

Criminal procedural reform in Chile and its impact on incarceration rates¹

A reforma processual penal no Chile e o seu impacto nas taxas de encarceramento

Silvio Cuneo²

Universidad Central de Chile – Santiago, Chile

silvio.cuneo@ucentral.cl

 <http://orcid.org/0000-0003-1072-745X>

Fernanda Tapia³

Universidad Central de Chile – Santiago, Chile

fernanda.tapia@ucentral.cl

 <https://orcid.org/0009-0005-9995-908X>

ABSTRACT: This article analyzes the exponential growth of the Chilean prison population since the implementation of the criminal procedure reform between 2000 and 2005. The study shows that Chile went from just over 33,000 incarcerated individuals in 2000 to nearly 65,000 in 2025, while its imprisonment rate also increased. The research problem addressed by this article is to explain why, despite being presented as a rights-based modernization aimed at strengthening due process and protecting fundamental rights, the criminal procedure reform ultimately functioned as a mechanism that facilitated mass incarceration. Accordingly, the study asks: in what ways did the Chilean criminal procedure reform contribute to the rise in imprisonment, and what political, economic, and cultural factors made this phenomenon possible?

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² PhD in Law, Academic at the Universidad Central de Chile.

³ PhD in Law, Academic at the Universidad Central de Chile.

After examining both the immediate and underlying causes of the increase in incarceration, the article concludes that the criminal procedure reform, far from reducing the use of imprisonment, became a mechanism that contributed to mass incarceration. The study warns that mass incarceration deteriorates prison conditions, deepens social exclusion, and undermines respect for human dignity. It therefore proposes revising both substantive criminal law and procedural rules in order to reduce imprisonment and bring the Chilean criminal justice system into line with international human rights standards.

KEYWORDS: Mass incarceration; penal populism; dismantling of the social state; criminal procedural reform.

RESUMO: *Este artigo analisa o crescimento exponencial da população prisional chilena desde a implementação da reforma processual penal entre 2000 e 2005. O estudo demonstra que o Chile passou de pouco mais de 33.000 pessoas privadas de liberdade em 2000 para quase 65.000 em 2025, registrando também um aumento da taxa de encarceramento. O problema de pesquisa abordado neste trabalho consiste em explicar por que, apesar de a reforma processual penal ter sido apresentada como uma modernização garantista e respeitadora dos direitos fundamentais, acabou funcionando como um instrumento que facilitou o encarceramento em massa. Nesse contexto, a pesquisa procura responder à seguinte questão: de que maneira a reforma processual penal chilena contribuiu para o aumento do encarceramento e quais fatores políticos, econômicos e culturais tornaram esse fenômeno possível? Após analisar diversas causas imediatas e mediatas do aumento do encarceramento, o artigo conclui que a reforma processual penal, longe de reduzir o uso da prisão, transformou-se em um mecanismo funcional ao encarceramento em massa. O estudo adverte que o encarceramento em massa deteriora as condições carcerárias, aprofunda a exclusão social e enfraquece o respeito à dignidade humana. Por isso, propõe a revisão tanto das normas penais substantivas quanto das normas processuais, com o objetivo de reduzir o encarceramento e adequar o sistema de justiça criminal chileno aos padrões internacionais de direitos humanos.*

PALAVRAS-CHAVE: Encarceramento em massa; populismo penal; desmantelamento do Estado social; reforma do processo penal.

1. INTRODUCTION

Over the last 30 years, Chile has experienced an exponential increase in the number of persons deprived of liberty. From just over 22,000 incarcerated persons in 1996, the number reached almost 65,000 in 2025. This paper analyzes various causes of this phenomenon, placing special emphasis on the new criminal justice system as an instrument that facilitates mass incarceration.^{4 5}

The research problem addressed in this study is to explain why, despite being presented as a rights-based modernization aimed at strengthening due process and protecting fundamental rights, the criminal procedure reform ultimately functioned as a mechanism that facilitated mass incarceration. Accordingly, this article seeks to explain how the Chilean criminal procedure reform contributed to the increase in imprisonment and what political, economic, and cultural factors made this phenomenon possible.

Recognizing that the growth of incarceration is a multifaceted phenomenon with multiple causes, this study distinguishes between underlying and immediate causes. Among the underlying causes, it examines the dismantling of the welfare state during the dictatorship and the consolidation of the neoliberal model, which increased inequality, urban segregation, and the criminalization of poverty. It also analyzes, as an underlying cause, the rise of penal populism and the political use of fear of crime, fueled by the media and “tough on crime” rhetoric, which have positioned crime as a central issue on the public agenda.

Among the immediate causes, the article examines legislation that has promoted punitive policies, with particular emphasis on the role of the criminal procedure reform. Although the reform introduced

⁴ In 1996, the number of persons deprived of liberty reached 22,172, equivalent to 161 persons per 100,000 inhabitants. By 2025, the total number of inmates was 64,969, equivalent to 327 per 100,000. Data from the Chilean Gendarmerie website, available at: <https://www.gendarmeria.gob.cl/compendios.html>.

⁵ GONZÁLEZ *et al.* (2025) analyze the recent sharp growth of the Chilean prison population and examine whether the country is entering a phase comparable to the processes of mass incarceration observed in other contexts, particularly in the United States.

modern institutions and strengthened formal procedural guarantees, it also reinforced negotiated justice mechanisms and abbreviated procedures that facilitated swift convictions and a sustained increase in the number of incarcerated individuals.⁶ In addition, successive legal reforms expanded police powers and broadened the grounds for pretrial detention, thereby weakening the principle that such a measure should remain exceptional.

The study will also examine other specific statutes—such as those relating to drug offenses, domestic violence, and property crimes—that increased penalties and restricted access to alternative sanctions, thereby contributing to the sustained growth of the prison population.

In the 1990s, after the return to a limited and protected democracy, Chile initiated several structural changes in different areas. One of the most significant changes was the criminal procedural reform, which left behind an old inquisitorial criminal system in order to implement an accusatorial one, thereby modernizing our criminal justice system and, at least in theory, respecting freedoms, rights, and guarantees consistent with a democratic state. Beginning in 2000, the new criminal procedure was gradually implemented. Initially, the new process entered into force in two regions of the country. As it was extended to other regions, some adjustments were made, and in 2005 the new system was implemented nationwide. The publicity of the new process, unlike the previous one which was essentially secret, also brought an important media shift, and various actions of the criminal courts, especially in the most high-profile cases, were covered by the mass media. This media coverage has been an important factor in the growing relevance of crime and fear of crime as central issues on the political agenda.

The increase in imprisonment in Chile, while not reaching the levels of the United States, has been a relatively recent trend. If we analyze average incarceration between 1974 and 2012, we see several fluctuations up to 1992. Since 1993, the upward trend was constant until 2009, when

⁶ Along the same lines are the works of CUNEO (2017) and WILENMANN (2019). A different thesis is advanced by ARRIAGADA *et al.* (2021), who, after analyzing various causes of the increase in incarceration in Chile, conclude that there is no evidence to support the claim that the criminal procedure reform has had a direct impact on that increase.

the level fell, although it remained very high in comparison with Chile's historical levels and with other realities in the region. From 2010 to 2021, the number of incarcerated persons fell significantly.⁷ Then, from 2022 to 2025, it rose again, and the last two years constitute the highest levels of imprisonment in Chilean history.

The following table and graph show the variations in the incarceration rate in Chile between 1974 and 2025⁸

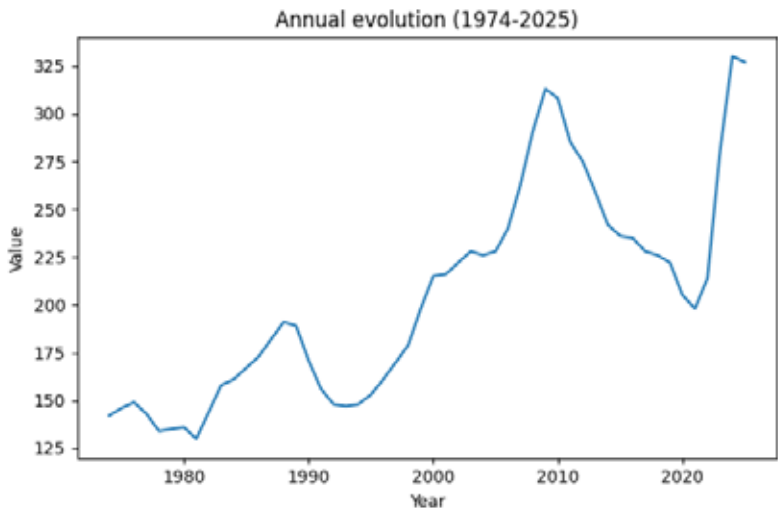
Year	Rate	Year	Rate	Year	Rate
1974	142	1992	148	2010	308
1975	146	1993	147	2011	285
1976	149	1994	148	2012	275
1977	143	1995	153	2013	259
1978	134	1996	161	2014	242
1979	135	1997	170	2015	236
1980	136	1998	179	2016	235
1981	130	1999	198	2017	228
1982	144	2000	215	2018	226
1983	158	2001	216	2019	222
1984	161	2002	222	2020	205
1985	167	2003	228	2021	198
1986	173	2004	226	2022	214

⁷ According to WILENMANN *et al.* (2024), the decline in incarceration in Chile between 2010 and 2022 constitutes a complex and multifactorial process that is more closely related to changes in the practical functioning of the criminal justice system—particularly in police activity and in the effective duration of imprisonment—than to specific legal reforms.

⁸ For the preparation of the following table and graph, the incarceration rate was calculated by combining data from the Chilean Gendarmerie website, which indicated the number of persons deprived of liberty, with data from the National Institute of Statistics, which indicates the approximate number of inhabitants.

Year	Rate	Year	Rate	Year	Rate
1987	182	2005	228	2023	280
1988	191	2006	240	2024	330
1989	189	2007	263	2025	327
1990	171	2008	291		
1991	156	2009	313		

TABLE 1. Prisoners per 100,000 inhabitants in Chile (1974-2025)



GRAPH 1. Prisoners per 100,000 inhabitants in Chile (1974-2025)

From the graph and table above, it can be observed that after the arrival of democracy (1990), there was a slight decrease in imprisonment in the first years. This is possibly because, after the atrocious human rights violations perpetrated during the dictatorship became publicly known, attention shifted toward respect for fundamental rights, which translated into a decrease in punitivism.

As David Garland⁹ argues with respect to mass incarceration in the United States, the phenomenon in Chile was not the result of a policy that was proposed, researched, costed, debated, and democratically agreed upon; rather, it is the consequence of the convergence of various policies and decisions. All the factors that determine an increase in the flow of people entering prisons, without a similar number leaving them, generate more imprisonment, but these decisions are not part of a coherent program.¹⁰

2. CAUSES OF MASS INCARCERATION IN CHILE

We will divide the analysis of the causes of mass incarceration in Chile into indirect causes and immediate causes. Among the indirect causes, we will first analyze the dismantling of the social state as a consequence of a neoliberal economic regime imposed during the military dictatorship and still in place today. This economic system has created an environment of inequality that, in the absence of social programs, manages poverty through criminal law, further deepening social and economic differences. Then, as a second indirect cause, we will analyze how punitive populism took on a leading role in democracy and was decisive in raising incarceration rates to unprecedented levels in Chile. These two indirect causes have given rise to immediate causes, namely criminal and criminal-procedural laws that favor imprisonment. Within the study of the immediate causes, special attention will be paid to the criminal procedural reform and its effects; afterwards, various rules that have contributed to an increase in the level of imprisonment will be identified.

⁹ GARLAND (2001), p. 198.

¹⁰ GARLAND (2016) analyzes various dimensions of mass incarceration in the United States, including racial disparities, the expansion of the penal net, and the stigma and loss of rights that follow criminal punishment. In explaining the complex phenomenon of rising punitiveness, Garland places particular emphasis on the way crime is perceived rather than on its actual magnitude, as well as on the electoral benefits associated with punitive political discourse. He also argues that criminal laws have less impact on the level of crime itself than on incarceration rates.

2.1 INDIRECT CAUSES

A) DISMANTLING OF THE SOCIAL STATE

When people speak of Pinochet's dictatorship (1973-1990), it is usually remembered as an authoritarian regime whose terrifying face is linked only to the mass disappearance of its political opponents, horrific human rights violations, censorship, terror, and the impunity of state agents. However, it is worth remembering that human rights are also violated in all those economic regimes that condemn millions of people to live in poverty.

Both the explicit violation of human rights (e.g., applying electricity to the genitals of a political prisoner) and the less explicit one (for example, the death of a child from pneumonia due to lack of public medical care) are incompatible with the recognition of human dignity. While the explicit violations were selective, and no less reprehensible for that reason, the economic changes affected the entire population, benefiting small groups and harming the majority of Chileans.¹¹

The dismantling of a semi-social state meant the end of basic social benefits, fostering labor precariousness and the segregation of the population by expelling the poor from city centers and abandoning them in inhospitable sectors on the urban margins. Under these new conditions of spatial segregation, the penal response accentuated its selectivity toward the most deprived groups. From these human masses rendered surplus by the new economic structures, prison populations are recruited, and the lack of a social state is complemented by more punitivism.¹²

¹¹ In this sense, the great political and social transformation promoted by the military Junta is the transformation of the liberal democratic regime that prevailed under the 1925 constitution, as CRISTI (2011), p. 119, points out: "what is sought, from the first moment, is the destruction of the pre-existing liberal democratic order and the creation of a new political order, whether a corporatist political order, as was initially thought, or an authoritarian "new democracy", protected and with corporatist remnants compatible with a full market society, as it turned out to be in the end."

¹² In the same vein, Karl Polanyi argues that allowing the market to be the sole director of the destiny of human beings would mean that they, stripped of the protective cloak of cultural institutions, "would perish from the effects of

Let us now examine how the economic transformation in Chile operated and how a neoliberal regime was implemented. It was Milton Friedman himself who advised Pinochet, “to impose a package of rapid measures for the country’s economic transformation: tax cuts, free markets, privatization of services, cuts in social spending, and general liberalization and deregulation [...] It was the most extreme capitalist transformation ever carried out anywhere”.¹³

The changes were carried out immediately as shock therapies on two fronts. On the one hand, radical economic changes were implemented, making every vestige of the social state disappear, impoverishing millions of people and enriching small groups. On the other hand, the armed forces and special police tortured and massacred political enemies, terrorizing the population and thereby making social mobilization against the changes impossible. In Klein’s words, in Chile terror was an accomplice to economic metamorphosis. In democracy, neoliberal proposals can at most take the form of measured reforms, since dismantling the social state is unpopular (e.g., Reagan and Sarkozy). “In short, Friedman’s economic model can be partially imposed in democracy, but to carry out his true vision it needs authoritarian political conditions”.¹⁴

Friedman’s ideas basically sought the elimination of market regulation, privatization, and the reduction or cessation of funding for social programs; in other words, his program could be crudely summarized in three words: deregulation, privatization, and cuts. Regarding the effects produced by a largely unregulated market, it is worth recalling that “[a]s a criterion of distribution, the market is effectively cruel, because it does not take into account how much someone needs something, but only whether they have the means to buy it”.¹⁵

In the midst of the Cold War, the administration of the U.S. government under Richard Nixon began contacting reliable sources

social exposure; they would die as victims of acute social dislocation through vice, perversion, crime and starvation”. Cited in UNDURRAGA (2014), p. 50.

¹³ KLEIN (2007), p.28.

¹⁴ Naomi KLEIN portrays the implementation of neoliberalism in Chile as a shock therapy. Whenever we refer to this, we will be following what the author proposed in her book *The Shock Doctrine: The Rise of Disaster Capitalism*.

¹⁵ ATRIA (2013), p. 152.

within the Chilean army in order to carry out a coup d'état. This does not mean that the Chicago Boys planned a coup in order to conduct their experiment. Rather, as Boeninger observes,¹⁶ the “Chicago Boys, with the collaboration of some Christian Democrats, had already prepared an economic program in anticipation of Allende’s fall and, through the Society for Manufacturing Development, had established contacts with the Navy.” Thus, the coup d'état in Chile, financed by the CIA, was the result of joint collaboration between the military and economists.

After the coup, in the first year of his rule, Pinochet privatized several state-owned companies, opened the borders to imports despite the barriers that had existed to protect domestic industry, eliminated price controls on basic goods, and cut public spending except in the military sphere. His advisers convinced him that the market would solve the economy’s problems by reducing inflation. However, things did not turn out as the Chicago Boys had predicted. In 1974 inflation reached 375% —the highest level in the world and almost double the highest level experienced during Allende’s government—and unemployment reached unprecedented figures.¹⁷ Likewise, growth rates collapsed, poverty increased, and income distribution worsened dramatically.¹⁸

With the implementation of a neoliberal regime and the reduction of state social benefits, Chile’s major cities deepened their geographical divisions. On the one hand, the poor were removed from upper-class neighborhoods; on the other, popular settlements or “land occupations” grew. This new geographical distribution of social sectors is largely the consequence of a process of forced removals carried out during the dictatorship. Between 1979 and 1985, thirty-five thousand poor families were expelled from central Santiago and abandoned on the periphery.¹⁹ Hiding poverty in order to appear to be a thriving country was a strategy to counter the high rates of disapproval directed at the economic plans advanced during the dictatorship.

¹⁶ BOENINGER (2014), p. 293.

¹⁷ KLEIN (2007), p. 114.

¹⁸ UNDURRAGA (2014), p. 87.

¹⁹ RAMOS and GUZMÁN (2000), p. 24.

The hordes of poor people expelled from middle- and upper-class neighborhoods had to settle wherever they could, usually in inhospitable places on the outskirts of cities, in areas without paving or sewage, near dumps or polluting industries, on land that had not been deforested, making them constant victims of fires and other catastrophes.

The inhabitants of these improvised settlements, lacking education and distant from official culture, began to be criminalized and controlled by the penal system. Physical differences fed Lombrosian prejudices, which very often led people to speak of subjects who “look like criminals.”

Democracy arrived in the 1990s, but the governments of the social-democratic coalition did not want to modify the economic regime implanted during the dictatorship. The most optimistic views speak, at most, of neoliberalism with a human face.²⁰ A harsher analysis is offered by Uribe, who prefers to describe Presidents Aylwin, Frei, and Lagos as enforcers of uncompromising neoliberalism, especially in terms of shrinking the state, even going so far as to suggest that they were more Pinochetist than Pinochet. Economic difference remains central, but it no longer operates alone: it is now joined by a new evaluative segmentation that helped separate people of similar economic levels into good and bad, decent people and indecent subjects, citizens who could turn to the police and those who could be detained by it.²¹

B) PUNITIVE POPULISM²²

The reality of crime and the idea people have of it do not maintain a coherent relationship, in the sense that increased fear of crime is not necessarily the consequence of an increase in crime. Behind all of this

²⁰ ATRIA (2013).

²¹ RAMOS and GUZMÁN (2000), p. 19.

²² According to PRATT (2007), penal populism emerges when criminal justice policies cease to be guided primarily by experts and instead become heavily influenced by public emotions, perceptions, and demands, particularly those related to fear of crime and feelings of insecurity. Pratt argues that penal populism is characterized by distrust of experts, the growing prominence of victims, the influence of the media, political competition, and the expansion of punishment.

there is a true fear industry that, as a central point of media politics, exercises enormous power, even deciding who can govern and, still more, who cannot govern.

Today, crime occupies a central place in news broadcasts and social media in Chile. Images of violent crimes are repeated, artificially magnifying the level of crime, increasing fear of crime, and generating ever greater empathy for victims and those close to them. In this context, it becomes unpopular to attempt an in-depth analysis of the causes of crime or the links among marginality, the economic regime, and crime. Only the simplistic response remains: vindictive and populist discourse calling for the crushing of criminals' evil. Any different attempt at explanation may be perceived as a justification of evil and as complicity with crime.

Thus, the sense of insecurity and the very high level of concern about crime do not necessarily respond to rising crime but to other factors. Although some increase in crime since the 1990s can be observed, the increase in fear and concern about criminality does not correspond to that growth.

Since 1990, in surveys conducted by the Centro de Estudios Públicos (CEP), citizens have considered crime to be the main problem the government should address almost every year. Since 2005 (the year in which the criminal procedural reform entered into force nationwide), citizens have considered crime the main problem in practically every year.²³

Just as fear of crime has no necessary relationship with, nor is it the consequence of, an increase in crime, the implementation of anti-crime measures likewise does not imply a reduction in crime and often responds more to electoral (populist) objectives than to proposals emerging from studies indicating the best possibilities for crime prevention and control. Fear leads specialized voices and coherent crime-prevention plans to be ignored, in favor of demagogic and vindictive discourses that, although inefficient and cruel, offer enormous electoral profitability.

The distorted and enlarged image of crime keeps a population frightened and demanding more prisoners, more controls, and a heavier hand. Political leaders choose easy rhetoric and show themselves inclined

²³ Data cited in JIMÉNEZ, SANTOS and MEDINA (2014), p. 70.

toward penal authoritarianism, following the U.S. example and fostering imprisonment and the restriction of rights and guarantees.

The mediatization of crime generates empathy with the victim, and presenting oneself as standing with victims, by adopting the logic of a zero-sum game, yields major electoral benefits. Thus, the discourse of greater punitiveness, heavy-handedness, zero tolerance, and war against crime is extremely useful for anyone seeking a political career, especially when speaking in the name of victims.

2.2. IMMEDIATE CAUSES. SPECIAL ANALYSIS OF THE EFFECT OF CRIMINAL PROCEDURAL REFORM

Within the immediate causes of mass incarceration, we will focus on various rules that either increase penalties, make it easier to obtain custodial convictions, or expand the grounds for pretrial detention. We will first review the criminal procedural reform and its role in the increase in imprisonment, and then examine other criminal laws.

A) CRIMINAL PROCEDURAL REFORM

With the arrival of democracy in Chile, governments committed themselves to the modernization of the state. It is in this context that a new criminal justice system began to be designed, in principle more liberal and democratic. During this same period, crime also began to assume special importance as an issue of concern to citizens and, for that reason, as a central matter on the political agenda. Criminal reform, not free from axiological contradictions, promised to be more respectful of human rights while also more efficient in meeting social demands for greater control. However, the presidential message accompanying the criminal procedure code, dated June 9, 1995, itself acknowledges that former ministers of Pinochet (Enrique Montero) and entities linked to the right wing (Instituto Libertad and Instituto Libertad y Desarrollo)²⁴

²⁴ The *Instituto Libertad*, founded in 1990, describes itself as an intellectual and policy-oriented think tank of the Chilean center-right and has been linked since its inception to *Renovación Nacional*, the political party founded in 1987

participated in the study and drafting of the bill. By contrast, human rights organizations were not invited.²⁵ Before the reform, Chile operated under an inquisitorial criminal procedural system in which the judge investigated, accused, and sentenced. In practice, because judges faced an enormous workload, much of the proceedings fell to court officials who were often not lawyers and frequently lacked legal training. The process was divided into two stages: the *sumario*—the investigative stage, which was essentially secret—and the *plenario*, the stage in which judgment was rendered. The evident partiality of the system lay mainly in the fact that the same judge who accused was also the one who had to sentence. The investigation, which formally also corresponded to the judge, was carried out by police officers, who often obtained evidence, especially confessions, through torture and ill-treatment. It was also an essentially slow process in which a high percentage of those incarcerated were defendants held in pretrial detention; technically, then, they were innocent people in prison. Moreover, this system was highly ineffective, and only 30% of cases ended with a judgment, while the remaining 70% were dismissed.

The new criminal procedure promised to safeguard constitutional guarantees and to be more efficient than its predecessor. To fulfill both principles, the reform created or reestablished different institutions: the Public Prosecutor's Office, as an independent body responsible for criminal investigation and prosecution; the Public Criminal Defense Office, responsible for providing legal assistance to all defendants; and the Guarantee Courts and Oral Criminal Courts. It also established various plea-bargaining mechanisms that, in real terms, mean the possibility of a conviction with a reduced sentence in exchange for the defendant's waiver of trial. This mechanism, with its liberal appearance—since the defendant is free to accept it or not—has proved to be a decisive factor in mass incarceration by allowing convictions and imprisonment with unprecedented speed.

This point reveals the incompatibility on which the new criminal process is based. On the one hand, it claims to be founded on respect for

that supported Augusto Pinochet in the 1988 plebiscite. Likewise, the *Instituto Libertad y Desarrollo* counts among its founders several former ministers and individuals who actively participated in the military dictatorship.

²⁵ HERNÁNDEZ (2000-2005), p. 4.

the citizen's guarantees or rights, by which the individual is protected from punitive power. But on the other hand, the principle of efficiency, very quickly, shows that the face seeking speed in proceedings—and in convictions—can perfectly well restrict procedural guarantees.²⁶ To the extent that guarantee-based criminal law, as a principle, is opposed to efficiency, the conflict has progressively been resolved in favor of the latter.²⁷

Although criminal procedural reform is usually described as guarantee-oriented, this is not necessarily so. Consider, for example, the whole arsenal of intrusive measures already set out in the very message accompanying the criminal procedure code, such as the authority of police officers, even without a judicial warrant, to search closed places on the mere claim that they heard cries for help; or the possibility of intercepting and recording the telephone communications of anyone suspected of having participated in a criminal act, etc. In practice, because of the selectivity with which the police operate, these exceptional rules end up becoming ordinary practices in poorer neighborhoods, where abuses of power are legally authorized. In addition, the code's own message repeatedly refers to "deviant conduct," a concept much broader than crime and one promoted by criminological currents whose main characteristic is the legitimization of dominant groups in society.²⁸ Such expressions reveal the intention, on the part of those who control the organs of the state, to "impose patterns of behavior on individuals that go beyond what is established and required by legal norms",²⁹ since for something or someone to be "deviant" there must first be a standard of conduct.³⁰

²⁶ With the criminal procedure reform, a new phenomenon emerged: penal managerialism, that is, the incorporation of logics of efficiency, productivity, performance monitoring, and outcome-based indicators into the institutions of the criminal justice system. GONZÁLEZ (2018).

²⁷ As discussed above, during Pinochet's dictatorship a neoliberal regime was imposed by force, generating a range of consequences for the penal apparatus. Subsequently, under democracy, this regime was maintained and even reinforced through the emergence of a managerial bureaucracy whose rationalities permeated the criminal procedure reform. HATHAZY (2013).

²⁸ BERGALLI (1980), p. 85.

²⁹ HERNÁNDEZ (2002-2005), p. 5.

³⁰ Paragraphs 17, 23 and 25.

While criminal procedural reform was being designed, the most conservative groups criticized the new model for being too guarantee-oriented. It was said that the balance between guarantees and criminal prosecution was skewed excessively in favor of the former. Twenty-five years after its implementation, given current incarceration levels, it is difficult to regard as guarantee-oriented a penal system whose numbers show it to be more punitive. Nevertheless, if we analyze, on the one hand, the type of convicted persons and their social and economic characteristics and, on the other hand, who are ideal candidates for non-punitive alternatives, we may conclude that this new system can be more punitive or more guarantee-oriented depending on the defendant's economic and social characteristics. Before the reform entered into force, many asked whether it would benefit or harm offenders (those accused or convicted). Practice has shown that the question was wrongly framed, since it benefits or harms them according to their social class.

This greater punitiveness of the new criminal process is fueled by fear of crime and has been manipulated and directed toward a clearly authoritarian orientation. Likewise, the inherent conflict between guarantees and efficiency has been resolved in favor of the latter, increasingly sidelining the rights and guarantees of defendants. As Garland³¹ warns in other contexts, the phenomenon appeared as a zero-sum game in which every recognition of defendants' guarantees or rights is understood as contempt for victims' pain. Governments and legislators, taking advantage of citizens' fear and victims' suffering, renounced all rationality and greased the punitive machine. The new criminal process made mass incarceration in Chile possible and was a necessary condition for it, and its preferred instrument was negotiated justice and the voluntary waiver of adversarial trial.

That voluntariness in accepting responsibility, required in negotiated proceedings, is questionable, since the alternative to such proceedings is to risk extremely high penalties. Thus, accepting a negotiated procedure (through admission of the offense) may become the only real possibility of avoiding enormous periods of imprisonment.

³¹ GARLAND (2005).

In this way, just as the medieval Inquisition did, we force the accused to accept guilt. We do not directly inflict torment on them, but the threat of having to spend twenty years in prison may in practice be worse than the worst medieval torture. Unlike torture, the procedure is clean in its forms, since no state agent stains his hands with blood, but through these mechanisms we make the exercise of the legitimate right to an adversarial trial extremely costly for the accused.³²

The speed of convictions can hardly be understood as an unintended effect of negotiated justice.

-Effects of the reform

The main effects of the reform are the greater number of convictions and the speed of criminal justice. In this sense, the criminal procedural reform has been functional to the prevailing discourse by making possible the increase in convictions and in the number of incarcerated persons.

One of the main effects of the reform was the quantitative and qualitative increase in admissions and terminations of judicial proceedings.³³ Unlike what happened under the old system, under the reform the number of judgments and convictions increased in absolute terms. In 1999 (one year before the reform entered into force), the conviction rate in Chile was 226 per 100,000 inhabitants. With the reform's entry into force, the conviction rate increased year after year from 2000 to 2009, reaching an unprecedented rate of 1,467 (per 100,000 inhabitants) in 2009, which means 248,140 convictions in that same year.³⁴

The following table shows how, between 2001 and 2008, convictions and acquittals in simplified and abbreviated procedures increased:^{35 36}

³² This reality was also denounced in Italy by Tullio PADOVANI in an article entitled "La soave inquisizione. Osservazioni e rilievi a proposito delle nuove ipotesi di ravvedimento" (1981).

³³ SALINERO (2012), p. 124.

³⁴ Data in SALINERO (2012), p. 127. Convictions do not necessarily imply an effective prison sentence.

³⁵ Data in SALINERO (2012), p. 131.

³⁶ Abbreviated procedures and certain simplified trials in Chile allow judges to issue a conviction without conducting a full oral trial. In these proceedings, the defendant admits the facts established during the investigation,

Year	Simplified Conviction	Simplified Acquittal	Abbreviated Conviction	Abbreviated Acquittal
2001	601	29	166	4
2002	1.300	59	1.044	6
2003	3.005	61	1.931	12
2004	12.786	226	4.797	65
2005	27.129	435	90217	123
2006	41.487	559	19.148	172
2007	52.317	840	24.569	279
2008	68.156	998	34.035	2220

TABLE 2. Trends in the Prison Population, Crime Reports (DMCS), and Victimization, 2000–2009

These negotiated-justice procedures require the waiver of an adversarial trial and, in a certain sense, of the presumption of innocence.

These procedures, based on self-incrimination, have shown sustained growth, favoring the rapid and negotiated imposition of a penalty, which in a large number of cases will be served effectively; they allow us not only to infer that they closely contribute to the current high levels of prison inflation, but also that they affect the actual punishment imposed in a possible second conviction (recidivism).³⁷

thereby avoiding an adversarial trial and obtaining a reduction in sentence in exchange for that admission. Regarding this form of “negotiated” justice, LANGER and SOZZO (2023) analyze this contemporary phenomenon in Latin America, noting that in many countries across the region the majority of convictions are no longer obtained through full oral trials, but rather through abbreviated procedures, plea agreements, admissions of responsibility, and other mechanisms inspired by the American plea bargaining system.

³⁷ SALINERO (2012), p. 132.

Acceptance of responsibility is often, rather than the reflection of a spontaneous acknowledgment of the facts by the defendant, a response to fear of a very lengthy conviction.³⁸

-Amendments to the criminal procedure code

In 2002, under the socialist government of Ricardo Lagos, Law No. 19,789 was enacted, altering identity checks. Specifically, the new rule amending Article 85 of the criminal procedure code expanded police powers by allowing a more intrusive search, extending the duration of the check, and including misdemeanors as an indication permitting such checks. The same law amended Article 134 regarding situations of flagrancy, expanding the discretionary powers of the police. The amendment authorizes the police to search the accused's clothing, luggage, or vehicle. In addition, the person may be detained if they have committed any of the misdemeanors contemplated in the criminal code. In other words, in cases involving not crimes but mere misdemeanors, defendants may be detained by the police.

In 2005, also with Lagos as president, Law No. 20,074 was enacted, amending the criminal procedure code and the criminal code. That law expanded the grounds for pretrial detention, depriving it of its character as *ultima ratio*. By amending Article 139 of the criminal procedure code, it established that pretrial detention would apply—beyond the already existing objective of ensuring the purposes of the proceedings—in order to ensure the safety of the offended party and of society. Articles 140 and 141 were likewise amended, intensifying their application. Thus, for example, the clause in Article 141 stating that “[p]retrial detention may not be imposed when it appears disproportionate in relation to the seriousness of the offense, the circumstances of its commission, and the likely sanction” was eliminated.

In 2006, the government of socialist Michelle Bachelet proposed a bill intended to improve the criminal procedural reform. This was the

³⁸ ARRIAGADA *et al.* (2021) reach a different conclusion from the one advanced here. After a meticulous analysis, they argue that the sentenced prison population had already been showing a sustained upward trend since the 1990s, prior to the implementation of the reform. Their study also concludes that the reform produced a significant reduction in the population subject to custodial pretrial measures.

so-called short anti-crime agenda, which took shape in Law No. 20,253, ultimately approved in 2008 and published on March 14 of that year with a clearly punitive orientation. The Minister of Justice himself, the Radical Party member Isidro Solís, stated on July 8, 2006, that the purpose of those bills was to toughen criminal policy in order to control crime. The following year, Minister of Justice Carlos Maldonado, also a member of the Radical Party, stated: “I am in favor of, and I am working in Congress for the approval of, the Short Agenda bill, which establishes stricter criteria regarding pretrial detention. Some judges are too guarantee-oriented.”³⁹

That rule aggravates recidivism for serious crimes, identifies flight risk as a new ground for pretrial detention, expands police powers by authorizing them to enter and search closed places even without authorization from a judge or prosecutor when there are grounds indicating that an offense has been committed, etc. In our view, these would be unconstitutional rules because they violate the inviolability of the home without a judicial order. In addition, this law introduces amendments authorizing the police to check identity when there are indications that the persons checked have committed or attempted to commit a crime. The period of flagrancy for any crime is extended to twelve hours. Likewise, this reform increases restrictions on the granting of release and curtails individual guarantees. In general terms, it is a rule that increases penal control.

Although the so-called Short Agenda implied a general increase in punitivism, the most significant point was the expansion of the grounds for pretrial detention. One of the merits that could be recognized in the reform was precisely that it had reduced the percentage of inmates in pretrial detention in relation to the total incarcerated population.

³⁹ “I will be very direct: prison is a necessary evil,” *El Mercurio*, July 14, 2007, D 10. The title of the former minister’s article is striking. If he truly believes that prison is a necessary evil, should it not be applied exceptionally and as a measure of last resort? Expanding the grounds for pretrial detention moves precisely in the opposite direction, namely, making it easier to imprison persons who are technically innocent and who, as the figures show, many times end up being acquitted. Increasing the grounds for pretrial detention means replacing the principle in dubio pro reo with one of in dubio pro carcerem.

Amendments such as these increase the imprisonment of persons whose guilt or innocence is still unknown.⁴⁰

It is senseless, and involves an enormous and irreversible human cost, to confine persons when the outcome of the proceedings against them is unknown. The figures reflect unjustifiable authoritarianism. Many men and women who have had to endure pretrial detention—that is, who have been in prison—have later been acquitted or convicted with benefits allowing them to serve their sentence in freedom. Keeping them confined, thereby putting their lives and their physical and psychological integrity at risk, is unacceptable in a democratic society. A study by Ulises Gómez⁴¹ shows that 65% of persons subjected to pretrial detention end up without a custodial sentence, either because they are acquitted or because they obtain some form of alternative measure. Another study based on statistics from the Public Criminal Defense Office⁴² shows that 22% of acquitted defendants had been held in pretrial detention.

On the other hand, Velásquez and Correa⁴³ highlight the lack of reasoning and justification provided by judges when ordering pretrial detention, particularly when invoking the ground of “danger to the safety of society.” The authors argue that, although case law requires rigorous judicial reasoning, judicial decisions are, in practice, highly mechanized and standardized. Judges tend to apply the criteria established by law as a checklist, without specifically explaining why the defendant poses a genuine danger. Moreover, the heavy workload of the criminal justice system creates pressure to resolve hearings quickly. This has allegedly encouraged bureaucratic practices and resulted in brief, repetitive, and insufficiently individualized decisions.

It is likewise contradictory that convicted persons who ultimately serve their sentence in freedom should previously have been imprisoned as defendants. According to criteria of rationality or proportionality, it cannot be defended that the “penalty” of an innocent person be more burdensome

⁴⁰ Currently, more than 35% of persons deprived of liberty are in pretrial detention, that is, they are imprisoned without a conviction.

⁴¹ GÓMEZ (2012).

⁴² MEDINA (2009), p. 23.

⁴³ VELÁSQUEZ and CORREA (2025).

than that of a convicted one. It appears that legislators act to satisfy fears and paranoias without respecting any criterion of proportionality.

If, as we have seen, this situation does not respect proportionality, then it cannot be defended on the basis of justice or retributive principles. Given the known effects of imprisonment, it is likewise implausible to find utilitarian criteria to defend this situation. We are simply faced with a brutal fact that cannot be justified or legitimized. It is only a phenomenon of power, not of law.

-The reform of the reform

In 2012, following the decision in a highly publicized case in which a confessed perpetrator who had killed a soccer supporter was not placed in pretrial detention by a guarantee court, then-President Piñera announced the reform of the reform, aimed at strengthening the fight against crime. This reform of the reform seeks to further expand the powers of the police and the Public Prosecutor's Office, extend the catalogue of precautionary measures, establish more sanctions for repeat offenders, create new measures supposedly protecting the victim, etc.

Continuing down this path will lead us to expand police powers more and more (thereby diminishing citizens' prerogatives), to increase the situations in which pretrial detention may be imposed (thus incarcerating more and more innocent persons), and to approve unconstitutional reforms contrary to human rights. These are rules that oppose international human rights law and are also useless in reducing crime or levels of social violence; the only ones who benefit are politicians who continue to promote and feed a simplistic vision of war between criminals and law-abiding citizens. Behind this progressive path toward authoritarianism lies the notion that divides people into "them and us," promoting the expansion of control into the most intimate sphere and leading ultimately to penal totalitarianism.

In 2016, under the second government of socialist Michelle Bachelet, Law No. 20,931 was enacted, known as the second short anti-crime agenda, "which facilitates the effective application of the penalties established for the crimes of robbery, theft, and receiving stolen goods and improves criminal prosecution in those crimes." Among other things, this rule expands the possibilities of negotiated justice, even offering a one-degree reduction in sentence for those who agree not to go to an

adversarial trial. Although measures of this kind may imply a lower penalty in the specific case, the mechanism makes it possible to increase convictions with less effort and can therefore favor mass incarceration. Another fundamental change introduced by this rule is the establishment of a different sentencing regime for the crimes of theft (except the least serious forms), robbery, cattle theft, and receiving stolen goods, known as the “rigid framework.” That is, for perpetrators of these offenses, the sentence may not be reduced by degree despite the existence of several mitigating circumstances, thus establishing a special and harsher regime than for other crimes. It is striking that the government and legislators showed such particular zeal in increasing penalties for crimes against property rights and not for other kinds of crimes. As noted above, that rigid framework may be altered and the sentence lowered by one degree when the defendant accepts criminal responsibility. This means that the only way to reduce the sentence is to waive a fair trial; in other words, exercising the right to go to trial entails the impossibility of requesting a reduction of sentence based on mitigating circumstances as in the majority of crimes. On the other hand, further promoting convictions without trial, the new short anti-crime agenda contemplates the possibility of imposing sanctions of up to ten years through negotiated justice; that is, a guarantee judge, in little more than five minutes, may sentence one or several defendants to ten years of imprisonment.

The aforementioned body of legislation, crafted in disregard of the data and with language revealing extreme populism, states in the presidential message that one of the purposes of the rule is to “lock the revolving door.” Regardless of the fallacies or the effects that a law like this may produce, the bill was approved with votes from both the political right and left. This cross-party support, when it comes to promoting the incarceration of misery, shows that the political class will prioritize penal populism over other public policies that might suggest more useful and humane paths, but that offer little electoral return.

B) SUBSTANTIVE LAWS

Two necessary conditions for mass incarceration are: the construction of new prisons and a procedure that allows more people

to be sent quickly to prison. Added to these conditions are increasingly punitive laws that contribute to mass incarceration.

On January 14, 2004, Law No. 19,927 on so-called “sexual offenses” was published. In general terms, this law increased punishment for various offenses and restricted the possibility of obtaining alternatives to imprisonment. Its enactment was preceded by various media scandals involving pedophilia that created an atmosphere in which Chile appeared to be a country with weak criminal legislation in the sexual sphere. Between 2006 and 2012, the number of sexual offenses reported to the prosecutor’s office increased from 94 to 131 (per 100,000 inhabitants). On October 7, 2005, Law No. 20,066 on Domestic Violence was published. That law expands criminal law by incorporating new offenses into traditional categories such as threats and bodily harm, as well as by creating new criminal types. Few offenses have seen their level of reports rise as sharply as those covered by this law, increasing from 338 in 2007 to 797 in 2012, most of which correspond to psychological or minor injuries. This rule strongly toughened criminal legislation in matters of so-called domestic violence by increasing the penalty for the offense of bodily harm (in domestic violence cases). Specifically, with regard to the persons referred to in Article 5, the sentence to be imposed is the one established for the respective offense increased by one degree. As Salinero⁴⁴ aptly illustrates, the offense of minor bodily harm carries a fine under Chilean criminal legislation. However, if those injuries are inflicted on persons the Domestic Violence law seeks to protect, the corresponding penalty ranges from 61 to 540 days of imprisonment. In addition, Article 19 of the law imposes restrictions on access to alternative resolutions, thereby favoring imprisonment.⁴⁵

- Laws on illicit drug trafficking

A special section will be devoted to Laws No. 19,366 (1995) and No. 20,000 (2005) on drug trafficking. In 1990, with the return to democracy, the Chilean government signed anti-drug agreements with the United States, which appear to have been conditions imposed by the northern country before it would later sign trade treaties. Those

⁴⁴ SALINERO (2012), p. 135.

⁴⁵ Data in JIMÉNEZ, SANTOS and MEDINA, 2014: 115.

agreements entailed increasing controls and arrests for drug trafficking, creating the National Council for the Control of Narcotic Drugs (CONACE), and implementing specific plans.

Laws No. 19,366 and No. 20,000 have entailed a disproportionate increase in penalties, in addition to a relaxation of guarantees and fundamental rights. With the entry into force of Law No. 19,366 in 1995, the number of convicted persons almost tripled in a single year, rising to nearly five times that number by 2004.⁴⁶ Later, with Law No. 20,000, convictions increased substantially. The latter law introduced the figure of so-called micro-trafficking. Before that law, when faced with trafficking involving small amounts of drugs, judges tended to reclassify the offense as a consumption-related misdemeanor or dismiss the case on the grounds that applying the high penalties contemplated for trafficking—from five years and one day to fifteen years of imprisonment—was disproportionate. In order to end this situation of impunity, Law No. 20,000 created the criminal offense of micro-trafficking with a lower penalty than that for trafficking.

Law No. 20,000, in direct conflict with the principle of the presumption of innocence, expressly establishes a presumption of guilt, shifting to the defendant the obligation to prove, under its Article 4, that he or she was not engaged in trafficking activities. This express presumption of guilt means that the mere negligence of a drug-dependent person may transform that person from user into trafficker, forcing them to face extremely high sentences. A rule of this sort ends up punishing the victims of the protected legal interest. As in the United States, thousands of drug-dependent persons begin to fill the prisons.

In 1990, the number of persons convicted to custodial sentences for drug-trafficking offenses was 704. By 1998, the figure had risen to 4,430. This 630% increase could be understood as the result of the imitation—or imposition—of U.S. criminal policies, and its projection could lead us to think that in the not-too-distant future those convicted under drug laws will constitute the majority of the prison population. In addition, drug laws have translated into a huge increase in the number of incarcerated women.

⁴⁶ SALINERO (2012), p. 138.

This situation of female imprisonment is particularly serious, given that prison, from its beginnings, has been “a tool directed fundamentally at controlling the male population”.⁴⁷ However, the war on drugs understood that the “enemy” could also be a woman. Selectivity among incarcerated women operates by imprisoning, very especially, a vulnerable group that for the most part shares three characteristics: they are women without power or influence, generally incarcerated for offenses linked to drug trafficking; they have lived in poverty; and a high proportion belong to minority ethnic groups.⁴⁸ The main reason women commit trafficking-related offenses more than others is linked to a historical role they have been required to fulfill. Women, who are often mothers, encounter greater social and cultural difficulties in separating themselves from motherhood (quite different from men with fatherhood), and drug-trafficking activity, unlike other crimes, can be carried out from the home. Thus, while fulfilling their role as mothers and homemakers, women can generate income through drug-trafficking-related activities without having to go out to seek work and neglect the household and the care of their sons and daughters. In this same sense, Anthony García⁴⁹ argues that “the limitations imposed by motherhood that prevent them from obtaining or keeping jobs (...) explain why they chose [drug-trafficking] activities.” In addition, because of the disadvantaged condition suffered by women, their role in trafficking usually corresponds to subordinate and highly visible tasks,⁵⁰ which makes them easily replaceable and easily apprehended.

Finally, given the greater growth of female imprisonment compared to male imprisonment, and noting that the majority of women deprived of liberty are serving sentences for drug-trafficking offenses and that more than 80% of incarcerated women are mothers, another question arises, whose possible answers may help us understand issues

⁴⁷ RIVERA (2009), p. 264.

⁴⁸ Carlen, cited in RIVERA (2009), p. 264.

⁴⁹ GARCÍA (2002), p. 512.

⁵⁰ MAQUEDA (2014), p. 247.

much more complex and profound than those addressed in this paper: Where do the children of imprisoned women end up?⁵¹

3.- FINAL CONSIDERATIONS

Although the criminal procedural reform established various formal guarantees in the conduct of trials, it also became a functional tool for increasing the number of persons deprived of liberty. The current figures for incarcerated persons in Chile are the highest in national history, generating overcrowding and worsening prison conditions.

Given the deplorable situation experienced by persons deprived of liberty, it is necessary to develop proposals to adjust legal frameworks, systems, criminal practices, and penitentiary practices to international standards. Let us not forget that Chile has signed and ratified international treaties and resolutions aimed at respecting human dignity. Thus, in 1991 Chile ratified United Nations General Assembly Resolution 45/111 on the treatment of prisoners, thereby undertaking to treat every prisoner with the respect owed to the inherent dignity and value of the human being, without discrimination on the basis of being deprived of liberty.

Persons deprived of liberty, subject to the limitations inherent in imprisonment, must retain the rights and freedoms enshrined in the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; etc. These are not altruistic doctrines or ideas regarding persons deprived of liberty. They are norms ratified by Chile and currently in force and, therefore, binding. In this sense, the Chilean State is obliged to develop public policies aimed at respecting human dignity. To that end, it is necessary to undertake substantive

⁵¹ Although the percentage varies from country to country and, in Latin America, women deprived of liberty do not represent 10% of the prison population, the increase in female imprisonment is greater than that of male imprisonment, which gives rise to particular concern when one notes the harmful social effects of incarcerating women who are also mothers. On the figures, see: <https://www.prisonstudies.org/map/south-america> and on the effects: LIEBLING and MARUNA (2005).

reforms, but also procedural reforms, aimed at reducing the number of incarcerated persons.

It is worth remembering that imprisoning another human being is an extremely violent act, one that involves fixing a body in a tiny space, dehumanizing the person who must endure it; and dehumanizing another human being also means dehumanizing ourselves, while mass dehumanization necessarily entails the dehumanization of society. This is so even if we do not become aware of prisoners' pain. Mass incarceration, like a silent specter, corrodes everyone's freedom and ultimately deprives us of what is most precious in life itself.

On the other hand, the criminogenic effects produced by prison will also be costs paid in the future: they will translate into more crimes and higher levels of violence, which will in turn generate more prisons, more controls, more police, and, moreover, more prisoners. In this way, mass incarceration, like an upward spiral, has as its endpoint the confinement of everyone. Only a change of direction, a turn toward respect for human dignity, can help us avoid a suicidal policy.⁵²

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⁵² CUNEO (2017), P. 321.

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Authorship information

Silvio Cuneo. PhD in Law, Academic at the Universidad Central de Chile.
silvio.cuneo@ucentral.cl.

Fernanda Tapia. PhD in Law, Academic at the Universidad Central de Chile.
fernanda.tapia@ucentral.cl.

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