

**Prosecutorial Involvement in Exoneration:
An Exploratory Analysis of Individual, Organizational, and Environmental Factors**

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The current literature on wrongful convictions documents the legal, psychological, and institutional barriers that prosecutors face in considering post-conviction claims of innocence. However, less is known about how the local court context may relate to prosecutors' decisions to engage in wrongful conviction investigations. To address this gap, the present study explores how characteristics of the local court community are related to the likelihood of prosecutors assisting, actively opposing, or remaining uninvolved in post-conviction claims of innocence. Specifically, we examine prosecutorial involvement in exonerations from three levels: case-factors, organizational factors, and county-context factors. Using archival data on the exonerations of factually innocent individuals ($N = 75$), we find that case-related factors are the strongest predictors of prosecutors' involvement in exonerations. Broadly, our findings suggest that prosecutors are more willing to revisit, assist and even investigate potentially wrongful convictions when the stakes are lower (e.g., the offense is less severe, there is no alleged official misconduct, the district attorney is well-established in the role, etc.). Given the wide range of prosecutorial responses to wrongful conviction claims, we emphasize the importance of specialized conviction review units to help routinize the practice of post-conviction review. Secondly, we suggest that district attorneys explicitly define professional performance metrics to include corrective measures such as assisting in the review of wrongful conviction claims. Finally, we encourage states to adopt formal legal regulations to guide prosecutorial behavior in response to post-conviction claims of innocence.

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I Introduction

Prosecutors in the American legal system are tasked with multiple, sometimes conflicting, roles. They are expected to be both zealous advocates and neutral ministers of justice.¹ Fred Zacharias describes this contradiction in roles as having to be both a player and a referee.² Prosecutors are entrusted with the adversarial role of ensuring convictions while also being obligated to act as a “quasi-judicial officer,” zealously advocating for the safety of the public but only through legitimate means.³ This contradiction is especially acute when faced with post-conviction claims of innocence. A conviction has already been secured, if not by the current prosecutor then by his or her predecessor. Yet, the legitimacy of that conviction is being called into question. What then does the prosecutor do? Does he or she willingly turn over documents and aid the investigation at every opportunity? Does he or she remain uninvolved and wait to see how it plays out? Or does the prosecutor oppose the exoneration effort by maintaining that the defendant is guilty and refusing to dismiss charges? Formal legal policies offer little guidance in this domain, leading to idiosyncratic involvement by prosecutors in involvement in exoneration cases.⁴ The narratives of two exoneration cases represent the extremes of this variation.⁵

On June 7, 1998, Judith Johnson and her six year old granddaughter, Brooke Sutton, were beaten and raped in Johnson’s home. Johnson was murdered and her granddaughter was left for

¹ Douglas H Gingsburg & Hyland Hunt, "The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?" (2010) 7 Ohio St J Crim L 771 [*Gingsburg & Hunt*].

² Fred C Zacharias, "Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice" (1991) 44 Vand LR 45 at 110 [*Zacharias*].

³ Daniel S Medwed, "The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit" (2009) 84 Wash L Rev 35 at 39 [*Medwed*].

⁴ Medwed, *ibid*; Fred C Zacharias, "The Role of Prosecutors in Serving Justice After Convictions" (2005) 58 Vand L Rev 171; Gingsburg & Hunt, *supra* note 1.

⁵ Case details come from publicly available information provided by the National Registry of Exonerations and the Innocence Project. All other information in this paper is anonymous and covered under the Human Subjects Protection Plan of the Preventing Wrongful Convictions research project. See Innocence Project, Joseph Abbitt, online: <<https://www.innocenceproject.org/cases/joseph-abbitt/>> (last visited 4 October 2019); Innocence Project, Clarence Elkins, online: <<https://www.innocenceproject.org/cases/clarence-elkins/>> (last visited 4 October 2019); The National Registry of Exonerations, Joseph Lamont Abbitt, online: <<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3807>> (last visited 4 October 2019); The National Registry of Exonerations, Clarence Elkins, online: <<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3202>> (last visited 4 October 2019).

dead. When Sutton regained consciousness, she called a neighbor and reported that someone had killed her grandmother. Based on the six year old's statement to the police that the perpetrator "looked like Uncle Clarence," Judith Johnson's son-in-law, Clarence Elkins, was convicted of rape and murder. He was sentenced to life in prison. Elkins maintained his innocence, and his wife set out to exonerate him. Several years after the conviction, Brooke Sutton recanted her identification of Clarence Elkins. On that basis, Elkin's lawyers requested a new trial. That marked the start of several years of active opposition from the District Attorney's Office. The prosecution, under the direction of Sherri Walsh, insisted that Elkins was guilty and ridiculed the victim's recantation as having been coached by her family. The convicting judge denied a new trial for Elkins. Two years later, a local innocence organization conducted DNA tests on the evidence from the crime scene. They found that the DNA evidence did not match that of Clarence Elkins. Despite this new evidence, the D.A.'s office maintained that Elkins was guilty, and the judge denied a new trial on the basis that the verdict was decided on Sutton's identification, not physical evidence, so the DNA results would not have changed the jury's decision.

Finally, the defense team turned their focus to a neighbor, Earl Mann, who had been convicted of raping three young girls sometime after the attack on Johnson and her granddaughter. Elkins was able to collect DNA evidence from Mann in the form of a cigarette butt when, by chance, Mann was transferred to the same prison and, eventually, same cell block as Elkins. He sent the cigarette butt to his attorneys, which they tested and found that Mann's DNA was a match with the DNA collected from the crime scene. Undeterred, the prosecution refused to release Elkins. It was only after the Ohio attorney general at the time held a press conference pressuring the District Attorney's Office to dismiss the charges, that they began to abandon their fight against Elkins' exoneration. After an additional round of DNA testing linked Mann to the crime scene, District Attorney Sherri Walsh filed a motion to dismiss the charges against Clarence Elkins. On December 15, 2005, the common pleas judge signed the order vacating the charges against Elkins and ordered his immediate release.⁶

By contrast, consider a different case of eyewitness misidentification. On May 2, 1991, two teenaged sisters were raped at knife point by an intruder who entered through the kitchen window in their home. The intruder bound their feet and hands before fleeing from the home over an hour after breaking in. The two victims later told investigators that the perpetrator looked like a man by the name of Joseph Abbitt who had previously lived in the neighborhood and had visited their home before. Both girls identified Abbitt from a photo lineup. From there, the police considered Abbitt their primary suspect despite mostly inconclusive, and even contrary, DNA evidence. After the victims positively identified Abbitt in court as the man who had attacked them, a jury convicted him of rape, burglary, and kidnapping. Abbitt maintained his innocence and in 1995 applied for assistance from a local innocence organization. The organization accepted his case and submitted the rape kits for reanalysis. While the first test came back inconclusive, a second test excluded Abbitt as the attacker. After fourteen years of serving a sentence for a crime he did not commit, Joseph Abbitt was officially exonerated.

In Joseph Abbitt's case, the prosecution's response looked profoundly different than that in Clarence Elkins case. A Raleigh newspaper described Abbitt as one of the lucky ones because

⁶ Jim Petro & Nancy Petro, *False Justice, Eight Myths that Convict the Innocent*, rev ed, (London: Kaplan Publishing, 2015).

the district attorney in the county where he was convicted was on a quest to free the wrongfully convicted after a prominent exoneration case in his jurisdiction rattled him several years earlier.⁷ The D.A. cooperated with the local innocence organization that was investigating Abbitt's case and quickly moved to exonerate him once DNA evidence pointed to his innocence.

What explains why prosecutors in one case would erect barrier after barrier to avoid an exoneration while prosecutors in another case took an active role in overturning a wrongful conviction? Prior research suggests that there are numerous legal, psychological, and institutional disincentives to prosecutors assisting in exoneration investigations.⁸ What is still missing from our understanding of prosecutors' responses to post-conviction innocence claims, however, is the role of the broader court context. Prior scholarship highlights the role of organizational and county-level contexts in shaping prosecutors' responses to post-conviction claims of innocence.⁹ In the present study, we seek to address these gaps by applying Eisenstein, Flemming, and Nardulli's courts as communities framework to prosecutorial assistance in the post-conviction phase.¹⁰ Specifically, we consider if prosecutorial involvement in an exoneration is related simply to case facts, whether organizational leadership plays a role, or if broader cultural factors are at work as well. Understanding prosecutorial involvement in exonerations is significant because the difference in prosecutors' approaches can equate to years of an innocent person's life spent waiting for freedom.¹¹

In Part II, we discuss the theoretical and empirical foundations for our research and offer a brief review of the relevant literature on post-conviction prosecutorial discretion. In Part III, we describe our exoneration data and the method of analysis we employ. In Part IV, we present our analysis and discuss which factors predict the nature of prosecutorial involvement in an exoneration case. In Part V, we provide context for our findings. We argue that the discretion prosecutors have in whether, and to what degree, they will become involved in a wrongful conviction investigation, presents an unfair choice. It is far better to establish clear procedures that compel prosecutors to cooperate with a credible and official entity tasked with reviewing post-conviction claims of innocence, than to leave it up to prosecutors to determine if they can afford to put their reputation and professional relationships on the line. When prosecutors' options of how to respond to wrongful conviction claims can range from active opposition and stonewalling to

⁷ Mandy Locke, "DNA Exonerates a Second Forsyth Inmate: Six Years After the Darryl Hunt Case, Joseph Abbitt is Cleared of Raping Two Girls in 1991", *The News & Observer* (3 September 2009).

⁸ Gingsburg & Hunt, *supra* note 1; Daniel S Medwed, "The Zeal Deal: Prosecutorial Resistance To Post-Conviction Claims Of Innocence" (2004) 84 BU L Rev 125; Aviva A Orenstein, "Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence" (2010) 48 San Diego L Rev 401 [*Orenstein*]; Alafair S Burke, "Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science" (2005) 47 Wm & Mary L Rev 1587 [*Burke*]; Dana Carver Boehm, "The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence" (2014) 2014 Utah L Rev 613 [*Boehm*].

⁹ Robert J Norris & Catherine L Bonventre, "Advancing Wrongful Conviction Scholarship: Toward New Conceptual Frameworks" (2015) 32 Just Q 929 [*Norris and Bonventre*]; Elizabeth Webster, "A Postconviction Mentality: Prosecutorial Assistance In Exoneration Cases" (2017) Just Q 1 [*Webster*].

¹⁰ James Eisenstein, Roy Flemming & Peter Nardulli, *The Contours of Justice: Communities and Their Courts* (Boston: Little Brown, 1988) [*Eisenstein, Flemming & Nardulli*].

¹¹ Webster, *supra* note 9; Daniel S Medwed, *Prosecutorial Complex: America's Race to Convict and its Impact on the Innocent* (New York: New York University Press, 2012).

significant assistance, far too much of a potentially wrongfully convicted individual's fate is left up to the preferences of a particular prosecutor or staff of prosecutors. We also outline specific recommendations to alleviate some of the burden on individual prosecutors by specializing or externalizing the conviction review process which, in effect, can improve wrongfully convicted individuals' access to (a second chance at) justice. Secondly, we propose a reprioritization of performance metrics to include corrective measures such as efficiently assisting in credible wrongful conviction claims. Finally, we encourage states to adopt formal legal regulation to guide prosecutorial behavior in the face of wrongful conviction claims. We conclude in Part VI by reviewing our findings and policy recommendations.

II Prior Research

The existing body of literature on post-conviction prosecutorial discretion generally concludes that prosecutors face significant barriers to assisting in an exoneration effort. After a conviction has been secured, there are very few incentives for prosecutors to reopen a case.¹² The lack of professional or legal code directing prosecutorial behavior after a conviction yields broad discretion in if, and to what degree, the local district attorney's office will engage in the investigation of a post-conviction claim of innocence.¹³ Up until 2008, the American Bar Association's Model Rules for Professional Conduct offered no prescriptions for how prosecutors were to handle new, and possibly exonerating, evidence after a conviction had already been secured.¹⁴ The addition of amendments (g) and (h) to Rule 3.8 on the special responsibilities of a prosecutor to the Model Rules of Professional Conduct directs prosecutors to investigate and disclose new evidence of a possible wrongful conviction, and when the evidence establishes a likely erroneous conviction, prosecutors are compelled to remedy the conviction.¹⁵ These amendments, however, establish what legal scholar Dana Carver Boehm describes as a floor, rather than a ceiling, for prosecutors' responsibility to disclose new information that points to a possible erroneous conviction.¹⁶ The rule does not require prosecutors to initiate an investigation solely based on a claim of wrongful conviction, and the provision only goes into effect when the

¹² Gingsburg & Hunt, *supra* note 1; Bruce A Green & Ellen Yaroshefsky, "Prosecutorial Discretion and Post-Conviction Evidence of Innocence" (2009) 6 Ohio St J Crim L 467; Orenstein, *supra* note 8; Daniel S Medwed, "The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence" (2004) 84 BU L Rev 125; Zacharias, *supra* note 4.

¹³ Medwed, *supra* note 3; Zacharias, *supra* note 4 at 173.

¹⁴ Am. Bar Association, *Model Rules of Professional Conduct* (Chicago: Am Bar Ass'n, 1983) [*Model Rules of Prof'L Conduct*]; Webster, *supra* note 7.

¹⁵ See Model Rules of Prof'L Conduct, *ibid* (stating that, "[g] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: [1] promptly disclose that evidence to an appropriate court or authority, and [2] if the conviction was obtained in the prosecutor's jurisdiction, [i] promptly disclose that evidence to the defendant unless a court authorizes delay, and [ii] undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit. [h] When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.").

¹⁶ Boehm, *supra* note 8.

prosecutor is made aware of new and credible exculpatory information.¹⁷ Beyond Model Rule 3.8 (g) and (h), which only a minority of states have adopted, there is a profound absence of legal or professional regulation on prosecutors' post-conviction involvement in wrongful conviction investigations.¹⁸

A. The Individual Level

Given the lack of legal regulation on how district attorneys and their staff respond to post-conviction claims of innocence, there is significant variation in the role of district attorney's offices in exoneration investigations. This variation can create significant inequalities among wrongfully convicted individuals seeking relief. Despite the significance of prosecutors' roles in exoneration investigations, the literature on why prosecutors assist or oppose post-conviction claims is largely underdeveloped. What little we do know about prosecutors' behavior in the post-conviction phase tends to focus narrowly on the individual level. Analysis at the individual level considers the role of factors related to the individual case, defendant, and prosecutor involved. In the first, and to date, only prior empirical examination of prosecutorial assistance, Elizabeth Webster focuses on a number of defendant and case-level predictors.¹⁹ She finds that cases involving violent offenses are less likely to receive at least some prosecutorial assistance than non-violent offenses. Black and Hispanic defendants are actually more likely to receive assistance than their White counterparts, and defendants who pled guilty to their charges are more likely to receive assistance than those who went to trial. Finally, she finds that evidentiary issues (e.g., mistaken witness identification, false confession, perjury, etc.) are not significantly related to prosecutorial assistance.²⁰

While Webster uses empirical data to predict prosecutorial assistance, the legal scholarship in this area draws heavily from cognitive science to explain the barriers prosecutors face in assisting with an exoneration investigation.²¹ Daniel Medwed describes how the widespread practice of evaluating prosecutors by their conviction rate can be internalized by individual prosecutors to create a conviction psychology.²² This conviction psychology may become especially engrained the longer a prosecutor is steeped in the office culture.²³ By extension, conviction psychology is a barrier to post-conviction prosecutorial assistance, as it compounds the already unpleasant task of acknowledging one's own, or a colleague's, mistake with the additional burden of tarnishing one's conviction record.

Relatedly, the desire for finality acts as an additional psychological barrier to assisting with post-conviction claims of innocence. By virtue of working in an adversarial system as a representative of the state, prosecutors tend to develop an alignment or affinity with victims.²⁴

¹⁷ *Ibid.*

¹⁸ *Ibid.*; Webster, *supra* note 9.

¹⁹ Webster, *ibid.*

²⁰ *Ibid.*

²¹ Burke, *supra* note 8; Medwed, *supra* note 8.

²² Medwed, *ibid.*; Orenstein, *supra* note 8; Boehm, *supra* note 8.

²³ Laurie L Levenson, "The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases" (2016) 20 Berkeley J Crim L 335 [*Levenson*]; Medwed, *supra* note 8.

²⁴ Kenneth J Melilli, "Prosecutorial Discretion in an Adversary System" (1992) BYUL Rev 669.

They are likely to communicate with, and often meet, victims of a crime they are prosecuting. Conversely, prosecutors generally have limited interaction with defendants. Often times, the extent of a prosecutor's exposure to a defendant is the rap sheet and police report, or perhaps even an experience prosecuting him in a previous case.²⁵ In that way, experiences with victims can be humanizing whereas the limited exposure to defendants may reinforce the perceived criminality of the defendant. This alignment with victims and opposition to defendants likely contributes to the desire for finality in two ways. First, prosecutors may be hesitant to reopen a case out of concern for a victim's desire for closure and to avoid retraumatizing them.²⁶ Second, prosecutors may resist reopening a case because they feel "the ends justify the means." This is the defense that, while the defendant may not be guilty of what he was convicted of, he is certainly guilty of something.²⁷

Additionally, there are a number of relevant cognitive biases that work in favor of maintaining convictions, rather than re-examining cases. In his application of cognitive science to prosecutorial discretion, Alafair Burke acknowledges that, like laypeople, prosecutors are not perfectly rational actors and, thus, are vulnerable to the influence of cognitive biases in making decisions.²⁸ He identifies four cognitive biases as particularly relevant to prosecutorial decision-making. First, Burke describes the human tendency to be more responsive to evidence that confirms, rather than refutes, our assumptions and to interpret new evidence in ways that are consistent with our preexisting beliefs.²⁹ This phenomenon is known as confirmation bias and is particularly relevant to post-conviction prosecutorial decision-making. When a prosecutor first receives a case, he or she begins shaping a narrative around the event that took place. An understanding of confirmation bias suggests that further evidence that supports the original narrative will be accepted relatively uncritically, while evidence that is incongruent with the original narrative may go unnoticed or dismissed.³⁰ After a conviction, confirmation bias may be even stronger, as the guilty verdict itself acts as further confirmation of the prosecutor's original narrative that the defendant is guilty.³¹

Burke applies three additional cognitive biases to prosecutorial decision-making: selective information processing, belief perseverance, and cognitive dissonance.³² Selective information processing explains the tendency of people to weigh evidence that supports their existing beliefs

²⁵ *Ibid.*

²⁶ Gingsburg & Hunt, *supra* note 1; Bruce A Green & Ellen Yaroshefsky, "Prosecutorial Discretion and Post-Conviction Evidence of Innocence" (2008) 6 Ohio St J Crim L 467 [*Green & Yaroshefsky*]; Orenstein, *supra* note 8.

²⁷ Mark Baker, *D.A.: Prosecutors in Their Own Words* (New York: Simon & Shuster, 1999); Orenstein, *supra* note 8; Medwed, *supra* note 8.

²⁸ Burke, *supra* note 8.

²⁹ Joshua Klayman & Young Won Ha, "Confirmation, Disconfirmation, and Information in Hypothesis Testing" (1987) 94 Psychol Rev 211; Ziva Kunda, *Social Cognition: Making Sense of People* (Cambridge: The MIT Press, 1999).

³⁰ Orenstein, *supra* note 16 at 426; Peter H Ditto & David F Lopez, "Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions" (1992) 63 J Pers Soc Psychol 568.

³¹ Burke, *supra* note 8 at 1612.

³² Burke, *ibid* note 8.

more heavily than evidence that contradicts those beliefs.³³ Belief perseverance describes how people often fail to update their beliefs, even in the face of proof to the contrary.³⁴ Finally, cognitive dissonance offers insight into why the aforementioned cognitive biases may be present. Cognitive dissonance describes the discomfort people feel when there is a disconnect between their behavior and their internal beliefs. As such, people tend to have a bias toward reconciling their beliefs with their actions.³⁵ In the case of prosecutors, this may mean maintaining a conviction even in light of potentially exonerating information. Confirmation bias, selective information processing, belief perseverance, and cognitive dissonance each highlight the cognitive barriers that prosecutors face in acknowledging and interpreting possibly exonerating evidence, especially after conviction.

B. Broadening the Lens

As an emerging line of research, prosecutorial involvement in exonerations does not yet have a widely accepted theoretical framework. However, the literature on criminal case processing, more generally, often relies on Eisenstein, Flemming, and Nardulli's courts as communities framework, which is applicable.³⁶ This conceptualization of courts extends beyond the individual actors involved in the criminal justice process by integrating three lines of research on courtroom decision-making: the individual, the organizational, and the environmental. The individual approach examines the backgrounds and attitudes of court actors. The organizational approach examines the interactions between those court actors, and the environmental approach examines the broader economic, social, and political culture of the community in which the court operates. By integrating these approaches, Eisenstein and colleagues emphasize the interdependence of court actors and the nature of courts as, "complex social institutions."³⁷

Although the literature on prosecutorial behavior in the post-conviction phase articulates the individual level perspective fairly well, analysis at the organizational and environmental level is more limited. Norris and Bonventre argue that this organizational perspective is too often absent from the literature on wrongful conviction.³⁸ In an effort to advance the conceptual frameworks for understanding wrongful convictions, they call for increased attention to the organizational contexts in which wrongful convictions manifest, rather than focusing narrowly on the individual actors at the forefront of prominent wrongful convictions.³⁹ In the context of prosecutorial involvement in exonerations, some of the legal scholarship addresses the influence of organizational factors, but this line of research requires additional development.

³³ Charles G Lord, Lee Ross & Mark R Lepper, "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence" (1979) 37 *J Pers Soc Psychol* 2098; Burke, *supra* note 8.

³⁴ Lee Ross, Mark R Lepper & Michael Hubbard, "Perseverance in Self-Perception and Social Perception" (1975) 32 *J Pers Soc Psychol* 880.

³⁵ Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford: Stanford University Press, 1957); Leon Festinger & James E Carlsmith, "Cognitive Consequences of Forced Compliance" (1959) 58 *J Abnorm Soc Psychol* 203.

³⁶ Eisenstein, Flemming & Nardulli, *supra* note 10.

³⁷ *Ibid* at 294.

³⁸ Norris & Bonventre, *supra* note 9.

³⁹ *Ibid*.

C. The Organizational Level

At the organizational level, scholars identify several disincentives to assisting in post-conviction investigations. For example, institutional norms in district attorneys' offices generally prioritize zealous prosecution, a concept that has traditionally been measured by conviction rates.⁴⁰ Not only is a prosecutor's conviction rate a performance metric, but in many offices it is also a factor in determining promotions and raises.⁴¹ Thus, there is very little institutional incentive to "undo" a conviction that has already been won. Additionally, reviewing wrongful convictions claims has a real cost in terms of resources and decreased efficiency. The concern for efficient use of time and resources is particularly relevant in light of the large number of post-conviction claims of innocence many district attorney's offices receive, some of which prove to be baseless. Daniel Medwed describes this as the "needle in a haystack disincentive."⁴²

Related to the institutional pressures prosecutors face in deciding to assist in the review of old cases are their concerns about maintaining working relationships with the police. By virtue of the working relationship between police departments and district attorneys' offices, prosecutors often develop a unified mentality with police officers, trusting that the police have done their due diligence in investigating the case and identifying the appropriate offender.⁴³ Elizabeth Webster finds empirical support for this notion, concluding that the likelihood of a prosecutor assisting in the investigation of a post-conviction innocence claim is significantly lower when the case involves alleged police misconduct.⁴⁴ Likewise, Levenson notes that senior prosecutors with a long history of working with the police department may be especially inclined to defer to the police in post-conviction investigations.⁴⁵ These findings highlight the salience of professional relationships and reflect a resistance from prosecutors to disrupt those working relationships by investigating alleged misconduct on the part of their colleagues.⁴⁶

Organizational disincentives to assist in wrongful conviction claims may be reinforced by public and political pressures faced by district attorneys' offices. Reopening a case, for example, exposes the fallibility of the criminal justice system, thus putting public trust in the system at risk.⁴⁷ This may be a particularly unpopular move in more conservative jurisdictions, as entertaining claims of innocence may undercut the "tough on crime" image to which many prosecutors aspire, and upon which many district attorneys campaign.⁴⁸ The opinions of the public play a uniquely important role in the careers of prosecutors, even compared to other criminal justice actors. This is because the vast majority of chief prosecutors is publicly elected.⁴⁹ Although elected prosecutors are accountable to the public, the public has very few metrics upon which to base their support

⁴⁰ Boehm, *supra* note 8.

⁴¹ Medwed, *supra* note 8; Orenstein, *supra* note 8.

⁴² Medwed, *supra* note 8 at 148.

⁴³ Medwed, *ibid* note 8.

⁴⁴ Webster, *supra* note 9.

⁴⁵ Levenson, *supra* note 23.

⁴⁶ Webster, *supra* note 9.

⁴⁷ Gingsburg & Hunt, *supra* note 1; Orenstein, *supra* note 8.

⁴⁸ Medwed, *supra* note 8; Gingsburg and Hunt, *supra* note 1; Judith A Goldberg & David M Siegel, "The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence" (2002) 38 Cal WL Rev 389.

⁴⁹ Carol J DeFrances, *Prosecutors in State Courts, 2001* (Rockville: BJS, US Dept of Justice, 2002).

other than rhetoric and conviction rate.⁵⁰ As such, assisting in a possible exoneration case may be particularly undesirable for prosecutors, as it threatens the aforementioned metrics which have consequences for both personal career development and the reputation of the prosecutor's office as an organization.

D. The Environmental Level

According to the courts as communities metaphor, at least one additional level of analysis is missing from our understanding of prosecutorial behavior in the post-conviction phase: the environmental context.⁵¹ This broad level of analysis incorporates the social, political, and organizational factors that create the environment in which court actors make decisions: the local court context.⁵² There is strong support in the criminal sentencing literature that sentencing is a contextualized process as researchers typically find that sentencing outcomes vary between jurisdictions and communities.⁵³ In his evaluation of contextual disparities in sentencing practices, Brian Johnson emphasizes that courtroom actors do not make decisions in a vacuum, but rather, their decisions are influenced by the environment in which those decisions are made.⁵⁴ To date, this perspective is largely missing from the work on prosecutorial behavior in the post-conviction phase. In her work on prosecutorial assistance in wrongful conviction investigations, Elizabeth Webster identifies the need for additional research on the relationship between local court context and prosecutorial assistance.⁵⁵ She writes, "A better understanding of political considerations, such as the racial demographics, "county legal culture," and political leanings of the jurisdiction, may also contribute to developing a clearer portrait of the circumstances surrounding prosecutors' willingness to assist."⁵⁶ Webster's call for greater attention to the county context and Norris and Bonventre's call for increased consideration of the role of the organizational context join together to highlight the need for multiple levels of analysis in understanding the path to remedying a wrongful conviction.⁵⁷

In response to the gaps identified by Norris and Bonventre, and Webster, we take a multi-pronged approach to understanding prosecutorial involvement in the investigation of wrongful conviction claims.⁵⁸ Specifically, our study applies the courts as communities metaphor to

⁵⁰ Medwed, *supra* note 8.

⁵¹ James Eisenstein & Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (Lanham: University Press of America, 1977)

⁵² Eisenstein, Flemming & Nardulli, *supra* note 10; Brian Johnson, "Contextual Disparities in Guidelines Departures: Courtroom Social Contexts, Guidelines Compliance, and Extralegal Disparities in Criminal Sentencing" (2005) 43 *Criminol* 761 [*Johnson*].

⁵³ Chester L Britt, "Social Context and Racial Disparities in Punishment Decisions" (2000) 17 *Just Q* 707; Jo Dixon, "The Organizational Context of Criminal Sentencing" (1995) 100 *Am J Sociol* 1157; Celesta Albonetti, "Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses" (1997) 31 *Law Soc'y Rev* 789.

⁵⁴ Johnson, *supra* note 52.

⁵⁵ Webster, *supra* note 9.

⁵⁶ *Ibid* at 23.

⁵⁷ Webster, *supra* note 9; Norris and Bonventre, *supra* note 9.

⁵⁸ Webster, *supra* note 7; Robert J Norris & Catherine L Bonventre, "Advancing Wrongful Conviction Scholarship: Toward New Conceptual Frameworks" (2015) 32 *Just Q* 929.

prosecutorial involvement in wrongful conviction investigations by analyzing three levels. First, we consider the most proximal factors, those related to the specific case that is being reviewed. Next, we consider the organizational context by looking at factors related to the district attorney in office at the time of conviction. Finally, we consider how the local county context is related to post-conviction prosecutorial involvement. In addition to addressing the gaps identified in prior scholarship, we extend the current literature by looking at instances of active prosecutorial opposition to wrongful conviction investigations. Prior empirical work looked only at prosecutorial assistance relative to cases where the prosecutor was not involved.⁵⁹ By examining the full range of prosecutorial responses to wrongful conviction claims from active opposition to non-involvement to active assistance, we are able to take a more comprehensive view of prosecutorial discretion. Finally, the current study avoids the debate on the definition of innocence by looking solely at individuals who are factually innocent.⁶⁰ By doing so, we eliminate cases where the prosecutor may fail to assist the defense because the defendant is still credibly believed to have committed the offense in question but is legally innocent on the basis of a procedural error.

III Data and Methods

This study explores prosecutorial involvement in the investigation of post-conviction claims of innocence by using archival data collected for seventy-five exoneration cases. We identify these cases from data originally collected for the Preventing Wrongful Convictions Project (PWCP), an empirical study funded by the National Institute of Justice. From the PWCP data, we identified twenty-two cases where prosecutors actively assisted in the post-conviction review and twenty-six cases where prosecutors actively opposed exoneration. We then used a random number generator to take a random sample of twenty-seven additional cases to create a third group where the prosecutor neither assisted nor actively opposed. Thus, the analytic sample for this study consists of seventy-five exoneration cases. In each case, the defendant was deemed factually innocent.⁶¹

We augment the data from the PWCP dataset with organizational and county-level variables. At the organizational level, we collected information about the chief district attorney in office at the time of the exoneration from government websites, defendant profiles from the Innocence Project and the National Registry of Exonerations, and news articles. For several cases where the relevant information was not available online, we called the district attorney's offices and requested the missing information. We acknowledge that the presiding chief district attorney may not always have been the one personally handling the post-conviction review. However, given the prominence and controversy of wrongful convictions, we are confident that chief district

⁵⁹ Webster, *supra* note 9.

⁶⁰ Jon B Gould, Julia Carrano, Richard A Leo & Joseph K Young, *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice* (Washington, DC: NIJ, 2012) [Gould et al].

⁶¹ The designation of factual innocence is reserved for cases with an executive, legislative, or judicial acknowledgement that the defendant was wrongfully convicted and sufficient evidence to convince a reasonable person that the convicted individual did not commit the offense. This definition distinguishes cases from legal innocence where an individual may be exonerated on the basis of a procedural error without necessarily being factually innocent. E.g., Jon B Gould & Richard A Leo, "One Hundred Years Later: Wrongful Convictions After a Century of Research" (2010) 100 J Crim L & Criminol 825.

attorneys would typically be involved in deciding how to proceed in response to wrongful conviction claims and, thus, are an appropriate level of analysis for understanding the role of organizational leadership. For the county-level variables, we collected a variety of demographic and political indicators from the 2000 U.S. Census, David Leip's *Atlas of Presidential Elections*, and included several existing variables from the PWCP data.⁶²

A. Outcome of Interest

The dependent variable of interest is a categorical indicator for whether a district attorney's office actively opposed, was uninvolved, or actively assisted in an exoneration case. The PWCP dataset defines active assistance as individuals or agencies "who played a crucial, direct, and active role in the exoneration."⁶³ Active opposition, by contrast, is defined as individuals or agencies who actively sought to hinder the exoneration in some way or maintained that the defendant was guilty even in the face of overwhelming evidence of innocence. For cases where the district attorney's office neither actively assisted nor actively opposed the investigation, we coded the type of prosecutorial involvement as uninvolved. While the delineations between a prosecutor assisting, opposing, or remaining uninvolved are not perfectly objective, these classifications help to capture the full range of prosecutorial responses in the post-conviction phase.

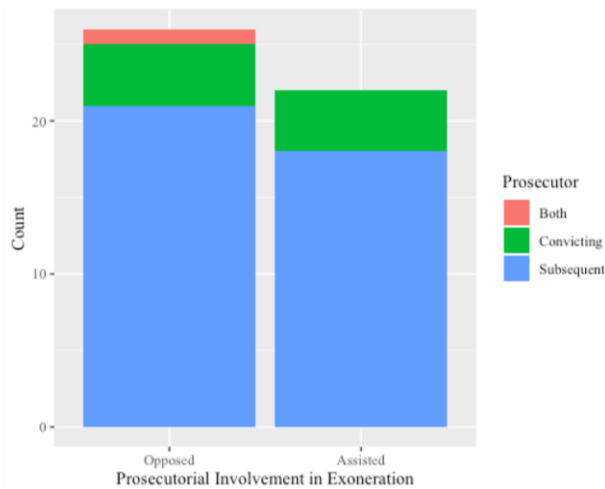
For cases involving active assistance or active opposition, the PWCP dataset differentiates between post-conviction involvement from the original, convicting prosecutor and involvement from a subsequent prosecutor.⁶⁴ The majority of exoneration cases in our sample involved a subsequent prosecutor, rather than the convicting prosecutor (see Figure 1). In other words, at the time of the exoneration, the prosecutor who originally convicted the defendant in question was either no longer working at that office or was not involved in reviewing the wrongful conviction claim. Of prosecutors who actively opposed the exoneration effort, twenty-one were the subsequent prosecutor only, four were the convicting prosecutor only, and, in one case, both the convicting and subsequent prosecutors were involved in opposing the exoneration effort. Of prosecutors who assisted, eighteen were the subsequent prosecutor and four were the convicting prosecutor.⁶⁵

⁶² US Census Bureau, 2000 Census, online: <https://www.census.gov/data/tables.html> (last visited 10 April 2019); David Leip, David Leip's Atlas of U.S. Presidential elections, datasets (2018), online: <http://uselectionatlas.org>; Jon B Gould et al, Predicting Erroneous Convictions, (2014) 99 Iowa L Rev 471.

⁶³ Gould et al, *supra* note 60 at 222.

⁶⁴ We are unable to differentiate between convicting and subsequent prosecutors for the cases coded as uninvolved because that distinction was only provided in the PWCP data when a case received prosecutorial assistance or opposition.

⁶⁵ The fairly even split between cases of assistance, non-involvement, and opposition does not suggest that these outcomes are equally likely occur. The uninvolved cases were sampled to create a similarly sized group to the assisted and opposed cases.

Figure 1. Convicting and Subsequent Prosecutor’s Involvement in Exoneration Cases

B. Predictor Variables

At the most proximal level, we examine a number of case-related variables (see Table 1). We include an indicator of whether or not an innocence organization played a central role in the exoneration (0 = no, 1 = yes). Innocence organizations were involved in 28.00% of the cases in our sample. Official misconduct is dummy coded (0 = no, 1 = yes). Official misconduct was involved in 22.67% of the cases (12% of all cases involved prosecutorial misconduct and 16.00% of all cases involve police misconduct).⁶⁶ Since DNA testing started being used to establish innocence in 1989, we include an indicator of whether the defendant was convicted pre or post 1989.⁶⁷ We also control for the severity of the offense using an ordered variable from least severe to most severe (1 = robbery, 2 = sexual assault only, 3 = murder only, 4 = both sexual assault and murder). The offenses the defendant was convicted of involved Robbery in 4.00% of cases, sexual assault (no murder) in 49.33% of cases, murder (no sexual assault) for 25.33% of cases, and both sexual assault and murder in 21.33% of cases. Black defendants represent a slight majority at 54.67%, with White defendants making up 32.00% of cases, and Hispanic defendants representing the remaining 13.33%. Finally, we control for the amount of time served by the defendant prior to exoneration.⁶⁸

⁶⁶ In the PWCP codebook, official misconduct is defined as an action “that violates a defendant’s constitutional rights. There is an element of intentionality or extreme negligence that is either present or can be legally inferred.” Misconduct is therefore distinct from official error, which is categorized as a mistake or omission that does not suggest intentional wrongdoing.

⁶⁷ Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (New York: Doubleday, 2000).

⁶⁸ Levenson, *supra* note 23 (Levenson suggests that prosecutors’ length of tenure may be negatively correlated with willingness to review post-conviction claims of innocence).

Table 1. Descriptive Statistics

	Frequency	Mean/Percent	Min	Max
Type of Involvement				
Actively Opposed	26	34.67%	0	1
Uninvolved	27	36.00%	0	1
Assisted	22	29.33%	0	1
Case-Level Factors				
Innocence Organization Responsible	21	28.00%	0	1
Official Misconduct	17	22.67%	0	1
Conviction occurred post-DNA	32	42.67%	0	1
Robbery	3	4.00%	0	1
Sexual Assault	37	49.33%	0	1
Murder	19	25.33%	0	1
Sexual Assault and Murder	16	21.33%	0	1
White Defendant	25	33.33%	0	1
Black Defendant	40	53.33%	0	1
Hispanic Defendant	10	13.33%	0	1
Time Served	-	144.89	7	342
District Attorney Factors				
White D.A.	68	90.67%	0	1
Male D.A.	68	90.67%	0	1
Time in Office	-	10.79	0	30
County-Level Factors				
Midwest	20	26.67%	0	1
South	28	37.33%	0	1
Northeast	21	28.00%	0	1
West	6	8.00%	0	1
Cook County	7	9.33%	0	1
Post-Furman Executions	54	72.00%	0	1
Rural Urban Continuum	-	1.77	1	7
Median Household Income	-	\$42,323.16	\$22,330	\$65,288
Log Median Household Income	-	10.63	10.01	11.09
% Bachelor's Degree	-	27.00%	10.9	60.2
% Presidential Vote Republican	-	55.48%	0.25	0.86
% Foreign Born	-	6.15%	0.1	16.1
% Non-White	-	24.50%	4.2	42.8

N = 75

To broaden our scope to the organizational level, we collected data on a number of factors related to the presiding district attorney at the time of the exoneration. The demographic variation among the district attorneys in our sample was rather limited, with 90.67% of the district attorneys being White and 90.67% being male. We also control for the number of years the presiding district attorney was in office when the exoneration occurred. Prior literature suggests that there may be a number of reasons why the length of time in office may be negatively related to willingness to

review post-conviction claims of innocence.⁶⁹ Levenson notes a false sense of expertise, being trained before the exoneration era, more exposure to the influence of the courtroom community, and established relationships with colleagues as possible factors that make older prosecutors more likely to resist post-conviction claims of innocence. Since district attorneys are the final authority on the decisions of the office, we control for the length of time in office prior to the exoneration. The average amount of time in office was 10.79 years.

The third and final level of analysis is the local court context. Since the vast majority of prosecutors' offices have county-based jurisdiction, we examine the local court context at the county level.⁷⁰ We consider two concepts related to county-context: the regional/political culture and the county demographics. To assess the regional/political culture, we include an indicator for region (Midwest, West, South, Northeast) and a measure from the U.S.D.A .Economic Research Service that ranks counties on a seven-point scale from urban to rural.⁷¹ We also include an indicator of whether any executions had occurred in that state since the *Furman v. Georgia* decision.⁷² The final regional/political variable we include is the percent of the Presidential vote for the Democratic candidate in the election year prior to the exoneration.⁷³ To examine the effect of county demographics, we include a number of concepts traditionally used in sentencing research to determine if courtroom actors' punitiveness varies by county.⁷⁴ Specifically, we include indicators of the percent of the county population that is foreign-born and the percent of the population that is non-White.⁷⁵ Additionally we include a measure of the percent of the population with a bachelor's degree and the median household income.⁷⁶ In both of the county-factors models we include a dummy variable for Cook County.

C. Analytical Approach

Given the natural ordering of types prosecutorial involvement, we analyze our data using ordered logistic regression (0 = opposed, 1 = uninvolved, 2 = assisted). This allows us to consider how variables from each of our three levels of analysis predict the likelihood of a prosecutor assisting rather than staying uninvolved or opposing the case. In other words, this type of analysis allows us to consider prosecutorial involvement as a range from opposition to assistance.⁷⁷ The

⁶⁹ *Ibid.*

⁷⁰ Steven W Perry, *Prosecutors in State Courts 2005* (Washington, DC: BJS, 2006).

⁷¹ US Dep't of Agriculture Economic Research Service, *Rural Urban Continuum Codes* (2003).

⁷² *Furman v Georgia*, (1972) 408 US 238. In *Furman v Georgia*, the Court decided that the imposition of the death penalty (in the cases in question) qualified as a cruel and unusual punishment and, thus, violated the Constitution. In effect, the *Furman v Georgia* decision severely restricted the applicability of the death penalty.

⁷³ We control for the election year to account for the variation in the percentage of the vote for the Democratic candidate based on the year.

⁷⁴ Brian Johnson, "The Multilevel Context of Criminal Sentencing: Integrating Judge and County Level Influences" (2006) 44 *Criminol* 259; Kim Byungbae, et al, "The Impact of United States v. Booker and Gall/Kimbrough v United States on Sentencing Severity: Assessing Social Context and Judicial Discretion" (2016) 62 *Crim Delinq* 1072.

⁷⁵ We include quadratic terms for both percent non-White and percent foreign born to test for curvilinearity.

⁷⁶ We take the log of median household income

⁷⁷ Although individual cases are nested within jurisdictions, we do not employ a fixed effect model because most of our jurisdictions contain only one case. However, to account for shared county-level characteristics, we include a

number of exonerations per county in our sample ranges from 1 to 7. We include a dummy variable for Cook County in our county context models since Cook County is home to the most exoneration cases in our sample and the cases are rather uniform in handling (the prosecutor actively opposed in six of the seven cases out of the County). Without controlling for Cook County, we risk overstating the effect of any of the county-level variables on prosecutorial opposition.

According to the diagnostic Brant test, our case factors model satisfies the parallel regression assumption. However, a few of the coefficients in the D.A. model and the county context model fail to satisfy the parallel regression assumption.⁷⁸ This suggests that a single equation may not be sufficient to provide the appropriate coefficient estimates across each level of our outcome. To account for this, we estimate each of the latter two models using a generalized ordered logistic regression.⁷⁹ To avoid overfitting the model with too many predictors relative to the limited number of observations, we examine each level of analysis separately.

IV Results

A. Case-Factors Model

By first examining the case-factors model, we see that a number of factors are statistically significant predictors of type of prosecutorial involvement in an exoneration. Innocence organization involvement, conviction post-DNA, misconduct, and offense severity are all statistically significant ($p < 0.05$). In order to interpret the magnitude of the effect of our variables, we estimate average marginal effects (see Table 2). Average marginal effects allow us to speak in terms of the likelihood of a particular outcome occurring based on a particular variable, holding all of the other variables constant. Offense severity is negatively related to the likelihood of receiving prosecutorial assistance. Specifically, the likelihood of a prosecutor actively opposing an exoneration increases 10 percentage points for each unit increase in offense severity. This suggests that a case involving sexual assault is 10 percentage points more likely to receive active prosecutorial opposition than a case only involving robbery. Official misconduct is negatively related to prosecutorial assistance. The likelihood of prosecutorial assistance is almost 22 percentage points lower for cases involving official misconduct than cases without misconduct. Contrary to Webster's findings, we find that cases where an innocence organization was involved

clustering correction by county for the organizational and environmental analyses since some jurisdictions account for more than one observation in our data.

⁷⁸ All of the coefficients in the case-factors model satisfied the parallel regression assumptions according to the Brant test. In the DA factors model, time in office violated the parallel regression assumption ($p = 0.019$). In the county context model, the Cook county variable and the indicator for region (West) did not satisfy the parallel regression assumption ($p = 0.00$ for both).

⁷⁹ To estimate a generalized ordered logistic regression, we use Richard Williams' `gologit2` Stata command (inspired by Vincent Fu's `gologit` command). This allows us to free some variables from the parallel lines constraint, while still constraining the variables that do satisfy the parallel lines assumption. Richard Williams, "Generalized Ordered Logit/Partial Proportional Odds Models for Ordinal Dependent Variables" (2006) 6 *Stata J* 58.

are actually less likely to have active assistance from the prosecutor.⁸⁰ In the discussion section, we offer a possible explanation for this departure.

Table 2. Case Level Factors (Level 1). Ordered logistic regression predicting prosecutorial involvement in exoneration cases (N=75).

	Model 1	Opposed vs. Uninvolved or Assisted	Assisted vs. Uninvolved or Opposed
	<i>b</i> (robust s.e.)	A.M.E.	A.M.E.
Innocence Organization Responsible	-1.254 (0.599)**	0.237	-0.198
Official Misconduct	-1.268 (0.569)**	0.232	-0.219
Post-DNA Conviction	1.880 (0.601)***	-0.344	0.325
Offense Severity	-0.549 (0.277)**	0.100	-0.095
Black Defendant	-0.687 (0.533)	0.123	-0.122
Hispanic Defendant	-0.491 (0.756)	0.086	-0.089
Time Served	0.008 (0.003)*	-0.001	0.001
/cut1	-1.410 (1.001)		
/cut2	-.465 (0.994)		

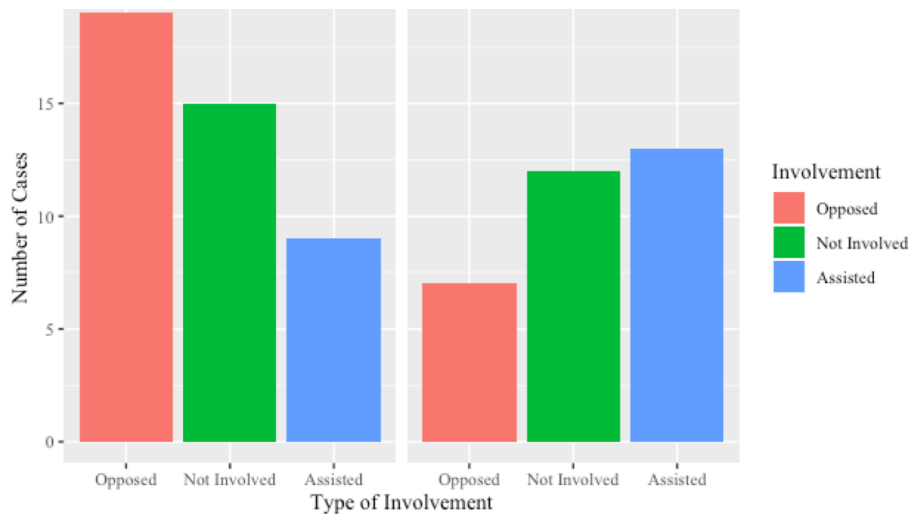
Notes. Pseudo R-squared: 0.12. /cut1 is the intercept indicating where the latent variable is cut to differentiate opposed from uninvolved and assisted when the predictor variables are at zero. /cut2 is the intercept indicating where the latent variable is cut to differentiate opposed and uninvolved from assisted when the predictors are zero.

*** p<0.01, ** p<0.05, * p<0.1

Whether the conviction occurred prior to the use of DNA testing in courts is also statistically significantly related to the type of involvement. Prosecutors are almost 33 percentage points more likely to assist, rather than oppose or remain uninvolved, in convictions that occurred from 1989 forward, when DNA evidence was more regularly available. To further investigate this finding, we looked at a simple cross tabulation of type of involvement pre- and post-DNA. We found that, of convictions that occurred prior to DNA, 44.19% were actively opposed by the prosecutor and 20.83% received assistance while the inverse was true of convictions that occurred post-DNA.⁸¹ Figure 2 displays how the frequencies of opposition and assisting flip after 1988.

⁸⁰ Webster, *supra* note 9.

⁸¹ According to a chi-squared test, the difference in type of involvement before relative to after DNA is marginally significant ($X^2=5.09$, $p=0.078$).

Figure 2. Type of prosecutorial involvement for cases convicted pre and post DNA

The amount of time served by the defendant prior to exoneration is marginally significant, but the effect is quite small ($p < 0.1$). It suggests that for each additional month served, the likelihood of a prosecutor actively opposing rather than staying uninvolved or assisting decreases by 0.1 percentage points. This is perhaps better understood as each additional year served decreasing the likelihood of prosecutorial opposition by 1.2 percentage points. This tentatively suggests that the barriers to assisting in an exoneration may diminish as the original conviction, and perhaps the prosecutor who secured that conviction, move further into the past.

Defendants' race and ethnicity are the only variables in our case-level model that fail to reach statistical significance. Webster found that Black and Hispanic defendants were more likely than White defendants to receive at least minor prosecutorial assistance.⁸² Whether it is due to our smaller sample size or broader range of prosecutorial involvement, we fail to replicate Webster's findings.⁸³ Our case level factors model, explains about 12% of the variation in type of prosecutorial involvement.⁸⁴

B. District Attorney Model Factors

To consider if any of the unexplained variation in type of prosecutor involvement is explained by factors related to the district attorney in charge at the time of the exoneration investigation, we estimate a second model. This model specifically examines the relationship between characteristics of organizational leadership (i.e., D.A. race, sex, and tenure) and involvement in exoneration investigations. We find that this organizational model explains only a small percentage of the variation in prosecutorial responses to wrongful conviction claims (about 4%).

⁸² Webster, *supra* note 9.

⁸³ *Ibid.*

⁸⁴ This is determined from the pseudo R-squared output of 0.12.

Of the district attorney level factors, only time in office is statistically significantly related to prosecutorial involvement in the exoneration (see Table 3).⁸⁵ The average marginal effect for time in office suggests that for each year in office, the likelihood of prosecutorial opposition decreases by 1.4 percentage points. The lack of significance for D.A. sex and race may be explained, in part, by the general lack of variation in D.A. demographics. Over 90% of the D.A.s in the sample were male and over 90% were White. Overall, the district attorney level factors we measure do not appear to exert much of an influence on prosecutors' decisions to engage in an exoneration effort.⁸⁶

Table 3. District Attorney Factors (Level 2). Generalized ordered logistic regression predicting prosecutorial involvement in exoneration cases (N=75).

	Equation 1	Equation 2	Likelihood of Opposition
	<i>b</i> (robust s.e.)	<i>b</i> (robust s.e.)	A.M.E.
White D.A.	-0.115 (0.906)	-	0.024
Male D.A.	-1.147 (0.958)	-	0.245
Time in Office	0.066 (0.033)**	0.005 (0.027)	-0.014

Notes. Pseudo R-squared: 0.04. Clustered by county (52 clusters). Equation 1 compares opposition to all outcomes above (uninvolved and assisted) and Equation 2 compares opposition and being uninvolved to assisting.

*** p<0.01, ** p<0.05, * p<0.1

C. County-Level Factors Model

Finally, we broaden the scope even further to explore the influence of county-level factors on the types of prosecutorial involvement in exonerations (see Table 4). We look at two county-level concepts. First, we examine the regional/political context, then we examine the demographic characteristics of the county. We find that the percent of the presidential vote for the Democratic candidate is not predictive of prosecutorial involvement in an exoneration. Likewise, our measure for culture of punitiveness (post-Furman executions) is not statistically significant. The ruralness of the county is also not predictive of prosecutorial involvement. However, we find that prosecutors in the West are less likely to actively oppose exoneration investigations than those in the Midwest, even after controlling for Cook County.⁸⁷ Specifically, cases in the West are 39.2 percentage points less likely to see prosecutorial opposition than cases in the Midwest. Webster also found that prosecutorial assistance was least likely in the Midwest; however, in her work, the greatest contrast was between the Midwest and the South, whereas we found that a significant difference between cases in the Midwest and West.⁸⁸

⁸⁵ Since time in office did not satisfy the parallel regression assumption, we report the results for time in office for both equation 1 (opposed vs uninvolved and assisted) and equation 2 (opposed and uninvolved vs assisted).

⁸⁶ When we model case factors and DA factors together, the pseudo R-squared estimate only increases from 0.12 to 0.14, a minimal gain in predictive power for the three additional variables.

⁸⁷ Of the seven cases drawn from Cook County, six were incidents where the prosecutor actively opposed the exoneration effort. The remaining case was an incident where the prosecutor was generally uninvolved in the exoneration effort.

⁸⁸ Webster, *supra* note 9.

Next, we examine whether the demographic makeup of the county predicts prosecutorial involvement in exonerations. We find that the racial/ethnic composition is not significantly related to prosecutorial involvement in exonerations. The percent of the county population that is non-White is not significantly related to prosecutorial involvement. Similarly, we fail to find a relationship between the percent of the population that is foreign born and how prosecutors engage in exoneration investigations.⁸⁹ Our wealth/status measures also fail to be statistically significant. Neither median household income nor the percent of the county population with a bachelor's degree is statistically significantly related to whether a prosecutor opposes or assists in an exoneration.

Table 4. County Level Factors (Level 3). Ordered logistic regression predicting prosecutorial involvement in exoneration cases (N=75).

	Equation 1		Equation 2		Likelihood of
	<i>b</i> (robust s.e.)		<i>b</i> (robust s.e.)		Opposition
					A.M.E.
Political/Regional					
% Presidential Vote (D)	1.255	(2.001)	-		-0.229
Post-Furman Executions	0.259	(0.807)	-		-0.047
Northeast	0.207	(0.746)	-		-0.041
South	0.072	(0.632)	-		-0.015
West	15.810	(0.816)***	0.984	(1.161)	-0.392
Rural-Urban	0.024	(0.141)	-		-0.004
Cook County	-2.825	(0.930)***	-16.802	(0.959)***	0.515
Demographic					
% Non-White	-0.021	(0.127)	-		0.004
% Non-White Quadratic	-0.000	(0.003)	-		-0.000
% Foreign Born	0.195	(0.266)	-		-0.037
% Foreign Born Quadratic	-0.009	(0.018)	-		0.002
% Bachelors Education	0.025	(0.038)	-		-0.005
Log Median Income	-1.043	(1.102)	-		0.199
Cook County	-2.974	(0.713)***	-15.734	(1.207)***	0.567

Notes. Election years are omitted for clarity. Equation 1 compares opposition to all outcomes above (uninvolved and assisted) and Equation 2 compares opposition and being uninvolved to assisting.

*** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$

V Discussion

Understanding prosecutorial involvement in exonerations is a fairly new line of research. The current study is only the second empirical test of post-conviction prosecutorial assistance. Our findings, in part, support prior literature on prosecutorial assistance in exonerations while also

⁸⁹ We include quadratic terms for population and percent foreign born but neither are significant, which suggests that population and percent foreign born are not linearly or curvilinearly related to prosecutorial involvement.

extending this emerging field of research in three important ways. First, we expand the scope of prosecutorial involvement in exonerations by including cases where prosecutors actively opposed, rather than limiting the analysis to just cases where prosecutors assisted or not. Secondly, we avoid any debate about whether prosecutors rightly resisted a wrongful conviction by including only cases of factual innocence. Finally, we address the identified gap in the literature by broadening the analysis to include organizational and county-level factors.

Like Webster, we find that the likelihood of prosecutorial assistance is lower when the original conviction involves a more serious offense and when there is alleged official misconduct.⁹⁰ Both findings suggest that prosecutors may resist assisting in an exoneration when the stakes are higher. In his evaluation of post-conviction prosecutorial behavior, Medwed describes a number of disincentives to assistance in wrongful conviction investigations but notes that there are few exceptions.⁹¹ One such exception is when the case has relatively low stakes. Medwed describes low stakes cases as those in which the defendant will not actually be released from custody due to a sentence for a separate crime or where the innocence of one defendant is coupled with evidence of the actual offender's guilt.⁹²

Our crime severity findings seem to fall within this lower stake framework. The stakes of overturning cases involving less serious crimes are likely lower than overturning convictions for more egregious and violent crimes because the former will likely draw less public attention or concern. This may explain why we see prosecutors more likely to assist when the crime is less severe and more likely to oppose when the case involves both murder and sexual assault. Further, overturning a conviction for a violent offense like murder leaves a victim's family without a conviction. Prosecutors are likely reticent to reopen a closed case for fear of revisiting past trauma for the victim and victim's family. Prosecutors' and victims' desires for finality deter active assistance, and our findings suggest that this is particularly the case when the offense in question was particularly violent.⁹³ Likewise, the personal and professional stakes of overturning a conviction are lower when there is no alleged official misconduct. Assisting in a case where either the prosecutor himself, a colleague, or a law enforcement officer is accused of misconduct may seriously jeopardize that prosecutor's professional relationships or even his own professional reputation in the event that he was the convicting prosecutor. Exposing law enforcement or prosecutorial misconduct can have significant professional and political implications.

The stakes of an exoneration may also fall the longer a defendant has served time. We find that for each additional year served, the likelihood of prosecutorial assistance increases by 1.2 percentage points. As such, the amount of time already served may combat the "ends justifies the means" mentality of some prosecutors that although the defendant may not be guilty of the crime he was convicted of, he is certainly guilty of something.⁹⁴ Since the defendant has been punished by serving some time already, the prosecutor may not fight as hard to ensure that defendant remains in custody. An alternative explanation is that the longer the defendant has been incarcerated, the less likely the convicting prosecutor is still in office. Removing the organizational concern of

⁹⁰ Webster, *supra* note 9.

⁹¹ Medwed, *supra* note 8.

⁹² *Ibid.*

⁹³ Gingsburg & Hunt, *supra* note 1; Green & Yaroshefsky, *supra* note 26; Orenstein, *supra* note 8.

⁹⁴ Orenstein, *supra* note 8; Medwed, *supra* note 8.

protecting a current colleague may increase prosecutors' willingness to assist in an exoneration. Either explanation fits within the lower-stakes framework.

Some promising news from Webster's work is that prosecutors have become more likely to assist in exonerations over time.⁹⁵ Relatedly, we find that prosecutors are less likely to oppose exoneration attempts in cases post-1989, when DNA became increasingly admissible in court. The progressive use of DNA testing in courts may give cover to prosecutors to assist in an exoneration by providing an objective test that they can use to defend an exoneration to the public. This sort of evidence can lower the stakes of assisting in the exoneration.

In addition, the increasing number, and rising publicity, of exonerations may have reduced prosecutors' tendency to oppose exoneration efforts, even for cases that are not specifically exonerated on the basis of exculpatory DNA evidence. Prior literature on wrongful convictions suggests that media attention and public aversion to wrongful convictions may be a counterweight to prosecutors' disincentives to pursue post-conviction claims of innocence.⁹⁶ As the network of innocence organizations grows and films like *The Central Park Five*, *Brian Banks*, and the Netflix miniseries *When They See Us* chronicle the stories of wrongful convictions, exonerations are increasingly a part of public discourse.⁹⁷ Perhaps these narratives and the public aversion to wrongful convictions provide prosecutors an opportunity that may not have existed 40 years ago, the opportunity to be the champion in overturning a wrongful conviction, rather than the villain.

Unlike Webster, we find that the involvement of an innocence organization is negatively related to active prosecutorial assistance.⁹⁸ However, this may very well be an artifact of differing measures of innocence organization involvement. While Webster broadly defines this as any involvement from an innocence organization or agency that reviews the wrongful conviction claim, our study more narrowly defines involvement as playing a, "crucial, direct, and active role in the exoneration."⁹⁹ As such, our definition drives down the likelihood that a case is identified as having "crucial, direct, and active" assistance from both the prosecutor and the innocence organization. The second departure from Webster's findings is that we fail to see a statistically significant effect of exoneree race/ethnicity on the type of assistance. While Webster found that both Black and Hispanic individuals were more likely to receive at least minor prosecutorial assistance than White individuals, we observe no effect.¹⁰⁰ Either way, Black individuals are significantly overrepresented among the wrongfully convicted.¹⁰¹

As the courts as communities metaphor would suggest, the decision whether to oppose or assist in an exoneration is not a decision that prosecutors make in isolation or solely on the basis

⁹⁵ Webster, *supra* note 9.

⁹⁶ Green & Yaroshefsky, *supra* note 26; Medwed, *supra* note 8.

⁹⁷ Ken Burns, Ben McMahon & Sarah Burns, *The Central Park Five* [Documentary, 2012]; Tom Shadyac, *Brian Banks* (Biographical Drama, 2019) Ava DeVernay, *When They See Us* [Television Broadcast, Netflix, 2019].

⁹⁸ Webster, *supra* note 9.

⁹⁹ *Ibid*; Gould et al, *supra* note 60 at 222.

¹⁰⁰ Webster, *supra* note 9.

¹⁰¹ Talia Roitberg Harmon, "Race for Your Life: An Analysis of the Role of Race in Erroneous Capital Convictions" (2004) 29 Crim Just Rev 76; Samuel Gross, Maurice Possley & Klara Stephens, *Race and Wrongful Convictions in the United States* (Irvine, National Registry of Exonerations, 2017).

of case-level factors.¹⁰² Rather, they make decisions about how to engage in a post-conviction claim of innocence within the context of organizational and environmental pressures as well. That said, in the current study, we are only able to identify and properly measure two particular organizational and environmental pressures that appear to sway prosecutors' decisions to engage in an exoneration investigation. Only the length of the time the district attorney has been in office and the region of the country appear to have this broad organizational/environmental influence on prosecutorial assistance.

Of the district attorney factors, only length of time in office was statistically significant. This may suggest that when district attorneys are more established and secure in their role, they feel more comfortable revisiting old cases and assisting in wrongful conviction investigations. This finding appears to run counter to Laurie Levenson's notion of the cynical senior prosecutor.¹⁰³ Her work suggests that more senior prosecutors have more conflicts of interest, tend to rely on their gut instincts, trust the credibility of their colleagues' work, and trust their informants. Each of those tendencies act to dissuade assistance.¹⁰⁴ While that may be true for line prosecutors, our finding suggests that the stability of the district attorney may in fact minimize the perceived risk of assisting. If the district attorney has repeatedly been re-elected (or weathered multiple changes in local political administrations), their office may be able to tolerate a bit more risk.

Of the county-level factors, only region appears to be systematically related to post-conviction prosecutorial behavior. We find that prosecutors in the Midwest are more likely to oppose an exoneration than prosecutors in the West. Importantly, this effect is independent of our measures of county political affiliation, punitiveness, and ruralness. As such, it remains to be seen what the particular mechanism is that explains this regional variation in prosecutorial behavior. Future research is needed to adjudicate if it is regional access to innocence organizations, the quality of professional training on post-conviction responsibilities, or some other regionally specific factor, or set of factors, that explains the variation in prosecutorial assistance in exonerations.

A. Limitations and Future Research

In considering each level of analysis in tandem, it is evident the case-level factors exert greater influence over prosecutors' decisions to get involved in an investigation than broader organizational and county level factors. The lack of statistically significant findings at the county-level is not particularly surprising, as the effect of more distal factors tends to be more diffuse than factors that are more proximal.¹⁰⁵ There is support for our findings in a related body of literature. Haynes, Ruback, and Cusick draw from the courts as communities framework but apply it to sentencing outcomes, rather than prosecutorial discretion. They, like many others, find that case specific factors such as offense severity and prior record are routinely the strongest predictors of

¹⁰² Eisenstein, Flemming & Nardulli, *supra* note 10.

¹⁰³ Levenson, *supra* note 23.

¹⁰⁴ *Ibid.*

¹⁰⁵ Stacy Hoskins Haynes, Barry Ruback & Gretchen Ruth Cusick, "Courtroom Workgroups And Sentencing: The Effects Of Similarity, Proximity, And Stability" (2010) 56 *Crime Delinq* 126 [Haynes, Ruback & Cusick].

sentencing outcomes.¹⁰⁶ The more distal factors, such as percent Republican or poverty rate, generally have a weaker direct effect on sentencing outcomes.¹⁰⁷ If there is a true effect of regional/political culture or demographic context on prosecutors' willingness to assist in wrongful conviction investigations, we would likely need greater statistical power from additional cases to detect these more diffuse effects.

This brings us to several limitations in the current study. One central limitation is the limited number of cases we are able to analyze. With only 75 cases, and an ordered outcome, we have fairly limited statistical power. This makes it difficult to find statistically significant differences, even if they may exist. Further, the small number of cases required us to limit our models to only the most theoretically relevant variables at each of the three levels rather than being able to analyze all of the variables in a single model because we simply did not have sufficient degrees of freedom to justify such a large model.

A second primary limitation in the current study is a matter of a relevant comparison group. All of the cases in our sample resulted in an exoneration, so we cannot speak to instances where there was a wrongful conviction claim and investigation but not an exoneration. As such, the results of the current study should be understood as relating to prosecutorial involvement among cases that are ultimately exonerated. Different trends may exist among cases that are investigated but not formally exonerated. This motivates the first proposal for further research. Future studies ought to collect data on prosecutorial involvement in cases that are investigated but not exonerated and those that result in an exoneration. By doing so, future research could speak to prosecutorial involvement in wrongful conviction investigations more broadly than just those that result in successes. With the additional cases, future research could investigate cross-level interactions between case factors and the broader organizational and county-level factors to determine if the effect of case-level factors on prosecutors' decisions to get involved in a wrongful conviction investigation vary by jurisdiction.

B. Policy Considerations

Although we find little evidence that prosecutorial involvement in exonerations differs systematically between counties, there are a number of institutional reforms that may help minimize the more proximal barriers to prosecutorial assistance. In fact, the general lack of county-level variation in prosecutorial involvement suggests that the successful reforms in one county may be successfully applied in another county. Broadly, our findings suggest that prosecutors are more likely to assist and less likely to oppose exoneration efforts when the stakes are lower. As such, we offer several recommendations for lowering the stakes of assisting in exonerations.

¹⁰⁶ Jill K Doerner & Stephen Demuth, "The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts" (2010) 27 *Just Q* 1; Darrell Steffensmeier & Stephen Demuth, "Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons" (2001) 39 *Criminol* 145; Darrell Steffensmeier & Stephen Demuth, "Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?" (2000) 65 *Am Soc Rev* 705.

¹⁰⁷ Haynes, Ruback & Cusick, *supra* note 105; Jeffery Ulmer & Mindy Bradley, "Variation in Trial Penalties Among Serious Violent Offenses" (2006) 44 *Criminol* 631.

Our findings lend support for the implementation of Conviction Review Units (CRUs) or Conviction Integrity Units.¹⁰⁸ We find that prosecutors are more likely to actively oppose exonerations when the stakes are higher, and CRUs offer a way to remove some of the burden on prosecutors to weigh the costs and benefits of getting involved in an exoneration. By shifting the responsibility for reviewing post-conviction claims of innocence from the discretion of the individual prosecutor involved to a specially assigned unit, district attorneys can increase the likelihood that their office equitably reviews wrongful conviction claims. Importantly, attorneys assigned to conviction review should work to become experts on the matter and implement efficient and unbiased systems for vetting claims.¹⁰⁹

Hollway's national review of CRUs identifies three best practices.¹¹⁰ CRUs can be most effective when they are independent from the district attorney's office, flexible in accepting all plausible claims of factual innocence for a preliminary review, and transparent in exchanging information and publishing policies and procedures. Although Hollway identifies independence from the district attorney's office as a best practice, there is a tradeoff. The independence of conviction review organizations can reduce potential conflicts of interest and can promote public confidence in the fairness of the review process, however, internal units have greater access to resources and evidence and, thus, may be able to review cases more efficiently.¹¹¹ Whether internal or independent, CRUs can help to relieve prosecutors from having to be both a player and a referee.¹¹²

For offices that may not have the resources or staff capacity to implement a CRU, we offer a second policy reform. District attorneys should initiate a change in performance standards.¹¹³ Our results suggest that offices where the district attorney is more established (has served longer) are more likely to provide active assistance in exonerations. We suggest that established district attorneys should leverage this influence. Instead of focusing on conviction rates in isolation, factors like declining weak cases, decreasing charge severity for overcharged cases, and assisting in wrongful conviction investigations ought to be factored into the overall performance evaluation of line prosecutors. In his research on prosecutorial responses to police misconduct, Erwin Chemerinsky identified the lack of professional incentives to investigate possible police misconduct as particularly problematic.¹¹⁴ In the Los Angeles District Attorney's office where Chemerinsky conducted his study, there was a widespread in belief among line prosecutors that promotion was a matter of efficiency and conviction rates. As such, efforts to investigate police wrongdoing would jeopardize professional relationships without offering any sort of professional reward.

¹⁰⁸ John Hollway, "Conviction Review Units: A National Perspective" (2016) Faculty Scholarship at Penn Law 1614 [*Hollway*]; Green & Yaroshefsky, *supra* note 26.

¹⁰⁹ Medwed, *supra* note 8.

¹¹⁰ Hollway, *supra* note 108.

¹¹¹ Green & Yaroshefsky, *supra* note 26.

¹¹² Zacharias, *supra* note 2.

¹¹³ Medwed, *supra* note 8; Erwin Chemerinsky, "The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles" (2001) 8 Va J Soc Pol'y & L 305 [*Chemerinsky*].

¹¹⁴ Chemerinsky, *ibid*.

Medwed argues that lack of incentive to redress wrongs is also relevant to the post-conviction context.¹¹⁵ Importantly, Medwed notes that, in many cases, assisting rather than stonewalling an investigation is more efficient and minimizes negative media attention.¹¹⁶ If the prosecution works with defense, they can expedite the investigation and, potentially, position the office as a champion of the exoneration. Joining with Medwed, we argue that district attorneys should explicitly redefine the parameters for promotion to include corrective measures such as dismissing superfluous charges and providing active assistance in credible exoneration investigations. Included in this redefinition of performance measures comes a need to more thoroughly document prosecutors' behavior in the post-conviction phase. If prosecutors are going to be held accountable for their treatment of wrongful conviction claims, there needs to be robust data on the timeliness and completeness of the information prosecutors contribute to exoneration investigations. By establishing prosecutorial assistance as a priority from the top, district attorneys can lower the stakes for their line prosecutors.

Formalized units for conviction review and reprioritized professional metrics offer some relief from the psychological and institutional barriers to prosecutorial assistance by making post-conviction assistance a routine that can be rewarded. However, the lack of legal requirements guiding prosecutorial behavior in the post-conviction phase stills leaves room for inter-jurisdictional and inter-prosecutor variation in responses to wrongful convictions. This highlights the need for states to impose formal postconviction obligations. At a minimum, states should adopt Model Rule 3.8(g) and (h), which gives prosecutors an affirmative responsibility to investigate "new, credible and material evidence."¹¹⁷ Adopting these amendments is not simply a matter of compelling prosecutors to act a certain way. Rather, formal legal regulation provides cover for prosecutors from potentially upset victims or the public. By removing some of the discretion in how to respond, prosecutors can simply do their duty. Certainly, none of our policy recommendations in isolation will eliminate prosecutorial opposition to wrongful conviction investigations. However, if taken together, these recommendations offer a path forward to ensure that wrongfully convicted individuals have a second chance at justice.

VI Conclusion

Although there is significant room for future research to advance the current study, we provide an initial analysis that addresses some of the gaps identified in prior literature on prosecutorial involvement in exonerations. Norris and Bonventre called for greater attention to organizational perspectives in understanding wrongful convictions, and Webster called for analysis of the county legal culture in understanding prosecutorial assistance in exonerations.¹¹⁸ We address each of these gaps by looking at prosecutorial involvement from three perspectives – case-level, district attorney level, and county level. We find that case level factors are the most strongly related to prosecutorial involvement. Broadly, our findings at the case-level suggest that when the stakes are lower (the crime is less serious, there is no alleged misconduct, the defendant

¹¹⁵ Medwed, *supra* note 8.

¹¹⁶ *Ibid.*

¹¹⁷ Boehm, *supra* note 8; Michele K Mulhausen, "A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)" (2010) 81 U Colo L Rev 309.

¹¹⁸ Norris & Bonventre, *supra* note 9; Webster, *supra* note 9.

has already served time), prosecutors are less likely to oppose an exoneration effort and more likely to assist. At the organizational level, the longer the district attorney had been in office at the time of the exoneration, the more likely the office is to extend prosecutorial assistance. In line with the lower-stakes framework, this suggests that more established district attorneys may be able to withstand more risk. Finally, at the county-level, we observe regional variation in prosecutorial assistance with prosecutors in the West being more likely to assist than prosecutors in the Midwest.

Prosecutorial opposition to an exoneration compounds the injustice of a wrongful conviction. Yet, when the potential professional and organizational costs of an exoneration are high, it is especially hard for prosecutors to see a defendant as innocent. For that reason, we support specializing and, when possible, externalizing conviction review to remove some of the burden from individual prosecutors and to increase access to justice. Secondly, we propose that district attorneys explicitly redefine professional evaluation metrics to include corrective measures, not just convictions. Finally, states should adopt formal legal regulation directing prosecutors' post-conviction responsibilities. Minimizing prosecutorial opposition is essential to rectifying wrongful convictions as efficiently as possible. For a wrongfully convicted individual, each delay or refusal to turn over evidence translates into days, weeks, or even years spent incarcerated, out of the workforce, and away from loved ones. The difference between a tumultuous and protracted path to exoneration like that of Clarence Elkins and being "one of the lucky ones" like Joseph Abbitt turns on the discretion of the prosecutor. In order to minimize the undue influence of case-level factors and broader organizational and county-level pressures, prosecutorial involvement in exonerations needs to be a matter of standard practice not of prosecutor' preference.