory move, the court seems to have expanded the president's power to regulate existing legislation. According to

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[45] Arquivo Nacional, Fundo: BV – Supremo Tribunal Federal, Série: HCO – Habeas Corpus, 1905, Cód. Ref. BV.0.HCO.2046.

[46] "Os Expurgos," *Correio da Manhã*, February 4, 1905.

[47] "A Doutrina do Acórdão, "*O Paiz*, 4/2/1905.

jurist Victor Nunes Leal, the court established that the executive could "innovate" while regulating, and there was a "vast field to unfold its regulatory capacity."[48]

Perhaps as an effort to contain this jurisprudential expansion of the executive, the 1934 Constitution, which upheld liberal democratic principles, expressly prohibited delegations from one power to another.[49] Nonetheless, jurists aligned with the movement that had defeated the oligarchies in 1930, such as administrative law scholar Themistocles Cavalcanti, defended legislative delegation based on the technical and urgent social and economic problems of the modern world. According to Cavalcanti, citing Aurelino Leal, the new social and economic challenges posed by urbanization, industrialization, and immigration required the expansion of police powers and regulatory flexibility, which could only be achieved through executive decrees. This opinion seems to have predominated in the courts, which frequently accepted legislative delegations despite the express constitutional prohibition.[50]

Finally, the 1937 Constitution, enacted after Vargas' coup d'état, authorized legislative delegations in the form of *decretos-leis*.[51] According to Cavalcanti, this was one of the new constitution's "accomplishments." If the previous 1934 Constitution had authorized the same, the crisis created by congress' "inertia" and "inefficiency" could have been avoided.[52] Thus, the delegations of power had reached their peak. In the early twentieth century, the legislative

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[48] Vitor Nunes Leal, "Delegações legislativas," *Revista de Direito Administrativo* 5 (1946): 378-390, 386.

[49] Constituição da República dos Estados Unidos do Brasil, de 16 de julho de 1934, art. 3º, § 1º.

[50] Mauricio Mesurini da Costa, *O Estado Interventor no Brasil e seus Reflexos no Direito Público (1930-1964): Themistocles Cavalcanti e sua Contribuição Doutrinária* (PhD dissertation – Universidade Federal de Santa Catarina – 2016), 214, 219, and 233.

[51] Constituição dos Estados Unidos do Brasil, de 10 de novembro de 1937, art. 12.

[52] Themistocles B. Cavalcanti, *Instituições de Direito Administrativo Brasileiro – 2º Volume* (Rio de Janeiro: Livraria Editora Freitas Bastos, 1938), XXIII.

delegation that created the 1904 Sanitary Code had been produced by a political alliance between rural oligarchs and the emerging technical elite. It was part of an interventionist project that required the momentary concentration of powers in an executive technical agency, the Public Health Authority. From 1937 to 1945, however, the delegations became part of the regular functioning of the authoritarian state. The new constitution was a façade for the president's unlimited exercise of power.[53] Congress was forcefully closed throughout the period, and the constitution authorized the president to issue *decretos-leis* in all federal matters.[54] Therefore, the *decretos-leis*, justified by jurists such as Cavalcanti as a form of legislative delegation, were in fact executive decrees that had legal force regardless of legislative authorization.[55]

As we saw in Chapter Two, the *ratione imperii* clauses empowered the mayor and the public health director to reform and sanitize the capital city without judicial opposition. Nonetheless, pressured by the legal mobilization of property owners and tenants, the courts occasionally circumvented the *ratione imperii* prohibition and ruled expropriations and sanitary disinfections illegal and unconstitutional. Yet the shield against judicial review was not a legal novelty. All justifications of the *ratione imperii* clauses drew on a long history of police power. Defending the 1902 law, city fiscal attorney Souza Bandeira had argued that the *ratione imperii*

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[53] According to the German political scientist and constitutionalist Karl Loewenstein (1891-1973), who analyzed the Vargas regime in 1942, the 1937 Constitution was a "ghost constitution." It's most relevant article was article 186, second to last, which declared the state of emergency in all Brazil. Carolina Mota, "*Brazil Under Vargas*: a Análise Jurídica de Karl Loewenstein sobre o Regime de 1937". In: Carlos Guilherme Mota & Natasha Schmitt Caccia Salinas, *Os Juristas na Formação do Estado-Nação Brasileiro, 1930-dias atuais* (São Paulo: Saraiva, 2010): 293-324.

[54] Constituição dos Estados Unidos do Brasil, de 10 de novembro de 1937, art. 180.

[55] Costa, *O Estado Interventor no Brasil*, 241-245.

acts were those of "administrative police functions," as opposed to the *atos de gestão* (managerial acts), private-like state actions such as selling and renting public property.[56]

Despite the occasional setbacks, throughout the 1910s and 1920s the Brazilian higher courts seem to have sustained the protection of police power acts, such as those related to public sanitation and urban reform, against judicial interference. In 1930, a few months before the revolution, city attorney José de Miranda Valverde, who acted in many of the Municipal Treasury Court expropriation cases during the urban reform, argued that the courts had created a "firm," "invariable," and "unshakable" jurisprudence applying the 1902 law. Valverde was trying to convince the Court of Appeals to invalidate one of many possessory injunctions recently granted by the municipal treasury judge. As opposed to what had happened during the urban reform, the current treasury judge systematically circumvented the *ratione imperii* prohibition, granting injunctions that, for example, authorized bars and markets to open earlier and close later than what the municipality had determined. As Valverde suggested, the higher courts seemed to side with the administration, upholding the prohibition to review such acts.[57]

In 1936, the new law regulating Rio de Janeiro's administrative organization repeated part of the 1902 *ratione imperii* formula, protecting the municipal authorities' acts against possessory injunctions. Jurists concerned with the fragility of democracy in an unstable political environment criticized the *ratione imperii* doctrine, partially reproducing the early-twentieth-century liberal constitutional critique presented in Chapter Two. In 1937, a few months before

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[56] Souza Bandeira, "A Reforma Municipal," *Correio da Manhã*, December 24, 1902.

[57] "Conflito de atribuições entre a Prefeitura Federal e o Juiz dos Feitos," *O Paiz*, April 2, 1930. The Court of Appeals revoked the injunctions in other cases. See "Jurisprudência," *Jornal do Commercio*, May 27, 1930; "Um conflito de atribuições entre a Prefeitura Federal e o Juiz dos Feitos da Fazenda Municipal," *Correio da Manhã*, May 16, 1930; "Jurisprudência," *Jornal do Commercio*, December 20, 1931.

the coup, criminal law jurist Nelson Hungria, who would reach the Supreme Court after re-democratization, in 1951, argued that the *ratione imperii* doctrine was unconstitutional. Citing Aurelino Leal, he reasoned that police power could not be arbitrary. For Hungria, arbitrary administrative acts such as the ones sanctioned by expansive interpretations of the *ratione imperii* doctrine contradicted Brazil's liberal democratic principles.[58]

Legal doctrine continued to uphold the distinction between *ratione imperii* and managerial acts. However, in his 1938 administrative law treatise, Themistocles Cavalcanti, who supported the expansion of the executive power, criticized the classification of *ratione imperii* acts. According to Cavalcanti, the distinction between *ratione imperii* acts and *atos de gestão*, which Souza Bandeira defended in 1902, was outdated. It had been crafted to identify which acts fell under the administrative jurisdiction that existed in France, and that Brazilian jurists such as the Visconde de Uruguay had defended during the monarchical period (1822-1889). Although jurists continued to use the distinction, the "main reason" to abolish it was the impossibility of clearly defining the two categories. Finally, the distinction was not necessary anymore because the administration never acted as a private entity, and it was unnecessary to evoke classifications to explain the state' unilateral acts.[59] While Hungria criticized the *ratione imperii* doctrine for fostering arbitrary executive action, Cavalcanti envisioned a different scenario. For him, it was as if clearly defining *ratione imperii* acts, as the courts had been trying to do since 1903, had become useless in a regime in which all executive acts were exercised *ratione imperii*, and therefore shielded against judicial review.

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[58] "Juizo dos Feitos da Fazenda Municipal," *Jornal do Commercio*, July 28, 1937.

[59] Cavalcanti, *Instituições de Direito Administrativo Brasileiro*, 149-152.

For Cavalcanti, "the tendency of modern law," evidenced by the United States jurisprudential expansion of the police power, was to increasingly broaden the discretionary faculties of the executive. Among those faculties, the police measures, which included sanitation, urban reform, and other sensitive issues such as the policing of immigrants and associations, both associated with the influx and dissemination of dangerous political ideas in the country, had a "discretionary character" and therefore did not need previous legal determination.[60] Cavalcanti argued that the sanitary police entailed the highest degree of discretionary action because it was based on purely technical-scientific knowledge. Against these police measures, he continued, people could invoke only the individual rights that were "not implicitly or explicitly restricted by statutes and regulations."[61] This broad construction, including rights that were implicitly restricted, essentially undermined a person's ability to contest police measures in the judiciary.

During the Vargas regime, two new justice systems were created to advance democracy and social rights. The provisional government (1930-1934) created the electoral justice system, which oversaw the fairness of elections to undermine the violent and fraudulent procedures that characterized the liberal oligarchic republic.[62] The 1934 Constitution created the labor justice system to enforce the new labor legislation that protected workers' rights against the economic power of employers. This system would inaugurate a new form of state interventionism in labor relations, mediated by judges and representatives of both employers and employees.[63]

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[60] Cavalcanti, *Instituições de Direito Administrativo Brasileiro*, 154-155.

[61] Cavalcanti, *Instituições de Direito Administrativo Brasileiro*, 173.

[62] Decreto n. 21076, de 24 de fevereiro de 1932; Constituição da República dos Estados Unidos do Brasil, de 16 de julho de 1934, art. 82.

[63] Constituição da República dos Estados Unidos do Brasil, de 16 de julho de 1934, art. 122; Constituição dos Estados Unidos do Brasil, de 10 de novembro de 1937, art. 139; Decreto-Lei n. 1237, de 2 de maio de 1939.

In addition to the new courts, the 1934 Constitution created a new judicial instrument protective of individual rights. Between 1889 and 1926, liberal jurists such as Pedro Lessa and Rui Barbosa had defended an expansive interpretation of habeas corpus for the protection of all individual rights, from freedom of movement to religious freedom. However, in 1926, a broad constitutional reform changed the 1891 Constitution's article that regulated habeas corpus adding the words "prison or illegal constraint of freedom of movement," thus burying that expansive interpretation. Nonetheless, what seemed like a moment of restriction of individual guarantees opened space for the creation of a new judicial instrument. Discussed in 1926, but only effectively created by the 1934 Constitution, the *mandado de segurança* protected any "incontestable" right threatened or violated by any authority's illegal or unconstitutional act. Confirming that the *mandado* was a substitute for the broad habeas corpus interpretation, the constitution mandated that the procedures for both instruments were the same.[64]

Notwithstanding the new courts and the new judicial instrument, the constitutional and administrative law thinking that prevailed between 1930 and 1945 sustained the prominence of the federal executive over the judicial protection of individual private rights. As Cavalcanti suggested, administrative powers had grown to a point where even the *ratione imperii* distinction had become unnecessary, and the courts could not interfere with administrative action that explicitly or implicitly restricted individual rights. After 1937, the expansion of the executive power would impose severe restrictions on both the courts and the *mandado de segurança*.

The 1937 Constitution authorized Vargas to re-submit laws that the judiciary declared unconstitutional to the congress if he believed they served the people's well-being and the

[64] Luiz Henrique Boselli de Souza, "A Doutrina Brasileira do Habeas Corpus e a Origem do Mandado de Segurança," *Revista de Informação Legislativa* 77 (2008): 75-82. Constituição da República dos Estados Unidos do Brasil, de 16 de julho de 1934, art. 133, inc. 33.

promotion or defense of national interests.[65] Because the congress was closed in 1937, and all its prerogatives were absorbed by the president, Vargas would effectively revoke Supreme Court decisions through *decretos-leis*.[66] The constitution also extinguished the federal courts, which had jurisdiction over federal executive acts. Although this jurisdiction was technically transferred to state courts, the federal courts' extinction may have been another strategy to undermine the judicial control over the president.[67] In 1941, the labor courts were effectively installed as part of the executive, not the judicial branch.[68] Moreover, Vargas abolished all political parties, refused to organize plebiscites and elections, and extinguished the electoral courts. Finally, the *mandado de segurança* lost constitutional status, and the president's, state ministers', and federal intervenors' acts were shielded against this new judicial instrument.[69]

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[65] Constituição dos Estados Unidos do Brasil, de 10 de novembro de 1937, art. 96, parágrafo único. The decree that instituted the 1930 provisional government suspended constitutional guarantees and prohibited the courts from hearing cases against the government's acts.[65] In 1931, two decrees reduced the number of Supreme Court justices, and mandated the retirement of six justices, including Godofredo Cunha and Pires e Albuquerque, the former federal judges who had acted as substitute justices during the controversial Largo da Carioca trials, in 1904. The 1934 Constitution established mandatory retirement for Supreme Court justices at the age of 75, which was reduced to 68 in 1937. The forced retirements and the new rule opened space for Vargas to select most of the justices that composed the court during his regime. Thus Vargas seemed to already have political control over the court, even before the 1937 coup, when the centralization of powers in the executive would substantially limit the justices' power. Emilia V. da Costa, *O Supremo Tribunal Federal e a Construção da Cidadania* (São Paulo: Editora UNESP, 2006), 75-83.

[66] Costa, *O Supremo Tribunal Federal e a Construção da Cidadania*, 77-78.

[67] Lenora de Beaurepaire da Silva Schwaitzer, *A Justiça Federal na Era Vargas* (MA thesis – Centro de Pesquisa e Documentação de História Contemporânea do Brasil – CPDOC-FGV – 2012).

[68] Decreto-Lei n. 3229, de 30 de abril de 1904.

[69] While the 1937 Constitution did not authorize the *mandados de segurança*, the 1939 Civil Procedure Code did, nonetheless establishing those limitations. Decreto-Lei n. 1608, de 18 de setembro de 1939, art. 319.

In 1902, legislators had inserted the term *ratione imperii* in a statute hoping to undermine the judicial appreciation of executive acts aimed at reforming Rio de Janeiro. Yet, what jurists conventionally called the "*ratione imperii* doctrine" was subject to interpretation, which sometimes justified judicial control. The shielding of executive acts against judicial review would become even more explicit in the 1930s and 1940s. The judiciary, which had been an active player in partially curtailing the urban reformers' authoritarianism, lost most of its influence, especially under the Varguist dictatorship. Whether jurists subscribed to the *ratione imperii* doctrine or not, the aspirations and implementation of executive discretion and independence it had created in the early twentieth century contributed to an unprecedented expansion of state power.

Conclusion

The legal debates sparked by the 1903-1909 urban reform were part of a larger process that marked the transformation of Brazilian law. The elites in power had used executive empowerment and broader limitations on individual rights, such as the right to property, as instruments of material progress. At the turn of the century, progress was defined in exclusionary terms. Brazil's path toward civilization required the exclusion of its poor and black majority from the new civilized city. State interventionism based on those legal instruments aimed at delivering the capital to the cosmopolitan elites that profited from the export economy and from their association with international capital.

However, after the overthrow of the liberal oligarchic regime in 1930, some of the same legal instruments would promote unprecedented social inclusion. The 1934 Constitution's limited conception of property opened space for struggles for access to land both in the rural

countryside and in the urban centers. The strong Varguist executive redefined citizenship to include workers through labor protections and social assistance, despite the violent repression of political dissidents and the control of labor movements. The legal framework that had sustained an exclusionary state-building project in the early twentieth century provided the basis for the implementation of an anti-liberal, nationalist, and socially-oriented project in the 1930s and 1940s.

Epilogue

Throughout this dissertation, we have seen how legal institutions, ideas, and practices framed and were transformed by disputes to own, profit from, live, and work in Rio de Janeiro. Institutions such as the Municipal Treasury Court, which processed judicial expropriations, the Sanitary Court, which had broad jurisdiction over public health matters, and the higher courts, which heard the appeals, mediated the conflicts between state authorities, property owners, creditors, and tenants. In cases such as the 1904 Largo da Carioca trials, described in Chapter Three, the courts' institutional dynamics and their responsiveness to public opinion influenced judicial outcomes. However, despite the courts' important role in curtailing administrative independence and discretion, we saw in Chapter Six that the urban reform contributed to the consolidation of legal arguments and instruments that empowered the executive, thus opening space for the 1930s interventionist and eventually authoritarian state.

Legal ideas framed resistance inside and outside courts, in the newspapers, political chambers, and on the streets. As we saw in Chapter Two, a 1903 cartoon translated the complex legal concept of *ratione imperii* into popular language in an attempt to mobilize people against the expansion of executive powers. During the mobilization for the 1904 Vaccine Revolt, analyzed in Chapter Four, people interpreted the right to the inviolability of the home as a constitutional protection to the private space of patriarchal power. In the debates about zone

expropriations, introduced in Chapter Three, state attorneys tried to expand the concept of public utility to justify the expropriation of buildings in entire zones of the city. Yet, defense lawyers interpreted the concept narrowly, ultimately convincing the Court of Appeals to restrain the municipality's impetus to expropriate more than what was necessary for opening and broadening streets. While these professional and popular interpretations of legal concepts framed the reform, Chapter Six revealed that the legal debates that emerged contributed to a permanent transformation on the concept of property. In 1910, influenced by the unprecedented limitations imposed on property to reform the capital, Viveiros de Castro argued that property had a social function. During the 1930s, the idea that property was inherently limited by social interests would predominate in the new interventionist and anti-liberal state led by President Getulio Vargas.

In courts, the lawyers', state attorneys', judges', and court officials' legal interpretations and practices changed the terms of expropriations, domiciliary disinfections, and evictions. In Chapter Three, we saw how the defense lawyers' arguments changed the Municipal Treasury Court's praxis regarding, for example, the deposit of indemnifications for expropriations in the municipality's safe, thereby curtailing Mayor Pereira Passos' strategy to delay payments. Nonetheless, we also explored how court officials' practice of informing the court that property owners were absent from the capital expedited procedures, despite the lawyers' complaints. In Chapter Five, I showed how a lawyer's argument prompted the Court of Appeals to suspend an eviction until a final decision was issued, thus changing its previous practice and creating obstacles to the sanitary intervention plan.

The trials of expropriations, domiciliary disinfections, and evictions revealed some of the contradictions that characterized the reform plan. In Chapter Three, for example, we saw how

state attorneys articulated the concept of public utility to justify expropriations that benefited private parties, transferring land and capital to fractions of the local and international elites. By sanctioning the auctions of unused land and allowing creditors to collect indemnifications, the Municipal Treasury Court contributed to this process. In Chapter Five, I showed that although the hygienist ideology constructed the poor's living spaces as menaces to public health, even buildings that housed upscale residents, such as the Hotel Victoria, were in poor sanitary conditions. In that same chapter, we saw how public health attorneys invoked progressive concerns with the city's poor, nonetheless occasionally reproducing social stereotypes that justified the segregation plan, and silencing regarding the lack of alternative for the people who were evicted from condemned tenements.

Focusing on the role of law in the 1903-1909 urban reform has brought to light the participation of legal professionals in debates about the city. As we saw in Chapter One, since the 1850s doctors and engineers had relied on their scientific expertise to dominate public debates and the state institutions dedicated to urban reform and sanitation. However, beginning in December 1902, after substantial legislative and institutional innovations created a controversial legal framework to support fast and comprehensive urban transformations, lawyers, state attorneys, legal scholars, and judges became central players in legal and political conflicts that shaped the city's future.

Occasionally, as shown in Chapter Two, lawyers such as Candido de Oliveira, a monarchist who participated in the plotting of a coup d'état during the Vaccine Revolt, used litigation and scholarly critique of reformist measures as strategies to destabilize the government. State attorneys such as Souza Bandeira, who represented the municipality in expropriation cases, wrote to newspapers defending the reform and its legal framework. As I showed in chapters

Three and Four, lawyers such as Carlos de Carvalho, who defended the Largo da Carioca's proprietors, and Pedro Tavares Jr., who defended Manuel Costa against the invasion of his home in the 1905 Supreme Court case that inspired a wave of litigation against reformist measures, also tried to mobilize public opinion through the press in order to influence the courts' decisions. Judges such as Godofredo Cunha, who changed his vote to favor the Largo da Carioca's property owners while acting as a Supreme Court justice, played pivotal roles in shaping the urban reform process.

Finally, this dissertation has shown how poor tenants and property owners established collaborations with lawyers through civil society organizations, such as the associations of proprietors and trade unions, as well as friendship and professional ties, to resist the wave of expropriations and evictions aimed at displacing and dispossessing them. Most of those lawyers, being part of Rio's cosmopolitan elite, did not oppose the city's segregation and the building of a "civilized" nation modeled after the United States, France, England, and even Argentina, their usual references when they argued that Brazil should follow the legal doctrine and jurisprudence of the "civilized world." Nonetheless, they opposed state interventionism for various political and professional reasons, sharing a commitment to the judicial protection of individual rights. As I argue in the following pages, this momentary cross-class alliance that mobilized the law against the reform inaugurated a still on-going pattern of struggles to own, profit from, live, and work in Rio de Janeiro.

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The history of property in Brazil is a history of occupations. From colonization to present-day conflicts in the western agrarian frontiers, different forms of what we call legal property ownership were products of squatting, followed by litigation, violence, and the forgery of documents. Squatting has been both an elite strategy of land grabbing for the purposes of speculation and a lower-class strategy to access land for subsistence and housing. The history of property in large cities such as Rio de Janeiro is not different. There, where the state has been the most present since the eighteenth century, people of different social classes squatted land, fought for it inside and outside courts, and forged documents to legitimize their claims. Following this tradition, during the early-twentieth-century urban reform, poor tenants evicted from the downtown tenements squatted land on the city's hillsides to claim their rights to live and work in Rio de Janeiro.

The early-twentieth-century struggles for access to the city were not based on claims to property ownership. To the contrary, some tenants claimed that they could not be punished for sanitary infractions precisely because they did not own the properties where they lived. Instead, both individual and collective habeas corpus petitions, such as Augusto Queirós' petition on behalf of the city's proletarian classes, as well as the mobilization for the 1904 Vaccine Revolt, evoked the constitutional right to the inviolability of the home against sanitary measures that threatened the poor with evictions. However, as the evictions displaced thousands of people to communities on the distant suburbs and the city's hillsides, Rio's poor forged new claims over the city's soil. Throughout the twentieth century, their struggles were based on legal concepts such as possession, adverse possession, and the social function of property, all of which indicate that claims to property, previously exclusive to landlords, had become available to the poor. This was possible because after Rio's displaced squatted unused land on the hillsides, they adopted

some of the same strategies, such as litigation, street protest, and alliances with politicians, lawyers, and landlords, to resist removal.

The early-twentieth-century urban reform expanded a new form of occupation of Rio's urban space, which gradually replaced the downtown tenements as the most important housing option for the city's poor. Although the occupation of land on the city's hillsides likely dates from the early nineteenth century, the "origin myths" of Rio's favelas (hillside communities), constructed through both the collective memories of residents and the press, point to the 1880s and 1890s. The first "myth" indicates that the city's favelas originated from mid-nineteenth-century urban *quilombos*, runaway slave communities.[1] According to the second "myth," in 1893, after municipal administrators and private companies joined forces to demolish the Pig Head tenement, some of the residents who were evicted built shacks on nearby Providência Hill. One of the Pig Head's proprietors owned some of the hillside land, and rented it to the tenement's old tenants. Mayor Barata Ribeiro, who led the tenement's demolition, authorized the evicted to use the demolition materials to build their new homes.[2]

Finally, the third "myth" points to 1897, when soldiers returning from the Canudos War in the Northeastern hinterland joined the Providência Hill's residents. For several months, the republican government had been trying to eliminate the Canudos community, led by the messianic religious leader Antônio Conselheiro in the countryside of Bahia, far from the capital. The governing elites viewed Canudos as a symbol of backwardness, an anomaly inside the modern and civilized republic that they were trying to build from Rio de Janeiro. The authorities

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[1] Adrelino Campos, *Do Quilombo à Favela: A Produção do "Espaço Criminalizado" no Rio de Janeiro* (Rio de Janeiro: Bertrand Brasil, 2005).

[2] Rafael Soares Gonçalves, *Favelas do Rio de Janeiro: História e Direito* (Rio de Janeiro: Editora PUC-Rio, 2013), 44-45; Lilian Fessler Vaz, "Notas sobre o Cabeça de Porco," *Revista Rio de Janeiro* 1, n. 2 (1986): 29-35.

accused Conselheiro of being a rebel who supported the restoration of the monarchy. After the troops finally defeated and exterminated the 30,000-persons community, in one of the early-republican civilizational project's most violent moments, many soldiers returned to the capital, hoping to receive their payments. Yet the Ministry of War never paid them. As a strategy to both find cheap housing and protest the ministry's negligence, some of the soldiers occupied the Providência Hill, which they called Favela Hill after a hill they had encountered near Canudos.[3]

In all these "origin myths" the city's favelas emerge from histories of social and racial exclusion, violence, and resistance. For slaveholders, the *quilombos* were a threat to the public order.[4] The republican governing elites framed both the demolition of the Pig Head and the extermination of Canudos as civilizational measures. The former was part of the war on tenements based on the hygienist ideology that portrayed the poor's living spaces as disseminators of vice, crime, and disease, thus concrete reminders of the capital's backward colonial past. The latter was part of a discourse that opposed the civilized capital to the backwards Brazilian *sertão* (hinterland). Canudos was a recalcitrant traditional and religious community that challenged the republic's modern foundations in scientific knowledge and progress.[5] In the comparison between Canudos and the favelas, early-twentieth-century engineers and doctors opposed Rio's *sertão*-like hills, allegedly inhabited by dangerous and backward

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[3] Licia do Prado Valladares, *A Invenção da Favela: do Mito de Origem a Favela.com* (Rio de Janeiro: Editora FGV, 2005).

[4] Flávio dos Santos Gomes, *A Hidra e os Pântanos: Mocambos, Quilombos e Comunidades de Fugitivos no Brasil (Séculos XVII-XIX)* (São Paulo: Editora UNESP, 2005), 151.

[5] Valladares, *A Invenção da Favela*, 36.

people, to the new Central Avenue, a symbol of progress, built by President Rodrigues Alves' commission in 1904.[6]

At the same time, the *quilombos*, the tenements, and Canudos, mythical predecessors of Rio's favelas, represented spaces of resistance and freedom. From the seventeenth to the nineteenth century, the *quilombos* were a form of slave resistance outside the legal-institutional channels. These communities provided safe havens for runaway slaves across the colonial and imperial territories, from the capital to the Amazonian borderlands.[7] Throughout the second half of the nineteenth century, tenements were hiding spaces where the city's slaves and former slaves blurred the lines between free and unfree, and built networks of solidarity against slavery.[8] For journalist Euclides da Cunha, who published his report on the Canudos War in 1902, although the community was a danger to the region's social order and a symbol of backwardness, Canudos was also a space of freedom regarding labor and the usage of land[9]

During the second half of the nineteenth century, law had been part of both the authorities' initial attempts to control the occupation of hills, and the residents' language and strategies against removal. Drawing on the late-eighteenth-century idea that the city's hills obstructed the circulation of air and therefore contributed to the spread of diseases, an 1853

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[6] Gilberto Hochman, "Logo ali, no final da avenida: *Os Sertões* Redefinidos pelo Movimento Sanitarista da Primeira República," *História, Ciências, Saúde – Manguinhos* 5 (1998); Romulo Costa Mattos, *Pelos Pobres! As Campanhas pela Construção de Habitações Populares e o Discurso sobre as Favelas na Primeira República* (PhD dissertation – Universidade Federal Fluminense – 2008), 49.

[7] Flávio dos Santos Gomes, "A 'Safe Haven': Runaway Slaves, Mocambos, and Borders in Colonial Amazonia, Brazil," in *Hispanic American Historical Review* 82, vol. 3 (2002): 469-498.

[8] I discussed this feature of nineteenth-century tenements in Chapter One. Sidney Chalhoub, *Visões da Liberdade: Uma História Das Últimas Décadas da Escravidão na Corte* (São Paulo: Companhia das Letras, 1990), 26-29.

[9] Euclides da Cunha, *Os Sertões* (São Paulo: Três, 1984). Valladares, *A Invenção da Favela*, 33-35.

decree that ordered the demolition of the Santo Antônio Hill, located in the downtown area, referred to the risk that the precarious shacks on the hillside posed to the lives of those who lived there. Although the hill would not be demolished until the late 1950s, in 1897 the municipal government proposed the removal of its shacks because they were hygiene hazards and violated the municipal code's rules regarding safe constructions.[10]

In 1897 and 1898, army officers wrote to the capital's mayor in defense of the Santo Antônio Hill's residents. According to the officers, the army had authorized the hill's occupation, and its residents were poor, hardworking, honest, and patriotic people, many of whom were soldiers who had fought in the Canudos War, whose only alternative to the city's crowded and expensive tenements was to live on the hillside. The officers argued that the hill's shacks were not threats to public health, and therefore could be "tolerated" by the municipal authorities. Thus, part of their defense relied on the administrative authorities' discretion to enforce municipal regulations. Yet, the hill's residents allegedly had in mind a different legal solution for their problem. According to colonel Affonso Pinto de Oliveira, the hill's occupants "claimed to have a right to possession."[11]

In the early twentieth century, municipal decrees legalized the state's toleration of the hillside communities that the 1897 officers had proposed. A July 1900 decree prohibited the construction of precarious shacks except on unoccupied hills.[12] Under the Pereira Passos administration, the municipal building code of 1903 restricted occupations by stipulating that new licenses for construction would be granted only to people who proved property ownership.

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[10] Gonçalves, *Favelas do Rio de Janeiro*, 46-47.

[11] Gonçalves, *Favelas do Rio de Janeiro*, 49.

[12] Gonçalves, *Favelas do Rio de Janeiro*, 50.

Nonetheless, the code repeated the 1900 decree, reinforcing the exception for the construction of precarious shacks on uninhabited hills. Coupled with the thousands of expropriations and evictions ordered by Mayor Passos and Public Health Director Cruz, and the government's failure to build low-income housing, this rule may have contributed to the expansion of Rio's favelas during the urban reform.[13]

During the first decade of the twentieth century, the hygienist and public order discourses directed at the tenements gained the mainstream press's pages regarding the hillside residents. According to the press, the police identified the Favela Hill as a dangerous site, inhabited by all kinds of criminals. The press' association between criminality and the residents' African and Afro-Brazilian origins, religious practices, and musical meetings contributed to the racialized stigmatization of these communities. In the newspapers' "police columns," people were portrayed as cruel savages, living under a violent moral code.[14] The participation of 2,000 residents of the Favela Hill in the 1904 Vaccine Revolt reinforced the elite's concerns with the permanence of the so-called "dangerous classes" near the downtown.[15] During the violent repression that followed the protests, 180 soldiers went up the hill to search each of the community's houses.[16]

Nonetheless, in 1905, writing about the poor's living spaces in the city, the engineer Everardo Backheuser reminded Rio's elites that many of Favela Hill's residents were hardworking proletarians. The escalating housing crisis caused by the urban reform had triggered

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[13] Brodwyn Fischer, *A Poverty of Rights: Citizenship and Inequality in Twentieth-century Rio de Janeiro* (Palo Alto: Stanford, 2008), 36.

[14] Mattos, *Pelos Pobres!*, 48-51, 108.

[15] Leonardo Pereira, *As Barricadas da Saúde: Vacina e Protesto Popular no Rio de Janeiro da Primeira República* (São Paulo: Editora Fundação Perseu Abramo, 2002), 59.

[16] Mattos, *Pelos Pobres!*, 52.

elite and official concerns with the relocation of the poor.[17] The legislative exceptions for the proliferation of hillside communities may have been a cheap solution for maintaining the workforce close to the civilized downtown, where they were needed as maids, construction workers, shoe shiners, and in other kinds of low-income and precarious labor. But even Backheuser, who mitigated the portrayal of those communities' residents as dangerous people, agreed that the hillside shacks should be removed. The consensus among the governing elites was that Rio needed sanitary and cheap housing for the poor. *Vilas operárias* (proletarian housing projects) were designed to both keep the workforce under control and imbue them with the hygienic and "civilized" habits adequate to the new city.[18] There were even proposals to gradually transform workers into property owners to create a sense of order that would eventually cultivate work and family values among the poor.[19] Yet, this gradual transformation was never implemented and the *vilas operárias* that were built were insufficient to house the displaced.[20]

The growth of settlements on the hillsides was accompanied by the articulation of strategies against removals. Although legislation allowed the toleration of the hillside communities' expansion and the urban reform was concentrated in the downtown streets, the public health authorities eventually targeted the hillside shacks that proliferated. In 1906, for example, Antonio Izidoro Gonçalves hired a lawyer to ask for a possessory injunction against an

[17] Mattos, *Pelos Pobres!*, 53.

[18] Mattos, *Pelos Pobres!*, 48.

[19] Gonçalves, *Favelas do Rio de Janeiro*, 60, footnote 19.

[20] Lia de Aquino Carvalho, *Habitações Populares: Rio de Janeiro, 1866-1906* (Rio de Janeiro: Biblioteca Carioca, 1995).

order to evict and demolish his house on Favela Hill.[21] In 1907, municipal and federal authorities, including Public Health Director Oswaldo Cruz, decided for the "complete sanitation" of the city's hills, a euphemism for demolishing the shacks and removing the people. Yet, a group of Favela Hill residents organized a march to the newspapers' offices to claim that the authorities wanted to "destroy the asylum of the poor, leaving them homeless."[22] These two episodes indicate that, alongside tenement landlords and tenants, favela residents adopted strategies of litigation, protest, and strategic alliances with the press.

During the second decade of the twentieth century, the hillside communities continued to develop strategies against removals. In 1911, for example, a commission of residents of Santo Antônio Hill contacted the lawyer Evaristo de Moraes to represent them against an eviction order issued by the public health authorities. Moraes was an active voice in defense of the city's workers, known for representing trade unions and prostitutes. Although, as a reformist socialist, he reinforced the elite's hygiene ideology, Moraes was a fierce critic of the government's cruelty toward the city's poor, whom he described as "orderly creatures." Nonetheless, Moraes eventually replied to the Santo Antônio Hill commission that only very few residents had a chance to succeed in court, and that therefore he was not able to effectively help them as a lawyer.[23]

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[21] Eneida Quadros Queiroz, *Justiça Sanitária – Cidadãos e Judiciário nas Reformas Urbana e Sanitária – Rio de Janeiro (1904-1914)* (M.A. thesis – Universidade Federal Fluminense – 2008), 16-17.

[22] The quote is from a newspaper report on the favela residents' mobilization. Romulo Costa Mattos, "Shantytown Dwellers' Resistance in Brazil's First Republic (1890-1930): Fighting for the Right of the Poor to Reside in the City of Rio de Janeiro," *International Labor and Working-Class History* 83 (2013): 54-69.

[23] Mattos, "Shantytown Dwellers' Resistance in Brazil's First Republic", 57-58; Romulo Costa Mattos, *Pelos Pobres!*, 157.

In 1913, a court-ordered possessory injunction postponed the removal of shacks on the Santo Antônio Hill. The same happened in 1916, when besides going to court, the residents' commission went down to the Catete Presidential Palace to ask President Venceslau Brás to revoke the public health authority's order to demolish their homes. At the last minute, the order was revoked. However, a month later, a fire destroyed the shacks, resulting in the loss of homes and lives. Following the tragedy, the people who lost their homes were authorized to build on the Telégrafo Hill, in the northern zone of the city, outside the downtown. Three years later, in 1919, new shacks had appeared on the Santo Antônio Hill, showing that the poor were willing to resist removals by squatting land regardless of the risks.[24]

During the 1920s, the attacks on the city's hillside communities continued, culminating in the plan designed by the French urbanist Alfred Agache, in 1927. Agache's plan portrayed the favelas as autonomous cities that threatened Rio's public security, health, and aesthetics. It recommended their elimination and the construction of low-income housing in the northern industrial districts. Yet, the plan was never implemented likely due to the resistance of the city's elites, based on nationalism and challenges to Agache's technical competence.[25] In the early 1930s, Mayor Pedro Ernesto eventually invalidated Agache's plan, thus inaugurating a new paradigm of city governance. Ernesto, a social reformist appointed by President Getulio Vargas, anticipated the political importance of the capital's hillside communities. Under his government,

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[24] Mauricio de Almeida Abreu, "Reconstruindo uma História Esquecida: Origem e Expansão das Favelas no Rio de Janeiro," *Espaço & Debates* 37 (1994), 41 and footnote 77; Mattos, "Shantytown Dwellers' Resistance in Brazil's First Republic," 57; Gonçalves, *Favelas do Rio de Janeiro*, 79-80.

[25] Fischer, *A Poverty of Rights*, 40.

the municipality implemented the first policies directed at improving these communities' living conditions, such as the inauguration of public schools.[26]

During the 1930s and 1940s, the favelas continued to grow due to a fragile balance between contradictory state policies, the elite's political and financial interests, and the residents' resistance to periodic removal plans. Under the Vargas dictatorship (1937-1945), the 1937 Código de Obras (Construction Code) made the favelas, defined as the ensemble of two or more shacks built with improvised materials, illegal.[27] Nonetheless, local and national politicians, including even Vargas himself, cultivated networks of patronage and political support with the favela leaderships that emerged. Simultaneously, the favelas had become part of the city's housing market, and rich investors, sometimes represented by community leaders and favela entrepreneurs, profited from the collection of rents. These networks of political and economic interests contributed to the endurance of the hillside communities, despite their illegality.[28]

When faced with removal threats, which occasionally came from public health authorities, but mostly from alleged property owners claiming their land, favela residents applied some of the same strategies of the early-twentieth-century mobilization against tenement evictions. They hired lawyers to defend them in court and relied on the combination of legal and extra-legal strategies to enhance their chances of succeeding. For example, they applied pressure on the politicians who relied on their political loyalty to win elections. As the Santo Antônio Hill's dwellers had done in 1916, in the early 1940s the residents of a favela located in Santa Tereza went down to the Catete Presidential Palace to ask for President Vargas' support. The

[26] Gonçalves, *Favelas do Rio de Janeiro*, 106.

[27] Decreto n. 6000, de 1 de Julho de 1937, art. 349.

[28] Fischer, *A Poverty of Rights*, 234-252.

First-Lady Darcy Vargas, known for her charity work, often mediated the dialogue, intervening in favor of favela residents threatened with evictions.[29]

Although some of the strategies were the same, the vocabulary of legal mobilization had changed. During the early-twentieth-century reform, the lack of property was compensated by an emphasis on the home, a private space constituted by the existence of a household regardless of ownership. While they were forced to squat, the communities that occupied land on the hillsides forged narratives that portrayed the hills before their arrival as empty wilderness. The elite view of the favelas as representations of the backwards hinterland contributed to this portrayal. For favela residents, this narrative, which was also part of the construction of their own communal ties, had strong political and legal significance. The emptiness of the hills was translated into claims to *usucapião* (adverse possession), defined by the 1916 Civil Code as the continuous occupation of land, regardless of title, without opposition, for 30 years. Moreover, residents hired lawyers to translate their informal codes and contracts to judges, hoping that they would be recognized by the formal legal system.[30]

The emergence of a new definition of property limited by notions of public good contributed to the favela communities' struggles to remain in the city. As we saw in Chapter Six, beginning with the 1934 Constitution, property was defined as a right that could not be exercised against the social or collective interest.[31] While legal scholars such as Léon Duguit and Viveiros de Castro had envisioned the social function as the result of limitations on property ownership imposed by the top-down growth of the modern state's responsibilities, the 1934 Constitution's

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[29] Fischer, *A Poverty of Rights*, 235-236.

[30] Fischer, *A Poverty of Rights*, 235-236; Código Civil de 1916, art. 550.

[31] Constituição da República dos Estados Unidos do Brasil, de 16 de julho de 1934, art. 113, 17.

concepts of collective or social interest could be appropriated by bottom-up struggles for access to land and housing.

Yet, in a usual elite maneuver to neutralize social change, the drafters of the constitution added that the effectiveness of the social and collective interest limitations would depend on legislative acts.[32] For five decades, while successive authoritarian and democratic constitutions reproduced limited conceptions of property, the balance of power that guaranteed the rural oligarchs' domination over congress made the clause for the most part ineffective, especially regarding the reform of Brazil's highly concentrated rural landownership.[33]

Albeit technically ineffective due to the lack of legislation, in the 1930s and 1940s the new constitutional definition of property became part of Rio's favela residents' legal vocabulary against removals. As historian Brodwyn Fischer has shown, their claims based on property's social interest intertwined with claims to adverse possession. Evoking the social interest clause made more sense wherever the residents had created communities on previously unoccupied land.[34] After decades of anti-eviction struggles, in 1956, the national congress passed a bill that banned favela evictions for two years, therefore putting an end to the property conflicts between alleged owners and squatters who claimed adverse possession.[35] The Lei das Favelas (Favelas Statute), an initiative of leftist congressmen signed by President Juscelino Kubitschek, implied that to uphold the social well-being judges must take into consideration access to housing. It was

[32] Article 113, 17 read "It is guaranteed the right to property, which cannot be exercised against the social or collective interest, in the form determined by statutes."

[33] Gonçalves, *Favelas do Rio de Janeiro*. Brazil had new constitutions in 1937 (authoritarian), 1946 (democratic), and 1967 (authoritarian), all of which contained different formulas for the limited conception of property.

[34] Fischer, *A Poverty of Rights*, 227.

[35] Although the ban was for only two years, some policymakers argued that the statute was self-renewing in the absence of contrary legislation. Fischer, *A Poverty of Rights*, 298.

therefore a victory of the favela activists who had pushed for this progressive interpretation of the constitutional limitation on property for years.[36]

From home to property to housing, the struggles of Rio's poor to live and work in the city appropriated and reshaped legal vocabulary inside and outside courtrooms. Beginning in the early 1960s, when Carlos Lacerda, governor of Guanabara State (1960-1965), renewed Mayor Pereira Passos' early-twentieth-century paradigm of an anti-popular "technical" administration, Rio's favelas faced a fierce state-led campaign of forced removals. These policies intensified during the military dictatorship (1964-1985), when an unprecedented number of hillside communities was destroyed.[37] In addition to the old hygienist ideology that demonized these places as focuses of disease, crime, and immorality, both the military and the leftist resistance portrayed the favelas as potential communist revolutionary cells. Yet, as in the early twentieth century, Rio's poor continued to rely on strategic alliances and legal mobilization to defend their most immediate need: cheap housing near work opportunities.[38]

In the late 1980s, seizing the transition to democracy, social movements invoked the social function of property and the right to housing as legal arguments for the democratization of access to land in rural areas and housing in large cities. The 1988 Constitution, forged in a

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[36] Fischer, *A Poverty of Rights*, 298.

[37] Between 1962 and 1974, 80 favelas, which included 21,193 houses with a total of 139,218 people, were removed. Romulo Costa Mattos, "Remoções de Favelas na Cidade do Rio de Janeiro: uma História do Tempo Presente". *Outubro* 21 (2014): 171-190.

[38] Janice Perlman, *The Myth of Marginality: Urban Poverty and Politics in Rio de Janeiro* (Berkeley: University of California Press, 1976). Recently, Brodwyn Fischer has analyzed the gap between communist ideology and the grassroots urban movements in the 1950s. She argues that "the gap between party doctrine and the massive, diffuse urban social movements of the mid-twentieth century was broader and more fateful still." Brodwyn Fischer, "The Red Menace Reconsidered: A Forgotten History of Communist Mobilization in Rio de Janeiro's Favelas, 1945-1964," *Hispanic American Historical Review* 94:1 (2014), 2.

transition that both preserved the old political forces that had sustained the authoritarian regime and opened space for diverse struggles for civil, political, and social rights, further developed the concept of property's social function and included housing among the constitutionally-guaranteed social rights.[39] National legislation that had existed since the 1960s was further elaborated to allow the state to grant land for the purposes of housing the poor.[40] Moreover, legal doctrine revived the social function as a paramount principle of Brazil's property regime.[41] Rio de Janeiro's current segregated social geography, which serves the interests of political and economic elites, has been consolidated since the 1990s. However, faced with the constant, though only occasionally explicit, threat of removal, the heirs of those evicted and displaced by the early-twentieth-century urban reform continue to mobilize the law, on the streets, in political chambers, the press, and courts, as a powerful language to claim their right to the city.

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[39] The 1988 Constitution mandated that property was limited by its social function (art. 5, XXIII), included the social function of property among the nation's economic foundations (art. 170, III), and provided the outlines for defining the social function in the chapters about urban and agrarian policies (arts. 182, 184, 185, and 186).

[40] The Decreto-Lei n. 271, from 1967, allowed the concession of public and private land for, among other purposes, land regularization of social interest. In 2001, the Estatuto da Cidade (City Statute), a groundbreaking law in the national and global scenario of struggles for the right to the city, regulated diverse forms of access to land for the purposes of housing the poor.

[41] Beginning in the 1990s, a group of Brazilian jurists who defended the interpretation of private law through constitutional principles advanced a historical narrative that attributed the rise of the social function of property in Brazil to the influence of Léon Duguit's definition in the drafting of the 1934, 1937, and 1946 interventionist and socially-oriented constitutions. This group, which is still highly influential in the Brazilian legal academy, interprets the social function clause of the 1988 Constitution as a powerful principle that limits private ownership in Brazil. See, for example, Gustavo Tepedino & Anderson Schreiber, "A Garantia da Propriedade no Direito Brasileiro," *Revista da Faculdade de Direito de Campos* VI, n. 6 (2005).

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