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The Misrule of Law: Land and Usurpation in Brazil

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How do we conceive of law if litigation does not aim to settle conflict, if it is a means to perpetuate and obscure rather than resolve disputes? In this essay, I shall demonstrate the power of an unsettling norm: The Brazilian legal system aims neither to solve land conflicts justly nor to decide their legal merits through adjudication. My argument stresses intention and norm because land law in Brazil is so confusing, indecisive, and dysfunctional in its own terms that one suspects that the cause of these characteristics is not incompetence or corruption alone but rather the force of a set of intentions concerning its construction and application different from those aimed at resolution. Thus, I argue that Brazilian law regularly produces unresolvable procedural and substantive complexity in land conflicts; that this jural-bureaucratic irresolution dependably initiates extrajudicial solutions; and that these political impositions inevitably legalize usurpations of one sort or another. In short, land law in Brazil promotes conflict, not resolution, because it sets the terms through which encroachments are reliably legalized. It is thus an instrument of calculated disorder by means of which illegal practices produce law and extralegal solutions are smuggled into the judicial process. In this paradoxical context, law itself is a means of manipulation, complication, stratagem, and violence by which all parties—public and private, dominant and subaltern—further their interests. It therefore defines an arena of conflict in which distinctions between legal and illegal are temporary and their relations unstable.

To make these points, I shall analyze a case of land fraud in the settlement of São Paulo's urban periphery.¹ My objectives in this analysis are, first, to provide an ethnographic account of an extraordinary land conflict; second, to understand the relation between law and society that it reveals; and third, to consider aspects of the anthropology of law that it problematizes. This case illustrates the overwhelming significance of illegality in Brazilian land oc-

¹ Part of a larger study of land, labor, law, and social movements in Brazil, this essay is based on two years of field and archival research between 1987 and 1990 funded by a Fulbright Hays Faculty Research Award, a CIES Fulbright Regional Award, and the University of Southern California. I am grateful to the people of Jardim das Camélias in São Paulo for their invaluable assistance in collecting and analyzing data presented in this article. I am especially indebted to Antônio Benedito Margarido, lawyer to their neighborhood association; José Nogueira Souza, its president during fieldwork; and Teresa Caldeira, fellow anthropologist.

cupation and the ways by which legal complication leads to the legitimization of usurped land rights. It also establishes the historical foundations of these practices, for its titanic but characteristic complexity takes us through nothing less than 400 years of history to make sense of the present-day dispute. Thus, we find the structuring relations between land and law that sustain conflict first in the development of Portuguese land policy as an instrument of colonization and then in imperial and republican attempts to use land reform to bring free European immigrants to Brazil.² This investigation further reveals that today's land frauds repeat old patterns with one basic difference: The poor now regularly compete in legal arenas from which they have been excluded—not because the law is more concerned with justice or resolution, but because they have learned, in large measure through land struggles, how to use the law's complications to extralegal advantage.

The reason for unearthing this complex history is not only analytic. Land disputes are also explicitly struggles over the meaning of history because they oppose interpretations about the origin of rights. At the legal heart of such cases is a title search, a search for origins which justify or debunk claims. Thus, I soon discovered that no one could make much sense of the dispute in question without following it back in time. Litigants, lawyers, judges, residents, and swindlers study its genealogy to base their present-day arguments on the authority of history, which in this case begins in 1580. They operate under an assumption basic to property rights in many societies: that historical precedent confers legitimacy. It need not. An alternative argues that present necessity overrides precedent, a position for instance that many Catholic Church activists have taken in Brazilian land disputes. As we shall see, however, disputants usually adopt a historicizing strategy: They use law to give their claims believable historical origins. Most turn out to be, nevertheless, highly ambiguous and many deliberately false.

If the search for origins aims to discover precedents that justify one set of claims to subvert another, then my research into origins also has its corrosive intent. I establish their legal fiction not only to debunk the appeal to history in such cases but also to question what remains a central tenet in legal anthropology about the idea of law itself and its explanation by function: that the basis of law as an institution is its function in maintaining the necessary conditions of social life. Whether considered in terms of cohesion as in an older literature or its obverse, hegemony and resistance, as in a newer, law serves social necessity essentially by resolving conflict and enforcing conformity to norms, usually on the basis of notions of what is right, just, and good;

² Elsewhere I show with greater scope that Brazil's urban peripheries owe their formation to land policies designed to regulate labor supply by attracting, anchoring, and disciplining a desired kind of work force (Holston 1989:chs. 6–8; and Holston n.d.). This regulation establishes not only basic patterns of migration and settlement but also the conditions of land conflict upon which I focus in this essay.

and its inability to do so is the result of some factor extraneous to its nature, such as incompetence, corruption, or politics.³ In this essay, I am especially concerned with this last point and the theoretical consequences of banishing the disruptive from the explanatory model.

To take a classic example, Schapera (1955:xxv) justifies why he excludes the violations, abuses, and “many subterfuges employed to circumvent the law” from his handbook of Tswana law by claiming that the natives themselves might resent “the inclusion of what are, after all, abuses of the law and not part of the law itself.” Of course, anthropologists of diverse theoretical persuasions have often described such extrinsic or so-called latent features of legal systems (see Nader 1965:18–21 for samples from an older ethnography). But in an astute observation that remains valid today, Nader (1965:21) writes: “for the most part the inclusion of such extralegal functions in the anthropological literature has been anecdotal. [They] are not meant to illustrate *the law*; rather they are examples of what should be included in any truly *ethnographic* study of the law.”⁴ Recent anthropological studies reject this essentialist and functionalist view of law by focusing on conflict, politics, and discourse.⁵ Though these studies rightly emphasize the way power motivates legal systems, they have not problematized the idea of law itself by conceptualizing its evident dark side as law in relation to the utopian factors of justice, harmony, and resistance they retain. Thus, in a discussion of Brazilian law, Shirley (1987:89) attributes its dysfunctions to a “gap between the formal and the applied law.” Such dichotomization is not restricted to anthropology and has important consequences. Brazilian legal education generally attributes the law’s evident and incapacitating chaos to the gap that Shirley elevates to an analytic concept. Law students are taught that formal law in Brazil is based on the transcendent values of a liberal legal culture corrupted by real-world, class-ridden, and statist interests. In what follows, I do not

³ Any number of anthropological studies reiterate this tenet. It appears across the theoretical, topical, and regional spectrum as an emphasis, for example, on maintaining social control through custom or enforcement (Malinowski 1926, Radcliffe-Brown 1933), cleaning up social messes (Llewellyn and Hoebel 1941), curbing abuses (Gluckman 1955), producing social cohesion through conflict (Gluckman 1956), settling disputes (Gulliver 1963), encouraging compromise and balance (Nader 1969), and eliminating ambiguity (Leach 1977). An exception is Leach’s (1963) provocative but neglected paper in which he argues, against both Malinowskian and anti-Malinowskian functionalists, that in primitive society law serves to protect privilege.

⁴ Even Barnes (1961:193), in one of the earliest studies of “law as politically active,” concludes that although “jural institutions [where there are no courts] . . . in fact provide the rules by which [political] struggles are carried on . . . the law may nevertheless be regarded as an enduring consistent set of rules impartially applied.”

⁵ For example, recent essays suggest that legal systems create conflict (Starr and Collier 1989); that legislation is an arena of factional struggles and that folk law contests colonial rule (Vincent 1989); that so-called customary law is an invention of colonialism (Cohn 1989 and Moore 1989); that disputing may be governed by and used to promote harmony as a specific political strategy (Nader 1989); and that legal discourse may introduce hierarchy in relations presumed equal (Greenhouse 1989; see also Santos 1988 on law as discourse).

doubt that utopian principles may exist in law or indeed that they are desirable. What I doubt is that the law's dystopias are external to its construction.

THE ILLEGAL PERIPHERY

Since the 1940s, most workers in São Paulo confront a dual residential dilemma. Because they lack other options, they have to build their own houses; but to find an accessible lot for a house, they have to go ever farther out into the hinterland—"into the bush," as they say—where the only infrastructure is the dirt road that speculators in tract real estate and transportation construct to sell the land. The force of this dual necessity drives the expansion of the urban periphery at astonishing rates as these speculators have opened it up to millions of workers.⁶ In the classic settlement pattern called autoconstruction, residents first erect shacks of concrete block or wood and then spend decades transforming them into finished, furnished, and decorated homes (see Holston 1991). As a result of this process, home ownership is almost a norm in the periphery as about 60 percent of families live in their own houses, 30 percent rent, and 10 percent live in houses loaned to them by proprietors who are usually relatives (Metrô 1990:30). With little exception, people initiate autoconstruction in two ways: They either purchase or seize a house lot. However, both options almost invariably lead to some form of illegal residence.⁷ People who squat on seized land have no legal rights to it, though the law tends to recognize their ownership of their constructions. Those who purchase lots, thereby having some legal claims to own them, usually find that the developer's illegal methods in selling the land—ranging from outright fraud to the failure to provide the basic urban services required by law—have jeopardized legal recognition of the deed. In fact, São Paulo's planning bureau has recently estimated that not less than 65 percent of the entire population resides in violation of property or housing laws (Rolnik *et al.* 1990:95)! Whether people seize or purchase land, most seem to understand the central paradox of their situation: The very illegality of their lots makes land accessible to those who cannot afford the higher sale or rental prices of legal residence. Even more significant, this illegality eventually prompts a confrontation with legiti-

⁶ Though the geographic and demographic characteristics of the periphery constantly change, I estimate its current population at 5.5 million people or just over half the residents of the municipality of São Paulo (Seade 1989:table 12.15). One may get a sense of the periphery's rate of expansion by considering that the urban area of Greater São Paulo increased 53 percent between 1977 and 1987 (Metrô 1990:16), and that the population of the peripheral district São Miguel Paulista registered annual growth rates during the 1950s, 1960s, and 1970s of 15.2 percent, 13.6 percent, and 6.6 percent respectively, while those of the municipality as a whole were 5.6 percent, 4.8 percent, and 3.7 percent during the same decades (Caldeira 1984:38).

⁷ I give an ethnographic account of the forms and processes of illegality summarized in this essay in Holston 1989:257–99 and Holston n.d., for the illegal peripheries of Brasília and São Paulo respectively. I analyze the political significance of illegal residence and its role in mobilizing people to form grassroots organizations to legalize property ownership and obtain urban services.

mate authority in which residents usually succeed, after long struggle, in legalizing their precarious land claims. Illegal residence is, therefore, a common and reliable way for the working classes to win legal access to land and housing that would otherwise be beyond their means. Thus, a fundamental relationship between usurpation and legitimation characterizes the periphery's development: Usurpation initiates settlement and precipitates the legitimation of land claims.

It is important to add that this relationship first crystallized at the beginning of Brazil's colonization as a strategy of landholding elites and real estate speculators, who perfected it as a means to reap incalculably greater gains. For centuries they have used it not only to further their commercial enterprises but also to achieve an overwhelming concentration of land ownership. Indeed, one of this essay's objectives is to demonstrate that Brazilian land law was constructed to be an accomplice, not a deterrent, of this practice. Everywhere in Brazil, therefore, and especially in the best of families, we find legal landholdings that are at base usurpations legalized.

The legal status of property initially depends on how it is alienated or acquired, which means essentially either by sale or seizure. By law, parcels of urban land can only be developed legally when they are subdivided into lots. Federal and municipal codes regulate urban subdivisions (especially Federal Law 6,799/1979), establishing physical requirements, which include minimum lot size, hook-ups for services, and open spaces for traffic circulation and community facilities; and bureaucratic regulations, which stipulate the procedures for registering the subdivision and alienating the land. These are in turn founded on the bureaucratic mode of land acquisition established in the Brazilian Civil Code (Código Civil 1990:Art. 530) through which property is acquired "by the transcription of the title of transfer in the Real Estate Registry." All transactions relating to property must be so registered to obtain the relevant legal rights. These transcriptions are regulated by the Law of Public Registries (6,015/1973), which sets out the formalities constituting the privately owned, labyrinthine, and venal cartulary system of public registries in Brazil, called *cartórios*.⁸ Their immense bureaucratic power is given in the

⁸ The term *cartório* refers generically to all types of judicial offices relating to the registration and documentation of transactions by persons and corporations which attribute authenticity and public faith to them. It includes notary offices, court clerk offices, and public registries and refers as well to the places in which these services are performed and archived. The term may be used more narrowly to distinguish the complex system of public registries, including those for private individuals, corporations, real estate, and titles and documents. *Cartórios* are owned and operated by a notary public on the basis of a lifetime government grant. Each contains specialized officials who register transactions within their sphere of authority in legalized books and who authenticate copies of those transcriptions for use elsewhere. All acts and agreements must be so registered to have any legal significance—whence the notion of a social order of paper, sealing wax, and stamps. See Silva (1967) and França (1977) for terminological distinctions; Batalha (1984:13–26) for a historical analysis of the system of public registries; and Batalha (1984:455–66) and Rodrigues (1987:400–9) for studies of the real estate registry specifically.

Civil Code (Art. 533), which states that transactions of real estate do not transfer ownership or related rights except from the date on which they are transcribed into the legalized books of the registry: that is, “those who don’t register don’t own,” as the saying goes. Full ownership of urban land, therefore, requires a legally registered deed, called an *escritura*, to a lot in a legally registered subdivision. Anything less jeopardizes ownership.

As defined in the regulatory codes, people buy lots in four types of subdivisions, usually existing side by side in the same neighborhood: the legal, irregular, clandestine, and fraudulent. The rarest of the four, a legal subdivision, meets all physical and bureaucratic requirements. An irregular subdivision (*loteamento irregular*) is—or better, appears to be—legitimately owned and registered by its developer but violates in some way the requirements for parceling the land. A clandestine subdivision (*loteamento clandestino*) is not registered in the real estate registry though the land itself may be legitimately owned by its developer. A fraudulent subdivision (*loteamento grilado*) is sold by a swindler, called a *grileiro*, who pretends to have legitimate title to the land through a vast repertoire of deceptions. The land scam itself is called a *grilagem* and the land thus held or sold a *grilo*.⁹ Although an illegal subdivision often combines features of several types, it is classified according to its most severe infraction. Thus, while all types are likely to be in violation of the planning codes, the *loteamento grilado* faces additional problems because it is developed, and even registered, on the basis of fraudulent documents.

When people purchase a lot in an illegal subdivision, they cannot obtain a legally registered deed until they correct the infraction. However, it may take them decades even to discover a problem because they can only apply for an *escritura* after completing all payments for the property, a bureaucratic formality sustaining many a swindler. When residents finally perceive their legal predicament, they usually learn that their investment is imperiled, their claims hopelessly entangled in bureaucratic misadventure, and their families threatened with eviction. In 1979, Caldeira (1984:70) found that among those households purchasing land in Jardim das Camélias, the neighborhood I also studied in the periphery of São Paulo, 57 percent had completed payments, although only 16 percent declared that they had definitive title to their lots. However, even such declarations cannot be taken at face value because many residents simply refuse to admit that their property, purchased with such sacrifice, is not secure. People have told me many times that “there may be some problems around here but everything is in order with my lot” and have produced documents to prove it. The difficulty is that a *grileiro* typically provides his victims with reams of bona-fide records—for example, sales

⁹ Although the etymology is uncertain, the use of *grilo* and cognates to refer to land fraud appears to derive from an analogy with the habits of the cricket (*grilo*): A claim-jumper’s valid title is as hard to find as a cricket is to locate, even though you hear it. The analogy dates from the creation of the real estate market in public lands after 1850.

receipts, tax documents, lot surveys, and protocols for preliminary registration—of transactions based on frauds not yet uncovered, which may become the basis of what are ultimately spurious deeds.¹⁰

Such subterfuge exemplifies a fundamental strategy that land swindlers of all stripes employ: the use of complication as a means to deceive. Drawing inspiration from the intricate formalities of the legal code itself and its bureaucracy of signatures, seals, stamps, and notarized copies, they model their deceptions on the very laws they violate. They try every legal and bureaucratic facade possible to give their operations a cloak of legality, sometimes so expertly woven that lawyers and judges are fooled, let alone humbler folk who are apt to be intimidated by official-looking documents. The result is that it is usually exceedingly difficult to determine the legal status of land purchased in the periphery, or the distribution of property conditions within a neighborhood, without an exhaustive title search of each and every lot. Grileiros rely on this very difficulty, knowing not only that people are gullible and that interviewing about property unreliable, but also that standard title searches are not likely to reveal frauds because, for example, that legally registered documents in one registry may be based on false or irregular documents from another.

The following case illustrates this stratagem. Squatters have long occupied a seventy-two-acre area along one bank of São Paulo's Tietê river in the northern periphery of the city. In 1987, y sold the land to z, who registered the sale at the Seventh Notary Office of São Paulo. This cartório based its transcription of the conveyance on the property's registration that same month at São Paulo's Seventeenth Real Estate Registry. That registration states that the land belonged to a couple born in the 1860s, married in 1890 in Santos, and living in 1986 in Guarulhos near São Paulo, who sold the land in that year by power of attorney to y. The problem is that in 1986 the couple had been dead for many decades, according to death certificates registered at São Paulo's Nineteenth Civil Registry. Digging considerably deeper, we find the original fraud: The Seventeenth Registry based its registration on a deed transcribed in 1986 in the Registry of a small town in the southern state of Paraná, which attests that a certain x presented himself as having the couple's power of attorney to sell the land to y—a lawyer, by the way. I predict that the courts will take many years to conclude that z and the estate of the couple were defrauded by x and y who made off with a lot of money, provided that z was not a partner in the fraud or that the claims of the old couple do not turn out to be illegitimate, neither of which is a remote possibility. In either case, I wager that given the legal complication of any of these possibilities, the squatters will end up with the land—if they can mobilize to demand that the govern-

¹⁰ I have shown elsewhere (Holston n.d.) that such spurious deeds are not necessarily worthless because they can be used to establish the good faith of the fraud victim, a juridical status crucial to political mobilizations involving land disputes among the poor of the periphery.

ment legalize their usurpation because of "social interest," as permitted by the federal constitution.

Even if the intrepid researcher survives the paper chase in such cases, it is often difficult to determine who owns what beneath the layers of complication. Hence, as in the next example, these disputes are frequently impossible to settle in court. Rather, they circulate forever through the bureaucratic system, awaiting more conclusive but nonexistent evidence on the merits of competing claims. Needless to say, irresolution best serves the interests of swindlers, as these cases are usually solved through extrajudicial and politically onerous maneuvers, such as accords or periodic amnesties, in which executive or legislative institutions of government intervene to declare the judicial system checkmated and abrogate one set of property claims in favor of another. Such interventions inevitably legalize usurpation and thereby insinuate illegal and extralegal practices into the law. Moreover, their all-too-common occurrence in the history of Brazil's settlement has inspired many an illegal land operation. Thus, as a delegate to São Paulo's 1935 constitutional assembly reminded his colleagues during debate on an amendment to give legitimate title to those who claimed land without it if they had paid state property taxes, there is a perverse and well-known correlation between making and breaking law. "The land policy of São Paulo," he complained, "has always been to try to avoid future land frauds [*grilos*] by legalizing past land frauds" (Estado de São Paulo 1935, 2:228), thus pointing out that the distinctions between legal and illegal in this area of vast social consequence were conceptually slim, non-categorical, and temporary. Perhaps because it merely restated the norm, however, his observation had no effect on congressional deliberation.

A CASE OF LAND FRAUD

To understand the vitality of this land policy and its importance in the formation of the periphery, I shall analyze an example of land fraud in Jardim das Camélias, a neighborhood with a population of about 7,000 located in the district of São Miguel Paulista on the extreme northeastern periphery of the city. Developed intensively only after 1969, this neighborhood is typical of the newer and poorer areas of the urban hinterland in which migrants (or the children of migrants) construct their own houses and hold industrial and service sector jobs at the lowest wage levels.¹¹ Based on a comprehensive household survey completed in 1979, Caldeira (1984:69–70) estimated the following tenancy conditions for a total population at that time of approximately 900 households and 4,650 people: 60 percent of the households lived on lots they had purchased, 26 percent rented accommodations, 12 percent

¹¹ See Caldeira (1984) for a comprehensive ethnography of Jardim das Camélias, and also Caldeira (1986) for a discussion in English of its grassroots political organization.

live in houses ceded to them (usually by relatives), and 3 percent occupied ceded lots. The latter are typically the so-called enforcers or hired gunmen (*capangas*) of the real estate agents who receive construction material and the use of a house lot in exchange for security services. By the time I conducted my fieldwork almost a decade later, one significant change in tenancy had occurred: Whereas there were no land seizures in 1979, hundreds of people had squatted in several areas of Jardim das Camélias by 1988. This “invasion” of the neighborhood, as many call it, generated deep hostilities between those who had squatted and those who had purchased—conflicts which underscore the importance of property ownership as a category of self-esteem and political consequence dividing the poor into antagonistic fractions.

The case involves 207 families who purchased lots between 1969 and 1972 but who have never been able to get legal title to them because they were sold fraudulently. It is only one instance of the kind of *grilagem* and consequent legal chaos tormenting over half a million other families in São Paulo’s eastern periphery. I shall first outline the chronology of the land dispute since the residents became ensnared and then analyze the various ownership claims whose contradictions have made it judicially insoluble and whose complications stretch back to the sixteenth century.

In 1969, a man named Rafael Garzouzi, “the Turk” or “the Lebanese,” as residents call him, appeared in the sparsely settled Jardim das Camélias. Through his real estate company, Adis Administração de Bens S. A., he opened a few dirt roads, set up an on-site office, fenced in eleven six-by-twenty-meter lots, and began to sell them. To buyers, he exhibited a plan for developing the entire neighborhood and deeds to the area that had been registered at the appropriate *cartório*. He offered a promissory contract that bound purchasers to monthly installments for periods of two to ten years and that pledged Adis to furnish receipts and a quittance after final payment. With these in hand, the buyer could then register his purchase and transfer ownership. Among the many things that Adis did not tell its clients, however, was that although notarized as a document, its subdivision plan had not been approved by the planning authorities—nor could it be. It not only violated planning codes but, more seriously, disfigured a plan already approved in 1924 for the very same area in the name of José Miguel Ackel.

In early 1970, the estate of Nadime Miguel Ackel, José Miguel’s brother, sued Adis to repossess the eleven lots it claimed to own. Adis brought counter-suit claiming that it had held legitimate ownership rights since 1958, and its predecessors since 1890, to an enormous tract of land that included the lots. Adis sought damages, charging that the Ackel estate had in fact usurped these rights in developing the 1924 subdivision plan and in selling approximately seventy lots since then. Adis expertly manipulated the judicial bureaucracy so that charge and countercharge circulated through the legal system for several years without any effect. It used the time, however, to appropriate the rest of

the neighborhood and to sell another 233 lots, part of which it renamed Vila Tyrol. Adis also sold two large areas to business associates, who subdivided them for sale as Jardim Ocidental and Jardim Eliano. The area now had four different names and subdivision plans with differing lot locations, irregular roads, and substandard lot sizes—all of which facilitated the sale of the same lot more than once. The 1924 plan was thus thoroughly disfigured by multiple layers of contradictory developments and an ever-expanding number of third parties who had ownership claims. Moreover, in response to the Ackel challenge, Adis and associates launched a campaign of intimidation: They installed capangas who demolished constructions, tore down fences, refenced according to different lot sizes and locations, and otherwise denied access to those who had not bought from their bosses.

Residents responded in various ways. Many contracted lawyers who appeared in the neighborhood to offer their services and who disappeared as soon as they received advances on their fees. Some were duped by door-to-door document peddlers claiming to represent the real estate companies or even city hall. Others ignored the situation, pretending or believing that their lots were legal. Finally, suspecting illegalities on all sides, about eighty people organized a Neighborhood Friends Association in 1972 to defend their interests collectively. They sought advice from a group of lawyers affiliated with the University of São Paulo, the Catholic Church, and leftist political parties, and known for their work with other grassroots organizations. This turned out to be an enduring relation, as one of these lawyers has remained dedicated to the case ever since.

Once the dispute was juridically engaged, the state of São Paulo intervened, claiming that it in fact owned the land and in 1972 ordered the eleven lots sequestered. The Ackel estate opened a new suit in 1973 against both Adis and the state to repossess all 207 lots it claimed, to which the state responded by sequestering everything in 1975. This writ ordered residents to make all remaining payments to an escrow account in a state savings bank pending resolution of the ownership dispute. It meant that they had to complete payments without receiving proof of ownership, that they could not sell their lots legally, and that neither the subdivision nor any of its constructions could be regularized. Nevertheless, I have not heard of any residents who stopped payment. Indeed, all the ones I know personally completed theirs in escrow.¹²

The state's action meant that Adis was not receiving any installments. As the writ of sequester did not prevent it, Adis responded by serving residents with eviction notices to intimidate them into making lump-sum payments. During this period the neighborhood association and its attorney learned how

¹² The diligence of residents in making payments throughout this confused period follows not only from their lawyer's counsel on securing the status of buyers in good faith before the courts. It also follows from the importance these workers attach to the social and moral distinction of property ownership.

to use the legal system to forestall eviction and eventually how to complicate Adis's activities in Jardim das Camélias to the point of inactivation. Until that time, no other lawyer representing residents had been able to beat the grileiros. At most, they had been able to arrange out-of-court settlements in which their panicked clients paid to cancel eviction proceedings; at worst, their clients were evicted. By contrast, the Association's lawyer convinced members to contain their fears until their day in court. Then, at each hearing, he challenged Adis to prove ownership definitively, which it could not do in any instance. He also argued that the residents had not defaulted on their contracts or invaded the lots but were buyers in good faith who were making full payments in escrow pending resolution of the dispute. As a result of these and other tactics, he forced Adis to request postponements or to withdraw lawsuits altogether. In the end, after spending a considerable sum of money in legal fees, it lost every case. Moreover, in 1983, the Association denounced Adis's disfigurement of the 1924 subdivision plan to city hall, which ordered the company to pay for a new survey and plan regularization. As the Association expected, the new plan was regularized but could not be registered in Adis's name. This failure publicly compromised Adis's ownership argument. Furthermore, regularization dismembered each lot with its exact measurement and location for tax purposes—an important recognition of the residents' rights and duties. As a result of such legal engagements, the Association learned how both to disarm its enemies through legal maneuvers and to build an impressive dossier of official documents to support its claims.

This mastery of the rules of the land game was a pioneering achievement for lower-class protagonists in a land dispute. It counters the norm that even when represented by counsel the poor lose head-on encounters with real estate speculators and land barons. The Association's success in this case was very much due to the abilities of its president and its lawyer to achieve a new understanding of law as a strategic resource and of the legal system as a game of tactics to engage and exploit. With this approach, they overcame a variety of what might be called essentialist views that have long characterized the poor's deferential, alienated, and subordinate relation to law. These views accept the obvious bureaucratic and upper-class exploitations of the legal system as external corruptions of what is in itself an embodiment of principles of justice to venerate, of established procedures and jural relations to endure fatefully, of complex knowledge and moral axioms best left to educated elites, or even—in revolutionary and millenarian movements—of political ideologies to reject out-of-hand.¹³ Though not a final victory, the Association's

¹³ It is worth noting several exceptions to the generally alienated relation of the poor to law. One involves labor law and its special courts, which were founded as a cornerstone of Vargas's corporatist state. Through these courts, the official and powerful trade unions established effective legal services for workers in labor disputes. Although these services are now expanding their scope, they have been mostly available through the trade unions to which only a minority of

success thus far constitutes a new relation to law on the part of its traditional victim, one that we may identify as strategic opportunism because it considers law to be a resource governed by circumstance rather than by fixed principles. Effectively, this innovation redistributes to the lower classes a legal strategy first perfected by Brazil's elites, as I show later, during the colonial period.

The federal government's intervention completed the legal imbroglio of the dispute in Jardim das Camélias. It also claimed to own the land as federal patrimony and refused to recognize the validity of any transaction or judicial proceeding concerning the area from which it had been excluded, thus effectively negating most of its history for the last few hundred years. Federal intervention obstructed and confused every judicial action previously undertaken to clarify ownership: It stopped demarcations and lawsuits in process and prevented both the city and the state from expropriating, legalizing, or in any way regularizing the disputed lands. In 1975, the case went to the Supreme Court as the only tribunal empowered to judge a conflict between federal and state governments. To proceed, however, it first had to evaluate each claim, discriminating the various private from public property interests in the area. As a result, the case still languishes in the high court for lack of evidence, resources, and probably the nerve to decide which among the multitude of ownership claims have most merit.

As the years pass, the major parties to the conflict have opted for extrajudicial strategies. In 1983, Adis and the estate of Nadime Miguel Ackel signed an accord to extinguish their suits against each other. Ackel conceded the 207 lots in dispute to Adis, which in turn conceded an equivalent number to Ackel in other areas of Jardim das Camélias. Neighborhood leaders consider the agreement nothing more than a pact among thieves to establish a united front against the increasing activity of squatters in the area. Nevertheless, a year later, the Neighborhood Friends Association signed an accord with both. It accepted the terms of their 1983 agreement if in exchange they suspended eviction proceedings, promised not to litigate against members of the Association in the future, agreed that those who had completed payments in escrow had fulfilled their contracts, and accepted a number of other points securing a minimum degree of tranquillity for residents. On the basis of such concessions, the three parties agreed to the viability of an extrajudicial, so-called friendly solution to the dispute. Why should each have accepted? Adis and

workers belong. A second exception is less directly relevant today but nevertheless historically significant. In a study of the last decades of slavery in Brazil, Chaloub (1990) shows that slaves made strategic use of the legal system in disputes with masters. He brings to light many cases in which slaves were successful at court in gaining freedom, changing masters, relocating family members, ameliorating conditions, and protesting punishments. There is little information about other areas of law in which the poor may be actively involved, though research not determined by essentialist and class-bound conceptions of law is lacking.

Ackel wanted to have as much recognition of their ownership claims as possible, and the residents wanted to determine a clear owner to whom they could make payments in exchange for receiving legal title. They were willing to pay; indeed their morality required payment to distinguish them from squatters. The question was to whom?

The agreement recognized that a friendly solution would require both the state and the federal governments to renounce their ownership interests. However, the state denied the request and took the opportunity to instruct the attorney general to form a commission to analyze the problem of such land disputes in the entire eastern periphery of the city. This commission of state prosecutors met throughout 1986, concluding, in the words of the attorney general, that "the already chaotic legal situation of the area, abandoned for so many years to the greed of the 'grileiros,' has become practically insoluble given its procedural complexity, characterized by the simple fact that an enormous number of original defendants and their successors allege that they have legal evidence to support their claims." Given the impossibility of a judicial solution, the commission proposed a resolution "by politico-administrative actions" based on a presidential decree abjuring the federal government's interests in favor of the state of São Paulo. In turn, the state would renounce in favor of "friendly accords," such as the one in Jardim das Camélias, where possible; or, if not, it would expropriate disputed land and award it to residents.¹⁴

Although two successive governors of the state have signed agreements to form a joint state and federal commission to work out the details of this proposal, no further action at either level of government was ever taken. When asked why, residents grumble about lack of political will and about corruption but do not seem too surprised after twenty years of confusion. The neighborhood association continues to seek friendly accords between new grileiros and new residents in the area and to contemplate other strategies. Meanwhile, all around São Paulo, and indeed all around Brazil, the fraudulent transaction of land continues unabated under the cover of procedural complexity, which is to say, under the cover of law.

A HISTORY OF DUBIOUS ORIGINS

Cases like the one we consider in this essay suggest that Brazilian law features several modes of irresolution. Although my focus here is land law and its bureaucracy, my own experience in Brazil is that this feature is a key attribute of many facets of its legal system. Unfortunately, I have not found research sensitive to this conceptual issue in other areas of law, although DaMatta has long argued for the special importance of ambiguity in Brazilian social life

¹⁴ Telex from Feres Sabino, Attorney General of the State of São Paulo to Leonel João Carvalho de Castro, director of the Office of Federal Patrimony, August 1986.

generally.¹⁵ While my primary and empirical concern in the following discussion is law in property conflicts, I intentionally imply a wider scope for my conclusions.

The Brazilian legal system features an ad hoc mode of irresolution in which disreputable or even honorable men seek advantage through the deliberate use of particular stratagems to influence an easily manipulated bureaucracy. But as a construction of law, the system is too inoperative, contradictory, and confusing in its own terms to attribute these characteristics to corruption, incompetence, or individual manipulation alone. Rather, its predictable dysfunction indicates a more systemic mode of irresolution. It suggests that the legal system skillfully embodies intentions to perpetuate judicial irresolution through legal complication. For that very reason, the law facilitates stratagem and fraud. Yet, as we have seen, it is not only the malpractice or devious practice of law that generates this complication. Using the law legally also creates “practically insoluble procedural complexity” and invariably does so in important conflicts.

Although legal irresolution certainly promotes and benefits corruption, I suggest therefore that it has a more profound consequence in Brazilian society: Irresolution is also a means of rule that the legal system empowers; that is, the rule of law in Brazil systematically produces irresolution for a society in which irresolution is a means of rule. Of course, legal ambiguity need not entail administrative uncertainty. There are countries more or less efficiently governed with legal systems, such as American and British common law, that produce irresolution.¹⁶ Moreover, there are other means of rule in Brazil, and judicial resolution is not unheard of. But the more significant the dispute in Brazil, especially involving land, the less likely it will find such settlement. Rather, the ruling classes use law to avoid court decisions in which they have to submit to the uncertainties of justice. Instead, they launch jural-bureaucratic maneuvers to keep conflicts open but bureaucratically tied up until they can secure an extrajudicial, political, and politic solution. Going to court for a judgment between elites may be an act of desperation that they fear because it means that they have exhausted their networks of power and favor—that they have failed to find a *jeitinho* (a knack or way of getting around a bureaucratically or legally difficult problem), as this extralegal process is often called—and are therefore likely to lose. However, going to court against those they dominate is an opportunity to display their power to control a judicial process which in general humiliates the poor by forcing them to submit to judgments or procedures worked out in advance. That the residents of Jardim das Camélias and their lawyer have learned to orchestrate this process to avoid decisions and to develop extrajudicial solutions means nothing less than that they

¹⁵ See especially the 1991 English edition of DaMatta's classic study in 1979: *Carnavais, Malandros e Heróis*.

¹⁶ I am grateful to Professor M. G. Smith for this observation.

are redefining the legal arena. They are not changing the rules of the game but using them to challenge the exclusivity of its strategic players. Thus, people invoke the law's complications not only for fraudulent purposes but to bring conflict into the legal arena as a way to keep it unresolved but contained, thus controlling it in a residual sense until the political will is found for solution. In perpetuating conflict, therefore, jural-bureaucratic irresolution may be politically functional but not in any functionalist sense.¹⁷

To demonstrate the force of irresolution in the law, I shall unravel the tangled sets of ownership claims to land in Jardim das Camélias. Their history takes us to the colonial foundations of Brazil and reveals the remarkable degree to which both territorial occupation and land law developed out of the need to legalize usurped rights—first to further the fortunes of Brazilian colonists against those of Portuguese rule and, after independence, to consolidate them. As we follow the litigants' own arguments back in time, we shall find that the so-called *grileiro* in this case is not the only party to use law to construct historical origins and that it will be difficult indeed to determine which origins are less dubious.¹⁸

Federal Ownership Claims: Sesmarias and the Indians

The federal government claims that it owns the lands of Jardim das Camélias because they fall within the boundaries of the ancient Indian Settlement of São Miguel and Guarulhos established by royal land grant in 1580 and officially extinguished in 1850. I found two arguments to support this claim. One reasons that the imperial Land Law of 1850, and subsequent legislation, incorporated indigenous settlements into the national patrimony. All federal constitutions, except the first in 1891, have reaffirmed this incorporation. The Republican Constitution of 1891 placed indigenous lands under the patrimony of individual states, a decision reversed in 1934. The federal government's second argument accepts that by the first constitution the states had acquired rights in 1891 to former Indian settlements declared abandoned and vacant

¹⁷ My own conception of law here is not reified, functionalist, or conspiratorial. In ascribing intentions, goals, objectives, and motives to law, I am not invoking some supraindividual entity or collective historical subject as "law." Rather, I am referring to specific texts, rules, procedures, and institutions which are explicitly concerned with the regulation of social relations and actions, one largely grounded moreover in the consideration of intention. The intentions I speak of therefore are neither free-floating nor hidden but instead attributable to specific actors, including legislators, judges, lawyers, litigants, swindlers, and criminals. Thus, I stress intentional and not functionalist explanation, drawing this distinction between the two: The former accounts for behavior by focusing on its intended consequences while not, of course, neglecting the unintended ones; the latter explains individual actions by deriving them from the supposedly beneficial or self-regulating actual consequences of aggregate patterns of behavior.

¹⁸ These arguments are presented in various legal documents, such as titles, registrations, court records, notarized accords, and technical reports. I am greatly indebted to Antônio Benedito Margarido for sharing his archive of these documents with me. I have also consulted the records of the Neighborhood Association of Jardim das Camélias and local historical studies, such as Bomtempi (1970).

(*terra devoluta*) but claims that the lands in question were never in this category. Rather, it argues that the national government has retained ownership because it leased these lands to non-Indians since the seventeenth century on the basis of numerous executive and legislative interventions.

Several counter-arguments have been advanced against these claims. Some assert that the states acquired real rights to Indian lands in 1891 which cannot be repealed by subsequent constitutions. Others maintain that the federal government has ownership interests but not rights because it never distinguished the residual indigenous lands from private holdings as required. Nevertheless, the important point is that all of these positions have juridically plausible aspects which even the Supreme Court seems incapable of sorting out. This impasse derives directly from the legacy of legal chaos that postcolonial Brazil inherited from the Portuguese system of royal land grants, one of which was the Indian Settlement of São Miguel. Hence, to understand the rule of jural-bureaucratic complication and the array of claims in Jardim das Camélias, we must survey this legacy.

One founding premise of Portuguese colonialism is that the royal emissary's act of discovery or conquest incorporated land into the king's personal patrimony. This incorporation established the legal foundation for the empire's policy of ruling the colonies by creating landholding elites. This established the king's right and duty to redistribute conquered land to his subjects for the conjoined purposes of economic exploitation and Christianization. The Crown had assumed the latter project when the pope ordained King João III as Grand Master of the Order of Christ in 1522, making him responsible for propagating the faith among peoples discovered in the course of Europe's maritime explorations. Hence, the Portuguese crown claimed title to the entire territory of Brazil by virtue of Cabral's landfall in 1500 and established jural-political organization in the Rules of Government of 1548 through the distribution of land for commercial and religious enterprise.

To regulate this distribution, the Portuguese employed a medieval system of royal land grants called *sesmarias*. In the late fourteenth century, the Crown devised various legal mechanisms to force the cultivation of uninhabited, unproductive, or abandoned lands. It consolidated these measures as the Law of Sesmarias and incorporated them into the legislative codes that governed Portugal and its colonies. Because the Crown's central initiative was to link land occupation to productive agricultural use, the imperial codes authorized the expropriation of unproductive property for reassignment as noninheritable grants in exchange for a rent of one-sixth of the annual production. They limited the size of these grants to the capacity of applicants to cultivate them and specified the duration of usufruct rights, after which uncultivated sesmarias reverted to the Crown—restrictions destined to cause great conflict in Brazil.

Transferred to the Americas with the royal instructions of 1548, this policy

became the Crown's only legal means to fix people on the land to carry out its projects of commercial cultivation and religious instruction, both based on sedentary agriculture as the Christian alternative to the nomadic habits of heathens. Therefore, the Crown authorized its New World agents to distribute sesmarias only to those who possessed the considerable resources necessary to develop them for these purposes. This necessity transformed the policy. To attract such colonizers, especially to set up slave-based sugar plantations, the Crown offered generous incentives, removing inheritance restrictions and annual payments (except for God's tithe) from the grants. Moreover, even though the requirement of cultivation still applied, its meaning changed. In colonial Brazil, land itself had little value. This was not only because of the immense amount available but especially because its profitable exploitation depended on complex capital arrangements concerning the supply of slaves. Because the production of sugar, cattle, and later coffee required the continuous incorporation of new lands and slaves, the Crown often used sesmaria grants to guarantee future investments in export production rather than to secure the actual occupation of land. Hence, land could be legitimately held for future use without being cultivated or occupied—a perversion of the original objectives of the sesmaria law.

On the basis of these changes, the Crown's agents used royal grants to carve up Brazil into enormous latifundia. The common concessions of ten, twenty, and even one hundred leagues (167, 334, and 1,670 square miles, respectively) were so large, according to a contemporary observer, that in many one could "lose Italy" (cited in Lima 1988:58). This distribution consecrated their grantees as an aristocratic, slaveholding, commercially oriented ruling class. By 1822, the year of independence from Portugal, the institution of sesmarias had produced a perversity: After three centuries of colonization, Brazil was a land without people and a people without land.¹⁹

In addition, the system of sesmarias had several lasting legal consequences. The first concerned the role of government in legitimating private property as a holding cut out from the public domain. Their role evolved as the notion of the sesmarias' ownership changed. Initially part of royal patrimony, they were granted to applicants as administrative concessions of usufruct rights. Because land could not be bought or sold, there was no real estate market. The historian of land law, Ruy Cirne Lima, argues that the Crown's ownership of sesmarias began to be considered in a different light after it imposed an annual tax (*foro*) in 1695 on the basis of ordinary property law (1988:41–43). After that, sesmarias were gradually thought of less as administrative restrictions on

¹⁹ According to Gonçalves Chaves's assessment published anonymously that year, little territory was still undistributed that was not "subject to invasion by Indians." As a result, "there are many poor families, wandering from place to place, at the mercy of the favor and caprice of the landowners and always lacking the means to obtain a bit of land in which to make a permanent establishment" (cited in Faoro 1975:407).

the appropriation of land by private individuals or public entities and more as alienations of property cut out of the royal domain, over which grantees had common property rights as symbolized by their obligation to pay property taxes. This conceptual transformation was not completed until the Imperial Constitution of 1824 guaranteed private property and the Land Law of 1850 consolidated its legal and market foundations. The latter established that grantees could petition the government for recognition as property owners and that thereafter public lands could only be acquired through purchase.

The second consequence of the *sesmarias* system was legal confusion, and it became a strategy of domination on both sides of the Atlantic. The Crown awarded many land grants with indefinite boundaries, producing endless litigation and violence over contested rights.²⁰ Congressional debates concerning land legislation in 1843 show that some legislators suspected that the Crown deliberately granted vague *sesmarias* not out of ignorance of uncharted territories or for lack of surveying skills but to keep planters “busy plotting against each other rather than against the crown” (Dean 1971:607). Yet, the Brazilians themselves developed the strategy of legal confusion with greater brilliance. Having taken the best lands, the rural elites worked in the eighteenth century not only to augment their individual shares but also to dominate the system of land distribution by preventing others access to it. Certainly, their means were violent. More effectively, however, they dominated distribution by generating such a confused heap of legislation about *sesmarias* that only those already in power could manipulate it. Their strategy was not to deny the law—as it is often assumed in the common assertions that Brazil was and is a lawless land—but rather to create an excess of it, zealously applying the Germanic–Roman legal fundament that “the law has no gaps.”²¹ These elites sent their sons to the University of Coimbra in Portugal to study law, and they returned to constitute the upper echelons of the legal and political professions in both pre- and post-independent Brazil.²² As judges, legislators, politicians, administrators, and heads of state, these elites staffed local governments and courtrooms, enacted laws to jeopardize opponents’ holdings, manipulated inheritance regulations, obtained additional grants surreptitiously through distant family members and arranged marriages, and squatted on unclaimed and disputed lands. In sum, they learned how to complicate the legal system for their advantage. Lima (1988:46) concludes that after a century of attaching legal restrictions and administrative procedures to land

²⁰ For instance, early land grants often used bow shots as their unit of measure. See Bomtempo (1970:52) for examples.

²¹ For example, in some places and under some conditions but not others, legislation required city council approval of grants in 1713, prior land surveys in 1753, and size limitations in 1795. The principle that there are no gaps in the law is enshrined in the current Civil Code in its Introduction, Article 4.

²² Viotti (1985:28) notes that in the course of the eighteenth century about 1,700 Brazilians received training at Coimbra.

grants, the elites succeeded in creating "an invincible tangle of incongruent texts, contradictory regulations, and defective bureaucratic mechanisms, all united under a constraining pile of doubts and stumbling blocks."

The fate of the Indian Settlement of São Miguel is a case in point. Established by Guaianase natives around 1560, it was soon transformed by Jesuit missionaries into the model Indian village proposed in the Rules of Government. In 1580, the Jesuits obtained a sesmaria for it of about 100 square miles, making it an official reserve of Christianized Indians. They intended not only to separate the converted and the lands necessary to teach them the ways of civilization through agriculture but also to gain the Crown's legal sponsorship so that the grant would protect the Indians from enslavement and their lands from seizure by neighboring colonists in the expanding village of São Paulo. Nonetheless, the Indians lost both their freedom and their lands. Not surprisingly, these deprivations occurred under the cover of law, and they offer a lesson in how legal complication and ambiguity serve illegal practices and how these practices in turn produced more law.

The enslavement of Christianized Indians was a legal travesty. The local government first arrogated control over their secular affairs and then created legal ambiguities and procedural complications concerning collective work responsibilities that permitted their *de facto* bondage.²³ Motivated by the usual complex of gold, greed, and expansion, it also usurped Indian lands through the legalization of illegal acts. First came outright land seizures. Then, at the beginning of the sixteenth century, the local government legally awarded to colonists sesmarias which illegally included Indian land. Such "irregularities," as officials described them, went unresolved for half a century until 1660, when the regional council managed to authorize itself to distribute lands within the reserve to colonists "as long as the Indians were not thereby disadvantaged" (Bomtempi 1970:64). This contradiction notwithstanding, it now legally regularized the irregular grants and issued new ones. In 1679, an appellate judge came to São Paulo to "correct," as the procedure was called, disjunctions between the law-in-books and the law-in-practice. Considering the land problem, he simply rewrote the former to fit the latter by recognizing officially what the Council had already usurped, namely, its authority over the Indian Settlement and the right to distribute its lands without restrictions. He further ordered the Council to oblige all squatters in the reserve to pay an annual tax, thereby regularizing their seizures by converting them into lease-

²³ For example, in 1596, the Crown issued a contradictory ruling on the freedom of converted Indians that declared that "neither will the gentiles, in order not to fool themselves, think that by serving the residents they will be captives, nor will they serve them for more than two months." When the Jesuits protested the flagrant buying and selling of these Indians, the Town Council got the chief judge in 1612 to prohibit religious authorities "from taking legal action against residents who sell free Indians because, even though this practice is criminal, its repression falls under the competence of the secular justice." This did nothing other than establish its authority to do nothing (cited in Bomtempi 1970:46, 48).

holds and transforming their status from mere invaders of public land to legally recognized leaseholders. These leases, called *aforamentos*, established usufructuary rights to land which were both alienable and inheritable. As they were far easier to arrange than royal grants and as they initiated a private market in land rights, they enabled the Council to dispose quickly and legally of the remaining Indian lands—all supposedly inviolable by the still valid title of *sesmaria*.

From time to time the Crown took note of this apparent contradiction but always deferred resolution in favor of temporary measures that indirectly recognized the validity of the leases, like its declaration in 1703 that only its representative had authority to collect the rents. When in 1733 the Crown finally voided the Council's rule over the reserve and ordered the land returned to the Aborigines, the Council rejoined that for over a century it had accumulated legal support for its land policies from numerous regional, colonial, and royal administrations. Like any smart *grileiro*, it brought out its dossier of collected documents (*sesmaria* titles, tax records, land surveys, leases, and so forth) to prove its point and succeeded in tying up the litigation in procedural complications until 1745. At that point, it dropped its case, having first determined that the appropriation of indigenous lands was irrevocable because there were few Indians left to retrieve them.

During the regime of *sesmarias*, elite Brazilians developed the skills to use law, government, and bureaucracy to create "an invincible tangle" of land regulations (Lima 1988:46). This imbroglio paralyzed the Crown's adjudication of land conflict, effectively permitting local authorities to legitimate illegal practices in their interest. Thus, legal complication became a weapon against Portuguese impositions and a reliable means to pilfer royal patrimony. Therefore, when the Council of Appeals at Rio de Janeiro abolished the policy of *sesmarias* in 1822 and suspended the leasing of crown lands, it was only formally extinguishing what had already been thoroughly subverted and usurped.

Ackel Ownership Claims: Posse and Squatter's Rights

The ancestry of the Ackel family's claims to Jardim das Camélias may be traced to the period of even greater confusion that began with the abolition of the *sesmarias*. For an entire generation, until the Land Law of 1850, no legal substitute for alienating public lands could be agreed upon. In its absence, the effect of the Council of Appeal's decision was to encumber occupation with another layer of chaos: It made illegal seizure the only way to obtain land and automatically turned all further acquisitions into acts of encroachment. Since the beginning of colonization, squatting on crown lands had been the common practice of settlers who lacked the resources to apply for *sesmarias* but who had the wherewithal to survive in the wilderness on subsistence cultivation. Given the immensity of Brazil and the large tracts of uncultivated and dis-

puted territory within the plantation areas, squatting was an ever-available alternative, tolerated, if ever noticed, unless someone obtained a grant to the squatters' land. Such holdings, called *posses*, thus made it possible for those who could not participate in the commercial economy to survive as free settlers and served as the trump, so to speak, of poorer immigrants—the frontiersmen, sharecroppers, and small farmers—against the regime of latifundists.²⁴

During the colonial period, squatting had an ambiguous jural status. Although considered illegal, *posses* were customarily recognized as legitimate if they were actively cultivated for a long time—with ongoing and evident production. Thus, productive squatters had certain customary rights.²⁵ These derive from the idea, already found in medieval Portugal's Law of Sesmarias, that property has a social function and property owners an obligation to produce some social benefit, be it food or colonization. Although this justification explains the government's concern about giving legal title to those who productively but illegally occupied land, especially public land, even if it jeopardized the rights of those who held it legally but unproductively, ambiguities about the meaning of productive and unproductive possession, squatting, and property persist to this day in various legal and cultural forms as endemic sources of land conflict. The colonial courts generally ruled that squatters' rights over cultivated lands could be legalized if their claims were registered and taxes and fees paid within a specified period. This decision essentially

²⁴ With reference to land, *posse* signifies physical possession by various means, including occupation and civilization, as distinct from property. Brazilian civil law has historically emphasized this distinction, based on Roman law and the theories of the German jurists Ihering and Savigny. In general terms, Brazilian law considers property as a juridical power or a bundle of rights including use, profit, alienation, and indemnity which does not have to be exercised to continue valid. By contrast, it views possession as a factual power that must be actively exercised. Property includes possession as its effect, but the cause of possession is not always property: e.g., a thief has possession but not property of stolen goods, a lessee has usufruct but not ownership, and so forth. In terms of its acquisition, the current Civil Code (Art. 489) classifies possession as just when it is not "violent, clandestine, or precarious" and unjust when the contrary. See Nascimento (1986), Levenhagen (1982), and Viana (1985) for discussions of these distinctions. In terms of land holdings, all of Brazil's civil codes and federal constitutions have established conditions under which *posseiros* may acquire property rights to the *posses* they continuously occupy and productively use. This possibility of turning possession into property has, as I explain below, long been a primary source of Brazil's endemic land violence.

²⁵ Such rights should not be confused with the so-called customary law developing in African colonies at the same time as a residual category of indigenous legal practices not taken over by colonial governments (see Moore 1989). Rather, for Portugal and its colonies, custom was itself legally defined by legislation. As part of the legal reform of the marquis of Pombal, the Law of Good Reason of 1769 defined customary rights by the following requisites: "conformity to the good reasons . . . that constitute the spirit of my [the King's] laws," non-contradiction of these laws, and age in excess of one hundred years (cited in Lima 1988:54). Opinion was unanimous that the practice of seizing and occupying land for cultivation met the criteria of rationality and time but was divided about its contradicting the regulation that land in Brazil could only be acquired through the concession of sesmarias. On the Law of Good Reason, see Miranda (1928:68–71) and França (1977:518–21).

converted a posse into a *sesmaria* or *aforamento*. For many squatters, however, these expenses were prohibitive; and a favorable ruling often had the perverse effect of forcing them off the land or at least into unambiguous illegality. Therefore, humbler squatters rarely sought to legalize their holdings. But the landed elites could generally afford the conversion, and this possibility encouraged them to squat on public land as an effective strategy to augment their estates. Moreover, they could take advantage of the ambiguous meaning assigned to active cultivation by seizing large tracts of land for legalization later. Thus, in anticipation of a new mechanism to legalize holdings after the abolition of *sesmarias*, elite squatters claimed posses of staggering size, even greater than that of the royal grants, usually marking their cultivation with nothing more than a trail or a corral, if that. In the backlands, squatters claimed as much as they could imagine; in the more settled areas, as much as they could hope to get away with.²⁶ These elite squatters thereby consecrated a fundamental and perduring strategy of land acquisition in Brazil: As usurpation usually initiated legalization, they confirmed land seizure as a dependable way to gain legal property rights.

Economic expansion, greed, and family ambition fueled the land grab which became a range war when new land pirates emerged to compete with established latifundists. With unguarded areas subject to seizure, all sides hired gunmen, known then as now by the Quimbundo term *capanga*, to defend their stakes and seize others. The modest farmers and backlanders who had actually settled posses were branded intruders and pushed off their lands. Completing a vicious cycle, the landless were recruited as *capangas*. In the absence of any legal means to establish title, killings became routine as conflicting land claims multiplied unchecked.²⁷

During this period, land grabbers refined the technique of manipulating the law that I identified earlier as a trademark of *grilagem*: They gave claims to encroached lands a cloak of legality by involving them in what appeared to be legitimate transactions. The two-fold objective of this technique is to build a dossier of documents attesting to what would be a legal transaction in each

²⁶ In 1845, the president of the province of Minas Gerais, one of the more populated regions, reported that 44 percent of its lands were claimed in posses, 36 percent in *sesmarias*, and 20 percent remained undistributed (cited in Dean 1971:610). Dean makes the interesting point that the abolition of primogeniture in the 1830s may also have stimulated the expansion of land claims as it became possible for landholders to bestow latifundium on each child. Hence, they mounted expeditions to obtain posses for their descendents.

²⁷ I know of no estimate of the number of killings during this period. However, a recent New York Times article (January 29, 1991) claims that between 1964 and 1990, 1,600 people were reported killed in violence related to rural land conflicts, though there are certainly many more unreported. Of the 1,600 cases, only seventeen went to trial. Of these, only one resulted in a conviction, namely, that in December 1990 for the murder of rural syndicalist Chico Mendes, which was the focus of tremendous international media coverage. In its 1988 report on Brazil, Amnesty International concludes that since 1980 more than 1,000 people have been killed in rural land conflicts, 38 percent by hired gunmen (Amnesty International 1988:10–11).

case if it were grounded in legitimate property rights and, thereby, to involve as many people as possible in the apparent recognition of the usurper's claim. There are as many versions of this stratagem as there are regulations about land itself. To immerse the property in a web of legitimate transactions, a squatter might pay taxes on his posse, sell a piece of it, donate a portion to a religious organization, have it surveyed, use it as collateral for a loan, bequeath it, or give it as dowry. His inheritors and business partners would continue to accumulate such transactions, making sure to pay the required fees and taxes. Most importantly, they would dutifully record them in the ledger of the local parish, which served in many places as the first registry. All the accumulated paper of these transactions—the receipts, wills, permits, surveys, bonds, ledger pages, and so on—was used as proof that the state and the church had sanctioned them. It is a technique, therefore, requiring considerable legal knowledge, and using it dissimulates usurpation and fraud within a web of legitimate claims. It aims to encumber this web with too many social relations with the passage of time to dismantle, so that legitimation by executive decree or legislative act becomes inevitable. In this kind of complication, fraud finds an accomplice in the law.

Sometime between 1822 and 1850, the parents of Gabriela Fernandes established a large posse within the Indian Settlement of São Miguel. When Gabriela married Felisbino Santana, they gave her a parcel of 600 acres as her dowry. By the time she died in 1886, this land had been registered at the local parish and legalized under the terms of the 1850 land law.²⁸ Her four children thus inherited it in equal shares. In 1924, one sold his parcel of 150 acres to José Miguel Ackel and a partner. Within the year, the former bought out the latter, developed a plan to subdivide the land into about one thousand lots, registered the approved subdivision as Jardim das Camélias, and put the lots up for sale. The enterprise failed. No doubt, it drew few buyers because at that time São Miguel Paulista was a distant and disconnected suburb of São Paulo, without its own places of employment or convenient transportation to others. Only in the 1930s did this situation change with the installation of factories and bus and train service. During this period of local growth, José Miguel sold 207 of his lots to his brother Nadime Miguel, a sale transcribed at the Seventh Real Estate Registry of São Paulo in 1935.

Thus, the origin of Ackel property in Jardim das Camélias lies in the sale of encroached indigenous lands and the legitimation of squatters' claims. Its

²⁸ This law established the means to legalize posses and at the same time eliminated them as a basis for future land claims. In brief, it required that all squatters register their claims and pay validation taxes. It also converted uncultivated or invalidated posses into unclaimed, no-man's lands (*terras devolutas*) and made the occupation of such lands thereafter a criminal act. In most respects, the Land Law of 1850 could not be implemented and was a failure, as landholders defeated it through legal complication and fraud. See Carvalho (1981), Dean (1971), and Lima (1988); for an interesting comparison with the U.S. Homestead Act of 1862, see Viotti (1985:78–93).

history demonstrates that despite its titles and registrations, the Ackel claim does not differ from those of the other litigants because it reveals a strategy of law that they all share in their origins: the use of some mix of custom, fraud, and legal complication to turn the mere possession of land—by grant, lease, seizure, proclamation, or even purchase—into property. If the Ackel history highlights the importance of custom in this strategy, the last one we consider exposes fraud.

The Ownership Claims of Adis and the State of São Paulo

The origins of Adis's claim in Jardim das Camélias, which also account for those of the state of São Paulo, are at the center of one of the most notoriously complex land cases in Brazilian history, which is indeed quite a distinction. Because its complexity seems endless, I cannot declare that I understand it fully nor that the following outline is free from distortion or error. It is clear, however, that there is no undistorted version as distortion structures the use of law in the case. Its legal manipulations were designed to create multiple and plausible, yet discordant and flawed accounts in relation to which the notion of legal truth dissipates and the possibility of resolution appears only in the impositions of conjunctural politics. Like the other litigants, Adis's principal argument is a genealogical one: It justifies its claim by presenting a supposedly legitimate pedigree traced to 1890 through seven generations of property rights, each certified by registered documents which in turn refer to earlier ones as giving legitimate origin to its claim. Once we examine this property tree, however, it becomes evident that Adis and its predecessors have been creating illicit but never entirely false origins all along the way.²⁹

When the imperial government promulgated Brazil's first comprehensive land law in 1850, it intended not only to establish legal means to regulate land titles and to prevent further seizure of public territory, but also to use land policy to bring European immigrants to Brazil, initially as free laborers to replace slaves on the plantations and later as free settlers on their own land. To that end, in 1890, the first republican government awarded 50,000 hectares (about 200 square miles) of unclaimed land in equal parcels on each side of the Tietê River east of São Paulo to the engineer Ricardo Medina. The south parcel of this enormous concession included São Miguel Paulista and indeed all of what is today the East Zone of the city. Medina's contract depended upon several conditions: He had to found an agricultural colony of 500 families in each parcel within two years, survey the land to distinguish unclaimed

²⁹ The supposed genealogy of Adis's claims has become almost folkloric in Jardim das Camélias due to an open letter it circulated among residents in 1972 at the height of land violence. With no doubt unintended burlesque, it gave a detailed, legal-sounding history of its property rights and then lamented that it was being slandered by grileiros operating in the area. It alerted residents to the "false titles that the authentic 'grileiros' exhibit" and urged them to verify the "origins" of its "legitimate rights" at the relevant cartórios.

lands from those previously acquired by others and to which he had no rights, and pay a fixed price for the former which he could resell to the immigrants. Failure to meet any of these conditions voided the contract. In that case, however, the grantee would retain rights to half the lands acquired under its terms but forfeit the other half to the grantor. In 1891, Medina transferred his concession, with all of its conditions, to the Banco Evolucionista which he founded—one of the many precarious development banks that the new land policies spawned. However, the bank failed to colonize the areas by the deadline and lost the contract. It did manage to survey the south parcel and offer payment for it but did not, significantly, differentiate claimed from unclaimed lands within it. On this basis, the republican government gave the bank title to 25,000 hectares in 1892. Although this established the bank's proprietary rights, it subjected them to all the conditions of the original concession.

A year later, the Banco Evolucionista mortgaged this conditional title to another bank, the Banco de Crédito Real do Brasil, which foreclosed when it failed in 1900. Although the new titleholder also went bankrupt in 1909, its president, Eugênio Honold, bought the title at auction during the bank's liquidation. In turn, he sold it in 1917 to the real estate company, Predial. In the meantime, however, other creditors of the Banco Evolucionista sued to gain their shares of its assets. The state of São Paulo had also intervened, claiming that it and not the defunct bank owned the vacant lands in question by virtue of the 1891 Constitution. The case went to the Supreme Court, but its decision in 1928 seemed to complicate rather than settle the dispute: Although the Court reaffirmed the validity of the Banco Evolucionista's rights, denying that the Constitution had voided them, it ruled nevertheless that the state of São Paulo had rights to one-half of the 25,000 hectares on the basis of the reversionary clause of the initial 1890 contract. The Court named the state and not the union as reversioner, arguing that by the time the bank had defaulted on the contract, the Constitution's provisions had awarded unclaimed lands to the states. Thus, the Supreme Court recognized that the bank and the state each had rights to 12,500 ideal hectares which were subject to the same, original requirement to distinguish claimed from unclaimed holdings.

This ruling had two principal effects. First, it gave legal origin to the ownership interests of the state of São Paulo in places like Jardim das Camélias. Second, the Court's recognition of the bank's title, though reduced by half in ideal terms, permitted its successors to continue to use the title in banking and business transactions. Because the lands were never distinguished and because there were many successors, the title became involved, always ambiguously and sometimes fraudulently, in innumerable transactions. Thus, when Predial sold it in 1958 to Nagib Jafet, a former president of Adis, one clause of the contract stated that the seller "is not

responsible for any divestment of rights.” In the same spirit, Jafet sold it to Garzouzi in 1966, who transferred it to Adis when he became its sole shareholder in 1968.

For one hundred years, therefore, a multitude of banks, real estate companies, and third parties have been using this title to complete countless property transactions—some involving the title itself and many more actual pieces of land but all fundamentally compromised by its conditional nature. The dealers of this fetish-like item have depended on two things to perpetuate its transaction: its accumulated complications and fraud. The title’s complexity keeps it potent by preventing the courts from settling any one dispute without resolving all. As this task is practically impossible, the courts never declare the title’s powers exhausted. Hence, opportunities multiply for *grilagem*. The only solution is to regularize, by extrajudicial intervention, every hectare within the title’s scope so that it loses force because it has no object; that is, unclaimed or ambiguously held land. The commission of state prosecutors convened to examine the problem in 1986 reached precisely this conclusion, recommending nothing less than a presidential decree to resolve the land disputes in Jardim das Camélias.

In investigating the perpetuation of the Banco Evolucionista’s title, I have found sixteen different types of frauds. Some are blatant, such as falsifying documents, tampering with boundary markers, corrupting officials, and destroying registry records. Others are subtle, long-term stratagems which use the law to establish precedents in the swindler’s favor. For example, a *grileiro* uses doctored documents to a piece of land as a way of opening a lawsuit to regain possession against an accomplice who plays the part of illegal occupier. The latter defends himself badly and is evicted, establishing court actions and precedents that the *grileiro* invokes later to support his claim of ownership. Perhaps the most remarkable fraud occurred at the very beginning. In foreclosing the Banco Evolucionista’s mortgage, the Banco de Crédito Real claimed to have acquired real estate described in an out-of-court “letter of adjudication.” The problem is that the mortgage could only refer to possible rights to ideal hectares and not to real rights over specific lands—a detail that condemns both federal and state ownership claims as well in my view. However, the so-called letter included a survey that defined an area of 21,600 hectares. This magical transformation of ideal into real is an example of a type of mortgage scam quite popular among well-connected swindlers. In one way or another, a *grileiro* obtains documents giving him rights to vaguely or ideally defined lands. He mortgages these to a partner as collateral for a loan on which he deliberately defaults. As foreclosure requires an inventory of assets, the partner hires a surveyor to produce a description of the mortgaged property, which is nevertheless often impossible to verify for subtle technical omissions. This survey becomes part of a private letter of agreement or

auction which liquidates the debt, and the settlement is then legally executed. As the documents are now part of a judicial proceeding, the *grileiros* have relatively little difficulty obtaining a registered deed to lands which may not even exist but which they have defined within a net of perfectly legal operations. In the documents of Adis and its predecessors, such alchemic mortgages, letters of agreement, and surveys appear over and over as the origins of their claims.

MAKING THE ILLEGAL LEGAL

After 400 years of settlement, one thing is certain: No one has an unambiguous title to land in Jardim das Carmélias—or indeed to enormous areas of Brazil. As a result, and in spite of many claims to the contrary, there is simply no clear owner from whom residents can receive an incontestable deed to any of the 207 lots whose disputed history we have traced. Each litigant in the conflict has used law to create a version of this history that gives an origin for its claims. These origins are inventions of law, literally legal fictions. The central government first created a legally inviolable sanctuary for the Indians of São Miguel and then, in various incarnations of colonial, imperial, and federal rule, legalized its usurpation. It seems undeniable that although the federal government may have acquired ownership interests in the area as a result, these are not real rights because it never distinguished the residual indigenous lands from other kinds of holdings. Thus, the federal government has no registered title and, in one of those satisfying twists of history, cannot prove ownership in terms of its own Law of Public Registries. The situation of the state of São Paulo is similar: Its interests remain tied to the unfulfilled conditions of Medina's 1890 contract, and it too lacks registration. Although the claims of the Ackel family and Adis are backed by titles and registrations, these are ill-gotten. The former claims derive from the sale of encroached Indian lands and the legalization of squatters' holdings. Ironically, the latter have more official recognition in tax records, public registries, and court documents, but only because they are the more skillfully and ambitiously fraudulent. Which claim, therefore, has most legal merit?

A definitive or even a positive answer seems impossible, not only because of the importance of illegality in each claim but also because of the unstable relationship between the legal and the illegal. Indeed, our historical study has shown not only that usurpation is a prime mover of Brazilian territorial occupation but also that land law itself developed in great measure out of the need to legalize encroachments. This development took the form of an invincible heap of legal complexities generated as a strategic means of initiating extrajudicial maneuvers to precipitate the legalization of seizures and influencing other areas of Brazilian law and bureaucracy in the process. During the colonial period, land law became an arena for contesting Portuguese rule by

complicating it to the point of inactivation. It was thus a means of achieving autonomy for the colony. However, this mode of resistance was also one of local hegemony: legal complication sustained land conflict to the extralegal advantage of the elites who could make the illegal legal. Then as now, land seizures did help poor settlers gain access to land and were recognized as legitimate on the basis of customary rights if productively occupied. Although this mix of custom and law aided the humble, it also and to a greater extent permitted swindlers to dissimulate fraud within a web of legitimate transactions. Thus, illegal appropriation became a basic means of land acquisition and illegality a common mode of social organization at all levels of Brazilian society. Out of this universal necessity to turn illegal or usufructuary possession into real property developed the fine art of legal complication.

During these centuries, therefore, the law's orchestrated irresolutions have promoted land seizures by creating confidence in their eventual legalization. In this time-hallowed process, illegal practices produce law, extralegal solutions are incorporated into the judicial process, and law is confirmed as a channel of strategic disorder. As a result, illegality and jural-bureaucratic irresolution have become the norm in land cases. In such circumstances, law has nothing to do with the common North American notions of neutral or authoritative regulation or of the separation of law from society in which the latter produces the former but is nevertheless controlled by it. Rather, law in the Brazilian context ensures a different norm: the maintenance of privilege among those who possess extralegal powers to manage politics, bureaucracy, and the historical record itself. In this sense, legal irresolution is an effective, though perverse, means of rule.

Lately, however, the scope of the legal system has changed, not through legal reform—of which there is sadly little to speak—but through grassroots social movements. Their collective actions during the last two decades have produced a general if unsteady expansion of the idea of a right to legal rights, which is turning poor Brazilians into legal strategists with increasing frequency. In the course of a generation, some have learned to use the law's complications to tie up land conflict to their advantage. Without doubt such initiatives draw new ethical, political, and even personal force from an old and oppressive institution. Nevertheless, these new players are more likely to reproduce than to change the system. If the residents of Jardim das Camélias win their case, they will do so because they have beaten the master at his game. In many ways, they have already succeeded by using law to avoid being its victim. Yet, in learning to generate legal irresolution, they accept the game's premise that irresolution enables those with superior power to transform the illegal into the legal, a power that at present they lack. Eventually, the legal system may change under the weight of similar engagements: Increased or universal participation may render extrajudicial solution to legal conflict too difficult, and the particular rule of law that it supports may end.

But if there is hope that such transformation has begun, its outcome remains uncertain as the law's enduring dystopias are both constitutive and symptomatic of a morbid interregnum.

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