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Dossiê

*“Condenações e acusações injustas: panorama atual,
causas, mecanismos de correção e reparação”*



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IBRASPP

Editorial of dossier “Wrongful convictions and prosecutions: current status, causes, correction and reparation mechanisms” - Wrongful convictions and prosecutions: an introductory overview

Editorial del dossier “Condenas e imputaciones erróneas: estado actual, factores que las producen, mecanismos de corrección y reparación” - Condenas y persecuciones penales erróneas: una introducción panorámica


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ABSTRACT: This paper provides an overview of several central topics for comparative research on wrongful convictions and prosecutions (near misses). The work addresses three issues: studies that attempt to establish the quantity or frequency of errors; research that investigates the factors that increase the likelihood of their occurrence; and, finally, research on the mechanisms for correcting and compensating them. In each area, advances in available knowledge are identified, but also that we are still far from having all the information that would be required. We aim to serve as an introduction to this special issue of the RBDPP

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and as a starting point for those who wish to know state of the art on the subject.

KEYWORDS: wrongful convictions; wrongful prosecutions; contributing factors; correction of wrongful convictions; compensation of wrongful convictions and prosecutions.

RESUMEN: *En este trabajo entregamos una visión panorámica de diversos tópicos que han sido centrales en la investigación comparada en materia de condena e imputaciones erróneas. Nuestro objetivo es que ella sirva de introducción a este dossier especial de la RBDPP y también como un punto de partida para quienes quieran conocer el estado del arte en la materia. El trabajo aborda tres temas: la investigación que intenta establecer la cantidad o frecuencia de los errores; aquella que indaga en los factores que aumentan la probabilidad que se produzcan; y, finalmente, en los mecanismos destinados a corregirlos y repararlos. En cada área se identifican avances en el conocimiento disponible, pero también que aún estamos lejos de contar con toda la información que se requeriría.*

PALABRAS-CLAVES: *condenas erróneas; persecuciones penales erróneas; factores que aumentan su probabilidad; corrección de condenas erróneas; compensación de condenas e imputaciones erróneas.*

INTRODUCTION

No criminal justice system can claim to be error-free.³ No system is infallible. Any suggestion of infallibility reveals a lack of understanding of how the system works and what happens in any human enterprise. Indeed, criminal justice forms part of a very complex system, where actors with very different objectives intervene, events are serious and very dissimilar, and the number of interacting factors can generate tensions that increase the chances of bad decision-making. Moreover, judicial

³ Among these mistakes, those that are probably most serious and paradigmatic occur at opposite extremes. On the one hand, there are cases in which an innocent person is convicted (also called “false positives”) and, at the other extreme, in which a guilty party is acquitted (“false negatives”). In between, there are many other types of errors.

systems usually have structural limitations that compromise their ability reconstruct past events and discover the truth.

Hence, the problem of wrongful convictions is not just a theoretical possibility. Rather, the evidence indicates that errors are more frequent than is intuitively believed, that they may arise from perfectly avoidable causes, and that they produce enormous damage to those who suffer them. Unfortunately, at the same time, criminal justice systems are notoriously reluctant to correct and remedy their mistakes. Thus, the risk of erring is a reality that cannot be ignored.

Academic interest in criminal justice errors and false positives is old, both in the Anglo-Saxon and continental traditions. For example, in the United States, Edwin Borchard's work at the beginning of the twentieth century is often highlighted as a precursor in the field.⁴ In Europe, the investigations can be identified even earlier, for example, in Giurati's work originally published in 1893.⁵ However, the most intense concern about this matter seems to have occurred only in recent decades. At present, the study of one type of error—the conviction of innocent people—has gained enormous importance, attracting growing academic research.⁶ At the same time, this renewed interest has given birth to an activism movement aimed at exonerating innocent victims of wrongful

⁴ We refer to his work of 1913 (BORCHARD, Edwin. *European systems of state indemnity for errors of criminal justice, passim*); and, especially from 1932 (BORCHARD, Edwin. *Convicting the innocent: errors of criminal Justice*. New Haven: Yale University Press, 1932, *passim*). On the importance of the Borchard's work, see NORRIS, Robert. *Exonerated*. New York: New York University Press, 2019, pp. 14-15; LEO, Richard, GOULD, Jon. *Studying wrongful convictions: learning from social sciences*, pp. 11-12.

⁵ GIURIATI, Domenico. *Errores judiciales: diagnosis y remedios*. Santiago: Ediciones Olejnik, 2018, *passim*. In Germany highlights the classic work of Hirshberg originally published in the mid twentieth century (1960). HIRSHBERG, Max. *La sentencia errónea en el proceso penal*. Buenos Aires: Ediciones Jurídicas Europa-América, 1969, *passim*.

⁶ The literature that reviews academic research in the field is extensive, particularly in the United States. For instance, two books contain chapters with comparative analysis of the problem in different continents, including Germany, Canada, Spain, the United States, The Netherlands, England, Italy, Israel, Poland, and Switzerland: HUFF, Ronald.; KILLIAS, Martin (editors). *Wrongful convictions: international perspectives in miscarriages of justice*. Philadelphia: Temple University Press, 2010, *passim* and HUFF, Ronald.;

convictions.⁷ Finally, this renewed interest in wrongful convictions has produced several governmental and authoritative reports that have tried to diagnose the problem and, at the same time, propose solutions.⁸

Experience and scholarly inquiry over the last couple of decades have generated a massive growth in knowledge about wrongful convictions. We know that wrongful convictions are more common than we previously

KILLIAS, Martin (editors). *Wrongful convictions & miscarriages of justice*. New York: Routledge, 2013, *passim*.

⁷ The best-known work is that carried out by the Innocence Project, created in the United States in 1992 by Barry Scheck and Peter Neufeld, which is dedicated to exonerating wrongly convicted people by demonstrating their innocence, mainly using DNA evidence. More information is available at: www.innocenceproject.org (last accessed on July 1, 2022). The Innocence Project spawned the growth of other such innocence-advocacy organizations, many of which expand the work to non-DNA cases as well. Together, these projects have formed the Innocence Network, an international network of organizations dedicated to providing free legal and investigative services to exonerate people wrongly convicted. In addition to affiliates in the United States, the Network includes institutions from Australia, Argentina, Brazil, Canada, Italy, Ireland, the Netherlands, Taiwan, and United Kingdom. <https://www.innocencenetwork.org/directory> (last accessed on July 1, 2022). For a history of the innocence movement in United States. NORRIS, Robert. *Exonerated*. *Passim*, FINDLEY, Keith. *Innocence Found: The New Revolution in American Criminal Justice*, in COOPER, Sarah (ed.). *Controversies in innocence cases in America*, Ashgate Publishing Ltd., 2014, *passim* and FINDLEY, Keith & GOLDEN, Lawrence. *The Innocence Movement, the Innocence Network, and Policy Reform*, in ZALMAN, Marvin and CARRANO, Julia (eds.). *Making justice: the innocence challenge to criminal justice policy and practice*, Taylor & Francis/Routledge Press, 2013, *passim*.

⁸ A few examples: In Canada, FPT HEADS OF PROSECUTIONS COMMITTEE. *Report on the preventing of miscarriages of justice*. 2004, *passim* and FPT HEADS OF PROSECUTIONS COMMITTEE. *The path to justice: preventing wrongful convictions*. 2011, *passim*. In Scotland CHALMERS, James; LEVERIK, Fiona; SHAW, Alasdair (editors). *Post-corroboration safeguards review report of the academic expert group*, 2014, in <https://www.webarchive.org.uk/wayback/archive/20150219141548/http://www.gov.scot/About/Review/post-corroboration-safeguards> (last accessed on July 1, 2022). In England, Wales, and Northern Ireland: THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interest of justice: an inquire into the Criminal Case Review Commission*, 2021, in <https://www.criminal-justicehub.org.uk/wp-content/uploads/2021/11/Westminster-Commission-on-Miscarriages-of-Justice-In-the-Interests-of-Justice.pdf> (last accessed on July 1, 2022).

believed and go beyond the mere theoretical possibility of error in any criminal justice system.⁹ Moreover, most errors occur because of systemic practices or structures that could be corrected if we identified them in advance. In this regard, one of the issues that has produced the most significant number of studies has been identifying factors that increase the likelihood that convictions of innocent people will occur.¹⁰ Research has shown that, when such factors are present, the probability of an error or the outright conviction of an innocent person increases significantly.¹¹

More recently, studies have arisen focusing on a different type of error, the so-called *near misses*— that is, cases in which an innocent is arrested or prosecuted, but the case is dismissed before trial or the accused

⁹ So far, we have talked about wrongful convictions as synonymous with convictions of innocent people. However, in a broader sense “wrongful conviction” encompasses various situations beyond conviction of innocents, including cases in which the conviction was based on a process with serious due process violations, incorrect application of criminal law, or a wide range of significant defects of another nature. HOYLE, Carolyn; SATO, Mai. *Reasons to doubt: Wrongful convictions and the criminal case review commission*. Oxford: Oxford University Press, 2019, p. 23. It should be noted that there is also an important debate regarding the scope of “innocence” for the purposes of understanding cases of wrongful convictions. We will not address that debate in this work as it would stray from our core goals. On this matter we recommend LEO, Richard. *Has the innocent movement become an exoneration movement? The risks and rewards of redefining innocence*. In MEDWED, Daniel (editor). *Wrongful convictions and the DNA revolution. Twenty-Five Years of Freeing the Innocent*. Cambridge: Cambridge University Press, 2017, pp. 57-83; FINDLEY, Keith. *Defining innocence*, pp. 1157-1208.

¹⁰ The literature with empirical research on the subject is also very extensive. We recommend for those starting their study an important book that presents a detailed analysis of the first 250 cases in which DNA exonerated a wrongly convicted person in the United States: GARRETT, Brandon. *Convicting the innocent*. Cambridge: Harvard University Press, 2011, *passim*.

¹¹ Until now we have spoken indistinctly of system errors and wrongful conviction, even though these concepts are different. When we speak of system errors, we refer to a much broader category of problems in the functioning of criminal justice, including innocent people wrongly convicted. Other errors, however, also belong in the category of “system errors,” such as, for example, the acquittal of the guilty, failure to prosecute crimes that have been committed, and the arrest and detention in custody during trial of innocent people without their subsequent conviction, among others.

is acquitted.¹² These cases are of particular significance because they represent those in which the system ultimately succeeded in recognizing the innocence of the accused before a conviction, but only after inflicting substantial harm on the accused. In this sense, they can be described as cases of wrongful prosecutions in which the ultimate error (a wrongful conviction) is avoided.¹³ While wrongful prosecutions do not reflect precisely the same problem as the conviction of innocents, the evidence shows that the factors causing wrongful prosecutions are similar and their effects are often equally devastating, especially in cases where they have led to pre-trial imprisonment.¹⁴

In this context, we aim to give a general overview as an introduction to this special dossier of the Brazilian Journal of Criminal Procedural Law (hereinafter, RBDPP), which contributes studies and evidence that enhance our understanding of wrongful convictions and prosecutions. This work focuses on three specific issues. In the first section, we review the main findings of the research on the incidence of wrongful convictions in the criminal justice system. The second briefly identifies the factors that increase the likelihood of wrongful conviction (or prosecution). The third presents some ideas about mechanisms that can correct wrongful convictions and, ultimately, compensate the wrongly convicted. Finally, we conclude with some brief thoughts on the works included in this special issue of the RBDPP.

1. HOW MANY WRONGFUL CONVICTIONS AND PROSECUTIONS ARE THERE?

Criminal justice systems have a natural tendency to deny the existence of wrongful convictions and prosecutions or to minimize their

¹² GOULD, Jon; CARRANO, Julia, LEO, Richard; HAIL-JARES, Katie. Predicting erroneous convictions, p. 476.

¹³ GOULD, Jon; CARRANO, Julia, LEO, Richard; HAIL-JARES, Katie. Predicting erroneous convictions, p. 476.

¹⁴ FORST, Brian. Wrongful convictions in a world of miscarriages of justice. In HUFF, Ronald.; KILLIAS, Martin (editors). Wrongful convictions & miscarriages of justice. New York: Routledge, 2013, p. 17.

significance as exceedingly rare and exceptional.¹⁵ It is therefore essential to review the evidence about the frequency of wrongful convictions and prosecutions.

While determining the number or rate of wrongful convictions is complicated and challenging, and counting wrongful prosecutions is even more difficult, various methods and strategies have been developed to estimate the scope of this problem.¹⁶

A first method has been through studies that attempt to identify a statistical error rate based on specific categories of crimes where information about wrongful convictions is available. In the United States, several authors have made efforts in this line, while acknowledging limitations to their methodologies and conclusions. In 2007, based on cases with death sentences for crimes of rape-homicide during the 1980s, Risinger concluded that the error rate for this type of case varies between 3.3% (the most conservative figure) and 5% (the highest reasonable figure).¹⁷ In 2008, based on United States death penalty cases from 1973-1989, Gross estimated an error rate between 2.3% and 5%, and in rape crimes, the percentage would rise to 3.2 and 5%.¹⁸ In 2014, Gross and others established a rate of 4.1% of wrongful convictions in death penalty cases between 1973 and 2004, considering this a conservative figure.¹⁹ Although these figures are by no means negligible, they are restricted to some categories of crimes and have important methodological limitations when extended to other categories of cases.

It is widely recognized that these estimates apply only to the most serious cases, such as rapes and murders, and that it is quite likely

¹⁵ FINDLEY, Keith. Defining innocence, p. 1158.

¹⁶ An overview in LOEFFLER, Charles; HYATT, Jordan; RIDGEWAY, Greg. Measuring self-reported wrongful convictions among prisoners, pp. 261-266; GOULD; Jon; LEO, Richard. One hundred years later: wrongful convictions after a century of research, pp. 832-836.

¹⁷ RISINGER, Michael. Innocent Convicted: An Empirically Justified Wrongful Conviction Rate, *passim*.

¹⁸ GROSS, Samuel. Convicting the innocent, p. 180.

¹⁹ GROSS, Samuel, O'BRIEN, Barbara; HU, Chen; KENNEDY, Edward. Rate of false convictions of criminal defendants who are sentenced to death, pp. 7230-7235.

that the rates of wrongful prosecution and conviction for lesser charges is substantially higher.²⁰ In the United States, emerging research has shown that negotiated procedures on less serious offenses, particularly misdemeanor cases, create a far greater risk that innocent defendants will plead guilty. Blume and Helm have asserted that the largest category of wrongly convicted people corresponds precisely to persons charged with minor offenses,²¹ and this phenomenon has been linked with the extensive use of plea bargaining in these low-severity offenses.²² There are, however, no exact figures about the magnitude of this phenomenon in the US. In part this is because less serious offenses are treated much more informally by criminal justice systems, with fewer records and monitoring. Moreover, because the sentences in lower-level cases tend to be relatively short, the incentives to appeal or seek post-conviction relief are reduced, and innocence advocacy organizations rarely devote their limited resources to those cases.²³ Accordingly, low-level cases are much less likely to be scrutinized in litigation by filing a post-conviction review petition.²⁴ Hence, the “dark figure” on wrongful convictions in

²⁰ Risinger himself, who appears very cautious about extending the results of his investigation to other crimes, states nevertheless that there were no good reasons to think that the rate was substantially different in less serious crimes given for example that the system does not invest the same efforts and resources in their clarification. RISINGER, Michael. *Innocent Convicted: An Empirically Justified Wrongful Conviction Rate*. pp. 782-788.

²¹ BLUME, John; HELM, Rebecca. *The unexonerated: factually innocent defendants who plead guilty*, p. 173.

²² FINDLEY, Keith; ANGULO, Maria Camila Angulo; HATCH, Gibson; SMITH, John. *Plea bargaining in the shadow of a retrial: bargaining away innocence*. p. 4.

²³ GROSS, Samuel. *Errors in misdemeanor adjudications*, p. 999; NATAPOFF, Alexandra. *Punishment without crime*. New York: Basic Books, 2018, p. 89. FINDLEY, Keith. *Reducing Error in the Criminal Justice System*, p. 1292.

²⁴ NATAPOFF, Alexandra. *Misdemeanors*, p. 118; KING, John. *Beyond ‘life and liberty’: the evolving right to counsel*, p. 22. An extreme case is Chile since a post-conviction review cannot be requested in misdemeanors punished with sentences of up to 60 days of deprivation of liberty (article 473 of the Code of Criminal Procedure). In the same direction, dealing with Switzerland, Gilliéron argues it is highly probable that there are many more wrongful convictions than those discovered by the research because it is possible to assume a high percentage of convicted persons waive their right to file an objection. GILLIÉRON, Gladys. *Comparing plea bargaining and abbreviated trial procedures*. In BROWN, Darryl; TURNER, Jenia; WEISSER, Bettina. *The*

minor cases remains unknown, but undoubtedly is much higher than in serious cases.²⁵

Indeed, due to the high number of misdemeanors prosecuted each year, the enhanced likelihood of pleading guilty just to end the prosecution (often in return for immediate freedom) and avoid the risks of greater punishment, and the comparatively lax oversight in such cases, the United States undoubtedly faces a massive problem in low-level cases.²⁶ For instance, relying on data from the National Registry of Exonerations between 1989 and 2017, Gross identifies that about 80% of the exonerated misdemeanors cases were based on a guilty plea, comparing it with 16% in felonies.²⁷ On the other hand, nationwide, more than 95% of all convictions for misdemeanors are produced by a guilty plea.²⁸

Additionally, the problem is not exclusive to the United States and has generated growing concern and debate in Europe. Killias has argued that expanding the scope of simplified procedures (usually intended for less serious offenses) could cause many wrongful convictions²⁹ because negotiations are permitted in these procedures, increasing the likelihood of convicting an innocent.³⁰ This is consistent with Chile's data. In Chile, the so-called simplified procedure, which applies to medium or low-severity crimes (punished with penalties of up to 540 days of

Oxford Handbook of Criminal Process. Oxford: Oxford University Press, 2019, p. 724.

²⁵ Gross points out that wrongful convictions in misdemeanors are almost undetectable even though they are likely to be much more frequent than in ordinary crimes. GROSS, Samuel Gross. *Convicting the innocent*. p. 180.

²⁶ For example, it is estimated that in 2008 80% of the total cases handled by state criminal courts were misdemeanor (usually punishable by fines or short-term custodial sentences). NATAPOFF, Alexandra. *Misdemeanor*, p. 103.

²⁷ GROSS, Samuel. *Errors in misdemeanor adjudications*, p. 1009.

²⁸ NATAPOFF, Alexandra. *Punishment without crime*, p. 109.

²⁹ KILLIAS, Martin. *Wrongful convictions in Switzerland*. In HUFF, Ronald Huff; KILLIAS, Martin (eds.). *Wrongful convictions: international perspectives on miscarriages of justice*. Philadelphia: Temple University Press, 2010, p. 144.

³⁰ KILLIAS, Martin. *Errors occur everywhere-but not at the same frequency*. In HUFF, Ronald; KILLIAS, Martin Killias (Eds.), *Wrongful convictions and miscarriages of justice: Causes and Remedies in North American and European Criminal Justice Systems*, p. 66.

deprivation of liberty, including fines), produces a substantial proportion of all convictions (e.g., 42.2% in 2016). Data from 2006 to 2016 show that 93% of these proceedings would conclude by defendant's admission of responsibility, leading to a subsequent conviction (in 99% of those cases). Research on Chile's post-conviction review mechanism shows that the most significant number of exonerations are connected to convictions obtained in simplified procedures with the defendant's admission of responsibility (64.5% in 2007-2016).³¹

A second method to identify wrongful convictions is to record individual cases by systematically recording cases where an exoneration has occurred. This method cannot provide a full quantitative accounting of the problem, because it depends on the ability to identify and count all wrongful convictions, while most wrongful convictions remain hidden. Nonetheless, the method is valuable because it provides an image of reality and a body of known exonerations that can be studied to identify patterns and contributors to the problem.³² Again, the renowned databases worldwide are those in the United States. The most extensive one is the database of the National Registry of Exonerations (NRE), which records all known cases of people convicted and then exonerated by every method (not exclusively DNA), starting in 1989. At the end of June 2022, it listed 3.176 cases.³³ Other countries admire the NRE, and some claim the need to implement similar initiatives.³⁴

³¹ DUCE, Mauricio. *Procedimientos abreviados y simplificados y la condena de inocentes en Chile: algunas propuestas para prevenir y minimizar los riesgos*. In Javier Velásquez and Alejandro Fernández (Eds.), *Temas actuales de Derecho Penal y Procesal Penal a 20 años del inicio de la Reforma Procesal Penal*. Valencia: Tirant lo Blanch, 2022, p. 72.

³² For instance, the Innocence Project in the United States only records the cases of exonerations in which it has participated since 1992 (375 as of January 2020), which is much lower than the total number of known exonerations in that country during the same period. <https://innocenceproject.org/research-resources/> (last accessed on July 1, 2022).

³³ <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last accessed on July 1, 2022).

³⁴ Speaking for the Italian case, but with projections for the whole of Europe: LUPARIA, Luca; GRECO, Chiara. *Unveiling wrongful convictions between U.S. and Italy: cross-learning from each other mistakes*, pp. 118-120.

Some other countries have other types of registries of exonerated cases, even if they lack the systematic nature and goals of the NRE. For example, the Criminal Cases Review Commission in England, Wales, and Northern Ireland record that between April 1997 (its creation) and May 2022, it ordered 792 cases be referred to the Courts of Appeal due to a suspicion of wrongful convictions. Of these, appeals were admitted on 540 occasions (117 awaiting consideration and 217 dismissed).³⁵ Luparia and Pitturuti's list reports 191 cases of wrongful convictions in Italy between 1991 and 2019.³⁶ In Chile, one of the authors collected data from judicial post-conviction reviews resolved by the Supreme Court between 2007 and 2020 (October) and identified 57 cases in which the Court accepted the petitions, declaring that people convicted in a final judgment under the new adversarial system were innocent.³⁷

While the number of cases registered in several countries is by no means negligible, this is not a good measure of the actual scope of the problem. Anecdotal evidence covers only a tiny portion of the cases in which the system may have erred. For example, where errors occur without a conviction, such as wrongful prosecutions,³⁸ there is generally no legal means for challenging those prosecutions and no way to find and catalogue them. Moreover, even after conviction, cases will not be counted in the registries if the convicted person, despite actual innocence, is unable to find the evidence needed to prove their innocence

³⁵ <https://ccrc.gov.uk/facts-figures/> (last visited on July 1, 2022).

³⁶ LUPARIA, Luca; PITTIRUTI, Marco. Post-conviction remedies in the Italian criminal justice system. *Erasmus Law Review* No. 4, 2020, p. 63.

³⁷ It should be noted that other applications were also admitted during the same period, but they dealt with cases adjudicated under the previous inquisitorial system and therefore were not analysed. There were two additional cases in which the Supreme Court admitted the post-conviction review in the current adversarial procedure but in which there was not a statement of factual innocence by the Court. DUCE, Mauricio. La corrección de condenas erróneas en el ámbito comparado: análisis de algunos ejemplos para alimentar el debate en Chile, p. 315.

³⁸ For instance, in Italy on the period 1991-2018, Luparia and Greco identified around 27,500 cases of "unjust detentions," meaning cases in which an individual was held in pre-trial detention and afterward was acquitted of all charges. LUPARIA, Luca; GRECO, Chiara. Unveiling wrongful convictions between U.S. and Italy: cross-learning from each other mistakes. *Wrongful Convictions Law Review* vol. 1, 2020, p. 102.

according to the standard required. Indeed, the comparative literature recognizes this limitation—that cases of formal exoneration are only the tip of the iceberg of a much larger problem. For a variety of reason, including access barriers, many cases never reach the kind of formal resolution required for inclusion in a registry.³⁹ In addition, not even all exonerations are counted in the databases or registries of exoneration; even in cases in which a person manages to navigate the process and achieve exoneration, the exoneration will be recorded and counted only if a registry finds the case, and many such cases, particularly those involving minor offenses, generate little or no publicity of the type necessary to get the attention of a registry.

A third methodology to approach the number of wrongful convictions is through surveys of actors in the criminal justice system in which they estimate the percentage of cases of wrongful conviction. Such survey data produces estimated error rates ranging from 0.5% to 10%.⁴⁰ As Gross points out, while these are significant results, the criminal justice system actors who produce these estimates are also hampered by access to little systematic information on the subject, so their estimates tend to be constructed with gross assumptions of reality.⁴¹

Finally, a fourth methodology is surveying convicted people to measure their self-reporting of innocence. In the most recent report of this type, published in the United States in 2019, one-third of the prisoners declared that they were wrongfully convicted, but only 8% made a claim of factual innocence. Only 6% made a consistent and plausible claim. The results showed an important level of variability depending on the type of crime. For instance, the lowest percentage was in DUI with 2% and the highest was rape convictions, at 40%.⁴²

³⁹ FINDLEY, Keith. *Adversarial inquisitions: rethinking the search for the truth*, p. 918.

⁴⁰ LOEFFLER, Charles; HYATT, Jordan; RIDGEWAY, Greg. *Measuring self-reported wrongful convictions among prisoners*, pp. 263-264.

⁴¹ GROSS, Samuel. *How many false convictions are there? How many exonerations are there?* In HUFF, Ronald; KILLIAS, Martin (editors). *Wrongful convictions & miscarriages of justice*. New York: Routledge, 2013, p. 48.

⁴² LOEFFLER, Charles; HYATT, Jordan; RIDGEWAY, Greg. *Measuring self-reported wrongful convictions among prisoners*, p. 261.

In summary, while there are enormous difficulties in accurately establishing a percentage of wrongful convictions, such errors are not just occasional accidents in criminal justice systems. Especially if we add to this phenomenon the cases of wrongful prosecutions, we face an issue that must be the subject of enormous concern.

2. WHAT DO WE KNOW ABOUT THE FACTORS THAT INCREASE THE LIKELIHOOD OF WRONGFUL CONVICTIONS AND PROSECUTIONS?

In the comparative field, one of the most deeply researched topics has been inquiries into the factors that are correlated with wrongful convictions. In the United States, a broad consensus has emerged that there are six main factors: (1) mistaken eyewitness identifications (2) flawed expert and forensic evidence; (3) false confessions (including false guilty-plea); (4) unreliable or untruthful witnesses; (5) misconduct of prosecutorial agencies; and (6) inadequate legal representation of those convicted.⁴³ To those, many commentators offer a seventh factor, which applies in virtually all cases alongside one or more of these other six discrete contributors—the problem of tunnel vision, principally driven by cognitive biases (but also exacerbated by various systemic features).⁴⁴ The evidence also shows that no single factor is responsible; several commonly converge in accredited wrongful conviction cases. Thus,

⁴³ We point out that the literature on this subject is extensive. In addition to Garrett's work, we recommend REDLICH, Allison; ACKER, James; NORRIS; Robert; BONVENTRE, Catherine. *Examining wrongful convictions: stepping back, moving forward*. Durham: Carolina Academic Press, 2014, *passim*; COOPER, Sarah Lucy. *Controversies in innocence cases in America*. Burlington: Ashgate, 2014, *passim*; TURVEY, Brent; COOLEY, Craig. *Miscarriages of justice: actual innocence, forensic evidence and the law*. United States: Academic Press, 2014, *passim*; ZALMAN, Marvin; CARRANO, Julia. *Wrongful convictions and criminal justice reform*. New York: Routledge, 2014, *passim*; CUTLER, Brian. *Conviction of the innocent: lessons from psychological research*. Washington DC: American Psychological Association, 2012, *passim*. We also recommend the Innocence Project and NRE website on this matter.

⁴⁴ FINDLEY, Keith, & SCOTT, Michael. *The multiple dimensions of tunnel vision in criminal cases*, *passim*.

the conviction of innocent people and the most paradigmatic cases are explicable because of several issues that arise simultaneously.⁴⁵

As can be seen, four of these factors relate to the use of evidence in the criminal process that, for different reasons, can lead to erroneous decisions (1 to 4). Two are associated with institutional behaviors that can be decisive in causing errors (5 and 6). And the seventh relates to both. Considering this, strategies that attempt to minimize the probability of wrongful convictions should aim to improve the quality of evidence and the quality of the work of the institutions and actors involved in criminal justice.

There is growing comparative evidence from countries on different continents that mirrors the research from the United States. It is beyond the scope of our project to undertake an in-depth global examination of the research. But we can and do reference examples from various nations in multiple continents, such as England⁴⁶ and Italy⁴⁷ in Europe; Canada⁴⁸ in North America; China⁴⁹ in Asia; Chile⁵⁰ in Latin America; and Australia⁵¹ in Oceania. In all of the examples the evidence shows to varying degrees that the factors described for the United States are also present in documented wrongful convictions around the world.

⁴⁵ SIMON, Dan. In doubt: the psychology of the criminal justice process. Cambridge: Harvard University Press, 2012, p. 7. Simon adds that although in some cases the set of factors can occur by chance, in the vast majority he suspects that they arise rather as a product of the dynamics of the police investigation process. He states that from an investigative error a cascade of other problems can follow that end in the conviction of an innocent person.

⁴⁶ NAUGHTON, Michael. The innocence & the criminal justice system: a sociological analysis of miscarriage of justice. Palgrave MacMillan, 2013, *passim*.

⁴⁷ LUPARIA, Luca (Ed.) L'Errore Giudiziario. Milano: Giufree Francis Lefebvre, 2021, *passim*. LUPARIA, Luca; GRECCO, Chiara. Unveiling wrongful convictions between U.S. and Italy: cross-learning from each other's mistakes. *Passim*.

⁴⁸ CAMPBELL, Kathryn. Miscarriages of justice in Canada. Toronto: University of Toronto Press, 2018, *passim*.

⁴⁹ JIAHONG, He. Back from the dead: wrongful convictions and criminal justice in China. Honolulu: University of Hawai'i Press, 2016, *passim*.

⁵⁰ DUCE, Mauricio. ¿Debiéramos preocuparnos de la condena de inocentes en Chile? Antecedentes comparados y locales para el debate, pp. 77-138.

⁵¹ WEATHERED, Lynne. Wrongful convictions in Australia, pp. 1398-1400.

This suggests that wrongful convictions do not appear to be solely a consequence of a particular criminal procedural model or tradition; instead, they are a universal structural problem in the functioning of criminal justice systems. While that much can be gleaned from the research, it is important to note that the level of knowledge about how these factors operate varies from country to country, and there is still an essential need for further empirical research to understand the different realities better.

An interesting ongoing methodological debate has emerged in the United States about the limitations of the published studies that identify risk factors only from cases of wrongful convictions to explain the causes of errors. The bias in establishing a causal link from samples based on exoneration cases poses a potential problem.⁵² For this reason, interesting empirical research has been done in which researchers simultaneously examine cases of wrongful convictions and so-called *near misses*. The idea of these investigations is to verify what happens in cases where the criminal justice systems discovered the errors before a conviction and to compare these cases with those in which that did not happen. The results of this line of research confirm that the factors mentioned above increase the probability of system error, but the research has also added new factors to consider. These include factors like the punitive culture of the state in which the innocent is convicted, the existence of the convicted person's prior criminal records, and the defendant's age, among others.⁵³

It is impossible to analyze these factors in detail in this introduction. The available evidence is extensive and complex for each one, encompassing studies ranging from case studies to scientific evidence that analyzes the phenomena that influence the generation of the respective factor. As an example, we briefly review the role of expert and forensic

⁵² GOULD, Jon; CARRANO, Julia, LEO, Richard; HAIL-JARES, Katie. Predicting erroneous convictions, *passim*.

⁵³ The main research in this new line of work is a study financed by funds from the National Institute of Justice of the United States. The study involved the analysis of 460 cases (260 of the conviction of innocent persons and 200 near misses) that took place between 1980 and 2012. GOULD, Jon; CARRANO, Julia, LEO, Richard; HAIL-JARES, Katie. Predicting erroneous convictions, *passim*.

evidence, as it represents a good illustration of the types of problems that have led to wrongful convictions and prosecutions and how research has helped us to understand the complexity of such problems.

The data from the Innocence Project show consistently over time that the improper use of expert evidence is one of the most relevant factors in cases of wrongful convictions, present in about 52% of the cases in which a convicted person was exonerated by DNA evidence.⁵⁴ According to the NRE database, the use of expert evidence is also one of the main factors contributing to the production of all types of wrongful convictions, not just those with DNA evidence, found in 24% of the cases.⁵⁵ This coincides with the information available in other countries, although though these other countries lack such precise statistical data.

The available evidence also helps identify the main problems in using expert evidence that explains its impact on wrongful convictions. We mention three of them. The first is the tendency of criminal justice systems to use a set of low-reliability experts and forensic evidence, which generally occurs because many of the forensic disciplines employed in criminal prosecutions have little methodological or scientific rigor. For some of these disciplines, the Anglo-Saxon literature groups these cases under the notion of “Junk Science.”⁵⁶ These are cases with expert evidence that projects an aura of scientific or methodological rigor that it does not really possess. Consequently, use of this evidence leads judges or juries to reach erroneous conclusions in their final decisions. A central contribution from the scientific community on this issue has come from work by the National Academy of Sciences (NAS) of the United States. In 2009, the NAS’s National Research Council published a report intended

⁵⁴ <https://innocenceproject.org/exonerations-data/> (last accessed, July 1, 2022).

⁵⁵ <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last accessed July 1, 2022).

⁵⁶ Thomas explains how this term became popular in the United States through a work published by Peter Huber in 1991. Thomas describes junk science as “the mirror image of real science, with much of the same form but none of the same substance”. THOMAS, Sabra. *Addressing Wrongful Convictions: An Examination of Texas’s New Junk Science Writ and other Measures for Protecting the Innocent*, p. 1039. Using the term in the same direction, FABRICANT, Chris. *Junk science and the criminal justice system*. Brooklyn: Akashic Books, 2022, p. 26.

to assess and improve the quality of forensic sciences, identified severe deficiencies in forensic work in areas of common use in criminal courts, particularly so-called pattern-matching disciplines such as bite marks analysis, microscopic analysis of hairs, the marks of shoe prints, voice comparisons, and even the use of fingerprints. The report established that these disciplines have reliability problems due to inadequate validation in the scientific research on which they are based.⁵⁷ In short, such evidence has a weak and debatable scientific basis. It is not surprising that if regularly used expert evidence has no real scientific support, such evidence could be an engine of erroneous decisions. This report has been confirmed by subsequent reports in the United States⁵⁸ and other institutions in other countries.⁵⁹

A second problem identified in the comparative literature is what Garrett and Neufeld describe as “invalid” forensic testimony.⁶⁰ By this they refer to experts, even those belonging to disciplines that do not have significant reliability problems, who at trials tend to make statements and reach conclusions that have no empirical support in their respective discipline. Invalid testimony arises in two ways: improper use of empirical data about the general population (e.g., testifying that “11% of the population ... could have been the semen donor [in a rape case], when in fact 100% of the population could have been the donor”), and conclusions about the probative value of the respective evidence that had no support in the empirical evidence (e.g., “where the analyst opined that the particular reddish-yellow hue of [the suspect’s] hair and the crime scene hair were found in ‘about 5 percent of the population,’” when no

⁵⁷ NATIONAL RESEARCH COUNCIL. *Strengthening forensic science in the United States: a path forward*. Washington D.C.: The National Academies Press, 2009, pp. 1-33.

⁵⁸ PRESIDENT’S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY (PCAST). *Forensic science in criminal courts: ensuring scientific validity and feature comparison methods*. Washington D.C, 2016, passim.

⁵⁹ EDMOND, Gary. Forensic science evidence, adversarial criminal proceedings, and mainstream scientific advice. In BROWN, Darryl; TURNER, Jenia; WEISSER, Bettina. *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, pp. 778-780.

⁶⁰ GARRETT, Brandon; NEUFELD, Peter. *Invalid Forensic Science Testimony and Wrongful Convictions*, pp. 7-8.

data supported that claim).⁶¹ In other words, the problem is how the experts interpret and report the results obtained in their operations when testifying.⁶² Again, it is obvious that, where invalid testimony is given, the risk of making wrong decisions is significantly increased.

A third problem relates to the behavior of experts working for criminal justice systems. This includes as a first dimension the *bad apple* cases. This refers to experts who take deliberate actions to produce error, such as not disclosing to the defendant evidence favorable to their case, fabricating forensic evidence against them, and presenting unsupported forensic opinions in order to assist the police or prosecutors improperly.⁶³ While there are cases of extremely serious misbehavior documented in several countries where some experts have had a decisive influence on dozens or hundreds of cases over several years of work, there is some debate about the actual scale of the problem.⁶⁴ In 2011, Garrett detected that about 14% of the cases analyzed from the database of the innocent project included failures in the discovery of exculpatory evidence or the plain fabrication of evidence.⁶⁵ Although this is not the majority of cases, it is a significant figure that should be cause for concern. Moreover, while “bad apples” are a serious concern, any analysis of error in criminal cases must recognize that simply rooting out bad apples will not solve even the “bad apples” problem. As egregious as is forensic misbehavior, that kind of fraud does not arise in a vacuum. Such fraud can arise only

⁶¹ GARRETT, Brandon; NEUFELD, Peter. *Invalid Forensic Science Testimony and Wrongful Convictions*, p. 9. A more recent and detailed explanation on this problem GARRETT, Brandon. *Autopsy of a crime lab: exposing the flaws in forensic*. Oakland: University of California Press, 2021, pp. 76-93. See also FINDLEY, Keith. The absence of misuse of statistics in forensic science as a contributor to wrongful convictions: from patten matching to medical opinions about child abuse. *Dickinson Law Review* vol. 125 No. 3, 2021, pp. 615-652.

⁶² GARRETT, Brandon; NEUFELD, Peter. *Invalid Forensic Testimony and Wrongful Convictions*, pp. 6-8.

⁶³ NAUGHTON, Michael. *The Innocence & the criminal justice system*, p. 65.

⁶⁴ An excellent summary of major cases and various scandals in the United States arising from the misbehavior of experts and the work of laboratories can be found at GUERRA THOMPSON, Sandra. *Cops in lab coats*. Durham: Carolina Academic Press, 2015, pp. 35-81.

⁶⁵ GARRETT, Brandon. *Convicting the innocent*, p. 108.

in systems and institutional structures that *permit*, or sometimes even encourage, such misbehavior. Even for the bad apples problem, systemic reform is needed.

A second dimension concerning the problematic behavior of the experts is even more systematic and, therefore, more widespread. A large body of evidence shows that forensic analysts and expert witnesses of different kinds can be led astray by significant cognitive biases.⁶⁶ These innate biases affect the quality and reliability of an expert's opinions and conclusions. Again, some of these biases are permitted, even exacerbated, by institutional structures, such as systems that expose analysts to task-irrelevant but prejudicial information, or that lead forensic analysts to perceive their role as aligned with law enforcement. Dror describes the impact of such biases in this way: "Biases can impact the actual observation and perception of the data, testing strategies, as well as how the results are interpreted and how conclusions are reached."⁶⁷ A systematic review of the literature on cognitive biases in forensic disciplines published in 2019 identified 29 research studies. It concluded that the available research constitutes a robust database that supports forensic sciences practitioners' susceptibility to various types of cognitive biases.⁶⁸

Different sources produce experts' and forensic analysts' cognitive biases. It is not possible to review them all in this brief article. For example, as noted, robust evidence indicates that the exposure to task-irrelevant or prejudicial information that is not required to form the expert opinion could potentially affect the reliability and accuracy of an opinion and conclusions.⁶⁹ In addition, not only the type of

⁶⁶ Cognitive bias could be described as unconscious beliefs and inadvertent but predictable mental tendencies that can impact perception, memory, reasoning, and behavior and that influence our decision-making processes. METERKO, Vanessa; COOPER, Glinda. Cognitive bias in criminal case evaluation, p. 1.

⁶⁷ DROR, Itiel. Cognitive and human factors in expert decision making: six fallacies and the eight sources of bias, p. 7998.

⁶⁸ COOPER, Glinda; METERKO, Vanessa. Cognitive bias in forensic science: a systematic review, pp. 35-46.

⁶⁹ KASSIN, Saul; DROR, Itiel; KUKUCKA, Jeff. The forensic confirmation bias: problems, perspectives, and proposed solutions, pp. 45-48; EDMOND, Gary;

information the analysts access is important, but also the order or the sequence in which the information is presented plays a critical role in the quality of decision-making processes and outcomes.⁷⁰ Task irrelevant information could affect the collection of information, the selection of adequate procedures, and then the analysis and evaluation from an expert. This can have a decisive impact on the quality and reliability of an expert opinion. Again, a link to the likelihood of increasing wrong decisions is evident.

While accumulated experience with and research about expert evidence enhances our understanding of some of the ways criminal justice systems produce wrongful convictions, it also highlights the enormous research challenges we face to better understand the problem and, in turn, design policies to reduce errors. In this regard, it illustrates the complexity of addressing measures to minimize the impact of this type of evidence on wrongful convictions. For example, the problem of cognitive bias has generated enormous debate on the need to introduce profound reforms to forensic laboratories, including their work processes and protocols, measures to ensure their quality controls (addressing aspects such as institutional accreditation, individual certification of forensic analysts and periodical proficiency testing), and their institutional location (e.g., independence from law enforcement agencies), among others.⁷¹ Addressing these issues will require legal reforms, institutional changes, and the development of complex public policies.

TANGEN, Jason; SEARTSON, Rachel; DROR, Itiel. Contextual and cross-contamination in the forensic sciences: the corrosive implications for investigations, plea bargains, trials and appeals, pp. 1-25.

⁷⁰ DROR, Itiel; KUKUCKA, Jeff. Linear sequential unmasking-expanded (LSU-E): a general approach for improving decision making as well as minimizing noise and bias, p. 1.

⁷¹ NATIONAL RESEARCH COUNCIL. Strengthening forensic science in the United States: a path forward, pp. 183-216; GUERRA THOMPSON, Sandra. Cops in lab coats, pp. 181-204; GARRETT, Brandon. Autopsy of a crime lab: exposing the flaws in forensic, pp. 196-206; KASSIN, Saul; DROR, Itiel; KUKUCKA, Jeff. The forensic confirmation bias: problems, perspectives, and proposed solutions, pp. 48-50; GIANELLI, Paul. Independent crime laboratories: the problem of motivational and cognitive bias, pp. 247-266.

3. THE CORRECTION OF AND COMPENSATION FOR WRONGFUL CONVICTIONS

Even if a criminal justice system succeeds in errors, some wrongful convictions are inevitable. Thus, it is necessary to address issues that have been the subject of somewhat less concern and study at the comparative level; these are the mechanisms available to correct wrongful convictions and the systems for compensating exonerees. From a global perspective, these are issues on which a great deal of research and policy reform is required if criminal justice systems are to become more sensitive to the problem and take its consequences seriously. For this reason, this section will briefly present some of the problems experienced in both areas and some new developments in the comparative experience that could help to overcome them.

3.1. MECHANISMS TO CORRECT WRONGFUL CONVICTIONS

There is no single model of how to approach the correction of wrongful convictions, both in terms of mechanisms or procedures and substantive criteria for vacating a conviction, even within the context of a particular legal tradition such as the Anglo-Saxon world.⁷² Historically, different systems have employed various approaches to providing post-conviction relief. For instance, some systems have assigned the function of correcting convictions to the executive branch, while others leave it to a judicial body. And different systems have developed different substantive standards for such review.

In the continental tradition, the general tendency has been to hand over to some judicial body the decision to reverse a conviction when *res judicata* would otherwise bar review. This is done through the mechanism usually known as the review action or remedy (*acción de revisión*). This is a mechanism whose original design dates back several centuries and

⁷² ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems. In: BROWN, Darryl; TURNER, Jenia; WEISSER, Betina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, pp. 961-962; CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, p. 268.

which was later enshrined in the criminal justice reforms that began in the 19th century, paradigmatically in the French Napoleonic code of 1808, which was very influential in the rest of Europe, in countries such as Spain and Italy, and then in Latin America.⁷³ The central hypothesis that has enabled this action to proceed is that relief should be granted to a convicted person who can prove with new evidence that he was factually innocent of the crime for which he was originally convicted.

In the Anglo-Saxon world, the mechanisms have traditionally been more diverse. For example, in the United States, various post-conviction procedures exist that permit a convicted person to present the court in which the conviction was obtained (like the systems prevailing in continental Europe) with new evidence supporting a claim of factual innocence (although most of these procedures do not require the defendant to prove actual innocence, but rather simply that the new evidence would create a probability of an acquittal at a retrial).⁷⁴ Other examples of different institutional arrangements are noteworthy because they have been modified relatively recently. New Zealand's historical system (now reformed as we shall see) relied on an administrative body requesting the Governor General to exercise a royal prerogative of clemency.⁷⁵ In England, on the other hand, before its reform, the procedure employed a mixed or hybrid system, in which the Home Secretary was responsible initially for determining whether to refer a case to the criminal division of the Court of Appeal for ultimate review, in cases decided by a Crown Court.⁷⁶

⁷³ DUCE, Mauricio. La corrección de condenas erróneas en el ámbito comparado: análisis de algunos ejemplos para alimentar el debate en Chile, pp. 316-317.

⁷⁴ ROBERTS, Stephanie. Post-conviction procedure: the next frontier in innocence reform. In MEDWED, Daniel. *Wrongful convictions and the DNA revolution: twenty-five years of freeing the innocent*. Cambridge: Cambridge University Press, 2018, pp. 252-256.

⁷⁵ CORMACK, Tracey. *The criminal case review commission*, p. 93.

⁷⁶ NOBLES, Richard; SCHIFF, David. After ten years: an investment in justice. In: NAUGHTON, Michel (ed.). *The Criminal Case Review Commission: hope for the innocents?*. United Kingdom: Palgrave Macmillan, 2012, p. 151; ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems, p. 963; THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice: an inquiry into the Criminal Case Review Commission*. United Kingdom, 2021, p. 18.

A similar procedure existed in Scotland, where the Secretary of State had to be approached first.⁷⁷

A constant in both the Anglo-Saxon and continental worlds is that the traditional mechanisms do not seem to have been sufficient to deal with the magnitude of the problem generated by wrongful convictions, allowing only a tiny portion of them to have a real chance of meaningful review. This in part explains why the exonerations achieved to date through these mechanisms represent only the tip of the iceberg.⁷⁸ These inadequacies of these mechanisms include problems such as barriers to access to these mechanisms (including costs and their highly technical procedures), as well as difficulties arising from the high standards required to obtain exoneration. The restricted nature of these traditional mechanisms was likely due to a lack of awareness of the problem of wrongful convictions; these mechanisms all developed in an era when wrongful convictions were believed to be very exceptional, anomalous, and almost freakishly rare. Their permanence over time seems to reflect that criminal justice systems have placed more emphasis on protecting the finality of the system's decisions rather than on justice or truth.

In recent decades, the new awareness of the scope and nature of the innocence problem has argued strongly for the reviewing and revising these traditional correction mechanisms. Thus, for example, in continental Europe, at the legislative and judicial level, the mechanisms for the review of wrongful convictions have become more flexible, admitting exonerations in cases where the convicted person can prove their innocence and also when there is evidence that casts doubt on the original conviction.⁷⁹ Some nations have thus made progress in abandoning factual innocence as the main ground that allows the review of final

⁷⁷ CHALMERS, James; LEVERICK, Fiona. *The Scottish Criminal Case Review Commission and its referrals to the appeal court: the first 10 years*, p. 609.

⁷⁸ Examples from two countries again support this claim: in the United States: GARRETT, Brandon. *Convicting the innocent*, pp. 11-12; in Italy: LUPARIA, Luca; PITTIRUTI, Marco. *Post-conviction remedies in the Italian criminal justice system*, p. 63.

⁷⁹ *Reviewing the evolution in Spain but with references to the developments of Italy, Germany, and other European countries*: DUCE, Mauricio. *La corrección de condenas erróneas en el ámbito comparado: análisis de algunos ejemplos para alimentar el debate en Chile*, pp. 322-326.

convictions, instead, moving in the direction of understanding that errors must be understood in a much broader sense.⁸⁰

Looking more broadly at the comparative level, some jurisdictions have embarked on significant experimentation with new mechanisms to deal with the long-standing problem of wrongful convictions. For example, one of the most recent experiences has been the development of “conviction integrity units” (CIUs). This alternative has emerged in the United States in the last 15 to 20 years and represents a response from some prosecutors to the problem of erroneous convictions, suggesting a complementary, rather than wholly adversarial, approach to criminal cases. CIUs consist of internal units within the prosecutors’ offices to investigate ex officio or at the request of a convicted person in cases where there is suspicion that an innocent person may have been convicted.⁸¹ A detailed analysis of the central elements of their design and the impact they have on reversing wrongful convictions cannot be addressed in this text, but it is worth mentioning that this is a type of strategy that is beginning to produce results⁸² and receive increasing attention beyond the borders of the United States.⁸³

Another example, more consolidated in comparative terms, has been the creation of innocence commissions. These have been established for many different purposes, but in this paper, we focus on those whose primary function is to investigate potential cases of wrongful convictions and then allow for their re-examination and review.⁸⁴ This strategy is

⁸⁰ NAN, Joost; LESTRADE, Sjarai. Towards a European right to claim innocence?, p. 1334.

⁸¹ HOLLWAY, John. *Conviction integrity units: a national perspective*. United States of America: University of Pennsylvania Law School, 2016, *passim*; SCHECK, Barry. Conviction integrity units revisited, pp. 705-753.

⁸² According to the annual report of the NRE in 2020, conviction integrity units were involved playing a crucial role in 61% of the exonerations registered that year. NATIONAL REGISTRY OF EXONERATIONS. Annual Report 2020. p. 1.

⁸³ For example, it has recently been proposed as an interesting innovation to introduce in Italy. LUPARIA, Luca; GRECO, Chiara. Unveiling wrongful convictions between the U.S. and Italy: Cross-learning from each other’s mistakes, pp. 118-121.

⁸⁴ In the case of the United States, Cooper identifies commissions with three different objectives: (1) correcting errors; (2) propose systemic reforms; and

beginning to have an impact in Anglo-Saxon and continental countries. The emergence of the commissions can be traced back to the 1990s in similar contexts: the discovery of high-profile cases of innocent people convicted, which led to questioning of the current institutional framework and debate on the need for more effective mechanisms to deal with the problem.⁸⁵

The first to be created were those of England, Wales, and Northern Ireland in 1997,⁸⁶ Scotland in 1999 (SCCRC),⁸⁷ and Norway in 2004 (NCCRC).⁸⁸ Subsequently, the first commission of this type was incorporated in the United States in the state of North Carolina, called the North Carolina Innocence Inquiry Commission (NCIIC) in 2006⁸⁹ and,

(3) developing integrity programs. COOPER, Sarah. Innocence commissions in America: ten years after. In: COOPER, Sarah (ed.). *Controversies in innocence cases in America*. England: Routledge, 2014, pp.198-200. A synthetic review of several models can be seen at CAMPBELL, Kathryn. *Miscarriages of justice in Canada*, pp. 281-286.

⁸⁵ For the cases of England, Wales, Northern Ireland, Scotland, North Carolina, and Norway see CAMPBELL, Kathryn. *Miscarriages of justice in Canada*, pp. 268-286. Without Norway, but including Canada and Australia, see: ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems, pp. 961-990. For England, Wales and Northern Ireland, see: HODGSON, Jacqueline. *The metamorphosis of criminal justice: a comparative account*. Oxford: Oxford University Press, 2020, pp. 280-338.

⁸⁶ <https://ccrc.gov.uk/> (last accessed, July 1, 2022); BELLONI, Rank; HODGSON, Jacqueline. *Criminal injustice: an evaluation of the criminal justice process in Britain*. Great Britain: Palgrave, 2000, pp. 185-195; ELKS, Laurie. *Righting miscarriages of justice? ten years of criminal case review commission*. London: Justice, 2008, *passim*; NAUGHTON, Michael. *The Innocent and the Criminal Justice System*, pp. 162-190; HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission, *passim*; THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice: an inquiry into the Criminal Case Review Commission*, pp. 9-10.

⁸⁷ <http://www.sccrc.co.uk/> (last accessed, July 1, 2022); CHALMERS, James; LEVERICK, Fiona. The Scottish Criminal Case Review Commission and its referrals to the appeal court: the first 10 years, *passim*.

⁸⁸ <https://www.gjenoptakelse.no/en/> (last accessed, July 1, 2022); STRID-BECK, Ulf; MAGNUSSEN, Philos Svein. Prevention of wrongful convictions: Norwegian criminal safeguards and the criminal case review commission, p. 268.

⁸⁹ <http://innocencecommission-nc.gov/> (last accessed, July 1, 2022); COOPER, Sarah. Innocence commissions in America: ten years after, pp.

more recently, in New Zealand (NZCCRC), which began its functions on July 1, 2020.⁹⁰ There are also advanced proposals for the implementation of similar commissions in Australia⁹¹ and Canada.⁹²

With some differences, the configuration and work of these commissions can be summarized as follows: they are independent bodies whose main function is to receive complaints from convicted persons, investigate those complaints, and then, if they meet the requirements of the respective legislation, forward them to the courts for reopening and eventual exoneration. The scope of action usually covers convictions of innocent people and all types of wrongful convictions generated by various causes.⁹³ Consequently, the focus of the commissions has not been to replace the judicial system in the review of cases but rather to create a public body that can ensure independence and that has investigative powers to review and prepare potential cases of wrongful convictions, providing an opinion on them, but leaving the final power of decision in the hands of the courts.

These commissions' objectives have been to generate greater independence of the body analyzing the cases, raise the standards of

197-217; MUMMA, Christine. The North Carolina innocence inquiry commission: catching cases that falls through the cracks. In: ZALMAN, Marvin; CARRANO, Julia (eds.). *Wrongful convictions and criminal justice reform*. New York: Routledge, 2014, pp. 249-265.

⁹⁰ <https://www.cccr.nz/> (last accessed, July 1, 2022).

⁹¹ KIRBY, Michael. A new right of appeal as a response of wrongful convictions: it is enough?, pp. 299-305.

⁹² For some time now, the Canadian Ministry of Justice has committed to the creation of a Commission for which it has commissioned various consultations and technical opinions. One of the most recent was an expert report in December 2021, which identified the need to create a commission that would be proactive, have a systematic view of cases, and aim to correct not only the convictions of innocent people but cases of miscarriages of justice in a generic way. <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/p1.html> (last accessed, July 1, 2022).

⁹³ The dissonant model in several of these matters is the North Carolina commission, which, for example, only accepts situations of convictions of factually innocent persons and, if it decides to remand a case to a court, it does so to a special three-judge panel that operates under different rules than ordinary appeals. ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems, pp. 976-977.

transparency in their procedures and decisions, contribute to greater public legitimacy in their decisions, and generate more professional and specialized bodies that improve the quality of investigations in these cases, increasing the likelihood of overturning wrongful convictions. This institutional framework is also expected to relieve the victims of these convictions of the enormous burden that the previous models imposed in going before the respective bodies and having to prove their innocence or the erroneous nature of the conviction. From this perspective, the commissions have been a strategy that attempts to ensure access to the review of wrongful convictions as a central element.⁹⁴

There are some differences in the rules of integration of the commissions, their resources, working procedures, and legal powers, and the standards required to activate the exoneration process before the courts. However, for the most part, these bodies have similar orientations, except for the North Carolina model, since all the rest follow closely the CCRC model as a base. The CCRC of England, Wales, and Northern Ireland is not only the oldest commission but is also considered a “gold” standard or the ideal model to follow in the comparative literature.⁹⁵ Moreover, it has been the inspiration for other commissions and, at this point, it has data and evaluations of its work for nearly 25 years. Despite essential criticisms of the CCRC’s work and the fact that there are several areas where improvements are needed, in general the CCRC is recognized as a substantive improvement in dealing with wrongful convictions compared to the previous system.⁹⁶

The changes that can be seen in this brief overview of comparative experience indicate that there is still a long way to go in terms of improving mechanisms for correcting wrongful convictions, including the need for

⁹⁴ Referring to the CCRC: NOBLES, Richard; SCHIFF, David. After ten years: an investment in justice, pp. 151-152; HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission, pp. 1-4.

⁹⁵ WOACH, Kent. Wrongful Convictions: Adversarial and Inquisitorial Themes, p. 92.

⁹⁶ HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission, *passim*; THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice: an inquiry into the Criminal Case Review Commission, passim*.

more specific evaluations of the innovations that have been tried both in the continental world and in the Anglo-Saxon sphere. These innovations are complex, as they involve revising the standards and procedures for exoneration and potential changes in the institutional design of the organizations charged with investigating and deciding these cases. Still, recent experiences, such as review commissions or conviction integrity units, offer interesting and promising paths that should be evaluated and expanded.

3.2. COMPENSATION OF WRONGFUL CONVICTIONS

Once wrongful convictions have been detected and corrected, another problem arises: how do we compensate the victims of these errors for the damages caused? The concern arises because the available evidence shows that the negative impact of wrongful convictions on the wrongly convicted is enormous. Basic notions of justice demand an appropriate compensatory and remediative response.⁹⁷

Reparations for wrongful convictions have a long tradition in comparative law⁹⁸ and, even more recently, have been included as a guarantee in international human rights law.⁹⁹ However, beyond its

⁹⁷ Comparative evidence indicates that wrongful convictions cause enormous psychological, economic, family and social damage to those who suffer from them and their family environment. CAMPBELL, Katryn; DENOV, Myriam. *The burden of innocence: coping with a wrongful imprisonment*, pp. 139-163; GROUNDS, Adrian. *Psychological consequences of wrongful convictions and imprisonment*, pp. 165-182; SCOTT, Leslie. *It never ends: the psychological impact of wrongful convictions*, pp. 9-22; CLOW, Kimberly; LEACH, Amy; RICCIARDELLI, Rosemary. *Life after wrongful convictions*. In CUTLER, Brian (editor). *Conviction of the innocent*. Washington: American Psychological Association, 2012, pp. 327-341.

⁹⁸ Giuriati, reports that in Germany (Prussia) a law dating back to 1766 regulated compensation in this matter. GIURIATI, Domenico. *Erroros judiciales: diagnosis y remedios*, p. 155. A review of the existing statutes in Europe at the beginning of the twentieth century can be seen in the classic work of Borchard that we have cited. BORCHARD, Edwin. *Convicting the innocent: errors of criminal Justice*, pp. 684-718.

⁹⁹ Thus, it is provided for in articles 10 of the American Convention on Human Rights, 14.6 of the International Covenant on Civil and Political Rights, and 3 of Protocol No. 7 to the European Convention on Human Rights.

normative regulation, this is an area in which there is still a long way to go, just as is the case with correction mechanisms.

Chile represents an extreme case in this matter. Although the country has had constitutional rules allowing compensation for wrongful convictions since 1925, application of these laws has been minimal. Indeed, from 1925 until 1980, the legislature failed to adopt legislation needed to implement the constitutional right; consequently, no one was able to obtain compensation for wrongful conviction. Since the 1980 constitution, a new rule was established that did not require the enactment of a law to be able to request the Supreme Court to authorize a civil proceeding for compensation for miscarriages of justice. In the more-than 40 years since (data up to May 2020), that clause had generated 160 requests, of which only 10 had obtained a favorable decision. In other words, even after the revision of the constitutional right in 1980, this right is more illusory than real.¹⁰⁰

Another example, although not as extreme as the above, is the case of Spain. In that country, article 121 of the 1978 Constitution expressly regulates the liability of the State for damages caused by the functioning of the judicial system, including a clause on compensation for wrongful convictions. The evidence to date shows that, despite the apparent breadth of this provision, its use has been minimal. For example, in 2018, in the context of the 40th anniversary of the Constitution, Oubiña observed that those who have studied the use of this rule have concluded that for various reasons it “seems to have failed, or at least, to be significantly improvable in terms of justice.”¹⁰¹

Oubiña’s assessment is supported by the available empirical evidence. Between 2005 and 2016, the total annual average amount spent on compensation in Spain was EU\$3.5 million.¹⁰² This is a modest

¹⁰⁰ DUCE, Mauricio. La indemnización por condenas erróneas: una visión desde el derecho comparado, pp. 221-222.

¹⁰¹ OUBIÑA, Sabela. Artículo 121. In CAZORLA, Luis María; PALOMAR, Alberto. Comentarios a la Constitución Española de 1978. Madrid: Thomson Reuters Aranzandi, 2018, p. 640.

¹⁰² RUIZ DE VALBUENA, Irene. La justicia reduce su factura por errores judiciales. In Cinco Días El País Economía, 2017, at https://cincodias.elpais.com/cincodias/2017/10/27/legal/1509097046_653926.html (Last accessed July 1, 2022).

amount for the size of the Spanish judicial system.¹⁰³ In 2015, 99 cases were filed demanding compensation for judicial error, and in 2016 another 107 cases were filed. In the latter year, only one case concluded with a finding of State liability.¹⁰⁴

Expressions of dissatisfaction with compensation mechanisms are common in the comparative sphere.¹⁰⁵ In this context, looking at new approaches to the matter is interesting and important. The United States has no constitutional right to compensation for wrongful convictions. However, legislation and various mechanisms allow victims of such errors to seek redress at both the state and federal levels. The most recent empirical assessment available on the subject, using the NRE database, identified that between 1989 and 2018, 62% of exonerees filed some action for compensation and 70% of those applicants received some monetary award (42% of all exonerees), with a number of cases pending as of the date of the study that could increase these numbers.¹⁰⁶ As can be seen, even though they are far from ensuring compensation for the majority, these mechanisms operate more frequently than the examples of Chile and Spain, which have constitutional rules on the matter.

¹⁰³ According to official data in 2018, the total number of cases entered the Spanish justice system would approach six million (5,994,102) and those resolved were a slightly lower figure (5,781,667). www.poderjudicial.es (Last accessed July 1, 2022).

¹⁰⁴ RUIZ DE VALBUENA, Irene. La justicia reduce su factura por errores judiciales. *passim*.

¹⁰⁵ A recent investigation has concluded that Canada's compensation mechanisms are inconsistent, unfair, and inaccessible. McLELLAN, Myles. Compensation for wrongful convictions in Canada. Ottawa: Eliva Press, 2021, *passim*. In Italy, Luparia and Pittiruti maintain that there is an inborn reluctance on the part of judges to acknowledge the compensation of victims of wrongful convictions in the name of the undue protection of state finances. LUPARIA, Luca; PITTIRUTI, Marco. Post-conviction remedies in the Italian criminal justice system, p. 69.

¹⁰⁶ GUTMAN, Jeffrey; SUN, Lingxiao. Why is Mississippi the best State in which to be exonerated? An empirical evaluation of State statutory and civil compensation for the wrongfully convicted, p. 700. In this study, the authors examine a database with 2,000 exonerations from 1989 to 2018, but which only considers 1,802 people who were incarcerated. The study finds that compensation awards covered just under 60% of the years lost in wrongful convictions.

In the United States, there are different ways to obtain compensation,¹⁰⁷ of which we focus on one that we consider to be the most innovative. This is the development in recent decades of a series of special wrongful conviction compensation statutes at the federal level and various states, which create a right to compensation and a streamlined—often administrative—process for obtaining compensation. Their central characteristic is that, unlike traditional civil actions, these laws do not require proof of wrongdoing or constitutional violation by the state agent (no-fault); instead, they provide a right to compensation solely upon a showing of innocence of the crime for which the applicant was convicted.¹⁰⁸ The procedures, standards for granting relief, and scope of the available compensation vary considerably from state to state. Despite these variations, the United States expects these laws to establish a more straightforward path for victims of wrongful convictions to obtain redress in a more equitable manner.¹⁰⁹ In this context, their growth in recent years has been exponential. Bernhard reports that in 2009 there were 25 states with such legislation plus the District of Columbia and the federal system.¹¹⁰ That number rose in early July 2022 to 38 states,

¹⁰⁷ GUTMAN, Jeffrey. An empirical reexamination of State statutory compensation for the wrongly convicted, pp. 369-440.; GRIFFITS, Elizabeth; OWENS, Michael. Remedying wrongful convictions: societal obligations to exonerates. In REDLICH, Allison; ACKER, James; NORRIS, Robert; BONVENTRE, Catherine (edits). *Examining Wrongful convictions*. Durham: Carolina Academic Press, 2014, p. 1285; NORRIS, Robert; BONVENTRE, Catherine; ACKER, James. *When justice fails*. United States: Carolina Academic Press, 2018, p. 202.

¹⁰⁸ GUTMAN, Jeffrey; SUN, Lingxiao. Why is Mississippi the best State in which to be exonerated? An empirical evaluation of State statutory and civil compensation for the wrongfully convicted, p. 707.

¹⁰⁹ MOSTAGHEL, Deborah. Wrongfully incarcerated, randomly compensated-how to fund wrongful conviction compensation statutes, p. 517.

¹¹⁰ BERNHARD, Adele. A short overview of the statutory remedies for the wrongly convicted: what works, what doesn't and why, p. 409. Bernhard identifies the first such law as having been passed in 1913 in the State of Wisconsin. All in all, it appears that the expansion of these statutes is a new phenomenon. Gutman notes, in 2017, that 22 states had adopted such laws since 1989 (that number increased to 28 by July 2022). GUTMAN, Jeffrey. *An empirical reexamination of State statutory compensation for the wrongly convicted*, p. 396.

plus the District of Columbia and the federal system. As a result, only 12 states currently do not have such legislation.¹¹¹

This accelerated legislative expansion in the last decades is explained as a consequence of the apparent insufficiency of the other available compensation mechanisms, but also as a consequence of the increased visibility that the problem has achieved in the United States in this period.¹¹² At the same time, support for these legislative reforms has come from a variety of different individuals and associations, such as the American Bar Association and the Innocence Project. They have developed a strategy that has pushed for enacting compensation statutes as one of the ways to address the problem of wrongful convictions, and that appeals to both conservative and liberal political leaders.¹¹³

Gutman and Sun have assessed the effectiveness of these statutes. Their 2019 study found that 53% of those wrongfully convicted who belonged to States that had legislation in this area have used them. Of these, 73.5% obtained compensation, and 17.3% did not, with the remaining cases pending when the sample was taken. The average financial compensation awarded was US\$70,000 per year of wrongful imprisonment, and, in terms of scope, they found that almost half of the years lost due to these erroneous convictions were not compensated.¹¹⁴

Despite the modest successes of these statutes, these laws have been criticized because they have not been able to ensure 100% coverage of wrongful conviction exonerations.¹¹⁵ The point of the criticism is that

¹¹¹ <https://www.innocenceproject.org/compensating-wrongly-convicted/> (Last accessed July 1, 2022).

¹¹² The beginning of this accelerated expansion occurred in 1989 after the first DNA exoneration case in the United States. GUTMAN Jeffrey. An empirical reexamination of State statutory compensation for the wrongly convicted, p. 385.

¹¹³ NORRIS, Robert. Assessing compensation statutes from the wrongly convicted, p. 354.

¹¹⁴ GUTMAN, Jeffrey; SUN, Lingxiao. Why is Mississippi the best State in which to be exonerated? An empirical evaluation of State statutory and civil compensation for the wrongfully convicted, p. 699.

¹¹⁵ GUTMAN, Jeffrey. An empirical reexamination of State statutory compensation for the wrongly convicted, p. 437.

there is still enormous room for improvement in providing adequate coverage for victims of wrongful convictions.¹¹⁶

As can be seen in this brief analysis of comparative experiences in compensation for wrongful convictions, merely establishing rules promising compensation, even at the constitutional level, does not seem to be sufficient to ensure fair treatment for those who have been victims of serious errors in the criminal justice system. Along with the other issues we have identified in this short survey of wrongful conviction issues, compensation is also one that requires additional research and a commitment to work for reforms to improve our legal systems and practices.

4. CONCLUSION: ABOUT THIS SPECIAL ISSUE OF THE RBDPP

In the *call for papers* of this special dossier of the RBDPP, we sought studies that discuss the existence of wrongful convictions and prosecutions at the national and comparative level; analyzing the factors that increase the likelihood of such errors; and examining the mechanisms available in national or local legislation to correct erroneous convictions, and to provide remedies for such convictions and prosecutions. We expected that they would not only address the issues from the point of view of the normative analysis of the institutions studied but also contribute evidence that allows a better understanding of the practices that produce the errors.

Our objective has been to increase knowledge about an deepen reflection about the subject, especially with a comparative perspective and in a context such as Latin America, where the problem of wrongful convictions and prosecutions has not generated enough debate.

Along with this Editorial introduction, the dossier comprises five articles that have met the editorial filters and peer review. They have been written in four languages (English, Italian, Portuguese, and Spanish) and produced by seven authors from four countries in Europe

¹¹⁶ Norris reaches the same conclusion after a qualitative examination of the contents of the different legislations in force as of 2012. NORRIS, Robert. *Assessing compensation statutes from the wrongly convicted.*, p. 367.

and Latin America. We believe these indicators show the comparative relevance of this dossier's contribution to the field.

Most of the papers focus on analyzing the factors that increase the likelihood of errors. Firstly, we have included in the dossier two articles that focus on the traditional factors that have been the subject of comparative research, as we have pointed out in section two. Among these, we have a work from Brazil, focuses on eyewitness identifications and the jurisprudence of the Superior Court of Justice in that country (Schietti). The second, from Chile, investigates confessions and police interrogations in that country, and analyzes decisions of the Chilean Supreme Court on those matters (Beltrán).

Secondly, we have also included two papers that analyze error-producing factors that we could identify as "new" or emerging issues at the comparative level. In this direction, we have an interesting work from Poland that studies the factors that lead to wrongful convictions and prosecutions in environmental crimes (Solodov and Zębek). Another contribution comes from Brazil and analyzes the problem of mistaken identifications generated through the use of new technologies, specifically facial recognition algorithms (Cani and Alcantara).

Thirdly, we included a work about ways to compensate or provide remedies to those who are victims of errors. Included is an interesting paper from Italy that critically analyzes a recent statute in that country that aims to introduce rules on the reimbursement of legal costs by the State to the acquitted person (Pascucci).

This collection of papers is also significant because most of the papers address not only the problem of wrongful convictions, as has been traditional in comparative research, but also account for the serious problems caused by wrongful prosecutions.

We invite readers to review the papers contained in the dossier. We hope that they will allow you to reflect on your own reality and motivate you to develop research in the area that will enrich our knowledge on the subject.

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