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Myths and Realities of Juvenile Justice in Latin America

MARY BELOFF AND MÁXIMO LANGER

Latin America has been an almost forgotten region in the academic English-speaking literature on comparative juvenile justice systems.¹ A first goal of this chapter is to provide an overview of the history of Latin American juvenile justice systems until today. The evolution of Latin American juvenile justice presents two crucial moments: (1) its creation at the beginning of the twentieth century with the importation of the American model of juvenile courts and (2) its transformation in the past twenty-five years with the incorporation of international human rights law into domestic law. While in the first period Latin American laws conceived children and adolescents as subjects to be saved and treated, in the second period the laws have considered children and adolescents as rights bearers who have the same due process rights as adults and can be held criminally responsible, though subject to special regulations. Despite these differences, the two periods have actually been in agreement on their stated goals of removing children and adolescents from criminal law and responding to their deviant behavior with rehabilitative measures.

The second goal of this chapter is to assess whether the goal of juvenile justice of removing children and adolescents from criminal law has actually been put into action. This type of empirical assessment of Latin American juvenile justice systems is missing even in the Portuguese- and Spanish-speaking literatures. This chapter shows that throughout Latin America children and adolescents in conflict with the law are confined at substantially lower rates than are adults. On the basis of these findings, without denying other problems these systems present, we argue that Latin American juvenile justice systems have advanced their stated goal of removing children and adolescents from criminal law.

The third goal of this chapter is to start to assess the recent wave of juvenile justice reforms in Latin America by taking the Chilean reform as a case study. In the past twenty-five years, Latin American juvenile justice laws have undergone their deepest transformation since the creation of juvenile justice systems in the first half of the twentieth century. These reforms promised to bring more due process protections for juveniles and to use confinement only exceptionally and as a last resort. However, there have been almost no empirical assessments of the outcomes of these reforms, even in the Portuguese- and Spanish-speaking literatures. Even if Latin American juvenile justice systems remove a substantial number of children and adolescents from criminal law, as we show in this chapter, have these reforms made juvenile justice systems remove more or fewer children and adolescents from criminal law? By taking the Chilean law as a case study, this chapter shows that while the Chilean reform has brought more due process protections for deviant youth by reducing the percentage of juveniles in pretrial detention, it has likely substantially increased the absolute and relative levels of juvenile confinement.

Background and Early Regulations (until 1919)

Until the second decade of the twentieth century, Latin American countries did not have a comprehensive and specific mechanism like the juvenile court to deal with youth deviant behavior.² During the colonial era, the wars of independence in the early nineteenth century, and the process of constitutionalization in the second half of the nineteenth century, Latin America used medieval Spanish norms to deal with youth deviant conduct. The basic laws were the *Siete Partidas*, compiled in Castilla between 1256 and 1265, and other regulations such as the *Fuero Juzgo*, the *Leyes de Toro*, the *Nueva*, and the *Novísima Recopilación*.³

These Spanish regulations presented the following features: (1) they excluded from criminal responsibility and punishment children below the age of ten and a half; (2) they reduced the levels and kinds of punishment applicable to an intermediate category of children who were between ten and a half years and fourteen years, by considering factors such as the type of offense committed and whether the offender was

male or female; and (3) they contemplated a few mitigating sentencing factors for young offenders under the age of sixteen by type of offense.

The lack of a substantial concern for juvenile crime as well as the long and complex process of state formation in Latin America help explain why these Spanish rules (in particular, the *Partidas*) regulated the handling of juvenile cases well into the nineteenth century. The passing of the first criminal codes by Latin American independent nations formally replaced the Spanish regulations but were still heavily influenced by them. For instance, in Argentina, such a code was adopted in 1886. In keeping with the *Partidas*, this code established that exempted from punishment were children under ten years of age (article 81(2)) as well as those between ten and fifteen years, "unless they acted with discernment" (article 81(3)).

The Creation and Spread of the Juvenile Court in Latin America (1919–1990)

The U.S. model of juvenile courts was introduced in Latin America in 1919. The adoption of this system (known in Latin America as the "tutelar system") was the most important change in Latin American policies toward youth in conflict with the law until this day. Under this model, youth crime had to be approached differently than adult crime, and the goal of the interventions on youth was supposed to be rehabilitation, not punishment.

Latin American discourse on youth delinquents echoed U.S. ones. For instance, echoing Enoch Wines, it was stated in the parliamentary debate on the Argentine Protection of Minors Bill in 1918, "The extremely high number of children that roam our streets and live like birds on the wastelands, in the public plazas, on the land regained from the river, in the gaps of the doorways and the filthiest slums . . . will become, as a result of the natural evolution of their irregular lifestyle, the largest contingent of the prisons of our Nation."⁴

Under the humanist slogan of "taking the minor away from criminal law" (criminal law understood fundamentally in a retributive sense), the tutelary system was supposed to adopt protective and educational measures for the benefit of the youth that aimed at their rehabilitation.

These criminological trends were supported by the older and well-established idea in civil and common law countries that the state should act *in loco parentis*—that is, subrogating the parental functions—in cases in which the minor did not have parents or the parents were considered incapable of carrying out their parental duties. For this reason, from the beginning, the juvenile court, as the specialized legal institution that dealt with children and adolescents who committed crimes, was associated with regulations and institutions on the protection of the child, such as the family court.

Between 1919 and the 1940s, almost all Latin American countries passed laws establishing juvenile courts or similar institutions. Inspired by the U.S. juvenile court, Argentina was the first country with the enactment of Law 10.903 (Law for the Welfare of Minors).⁵ This law authorized the handing over to federal or provincial authorities of minors younger than eighteen years who had been abandoned, were placed in a situation of “moral or material danger” by their parents or caretakers, or were crime victims or offenders. This protection by the state (called *Patronato* in Argentina) had to be exercised to pursue the “health, security, moral and intellectual education of the minor” whose parents or caretakers did not provide adequate care (art. 4).

Similar mechanisms for the protection of children and adolescents were created in every Latin American country. For example, Brazil passed its first Code for Minors in 1927 and Uruguay in 1934. Chile passed its Law for the Protection of Minors in 1928, Costa Rica passed its Code for Infancy in 1932, Bolivia passed its National Welfare of Minors Agency in 1937, and Venezuela passed its Statute for Minors in 1949. Most of these institutions were placed within the judicial branch, though some countries such as the Andean countries and Mexico implemented their tutelary system as an administrative agency instead.

The criminal regulations on minors went on a somewhat different track. As already mentioned, influenced by the Spanish *Partidas*, the first Argentine Criminal Code of 1886 established ten years as the minimum age of criminal responsibility. It also established that the rule of discernment had to be used to determine whether individuals between ten and fifteen years were criminally responsible. Being less than eighteen years was considered a mitigating circumstance for

sentencing purposes. In 1921, a new Criminal Code established fourteen years as the minimum age of criminal responsibility (art. 36). In the mid-1950s, the minimum age of criminal responsibility was raised to sixteen years.⁶

The criminal codes of all Latin American countries adopted similar regulations. A first group had a low minimum age of criminal responsibility (MACR) for the lowest age range, combined with the rule of discernment for the intermediate age range.⁷ A second group had a higher MACR, and the tutelary regime for minors dealt with all cases that involved people under that age.⁸

Like juvenile courts in the United States, Latin American juvenile courts (or the administrative agencies that performed the same function) had broad and discretionary jurisdiction that ranged from taking care of abandoned or abused children (exercising the governmental intervention in loco parentis mentioned earlier) to the adjudication of cases of administrative violations and criminal offenses committed by juveniles. Thus, regardless of the minimum age of criminal responsibility, the stated central criterion for judges and administrative authorities to manage and decide on these cases was whether the child or adolescent was abandoned or at risk. If the minor was in one of these situations, he or she could be subjected to a protective measure, even if he or she was under the minimum age of criminal responsibility. Such measures included the institutionalization until the age of majority (twenty-one years old in the case of Argentina) of minors who did not have a family or whose family was incapable of taking care of them.

From the very beginning, one characteristic that distinguished the Latin American model of juvenile courts (either judicial or administrative) from the U.S. one was that Latin American juvenile courts used inquisitorial criminal proceedings to deal with their cases, as did almost all Latin American criminal courts for adults at the time. In the United States, the proceedings of the juvenile court disregarded due process not because adult criminal proceedings were inquisitorial but under a paternalistic rationale.⁹ In this sense, the inquisitorial character of juvenile courts in the United States was always considered exceptional and otherwise alien to the U.S. justice system, even before *Kent* and *In Re Gault*. In contrast, in Latin America, both criminal and juvenile courts operated within inquisitorial frameworks until well into the 1990s.¹⁰

This broader inquisitorial framework may partially explain why the Latin American legal community and case law did not consider problematic the due process limitations of Latin American juvenile courts until the 1990s.¹¹

The Recent Wave of Reforms on Juvenile Justice in Latin America (1990–Present)

Background of the Reforms

In the past twenty-five years, almost all Latin American Portuguese- and Spanish-speaking countries have introduced new laws on the rights of the child and on juvenile justice that replaced the laws of the classical tutelary system. The UN Convention on the Rights of the Child and other human rights instruments and transitions to democracy and concerns for juvenile crime in the region opened windows of opportunity for reforms in this area. Domestic, regional, and international reformers characterized the tutelary system as arbitrary and inefficient and, with the support of international donors, proposed reforms to Latin American juvenile justice as part of a broader package of criminal justice reforms.¹²

This process of reforms started with the Brazilian transition to democracy and the passing of the new Brazilian Constitution of 1988 that included two provisions on the rights of the child. Article 227 summarizes the provisions of the Declaration of the Rights of the Child¹³ and establishes, among other regulations, that it is the “duty of the family, the society and the State to ensure children and adolescents the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.” Article 228 of the Constitution says, “Minors under eighteen years of age may not be held criminally liable and shall be subject to the rules of the special legislation.”¹⁴

This process of reforms has been influenced by the Convention on the Rights of the Child (CRC, or the Convention) that all Latin American countries ratified within a very short period of time between 1990 and 1991, as shown in table 5.1.

TABLE 5.1. Dates of Signature, Ratification, and Entry into Force of the CRC by Country (Latin America)

Country	Signature	Ratification	Entry into force
Argentina	June 29, 1990	December 4, 1990	January 3, 1991
Bolivia	March 8, 1990	June 26, 1990	September 2, 1990
Brazil	January 26, 1990	September 24, 1990	October 24, 1990
Chile	January 26, 1990	August 13, 1990	September 12, 1990
Colombia	January 26, 1990	January 28, 1991	February 27, 1991
Costa Rica	January 26, 1990	August 21, 1990	September 20, 1990
Cuba	January 26, 1990	August 21, 1991	September 20, 1991
Ecuador	January 26, 1990	March 23, 1990	September 2, 1990
El Salvador	January 26, 1990	July 10, 1990	September 2, 1990
Guatemala	January 26, 1990	June 6, 1990	September 2, 1990
Haiti	January 20, 1990	June 8, 1995	July 8, 1995
Honduras	May 31, 1990	August 10, 1990	September 9, 1990
Mexico	January 26, 1990	September 21, 1990	October 21, 1990
Nicaragua	February 6, 1990	October 5, 1990	November 4, 1990
Panama	January 26, 1990	December 12, 1990	January 11, 1991
Paraguay	April 4, 1990	September 25, 1990	October 25, 1990
Peru	January 26, 1990	September 4, 1990	October 4, 1990
Dominican Republic	August 8, 1990	June 11, 1991	July 11, 1991
Uruguay	January 26, 1990	November 20, 1990	December 20, 1990
Venezuela	January 26, 1990	September 13, 1990	October 13, 1990

Note: Does not include English-speaking countries from Latin America and the Caribbean, whose analysis of juvenile justice is beyond the scope of this chapter.

These data on the ratification process suggest that the Convention was popular across the wide political spectrum of Latin America, where eighteen of the twenty nations ratified the Convention within one year and every country except Haiti within two years. Reformers argued that the ratification of the CRC required the passing of new domestic laws on children's rights in general and on juvenile justice in particular to comply with the Convention's rules and standards. To advocate and argue for reforms, reformers and their allies also relied on the American Convention on Human Rights and on advisory opinions and decisions by the Inter-American Court of Human Rights on the rights of children and adolescents.¹⁵ Reformers and their allies also argued that the

tutulary system was undergoing a profound theoretical crisis because academic studies had put into question the etiological theories on criminal deviance and rehabilitation as a goal of juvenile confinement on which the tutulary system was based.¹⁶

As in the case of the parallel criminal procedure reforms that also spread through Latin America in the same period, broader phenomena also enabled the passing of the new juvenile justice and children's rights laws.¹⁷ Transitions to democracy in the region as well as an increasing awareness about the phenomenon of the "street child" opened windows of opportunity to this reform program that presented the reforms as a way to improve due process and human rights standards for children and adolescents. Reformers maintained that the secrecy and the paternalistic rationales of the tutulary system deprived children and adolescents of their rights and gave room to unchecked discretion and abuses by tutulary system officials. Concerns about juvenile crime also enabled reformers to propose changes to juvenile systems that were perceived as inefficient.¹⁸ Reformers argued that the written and secret proceedings that the classical tutulary system used were too protracted, formalistic, and unaccountable.

The Reforms to Juvenile Justice

Table 5.2 describes the reforms that Latin American countries introduced on juvenile justice in chronological order and including whether the juvenile justice reform was introduced as part of a more comprehensive regulation on the rights of children or in a statute focused specifically on juvenile justice.¹⁹ For countries that have approved two or more laws in the period of study (since the ratification of the Convention until the present day), only the most recent regulation is mentioned.²⁰

As can be noticed from this table, the wave of reforms has included not only changes to the juvenile justice system, which deals with children in conflict with the law, but also regulations on the protection of the rights of children through positive endowments by the state. As already mentioned, the arguments for the introduction of new legislation on crime committed by youth included that the classical tutulary system was arbitrary and inefficient and that it did not meet the international human rights standards set by the CRC and other international

TABLE 5.2. Recent Legislation on Juvenile Justice and Rights of the Child in Latin American Countries (1990–2014)

Country	Statute	Date	Type of legislation
Brazil	Statute on the Child and the Adolescent [Estatuto da Criança e do Adolescente], Act 8069, which was later complemented by National System of Socio-educational Services [Sistema Nacional de Atendimento Socio-educativo (Sinase)], Act 12594, which was passed on January 18, 2012	Approved on June 13, 1990	General legislation concerning children's rights
El Salvador	Youth Offender Act [Ley del Menor Infractor], Act 863	Approved on April 27, 1994; amended by Decree 395 of June 28, 2004, regarding its name and some specific articles	Special legislation on juvenile justice
Costa Rica	Juvenile Criminal Justice Act [Ley de Justicia Penal Juvenil], Act 7576	Approved on February 6, 1996; enacted on March 8, 1996; published and entered into force on April 30, 1996	Special legislation on juvenile justice
Honduras	Childhood and Adolescence Code [Código de la Niñez y de la Adolescencia], Act 73-96	Published on September 5, 1996	General legislation concerning children's rights
Nicaragua	The Childhood and Adolescence Code of Nicaragua [El Código de la Niñez y la Adolescencia de Nicaragua], Act 287	Approved on March 24, 1998; published on May 27, 1998	General legislation concerning children's rights
Panama	Special Regime of Criminal Responsibility for Adolescents [Régimen Especial de Responsabilidad Penal para la Adolescencia] (Law no. 40).	Approved on August 26, 1999; amended by Law 46, approved on June 6, 2003	General legislation concerning children's rights
Bolivia	Code of the Children and Adolescent [Código del Niño, Niña y Adolescente], Act 2026	Approved on October 27, 1999	General legislation concerning children's rights
Peru	New Code of the Children and Adolescents [Nuevo Código de los Niños y Adolescentes], Act 27337	Approved on July 21, 2000; enacted on August 2, 2000; published on August 7, 2000	General legislation concerning children's rights

TABLE 5.2. (continued)

Country	Statute	Date	Type of legislation
Paraguay	Childhood and Adolescence Code [Código de la Niñez y la Adolescencia], Act 1680/01	Approved on May 8, 2001	General legislation concerning children's rights
Ecuador	Childhood and Adolescence Code [Código de la Niñez y Adolescencia], Act 2002-100	Approved on December 23, 2002; published on January 3, 2003	General legislation concerning children's rights
Guatemala	Comprehensive Protection of the Childhood and Adolescence Act [Ley de Protección Integral de la Niñez y Adolescencia], Act 27-03	Approved on June 4, 2003; enacted on July 15, 2003; published on July 18, 2003	General legislation concerning children's rights
Dominican Republic	Code for the Protection System and the Fundamental Rights of Children and Adolescents [Código para el Sistema de Protección y los Derechos Fundamentales de Niños, Niñas y Adolescentes], Act 136-03	Approved on July 22, 2003; enacted on August 7, 2003	General legislation concerning children's rights
Uruguay	Childhood and Adolescence Code [Código de la Niñez y la Adolescencia], Act 17823	Enacted on September 7, 2004; published on September 14, 2004	General legislation concerning children's rights
Costa Rica	Enforcement of Juvenile Criminal Sentences Act [Ejecución de Sanciones Penales Juveniles], Act 8460	Passed on October 20, 2005; entered into force on November 28, 2005	Special legislation on juvenile justice
Colombia	Childhood and Infancy Code [Código de Niñez e Infancia], Act 1098	Passed and published on August 11, 2006	General legislation concerning children's rights
Mexico (Oaxaca)	Act of Justice for Adolescents of the State of Oaxaca [Ley de Justicia para Adolescentes del Estado de Oaxaca], Decree 306	Published on September 9, 2006.	Special legislation on juvenile justice
Mexico (Nuevo Leon)	Act of the Special Justice System for Adolescents of the State of Nuevo Leon [Ley del Sistema de Justicia Especial para Adolescentes del Estado de Nuevo Leon], Decree 415	Published on September 10, 2006	Special legislation on juvenile justice

(continued)

TABLE 5.2. (*continued*)

Country	Statute	Date	Type of legislation
Mexico (Chihuahua)	Act of Special Justice for Adolescent Offenders of the State of Chihuahua [Ley de Justicia Especial para Adolescentes Infractores del Estado de Chihuahua], Decree 618/06	Published on September 16, 2006	Special legislation on juvenile justice
Mexico (Zacatecas)	Act of Justice for Adolescents of the State of Zacatecas [Ley de Justicia para Adolescentes en el Estado de Zacatecas], Decree 311	Published on September 30, 2006	Special legislation on juvenile justice
Chile	Juvenile Criminal Responsibility Act [Ley de Sistema de Responsabilidad Penal de los Adolescentes], Act 20.084	Enacted on November 2005; published on December 7, 2005; entered into force on June 8, 2007	Special legislation on juvenile justice
Mexico (D.F.)	Law of Justice for Adolescents for the Federal District [Ley de Justicia Para Adolescentes para el distrito Federal]	Published on November 14, 2007; entered into force on October 6, 2008	Special legislation on juvenile justice
Venezuela	Organic Act for the Protection of Children and Adolescents [Ley Orgánica para la Protección de Niñas, Niños y Adolescentes]	Enacted on August 14, 2007; published on December 10, 2007	General legislation concerning children's rights
Mexico	Federal Act of Justice for Adolescents [Ley Federal de Justicia Para Adolescentes]	Published on December 27, 2012; entered into force on December 27, 2014	Special legislation on juvenile justice

documents.²¹ The stated goals of the new legislation have included treating juveniles as rights bearers who have to be protected in their development and social integration, while preventing crime.²²

Even if the new Latin American juvenile laws adopted the principles of the CRC and of other international instruments, these laws did not follow one single coherent theory or model. Leaving aside the Costa Rican legislation, which was heavily influenced by German law, Latin American countries generally drafted their laws using their own

legislative models, which evolved based on the experience of other countries of the region that had already made changes to their legislation in this area. In the drafting of the new laws, there were also tensions and compromises between the principles of the classical tutelary system and the principles of the Convention and of the juvenile justice reformers, especially in the early laws. In addition, in the early years, there was no expertise in the region for the drafting of the new laws, given that the older juvenile justice experts had been raised in the classical tutelary system and that criminal law scholars had not been interested in this area.²³

These factors help to explain why the laws passed at the beginning of the 1990s reveal serious legislative drafting problems and evident theoretical inconsistencies. This is especially evident in the passing of comprehensive codes on the rights of the child.²⁴ This trend started to change when laws specifically focused on juvenile justice were passed, such as those of El Salvador and Costa Rica,²⁵ and as a group of experts participated in the drafting of the new laws in more than one country and learned from previous experience.

Despite the fact that some countries such as Brazil have set the age of legal responsibility at eighteen years, this regulation did not eliminate the category of "young offenders." All countries in the region established a minimum criminal age and created a juvenile criminal law system separate from the adult criminal justice system. The formal law of this juvenile system includes diversionary mechanisms, due process protections, and special posttrial measures for juveniles—generally known as "measures" or "socioeducational measures" in the early laws and as "juvenile sentences" in more recent ones. The legislations establish that the term "juvenile offender" can only be used for those who have been declared criminally responsible. Generally, juvenile offenders may not be subjected to measures or sentences of confinement unless no other alternative measures are available.

Regardless of whether the juvenile justice reforms were introduced as part of a more comprehensive regulation of the rights of children or in a statute focused specifically on juvenile justice, both types of legislation broadly follow the same framework originally adopted by the Brazilian statute. Table 5.3 summarizes the main features of this framework, which are further developed in the subsections that follow.

TABLE 5.3. Main Reforms on Juvenile Justice in Latin America (1990–Present)

Reform	Description
Principle of legality	A child or adolescent may be subjected to the juvenile justice regime only when he or she is accused of having committed a criminal offense.
Restorative and alternative mechanisms	There are measures for dealing with children and adolescents in conflict with the law without resorting to judicial proceedings and punishment.
Minimum age of criminal responsibility (MACR)	Almost all the countries in the region set the MACR at twelve, thirteen, or fourteen years.
Intermediate group	Children and adolescents above the MACR but under eighteen years are criminally liable, but they are presumed to have diminished responsibility due to their age.
Due process	The new laws have extended the due process protections of adults to youth in conflict with the law and have established specific due process protections for youth.
Legal consequences for youth declared criminally responsible	They are supposed to be different from those applied to adults and range from warnings and reprimands to confinement in a specialized institution. Their goals include social reintegration and rehabilitation.
Confinement as a last-resort measure	Pretrial and posttrial confinement should be used only exceptionally and for the shortest possible time.

1. THE COMMISSION OF A CRIMINAL OFFENSE AS A REQUIREMENT TO BE SUBJECTED TO THE JUVENILE JUSTICE SYSTEM (PRINCIPLE OF LEGALITY)

Article 40.2(a) of the CRC says, “No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed.” A number of Latin American constitutions establish a similar requirement that has also been included by all the Latin American juvenile justice statutes.²⁶

Latin American juvenile justice laws have interpreted that this requirement implies that a child or adolescent may be subjected to the juvenile justice regime only when he or she is accused of having committed a criminal offense. This requirement has been considered a radical change because under the classical tutelary system, authorities could

subject minors to sanctions on the basis of broad and vague legal criteria such as "social risk."²⁷ This requirement also distinguishes Latin American from Anglo-American and continental European juvenile justice systems that deal with not only juvenile offender cases but also children and adolescents who engage in "any specific behavior that would not be punishable if committed by an adult" or are in danger or in need of protection.²⁸

Despite this requirement, the new juvenile justice statutes have not specifically addressed the commission of petty offenses and of administrative violations by juveniles that in most Latin American countries are within the jurisdiction of the police and other administrative agencies. As a consequence, it is possible that children and adolescents accused of committing petty offenses and administrative violations are subjected to a harsher regime than the one established by the juvenile justice statute.

2. RESTORATIVE JUSTICE AND ALTERNATIVE PROCEEDINGS

Article 40.3(b) of the CRC establishes, "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: . . . (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected." The United Nations Guidelines for the Prevention of Juvenile Delinquency (known as the Riyadh Guidelines) recommend the adoption by states of the same principles.²⁹

The new Latin American statutes include such a principle by establishing restorative justice measures as an alternative to juvenile criminal law.³⁰ Latin American legislation aims at implementing this principle of restorative justice through the application of four mechanisms: (a) conciliation and mediation, (b) the opportunity principle, which allows prosecutors to dismiss cases that could be prosecuted, (c) diversion mechanisms, and (d) the institution of remission, established in article 11 of the Beijing Rules, which is just an alternative label for the application of the opportunity principle or diversion mechanisms.³¹ While the new juvenile justice legislation of certain countries such as Chile

and Costa Rica refers to the criminal procedure code regulations on adults to apply these mechanisms in the juvenile justice context, other Latin American countries such as Honduras and El Salvador regulate these mechanisms directly in the juvenile justice legislation.³²

These measures are ways to avoid the application of criminal law to juveniles, under the social integration idea that the fewer children and adolescents who are subjected to criminal law, the better, because criminal law is likely to interfere with, rather than to promote, the social reintegration of the juvenile.

Given that rehabilitation has been articulated as one of the goals of the juvenile justice reforms, these mechanisms could also be interpreted as a way to implement rehabilitation ideals in the context of juvenile justice.³³ The main problem with this interpretation of these mechanisms is the absence in most countries of the region of rehabilitation programs or even monitoring programs that check how these mechanisms are applied.³⁴ The absence of these rehabilitation or monitoring programs has actually led to law-and-order criticisms of these mechanisms under the argument that they are ways to be soft on crime.

3. MINIMUM AGE OF CRIMINAL RESPONSIBILITY (MACR)

Article 40.3.a of the CRC establishes that "States Parties shall seek to promote the establishment of . . . a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." The Committee on the Rights of the Child has understood this provision as an obligation for state parties to set a minimum age of criminal responsibility below which children cannot be held responsible in a penal law procedure.³⁵ Almost all the countries in the region set the MACR at twelve, thirteen, or fourteen years. The only country that has kept it at sixteen years is Argentina.

These children are immune from prosecution due to their lack of responsibility and are supposed to be referred to children protection systems. When children under the MACR are accused of committing a criminal offense, their cases are automatically diverted to the administrative system of child protection. A number of the new Latin American juvenile justice regulations have established that children may not be put in confinement when they are under the MACR.³⁶

4. DIMINISHED CRIMINAL RESPONSIBILITY FOR THE GROUP BETWEEN THE MACR AND EIGHTEEN YEARS

The new Latin American juvenile justice legislations establish that children and adolescents above the MACR but under eighteen years are criminally liable, but they are presumed to have diminished responsibility due to their age.³⁷ In other words, the children and adolescents who are between the minimum criminal age and eighteen years old are criminally responsible, though subject to a special regime.

Table 5.4 summarizes the minimum age of criminal responsibility as well as the maximum confinement applicable to children above the MACR and below eighteen years in eighteen Latin American countries on the basis of the statutes described in table 5.2.

TABLE 5.4. Minimum Age of Criminal Responsibility and Maximum Confinement for Those above the Minimum Age and below Eighteen Years in Latin America

Country	Minimum age of criminal responsibility	Maximum confinement for intermediate group(s)
Argentina	16	Punishment may be imposed only on those who have turned 18 years and who have been subjected to a minimum of one year of protective treatment.
Bolivia	12	Maximum confinement of three years for 12- and 13-year-old and of five years for 14- and 15-year-olds
Brazil	12	Maximum confinement period of three years. After turning 21 years, he or she must be released.
Chile	14	Maximum confinement of five years for 14- and 15-year-olds and of ten years for 16- and 17-year-olds
Colombia	12	Rehabilitation measures include confinement and may not be longer than three years.
Costa Rica	12	Maximum confinement of ten years for 12- to 15-year-olds and fifteen years for 15- to 18-year-olds
Dominican Republic	12	Maximum confinement of three years for 13- to 15-year-olds and of five years for 16- to 18-year-olds
Ecuador	12	Maximum of four years of confinement
El Salvador	12	Maximum confinement of five years for 12- to 15-year-olds and of seven years for 16 and older
Guatemala	12	Maximum confinement of two years for 13- to 15-year-olds and of six years for 15- to 18-year-olds

(continued)

TABLE 5.4. (*continued*)

Country	Minimum age of criminal responsibility	Maximum confinement for intermediate group(s)
Honduras	12	Maximum of eight years of confinement
Mexico (Chihuahua)	12	Maximum confinement of ten years for 14- to 16-year-olds and of fifteen years for 16- to 18-year-olds
Mexico (D.F.)	12	Maximum confinement of five years for 14- to 18-year-olds
Mexico (Federal Act)	12	Maximum confinement of five years for 14- to 16-year-olds and of seven for 16- to 18-year-olds
Mexico (Nuevo Leon)	12	Maximum confinement of six years for 14- to 16-year-olds and of eight for 16- to 18-year-olds
Mexico (Oaxaca)	12	Maximum of nine years of confinement, twelve years on confinement in cases of homicide, rape, kidnapping, and parricide
Mexico (Zacatecas)	12	Maximum confinement of months for 14- to 16-year-olds and of five years for 16- to 18-year-olds
Nicaragua	12	Maximum of six years of confinement
Panama	14	Maximum of five years of confinement
Paraguay	14	Maximum of eight years of confinement
Peru	12	Maximum of six years of confinement
Uruguay	12	Maximum of five years of confinement
Venezuela	12	Maximum of two years for 12- and 13-year-olds and of four years for 14-year-olds or older

Sources: Statutes described in table 5.2.

5. GENERAL AND SPECIFIC PROCEDURAL AND SUBSTANTIVE CRIMINAL RIGHTS

Article 40 of the CRC and other international instruments establish due process protections for youth accused of the commission of a criminal offense.³⁸ The new Latin American juvenile justice statutes also explicitly establish such due process protections and special child rights, which include, among others, the presumption of innocence; the right to be informed promptly and directly of the charges against him or her and, if appropriate, through his or parents or legal guardians and to have legal or other appropriate assistance in the preparation and presentation of his or her defense; the right to have the matter determined by a competent, independent, and impartial authority or judicial body,

in a fair hearing; the right against compulsory self-incrimination, to examine adverse witnesses, and to compulsory process; and the right to privacy.³⁹

Not only international instruments but also the criminal procedure reforms that Latin America has undergone in the past twenty-five years have influenced the due process regulations of the new Latin American juvenile justice systems. Under the slogan of replacing inquisitorial by adversarial systems of criminal justice, these criminal procedure reforms have included, among other measures, the introduction of oral and public trials, the elimination of pretrial investigating judges and a transfer of pretrial investigation to prosecutors, a clear distinction between the roles of prosecuting and adjudicating cases, the introduction of prosecutorial discretion and plea-bargaining-like mechanisms, and broader participation rights for the victim in the criminal process.⁴⁰ Given that the new juvenile justice legislations establish that regular criminal procedure regulations apply to children and adolescents in conflict with the law, the reforms to Latin American criminal proceedings have also changed the way these children and adolescents are prosecuted and tried.

6. POSTCONVICTION MEASURES FOR THOSE WHO ARE DECLARED CRIMINALLY RESPONSIBLE

The new Latin American legislations establish the possible legal consequences for a child or adolescent who is declared criminally responsible for the commission of an offense. These legal consequences are supposed to be different from those applied to adults and range from warnings and reprimands to confinement in a specialized institution. Rule 18 of the Beijing Rules says that nonconfinement measures should be used to avoid institutionalization to the maximum extent possible, and article 37(b) of the CRC says that the imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate time. The new Latin American juvenile justice legislations reflect these principles by including no confinement measures, ranging from caution to probation, to deal with children and adolescents who are found criminally responsible.⁴¹

The international legal instruments generally refer to this type of legal consequences as "measures."⁴² Depending on each country's

legislation, in Latin America they are known as “measures,” “socio-educational measures,” “punishments,” or “juvenile sentences.” The laws that were passed at the beginning of the 1990s, which followed the Brazilian model, generally refer to “protection measures” rather than “sentences” in order to distinguish the postconviction consequences for juveniles from those for adults.⁴³ Some of the later legislations instead use the term “juvenile sanctions.”⁴⁴

The new Latin American laws adjust the maximum time for sentences by age groups (e.g., twelve to fourteen and fifteen to seventeen years), under the rationale that time has different implications for the younger and for the older children and adolescents.⁴⁵ The most recent laws also establish specific sentencing rules that refer to the sentencing scale of the crimes, not to the maximum of the sentencing scale or to an abstract reference to the “seriousness” of crimes as a ground for the measure or sanction of confinement.⁴⁶

Two of the stated goals of juvenile criminal sentences in the new Latin American laws are the social reintegration of juveniles and their rehabilitation.⁴⁷ In practice, one of the problems for the goal of rehabilitation in most countries is the absence of programs and the lack of an adequate institutional infrastructure for allowing these nonimprisonment sentences or measures to try to advance this goal.⁴⁸

7. CONFINEMENT AS A PRETRIAL MEASURE AND AS AN ALTERNATIVE, EXCEPTIONAL, TEMPORARILY LIMITED, AND BRIEF POSTCONVICTION MEASURE

According to international child rights law, the imprisonment of a criminally responsible child or adolescent is an exceptional, alternative measure that must be applied only in the case of very serious crimes and must be of limited duration.⁴⁹ Pretrial and postconviction imprisonment must also be as short as possible.⁵⁰ The new Latin American laws have also adopted these principles.⁵¹

Latin American laws establish that children and adolescents may be subjected to (a) weekend imprisonment, (b) house arrest, and (c) imprisonment in a specialized institution. In practice, the only one that is actually applied in most countries is confinement in specialized institutions, as was already the case in the classical tutelary system, since, once again, no well-functioning programs that are sustainable over the

long term have been created to ensure that measures (a) and (b) are truly available in most of the region. The new laws also establish that children and adolescents may be deprived of their liberty only in specialized centers, not regular prisons.⁵²

From Theory to Practice: Comparing Use of Confinement and Sanctioning Policies in Criminal and Juvenile Courts

The theoretical statements analyzed in the previous sections about the goals of juvenile justice represent only the rhetoric and aspirations of legal policy rather than hard evidence that juveniles who commit offenses face different treatment and punishment outcomes than older offenders do. Most of the discussion of juvenile justice in Latin America has concerned only these rhetorical and aspirational dimensions of policy. But is there evidence from practice that juvenile offenders are deprived of their liberty differently than are defendants in the criminal courts in Latin America countries? Do juvenile offenders face different sanction policies than adults do? Data sources are quite uneven on crime and justice in the region, and no systematic studies have been undertaken. In addition, since the available data are collected and reported by countries with different standards of care, systematization, and consistency, it is important to be cautious while making cross-country comparisons. But an analysis of statistics on confinement and arrest and formal contact with the police suggests that juvenile courts in Latin America rely less on incarceration than criminal courts for adults do.

Table 5.5 begins the survey by showing the population in confinement of persons under eighteen, persons between eighteen and twenty-four, and persons over twenty-four, in eighteen Latin American countries. Table 5.5 shows that the total juvenile population in confinement is smaller than the total population in confinement of the other two age groups in these eighteen Latin American countries.

Figure 5.1 indicates the proportion of total secure confinement in juvenile and adult facilities that is occupied by persons under eighteen in these eighteen Latin American countries. In most countries, the confinement of youth accounts for only a very small share of total incarceration. Ten of the eighteen countries count fewer than 3% of those

TABLE 5.5. Population in Institutions of Secure Confinement by Age in Eighteen Latin American Countries

	Juveniles	Adults 18–24	Other adults
Argentina	1,375	14,071	60,789
Bolivia	1,874	n/a	13,489
Brazil	20,023	143,470	548,003
Chile	1,882	n/a	49,350
Colombia	3,300	n/a	113,884
Costa Rica	88	2,884	14,830
Dominican Republic	552	n/a	21,875
Ecuador	1,100	n/a	23,178
El Salvador	797	7,731	26,486
Guatemala	900	n/a	15,013
Honduras	278	n/a	11,879
Mexico	10,583	n/a	198,847
Nicaragua	153	n/a	7,200
Panama	428	5,231	14,593
Paraguay	256	n/a	7,924
Peru	1,558	10,526	61,390
Uruguay	500	3,707	9,418
Venezuela	887	n/a	24,069

Sources: Alertamerica, “Repositorio de datos,” <http://www.oas.org/dsp/Observatorio/database/countries.aspx?lang=es>, for all countries except the data about Chile, which comes from Gendarmería de Chile, *Compendio estadístico penitenciario, 2010–2012*; and SENAME, *Boletín estadístico anual de los niños(as) y adolescentes vigentes en la red SENAME, 2003–2013*. All data are from between 2011 and 2013, with the exception of the data on Venezuela, which is from 2008.

locked up as under eighteen, with Costa Rica having fewer than 1% and Argentina fewer than 2%. Another seven countries have between 3% and 5.6% of total inmates under eighteen. Only Bolivia, with 12.2% of total confinement in the under-eighteen group, has relatively large concentrations, and the Bolivian data that were obtained report a total confined population under 15,370, for an adult confinement rate of 130 persons and a total confinement rate of 174 persons per 100,000.⁵³

Table 5.6 and figure 5.2 compare adult and juvenile contact with the police—that is, people arrested, suspected, or cautioned by the police—with adult and juvenile confinement in twelve Latin American countries. The percentages of adult and juvenile formal contact with the

police are a proxy for how many adult and juvenile cases get into the justice system in each of these countries. While the percentage of juvenile formal contact with police is *higher* than the percentage of juveniles in confinement, the adult percentage of formal contact with the police is *lower* than the percentage of adults in confinement out of the total confined population in ten out of twelve countries (table 5.6). This is

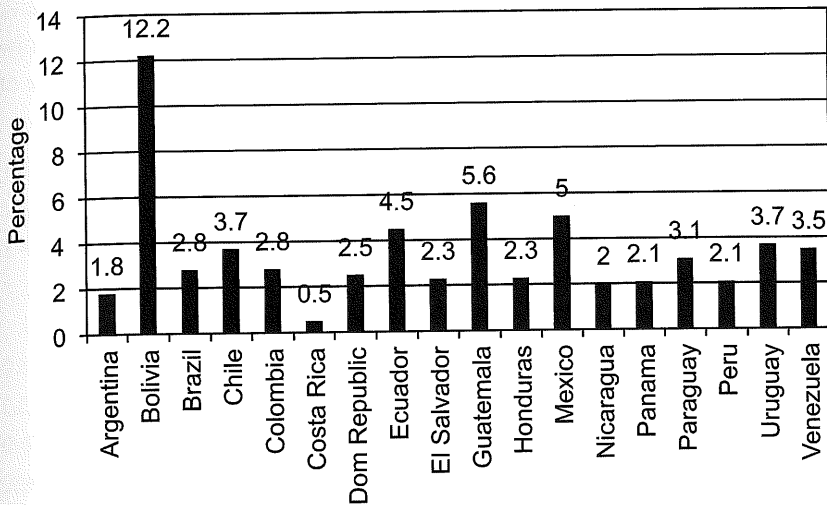


Figure 5.1. The percentage of persons under eighteen in institutions of secure confinement in eighteen Latin American nations. *Note:* The calculations shown are based on the data described in table 5.5. Under the definitions by Alertamerica, “juveniles” are persons under eighteen years, who are different from juveniles between eighteen and twenty-four years (whom we call “adults” in table 5.5, to use the category of juvenile consistently throughout this chapter), who are different from adults. However, to run the calculations of figure 5.1, we have assumed that those countries that did not report data for adults between eighteen and twenty-four years included any person eighteen years or older in their category of adults. Notice that if this assumption were not correct for one or more of these countries, the percentage of the juvenile population in confinement out of the total confined population would be even smaller. *Sources:* Alertamerica, “Repositorio de datos,” <http://www.oas.org/dsp/Observatorio/database/countries.aspx?lang=es>, for all countries except the data from Chile, which come from Gendarmería de Chile, *Compendio estadístico penitenciario, 2010–2012*; and SENAME, *Boletín estadístico anual de los niños(as) y adolescentes vigentes en la red SENAME, 2003–2013*. The percentages are calculated based on the latest available data on each country. All data are from between 2011 and 2013, with the exception of the data on Venezuela, which is from 2008.

TABLE 5.6. Percentages of Adult and Juvenile Formal Contact with the Police and of Adult and Juvenile Confinement in Twelve Latin American Countries

	% of juvenile formal contact out of total formal contact with police	% of juvenile confinement out of total confinement	% of adult formal contact out of total formal contact with police	% of adult confinement out of total confinement
Chile	9.36	2.77	90.64	97.23
Colombia	10.24	1.84	89.76	98.16
Costa Rica	1.49	0.34	98.51	99.66
Ecuador	11.01	2.41	88.99	97.59
El Salvador	12.71	3.76	87.29	96.24
Guatemala	2.53	1.12	97.47	98.88
Honduras	8.10	2.26	91.90	97.74
Mexico	2.99	4.82	97.01	95.18
Nicaragua	6.08	1.12	93.92	98.88
Paraguay	11.96	2.57	88.04	97.43
Peru	4.19	4.49	95.81	95.51
Uruguay	14.74	3.67	85.26	96.33

Sources: Alertamerica, "Repositorio de datos," <http://www.oas.org/dsp/Observatorio/database/countries.aspx?lang=es>; United Nations Office on Drugs and Crime (UNODC), "Statistics on Criminal Justice," <http://www.unodc.org/unodc/en/data-and-analysis/statistics/data.html>. Comparison between the latest available data from the same year in the UNODC database on adult and juvenile formal contact with the police, and adult and juvenile confinement. When the UNODC database did not contain confinement data, we used data on confinement for the same year from the Alertamerica database. In the case of Mexico and Paraguay, we used data from two different years because data on these four variables for the same year were not available. Data on Ecuador is from 2004; Costa Rica and Guatemala from 2006; Paraguay from 2006 and 2007; Peru from 2009; Colombia and Nicaragua from 2010; Chile, El Salvador, and Honduras from 2011; and Mexico from 2011 and 2012.

an indication that juveniles are confined less often than adults in these countries. The two outliers are Peru and especially Mexico, where the percentage of juvenile formal contact with the police is lower than the percentage of juvenile confinement and the other way around for adults.⁵⁴ In the other ten countries, the percentage of juvenile contact with the police out of all contacts is substantially higher than the percentage of juveniles in confinement out of the total confined population. In these ten countries, the rate of juvenile contact with the police goes from being 2.3 times higher than the rate of juvenile secure confinement in Guatemala and 3.4 times higher in El Salvador to 5.7 times higher in Colombia (table 5.6).

We now analyze the ratio of adult and juvenile confinement to, respectively, adult and juvenile formal contact with the police in twelve Latin American countries. Comparing the ratio of adults in confinement to adults in formal contact with the police with the ratio of juveniles in confinement to juveniles in formal contact with the police gives us another indication of how often confinement is used for each of these two age groups. In ten out of the twelve countries for which data are available, the ratio of juvenile confinement to juvenile formal contact with the police is much lower than the ratio of adults in confinement to adults in formal contact with the police⁵⁵—the two outliers are again

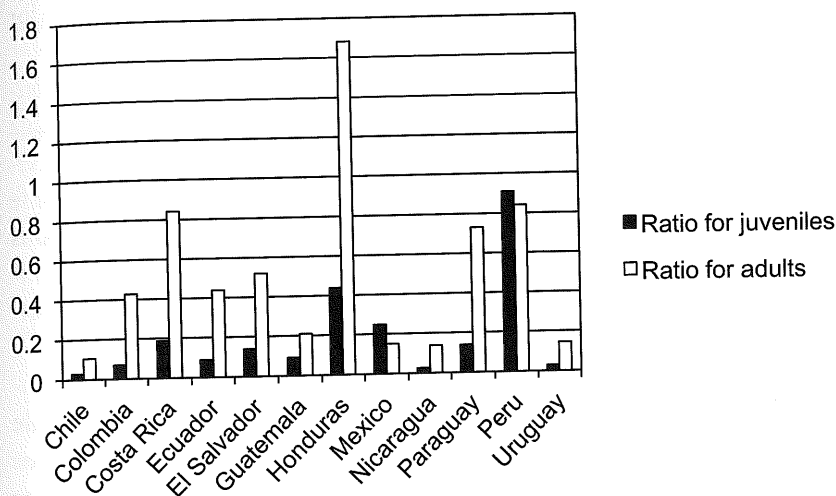


Figure 5.2. Ratio of adult confinement to adult formal contact with the police and of juvenile confinement to juvenile formal contact with the police in twelve Latin American nations. Sources: Alertamerica, Repositorio de datos, <http://www.oas.org/dsp/Observatorio/database/countries.aspx?lang=es>; United Nations Office on Drugs and Crime, "Statistics on Criminal Justice," <http://www.unodc.org/unodc/en/data-and-analysis/statistics/data.html>. Comparison between the latest available data from the same year in the UNODC database on adult and juvenile formal contact with the police, and adult and juvenile confinement. When the UNODC database did not contain confinement data, we used data on confinement on the same year from the Alertamerica database. In the case of Mexico and Paraguay, we used data from two different years because data on these four variables on the same year were not available. Data on Ecuador is from 2004; Costa Rica and Guatemala from 2006; Paraguay from 2006 and 2007; Peru from 2009; Colombia and Nicaragua from 2010; Chile, El Salvador, and Honduras from 2011; and Mexico from 2011 and 2012.

Peru and Mexico. In these ten countries, the ratio of adult confinement to adult formal contact with the police goes from being 2.3 times higher than the same ratio for juveniles in Guatemala to being 5.6 times higher in Nicaragua and 6.1 times higher in Colombia (figure 5.2). In other words, in Guatemala, there are 4.7 adults in formal contact with the police for each adult in confinement, while there are 10.8 juveniles in formal contact with the police for each juvenile in confinement. In Nicaragua, there are 7.1 adults in formal contact with the police for each adult in confinement, while there are 40.7 juveniles in formal contact with the police for each juvenile in confinement. In Colombia, there are 2.3 adults in formal contact with the police for each adult in confinement, while there are 14.2 juveniles in formal contact with the police for each juvenile in confinement (figure 5.2).

The overall picture that comes from these data indicates that confinement is used substantially less often for juveniles than for adults in most countries of Latin America. The data also provide some evidence of fewer or shorter punishments of incarceration for juvenile crimes. But we would need further data to draw stronger conclusions in this respect given that we do not have data about the length of confinement in the two systems or the balance between pre- and post-adjudication confinement.

The use of frequencies of formal contact with the police as a measure of adult and juvenile cases that come into the system (or of juvenile versus adult criminality) is imperfect because there are no indications of the severity of the offenses that led to this formal contact with the police. And the youngest offenders may be arrested more often in groups, which can overstate the proportion of crimes they represent. Despite these limitations, the large differences between the ratio of juvenile confinement to juvenile formal contact with the police and the ratio of adult confinement to adult formal contact with the police indicate that most systems of juvenile justice in Latin America follow through in practice with the emphasis on avoiding custodial confinement that is found in their laws on the books.

The same picture emerges from the time-series data that we have been able to collect on four Latin American jurisdictions—the state of Rio de Janeiro in Brazil, Colombia, Chile and El Salvador—as indicated in tables 5.7 to 5.10 and figures 5.3 to 5.6.

TABLE 5.7. Total Numbers and Percentages of Juveniles and Adults Arrests and in Confinement in the State of Rio de Janeiro (Brazil), 2007–2011

	2007	2008	2009	2010	2011
Arrested adults	14,355	15,508	18,468	19,877	23,090
Adults in secure confinement	22,393	21,306	22,443	24,867	27,685
Arrested juveniles	1,853	1,821	2,272	2,806	3,466
Juveniles in secure confinement	1,034	1,107	633	833	914
Percentage of adult arrests out of total arrests	88.57	89.49	89.05	87.63	86.95
Percentage of adult confinement out of total confined population	95.59	95.06	97.26	96.76	96.80
Percentage of juvenile arrests out of total arrests	11.43	10.51	10.95	12.37	13.05
Percentage of juvenile confinement out of total confined population	4.41	4.94	2.74	3.24	3.20

Sources: Secretaria de Estado de Segurança, Instituto de Segurança Pública, *Balanco de incidências criminais e administrativas*.

In the state of Rio de Janeiro, while the percentage of adult arrests was lower than the percentage of adult confinement, the percentage of juvenile arrests was higher than the percentage of juvenile confinement every year from 2007 to 2011 (table 5.7).⁵⁶

In the state of Rio de Janeiro, the ratio of adult confinement to adult arrest was 2.80 times higher than the ratio of juvenile confinement to juvenile arrests in 2007 and 4.55 times higher in 2011, with a lowest difference between the two ratios being 2.26 times higher in 2008 (figure 5.3).

In Colombia, while the percentage of adult arrests was lower than the percentage of adult confinement, the percentage of juvenile arrests was higher than the percentage of juvenile confinement every year from 2007 to 2011 (table 5.8).

In Colombia, the ratio of adult confinement to adult arrests was 20.6 times higher than the ratio of juvenile confinement to juvenile arrests

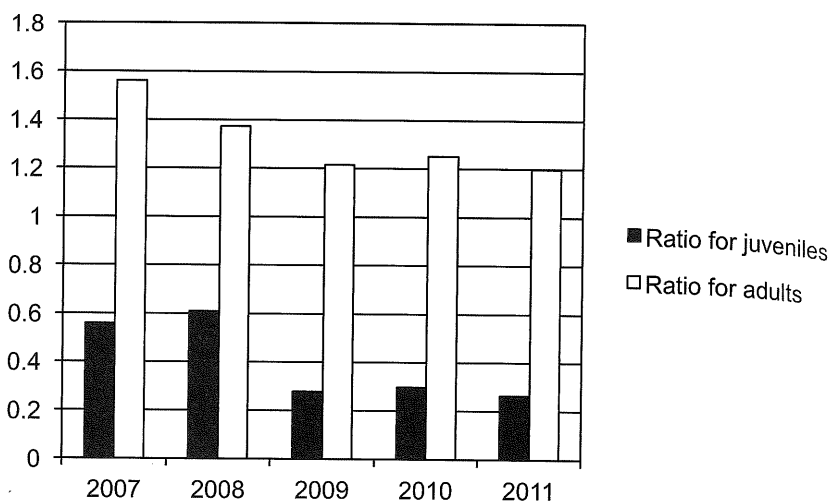


Figure 5.3. Ratio of adult confinement to adult arrests and ratio of juvenile confinement to juvenile arrests in the state of Rio de Janeiro (Brazil), 2007–2011. Source: Secretaria de Estado de Segurança, Instituto de Segurança Pública, *Balço de incidências criminais e administrativas*.

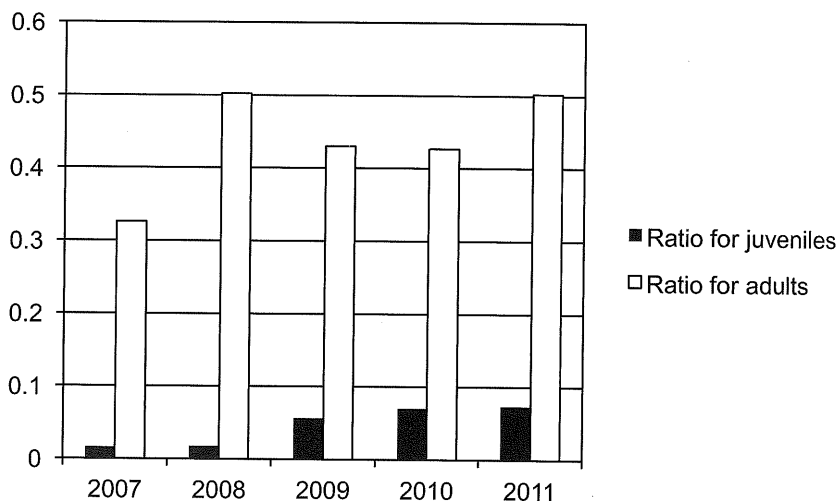


Figure 5.4. Ratio of adult confinement to adult arrests and ratio of juvenile confinement to juvenile arrests in Colombia, 2007–2011. Sources: Alertamerica, “Repositorio de datos,” <http://www.oas.org/dsp/Observatorio/database/countries.aspx?lang=es>; Policía Nacional de Colombia, *Revista criminalidad* 45–56.

TABLE 5.8. Total Numbers and Percentages of Juveniles and Adults Arrests and in Confinement in Colombia, 2007–2011

	2007	2008	2009	2010	2011
Arrested adults	195,027	139,358	176,640	197,733	200,066
Adults in secure confinement	63,603	69,979	75,992	84,444	100,451
Arrested juveniles	32,894	26,685	21,501	22,552	24,661
Juveniles in secure confinement	519	462	1,219	1,584	1,805
Percentage of adult arrests out of total arrests	85.57	83.93	89.15	89.76	89.03
Percentage of adult confinement out of total confined population	99.09	99.34	98.45	98.16	98.23
Percentage of juvenile arrests out of total arrests	14.43	16.07	10.85	10.24	10.97
Percentage of juvenile confinement out of total confined population	0.81	0.66	1.58	1.84	1.77

Sources: Alertamerica, "Repositorio de datos," <http://www.oas.org/dsp/Observatorio/database/countries.aspx?lang=es>; Policía Nacional de Colombia, *Revista criminalidad* 45–56.

in 2007 and 6.86 times higher in 2011, with a lowest difference of 6.08 times higher in 2010 and a highest difference of 29.02 times higher in 2008. In other words, in 2007, there were 63.00 juvenile arrests for each juvenile in confinement, while there were 3.00 adult arrests for each adult in confinement. In 2008, there were 57.80 juvenile arrests for each adult in confinement, while there were 1.99 adult arrests for each adult in confinement. In 2010, there were 14.20 juvenile arrests for each juvenile in confinement, while there were 2.34 adult arrests for each adult in confinement. In 2011, there were 13.70 juvenile arrests for each juvenile in confinement, while there were 1.99 adult arrests for each adult in confinement (figure 5.4).

In Chile, while the percentage of adult arrests was lower than the percentage of adult confinement, the percentage of juvenile arrests was higher than the percentage of juvenile confinement every year from 2008 to 2012 (table 5.9).

TABLE 5.9. Total Numbers and Percentages of Adult and Juvenile Formal Contact with Police and Adult and Juvenile Confinement in Chile, 2008–2012

	2008	2009	2010	2011	2012
Adult formal contact with police	503,575	556,869	558,373	554,095	534,168
Adult confinement	48,824	52,947	54,628	53,606	49,350
Juvenile formal contact with police	53,386	51,448	48,033	57,227	54,932
Juvenile confinement	1,569	1,750	1,844	1,690	1,882
Percentage of adult formal contact out of total formal contact with the police	90.4	91.5	92.1	90.6	90.7
Percentage of adult confinement out of total confined population	96.9	96.8	97.7	96.9	96.3
Percentage of juvenile formal contact out of total formal contact with the police	9.6	8.5	7.9	9.4	9.3
Percentage of juvenile confinement out of total confined population	3.1	3.2	3.3	3.1	3.7

Sources: United Nations Office on Drugs and Crime, "Statistics on Criminal Justice," <http://www.unodc.org/unodc/en/data-and-analysis/statistics/data.html>; Gendarmería de Chile, *Compendio estadístico penitenciario 2010–2012*; SENAME, *Boletín estadístico anual de los niños(as) y adolescentes vigentes en la red SENAME, 2003–2013*.

From a different perspective, in this country, the ratio of adult confinement to adult formal contact with police was 3.30 times higher than the ratio of juvenile confinement to juvenile formal contact with the police in 2008 and 2.69 times higher in 2012, with a lowest difference of 2.55 times higher in 2010 (figure 5.5). In other words, in 2008, there were 10.3 adult arrests for each adult in confinement, while there were 34.0 juvenile arrests for each juvenile in confinement. In 2010, there were 10.3 adult arrests for each adult in confinement, while there were 33.9 juvenile arrests for each juvenile in confinement. In 2012, there were 10.8 adult arrests for each adult in confinement, while there were 29.1 juvenile arrests for each juvenile in confinement.

As in the other jurisdictions where these data are available, in El Salvador, the percentage of adult arrests was lower than the percentage of adult confinement, while the percentage of juvenile arrests was higher than the percentage of juvenile confinement every year from 2005 to 2012 (table 5.10).

In this country, the ratio of adult confinement to adult formal contact with the police was 2.68 times higher than the ratio of juvenile confinement to adult formal contact with the police in 2005 and 2.75 times higher in 2012, with a lowest difference of 2.62 times higher in 2006 and a highest difference of 4.67 times higher in 2009 (figure 5.6). In other words, in 2005, there were 7.3 adults in formal contact with the police for each adult in confinement, while there were 19.5 juveniles in formal contact with the police for every juvenile in confinement. In 2006, there were 8.6 adults in formal contact with the police for each adult in confinement, while there were 22.5 juveniles in formal contact with the police for every juvenile in confinement. In 2009, there were 2.4 adults

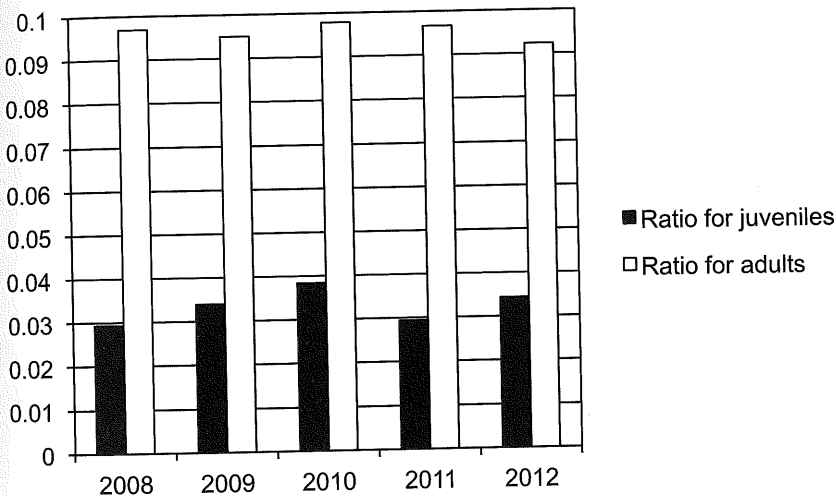


Figure 5.5. Ratio of adult confinement to adult arrests and ratio of juvenile confinement to juvenile arrests in Chile, 2008–2012. Sources: United Nations Office on Drugs and Crime, “Statistics on Criminal Justice,” <http://www.unodc.org/unodc/en/data-and-analysis/statistics/data.html>; Gendarmería de Chile, *Compendio estadístico penitenciario, 2010–2012*; SENAME, *Boletín estadístico anual de los niños(as) y adolescentes vigentes en la red SENAME, 2003–2013*.

TABLE 5.10. Total Numbers and Percentages of Juvenile and Adult Formal Contact with Police and Confinement in El Salvador, 2005–2012

	2005	2006	2007	2008	2009	2010	2011	2012
Adult formal contact with police	90,574	123,604	58,243	55,790	51,213	55,549	48,885	47,718
Adult confinement	12,469	14,420	17,867	19,390	22,198	23,151	25,019	27,033
Juvenile formal contact with police	8,127	11,480	7,255	8,657	8,367	9,214	7,116	5,170
Juvenile confinement	417	511	630	701	776	836	971	1,064
Percentage of adult formal contact out of total formal contact with police	91.8	91.5	89.0	86.6	86.0	85.8	87.3	90.3
Percentage of adult confinement out of total confined population	96.8	96.6	96.6	96.5	96.6	96.5	96.3	96.2
Percentage of juvenile formal contact out of total formal contact with the police	8.2	8.5	11.0	13.4	14.0	14.2	12.7	9.7
Percentage of juvenile confinement out of total confined population	3.2	3.4	3.4	3.5	3.4	3.5	3.7	3.8

Sources: United Nations Office on Drugs and Crime, "Statistics on Criminal Justice," <http://www.unodc.org/unodc/en/data-and-analysis/statistics/data.html>; Ministerio de Justicia y Seguridad Pública, "Dirección general de centros penales: Estadísticas penitenciarias," http://www.dgcp.gob.sv/index.php?option=com_content&view=article&id=123; Alertamerica, "Repositorio de datos," <http://www.oas.org/dsp/Observatorio/database/countries.aspx?lang=es>.

in formal contact with the police for every adult in confinement, while there were 11.0 juveniles in formal contact with the police for every juvenile in confinement. In 2012, there were 1.8 adults in formal contact with the police for every adult in confinement, while there were 4.9 juveniles in formal contact with the police for every juvenile in confinement.

The overall picture that comes from the data presented is that there are large differences between the proportion of adults and juveniles who are confined after being arrested or in formal contact with the police. This section has shown that these differences stand in most of the region by using not only cross-country but also cross-temporal data from multiple sources. These differences provide important indications that systems of juvenile justice in Latin America follow through in practice with the emphasis on avoiding custodial confinement that is found in their law in the books and theoretical tracts.

It is not possible to know from these data to what extent this lower use of confinement for juveniles is the result of pretrial detention decisions or postadjudicatory measures and sanctions. It is also impossible to know from these data whether this lower use of confinement for juveniles is the result of lesser use or use of shorter terms of confinement for juveniles. We also cannot know from these data what specific mechanisms—such as the principle of using confinement as a

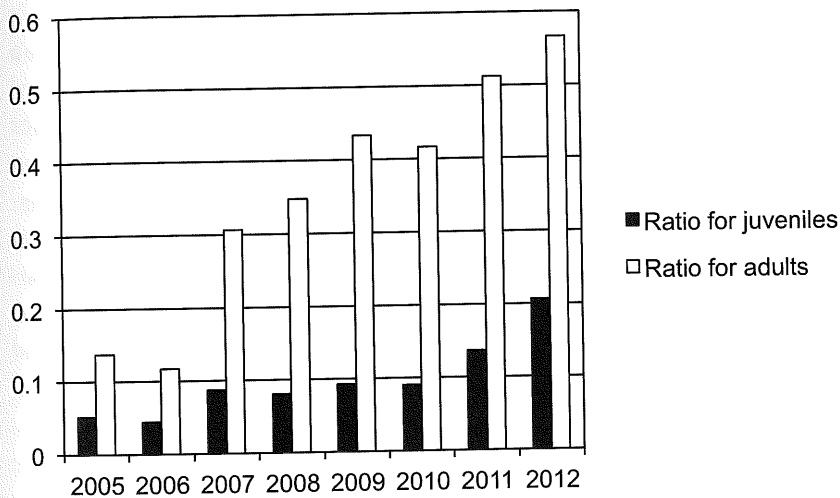


Figure 5.6. Ratio of adult confinement to adult arrests and ratio of juvenile confinement to juvenile arrests in El Salvador, 2005–2012. *Sources:* United Nations Office on Drugs and Crime, “Statistics on Criminal Justice,” <http://www.unodc.org/unodc/en/data-and-analysis/statistics/data.html>; Ministerio de Justicia y Seguridad Pública, “Dirección general de centros penales: Estadísticas penitenciarias,” http://www.dgcp.gob.sv/index.php?option=com_content&view=article&id=123; Alertamerica, “Repositorio de datos,” <http://www.oas.org/dsp/Observatorio/database/countries.aspx?lang=es>.

last resort, paternalistic sentiment toward juveniles, or the doctrine of diminished responsibility, to mention a few possibilities—explain this lower use of confinement.

But from these data, we can conclude that juvenile justice systems in most countries of Latin America are playing the function and goal of removing a substantial number of juveniles from criminal law by reducing the number of juveniles in conflict with the law who are subjected to confinement. Without denying the serious problems that juvenile justice systems in Latin America present, this is one stated goal of juvenile justice that a large proportion of Latin American juvenile justice systems seem to advance.

Future studies should further test whether these conclusions stand in individual countries and should reexamine these issues once better data are available about the functioning of juvenile justice systems in Latin America. Future studies could also deepen the approach taken in this chapter of making a double comparison between countries and between adult and juvenile systems in the region. In order to get a better picture of the law in action of juvenile justice in Latin America, it would be necessary to get cross-country and cross-temporal data on other variables, such as pretrial and posttrial confinement and pretrial and postconviction measures different from confinement, not only for offenses in the aggregate but also for individual offenses. More data on which actors within Latin American juvenile and criminal justice systems make the actual decisions on cases are also necessary. It would be ideal to obtain these data at the case level. In order to enable such studies, it is crucial that Latin American countries improve and widen their data collection on juvenile justice systems in particular and criminal justice more generally.

Evaluating the Recent Juvenile Justice Laws: The Chilean Law as a Case Study

As previously explained, Latin American countries have undergone a wave of reforms on juvenile justice in the past twenty-five years. Taking the CRC as one of their main models, Latin American countries have introduced reforms that have given more due process protections to juveniles and have established the principle that deprivation of liberty

for juveniles should be used exceptionally and only in those cases when it is absolutely necessary.

Despite the importance of these reforms, there have been almost no qualitative or quantitative empirical evaluations of their results, even in Portuguese and Spanish.⁵⁷ This lack of empirical evaluations is itself the result of the unavailability of good data in most countries of the region on the functioning of juvenile justice systems before and after the introduction of the reforms, as well as the result of the small size of an empirically oriented sociolegal community in the region. This section tries to start filling this vacuum and prompting more empirical research in this area by analyzing the Chilean juvenile justice reform.

Our main conclusions are that while the new juvenile justice reform in Chile has improved due process for juveniles by diminishing the percentage of juveniles in pretrial detention, it has likely increased the absolute and relative levels of juvenile confinement in Chile. As the preceding section has shown, juveniles are confined at lower rates than are adults in Chile, as elsewhere in the region. But our data in this section show that after the introduction of the juvenile justice reform, juveniles are confined at higher rates than before the reform in Chile.

The Chilean reform was approved by the Chilean Congress in 2005 (Law 20.084) and came into effect on June 8, 2007.⁵⁸ The Chilean reform aimed at replacing the old "tutelary system," based on protective measures for non-criminally-liable youth, by a model in which children and adolescents are considered criminally responsible for their own acts but subjected to special regulations.⁵⁹ The goals of the new law were to ensure that the Chilean legislation met due process and constitutional standards as well as the standards established by the CRC.⁶⁰ The law's goals also included improving the efficiency of the juvenile justice system to protect the victims of juvenile crime.⁶¹ There was thus a tension in the new law from its inception between its goals of protecting due process and the rights of children and adolescents in conflict with the law, on the one hand, and its crime control goals, on the other.⁶²

The previous legislation considered all children and adolescents under sixteen years old and sixteen- and seventeen-year-olds who were declared without discernment by the court as not criminally liable and subject only to protective measures.⁶³ Special courts called "minor courts" had jurisdiction to make these discernment determinations and

to take protective measures. If a sixteen- or seventeen-year-old juvenile was declared as having discernment, a regular criminal court would try his or her case under the same conditions as an adult, and the juvenile could be placed in an adult prison.

In contrast, the new Chilean juvenile law establishes the minimum age for criminal responsibility at fourteen years. Juveniles between fourteen and seventeen years are prosecuted under the same adversarial system implemented in Chile for adults between 2000 and 2005 but using the special regulations enacted for juvenile offenders.⁶⁴ The new legislation also abolishes the old minor courts and establishes that, as a general rule, the judges, public prosecutors, and public defenders who handle juvenile cases must be specialized in this area of law.⁶⁵ Though specialized in juvenile law, these judges do not sit in a separate juvenile court and may also intervene in adult cases.

The new legislation expressly states that authorities must consider all the rights and guarantees provided by the CRC and other international instruments that Chile has ratified.⁶⁶ The new legislation also determines that pretrial and postadjudication confinement of juveniles should be used only when there are no other available alternatives and never in cases in which it would not be appropriate for an adult.⁶⁷ The juvenile law also establishes precise sentencing rules in order to limit the use of arbitrary confinement, which was considered characteristic of the tutelary regime.⁶⁸

The new law also establishes that people younger than eighteen years who are deprived of their liberty must be put in institutions of confinement that are different from adult prisons. The institution in charge of the enforcement of criminal court decisions under the new regime is the National Service of Minors (Servicio Nacional de Menores, or SENAME). The configuration of SENAME is very different from a typical penitentiary office because its goals include rehabilitation and protection of vulnerable children and adolescents—not just those who committed crimes—and because its administrators and staff tend to have a different professional background (e.g., as social workers) than do the administrators and staff of adult prisons.

There have been a few empirical studies on Chilean juvenile justice.⁶⁹ But these studies have only provided and analyzed data on the functioning of the juvenile justice system before or after the introduction of the

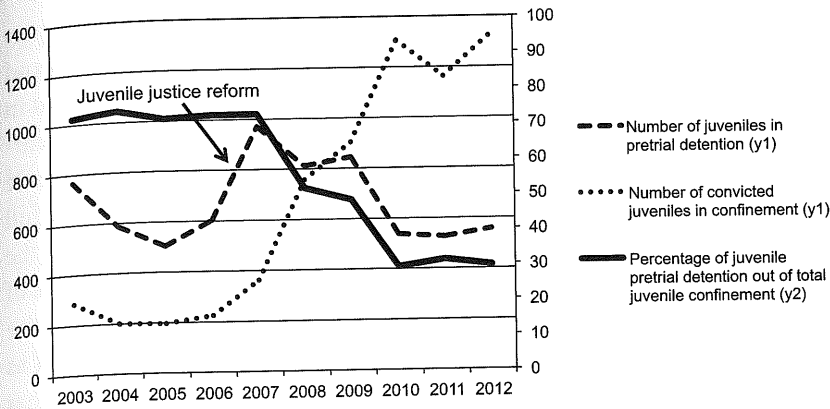


Figure 5.7. Number and percentage of juveniles in pretrial and postadjudication confinement in Chile, 2003–2012. *Note:* We have obtained the data on the number of juveniles in pretrial detention in the regular correctional system before the juvenile justice reform came into effect from the annual reports of Gendarmería, since the SENAME annual reports that we have used throughout the chapter as sources on the number of juveniles in confinement in Chile do not include such pretrial confinement data. As a consequence of using different sources, the numbers of total juveniles in confinement before the juvenile justice reform came into effect that figure 5.7 shows vary from the numbers we used in the rest of the chapter. However, the variation is not very significant (1,051 instead 927 juveniles in 2003, 784 instead of 799 individuals in 2004, 699 instead of 762 individuals in 2005, 827 instead of 848 juveniles in 2006, and 1,334 instead of 1,177 juveniles in 2007). And in any case, our analysis applies, since there is a substantial upward trajectory of juvenile confinement in Chile after the coming into effect of the juvenile justice reform. *Sources:* Gendarmería de Chile, *Compendio estadístico penitenciario*, 2010–2012; SENAME, *Boletín estadístico anual de los niños(as) y adolescentes vigentes en la red SENAME*, 2003–2013.

reform, rather than evaluating the reform.⁷⁰ Our strategy to make an evaluation of the reform is to include data before and after the juvenile justice reform and also data on adults that provide a point of comparison with the treatment of juveniles.

We start our assessment with figure 5.7, which shows the percentage and total levels of juvenile pretrial and postadjudication confinement. Figure 5.7 indicates that before the introduction of the juvenile justice reform (including the coming into effect of the adversarial procedure for juveniles), the levels of pretrial confinement were substantially higher than those of postadjudication confinement, being between 72.0% and 74.7% of the juvenile population in confinement from 2003 to 2006.

These high percentages of juvenile pretrial detention could be partially the product of inquisitorial proceedings that were written and very formalistic, and thus slow to reach the adjudicatory phase, and in which pretrial detention was the rule, rather than the exception, during the preadjudication stage. But since these percentages of juvenile pretrial confinement were much higher than for adults before the full coming into effect of the adversarial procedure for adults in 2005 (the adult pretrial detention was around 40%),⁷¹ these high percentages of juvenile pretrial detention could also be partially the product of the tutelary system. Since the tutelary system conceived of confinement as a protective measure for juveniles, it was less important whether that protective measure was imposed before or after the formal adjudication of the juvenile case.

Since the entering into effect of the new juvenile justice reform in 2007, the distribution of juvenile pretrial and postadjudication confinement started to change dramatically. In this period, the percentage of juveniles in pretrial confinement went from 72.9% in 2007 to 29.6% in

TABLE 5.11. Total Number of Juveniles in Confinement and Percentage of Juvenile Confinement out of the Total Confined Population, Chile, 2003–2012

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Juveniles in confinement	927	799*	762	848	1,177	1,569	1,750	1,844	1,690	1,882
Percentage of juvenile confinement	2.5	2.2	2.0	2.1	2.6	3.1	3.2	3.3	3.1	3.7

Sources: Gendarmería de Chile, *Compendio estadístico penitenciario, 2010–2012*; SENAME, *Boletín estadístico anual de los niños(as) y adolescentes vigentes en la red SENAME, 2003–2013*.

* The annual human rights report by Universidad Diego Portales, *Facultad de derecho: Informe anual de derechos humanos 2006; Hechos de 2005* (Santiago, Chile, June 2006), shows a total juvenile population in confinement for 2004 that is close to 960 juveniles, instead of the 799 juveniles that we report (see pages 66 and 70–71 of the report). The difference may be (partially) explained by the fact that while we have used the annual reports of SENAME that consistently report the number of juveniles in confinement by December 31 of each year, the human rights report in question reports data on juveniles in “Centers of Observation and Diagnosis” and “Confined for Behavioral Rehabilitation” by September 30, 2004. In addition, it is possible that the number of juveniles in “Juvenile Sections of the Correctional System of Chile” indicated by the report refers to the total number of juveniles who were deprived of their liberty in those sections in the year 2004—though we cannot tell from the report if this was the case. Instead, the numbers that table 5.11 shows include the number of juveniles that were in the “Juvenile Sections” by December 31, 2004, as indicated by SENAME’s annual report. In any case, the difference between our numbers and those of the human rights report for the year 2004 would not change the overall substantially upward trend of juvenile confinement in Chile before and after the juvenile justice reform.

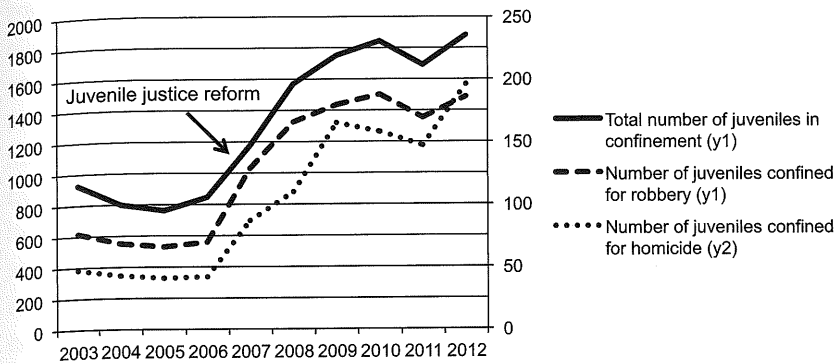


Figure 5.8. Number of juveniles in secure confinement for all crimes, for robbery, and for homicide, in Chile, 2003–2012. Source: SENAME, *Boletín estadístico anual de los niños(as) y adolescentes vigentes en la red SENAME, 2003–2013*.

2012. This result may be the product of the substantially shorter time to adjudication or the more liberal regulation of pretrial detention under the adversarial process, as has been the case with the application of the adversary process to adults.⁷² This reduction in the percentage of juveniles in pretrial detention can be considered a due process improvement since now most of the juveniles in confinement have been found guilty beyond a reasonable doubt at trial or have pled guilty.⁷³ However, figure 5.7 shows that the number of juveniles in pretrial confinement has not gone down in comparison to 2005 and that the change in percentages of juvenile pretrial detention is also the result of a substantial increase in the number of convicted juveniles in confinement.

Table 5.11 and figure 5.8 show the number of juveniles in confinement in the aggregate and by the two most relevant crimes from 2003 to 2012.⁷⁴ Table 5.11 and figure 5.8 show that juvenile confinement increased substantially from 2003 to 2012. This upward trend in confinement levels of juveniles started in 2007, the year the juvenile justice reform came into effect, and substantially increased since then. The number of juveniles in confinement increased 103% from 2003 to 2012 and 121% from 2006 (the year before the coming into effect of the juvenile justice reform) to 2012. The percentage of juvenile confinement out of the total confined population (i.e., juvenile plus adult) also grew from 2.5% in 2003 or from 2.1% in 2006 to 3.7% in 2012.

Figure 5.8 also shows that the increase in juvenile confinement for robbery and homicide explains almost all of the increase in juvenile confinement. While the number of juveniles in confinement for robbery went from 556 juveniles in 2006 to 1,487 juveniles in 2012, the number of juveniles in confinement for homicide went from 42 in 2006 to 196 in 2012. These two categories represented 89% of the juvenile population in confinement in Chile in 2012.

Figure 5.9 suggests that the levels of juvenile crime or at least of the juvenile cases that reached the justice system do not explain the increase in juvenile confinement. The number of arrests of people younger than twenty years for robbery went down in the period in question. If we take 2006 as the starting year, total robbery arrests decreased 11.6%, robbery with force on things decreased 11.4%, and robbery with force on people decreased 11.8%.⁷⁵ As for homicide arrests, they increased 7.6% (from seventy-nine to eighty-five cases) from 2006 to 2011, but homicide arrests in 2005 were ninety-one.

Given that there are no indications of an increase in juvenile arrests in the period in question and the lack of other alternative explanations, it is reasonable to infer that aspects of the juvenile justice reform of 2007 contributed to an increase in juvenile confinement.⁷⁶

In the remainder of this section, we argue that the procedural aspects of the juvenile justice reform cannot (fully) account for the increase in juvenile confinement. As already mentioned, the juvenile justice reform

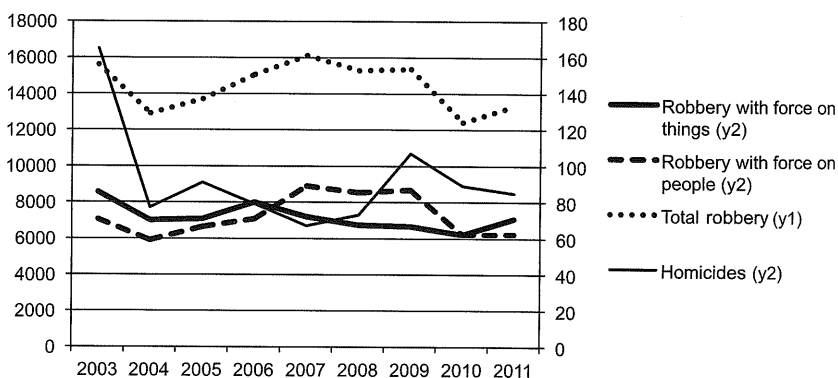


Figure 5.9. Robbery and homicide arrests for people younger than twenty years in Chile, 2003–2012. Source: Fundación Paz Ciudadana, *Anuario de estadísticas criminales*, 2011.

brought about deep procedural changes by making applicable to juveniles the adversarial reform that had come fully into effect for adults in 2005. This adversarial reform brought about not only due process rights to juvenile defendants but also other procedural and institutional features that could explain an increase in juvenile confinement. Empirical assessments of the adversarial reform regarding adults indicate that it has increased the efficiency of the Chilean administration of criminal justice by substantially reducing the time from arrest (or other ways of initiating a criminal process) to conviction through its deformalization of the pretrial phase and through the introduction of mechanisms such as guilty pleas and plea bargaining.⁷⁷ This time reduction would thus free resources and could enable the system to process more cases and enter more convictions—including convictions followed by confinement sentences. In addition, the adversarial reform strengthened the prosecuting institutions in Chile by creating an office of the prosecutor from scratch and by increasing police capacity.

The adversarial system was introduced for the adult population between 2000 and 2005 but only came into effect in Santiago (the largest region in the country in terms of population) in 2005. In the case of juveniles, the adversarial reform came into effect with the coming into effect of the new juvenile law in June 2007.

In order to evaluate whether the procedural aspects of the juvenile justice reform contributed to the increase of juvenile confinement, figure 5.10 indicates when the new adversarial criminal procedure system fully came into effect for adults and juveniles and presents data on the rate of adult and juvenile confinement between 2003 and 2012.

If we take the year 2003 as the baseline, with the full coming into force of the adversarial system for adults in 2005, the adult confined population increased 37% from 2003 to 2012. In the case of juveniles, taking again the year 2003 as the baseline, the juvenile confined population increased 103% during the same period. It is thus possible that the introduction of the adversarial criminal process was an intervening factor that has contributed to the increase of the adult and juvenile confinement population. However, the introduction of the same adversarial system for juveniles and adults could not explain why the juvenile confinement rate increased 2.78 times more than the adult confinement rate in this period, as shown by figure 5.10.

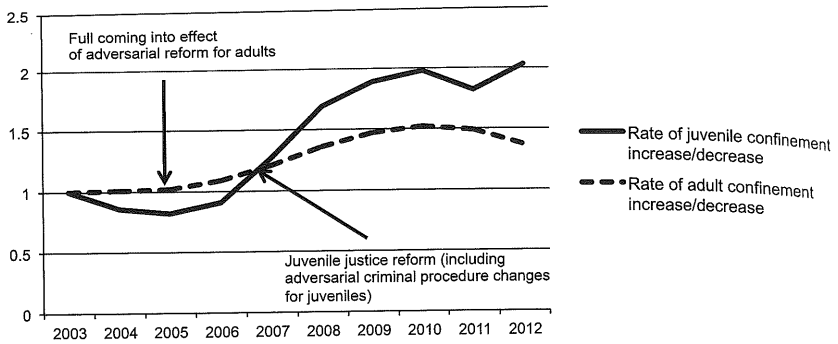


Figure 5.10. Rate of adult and juvenile confinement in Chile, 2003–2012, after the coming into effect of the adversarial system and the juvenile justice reform. Sources: Gendarmería de Chile, *Compendio estadístico penitenciario, 2010–2012*; SENAME, *Boletín estadístico anual de los niños(as) y adolescentes vigentes en la red SENAME, 2003–2013*.

In addition, this difference between the increase in adult and juvenile confinement is even more remarkable if we take into account that while the arrest rates do not seem to account for changes in juvenile confinement, changes in the rate of adult arrests may explain the increase in adult confinement, as figure 5.11 indicates. The upward part of the curve on arrests of people older than nineteen years track almost perfectly the upward curve on adult confinement. While total arrests of people older than nineteen years increased 47% (from 127,247 to 187,273 arrests) from 2004 to 2011, adult confinement increased 48% in the same period (from 36,123 to 53,606 cases).

If an increase in adult arrests may explain (a substantial share of) the increase in adult confinement, the adversarial reform would not explain such an increase. Unless the adversary system affected adult and juvenile cases in very different ways, the introduction of such a system would thus not (fully) explain the increase in juvenile confinement either.

However, it is possible that the adversary system affected adult and juvenile confinement differently given the different composition of the adult and juvenile docket. As we saw in figure 5.8, robbery, a crime that is comparatively easy to prosecute and try, accounts for 75% to 80% of juvenile confinement. In contrast, robbery and theft account for about 50% of adult confinement, and drug offenses—crimes that are generally more difficult to investigate, prosecute, and try than robbery—account

for over 15%. Also, as figure 5.11 shows, while robbery arrests for adults increased 26%, drug offense arrests for adults increased 198% between 2003 and 2011. It is thus possible that the adversary system has contributed to (more of) an increase in juvenile confinement than in adult confinement because the adversary process has been particularly good at investigating, prosecuting, and trying crimes such as robbery, which is the crime that accounts for most of juvenile confinement.

But even if the adversary system affected adult and juvenile confinement differently, it is unlikely that it is the only aspect of the juvenile justice reform that accounts for the increase in juvenile confinement given how much higher it has been than the increase in adult confinement and given that arrests for people younger than twenty decreased, while arrests for people older than twenty went substantially up.

Other aspects of the juvenile justice reform could then partially explain the juvenile confinement increase. As already mentioned, the Chilean reform aimed at replacing the old “tutelary system,” based on protective measures on non-criminally-liable youth, with a model in which youth are considered criminally responsible for their own acts, even if subject to special regulations. A number of the old “minor court” judges retired or were transferred to civil courts, and a new group of prosecutors and judges, trained and specialized in the new juvenile justice system, started to prosecute and adjudicate juvenile cases after the coming into effect of the juvenile justice reform in 2007. It is then

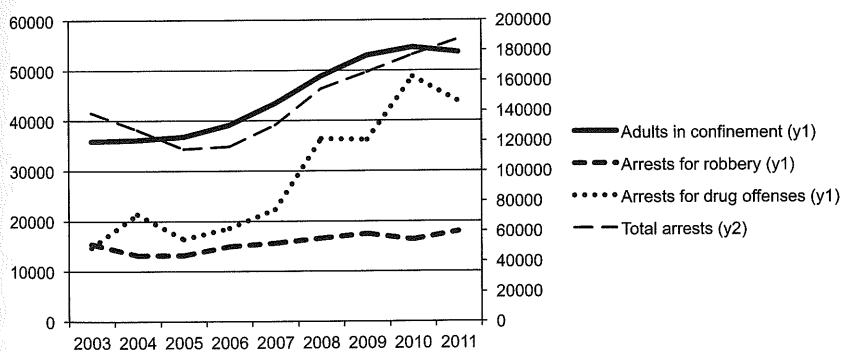


Figure 5.11. Adult confinement and arrests for people older than nineteen years in Chile, 2003–2011. Source: Fundación Paz Ciudadana, *Anuario de estadísticas criminales* 2011.

possible that the shift from a protective to a responsibility paradigm for juveniles has led to a higher use of confinement because it has left more room for decision makers to take into account retributive and incapacitation considerations that, as we mentioned, were one of the motivations or reasons for the introduction of the juvenile justice reform for a number of political actors. This may be particularly the case because the prosecutors and judges who try juvenile cases, though specialized in juvenile law, do not sit in a separate juvenile court and may also intervene in adult cases. Short of data at the case level on actual measures and sentences and other variables before and after the juvenile justice reform, which we do not have, the evidence to test this hypothesis can only be indirect.

In any case, whether there were particular interactions between the adversary system and the juvenile docket or whether the transition from a tutelary system to a criminal juvenile responsibility system left room to implement more punitive policies toward juveniles, our data suggest that the juvenile justice reform has contributed to higher confinement levels for juveniles.

As shown in table 5.9, juvenile confinement is only 3.7% of overall confinement, and confinement is used substantially less against juveniles than against adults in Chile. However, since the new juvenile justice system came into effect, juvenile confinement has doubled its absolute numbers and increased 2.78 times higher than adult confinement and represents a higher percentage of total confinement, without an increase in juvenile arrests. The new juvenile justice regime is likely responsible for this increase.

Conclusion

This chapter has provided an overview of the law in the books and the law in action of Latin American juvenile justice systems and has explored how much of a gap there is between the two. Latin American juvenile courts were created in the first half of the twentieth century under legal frameworks that conceived of youth in conflict with the law as subjects of protection and treatment. At the turn of the twenty-first century, there was a wave of juvenile justice laws that conceive of

deviant youth as rights bearers who are protected by due process and are criminally responsible for their conduct.

In the two periods, Latin American juvenile justice laws have had as two of their stated goals rehabilitating these children and adolescents and removing them from criminal law and punishment. Without denying the serious problems that Latin American juvenile justice systems present, our analysis of Latin American juvenile justice systems suggests that the second goal is advanced by these systems since Latin American juvenile justice systems do remove a substantial number of these children and adolescents from criminal confinement.

Our analysis of the Chilean juvenile justice reform also suggests that the reform has likely brought about substantially higher levels of youth confinement. As in the rest of the region, juveniles are confined at a lower rate than are adults in Chile. But after the introduction of the juvenile justice reform, absolute and relative levels of juvenile confinement have gone up. Future studies should explore whether the Chilean reform is representative or an exception among the new juvenile justice reforms in the region.

NOTES

Mary Beloff wrote the first three (historical) sections of this chapter, on the basis of her works cited in note 2. She deeply thanks Máximo Langer for his attentive reading, lucid comments, and careful editing of these three sections. She also thanks E. O'Byrne and J. Hardwick for their assistance in her translation to English of her original essay. Máximo Langer did the research for and wrote sections "From Theory to Practice: Comparing Use of Confinement and Sanctioning Policies in Criminal and Juvenile Courts" and "Evaluating the Recent Juvenile Justice Laws: The Chilean Law as a Case Study" of this chapter. He thanks Ricardo Lillo for his outstanding research assistance. Both authors thank Marcelo Bergman, Jaime Couso, and Mauricio Duce for their excellent comments on an earlier draft and Frank Zimring for his insightful input. Unless otherwise indicated, all translations from Portuguese and Spanish are ours.

1. For instance, none of the main collections in English comparing juvenile justice systems include a chapter on a Latin American country or on Latin America as a region. See Frieder Dünkler, Joanna Grzywa, Philip Horsfield, and Ineke Pruin, eds., *Juvenile Justice Systems in Europe: Current Situation and Reform Developments*, 2nd ed., 4 vols. (Mönchengladbach, Germany: Forum Verlag Godesberg, 2011); Eric L. Jensen and Jorgen Jepsen, eds., *Juvenile Law Violators, Human Rights and the Development of New Juvenile Justice Systems* (Oxford, UK: Hart, 2006); Josine Junger-Tas and Scott H.

Decker, eds., *International Handbook of Juvenile Justice* (New York: Springer 2006); Jill Mehlbye and Lode Walgrave, eds., *Confronting Youth in Europe: Juvenile Crime and Juvenile Justice* (Copenhagen: AKF Forlaget, 1998); John Muncie and Barry Goldson, eds., *Comparative Youth Justice: Critical Issues* (London: Sage, 2006); Michael Tonry and Anthony Doob, eds., *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives*, Crime and Justice 31 (Chicago: University of Chicago Press, 2004).

2. As indicated in the acknowledgment note, the historical sections of this chapter are mostly based on and follow the general historical account of the juvenile justice reforms provided in the following texts by Mary Beloff: "Sistema penal juvenil: ¿Garantías sin protección especial? La interpretación latinoamericana," in *Nova Criminis: Visiones criminológicas de la justicia penal* (Centro de investigaciones criminológicas de la justicia penal, Facultad de Ciencias Jurídicas y Sociales de la Universidad Central de Chile) 6 (December 2013): 63–118; "Medidas socio-educativas en la justicia juvenil: De la ley a la práctica," in *Un reto para la región: La aplicación de las medidas socio-educativas para adolescentes en conflicto con la ley penal* (Lima, Peru: ACCEDE/BID, 2013), 21–44; "Quince años de vigencia de la Convención sobre Derechos del Niño en la Argentina," in *La familia en el nuevo derecho: Homenaje a Cecilia Grosman*, ed. Aída Kemelmajer de Carlucci (Santa Fe, Argentina: Rubinzal-Culzoni, 2009), 131–184; "Algunas confusiones en torno a las consecuencias jurídicas de la conducta transgresora de la ley penal en los nuevos sistemas de justicia juvenil latinoamericanos," in *Revista mexicana de Justicia: Los nuevos desafíos de la PGR* (México: Procuraduría General de la República, 2006), 105–140; and "Los sistemas de responsabilidad penal juvenil en América Latina," in *Derechos de la niñez y la adolescencia: Antología* (San José de Costa Rica: CONAMAJ/EJ/UNICEF, 2001).

3. Brazil was influenced by Lusitanian legislation that was similar to the Spanish one regarding youth deviant behavior.

4. See Luis Agote, Record of Sessions of the National Congress, Chamber of Deputies of the Nation, Argentina, Meeting no. 11, June 8, 1918, 262. The epigraph by Enoch Wines can be found in Anthony Platt, *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1969), vi.

5. "Those articles . . . created bodies similar to the juvenile courts, as is expressly recognized by the Criminal Court of Appeals: 'The law for the welfare of minors, in its articles 14 et sequitur, is inspired by . . . North American laws and *in fact establishes the system of juvenile courts.*'" Leopoldo Lugones, Jr., *La memoria*, year 7, no. 82 (Buenos Aires: Biblioteca Policial, 1941), 74 (italics added).

6. Law 14.394, December 22, 1954 (Argentina).

7. See, e.g., Chilean Law of Minors 16.618 (1967).

8. See, e.g., Argentinian Law on Criminal Responsibility of Minors (1978); Code of Minors of Uruguay (1934); Criminal Code of Costa Rica (1941), art. 25.

9. See, e.g., *In Re Gault*, 387 U.S. 1, 16–17 (1967).

10. On the type of criminal process for adults that Latin American countries adopted between the second half of the nineteenth century and the early twentieth century, see Máximo Langer, "Revolution in Latin American Criminal Procedure:

Diffusion of Legal Ideas from the Periphery," *American Journal of Comparative Law* 55 (2007): 617–676.

11. While the U.S. Supreme Court ruled on whether the juvenile court was constitutional practically since its creation, the Supreme Court of Argentina began to consider only in the 1990s whether the proceedings to try juvenile criminal cases and making decisions on protective measures were constitutional. See, e.g., Supreme Court of Argentina, *Maldonado*, December 7, 2005.

12. On the broader criminal justice reforms in Latin America, see Langer, "Revolution in Latin American Criminal Procedure."

13. The Declaration was adopted by United Nations General Assembly Resolution 1386 (XIV) of 10 December 1959. On the influence of this declaration on article 227, see, e.g., Fernando Luiz Menezes Guiraud, "Atuação do Conselho Tutelar e a Questão das Drogas," *Igualdade* 41 (2008): 78–97, http://www.sociedadesemear.org.br/arquivos/20111024173251_ri_41_drogadicao.pdf.

14. See the English translation of Brazil's Constitution at http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf (accessed July 15, 2014). On the Brazilian reform, see, e.g., *Ser niño en América Latina: De las necesidades a los derechos* (proceedings of Seminario Latinoamericano "Infancia, Situaciones de Riesgo y Políticas de Prevención en América Latina en el Marco de la Convención Internacional de los Derechos del Niño," Buenos Aires, September 10–14, 1990), 73–82, 227–230, 311–324.

15. See American Convention on Human Rights, art. 5.5: "Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors." Among the opinions and decisions issued by the Inter-American Court of Human Rights, see, e.g., Advisory Opinion OC-17/2002 of August 28, 2002, "Juridical Condition and the Human Rights of the Child"; and its decision in the case of the "*Juvenile Reeducation Institute*" v. *Paraguay*, Judgment of September 2, 2004.

16. For a critical analysis of the arguments and strategies that reformers articulated to advance these reforms, see Philippe de Dinechin, *La réinterprétation en droit interne des conventions internationales sur les droits de l'homme: Le cas de l'intégration de la Convention des droits de l'enfant dans les droits nationaux en Amérique latine* (Ph.D. diss., Paris III University, 2006), available at http://tel.archives-ouvertes.fr/docs/00/08/99/74/PDF/these_p_de_dinechin_515p_.pdf.

17. On criminal procedure reforms in Latin America, see, e.g., Langer, "Revolution in Latin American Criminal Procedure."

18. See, e.g., Message of the President of Chile, Law Number 20.084, in Biblioteca del Congreso Nacional de Chile, *Historia de la ley 20.084, Establece un Sistema de Responsabilidad de los Adolescentes por Infracciones a la Ley Penal* (2005), 6–7.

19. Argentina did not pass new juvenile justice laws in the period under analysis. Penal Regulations of Minority Law 22278 of 1980 are still the main substantive regulation of juvenile courts in Argentina, though provinces have approved new procedural regulations in the past twenty years to meet the standards of the CRC and other

human rights instruments. In October 2005, Law 26061, titled "Comprehensive Protection of the Rights of the Children and Adolescent Act" [*Ley de Protección Integral de los Derechos de las Niñas, Niños y Adolescentes*], was published. But this law only contains incidental regulations regarding juvenile justice.

20. These countries include Bolivia, Colombia, the Dominican Republic, Ecuador, Guatemala (although its first code passed never came into force), and Venezuela.

21. See, e.g., Message of the President of Chile, Law Number 20.084, 6 (explaining that meeting the principles and directives of the UN Convention on the Rights of the Child was one of the reasons for the adoption of the new juvenile law in Chile); Code of Childhood and Adolescence of Honduras, art. 2 (explicitly mentioning as general goals of the code the protection of the rights established in the Convention and the need to modernize the legal regime in this area).

22. See, e.g., Message of the President of Chile, Law Number 20.084, 7-8.

23. The exception is Costa Rica, where well-recognized jurists and criminal law scholars in particular took part in the legal reform process on child and youth matters.

24. The Brazilian statute is an example of poor legal drafting because the main drafters were activists, rather than jurists. Theoretical inconsistencies have come from the tension between the tutelary and criminal responsibility models. On this tension, see, e.g., Mary Beloff, "Algunas confusiones en torno a las consecuencias jurídicas de la conducta transgresora de la ley penal en los nuevos sistemas de justicia juvenil latinoamericanos," in *Revista mexicana de justicia: Los nuevos desafíos de la PGR* (México: Procuraduría General de la República, 2006), 105-140.

25. The Underage Offender Law of El Salvador was passed by Decree 863 on April 27, 1994, and had its name and some specific articles amended by Decree 395 on July 28, 2004. The Juvenile Criminal Justice Law, 7576, of Costa Rica, was passed on March 8, 1996, and published on April 30 and has been in force since that date.

26. See, e.g., Code of Childhood and Adolescence of Honduras, art. 181; Dominican Republic, Law 136-06, art. 278.

27. See, e.g., Chile, Law 16.618 (Law of Minors), art. 32 (establishing that even when the judge reached the conclusion that the crime had not been committed or that the minor had not participated in it, he or she could still decide to apply any protection measure of those contemplated in that law in any case in which the minor was in material or moral risk).

28. See United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 3.

29. United Nations Assembly General Resolution, A/RES/45/112, sixty-eighth plenary meeting, December 14, 1990, Guidelines 5, 6, and 58.

30. See, e.g., Statute of Childhood and Adolescence of Brazil, arts. 99 et seq.

31. Remission is a mechanism adopted by most countries in the region.

32. See, e.g., Chile, Act 20.084, art. 27; Costa Rica, Act 7576, art. 9; Code of Childhood and Adolescence of Honduras, arts. 219 et seq.

33. On rehabilitation as one of the goals of the reforms, see, e.g., Chile, Law 20.084, art. 20; Ecuador, Code of the Childhood and Adolescence, Act 2002-100, arts. 307,

309. See also Mary Beloff, "¿Son posibles mejores prácticas en la justicia juvenil?" in *Derechos de niños, niñas y adolescentes: Seguimiento de la aplicación de la Convención sobre Derechos del Niño; Conceptos, debates y experiencias en justicia penal juvenil* (Buenos Aires: Ministerio de Justicia y Derechos Humanos, SENAF/UNICEF, 2007), 31–40.

34. See, e.g., Inter-American Commission of Human Rights, Rapporteurship on the Rights of the Child, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, pp. 39 (referring to the situation of Honduras), 126 (on El Salvador), 132 (referring to the lack of rehabilitation capabilities in drug-related cases in countries of the region); Committee on the Rights of the Child, comments to state reports: CRC/C/15/Add.241, November 3, 2004 (on the situation in Brazil); CRC/C/COL/CO/3, June 8, 2006 (on the situation in Colombia); CRC/C/15/Add.154, July 9, 2001 (on the situation in Guatemala). See also Beloff, "Sistema Penal Juvenil."

35. See Committee on the Rights of the Child, General Comment No. 10 (2007), on "Children's rights in juvenile justice," § 31.

36. See, e.g., Brazil, Statute of Child and Adolescent, art. 105; Guatemala, Law of Integral Protection of Childhood and Adolescence, art. 138; Peru, Code of Children and Adolescents, art. 242.

37. See, e.g., Ecuador, Code of the Childhood and Adolescence, Act 2002-100, art. 305.

38. See, e.g., United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 7; United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, arts. 17, 18.

39. On due process regulations, see, e.g., Code of Childhood and Adolescence of Honduras, arts. 182, 183, 213, 226–229.

40. On this wave of criminal procedure reforms in Latin America, see Langer, "Revolution in Latin American Criminal Procedure."

41. See, e.g., Code of Childhood and Adolescence of Honduras, arts. 188–196.

42. See, e.g., Convention on the Rights of the Child, art. 40(2)(b)(v).

43. See, e.g., Code of Childhood and Adolescence of Honduras, art. 188.

44. See e.g. Chile, Act 20.084, art. 6.

45. See e.g. Chile, Act 20.084, art. 18.

46. See e.g. Chile, Act 20.084, art. 23.

47. See, e.g., Message of the President of Chile, Law Number 20.084, 13–14; Colombia, Code of Childhood and Adolescence, Act 1098, art. 178 (stating that the sanctions must have a protective, educative, and restorative purpose); Costa Rica, Act of the Juvenile Criminal Justice, Act Ley 7576, art. 123 (establishing that the sentence must have primarily an educative function); Ecuador, Code of the Childhood and the Adolescence, art. 369 (stating that the goal of the socioeducative measures are the social reintegration of and compensation for the damage caused by the juvenile); Code of Childhood and Adolescence of Honduras, art. 198 (stating that confinement should be limited to what is strictly necessary for rehabilitation purposes).

48. See sources cited in note 34.

49. See, e.g., Convention on the Rights of the Child, art. 37(b).

50. See, e.g., Beijing Rules, Rules 13 and 17; Rules for the Protection of Juveniles Deprived of Their Liberty, Rules 1, 2, and 17.

51. See, e.g., Colombia, Code of the Childhood and Adolescence, art. 181 (limited duration of the provisory internment or pretrial detention) and art. 187 (establishing limitations in the duration of the socioeducative measures); Code of Childhood and Adolescence of Honduras, art. 188 (stating that confinement is an exceptional measure that should be as brief as possible, limited to a maximum of eight years, and may only be taken in certain defined circumstances).

52. See, e.g., Code of Childhood and Adolescence of Honduras, art. 199.

53. There are also reasons to take the data on Bolivia with special caution given that this country reported data on juvenile confinement for only five years for the period 2000–2013. All the data about Bolivia, including the confinement rate per 100,000, are taken from the Alertamerica database available online and refer to the year 2012.

54. There are reasons to take some of these data on Mexico with special caution because Mexico has provided data to the United Nations Office on Drugs and Crime (UNODC) for only two years in the 2003–2012 period, which has required that we compare rates from different years in the case of this country (2011 and 2012). In addition, Mexico's total adult confinement levels reported in Alertamerica and in UNODC are suspiciously low because its rate of adult confinement for every one hundred thousand adults is much lower than this rate for Brazil. We thus wonder whether jails and other institutions of local government are counted in this analysis.

55. Honduras has an adult ratio of 1.6 because the reported number of adults in formal contact with the police is lower than the reported number of adults in confinement. As indicated by the source note to figure 5.2, these data refer to the year 2011 and come from the United Nations Office for Drugs and Crime.

56. Notice that while the number of adult arrests is normally higher than the number of adults in confinement, these data on Rio de Janeiro show a higher number of adults in confinement for every year reported. The data are taken from the single source indicated in table 5.7. We do not know what may explain this pattern.

57. The only possible exceptions are a few reports by governmental offices that have presented and analyzed data on juvenile justice systems. But such reports do not enable inferring conclusions about the results of the reforms because they have not considered the pre- and postreform periods or have only compared one year before and after the introduction of the reform or have not compared the adult and juvenile populations. See, e.g., Defensoría Penal Pública, Departamento de Estudios, *Informe estadístico: Primer año de vigencia; Ley de Responsabilidad Penal Adolescente (8 junio 2007 a 7 junio 2008)* (Santiago, Chile), available at <http://www.dpp.cl/resources/upload/files/documento/8b1fie8511e7dddb91209c4c6dac46ed.pdf>; SENAME, *Informe de diagnóstico de la implementación de la ley 20.084: Junio 2007–Marzo 2010* (Santiago, Chile, 2010), available at http://www.sename.cl/wsename/otros/rpa/INFORME_LRPA_FINAL.pdf; Secretaria de Derechos Humanos, *Atendimento socioeducativo ao adolescente em conflito com a lei: Levantamento nacional 2011* (Brasília, Brazil, 2012), available at <http://www.anajure.org.br/wp-content/uploads/2013/04/LEVANTAMENTO-NACIONAL-2011.pdf>.

58. Act 20.084, December 2005.
59. Corporación Opción and UNICEF, *¿Conoce tus derechos! Manual sobre la Ley de Responsabilidad Penal de Adolescentes* (Santiago, Chile, 2009).
60. See, e.g., Message of the President of Chile, Law Number 20.084, 5–7.
61. See, e.g., *ibid.*, 7–8.
62. On this tension, see, e.g., Miguel Cillero y Martín Bernal, “Derechos humanos de la infancia/adolescencia en la justicia ‘penal de menores’ de Chile: Evaluación y perspectivas,” *Revista de Derechos del Niño* (Universidad Diego Portales y UNICEF, Santiago, Chile) 1 (2002): 31–33; Mauricio Duce, “El proceso establecido en el proyecto de ley que crea un sistema de responsabilidad de los adolescentes por infracciones a la ley penal: Avances y problemas,” *Revista de Derechos del Niño* (Universidad Diego Portales y UNICEF, Santiago, Chile) 2 (2004): 111–112.
63. Chile, Law 16.618, March 1967.
64. The Chilean adversarial reform was implemented gradually in different regions of the country. It came into effect in Santiago, the largest region in terms of its population, in 2005.
65. Chile, Law 20.084, art. 29.
66. *Ibid.*, art. 2.
67. *Ibid.*, art. 26 (confinement should be used as a last-resort measure and never in cases in which it would not be appropriate for an adult), art. 32 (pretrial confinement in a “closed regime” is applicable only for serious criminal offenses and when no alternative measure would be sufficient to meet the goals of pretrial detention). On these principles and the other principles that should guide the interpretation of the new Chilean law by courts and other actors of the system, see, e.g., Jaime Couso Salas and Mauricio Duce Julio, *Juzgamiento penal de adolescentes* (Santiago, Chile: LOM, 2013).
68. See, e.g., Chile, Law 20.084, art. 23.
69. See Defensoría Penal Pública, *Informe estadístico*; Defensoría Penal Pública, Unidad de Defensa Penal Juvenil, *3 años de vigencia Ley de Responsabilidad Penal del Adolescente 8 de Junio de 2007 a 7 de Junio de 2010* (Santiago, Chile, 2011); Gonzalo Berrios, “La Ley de Responsabilidad Penal del Adolescente como sistema de justicia: Análisis y propuestas,” *Política criminal* 6, no. 11 (2011): 163–191; Couso and Duce, *Juzgamiento penal de adolescentes*; SENAME, *Informe de diagnóstico*.
70. The only exception is the report by Defensoría Penal Pública, Departamento de Estudios, *Informe estadístico*. But this report includes data about a short period that goes from one year before to one year after the juvenile justice reform entered into effect and does not compare total confinement levels, as we do in this section.
71. See Gendarmería de Chile, Departamento de Estudios, *Compendio estadístico penitenciario 2010*, 29.
72. For an analysis of the evolution of pretrial detention in Chile before and after the introduction of the more adversarial system there, see Mauricio Duce and Cristián Riego, *La prisión preventiva en Chile: Análisis de los cambios legales y su impacto* (Santiago, Chile: Ediciones Universidad Diego Portales, 2011).

73. This due process improvement would be in line with the U.S. case *In Re Winship*, 397 U.S. 358 (1970).

74. The annual reports by SENAME are the source of our numbers on juveniles in confinement or custodial or secure confinement—terms that we have used indistinctively throughout this chapter. The labels and types of categories of juveniles in confinement were different before and after the juvenile justice reform in Chile. We have included in the total number of juveniles in secure confinement before the reform those in “Centros de Observación y Diagnóstico” (COD, Centers of Observation and Diagnosis; measures that were equivalent to pretrial detention); in “Rehabilitación Conductual Internado” (Confined for Behavioral Rehabilitation; measures that applied to those who were considered guilty for a criminal offense who were younger than sixteen years or were sixteen or seventeen years without discernment); and “Secciones de Menores de Gendarmería de Chile” (Juvenile Sections of the Correctional System of Chile, where those who were sixteen or seventeen years with discernment were sent). After the introduction of the reform, we have included in the total number of juveniles in confinement those subjected to pretrial detention (“Internación Provisoria”) and those convicted and deprived of their freedom by being subjected to the enclosed regime or the semienclosed regime (“Régimen Cerrado” or “Régimen Semicerrado,” as defined by articles 16 and 17 of Act 20.084).

75. The data on juveniles from figure 5.9 are imperfect because they also include arrests of individuals who were eighteen and nineteen years. We still use them because they are the only data by crime that we have been able to obtain. An alternative would have been to use the data on juvenile formal contact with the police for all crimes in Chile in the same period from the United Nations Office for Drugs and Crime; these data go in the same direction as the reported data and show an 11% decrease.

76. Another hypothesis that we considered was that the Piñera administration that took office in March 2010 pushed for a change in criminal policy by articulating a law-and-order discourse that criticized courts for being soft on crime, thus informally indicating to criminal justice actors that they needed to increase the levels of confinement. See, e.g., “Piñera reitera críticas a acción de la justicia en caso del violador de Placilla,” *La Tercera*, April 15, 2010, http://www.latercera.com/contenido/674_251648_9.shtml; Francisco Mendez Bernal, “Piñera y su curioso concepto de justicia,” *El Quinto Poder*, March 3, 2014, <http://www.elquintopoder.cl/politica/pinera-y-su-curioso-concepto-de-justicia/>; “Presidente critica a fiscales, jueces de garantía y tribunales por seguridad ciudadana,” *La Segunda*, February 26, 2014, <http://www.lasegunda.com/Noticias/Politica/2014/02/917180/presidente-critica-a-fiscales-jueces-de-garantia-y-tribunales-por-seguridad-ciudadana>. However, this hypothesis is not consistent with our data. As figures 5.8 indicates, the increase in the levels of juvenile confinement went up until 2010, the year that Piñera took office, and stalled or diminished after that. Available data thus indicate that the Piñera administration’s law-and-order discourse on crime does not explain the increase in juvenile confinement that we are analyzing.

77. See, e.g., Duce and Riego, *La prisión preventiva en Chile*.