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# Prisoner Capture: welfare, lawfare and warfare in Latin America's overcrowded prisons

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## 1. INTRODUCTION

This chapter focuses on the forms of legality and illegality produced by and within prison systems in Latin America. The region has seen prison populations surge in every country over the quarter century (see Table), rising well over five-fold in some and leading to a serious structural crisis in the criminal justice system. There is, of course, immense variation in the experience and management of incarceration. Some countries do not have overcrowding in their system, and in these, and indeed even in countries with serious problems, many penal institutions resemble the average North American or European prison, under the full control of the authorities and generally compliant with fundamental human rights norms. However, in a significant number of countries, rocketing incarceration rates have led to severe overcrowding and a loss of state control of individual facilities. In these the state either commits violence against prisoners, permits violence between prisoners, or has ceded the carceral space to the prisoners themselves.

The chapter discusses this effective 'prisoner capture', a double-sided phenomenon of state illegality in the state's practices of detention, and informal, or parallel, governance exercised by those that it detains. State authorities hold tens of thousands in extended and legally unjustifiable pre-trial detention, and frequently deny convicted prisoners their legal rights, including timely release. This officially sanctioned form of what is effectively kidnapping has created such overcrowding and underinvestment in prisons that national, constitutional, and international minimum norms on detention standards are routinely, systematically and grossly violated. These multiple illegalities on the part of the state have in turn encouraged the emergence of prisoner self-defence and self-governance organizations. This has resulted in 'prisoner capture' of a different order, when inmates take over the day-to-day governance of prison life. This produces a parallel normative and pseudo-legal world where

inmates discipline and even adjudicate on other inmates in the absence of state officials within the prison walls. The chapter opens with considerations about what current Latin American prisons and prison studies can add to the field of socio-legal studies in the region. It then examines the reasons for prisoner capture by the state, followed by discussion of the consequences and implications of prisoners' increasing control of the carceral space, and for the dominant socio-legal literature on prisons and imprisonment.

## HOW PRISONERS ARE CAPTURED BY THE STATE

### *Penal expansionism and toughening*

The surge in incarceration levels across Latin America is the consequence of a number of ideological, legal, and bureaucratic-discretionary factors. Penal expansionism (increasing the number and type of crimes on the statute books) and penal toughening (making maximum or mandatory custodial sentences longer or less flexible, and applying custodial sentences to a wider number of offences) have been trends across the region since the 1980s, and generally go hand-in-hand. Politicians – both legislators and those in the executive branch – have found that harsher laws are a good symbolic way of making crime pay politically and electorally, even when their policing strategies are clearly failing to reduce crime or insecurity. Rising numbers of arrests and detentions play well in 'statistical politics' (Müller 2016:233), and enable states to 'govern through crime' (Simon 1997).

For example, in Brazil, between 1985 and 2016, some 115 crime-related laws were passed, putting around 550 new offences on the already overcrowded statute books.[1] Much of Brazil's soaring prison population is due to the 1990 Heinous Crimes bills (*Lei de Crimes Hediondos*), passed hurriedly by legislators in after three high-profile kidnapping cases and toughened four years later after a celebrity murder. It made several types of serious crime, including drug trafficking, ineligible for bail, provisional release, pardons, amnesties, commutations and progression to minimum security prisons, and lengthened the period of eligibility for parole. It thus clogged up the prison system, especially the maximum security facilities, with street-corner drug dealers. In 1990 Brazil had around 90,000 prisoners. This

[1] http://emporiododireito.com.br/o-excesso-punitivo-e-mais-um-erro-legislativo/

jumped to 148,760 in 1995, and continued to more than double every decade, standing at 650,956 in early 2017. Attempts have been made to change the law but it continues to appeal to penal populists. But what are the underlying drivers of this expansion in the primary and secondary criminalization that so clearly contributes to rising prisoner numbers in the region?

*Welfare, lawfare and warfare*

Criminologists concur that incarceration rates are not correlated with reported crime rates *per se*, or the distribution of particular types of crime, but rather with how society and criminal justice institutions decide to treat criminal suspects. For example, Panama, Costa Rica, Uruguay and Chile have imprisonment rates above the regional median of 192, but have average to low homicide rates (11 per 100,000 in the two Central American countries, and eight and three, respectively, in the South American ones). Thus a number of socio-legal theories attempt to explain how incarceration has emerged in recent decades as a policy preference, connecting it to political economy, the demise of other policies for social inclusion, such as labour market intervention and redistributive safety net policies, and social and legal anxieties about those who appear to threaten the social order. This section examines three interconnnected ideas – welfare, lawfare and warfare – underpinning how the state has shifted its responses towards an economically, and often racially, excluded underclass. A later section will examine how the informal governance structure develops by inmates themselves have come to mirror these same rhetorics and functions.

*Welfare* suggests a duty of care. On the part of the state, this can be a targetted or universalist policy aimed at meeting the basic needs of the poorest in the population and was developed in modern times to save them from engaging in undesirable (criminal) activity to meet those needs and thus constitutes a strategy to divert the vulnerable away from the criminal justice system. Within prisons, welfare is a core function of administering the carceral population, from which the state has visibly withdrawn, with the result that families and organised inmate groups have increasingly taken over this role.

*Lawfare*

*Warfare* is the use of violence

French sociologist Loïc Wacquant, in his seminal study of the boom in the US prison population, argues that as the neoliberal state rejected in intellectual terms, and slashed in fiscal terms, its welfare function, incarceration was consciously used as an alternative means of disciplining the poor and the unruly subaltern class. However, in some Latin American countries, especially those governed by the new, often populist, centre-left, a more complex relationship has played out between incarceration, neoliberalism and redistributive policies. In Venezuela, prisoner numbers soared in the 1980s, especially after the financial crash in 1983, doubling from 12,000 in 1980 to 29,000 1989. Yet during the harshest years of neoliberal adjustment, from 1989 to 1998, inmate numbers remained relatively static and even declined by about 15 per cent. In the first few years of the Chávez government, numbers were reduced dramatically to only 14,000 in an 'explicit rejection of past policies that criminalized the poor, advances in human rights rhetoric, legal reforms and an emphasis on the reduction of social inequalities to combat growing violence and crime' (Antillano et al 2016, 200). More commonly, however, welfare provision and incarceration have expanded *in tandem* because there are structural limits to redistribution and the ability of globalized economies to provide work. In policy terms the left often seems paralysed in relation to security and crime issues, which have been historically a rightwing, authoritarian, and military terrain. Yet it also appreciates that law-and-order and crime rank high among the public's concerns and have an electoral impact. Thus the governments of Brazil under the PT, Venezuela under Chavismo, and Mexico City under the PRD offered welfare support to the 'good poor' and but resorted to preventive imprisonment for the 'bad' or undeserving poor. The left's structural analysis of crime, which leads it normally to prefer a welfare approach, gets replaced by a moral rhetoric. Venezuela's prison population rose only slightly from 2000-2008, but then took off, climbing from 19,257 in 2006 to 24,069 in 2008, to 240,825 in 2010 and reaching an all-time high of 51,256 in 2014. Both left- and right-wing governments have adopted US-style zero tolerance policies, which mapped conveniently onto deep historical elite antipathies to the poor disrupting the social order

and urban space, and informed the *mano dura* policies in Central America.[2] The General Law of the National Public Security System, enacted in the mid-1990s, introduced the unspecified category of 'anti-social behaviour' into Mexico's criminal code. The PRD introduced more than 500 amendments to Mexico City's penal code in 2002, inventing new crimes and increasing prison terms for others, resulting in a 40 per cent increase in the local prison population in three years (CDHDF, 2005). Following consultancy by former New York Mayor Giuliani, it then enacted the Civic Culture Law in 2004, which detailed 43 misdemeanours – generally informal economic activity such as street vending, or disruption of urban space such as noise, graffiti and public consumption of drugs or alcohol. These were punishable through monetary fines or detention for 6-36 hours. Detentions related to violations of the LCC rose from 49,205 in 2006 to 134,732 in 2011 (Müller 2013: 456-457). If the right prefers 'warfare' as its justification for mass incarceration, the centre-left combines welfare with 'lawfare', that is, 'the resort to legal instruments, to the violence inherent in the law, to commit acts of political coercion, even erasure' (Comaroff and Comaroff 2006: 30).

Draconian provisions for small-scale drug use and possession are evident in anti-narcotics laws across the region, many the result of the 'War on Drugs' urged on the continent by the USA in its bilateral conditional agreements, and by UN's and OAS's prohibitionist positions which it influenced (Metaal and Younger, 2010). Increased arrests and detention for drug-offences became one of the crude metrics of the success of this War and pushed up incarceration significantly in several countries. For example, it was reported that a condition of US-Ecuadorian bilateral agreements on anti-drug cooperation included a target increase of 12 per cent in persons detained and tried for drug offences under the 1991 Law of Narcotic Drugs and Psychotropic Substances (Edwards 2010, 51). Law 108 also mandated pretrial detention, and a minimum sentence of 10 years.[3] Similarly, Bolivia's law 1008, regulating the production of coca and other controlled substances, was informally designed

[2] Latin America has many such anti-vagrancy laws, introduced to discipline the underclass and ensure a labour supply, such as Venezuela's *Ley de Vagos y Maleantes* (Vagrants and Malefactors Law), on the books between 1939 and 1997

[3] Raised by Congress to 12 years in 2003.

by US agents. Mexico's penal laws have undergone inflation and toughening due to the wars on drugs and organised crime. The Federal Criminal Code was reformed in 1994 to raise the penalties for the production, trafficking and supply of drugs to a minimum of 10 and a maximum of 25 years in prison, and in 1996 the Federal Organized Crime Law substantially increased the prison terms for any even potentially related activities (Müller 2016: 231). The Calderón government then introduced indefinite sentences for 'serious' crimes. In consequence, the population of Mexico's federal prisons more than doubled between 1990 and 2012.

US security and penal policies played out most dramatically in El Salvador, which by 2016 had the highest incarceration rate (541 per 100,000 population) in the Americas behind the USA (a global outlier, with a rate of 693) due to government policies intended to deal with two violent street gangs, known collectively as *maras*. Teenage children of the many Central American refugees who fled the US-funded civil wars of the 1980s got involved in, or set up, Los Angeles street gangs. The 1996 Illegal Immigration Reform and Immigration Responsibility Act, intended to expel non-citizens sentenced to a prison term of a year or more and foreign-born US naturalized felons once they had served their prison terms, led the US government to deport to Central America an estimated 46,000 convicts and 160,000 illegal immigrants between 1998 and 2005. Many of these young men recreated local affiliates of the *Mara Salvatrucha* and the *Calle 18* gangs as a means of survival in a strange land (Rodgers and Muggah 2009: 306). Thus US foreign policy created mass flight and vulnerability, which led to mass detention (capture) under domestic penal laws, and mass expulsion under anti-terrorism and immigration laws (Rodgers et al 2009). The rightwing ARENA government responded to this sudden upsurge in rival gang violence with the notorious *mano dura* (Iron Fist) policy. Introduced in July 2003, it criminalized anyone over the age of 12 who possessed a gang tattoo or flashed gang symbols in public, offence punishable by 2-5 years in jail. The subsequent *Super Mano Dura* package of anti-gang measures increased the maximum term for leaders to nine years and to five years for ordinary gang members, who were many more in number. In 2002 the prison population was 10,907. It then rose steadily, with a steeper rise after 2006 and as of mid-2016 stood at 38,000 (including the 3,000 held in police cells). The rate of imprisonment jumped from 130 per 100,000 in 2000 to 541 in 2016.

As the examples above show, the rhetoric of warfare – variously invoking a War on Drugs, or Crime, or Terror – justifies the capture of the enemy in this war, although as Postema et al (2017) point out, detainees are not afforded even those protections due to prisoners-of-war under the Geneva Conventions. War talk instead justifies states of exception, which are overlaid on top of the standing criminal codes, criminal procedure and constitutional guarantees. Prisons are often 'zones of legal silence' (Garces 2014) in a number of ways: the legal grounds for detention are unchallengeable, the burden of proof shifts onto the accused (presuming guilt rather than innocence) yet once detained such proof is almost impossible to supply,[4] legal counsel is not supplied, and, in the increasing number of super-max facilities in the region, judicial and civil society oversight is resisted.

*Pretrial and illegal detention*

The excessive use of pre-trial detention is the clearest form of prisoner capture and makes the biggest contribution to the prisoner takeover of the carceral space and broader social allegiance with inmate organizations. It results partly from tougher criminal laws that prohibit bail or conditional release, and partly from the discretionary, and often illegal, practices of judicial-bureaucratic actors. Globally about one third of all detainees, that is, some 3.2 million individuals, are awaiting trial. However, some Latin American countries are world leaders: 78% per cent of Paraguay's and 69% of Bolivia's prisoners are awaiting due legal process (see Table). Yet, within the continent there is a very wide range. At the much lower end of the spectrum, just 12.3 per cent of Nicaragua's prisoners are on remand, with Costa Rica only slightly higher at 17.2, indicating that the practice is not inevitable, and is the result of state commission or omission.

Often the period of pre-trial detention exceeds any reasonable, or legally stipulated, period for the authorities to conclude their investigation and preparation of charges. This is

[4] Ecuador's Law 108 required all judicial decisions in drug cases to be reviewed by the Superior Court, ostensibly to avoid circuit judges being bought off by drug dealings. The effect was to virtually guarantee a guilty verdict (Edwards 2003).

frequently accompanied by a lack of information about the actual charges that will be, or have been, brought against detainees, denial of access to legal representation, and lack of information about when they will eventually be brought before a judge for the first time. In many cases individuals are held on remand on charges for which there would never be a custodial sentence at the end, or they are held for a period beyond the maximum custodial sentence that could be imposed. Brazil's National Justice Council (*Conselho Nacional de Justiça* - CNJ), set up as a watchdog body for the nation's judiciary as part of the judicial reform process in 2004, has had to monitor and correct the illegal detentions decreed and sustained by the country's circuit judges who simply ignore the legal rights of prisoners. Since August 2008, it has been conducting 'legal aid blitzes' (*mutirões*), sending in teams of lawyers in an attempt to clear huge backlogs in the court system. In eight years, the CNJ teams visited all Brazil's 27 federal states, reviewed 400,000 prisoner casefiles, and granted 80,000 benefits to which the prisoners were already entitled such as transfer to a lower security regime or parole. They also freed no fewer than 45,000 detainees, who had already served their entire sentence but were still in custody.[5]

In some cases, the state has legalized this excessive detention without due process. In Mexico the Federal Organized Crime Law introduced the practice of *arraigo* (which translates as having a 'hold' on someone or something), which allowed for the preventive detention of a suspect for up to 80 days without charge. This was subsequently incorporated into the Mexican constitution, thus creating a legal paradox as it violates a number of constitutional guarantees such as the right to legal counsel, the presumption of innocence and protection from torture, which is inevitably encouraged by prolonged pretrial or preventive detention without charge as officials try to extract information to prepare a legal case or about criminal or terrorist activities. However, like more run-of-the-mill forms of pretrial detention, its value to the crime-fighting apparatus of the state seems more symbolic than real: officials reported that of around 4,000 people detained under *arraigo* in 2011-2014, only 129 (3.2 per cent) were successfully prosecuted (Deaton and Rodríguez Ferreira 2015, 23).

[5] http://www.cnj.jus.br/sistema-carcerario-e-execucao-penal/pj-mutirao-carcerario

Indeed, the very low rate of subsequent conviction is enough to demonstrate not just the illegality, but also the apparent irrationality of mass pretrial detention. In the Mexican state of Jalisco, between 2006-2009, 43,153 people were detained for drug possession (crimes against health), but only 3,500 had charges brought and only 2,173 were convicted (Hernández 2010, 66). In El Salvador, despite a new requirement of some proof of criminal activity for an arrest in the *Super Mano Dura* package of anti-gang measures created a revolving door for the thousands who were often released due to lack of evidence (Savenije and van der Borgh 2014). A Brazilian government study found that 37.2 per cent of prisoners remanded in 2011 did not receive a prison sentence for their offence, with around half of those being acquitted. (IPEA 2014).

*Judicial-bureaucratic drivers*

All these forms of pre-trial detention (without charge, without counsel, for excessive and unjustifiable periods) are abusive and illegal, and amount to kidnap by the state. They violate both Constitutional norms in the respective countries, as well as innumerable articles in the international human rights conventions to which these states are parties: the Universal Declaration of Human Rights, the American Convention on Human Rights, the International Convenant on Civil and Political Rights. The Inter-American Commission on Human Rights has been a persistent critic of these practices, both from a human rights and legality perspective and, more lately, because of the contribution of pretrial detention to prison overcrowding, and thus to appalling conditions of detention. Indeed, remand prisoners are often held in the worst conditions within the prison system as there is no requirement for the state to provide education and work, to which convicted offenders are entitled. They are perhaps the most ill-treated and frustrated group of prisoners and quickly become reliant on inmate groups to provide then with basic necessities..

Thus pretrial detention, which is largely unnecessary undermines the legitimacy of the justice system and leads to loss of control of penal institutions by the authorities (IACHR 2013). The Open Society Institute, a transnational NGO set up to promote democratic governance, human rights, justice and the rule of law, among other issues, launched a global campaign in 2010 to reduce excessive pretrial detention. Its research and lobbying sought to

reframe what is generally seen as a criminal justice process issue as one of public sector corruption, public health, poverty and torture. OSI and its partners in Mexico and Brazil had to locate pretrial detention as a concern for other policy domains beyond the purely legal precisely because of the connivance, or indifference, of judicial actors – from individual judges to Supreme Courts – to the multiple illegalities of the practice (Open Society Foundations 2014).

Their strategy highlights the ambivalent role of justice-sector. Despite the prescriptive and positivist nature of the civil law legal systems used in Latin America, criminal justice actors continue to exercise a great deal of discretion in relation to who they arrest, arraign, detain and sentence, and on what charges. Sometimes the discretionary element is written into the laws themselves, in open-ended wording such as a 'antisocial conduct', drug possession 'for personal use', and activity 'potentially' linked to organized crime. In the absence of detailed studies of judicial behaviour at circuit court rather than Supreme Court level, it is hard to know whether compliance or resistance is due to the individual convictions of these 'street-level bureaucrats,' or whether they share a collective worldview as a result of passage through the same legal training institutions, professional acculturation or pressures from public opinion.

Judges frequently uphold detention laws of questionable legality: between 2007 and 2012 only 7 per cent of requests by prosecutors to detain under *arraigo* were denied (Deaton and Rodríguez Ferreira 2015, 22). Similarly, Brazil's Heinous Crimes bill was repeatedly upheld as constitutional between 1990 and 2006 until there was a shift in the Supreme Court and a number of its articles were overturned (Boiteux 2010, 32). Often, judicial actors use their discretion in favour of detention and against the spirit of the law. Recognising the futility of imprisoning drug users, a number of countries have passed laws aimed at decriminalising simple possession and diverting users away from the criminal justice system, specifically from prison. Yet these laws have often not had the intended impact as judges are able to make subjective decisions in relation to the offender and the offence.

In April 2011, when Brazil had over 215,000 people in pre-trial detention, that is 44% of the total prison population, the government passed the Precautionary Measures Bill (*Lei de*

*Medidas Cautelares*) intended to give judges a wider range of options beyond remand or unconditional release for suspects awaiting trial.[6] However, lower level judges effectively boycotted the new philosophy: in Rio de Janeiro 98% of those accused of drug offences continued to be held in pre-trial detention for the duration of their case (Lemgruber et al 2013). The same was true of 90% of cases involving illegal ownership of a firearm (for which bail conditions are set out in the law) and for well over 50% of non-violent offences against property such as theft and receiving stolen goods (ibid: 10). The CNJ then took another tack to reduced pretrial detention and in late 2015 set up a pilot project in the State of Sao Paulo to implement custody hearings, a mechanism whereby an individual arrested in flagrante must be brought before a judge within 24 hours in order to determine whether they should be remanded in custody or released pending trial.[7] Although this resulted in around half the suspects being released pending trial, which was an improvement, it still indicates that detention is the default position of most judges, regardless of the law.

## 2. PRISONERS CAPTURING THE CARCERAL SPACE

The result of this lawfare, these policies and practices of prisoner capture, has been to create carceral zones of legal exception over which many states where prison authorities have been forced either to share governance with organized prisoner groups, or have effectively relinquished control over the prison population.This churning of the prison population in many countries -- the revolving door of arrest, detention and release means that around one million individuals pass through the Brazilian prison system every year (DEPEN 2016: 23) --  has exposed huge number of marginalized young men, and their families, to the parallel order of violence and pseudo-legality. Mass incarceration reached a tipping point in the early 1990s, changing the dynamics of prison governance.  Most prisons operate with sets of informal and formal rules, set by staff and inmates alike, that make daily existence a bit more predictable and safer for both. However, the influx of thousands of young inmates disrupted this system of coexistence. Unprecedented overcrowding and appalling conditions of detention reduced the lives of many inmates to 'bare life' and produced a highly violent struggle for survival, as armed groups emerged competing for

[6] PL 4208/2001

[7] A bill to this effect had been stuck in the Senate since 2011.

dominance in the prisons as the state simultaneously retreated behind the perimeter walls, leaving the ordinary inmates unprotected. The Panopticon was replaced by the ghetto. Rising levels of violence then prompted prisoners to resist these necropolitics and to organize for their own survival, to use their own power in numbers in order to play 'inside the dialectic of law and disorder' (Comaroff and Comaroff 2006: 31). If many prisons and prison systems have given up the pretence that incarceration is intended to include (that is, provide welfare), rather than exclude, prisoners themselves came to the conclusion that they would be better off administering themselves as a surplus and excluded population, building a collective identity around their marginalization.

A new wave of ethnographies explores the way in which prisons are being informally governed by their inmates. The mode of self-organization varies considerably, depending on: the degree of autonomy of the prisoners, collectively, from the prison authorities; who exercises coercive control and ability to use violence, even lethal force, within the prison walls; the degree of structure, hierarchical organization and reach of prisoner syndicates (whether within a single facility, networked across several facilities in the prison system, or operational outside the prisons as well as within); and finally the material resources (goods brought into the prison, or necessities inherent to imprisonment, that can be traded or used to extract rents and encourage loyalty) and immaterial resources (legitimacy, trust or fear) available to such entities, enabling them to maintain dominance in relation both to the prisoners and to the prison authorities. Whereas Charles Tilly noted how governments often abused their power to act like racketeers, extracting rents by force, Latin American's prison systems have created the conditions for racketeering organizations to emerge, extracting rents from prisoners and their families beyond the prison wall, increasing their ambit so that 'violent crime increasingly counterfeits government, not least in providing fee-for-service security and social order' (Comaroff and Comaroff 2006, 5). It is the provision of these goods, which the state is unwilling to supply, that binds the ordinary inmate to the prisoner organizations. For as much as these groups have regulated prison life to make it a bit more survivable for the ordinary inmate in terms of provision of basic needs and, sometimes, the internal reduction of violence, they maintain this control through the implicit threat of violence against those who break the rules (prisoners and guards) or threaten the status quo (the prison authorities).

Bolivia's San Pedro prison became infamous for functioning as a barely bounded penal colony. The majority of the 2,300 inmates are awaiting trial, and must survive within a prison order where everything is commodified and traded: cells, healthcare, food, security, narcotics. Although the authorities are absent, no group of individuals dominates the prison, which exists in a finely balanced equilibrium. There are clear social hierarchies among the prisoners, and a complex economy based on secure property rights (Skarbek 2010), and violence is regulated by the community sufficiently that entire families live inside the prison (Cerbini, 2017).

However, more commonly, prison systems contain multiple gangs or prisoner groups, or successions of 'strong men' who call the shots on the wings. Venezuela's prisons developed armed self-rule in the 1990s, and governing groups (or *carros*) imposed their rules and hierarchies on the prison population: 'thugs' generally control the *carro* through a monopoly on violence, which includes firearms, paid for by a tax – *la causa* - which they levy on the other inmates, divided into workers and drones, evangelical Christians and, at the bottom, the dispossessed, and the outcasts (Antillano et al 2016). Prison life is paradoxical: it is at once hypercodified – there are highly detailed social rules about clothing, contact with other, sexuality, debts, drugs, language, movement – as a means of reducing inter-personal violence (which is generally outlawed, as disputes are adjudicated through pseudo-juridical conflict resolution processes) and yet underpinned by the threat of violence or exclusion by the governing group. Competition between groups to extort and extract rents from fellow prisoners and guards can lead occasionally to extreme violence.

Governments in the region do not like to admit that the prisons have been captured by the captives, and their responses have been mixed. A common strategy, used for decades now, is militarized intervention, whether for control of the prison perimeter, internal control of chaotic and overcrowded jails, or sporadic responses to disturbances. But this generally has a radicalizing, rather than subduing, effect on this carceral mass. In the early 1990s Venezuela militarized its overcrowded prisons, placing them under the purview of the National Guard: violence, using warfare to contain the consequences of lawfare. Riots and

violence soared, and became endemic within the Venezuelan prison system. Fires in Honduran prisons in 2003 and 2004 that killed scores, with rumours that those fleeing were fired on by the police, led to the *maras* being given their own, segregated units to self-govern and develop their own 'gothic sovereignty', to protect them as much from the illegal violence of the state as from each other (Carter 2014). São Paulo state's major criminal network, Primeiro Comando da Capital (PCC), , was founded in the early 1990s as an inmates' union to demand better conditions of detention following the extra-judicial execution of 111 prisoners by military police during a riot in the notorious Carandiru prison in 1992

The PCC is unusual in holding a monopoly of power not just in one jail, but across a very large jurisdiction, controlling around 95% of the prisons and prisoners in São Paulo state, with an increasing reach across Brazil. Unlike the *maras*, who were enabled to occupy the carceral space through draconian penal policies, the PCC was actually born within the prison system. Like the Venezuela *carros*, it has imposed a social hierarchy (although each system varies in this regard), a highly codified ethos, and pseudo-judicial disciplinary system (Dias and Salla forthcoming). Whilst in Rio de Janeiro the various criminal networks, or *comandos*, engaged in turf warfare on the streets and had to be segregated in separate wings or units of the prison system, the PCC has been successful in becoming into a hegemonic and bureaucratic organization. Moreover, having extended its activities beyond the prison walls, it has also acquired a dominant presence, as an organized crime cartel, in many low-income urban communities. The PCC's governance of the carceral space is key to the group's own survival as a structured organised crime syndicate, racketeering both inside and outside the prison. Unlike territories (carceral or non-carceral) where there are two or more gangs engaged in violent turf-warfare, the PCC has been able to impose a 'pax monopolista' (Biderman et al 2014), regulating the use of violence by its members and those under its purview, and thus allegedly reducing the homicide rate in the prisons and neighbourhood where it operates. However, it operates as a parallel power not in the absence of the state authorities but rather with their acquiescence in a 'deadly symbiosis' (Denyer Willis 2009).

On the one hand, it is highly convenient to the authorities that riots, which occurred on the weekly basis in the late 1990s, as prisoner numbers shot up, have completely stopped and that violence in the prisons is much reduced. On the other, the state's ceding of the prisons and other areas is toxic to its legitimacy and ability to hold a monopoly on force, as a key component of rule of law. Policy on the PCC so far has oscillated between an unspoken deal tolerating its governance on the prisons, to attempts to isolate its leadership in super-maximum security prison regimes or units. However, in May 2006 the latter led to a mass, orchestrated protest in prisons across the state, with a wave of violence in São Paulo city that shocked the authorities back to the perverse symbiosis policy. Cite here the political power too of the commandos in rio state sovereignty – political aspect leading onto El Salvador case…

In El Salvador mass detention led not just to prisoner takeover of the carceral space for everyday survival, but also consolidation of cohesive and politicised non-state armed groups able to challenge the state's monopoly on security policy from within prison. The *mano dura* policies actually ended up galvanizing the *maras* as their locus of control moved from the streets to the prisons. The authorities' intention had been to imprison the gang leadership in order to encourage ordinary members to 'leave and do other things'. But just as occurred with the PCC, the pattern of mass capture and release from 2003 onwards led to a growing social base for the gangs consisting of friends, relatives and hangers-on (van der Borgh and Savenije 2005: 156). Meanwhile a core of gang leaders stayed in prison enabling heads of local 'cliques' (affiliated to either MS or the Dieciocho) to meet one another in prison, and started constructing, from inside, a gang structure that had hitherto been very loose and federated. From September 2004, prisons were designated exclusively by membership of the two gangs, helping each consolidate their own identity and hardening the rivalry and division between the two (Whitfield 2013: 8). It also later provided a negotiated platform for the attempted gang truce after 2009.

The El Salvador National Council on Public Security had been regularly meeting with gang leaders in prison about prison conditions and homicide reduction, and in 2009 the gangs approached newly elected President Funes, heading a government of the leftist FMLN, via

religious leaders and an NGO. Funes assisted the gangs' ability to bargain politically from inside the prison walls by unexpectedly drafting in the army to patrol the perimeters of the prisons in May 2010. This disrupted the flow contraband, key to the informal prison economy and resulted in what prisoners saw as abusive searches of family members. The military presence was suddenly withdrawn in April 2012, a month after the start of a truce between MS and the Dieciocho. This had clearly been one of the demands of the gang to the government, as well as the transfer of 30 gang leaders from the maximum security Zacatecoluca prison back into the main prisons, where they were able to give 'command and control' orders to their members to honour the ceasefire in the run up to the March 2012 legislative elections. It also handed back control of the young gang members to the previously isolated veteran leaders. Thus the gangs were able to use their occupation of the carceral space as leverage against the state's coercive force. However, their longer term demands actually related to the supposed core purpose of the prison system itself: they wanted prison conditions improved and opportunities created inside and outside prison for education, training and employment. This was not, then, an attempt to wrest territorial control of the prison space as a criminal arena away from the purview of the state, but rather a protest at its operation as an exclusionary, rather than inclusionary, space. In facilities such as the Penal de Ciudad Barrios, a prison just for MS members, coping with 2,600 men crammed into a space designed for 800, the gang's senior leadership have already substituted for the state inside the walls, providing workshops, a bakery and a hospital that they staff, in the absence of state provision.[8]

CONCLUSION

Consequences are of several different orders

Ineffectiveness and churning.

Return to the two sides of 'capture'

State policy: Supermax vs chaos

[8] https://www.theguardian.com/artanddesign/2015/sep/04/adam-hinton-el-salvador-ms-13-gangs-prison-portraits

One, newer, containment strategy in the region is the adoption of US-style 'supermax' prisons which use modern technologies as a means to isolate, contain and maintain offenders under Panopticon-like permanent surveillance. It is also resisted: the PCC was partly founded in response to the informal super maximum security conditions and brutality in Taubaté prison.[9]

Occasionally, judges have challenged mass detention practices. In the first 12 months of the Mano Dura policy in El Salvador, 19,275 presumed gang members were arrested and held. Some 95 per cent were later released when the law was declared illegal (FESPAD and CEPES 2004). In this instance, judges actually upheld legality by refusing to imprison alleged gang members without proof, which is quite the opposite of the behaviour of judicial actors in other countries who routinely and excessively employ pre-trial detention in the absence of demonstrable and legal necessity These widespread and seemingly systemic illegalities are promoted by some actors and institutions within the state, and yet countered by others e.g. CNJ action, and the eventual overturn of the Heinous Crimes law

[9] There are several alternative 'foundational myths' according to Biondi (2016).

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Table: Incarceration levels and rates in Latin America 1992-2017

| COUNTRY | No. of prisoners | | Rate of increase b/a | Current occupancy rate * | Per cent pre-trial prisoners | Imprisonment rate | | Rate of increase b/a |
|---|---|---|---|---|---|---|---|---|
| | 1992* (a) | 2014-16 (b) | | | | 1992 (a) | 2014-16 (b) | |
| Argentina *(Dec 2015)* | 21,016 | 72,693 | 3.46 | 106% | 50.1% | 63 | 167 | 2.65 |
| Bolivia *(July 2016)* | 5,412 *(1996)* | 14,598 | 2.70 | 254% | 69.0% *(Feb 2016)* | 71 | 130 | 2.06 |
| Brazil *(Feb 2017)* | 114,377 | 650,956 | 5.69 | 164% *(Jan 2017)* | 37.7% | 74 | 316 | 4.27 |
| Chile *(Dec 2016)* | 20,989 | 42,488 | 2.02 | 111% *(Sept 2013)* | 33.5% | 155 | 235 | 1.52 |
| Colombia *(Jan 2017)* | 33,491 | 118,925 | 3.55 | 152% | 32.3% | 100 | 236 | 2.36 |
| Costa Rica *(Sept 2014)* | 3,346 | 17,440 | 5.21 | 139% | 17.2% | 105 | 352 | 3.35 |
| Ecuador *(Sept 2014)* | 7,998 | 25,902 | 3.24 | 114% | 48.8% | 74 | 162 | 2.19 |
| El Salvador *(Jan 2017)* | 5,348 | 37,244 | 6.96 | 310% *(Aug 2015)* | 33.1% | 99 | 574 | 5.80 |
| Guatemala *(July 2016)* | 5,476 | 20,697 | 3.78 | 296 *(Dec 2015)* | 48.6% *(May 2015)* | 56 | 124 | 2.21 |
| Honduras *(July 2016)* | 5,717 | 17,017 | 2.98 | 196% *(Dec 2015)* | 54% *(Sept 2015)* | 110 | 198 | 1.80 |
| Mexico *(July 2016)* | 85,712 | 233,469 | 2.72 | 112% | 39.6% | 98 | 192 | 1.96 |
| Nicaragua *(Oct 2016)* | 3,375 | 10,569 | 3.13 | 128% *(Sept 2010)* | 12.3% | 85 | 171 | 2.01 |
| Panama *(April 2016)* | 4,428 | 17,197 | 3.88 | 116% *(Sept 2015)* | 62.6 *(Dec 2014)* | 178 | 426 | 2.39 |
| Paraguay *(Dec 2015)* | 2,972 *(1995)* | 12,741 | 4.29 | 179% | 77.9% | 60 | 180 | 3.00 |
| Peru *(Nov 2016)* | 15,718 | 81,599 | 5.19 | 232% | 42.9% | 71 | 257 | 3.62 |
| Uruguay *(Oct 2015)* | 3,037 | 9,996 | 3.29 | 109% | 69.4% | 97 | 291 | 3.00 |
| Venezuela (June 2015) | 23,200 *(1993)* | 49,664 | 2.14 | 270% *(2014)* | 63.4% | 111 | 159 | 1.43 |
| Average | | | 3.77 | | | | | 2.68 |

Data from ICPS World Prison Briefing available online at

http://www.prisonstudies.org/info/worldbrief/?search=southam&x=South%20America:

The month and year of the data is given under the country, or under the different data items, if different.

The benchmark data are from 1992 unless indicated otherwise.

Argentina: 1992 figures included prisoners in police custody, 2015 data do not;

*Occupancy rate = number of detainees relative to the official capacity of the prison system. Over 100 per cent indicates overcrowding.