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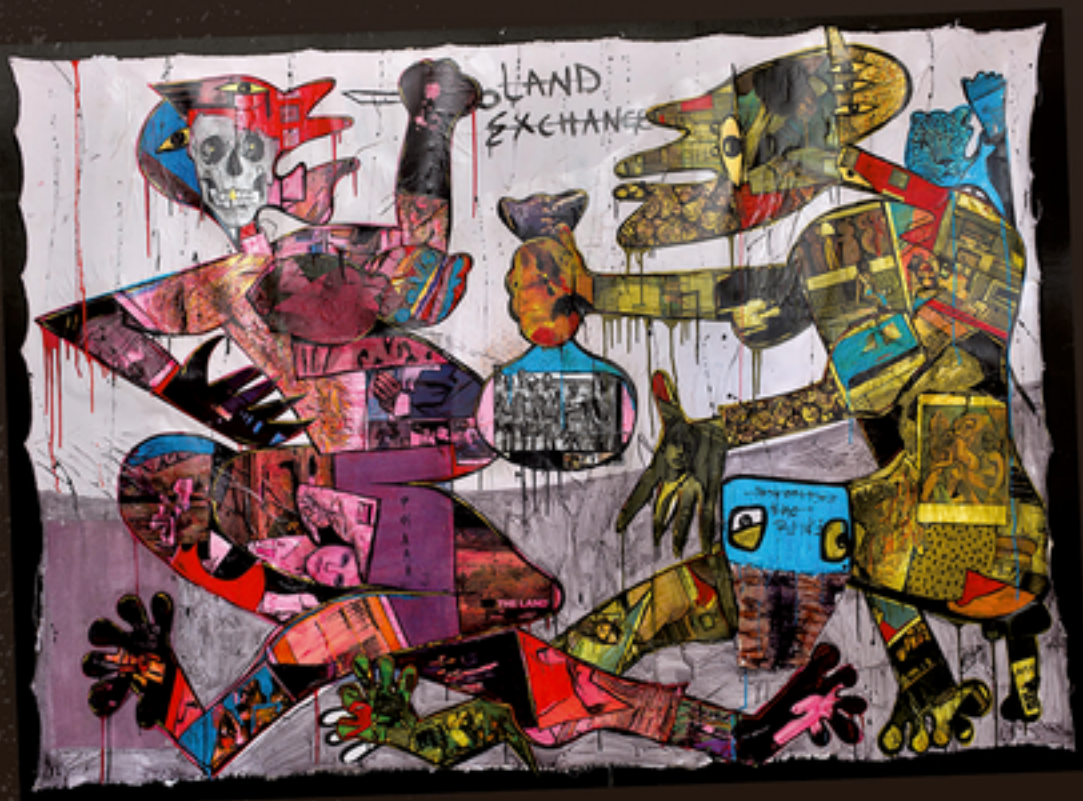
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DECOLONIZING COLONIAL
THE CRIMINAL LEGACIES,
QUESTION CONTEMPORARY
PROBLEMS

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Decolonizing the Criminal Question

Colonial Legacies, Contemporary Problems

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PART 3
LOCATING COLONIAL DURESS

The Coloniality of Justice

Naturalized Divisions During Pre-Trial Hearings in Brazil

Omar Phoenix Khan

Introduction

Custody hearings were introduced in Brazil in 2015 with the hope that prompt in-person presentation of detainees before a judge, rather than merely a police report, would decrease the excessive use of pre-trial detention. However, the use of pre-trial detention remains high, especially for young Black men with low to no income. This chapter contributes to the literature by highlighting the coloniality of justice as manifested within judicial decision-making at the pre-trial stage in Brazil. Analysis of twenty-six interviews with judges, prosecutors, public defenders, and specialists in Rio de Janeiro reveals the divergent treatment accorded to those on either side of the dichotomous notions of the *bandido*¹ (criminal) and the *cidadão de bem* (the good citizen). A thematic framework analysis leads to a discussion of the white-centred nature of citizenship and justice and how stigmatized spaces are considered criminogenic. The chapter traces how colonial white-supremacist logic has persisted in naturalizing inhumane treatment of racialized groups in the collective consciousness of the gatekeepers of justice in Brazil.

By any measurement, pre-trial detention is excessive in Brazil. Of countries with the highest number of people held pre-trial, Brazil now sits behind only the US and China, both of which have far larger general populations (Walmsley, 2017b). As of February 2019, there were 243,308 pre-trial detainees in Brazil (ICPR, 2019), representing 33.8 per cent of the overall prison population. This is a considerable increase from 2000, when only 80,775 pre-trial detainees were recorded (ibid). In Rio de Janeiro state, 56,372 people were deprived of their liberty in 2018, with over 52 per cent of this population detained pre-trial (29,498) (GMF, 2018).

This study focuses on judicial decision-making during ‘custody hearings’, which is the point at which *flagrante delicto*² detentions can be converted into preventative detention (referred to in this chapter as ‘pre-trial detention’).³ Custody hearings were

¹ The direct translation is ‘bandit’, but *bandido* has also been translated as ‘criminal’ or ‘thug’. The word denotes an overt tendency towards criminal behaviour as a way of life and can be linked to violence and corruption. I use *bandido* because it is more loaded with meaning than any translation.

² *Flagrante delicto*: meaning caught in the act of committing a crime.

³ Pre-trial detention in Brazil is divided into two sub-categories: either ‘temporary detention’ or ‘preventative detention’. The former refers to a period during investigation, used in the case of ‘certain serious crimes to protect the investigation or to prevent flight for five or 30 days (renewable once), depending on the nature of the crime’ (Nascimento dos Reis, 2017, p. 6). The latter can be ordered before or after formal

introduced in 2015 after much advocacy from civil society and against a backdrop of condemnation from UN agencies over the ‘excessive’ use of pre-trial detention and the concerning trend that detention was ‘being used as the first resort rather than the last’ (UN Human Rights Council, 2014, pp. 11–12). The hope was that the introduction of prompt *in-person* presentation of detainees before a judge, rather than merely the police report, would lead to the increased use of alternatives to pre-trial detention and provide an opportunity for detainees to report instances of torture. However, a recent report titled ‘Prison as a Rule’ found that pre-trial detention remained the most frequent outcome of custody hearings (62.5 per cent) in Rio de Janeiro, even though almost 70 per cent of those detained were suspected of non-violent crimes (IDDD et al., 2020). The report was also clear that those detained were primarily young Black men with little to no income.

Focusing on custody hearings enables examination of how justice practice—at the earliest point of formal detention—intersects with naturalized assumptions relating to multiple levels of citizenship and, thus, how coloniality influences judicial decision-making at an ontological level. The chapter begins by discussing the hierarchicalized and bounded nature of citizenship during the Portuguese Empire. The second section explores the concept of *coloniality* and charts how the same white-supremacist power structures were sustained beyond the abolition of slavery and into the postcolonial period. The themes revealed from an analysis of twenty-six interviews with court actors and specialists on judicial decision-making are then presented and discussed. The chapter contributes by building on Segato’s (2007) concept of the ‘coloniality of justice’—which has received limited discussion in English—by providing evidence of how contemporary justice practices continue to be influenced by colonial logics. This endeavour responds directly to Aliverti et al.’s (2021) call to ‘decolonize the criminal question’ by illustrating coloniality across three key dimensions.

Citizenship and the Colonial Period

During the Portuguese Empire, a person reduced to enslaved status in Brazil was considered ‘legally *dead*, deprived of every *right*, and possessing *no representation whatsoever*’ (Perdigão Malheiro cited in Chalhoub, 2006, p. 76). This hierarchy of humanity was enshrined in law, and any ethical questioning was abated by the Pope—considered the unquestionable font of morality—via the ‘Just War’ legitimization for slavery. Although Iberian ‘Just Wars’ had been waged before, with the violent creation and occupation of the Americas, the temporary justification and war-like state of exception transitioned to permanence.⁴ As Maldonado-Torres puts it, ‘[w]hat happens in the Americas is a transformation and naturalization of the non-ethics of war’ (2007, p. 247). This hierarchical relational philosophy that framed the conquerors as superior, rights-bearing citizens and the conquered as inferior and disposable did

charges ‘to counter procedural risks or risks to the public or economic order, without a predetermined final term’ (ibid, p. 7).

⁴ For discussion of coloniality and legacies of ‘Just War’ for Brazil, see Darke and Khan, 2021.

not dissipate or become reconstructed when the laws changed during the Portuguese Empire. Rather, the status difference became naturalized and accepted at an ontological level.

Unlike in Spanish-occupied territories across the Souths of America which saw large-scale revolutions to build republics, in Brazil, the Portuguese-descended Brazilian monarchy declared independence (in 1822) with comparatively little challenge to the regime. The Brazilian elites had no need to change their philosophies and practices and thus maintained their dominance over a largely uneducated underclass. Throughout the periods of Portuguese and Brazilian Empires, elites employed a politics of exclusion and purposefully limited upward social mobility and access to governance. Carvalho explains that although neighbouring Spanish colonies built national universities and invested in creating numerous high courts, 'Portugal refused systematically to allow the organization of any institution of higher learning in her colonies' (1982, p. 383).⁵ Records from the Portuguese Overseas Council state that this policy was explicitly created to ensure dependency of the colonies on Portugal for higher learning (Carvalho, 1982, p. 383).

During the nineteenth century, impoverished groups had some space for movement concerning citizenship status, although it was limited and the position always precarious. Beattie uses the term 'intractable poor' (2015, p. 5) to reflect how powerful social actors stereotyped them collectively as unsavoury social categories. He also coins the phrase 'category drift' and uses this to explain how enslaved people, freed Africans, and other subsections of the intractable poor could move—or perhaps more accurately, *be moved*—across low-status categories, largely at the behest of the governing class (ibid, p. 6). He reflects that it reveals the 'degrees of unfreeness' in Brazil, where those enlisted in the military, indigenous people, and even a 'freedman' could not be considered truly *free* to the same extent (ibid, p. 5). Beattie assesses the situation as precarious for all members of the intractable poor, but that category drift 'disproportionally targeted nonwhites' (ibid, p. 234). This disproportionality and structural nature of discrimination did not get wiped from Brazilian society or the collective conscience of those in power when slavery was abolished.

Coloniality and Citizenship

It is clear that although the end of the nineteenth century saw the abolition of slavery and the birth of the Brazilian republic, the hierarchical notions of citizenship that solidified during centuries of colonial rule remained. Quijano's (2000) concept of 'coloniality of power' is helpful for appreciating the particular dynamics of power that persist beyond decolonization on paper. Mignolo and Walsh describe how such dynamics were 'unveiled' when it became clear that the global and domestic domination of the same European-descended elites endured, creating a form of 'internal

⁵ During the century 1772 to 1872, 1,242 members of the Brazilian elite from all eighteen captaincies were enrolled at Portugal's University of Coimbra, and 80 per cent attended before 1828, when Brazil's first two law schools opened. See Carvalho, 1982, pp. 383–384.

colonialism' (2018, pp. 5–6). Santos expands on this last phrase to illustrate the importance for all levels of societal interaction across the Souths of America:

internal colonialism is not only, or mainly, a state policy; it is rather a very wide social grammar that permeates social relations, public and private spaces, culture, mentalities, and subjectivities. In sum, it is a way of life, a form of unequal conviviality that is often shared by both those who benefit from it and those who suffer its consequences.

(Santos, 2016, p. 26)

For Quijano, the coloniality of power revolved around two fundamental pivots. First, the purposeful arrangement of the means of production to serve exploitative global capitalism. Second, the codification of the boundaries between the conquerors and the conquered, according to invented and hierarchicalized racial categories, used as if they were biological truths (2000, p. 216). These key elements of coloniality were notable preoccupations of Brazilian elites in the late nineteenth and early twentieth centuries, as demonstrated via the overt call to whiten the population when recruiting a new labour force to replace those who had won emancipation. Even through the speeches of famed anti-slavery activists such as Nabuco, we can see that elites believed that they still belonged to Europe more than the Americas. That to be European is to be human, and in contrast, the non-European is something less than or other than human:

We Brazilians (and the same could be said of the other nations of the Americas) belong to the New World as a new, buoyant settlement, and we belong to Europe, at least in our upper strata. For any of us who has the least culture, the European influence predominates over the American. Our imagination cannot but be European, that is, human. It did not cease when Brazil held its first mass but went on, reforming the traditions of the savages who filled our shores at the time of the Discovery. It continued influenced by all the civilizations of humanity, like that of the Europeans, with whom we share the same basis of language, religion, art, law, and poetry, the same centuries of accumulated civilization, and, thus, as long as there is a ray of culture, the same historical imagination.

(Nabuco, 1963, p. 39 in Santos and Hallewell, 2002, p. 67).

The desire for population whitening was based on an ontological position that presented the hierarchicalization of racial groups as self-evident and natural, with scientists and philosophers comfortable in the thought that they were continuing the intellectual path set by Enlightenment thinkers. These philosophical assumptions were supplemented and enhanced in the late nineteenth century with the development of what was framed as scientific evidence that proved these long-held assumptions. Although many contested the ideas, eugenics gained considerable intellectual attention in Brazil in the twentieth century. Support was such that certain sections of the ruling classes wanted to implement substantial eugenic strategies, including the possible replication of Nazi policies to forcibly sterilize criminals and other groups (Souza and Souza, 2016, pp. 11 and 16).

In considering contemporary Brazil, Da Costa states:

Coloniality refers to the system of power where values, representations, and forms of knowledge production turn racial and other colonial differences into hierarchical classifications and values that dehumanize Afro-descendant and indigenous peoples, and correspondingly turn their worldviews and ways of life into symbols of backwardness vis-à-vis capitalist modernity.

(Da Costa, 2014, p. 196)

This capitalist modernity cannot be divorced from the conditions and consequences of coloniality that have brought us to this point. Modernity and coloniality are ‘two sides of a single coin’ (Grosfoguel, 2007, p. 218), with coloniality constituting ‘the dark side of modernity’ (Mignolo and Walsh, 2018, p. 111). Thus, any discussion of the now without due consideration of coloniality overlooks critical causal factors. Critical criminology has long championed the need to free analysis of Eurocentric positionality, with notable interventions from the Souths of America including Aniyar de Castro’s (1987) *Criminology of Liberation*, del Olmo’s (1990) *Second Criminological Break*, and Zaffaroni’s (1988) *Criminology from the Margins*.

The echoing of colonial-era asymmetries of power and privilege through the targeted execution of criminal justice in the Souths of America led Segato (2007) to highlight the ‘coloniality of justice’. Segato maintains that race is not the cause of inequality but ‘a product of centuries of modernity and the joint work of academics, intellectuals, artists, philosophers, lawyers, legislators and law enforcement officials, who have classified the difference as the raciality of the conquered peoples’ (ibid, p. 150). Darke notes that in contemporary Brazil, prison ‘is just the latest in a long series of repressive institutions in the post-colonial era that have openly targeted sections of the population deemed criminally dangerous, threats to state sovereignty, or simply poor, idle or dispensable’ (2018, p. 70). This chapter contributes to the literature by highlighting the coloniality of justice as manifested within judicial decision-making at the pre-trial stage in Brazil.

Analysis

Analysis included twenty-six semi-structured interviews with seven judges (J), four prosecutors (Pr), eight public defenders (PD), and seven subject matter specialists, such as NGO professionals and academics (S). These took place in Rio de Janeiro over three months in 2019. One of the seven judges interviewed is Black, and all others are white, which should be understood against a backdrop where 99.4 per cent of entry-level judges are white (AMB, 2018, p. 222).

Interview questions were designed to facilitate discussion and allow the interviewee to speak fluidly about the factors that influence judges’ decisions during custodial hearings. These interviews were combined with non-participant observation of sixty-four custodial hearings. A ‘thematic framework analysis’ (Braun and Clarke, 2006) was used to analyse the interviews and arrive at the themes under discussion.

The themes presented here were developed around what interviewees revealed as important factors about detainees for deciding whether to detain pre-trial.

Space and Place

Although the interviews were explicitly framed about judicial decisions during custody hearings, many of the interviewees⁶ moved swiftly to discuss how the dynamics of the courtroom and the social relations that play out within them are symptomatic of wider societal issues. Many spoke of boundaries between groups of people or places and presented resulting dichotomous societal relations. Indicative of the ingrained nature of these constructed boundaries was the fact that interviewees across all stakeholder groups—whether presenting with liberal or conservative views—referred to some notion of naturalized division. Some overtly highlighted the disparities, while others talked of differences as logical or without interrogating their validity or significance.

Interviewees regularly mentioned spatial delineators such as *favela/asfalto*⁷ and the city/periphery while discussing the differences people experience in their treatment at the hands of state justice representatives. Some mentioned these terms in passing as if they were natural divisions, while others highlighted them as constructed boundaries, symbolizing the places where the reality of citizenship changed. PD1 expanded on the different realities for different groups with particular mention of policing strategies and stated that this illustrated how ‘repressive power remains against those in favelas.’ He was steadfast in his assertions that what happens during custody hearings is an extension of the divergent realities of those located both physically and socially in different spaces:

[There is] a logic of different languages, they are different spaces that each of these groups of people occupy. The reality of a guy in a favela is completely different. I don’t know if you have heard about the issues of ‘violation of domicile’? In the favela, the police arrive with their foot through the door. In the South Zone, where the judges live, it will not be like that, it’s completely different. For him, this is inconceivable. Fuck, there the police kill, the police beat, the police violate rights. So, they are different realities . . . completely different worlds. In a country so unequal, putting such a person in a position to judge is problematic, because they cannot understand reality.

For one section of society, it is inconceivable that the police would kick down their door or shoot first and ask questions later; but for others, it is a reality. Several interviewees discussed how this different relationship with the state extends beyond the favela into the courtroom. They suggested that judges already conceptualize favela residents as dehumanized and therefore do not find it incongruous with the passage of justice to choose a further impingement on rights by detaining them in inhuman conditions.

⁶ Twenty-two of twenty-six interviews were conducted in Portuguese, and quotations from these interviews are my translations. Where I believe it relevant, I have included the original Portuguese as a footnote. Interviews with J6 and S4 were in English, and quotations attributed to them are their exact statements.

⁷ *Asfalto* translates as *asphalt*. The meaning, in this case, is to compare the planned and paved civic streets with the informal spaces of favelas, unrecognized by the state.

Several interviewees noted the connections between favela residents and assumptions of criminality as part of a perpetual anti-social narrative. They discussed how the favela has become synonymous with crime and, therefore, just being in such a space, even if it is your residence, is enough to presume involvement in crime. The words of J1 provide some insight into this view:

And even today [referring to the custody hearings that I had witnessed], there were some cases where the seizure of the drugs was in a context of extreme violence. A place where there has been exchange of fire between them and police officers. So, in crime there has been indirect violence. As much as the person was not apprehended with a gun, he is part of a group that is armed, and he was caught . . . The vast majority is theft and trafficking. So sometimes the fact of it being the defendant's first offence and having a good background alone does not rule out the need for detention, especially in those contexts we have seen.

Here we gain a glimpse of the judge's beliefs about who is dangerous or likely to commit crime. There is a conflation between a space associated with violence and somebody arrested with drugs but no weapon. J1 described this as 'indirect violence' and presumes the person to be part of a gang with no evidence beyond the space where the person was arrested.

J1 contrasted the situation in the above quote with that of 'a casual trafficker that doesn't present a great risk'. When I asked him to expand on what he meant by this, he provided another example from the set of hearings that I had witnessed that day. One of the hearings was for a truck driver found with drugs, and J1 explained that he 'does not have the context of criminal association'. In this case, J1 granted conditional release until trial, even though the prosecutor asked for conversion to pre-trial detention. This 'criminal association' is what J1 held in mind and led him to decide on pre-trial detention in the initial case discussed, where he deemed there to have been 'indirect violence'. J1 expanded by saying, 'so, we do not look at the crime, we look at the circumstances of arrest and the facts. That's important. The crime itself makes no difference.'

Such a statement reaffirms the assertion that subjective interpretations of circumstances—in this case, as they relate to space—are significant in influencing judicial decisions relating to pre-trial detention. It appears that merely being present in a favela, existing in one's own space—even without a weapon—may be enough to be associated with a gang/faction and thus lead to a greater likelihood of pre-trial detention. The criminalization of the entire marginalized space means that anyone associated with it is vulnerable to the *guilty by association* logic demonstrated by J1.

This subjective narrative about those associated with favelas also fails to acknowledge the structural factors that disadvantage the group. Prosecutors 1 and 2 suggested that the absence of critical documents such as workbooks, proof of address, and CPF⁸ numbers are objective indicators of the need to detain. Other studies have

⁸ Jobs within the licit market require a CPF 'Cadastro de Pessoas Físicas' (Natural Persons Register), the Brazilian individual taxpayer registry identification. A citizen must be registered to an official residence to gain a CPF, yet the state does not class many homes in favelas as such. Access to CPFs has increased; however, as it is not relevant to daily life for those working outside the official jobs market, many do not recall them when criminal justice officials ask.

also shown that an inability to provide such documentation is frequently interpreted as a regular involvement in crime (Machado et al., 2019, p. 233). However, many people living in favelas work informally, for example as cleaners, do not have formal workbooks, and are less likely to have CPF numbers or a residence recognized as official. Prosecutors did not reflect on how the lack of such documentation is symptomatic of structural discrimination rather than being an objective indication of criminality. Detainees are therefore disadvantaged due to situational factors primarily out of their control.

Boundaried Citizenship

Many interviewees presented the accepted sentiment that it was not merely that particular people occupy specific spaces but that these were the places where they belonged and that these people were deserving of the treatment with which the space was coupled. Several interviewees suggested that there are large portions of the population, including many judges, who believe that there are certain people who are deserving of prison or pain or death. J7 used the phrase ‘miserable classes’ to contrast with the privileged class who have their rights respected. J7 explained that when challenging other judges on their approach, they have responded with comments such as ‘Ah, they deserved it. They did it in that place, so they deserved it. If they’re there, it’s because they committed crimes.’ J7 provided further explanation of his observations that many of his fellow judges have naturalized such differences and taken these assumptions into the courtroom:

For example, in situations where a boy from the periphery who abuses his girlfriend, he is justifiably called a rapist. A middle-class boy who abuses his girlfriend, he is a boy in training, developing, discovering sexuality. The speech changes. When it’s the rights of those unworthy people, in his point of view, it is all about killing. Why arrest? Kill them quickly. Why pay for the prison system? Kill at once. Why judge? Condemn right away.

J7’s representation of the popular assumptions about the worth of people demonstrates a connection between the space from which someone comes, the place where they belong, and thus, what they deserve. The sentiment is presented as being held with such virulence that the logic suggests that guilt should be assumed and extrajudicial killing would be the preferable and economic action for society.

The dichotomous notion of the *cidadão de bem* (the good citizen), who deserves fundamental human rights, such as safety, freedom, and justice; and the *bandido* (the criminal), who forgoes such rights, is pervasive in Brazilian society. Many interviewees juxtaposed these two figures to illustrate the imagined divisions between those deserving of rights and protection and those who are imprisonable and killable. Those highlighting this division suggested that adherence to such beliefs at an ontological level influences judges’ considerations around fundamental rights such as presumption of innocence, prevention from torture, and liberty. This constructed dichotomy is emblematic of the extreme ends of a continuum of legitimized

access to citizenship and rights and can be traced to the orientaling discourses of colonialism.

S7 linked a deserving/undeserving dichotomy to popular discourse that conflates punishment with a judgement on what value people are perceived to offer society. S7 explained that those adhering to this discourse say things such as ‘they don’t produce, they don’t add to the economy, they don’t add value to anything, they just take, they take handouts and they rob ... So no need for them to live.’ Several interviewees mentioned that if a person can be labelled as a *bandido* or *traficante*,⁹ then that marker can be used to justify pre-trial detention beyond the scope of recommendations during custody hearings (and even extrajudicial killings). The drug dealer/trafficker label goes far beyond a simple financial transaction for illegal substances to a vision of someone much more dangerous. Indeed, a study found that if a question used the description ‘*traficantes*’ rather than ‘people who sell drugs’, the public were more likely to agree that the police should kill rather than arrest (18.6 per cent vs 10.3 per cent) (Lemgruber et al., 2017, p. 15). This suggests that the figure constructed in the public conscience goes beyond a connection to specific crimes to conjure up an image representing danger to the extent that extrajudicial killing is deemed to be justifiable. Many of the interviewees used the phrase ‘*bandido bom é bandido morto*’ (the only good *bandido* is a dead *bandido*) to illustrate the strength of desire to eliminate groups that are perceived to be unredeemable. PD4 explained how it would be wrong to think that it is merely a throwaway comment used by members of the public,¹⁰ as it has been used regularly by state officials.

Key themes of race and space reoccurred throughout the interviews and, in many cases, they could not be clearly separated. When these two factors are combined (racialized as Black and associated with a favela), the product is not simply double the risk of injustice but the conjuring of a specific character within the societal imagination: the dangerous and legitimately killable *bandido* or *traficante*. S4 illustrates this point:

The fear! What a thing the drug dealer became in peoples’ fantasy! Someone not human, not born from mother and father ... So you can kill 5, 10, 20, 55 on the street or in a prison.

PD1 explained that the slang term ‘*o freio de camburão*’ (the police car’s brake) is used to describe a humbly dressed young Black man, implying that the mere appearance of the person in a place deemed to be a white space is enough to cause the officers to react. PD1 explained that the same reaction occurs within the courtroom, whereby on discovering that a detainee is a Black resident of a favela, the judges make immediate assumptions and then look to confirm their impression. Interviewees suggested

⁹ *Traficante* is used in the Drug Law (2006) and can refer to drug dealers or drug traffickers. Legislation designed to punish large-scale organized trafficking continues to be used to prosecute those delivering or dealing small amounts of drugs. The common usage of *traficante* is a conflation of the diverse actors within the illicit drug market that leads any involvement with drugs to be associated with gun violence.

¹⁰ Studies have consistently found significant support for the phrase with the Brazilian public: 37 per cent (Lemgruber et al., 2017), 57 per cent (Fórum Brasileiro de Segurança Pública, 2015); and 43 per cent (Secretaria Especial de Direitos Humanos, 2010).

that such assumptions are entirely naturalized and are not stated overtly. Occasionally, however, such views are made explicit. In 2020, a judge was forced to publicly apologize after it was revealed that in justifying a fourteen-year sentence for theft, she used the phrase ‘[he was] certainly a member of the criminal group, due to his race’ (UOL, 2020).¹¹ This instance of overt association of race and criminality demonstrates the subterranean beliefs described by several interviewees as being held by many judges.

Other interviewees shared similar views regarding the societal-level schema about racialized groups, with several mentioning the extrajudicial police killing of Evaldo dos Santos Rosa¹² by way of illustration. Interviewees made the point that even though Evaldo fitted the profile of a *cidadão de bem*, as an employed heterosexual man, married with a traditional family and a house, he was still identified by police as killable—as a *bandido*—because he was Black and present in an underprivileged neighbourhood. Shooting eighty bullets at a car without any evidence of criminality or threat is not what representatives of a state do to people considered citizens, but an act reserved for an enemy during times of war. The intersectional nature of this scenario means that it is not simply the negative connotations of race plus that of space equating a double negation of citizenship, but that the amalgamation of the two creates something more pungent, more visceral. Whether on the street or in court, the conjured image is not merely of a lesser group to be overlooked but a dangerous Other to be expunged. Despite multiple sites of resistance, during monarchical regimes via uprisings and quilombos, and post establishment of the Brazilian republic (1889) with legal challenges and changes in legislation, it is evident that the boundary between the conquerors and the conquered remains foundational at an ontological level, meaning: central to understanding the *ways of being* in Brazil.

Whiteness as the Point of Departure

All prosecutors interviewed (all white women) showed awareness of historical racialized power structures but almost exclusively denied the relevance of such structures to current proceedings. In the rare moments that there was an acknowledgement of some possible resonance, prosecutors maintained that it was not a factor in their own thinking or actions. Both Pr1 and Pr2 referred to racial inequalities as ‘historical’ or ‘social’ issues and distanced the possibility of a difference in contemporary treatment. Both were very clear that any difference is not a question of prejudice, yet at the same time argued that a country only relatively recently free of slavery is bound to carry some residual discrimination. Pr2 ruled out such impact on the prosecutors but suggested that it could be true for judges. S3 spoke to the issue of the cognitive dissonance among court actors, displayed by Pr1 and Pr2. S3 explained:

¹¹ Judges can increase sentence lengths if the defendant is proven to be part of a criminal organization.

¹² On 8 April 2019, Evaldo dos Santos Rosa was driving his family to a baby shower in Guadalupe, a low-income area of Rio de Janeiro. Evaldo, a security guard and musician, was killed, and two others were wounded, when ten soldiers shot eighty bullets into the car. The military command initially claimed that the patrol was attacked by criminals but later changed its position (Phillips, 2019b).

We have this discussion: ‘I understand that everyone is racist, but *I’m not racist*. So we have a process of erasing the functioning or racism as something very systemic.

Both Pr1 and Pr2 expressed that it was rational to expect those with fewer resources or less education to commit more crime, yet did not mention how any structural or societal level issues may play a role or relate to racism. S3 described how the phrase ‘criminal tendency’ was frequently heard during custody hearings. She explained how it was often used in connection with racialized detainees who lived in favelas to suggest that there is a natural or inevitable element to their alleged offending. S3 expanded, ‘it is almost a premonition that this person will offend again’. Such statements resonated with J1’s comments about events connected to favelas having the ‘context of criminal association’. Here, S3’s explanation underlines that this association is silently racialized. S3 identifies how many people, including those with influence in custody hearings, recognize that there is a certain level of social disadvantage for racialized groups but overlook the systemic nature as well as the possibility that they may have been conditioned into particular beliefs.

Pr3 explained that when she started her career, it was openly said that the criminal court was ‘for “the three Ps”: those who are *Black, poor and whores*’.¹³ Although Pr3 maintained that there is no longer an overt focus on those previously disparagingly termed the *three Ps*, it appears that the sentiment remains relevant in the shared imaginary of citizens, consequently passing into preconceptions and judgements. However, when asked about why these groups are still detained more than others, Pr3 resorted to the same emphasis on historical and situational factors rather than any consideration of discrimination. Again, we see a natural logic that impoverished Black people are more likely to commit crime, with no attention to a difference in targeted policing practices or treatment within the courtroom.

The overwhelming majority of those presented in court are men, and interviewees almost exclusively spoke about defendants as men. However, the number of women in prison has increased from 10,112 in 2000 to approximately 44,700 in 2017 (Walmsley, 2017a). Alves argues that ‘the experience of disadvantaged Black women has become paradigmatic of the rapidly expanding Brazilian penal system’ (2016, p. 230). The gendered and racialized figure of the female *drug mule* is perhaps the most recent iteration of the *three Ps* sentiment.

When attempting to explain the history of ‘the three Ps’, Pr3 conceded that she is not an expert on the ‘racial issue’ when referencing the reality of Black people’s lives. Indicative of the centring of whiteness as an unspoken assumption, many white interviewees discussed race only when speaking about Black or indigenous people or those with multiple heritage. The construction of whiteness was consistently overlooked. There is an inherent ontological positioning in many cases where justice is considered for a core group (i.e. white people) and access to justice for others is part of a racial issue. Pr3 further revealed this thinking when reflecting that it was safer to go out in public in the past while also noting that society was more overtly racist during the same period. It is evident that when talking about generalizations for the wider public,

¹³ My translation of ‘*pobre, preta e puta*’.

Pr3 centred the white experience, and the concerns of racialized groups were seen as peripheral if acknowledged at all.

Normalization of Black Pain and Death

Centring whiteness is just one side of a coin that, on the other, marginalizes blackness and normalizes pain, danger, and death for Black populations. PD6 spoke about the concerted effort from the Brazilian government to whiten the population and how white European immigration was encouraged while noting vagrancy laws and the criminalization of capoeira as examples of overt state oppression directed explicitly at Black populations. PD6 spoke to the legacies of such state policies and stated that ‘Colourism in Brazil is very strong. The darker your skin is, the more racism you will suffer.’

The opportunity to disclose torture was a central driver for introducing custodial hearings. However, reflections of several public defenders suggested that such protections are operationalized in ways that both centre whiteness and normalize Black pain. Multiple public defenders commented that judges are so accepting of corporal punishment of Black people and accustomed to the sight of Black pain that it does not affect them. PD6 encapsulated this sentiment most clearly:

Judges aren’t bothered by seeing an injured, tortured, bruised Black prisoner before them. It doesn’t cause discomfort. Nor does it bother them to keep that person deprived of liberty and to legitimise this violence suffered, because it’s the natural division of power in Brazil ... They’re not committed to the rights of that person who is there before them. They’re committed to ensuring that the potential iPhone thief will be incarcerated.

Here PD6 is clear in exposing the white supremacy inherent in accepting corporal punishment against Black people and conceded that even progressive fields such as the public defenders’ office are ‘committed to a white epistemology’. J6 also wanted to underline the relevance of the legacies of colonial violence for understanding contemporary treatment of racialized people. J6 expressed her view that society is conditioned to understand that people have different inherent value. Such belief allows the acceptance of extrajudicial killings in favelas and explains why judges are willing to detain people despite the inhumane pre-trial conditions. J7 also likened the carceral system to ‘concentration camps’ and ‘modern slave quarters’ and variously evoked the hierarchical systems of slavery or the systematic approach to removal of the ‘undesirable’ by the Nazis.

Shortly after my empirical research, a video emerged of a Black teenager in São Paulo, tied-up, gagged, and stripped in public, being whipped with an electric cord by two white security guards after stealing four chocolate bars (Phillips, 2019a). News reports talked of public outrage, while also conceding that scenes of young Black men ‘being tied up, tortured and even murdered are common in Brazil’ (ibid). The fact that such torture—whipping being the quintessential form during colonialism—could be considered common in contemporary Brazil exemplifies the

clear resilience of colonial notions of what it is acceptable to do to people racialized as Black. Whether for an iPhone or food, the protection of white property continues to be prioritized over Black pain and fundamental rights. Here we see the two key elements of coloniality influencing the justice process: the centrality of capitalist interests and racialized hierarchy.

When asked whether people are treated differently in custody hearings, PD2 made himself plain: 'There is [differential treatment]. No doubt!' He then gave an example of a young white man being brought to a custody hearing. PD2 described how other court actors showed great concern, with one saying, 'Gee, I am worried about his mother. She must be losing her mind because she does not know about her son.' This example is representative of sentiments described by multiple interviewees about how certain citizens (white/male/high socio-economic status) evoke a response of concern in a way that is rare for other detainees. PD2 explained that this is because those with power in court are used to considering the detainees (mainly young Black men from favelas) as fundamentally 'different people' and not as 'equal human beings,' resulting in the lack of concern in their detention pre-trial. The whiteness of the privileged detainee worked to serve as 'positive racial capital' (Segato, 2007, p. 150) and resulted in preferential treatment. Conversely, the naturalized construction of blackness as inherently criminal and dangerous serves as negative racial capital, resulting in the overuse of pre-trial detention.

Discussion

It has thus become obvious that the naturalization of difference is the consequence of ontological coloniality, meaning the coloniality of being (what counts as being, including human being), which in turn founds the coloniality of knowledge and power. (Santos, 2016, p. 178)

After almost 400 years of legalized and naturalized racial inequality, where people were not seen as members of different socio-economic or cultural classes but literally as part of a different subset of humanity, we arrive at a socially constructed yet firm notion of separation by race, which Luiz Eduardo Soares describes as an 'ontological abyss' (in Lemgruber et al., 2017, p. 36). Souza (2017) urges us to consider slavery not as a name for a thing that once was and is no more but rather as a concept that creates an exclusionary and perverse singularity with significant long-term consequences. When the law changed, the hierarchical concepts were not erased from the elites' collective consciousness, and the consequences of this can be seen in the over-representation of Black Brazilians in pre-trial detention. As Segato writes, '[t]he "colour" of prisons is that of race, not in the sense of belonging to a particular ethnic group, but as a mark of a history of colonial rule that continues to this day' (2007, p. 142). She argues that to deny the racialization of prison populations would be to contradict experience, and thus we need to focus on 'the continuity of the colonial structure in the present' (ibid, p. 153).

This chapter has considered how the legacies of these colonial constructs continue to influence decision-making at the pre-trial stage to reveal the coloniality of justice.

The chapter responds directly to Aliverti et al.'s (2021) call to 'decolonize the criminal question' by exposing and explaining how contemporary justice mechanisms are informed by colonial logics across three key dimensions.

Temporal Dimension

The chapter speaks to Aliverti et al.'s (2021, p. 302) 'temporal dimension' by illustrating how colonial logics inform everyday court practice and is thus indicative of the broader coloniality of justice. As J7 explained:

The situation has not changed because our culture is a culture of violence against poor and Black children. We have a cultural history of slavery. So, although we have decreed the end of slavery, it is still in the subconscious of our population, and we still treat Black people as second-rate people.

As this quote notes, while laws are in place to ensure equality of treatment, the racialized social and civic hierarchy created under colonial hegemony 'is still in the subconscious' of the Brazilian population. According to many interviewees, judicial decision-making cannot be examined in isolation, and due consideration must be given to the assumptions made within the broader public consciousness. The logic of who is deserving/undeserving still upholds divisions between people, invented and introduced to the Souths of America during empire. A logic underpinned by a conqueror/conquered narrative, whereby some are considered '*killable Others*' and for whom due process can be overlooked and legitimated to protect an elite asserted as more deserving (Darke and Khan, 2021, p. 735).

Spatial Dimension

Aliverti et al.'s (2021) spatialized dimension refers to the Euro-American dominance of epistemological space, and this concept maps onto geographical boundaries in Brazil. The divisions are not merely physical markers constitutive of values. Those of the asphalt space are imbued with a 'Europeanness' in Souza's sense (2007, p. 24) and thus considered rational, moral, and of inherent value. Conversely, favela residents are marred with colonial stereotypes, such as assumed dangerousness, criminality, and immorality. Outside the courtroom, this is observable where violation of domicile, violence, and even extrajudicial killings are normalized in the favela and inconceivable in elite neighbourhoods. This division of treatment is extended into the courtroom, where the stigma of the favela as a place synonymous with crime can be enough to overlook fundamental rights such as assumptions of innocence. J1's thoughts relating to a 'context of criminal association' revealed how merely being present in a favela, existing in one's own space—even without a weapon—can be enough for the presumption of guilt by association and, thus, lead to a greater likelihood of pre-trial detention.

Colonial-era assumptions of European epistemic supremacy are thus made manifest within these physical (yet constructed) boundaries.

Subjective Dimension

Interviewees reflected on the evident assumptions that underpin the difference in treatment of those deemed to be a *bandido* or *traficante* in comparison to a *peessoa de bem*. Testimony suggested that judges orientalize those from favelas by presuming a connection to crime if a person is impoverished or does not have a job within the licit market. Interview testimony strongly indicated that the figure of the *bandido* is heavily racialized within the shared imagination, demonstrating the legacies of the racist colonial and eugenics movements associating Black people with crime. These findings relate to Aliverti et al.'s (2021) subjective dimension of 'decolonizing the criminal question'. The notion that the mere appearance of a young Black man is enough for the police to hit the car's brakes also indicates a gendered element to the construction of the *bandido*. While women appear less in custody hearings, interviewees suggested that those who did were also perceived according to long-standing, constructed stereotypes of underserved Black women as immoral, promiscuous, and bad mothers, all of which are inferences with orientalist, colonial origins. In either case, the intersectional nature of race and gender coalesces to create enduring and criminalizing stereotypes.

In making clear the overt relevance to custody hearings, interviewees contended that judges are so accustomed to witnessing the pain of Black people that they have no issue with remanding them to inhumane conditions. For Alves, 'Blackness is ontologically marked as the negation of sociality' (2014, p. 144), and for Black Brazilians, the constant threat of death is intrinsic to life. Alves quotes Sarah Hartman (1997) to explain that Black people are appreciated as citizens or even as humans 'only to the extent of their culpability' (2014, p. 145). This dynamic is observable in the pre-trial context, as those routinely denied the usual trappings of citizenship (according to Euro-American normative conceptualizations) are only acknowledged as citizens when the law is used against them.

Darke relates a common Brazilian expression 'for my friends, everything: for my enemies, the law' (2018, p. 70) to highlight how the powerful have always weaponized the law against the *Other*. White-supremacist ideology forged during colonization of the Souths of America continues to facilitate an asymmetry of power in the Brazilian justice system at the pre-trial stage. The racialized social hierarchy and the prioritization of property of the privileged over the lives of the marginalized illustrate the ongoing coloniality of justice in Brazil. This study suggests that equality of justice will only be achieved after a profound, active reckoning with the naturalized acceptance of the dichotomous constructions of the conquerors and the conquered.

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