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Special Interests in Prosecutor Elections

Carissa Byrne Hessick,* Nathan Pinnell**

When the news hit, it caused a firestorm. The New York District Attorney's Office had been building a case against the President's children—Ivanka Trump and Donald Trump, Jr.—when their lawyer approached the Manhattan District Attorney, Cyrus Vance, to ask him to drop the case. Although it was somewhat unusual for a lawyer to circumvent the career prosecutors handling a case, the bombshell was that the lawyer had donated \$25,000 to Vance's reelection campaign while his office had been investigating the Trumps. As a result, Vance's meeting wasn't simply with a defense attorney—it was with one of his largest donors.¹

Vance is not the only prosecutor to face scandal in recent years for his campaign contributions. Alameda County District Attorney Nancy O'Malley faced significant criticism for accepting a \$10,000 contribution from the Fremont police union in 2017 while her office was investigating officers in the union for the fatal shooting of a pregnant teenager.² The police officers involved in the shooting, including the union president, were never charged.³

These donations are controversial because they raise the specter of an elected prosecutor making decisions that would benefit a donor, rather than the general public. To be clear, this is a major weakness of our privately funded campaign finance system more generally—when public officials must raise money to compete in elections, those officials are more likely to favor the interests of their donors rather than the public interest at large. However, the issue may be more urgent for prosecutors because their decisions are about putting specific people in prison rather than setting general policy,⁴ and because their decisions are often shielded from

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¹ Andrea Bernstein et al., *How Ivanka Trump and Donald Trump, Jr., Avoided a Criminal Indictment*, NEW YORKER (Oct. 4, 2017), <https://www.newyorker.com/news/news-desk/how-ivanka-trump-and-donald-trump-jr-avoided-a-criminal-indictment> [https://perma.cc/JA9A-MYRU]. Presumably because it perceived a potential conflict of interest, Vance's campaign returned the donation shortly before the meeting occurred. *Id.*

² See Steven Tavares, *DA O'Malley Took \$10K From Fremont Police Union Before Clearing Fremont Cops in Killing of Pregnant Teen*, E. BAY EXPRESS (Mar. 16, 2018), <https://eastbayexpress.com/da-omalley-took-10k-from-fremont-police-union-before-clearing-fremont-cops-in-killing-of-pregnant-teen-2-1/> [https://perma.cc/FZ64-46BE].

³ *Id.*

⁴ See Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the*

public view.⁵

Concerns about how donations may affect prosecutorial decision-making has led a group of progressive prosecutors in California to request the state bar adopt a rule prohibiting local prosecutors and candidates for prosecutor from accepting police union donations.⁶ The proponents of this rule argued that taking money from police unions could influence prosecutors' charging decisions or could create the impression that it influenced those decisions. They further argued it was necessary to ban such contributions because prosecutors have often failed to charge police officers for using unjustified force against civilians.⁷

While much has been written about money in politics generally,⁸ little attention has been paid to money in prosecutor elections specifically. This Symposium Article aims to identify the special interests at play in prosecutor elections. Using an original nationwide dataset of campaign contributions in prosecutor elections, it also seeks to provide insight into the extent of special interests' financial power in those elections.

In accomplishing these two tasks, this Article grapples with the incongruence between ordinary theories of special interests and the office of prosecutor. Most theories have been developed to describe and explain how special interests seek to influence public officials with broad policymaking powers, such as legislatures, chief executives, and even judges. While prosecutors certainly possess important policymaking powers, those powers are far more limited, both in breadth and in scope.

Litigation State, 102 CORNELL L. REV. 929, 959–60 (2017) (explaining why concerns about campaign contribution solicitations “have special bite in the contexts of enforcement and adjudication, where government officials are called upon to make decisions involving discrete and identifiable individuals and groups”).

⁵ See Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. (forthcoming 2021) (cataloguing the key prosecutorial decisions that are made without transparency).

⁶ Darrell Smith, *Prosecutors Push for Rules to Block California DAs from Taking Police Union Campaign Cash*, SACRAMENTO BEE (June 2, 2020, 12:58 PM), <https://www.sacbee.com/news/california/article243184411.html> [<https://perma.cc/ZVC9-KSSJ>].

⁷ See *id.*

⁸ See, e.g., BRIAN E. ADAMS, CAMPAIGN FINANCE IN LOCAL ELECTIONS: BUYING THE GRASSROOTS (2010); MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES (1998); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2016); Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620 (2000); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989); Edward J. McCaffery, *A Better Hope for Campaign Finance Reform*, 52 ARIZ. ST. L.J. 445 (2020); Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004); Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781 (2014).

Prosecutor elections are increasingly seen as a way to reform the criminal justice system because prosecutors can use their discretion in individual cases to bring about significant policy changes.⁹ But not much is known about prosecutor elections. Only recently have scholars begun to study how often prosecutor elections are contested¹⁰ and what candidates say in those elections.¹¹ How groups decide whether to support a prosecutorial candidate and when that support takes the form of a campaign contribution are largely unknown. What is more, because the office of local prosecutor differs in important ways from other elected offices, existing theories and ordinary intuitions may not fully describe or explain special interests in prosecutor elections.

This Article aims to help fill that gap. By presenting both hypotheses about special interests in prosecutor elections and actual data about campaign contributions, it seeks to articulate and begin to refine a more nuanced understanding of the role that special interests play in prosecutor elections.

The Article proceeds in three parts. Part I describes the concept of special interests and how those interests generally have been described in the campaign finance literature. That literature treats contributions as either expressive, access-oriented, or some combination of the two. Part II offers our preliminary thoughts on special interests in prosecutor elections, identifying the various interest groups that might seek to participate in prosecutor elections and discussing how those interests might behave differently than they do in elections for other officials. Part III tests some of the preliminary thoughts offered in Part II using an original dataset of contributions from prosecutor elections. It concludes that, while some interests operate according to expectations, others do not.

I. SPECIAL INTERESTS AND CAMPAIGN CONTRIBUTIONS

This part explains the general concept of special interests. It then turns to the reasons why people and interest groups contribute to campaigns. Drawing on existing literature, it explains that there are three major reasons why people make campaign contributions. It concludes by offering some thoughts about how those different motivations may affect which types of candidates receive contributions from the various types of special interests.

⁹ See, e.g., EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017).

¹⁰ See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537 (2020); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014) [hereinafter Wright, *Beyond*]; Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009) [hereinafter Wright, *Elections*].

¹¹ Wright, *Elections*, *supra* note 10, at 600–06.

A. *Special Interests in Elections*

The term “special interest” gets thrown about quite a lot in modern discussions about politics and elections. It generally seems to carry a negative connotation—the implication being that special interests are different than, or at odds with, the “public interest.”¹² Indeed, legal scholars sometimes talk about special interests as the modern-day incarnation of Madison’s “factions”¹³—groups that he identified as a special threat to democracies and something that our constitutional structure was supposed to help guard against.¹⁴

Although the term “special interest” seems to carry negative connotations, the idea that interest groups play an important, if not valuable, role in the American political process is incredibly well established.¹⁵ Especially for those who seek to describe human behavior, interest groups may help make sense of how and why the political process operates as it does.

Campaign contributions may be a particularly attractive way for interest groups to participate in American democracy. Rather than simply hoping that voters will elect public officials to make decisions that might benefit a given interest or to avoid decisions that could hurt that interest, an interest group can use money to actively support candidates that would benefit them and oppose candidates that would negatively affect them. Interest groups can support or oppose candidates by spending their own money to buy advertisements or otherwise communicate with voters. Or they can contribute to candidates, who then use that money to pay for advertisements, yard signs, consultants, staff, and other aspects of their campaigns.

This account is consistent with how economists have described interest groups and campaign contributions—namely, that groups use campaign contributions as a way to seek access to policymakers. That access is desirable because government “ha[s] the power to create benefits that [are] unavailable other than through politics, or [are] more cheaply available through politics.”¹⁶ These benefits, termed “rents,” come from the monopolistic control that politicians have over a “scarce or unique

¹² See, e.g., Michael R. Dimino, Sr., *We Have Met the Special Interests, and We Are They*, 74 MO. L. REV. 495, 496 (2009) (“The term ‘special interest’ is a disparaging one because it implies a comparison with something else – a ‘general interest.’”); Kevin P. Kirchner, *Special Interests v. the Public Interest: Money Talks in Environmental Regulation*, 25 ECOLOGY L.Q. 665, 672 (1999) (speaking about “special interests” in juxtaposition with “the public interest”).

¹³ Jide Nzelibe, *In Praise of Faction: How Special Interests Benefit Constitutional Order*, 109 NW. U. L. REV. 639, 643–44, 671 (2015); See Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 173–74 (2003).

¹⁴ THE FEDERALIST NO. 10 (James Madison).

¹⁵ See e.g., Dimino, *supra* note 12; Nzelibe, *supra* note 13; Carmen Pavel, *Making a Faustian Bargain Work: What Special Interests Can Tell Us About Representation in the WTO*, 12 GEO. J.L. & PUB. POL’Y 471 (2014).

¹⁶ FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 9–10 (1997).

factor of production”—government regulation.¹⁷ By obtaining access and influence through contributions to a politician’s campaign, a donor may attempt to leverage that access and influence for regulatory decisions in their favor.¹⁸ These regulatory decisions can be positive (rent creation), redistributing wealth in ways that benefit the favored industry, or negative (rent extraction), threatening to impose costs on private parties unless they comply with a politician’s demands.¹⁹ Thus, in contributing to political campaigns, donors are simply acting in a rational way, either investing in politicians who will enact policies that favor them or paying to avoid politicians who may enact policies that will harm them.²⁰

B. Theories of Campaign Contributions

American elections have become increasingly expensive. Total federal spending in the 2020 election neared \$14 billion, making it more than twice as expensive as the 2016 election.²¹ The 2016 election was previously the most expensive election in United States history; it was more expensive than the 2012 election, which in turn cost more than the 2008 election.²² Throughout this rise, direct contributions played a large role. In 2008, for example, Americans spent over \$5.29 billion on political campaign contributions, of which over 90% came from individuals’ personal contributions.²³

Despite the rise in contributions, questions remain about who chooses to contribute to political campaigns and their motivations for doing so, particularly in local elections. Much of the literature on campaign contributions focuses on federal elections, particularly contributions to candidates for House and Senate seats.²⁴ Studies of non-federal elections typically limit their consideration to contributions

¹⁷ Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 562 (1969).

¹⁸ Brett Silverberg, Comment, *Turning Cash into Votes: The Law and Economics of Campaign Contributions*, 25 U. MIAMI BUS. L. REV. 111, 118 (2016).

¹⁹ See Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 104 (1987).

²⁰ *Id.*

²¹ *2020 Election To Cost \$14 Billion, Blowing Away Spending Records*, OPENSECRETS.ORG (Oct. 28, 2020, 1:51 PM), <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/> [<https://perma.cc/QA94-P5Z2>].

²² *Id.*

²³ Adam R. Fremeth, Brian Kelleher Richter & Brandon Schaufele, *Campaign Contributions over CEOs’ Careers*, 5 AM. ECON. J.: APPLIED ECON. 170, 170 (2013).

²⁴ See, e.g., James G. Gimpel, Frances E. Lee & Michael Parrott, *Business Interests and the Party Coalitions: Industry Sector Contributions to U.S. Congressional Campaigns*, 42 AM. POL. RES. 1034 (2014) (analyzing campaign contributions to House incumbents); James M. Snyder, Jr., *The Market for Campaign Contributions: Evidence for the U.S. Senate 1980–1986*, 5 ECON. & POL. 219 (1993) (testing a model of campaign contributions on the U.S. Senate); David G. Abler, *Campaign Contributions and House Voting on Sugar and Dairy Legislation*, 73 AM. J. AGRIC. ECON. 11 (1991) (investigating the influence of campaign contributions on House votes).

in statewide or state-level elections, such as candidates for the state legislature or judiciary.²⁵ And while researchers have begun to study contributions in judicial elections,²⁶ little research, if any at all, has explored the motivations behind contributions to candidates whose power is limited to enforcement of the law, such as local prosecutors.²⁷

Although scholars have not focused on the motivations for donating to prosecutor campaigns in particular, they have identified three reasons why donors choose to give to campaigns more generally—expressive reasons, access-oriented reasons, and ideological reasons. For individuals, the traditional theory is that contributions are “expressive.”²⁸ In other words, contributions “indicate the political preferences, either partisan or ideological, of the donor,” and donors are prompted to give by a desire for representatives in government with beliefs similar to their own.²⁹ Work subscribing to this theory has been used to estimate the ideology of politicians based on the contributions they receive, as well as the ideology of the donors who make those contributions.³⁰ Some work has also suggested that rather than being considered an “investment” in a politician in search of “direct private benefits,” contributions from individuals can be considered “a form of consumption not unlike giving to charities.”³¹ As with other consumption goods, the likelihood of political contributions varies directly with an individual’s income, with higher-

²⁵ See, e.g., Michael Barber, *Donation Motivations: Testing Theories of Access and Ideology*, 69 POL. RES. Q. 148 (2016); Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL’Y Q. 281 (2007). But see Arnold Fleischmann & Lana Stein, *Campaign Contributions in Local Elections*, 51 POL. RES. Q. 673 (1998) (discussing campaign contributions in municipal elections); Sarah Reckhow et al., “Outsiders with Deep Pockets”: *The Nationalization of Local School Board Elections*, 53 URB. AFFS. REV. 783 (2017).

²⁶ See Cann, *supra* note 25, at 281 (“Looking at cases decided in the Supreme Court of Georgia’s 2003 term, I show that campaign contributions are indeed correlated with judges’ decisions . . . [and] directly affect judicial decisionmaking.”); Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 POL. & POL’Y 314, 314 (2003) (“I find empirical evidence suggesting that the justices are influenced by the preferences of campaign contributors.”).

²⁷ We have been unable to discover any existing studies which consider individual contributions to prosecutors. There is one recent article that gathers and presents data for independent expenditures in a small number of prosecutor elections. See Rory Fleming, *Legitimacy Matters: The Case for Public Financing in Prosecutor Elections*, 27 WASH. & LEE J. C.R. & SOC. JUST. 1 (2020). But the author appears to have used somewhat subjective criteria to build his sample and does not indicate how (or whether) he ensured that all candidates who met those criteria were identified and included in his analysis. See *id.* at 10–14.

²⁸ Scott Limbocker, *Why Do Bureaucrats Make Campaign Contributions to Presidential Candidates?: Evidence from 2004 to 2012*, 48 PRESIDENTIAL STUD. Q. 667, 671 (2018).

²⁹ *Id.*

³⁰ See Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 367 (2014); Andrew B. Hall, *What Happens When Extremists Win Primaries?*, 109 AM. POL. SCI. REV. 18, 20–22 (2015).

³¹ Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 117–18 (2003).

income individuals being more likely to donate.³²

The “expressive” or “consumption-based” account of individual contributions is in stark contrast to theories about contributions from political action committees (PACs). Unlike individuals, conventional PACs are “purely access-oriented,”³³ aimed at securing the time and influence of politicians in the creation of policy.³⁴ In the legislative process, this infrequently translates to a direct change in how a legislator votes on a bill,³⁵ rather, it is more likely to impact the intensity of support for a bill, whether it comes to the floor at all, and what the bill looks like if it does.³⁶ Notably, in the judicial context, some work has found a relationship between campaign contributions and the content of judicial decisions.³⁷

Access-oriented contributions are most often talked about in the context of donations to legislators.³⁸ But access could also explain contributions to other elected officials. Corporations doing business in a state, for example, could potentially see their profits affected by the judicial decisions of that state, giving corporate PACs an incentive to contribute to the election of business-friendly judges. The corporation might try to reward a judge for past votes friendly to their interests or incentivize future votes in line with their interests,³⁹ analogous to the concept of rent creation. Alternatively, the corporation may try to prevent the election of judges perceived as unfriendly to their interests,⁴⁰ analogous to an attempt to prevent rent extraction.

Due to the potential for rent creation and extraction, the literature on campaign contributions in local elections has focused on the importance of access-oriented

³² *Id.*

³³ Barber, *supra* note 25, at 150.

³⁴ Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 814–15 (1990).

³⁵ Lynda W. Powell, *The Influence of Campaign Contributions on the Legislative Process*, 9 DUKE J. CONST. L. & PUB. POL’Y 75, 75 (2014) (“[M]any studies find no causal link between contributions and policy outcomes. The vast majority of these studies have looked at . . . donations to legislators and the roll call votes these legislators cast.”).

³⁶ Hall & Wayman, *supra* note 34, at 814–15 (“[W]e believe groups allocate their various resources (1) to mobilize strong supporters . . . in various . . . decision-making forums relevant to the group’s interests; (2) to demobilize strong opponents; and (3) to effect the support of swing legislators.”).

³⁷ See Cann, *supra* note 25, at 281; Eric N. Waltenburg & Charles S. Lopeman, *Tort Decisions and Campaign Dollars*, 28 SE. POL. REV. 241 (2000); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 646 (1999); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 69 (2011).

³⁸ See, e.g., McChesney, *supra* note 19, at 104 (discussing action a private citizen might take to avoid “legislative action”).

³⁹ See Madhavi M. McCall & Michael A. McCall, *Campaign Contributions, Judicial Decisions, and the Texas Supreme Court*, 90 JUDICATURE 214, 214 (2007).

⁴⁰ See *id.*

donors. In particular, the real estate industry might be thought of as an access-oriented donor in local elections. Because local governments control land use policy, and because those policies are so important to the real estate industry, the conventional wisdom is that real estate developers are a large—if not the largest—contributors to municipal campaigns.⁴¹

However, more recent work has cast doubt on the primacy of real estate interests in local elections. In one study of local elections in St. Louis and Atlanta, business interests were found to play a major role in financing candidates, with real estate development interests not being the dominant force previous research had assumed.⁴² Additionally, candidates for alderman in St. Louis received 20% of their contributions from other elected officials, indicating a subcategory of access-oriented donors: other elected officials investing in candidates “to gain access to power.”⁴³ Another, larger study of mayoral elections found that, on average, 70–90% of candidates’ total funds could be traced to only eight sectors, including real estate interests, the legal community, political entities, and various other corporate interests.⁴⁴ And while real estate was the largest sector for donations, it was only slightly larger than the others, and “there [was] no dominant sector.”⁴⁵ These studies seem to confirm that rent creation and rent extraction can explain a large portion of the contributions in local elections, but they also suggest that we may not fully understand which interests seek to create or extract rents.

Between “expressive” contributions from individuals and access-oriented contributions from special interests, some middle ground exists—contributions from ideological groups. Ideological groups “value access while also caring about ideology.”⁴⁶ Unlike purely access-oriented groups, ideological groups’ interest in advancing certain policies means that partisan alignment is relevant to their decision of who receives a contribution.⁴⁷ Thus, like access-oriented PACs, ideological groups care about long-term relationships with politicians who might be effective in

⁴¹ SUSAN S. FAINSTEIN, *THE CITY BUILDERS: PROPERTY, POLITICS, AND PLANNING IN LONDON AND NEW YORK* (1994); JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* (1987).

⁴² Fleischmann & Stein, *supra* note 25, at 679.

⁴³ Fleischmann & Stein, *supra* note 25, at 681. Those officials were not significant donors in Atlanta. See Fleischmann & Stein, *supra* note 25, at 681.

⁴⁴ Brian E. Adams, *Fundraising Coalitions in Open Seat Mayoral Elections*, 29 J. URB. AFFS. 481, 488 (2007). The eight donor categories were: unions, real estate interests, the legal community, political entities, the finance sector, corporate executives/business owners (excluding real estate, finance, and legal), direct contributions from businesses (excluding real estate, finance, and legal), and retirees/homemakers. *Id.*

⁴⁵ *Id.* at 489.

⁴⁶ Barber, *supra* note 25, at 150.

⁴⁷ David P. Baron, *Electoral Competition with Informed and Uninformed Voters*, 88 AM. POL. SCI. REV. 33, 34 (1994) (“[I]nterest groups on the left of the policy dimension are assumed to be aligned with the candidate of the party on the left and those on the right with the candidate of the party on the right.”).

pursuing their favored policy.⁴⁸ And like individuals, ideological groups will contribute to candidates from their preferred partisan or ideological bent.⁴⁹ However, ideological groups are more strategic than individuals in their contributions, attempting to minimize electoral impact when donating to a politician from the “other” party.⁵⁰ In this way, they are akin to the elected officials who donated to aldermen in St. Louis: focused on investment and policy success while still relatively constrained by their party label.

To summarize, the existing literature portrays contribution motivations as falling along a spectrum, bookended by expressive donations on one end and access-oriented donations on the other, with donations from ideological groups in between. These theories of donor motivation may allow us to better understand which candidates are likely to receive campaign contributions from which types of donor. For example, candidates who are projected to win an election are more likely to receive donations from donors motivated by access. Those access-oriented donors would be highly likely to care about a candidate’s prospects for winning the election, often to the exclusion of most other considerations, because a candidate who loses is a poor investment.⁵¹ In contrast, donors motivated by expressiveness are more likely to give to candidates regardless of whether their chosen candidate is projected to win the race, focusing instead on how well their ideology aligns with that of the candidate.⁵²

Of course, discerning the motivations of any individual donor may be difficult. But, if these theories about donor motivations are accurate, we should expect patterns in contributions to emerge in the aggregate. For example, because incumbent prosecutors so often win reelection, we should expect to see access-oriented donors focusing their money on incumbents. And if we assume that they are making informed decisions when they donate, we should expect them to donate more often to candidates who win rather than candidates who lose.

Ideological donors should also favor those same candidates, but not to the same extent. They would be more willing to donate to candidates who challenge incumbents if they feel a challenger would represent their interests better. And their concern for ideology might result in more donations to candidates who do not go on to win.

In contrast, donors motivated by expressive giving might be expected to spread their donations more equally among incumbents and challengers. Unaffected by the trappings of office, expressive donors are more motivated by the candidates who are

⁴⁸ See Barber, *supra* note 25, at 150.

⁴⁹ See Barber, *supra* note 25, at 150.

⁵⁰ Thomas L. Brunell, *The Relationship Between Political Parties and Interest Groups: Explaining Patterns of PAC Contributions to Candidates for Congress*, 58 POL. RES. Q., 681, 681 (2005).

⁵¹ After all, a politician who is not in office will have no direct ability to create the rents which access-oriented donors are seeking.

⁵² See Limbocker, *supra* note 28, at 671.

speaking to their ideological preferences. What is more, expressive donors would be least likely to focus their donations on the candidates with the highest chances of winning; rather, those donors would be willing to consider even quixotic bids for office if the ideas behind the campaigns appeal to them.

II. SPECIAL INTERESTS IN PROSECUTOR ELECTIONS

This section offers some tentative thoughts about special interests in prosecutor elections. It begins by articulating potential differences between prosecutors and other elected officials and how these differences may impact traditional theories of donation motivations. It then identifies several potential interest groups that may take a particular interest in prosecutor elections. Specifically, it identifies real estate interests, the legal community, political organizations, the bail bond industry, and law enforcement as potential special interests, and it discusses which of the donor motivation theories are likely to apply to each group.

A. *Accounting for Differences in the Office*

Prosecutors are not merely officials who enforce the law—they also have significant policy power. Because they do not have the resources to bring criminal charges in every case where probable cause exists, prosecutors must make strategic decisions about which cases to prioritize. Those decisions may be based on any number of factors, including local crime patterns and strength of evidence. But policy considerations are likely to play at least some role in some decisions. Prosecutors will believe that certain crimes should be prioritized above others, and those priorities will have significant consequences for how the law is enforced within their communities.

Although they have power to make policy within their jurisdictions, prosecutors are different than many other public officials who accept campaign contributions. For one thing, their policy powers are circumscribed. Unlike legislators, chief executives, and judges, prosecutors do not have the power to set policy on a large number of issues. Instead, their policy powers are limited to a single subject matter: crime. As a result, fewer groups may take an interest in what the prosecutor does.

Another difference is that, even within the subject of crime, prosecutors' powers are relatively limited. They cannot change the substance of criminal law; they can merely decide how it is enforced within their jurisdictions.⁵³ And even when it comes to enforcement, their power is limited. Prosecutors do not determine which locations are more heavily patrolled by the police. While they may decline to prosecute people who are arrested by the police, prosecutors usually do not control who the police arrest in the first instance.⁵⁴

Some prosecutors limit their own powers even further by declining to make

⁵³ See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U.L. REV. 171, 198–203 (2019).

⁵⁴ See *id.* at 191–94.

general policy decisions and instead allowing their subordinates to exercise more discretion in individual cases.⁵⁵ Indeed, because enforcement policies receive more scrutiny than case-by-case discretionary decisions, prosecutors may have a political disincentive to publicly announce general policies,⁵⁶ thus making them a less attractive target for interest groups.

Because of these differences, existing campaign finance theories may not perfectly capture donors' motivations in prosecutor elections. For example, prosecutors may not be particularly attractive to access-oriented donors because their policymaking potential is not as large as other public officials. The access-oriented donors might want to direct their money places where it could have more impact.

On the other hand, when it comes to prosecutors, access might not be about general policymaking powers, but rather about decisions in particular cases. This seemed to be the concern in the Cy Vance case. He had to make a decision whether to bring charges against particular defendants.⁵⁷ Prosecutors commonly meet with defense attorneys before making that decision—perhaps the defense attorney can offer additional factual information or perspective that would make prosecution seem like a worse idea.⁵⁸ But those meetings are not required and often do not take place. Does donating to the district attorney make it more likely that a defense attorney would be granted that meeting or more likely that the arguments raised against prosecution would be taken seriously? If so, then “access” might be an important motivation for defense attorneys who donate to prosecutor campaigns.

B. *Identifying Special Interests for Prosecutors*

As mentioned above, not all interest groups are likely to think that prosecutor elections are worth their investment. So, it is worth trying to identify which special interests would care enough about prosecutor elections to donate.

⁵⁵ See, e.g., Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1144–57 (2012) (describing different institutional structures of prosecutor offices, some of which are hierarchical and controlled through policies and others which are non-hierarchical and in which line prosecutors exercise significant discretion).

⁵⁶ For example, when Suffolk County District Attorney Rachael Rollins publicly announced a list of crimes she would not prosecute, a law enforcement group filed an ethics complaint against her with the Massachusetts State Bar. Carissa Byrne Hessick & F. Andrew Hessick, *The National Police Association is Throwing a Fit over Prosecutorial Discretion*, SLATE (Jan 4, 2019, 12:55 PM), <https://slate.com/news-and-politics/2019/01/national-police-association-throwing-fit.html> [<https://perma.cc/4LAT-GVDH>].

⁵⁷ See *supra* note 1 and accompanying text.

⁵⁸ See, e.g., John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 447–50 (1997) (describing a certain type of meeting between defense attorneys and prosecutors called “proffer sessions” as a “critical stage of the [criminal] investigation” that can result in a prospective defendant being treated as a cooperating witness and receiving a favorable plea deal or a nonprosecution agreement).

Perhaps the most obvious interest groups are people who have been accused of a crime and the people who have been the victim of a crime. These groups are likely to care more about prosecutor elections than the rest of the public, and they are likely to want the office to act in particular ways. At least while their own cases are pending, those accused of crimes would want the office to be less aggressive at prosecuting crime and more lenient, while those who have been victims of a crime would want the office to be more aggressive at prosecuting crime and more punitive.⁵⁹ Importantly, people are unlikely to know in advance whether they will end up as a criminal defendant or a crime victim, so they may not be able to account for that interest during a prosecutor election. And once their personal case has been disposed of, they may no longer want the system to be more lenient or less punitive because they do not know whether they might later end up in a different position: the one-time criminal defendant might end up as a crime victim and vice versa.⁶⁰ Thus, although they might have the biggest interests at stake, neither group may be in a position to act on those interests during the ordinary election cycle.⁶¹

However, other groups whose interests remain relatively static might take a special interest in prosecutor elections: specifically, the real estate industry, lawyers, political groups, the bail industry, and law enforcement. We consider each of these groups in turn.

⁵⁹ This is obviously an oversimplification. There are crime victims who have advocated for a less punitive criminal justice system. See, e.g., Lisa Murtha, *These Families Lost Loved Ones to Violence. Now They Are Fighting the Death Penalty.*, AMERICA: THE JESUIT REVIEW (Dec. 28, 2017), <https://www.americamagazine.org/faith/2017/12/28/these-families-lost-loved-ones-violence-now-they-are-fighting-death-penalty> [<https://perma.cc/RPV5-B5TW>]. Conversely, there are people who have been convicted of crimes who support punitive outcomes for others who break the law. See, e.g., Reginald Dwayne Betts, *Kamala Harris, Mass Incarceration and Me*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/magazine/kamala-harris-crime-prison.html> [<https://perma.cc/27S7-YR7U>].

⁶⁰ Indeed, many people who are accused of committing crimes have been crime victims themselves, and vice versa. See, e.g., BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* 63–82 (2018); *Overlooked: Women and Jails in an Era of Reform*, VERA INST. JUST., <https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf> [<https://perma.cc/83LA-TBB5>] (last visited May 7, 2021) (“Jailed women also report very high rates of victimization—including childhood sexual abuse, sexual assault, and intimate partner violence—and almost a third had experienced post-traumatic stress disorder (PTSD) in the past 12 months.”); Linh Vuong et al., *Children Exposed to Violence*, NDDC (2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/focus-children.pdf [<https://perma.cc/VX5U-XUPY>] (explaining that previous exposure to violence involves “a greater risk of early and chronic involvement with the juvenile justice system” and documenting a correlation between drug use, truancy and early exposure to violence).

⁶¹ *But cf.* Matt Hamilton & Harriet Ryan, *Donors to D.A. Jackie Lacey Included a Murder Suspect’s Parents and a Felon*, L.A. TIMES (Mar. 18, 2019, 7:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-district-attorney-donations-returned-20190314-story.html> [<https://perma.cc/W3UE-PEDA>].

1. Contributions from Real Estate Interests

As previously discussed, real estate was initially considered the dominant force in local elections, although some recent studies have cast doubt on the accuracy of that characterization.⁶² While the connection between real estate interests and local offices like city councilor is easy to discern, the connection between real estate interests and the office of district attorney is more tenuous. Prosecutors do not have direct control over land-use decisions: Prosecutors do not decide how land will be zoned, nor do their actions usually have an impact on which land will be developed. Moreover, barring prosecution of a developer for criminal actions, it seems unlikely that most district attorneys would have a direct impact on the real estate industry or real estate development at all. Real estate interests, then, seem unlikely to be motivated by access to district attorneys, given the unclear ramifications of what that access would provide.

However, that does not mean contributors from the real estate industry would be motivated by solely expressive concerns; rather, ideological concerns seem relevant. A large literature has attempted to measure the impact of crime rates on property values,⁶³ concluding that in some contexts higher crime rates may reduce property value.⁶⁴ Real estate interests acting in a risk-averse manner and aiming to

⁶² See *supra* notes 42–45 and accompanying text.

⁶³ See Keith Ihlanfeldt & Tom Mayock, *Panel Data Estimates of the Effects of Different Types of Crime on Housing Prices*, 40 REG. SCI. & URB. ECON. 161, 161 (2010) (“One of the most studied effects of crime is the impact that neighborhood crime has on housing values.”); see also Sourav Batabyal, *Temporal Causality and the Dynamics of Crime and Delinquency*, 39 ATL. ECON. J. 421, 421 (2011) (“[P]roperty values work as a linkage between crime-delinquency relationship in the short-term data.”); Steve Gibbons, *The Costs of Urban Property Crime*, 114 ECON. J. F441, F441 (2004) (“This paper estimates the impact of recorded domestic property crime on property prices in the London area.”); Devin G. Pope & Jaren C. Pope, *Crime and Property Values: Evidence from the 1990s Crime Drop*, 42 REG. SCI. & URB. ECON. 177, 177 (2012) (“In this study we exploit the dramatic, nationwide decrease in crime that occurred in the 1990s to examine the relationship between changes in crime rates and property values.”); Scott Wentland, Bennie Waller & Raymond Brastow, *Estimating the Effect of Crime Risk on Property Values and Time on Market: Evidence from Megan’s Law in Virginia*, 42 REAL EST. ECON. 223, 223 (2014) (estimating the impact of the presence of registered sex offenders on property values).

⁶⁴ See Ihlanfeldt & Mayock, *supra* note 63, at 162 (“A 1% increase in our preferred measure of neighborhood crime (number of crimes per acre) is found to reduce housing price by between .1 and .3%.”); Paolo Buonanno, Daniel Montolio & Josep Maria Raya-Vilchez, *Housing Prices and Crime Perception*, 45 EMPIRICAL ECON. 305, 305 (2013) (“[I]n districts perceived as being less safe than the average for the City of Barcelona, houses are highly discounted. Less safe districts have on average a valuation that is 1.27% lower.”); Michael C. Lens & Rachel Meltzer, *Is Crime Bad for Business? Crime and Commercial Property Values in New York City*, 56 J. REG. SCI. 442, 442 (2016) (“We find that crime reduces commercial property values, and the magnitude of the effect depends on the type and geography of crime.”); Andrew J. Buck, Joseph Deutsch, Simon Hakim, Uriel Spiegel & J. Weinblatt, *A Von Thünen Model of Crime, Casinos and Property Values in New Jersey*, 28 URB. STUD. 673, 673 (1991) (“The cost of crime resulting from casinos, as reflected in unrealised assessed real estate valuation, appears to be on average \$5.2m per square mile in 1986 (current prices) in the South Jersey area.”); Robert M. Feinberg & David Nickerson, *Crime and Residential Mortgage Default: An*

stave off any potential increase in crime rates may thus be motivated to contribute to campaigns promising a crackdown on crime.

If the real estate industry can be accurately characterized as an ideological group in their contribution motivations, what patterns in their contributions might be expected to result? Because there is no reason to think that either incumbents or challengers would be more likely than the other to take a tough-on-crime position in an election, it seems unlikely that contributions from real estate interests will skew greatly towards either incumbents or challengers.

However, we might expect to see these tough-on-crime positions play out along other dimensions. Support for law enforcement and associated rhetoric is generally higher among the Republican party,⁶⁵ and so, on average, those candidates running as Republicans may be more likely to stake out tough-on-crime positions. If that is the case, we should expect to see more real estate contributions to Republican candidates than Democratic candidates.

2. Contributions from the Legal Community

In contrast to real estate interests, the legal community has a direct and obvious link to prosecutors. Prosecutors come from the legal community. Many lawyers can count prosecutors among their friends and former classmates, and some lawyers find themselves working in close proximity to prosecutors on a regular or even daily basis. Moreover, when lawyers choose to run for any office, be it Senator or district attorney, their law school connections can provide a valuable source of initial funding.⁶⁶ As a group, lawyers are extremely active in donating to campaigns.⁶⁷ They also tend to have deep pockets: in one study of congressional candidates, lawyer-candidates raised more than twice as much as non-lawyer-candidates in the early months of their campaigns.⁶⁸ For a low-salience election (such as a prosecutor election), raising significant amounts of money from the start could help provide the name recognition needed for a candidate or challenger to break through.⁶⁹ And because only attorneys may run for local prosecutor, any donations from candidates

Empirical Analysis, 9 APPLIED ECON. LETTERS 217, 220 (finding that crime rates up to three years prior can affect current default risk on mortgage contracts “through their impact on property values”).

⁶⁵ Emily Ekins, *Policing in America*, CATO INST., <https://www.cato.org/sites/cato.org/files/pubs/pdf/policing-in-america-working-paper.pdf> [<https://perma.cc/VE8Y-Z5NE>] (last visited May 7, 2021) (“Republicans (81%) are far more favorable toward the police than independents (59%) and Democrats (59%).”).

⁶⁶ Adam Bonica, *Professional Networks, Early Fundraising, and Electoral Success*, 16 ELECTION L.J. 153, 166 (2017).

⁶⁷ *Id.* at 161.

⁶⁸ *Id.* at 162. Lawyers hailing from “elite” law schools did even better, raising more than three times as much as non-lawyers. *Id.*

⁶⁹ Chris W. Bonneau, *Campaign Fundraising in State Supreme Court Elections*, 88 SOC. SCI. Q. 68, 69–70 (2007).

to their own campaigns would technically come from the legal community.

Moreover, as discussed above, the criminal defense bar has an interest in access to prosecutors. That access could allow them to negotiate better plea bargains for their clients or even convince the prosecutor not to file charges in the first place.

Because there are a variety of ways in which the legal community interacts with prosecutors, we should not assume that all lawyers have the same motivations for their campaign contributions. Lawyers contributing to the campaign of their former classmate in a distant state are unlikely to be motivated by an interest in access. Nor are the lawyers donating to their own campaigns. Conversely, defense attorneys, who know their clients' fates may depend on a good relationship with the prosecutor, are more likely to be access-motivated donors. Other attorneys who appear only infrequently (or not at all) opposite the prosecutor may fall somewhere in the middle, with some interested in access and others interested in electing a district attorney that shares their ideological preferences.

Because of these challenges, we should not treat the legal community as a monolith. We should instead seek to disentangle those lawyers who are most likely to donate for access from those who are least likely to do so. We may be able to achieve this by using geography as a proxy for motivation. Because out-of-state donors are unlikely to be motivated by access, we might expect their contributions to be motivated by expressive reasons. Likewise, the lawyers most likely to be motivated by access would be those living and working in the same district as the district attorney to which they contribute. And, as discussed above, donors motivated by access are looking for a return on investment. They do not want to waste money on candidates who have little chance of winning. Of course, a lawyer who donates to her own campaign likely lives within the district, but she will be motivated by pure self-interest, not access. Thus, we will also need to separate out self-donations from other in-district donations.

3. Political Contributions

Another common source of contributions mentioned in the existing literature is that of political contributions. Contributions from a candidate or candidate's committee can be a powerful tool for one politician to curry favor with another. After providing funds to a candidate who is in need, politicians may expect that the candidate will owe them a favor. Sometimes, that favor may be as simple as providing financial support in return if the contributing politicians ever find themselves in dire financial straits. Other times, progressive ambition may be at play: politicians who know they plan to run for a higher office will want to have allies and endorsements from other candidates.⁷⁰ Additionally, politicians already

⁷⁰ Particularly among local politicians, ambition for higher office is exceedingly common. See, e.g., Cherie D. Maestas et al., *When To Risk It? Institutions, Ambitions, and the Decision To Run for the U.S. House*, 100 AM. POL. SCI. REV. 195, 206 (2006) ("After all, if we set our future prospects variable at 1 and our cost variables at 0, the model predicts a .92 probability of ambition for a House

running for statewide office will want to keep politicians in office with whom they have already developed relationships. In those cases, contributing to the campaigns of other politicians is simply transactional alliance-building.

There is reason to think that many prosecutors would be interested in such alliances. Being a prosecutor is often a stepping-stone to higher office, such as a judge.⁷¹ Professor Jed Shugerman has compiled a database of “prosecutor politicians” who rose to political prominence after first serving as a prosecutor.⁷² Indeed, the current Vice President, Kamala Harris, began her career as the elected prosecutor in San Francisco.⁷³

While ideology plays a role in which candidates will receive donations from a given politician, political contributions as a whole should not skew for a particular party. Because of party pressures, politicians are unlikely to give extensively to candidates who do not share their political affiliation. As such, they should instead focus their donations on candidates of the same party. However, politicians of both parties should feel that pressure equally.⁷⁴ Thus, political contributions should not be more prevalent among Republicans or Democrats, as both parties have their fair share of ambitious and access-oriented politicians.

However, access-oriented donors should be motivated by getting a return on

seat [among state legislators].”).

⁷¹ Hessick & Morse, *supra* note 10, at 1569; Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates*, CATO INST., at tbl.1 (Sept. 18, 2019), <https://www.cato.org/publications/studies/are-disproportionate-number-federal-judges-former-government-advocates> [<https://perma.cc/2W5U-DNFP>].

⁷² Jed Shugerman, “*The Rise of the Prosecutor Politicians*”: *Database of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880-2017*, SHUGERBLOG (July 7, 2017), <https://shugerblog.com/2017/07/07/the-rise-of-the-prosecutor-politicians-database-of-prosecutorial-experience-for-justices-circuit-judges-governors-ags-and-senators-1880-2017/> [<https://perma.cc/78AC-3J78>].

⁷³ See Jeannie Suk Gersen, *Kamala Harris and the Noble Path of the Prosecutor*, NEW YORKER (Nov. 20, 2020), <https://www.newyorker.com/news/our-columnists/kamala-harris-and-the-noble-path-of-the-prosecutor> [<https://perma.cc/QU92-BAYP>] (describing and analyzing Harris’s prosecutorial career).

⁷⁴ Although there are third parties in American politics (such as the Green party or Libertarian party), they rarely have much influence as a cohesive party because of Duverger’s Law. See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 217 (Methuen Press 1954) (“The simple-majority single ballot system favours the two-party system . . .”). As a result, politicians from third parties may be most influential when they cooperate with the major party that is closest to them in ideology. For a recent example of this, one need look no further than the aftermath of Bernie Sanders’ 2016 presidential campaign. Despite spending 25 years in Congress as an Independent, Sanders had relatively little in the way of legislative accomplishments. Edward-Isaac Dove, *Sanders Had Big Idea but Little Impact on Capitol Hill*, POLITICO (Mar. 12, 2016), <https://www.politico.com/story/2016/03/bernies-record-220508> [<https://perma.cc/2UUX-SQA7>]. After his failed campaign for the Democratic nomination, the party “adopted the most progressive platform in its history that year.” John Haltiwanger, *Bernie Sanders Influenced US Politics More Than Any Other Failed Presidential Candidate in the Country’s History*, BUS. INSIDER (Apr. 8, 2020), <https://www.businessinsider.com/bernie-sanders-influence-on-us-politics-historic-despite-failed-campaigns-2020-4> [<https://perma.cc/N42T-LMGA>].

their investment and target their contributions accordingly. While winning is important, so is the relative value of their investment to the recipient. Incumbents or challengers who are already heavily favored to win are unlikely to feel indebted to a donor who adds a few hundred dollars to their war chests. On the other hand, candidates in a tight race are likely to remember anyone who helps them eke out a narrow victory. Thus, it is possible that these political contributions occur more often in the context of highly competitive races than in blowouts.

4. Contributions from the Bail Bond Industry

Prosecutorial power is at its greatest in individual cases, when a prosecutor can decide whether to bring charges, which charges to bring, and what type of plea bargain to offer. Prosecutors also have power to influence judges by making recommendations about how judges should use their discretion. We can see this influence in recommendations about bail.⁷⁵

When a defendant is arrested, a judge must decide whether to release the defendant or detain him pending trial. When defendants are released, they are often asked to post bail—that is, they are required to pay a sum of money that will be returned to them only if they return to court. The practice is thought to ensure that defendants do not flee rather than stand trial. But not all defendants can afford to post the bail set by their judges. An entire industry has sprung up to take advantage of that: the bail bond industry.⁷⁶

Essentially, the bail bond industry works as follows: If a person cannot afford to post the bail set in her case, she contacts a bail bond company. The bail bond company posts the bail, and in exchange the defendant pays the bail bond company a fee of about 10–15% of the total bail amount.⁷⁷ When the defendant returns to court, the bail bond company gets its money returned, but the company gets to keep the fee that the defendant paid.

In most cases, prosecutors can affect whether bail is set and how high.

⁷⁵ See THE COALITION TO END MONEY BOND, MONITORING COOK COUNTY'S CENTRAL BOND COURT: A COMMUNITY COURTWATCHING INITIATIVE 34 (2018), http://www.chicagoappleseed.org/wp-content/uploads/2018/02/Courtwatching-Report_Coalition-to-End-Money-Bond_FINAL_2-25-18.pdf [<https://perma.cc/LUU9-RQRD>] (reporting that court watchers in Cook County (Chicago), Illinois found that judges followed prosecutors' recommendations regarding pretrial release in 90 percent of cases); Aurelie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors* (June 20, 2020) (working paper), https://papers.ssm.com/sol3/papers.cfm?abstract_id=3335138 [<https://perma.cc/TY6R-EANU>] (presenting empirical findings that suggest judges often follow prosecutor recommendations about bail and pretrial release).

⁷⁶ See SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S JUSTICE SYSTEM* 177–81 (2017) (describing the industry).

⁷⁷ Andrew Davis, *How Bail Keeps People Locked Up for Being Poor, and Led to a \$2 Billion Private Industry*, CNBC (Nov. 14, 2019), <https://www.cnbc.com/2019/11/14/who-makes-money-from-bail.html> [<https://perma.cc/H6NM-TN3P>].

Prosecutors have discretion over what charges to bring, and the type of charges often affect how high bail is set. Prosecutors can also make recommendations about bail amounts to judges, and judges will often take those recommendations seriously.⁷⁸ These decisions can have a big impact on the profit margins of the bail industry. After all, bail bond companies make more money when the bail amount is set particularly high—the higher the bail, the fewer people can afford to pay it themselves and the higher the fee that the bail bond company can charge. If a prosecutor chooses to end cash bail or just not to pursue bail for certain offenses, then the bail bond industry will suffer.

Thus, the bail bond industry has a financial stake in who wins prosecutor elections. This means they will be access-oriented in their contributions, and so we should expect to see them contribute more to incumbents. We might also expect them to be ideological and to prefer tough-on-crime prosecutors who seek a high bail amount for every crime. But bail is not a particularly salient political question in the same way that crime generally is, so it is unclear whether political party will serve as an especially useful proxy for ideology in this context.

5. Law Enforcement Contributions

Another special interest group with obvious ties to the criminal justice system is law enforcement. Law enforcement officers are intimately intertwined with the office of the district attorney, with law enforcement officers building cases against suspects, arresting those suspects, holding them in jail, and testifying at trial. As a result, a bad relationship with the law enforcement community in their district can make a prosecutor's life difficult.⁷⁹ Indeed, good relationships with law enforcement are so important that some prosecutors will tout those relationships when running for reelection.⁸⁰

Unlike with the bail bond industry, the close relationship between law enforcement and prosecutors is more than just financial. Although some law enforcement officials may see their jobs threatened by a new prosecutor taking office,⁸¹ most members of the law enforcement community will find their jobs

⁷⁸ See *supra* note 75.

⁷⁹ In one case, an Indiana prosecutor had to appeal to the city council and commissioners because law enforcement agencies in his district were not providing the evidence needed to comply with discovery requests. See Michael Johnson, *White County Prosecutor, Sheriff at Odds Over Criminal Case Information Sharing*, MONTICELLO HERALD J. (Dec. 7, 2020), https://www.newsbug.info/monticello_herald_journal/news/local/white-county-prosecutor-sheriff-at-odds-over-criminal-case-information-sharing/article_944c4573-6d03-5fdf-a231-6599f9de423a.html [<https://perma.cc/WGV3-PPB5>]. The prosecutor went on to point out that many cases either wouldn't get filed or would be dismissed if his office couldn't get the information it needed. *Id.*

⁸⁰ See Wright, *Elections*, *supra* note 10, at 601 tbl.3 (documenting that prosecutors often claim to have a good relationship with law enforcement when they campaign).

⁸¹ In St. Louis, a prosecutor who felt that some police officers were too untrustworthy to testify responded by dropping all cases relying on statements by those officers, refusing to accept new cases from those officers, and not accepting any search-warrant requests from them. See Justin George & Eli

relatively unchanged regardless of who wins the district attorney race. Moreover, given the already close relationship between the law enforcement community and prosecutors, law enforcement donors would be unlikely to be motivated by access in the conventional sense. After all, you rarely have to pay for access to your coworkers.

This calculus may be slightly different when it comes to a particular issue: police use of force. Prosecutors do not merely work with law enforcement officers; they must also decide whether to bring criminal charges against officers who use unwarranted force against civilians. In those cases, police officers might be access-oriented. Indeed, this was the allegation Nancy O'Malley faced—that the donation she received from the police union made her less likely to bring charges against officers generally and police union leadership in particular when they shot an unarmed teenager.⁸² So, to the extent they are access-oriented, law enforcement donations might favor incumbents.

But aside from police-use-of-force cases, the law enforcement community seems most likely to be motivated by ideological or expressive concerns. However, unlike regular expressive donors, which have a variety of viewpoints scattered across the ideological spectrum, we might expect law enforcement to have a more homogenous viewpoint. One study of over 8,000 police officers in 2017 revealed that 86% of those police officers felt that the public did not fully comprehend the trials that officers face in their job, with the same percentage saying that their department did not have enough officers to adequately police the community.⁸³ Another study which had police experts (retired division commanders and current supervisors) rate body camera footage on how well the officers in that footage performed their duties “found that only the police officers who indicated a softer stance toward crime were rated poorly.”⁸⁴ The combination of feeling misunderstood, underequipped, and pressure from those in charge to take harder stances towards crime may make the law enforcement community less likely to donate to candidates not sharing that viewpoint. Because of this, and because support for law enforcement is higher among Republicans,⁸⁵ we might expect to see contributions from law enforcement sources favor Republican candidates.

Hager, *One Way To Deal with Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019), <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say> [https://perma.cc/WU2G-8YQB].

⁸² See *supra* note 2.

⁸³ Rich Morin et al., *Police Views, Public Views*, PEW RES. CTR. (Jan. 11, 2017), <https://www.pewsocialtrends.org/2017/01/11/police-views-public-views/> [https://perma.cc/RGJ5-2HAU]. In contrast, 83% of the public said that they understood the challenges of police work, while only 34% felt that a larger police presence was necessary in their community. *Id.*

⁸⁴ Shefali V. Patel, *When Some Police Feel Misunderstood, It Can Impact Their Performance*, SALON (July 8, 2018), https://www.salon.com/2018/07/08/when-some-police-feel-misunderstood-it-can-impact-their-performance_partner/ [https://perma.cc/6C2H-BQ87].

⁸⁵ See Ekins, *supra* note 65, at 1 (“Republicans (81%) are far more favorable towards the police than independents (59%) and Democrats (59%).”).

III. CAMPAIGN CONTRIBUTION DATA

This part proceeds in two sections. First, Section III.A describes the methods used to classify campaign contributions in prosecutor elections as coming from a particular special interest group. Based on those classified contributions, Section III.B then examines how interest groups give in prosecutor elections.

A. Methodology

Our analysis is based on an original data set of all contributions in prosecutor elections in a single election cycle.⁸⁶ The dataset contains direct campaign contribution data from almost every district⁸⁷ in the 45 states that elect their local prosecutors.⁸⁸ It includes the amount and date of the contribution, the candidate who received the donation, and, in most cases, the name of the contributor.⁸⁹ Contributors often provided additional information about themselves, including their address, occupation, and employer. Not all states required occupation or employer information, and we found that the information was missing in some states even when it was required.⁹⁰ Information about whether the contributor was an individual or an organization was also sometimes provided, although that information had to occasionally be inferred.⁹¹

Some states allowed us to download campaign finance data electronically. Other jurisdictions had this information available only in paper records or scanned paper records. For those jurisdictions, we entered all information by hand. The

⁸⁶ Different states hold their prosecutor elections in different years. Most of the contribution data we gathered was from elections held in 2014 and 2016. But some elections were held as early as 2012 and some as late as 2017. For more information about the particular elections we studied, see Hessick & Morse, *supra* note 10, at 1558–61.

⁸⁷ Of the 2,315 districts that elect their local prosecutor, we were unable to collect contribution data from approximately 10% of districts. The data from those districts was missing, destroyed, or otherwise unavailable.

⁸⁸ Prosecutors are not elected in the following states: Alaska, Connecticut, Delaware, New Jersey, and Rhode Island. Hessick & Morse, *supra* note 10, at 1550–51, tbl.1. Additionally, there were no contributions in any of the North Dakota elections.

⁸⁹ Some contributions were “unitemized,” meaning the contributions were not tied to an individual donor.

⁹⁰ Moreover, even in states in which the information was available, contributors would not always fill out all of the relevant information. To compensate for this, when we could match contributions within the same state and district by the donor’s name, we inferred any relevant categories from another contribution. For example, if a contributor listed her occupation as a sheriff in one contribution but left her occupation in another contribution blank, we concluded that both of those donations could be attributed to the law enforcement community.

⁹¹ Usually, whether a contributor was an individual or organization could be inferred because an organization would provide only one name, while an individual would provide both a first and last name.

dataset also does not include independent expenditures that groups or individuals made in a campaign; it includes only donations made directly to candidates.

To determine which contributions could be classified as coming from each special interest, we relied upon the self-reported information about the contributor's name, occupation, and employer. Because organizations rarely included any information about their industry, we relied solely upon their name. For individuals, we relied upon their occupation and employer, when available.⁹²

To classify a contribution as political, bail, law enforcement, or real estate, we used a keyword search on each field, followed by a hand verification that the results returned were accurate. For example, to classify a contribution as coming from the bail bond industry, we searched through organization name, individual employer, and individual occupation for any results that contained either "bail",⁹³ "bond", or "surety". After returning all contributions that included those terms, we then reviewed the results by hand to search for erroneous matches. For the remaining special interest group, the legal community, we relied on manual coding in those jurisdictions that required hand entry, and searches for the terms "attorney" and "lawyer" in districts that permitted us to download data.

Importantly, our data looks different for different states. As noted above, some states do not collect information about a donor's occupation or employer. In addition, other states do not allow organizations, such as corporations or unions, to make campaign contributions. These limitations affect our findings. When occupation and employer information is not included, we are unable to fully capture interest group participation. And when organizations are prohibited from donating, interest groups' ability to contribute to campaigns may be circumscribed.

Despite these limitations, when viewed in the aggregate, the data we do have allows us to make a series of observations about interest group donations in prosecutor campaigns.

B. *The Results*

Before getting into how the specific interest groups donated, we first want to give a general picture of campaign contributions in prosecutor campaigns. In the more than 2,000 prosecutor elections we studied, we found 210,769 donations, resulting in a total of \$107,507,497 raised in prosecutor campaigns. As noted above, not all of these donations had sufficient information associated with them to allow us to determine if they were associated with any particular interest group. Specifically, only 121,808 donations (which totaled \$66,772,107) had sufficient information. Another 5,277 contributions were self-donations, which collectively totaled \$12,784,183.⁹⁴ In sum, then, we had sufficient information to draw

⁹² We attempted to classify individuals who provided either occupation, employer, or both. We were unable to classify individuals who did not fill out either of those fields.

⁹³ A space was intentionally left after bail to avoid returning results like "bailiff."

⁹⁴ In the analysis that follows, we typically excluded self-donations. Because self-donations

conclusions about roughly three-fifths of the total number of contributions and the total amount raised by prosecutors during this election cycle.

In the subset of donations for which sufficient information was available, we saw dramatically different levels of contribution activity from different interest groups. Around 18% of the money raised came from lawyers, while the bail bond industry donated surprisingly little.

Table 1. Breakdown of Contributions Overall and by Interest Group

	Number of Contributions	Total Amount Raised	Median Contribution
All Contributions (w/Sufficient Information)	121,808	\$ 66,772,107.04	\$ 250.00
Real Estate	4,649	\$ 2,847,085.94	\$ 270.00
Lawyers	28,494	\$ 11,720,875.96	\$ 250.00
Political	5,458	\$ 9,338,503.94	\$ 500.00
Bail	674	\$ 428,663.05	\$ 400.00
Law Enforcement	2,950	\$ 1,356,117.38	\$ 175.00

Given the obvious financial interests that the bail industry has when it comes to prosecutor decision making, we expected to find much higher levels of donations. Indeed, studies of non-prosecutor elections found members of the bail industry to be active donors in political campaigns.⁹⁵ Law enforcement contributions also make up a smaller percentage of overall donations than we expected given how much of the public conversation centers on law enforcement contributions to prosecutor elections.⁹⁶ However, this may stem from the limitations of our data. Because our dataset relies on self-reported information, it is possible that not all individuals affiliated with law enforcement and the bail industry reported themselves as such. Likewise, because our dataset contains only direct contributions to prosecutor candidates and does not include independent expenditures, we are not able to fully measure the impact of law enforcement spending or bail industry spending that took the form of independent expenditures. For example, if a police union donated to a PAC that was formed to support or oppose a particular candidate,⁹⁷ that money is

came from the candidates themselves, they were not truly “contributions” in the traditional sense.

⁹⁵ See, e.g., Ciara O’Neill, *Bail Bond Businesses Buck for Bookings*, FOLLOWTHEMONEY.ORG, at fig.1 (June 7, 2018), <https://www.followthemoney.org/research/institute-reports/bail-bond-businesses-buck-for-bookings> [<https://perma.cc/3E8F-34SN>] (reporting \$3,194,139 in lobbying spending and \$969,651 in contributions by the bail bond industry for years 2014, 2015, 2016, and 2017).

⁹⁶ See *supra* note 6.

⁹⁷ See, e.g., Michael Barba, *SF Police Union Dumps \$50K into Committee Against DA Candidate*, S.F. EXAMINER (Oct. 21, 2019), <https://www.sfexaminer.com/news/sf-police-union-dumps-50k-into-committee-against-da-candidate/> [<https://perma.cc/VB4T-Y6R2>].

not captured in our data.

Although lawyers as a whole represent a significant portion of the contributions, as noted above, we do not think that lawyers represent a single interest group. Some lawyers are likely to be motivated by access, while others may give for expressive reasons. And the lawyers who donate to their own campaigns are likely to do so out of pure self-interest. As a rough proxy for these varying concerns, we used the address for each contribution for which it was reported to determine whether a lawyer's contribution came from within the district or from a different state. Additionally, by matching the candidate's name, we were also able to identify donations given by a lawyer to their own campaigns. Table 2 reflects those results.

Table 2. In-District, Out-of-State, and Self Donations in the Legal Community

	Number of Contributions	Total Amount Raised	Median Contribution
In-District Attorney	18,595	\$ 7,810,616.06	\$ 250.00
Out-of-State Attorney	1,163	\$ 550,839.54	\$ 250.00
Self-Donation	2,171	\$ 5,086,411.56	\$ 350.00

The patterns in contributions from lawyers is hardly surprising. Attorneys from the same district as a candidate contribute far more frequently than attorneys from a different state. Lawyers also contributed large amounts to their own campaigns: the \$5 million candidates contributed to their own campaigns was almost two-thirds as much as the \$7.8 million they received from in-district attorneys, despite being comprised of only a fraction of the number of discrete contributions. Such self-funding is not unique to prosecutor elections: one study of state-level offices from 2010 to 2015 found that 10% of all direct contributions were from the candidates themselves.⁹⁸

We also had expectations as to the types of candidates that would receive donations. As discussed above,⁹⁹ the existing literature on donor motivations indicates that the biggest difference between access-oriented and expressive donors is how strongly they care about donating to a winning candidate. For access-oriented donors, this is their overriding concern. Ideological donors care somewhat less than access-oriented donors. And expressive donors care the least. At the same time, donors do not have perfect information. Donors do not know who will go on to win an election—they can only make an educated guess. Donors therefore have to rely

⁹⁸ J.T. Stapleton, *The (Mostly) Unchanged Efficacy of Self-Funding a Political Campaign*, FOLLOWTHEMONEY.ORG (July 28, 2016), <https://www.followthemoney.org/research/institute-reports/the-mostly-unchanged-efficacy-of-self-funding-a-political-campaign> [<https://perma.cc/SYH2-FXVT>].

⁹⁹ See *supra* Section I.

on signals, such as endorsements from party leaders and other heuristics,¹⁰⁰ to determine which candidates will be most competitive. And we would expect that the donors most concerned with winning would rely more heavily on such signals in making their decisions. While not always correct, we would expect these predictions to lead access-oriented donors to contribute more to candidates who went on to win their general election.

To investigate this, we determined what percentage of the total amount contributed by each interest group in contested general elections went to the eventual winner of that general election. We excluded candidates who did not face opposition in the general election (either because they lost in the primary or were unopposed). We likewise excluded self-donations. Table 3 displays our findings.

Table 3. Percentage of Amount Raised by General Election Winner from Interest Group

	General Election Winner (% of Amount Raised)	General Election Winner (Number of Contributions)	General Election Loser (% of Amount Raised)	General Election Loser (Number of Contributions)
All Contributions (w/Sufficient Information)	78.4%	54,316	21.6%	15,966
Real Estate	81.7%	1,708	18.3%	450
In-District Lawyers	83.5%	8,436	16.5%	1,659
Out-of-State Lawyers	88.6%	593	11.4%	116
Political	74.0%	2,575	26.0%	1,281
Bail	86.3%	174	13.7%	34
Law Enforcement	78.3%	886	21.7%	285

Our data show that, as a general matter, donors overwhelmingly donate to the winning candidate—almost 80% of the overall amount donated go to the winning candidate—and our individual interest groups do not fall very far from that benchmark. Real estate, bail, and both categories of lawyers direct more of their dollars to the winning candidate. Remarkably, the group that we expected to care the least about picking the winning candidate—out-of-state lawyers—gave the highest percentage of their money to winners.

¹⁰⁰ See Mirya R. Holman & J. Celeste Lay, *Are You Picking Up What I Am Laying Down? Ideology in Low-Information Elections*, 57 URB. AFFS. REV. 315, 316 (2020).

Of course, because of the uncertainty inherent in elections, donors may be incorrect in their predictions of who will win an election. Knowing that their predictions may fail, some donors may choose to donate only when a candidate is heavily favored to win. Other groups might want to direct their donations to close races where their money is most likely to be impactful.

Therefore, we examined what percentage of the total amount contributed by each interest group was contributed in *competitive* general elections. Specifically, we compared donations in races where the general election winner received less than 60% of the vote share to races where the winner received more than 60% of the general election vote share. As with the previous analysis, we excluded self-donations from consideration. Table 4 displays our results.

Table 4. Percentage of Amount Raised by Competitiveness of Election and Interest Group

	Close General Election (% of Amount Raised)	Close General Election (Number of Contributions)	Not-Close General Election (% of Amount Raised)	Not-Close General Election (Number of Contributions)
All Contributions (w/ Sufficient Information)	60.2%	53,460	39.8%	45,093
Real Estate	54.9%	1,704	45.1%	1,844
In-District Lawyers	53.2%	7,161	46.8%	7,167
Out-of-State Lawyers	66.6%	500	33.4%	362
Political	75.1%	3,020	24.9%	1,947
Bail	61.5%	171	38.5%	182
Law Enforcement	61.9%	926	38.1%	1,286

Here, the results are more consistent with our expectations. We expected to see political contributions in close elections, and that is what the data show. We also see the groups that we thought might also be access-oriented—specifically, in-district lawyers and the bail industry—donating more in races where the outcome was more certain, although real estate contributed more than the bail industry in more certain elections. On the other hand, we also see that groups such as law enforcement and out-of-state lawyers are more likely to contribute in close general elections.

One possible heuristic that donors may use in deciding whether to support a candidate is incumbency. Because incumbent prosecutors win at an incredibly high

rate,¹⁰¹ some donors may find that contributing to incumbents is the easiest way to contribute to a winner. Consequently, some donors may be motivated to give to incumbents because that donation could ensure access to that prosecutor after their reelection. What is more, a donation could also ensure access in the time period after the contribution but before the election.

Thus, we examined donations to incumbents versus challengers in contested elections. Table 5, below, only includes elections in which there was an incumbent being opposed by a challenger in either the primary or general election. Elections in which a candidate ran unopposed were not included. Nor were open elections included, as no incumbents ran in those races. As with Tables 3 and 4, self-donations were also excluded.

Table 5. Percentage of Amount Raised by Incumbency and Interest Group

	Incumbent (% of Amount Raised)	Incumbent (Number of Contributions)	Challenger (% of Amount Raised)	Challenger (Number of Contributions)
All Contributions (w/Sufficient Information)	64.7%	57,9403	35.3%	22,456
Real Estate	72.1%	2559	27.9%	749
In-District Lawyers	64.9%	8,899	35.1%	2,983
Out-of-State Lawyers	51.3%	272	48.7%	352
Political	53.5%	2,731	46.5%	1002
Bail	78.3%	479	21.7%	111
Law Enforcement	66.5%	1,807	33.5%	436

As Table 5 shows, overall donations tend to favor incumbents. The bail industry favors incumbents most heavily—nearly 80% of all bail industry donations go to incumbents—and real estate also sends a higher percentage of its money to incumbents than the average donor. In-district lawyers and law enforcement give similar percentages to incumbents as did the average donor. The remaining interest groups are actually less likely than the average donor to contribute to incumbents. The group that we expected to be expressive—out-of-state lawyers—did give the most to challengers, but still gave more than 50% of their money to incumbents. That may suggest that expressive donors are more motivated by the possibility of

¹⁰¹ Hessick & Morse, *supra* note 10, at 1544 (“Our study confirmed that when incumbents seek reelection, they win an astonishing 95 percent of the time.”); Wright, *Beyond*, *supra* note 10, at 601 tbl.1 (finding that incumbent prosecutors win 94% of elections in which they run).

change than by maintaining the status quo.

The concept of winning in an election for prosecutor is complicated by how many candidates run unopposed. A person who donates to an unopposed candidate is not motivated to see that candidate win in the conventional sense, as they have no opposition to overcome. Instead, donors to unopposed candidates must be motivated by other concerns, such as building goodwill, ensuring access, or perhaps personal or expressive reasons.

Table 6, below, gives the overall number of contributions and amount raised by unopposed candidates from each interest group. The unopposed candidates included in this table are those candidates who faced no opposition at any point of the campaign and so were unopposed in both the primary and general election. The final column in Table 6 gives the percentage of that interest group's overall amount contributed that went to unopposed candidates.

Table 6. Contributions to Unopposed Candidates by Interest Group

	Total Amount Raised by Unopposed Candidates	Number of Contributions	Percent of Overall Amount Raised
All Contributions (w/ Sufficient Information)	\$ 12,093,977.28	28,295	18.1%
Real Estate	\$ 648,276.06	1,390	22.8%
In-District Lawyers	\$ 1,505,297.90	4,234	19.4%
Out-of-State Lawyers	\$ 74,087.00	153	12.9%
Political	\$ 939,408.40	1,116	10.1%
Bail	\$ 60,100.00	145	14.0%
Law Enforcement	\$ 283,651.58	1041	20.9%

We see here that donations to unopposed candidates are lowest among political organizations, with the group we expected to be expressive—out-of-state lawyers—giving the second lowest percentage of their overall donations. On the other hand, more than one-fifth of the total amount contributed by real estate interests (23.3%) and law enforcement (21.8%) went to unopposed candidates. It is not entirely clear why ideological interests like real estate and law enforcement would so favor unopposed candidates. However, just as donors as a whole fall along a spectrum from expressive to access-oriented, some ideological groups may be more access-oriented than others. The level of support for unopposed candidates among real estate and law enforcement may indicate that access-seeking informs their behavior to a larger extent than was predicted.

The previous tables have assumed that donors are motivated to give based on who is likely to succeed. But some donors may donate because they want a

particular candidate to succeed or because they like a particular candidate's ideology or policy positions. Our dataset does not allow us to determine the particular policies that a candidate will adopt. Instead, we use party affiliation as a proxy for both ideology and policy positions. Admittedly, it is not a perfect proxy: it may not be readily apparent what a Democratic prosecutor represents as opposed to a Republican prosecutor. Nonetheless, prosecutors who run under a party label do not do so at random. For some, it may be because that party offers them the greatest chance for political advancement. For others, it may be because they align with the party's ideology. And the different party ideologies may lead more punitive candidates to run as Republicans rather than as Democrats.¹⁰²

Table 7 compares the amount raised by Democrats and Republicans from each interest group as well as the number of contributions received. The percentage of amount raised by Republican and Democratic candidates does not equal 100% in Table 7 because five states that we studied—Arkansas, California, Minnesota, North Dakota, and Oregon¹⁰³—hold nonpartisan elections and because some candidates ran under other party labels, such as the Green or Libertarian party. Unlike Tables 3 through 6, Table 7 is not restricted to only contested elections but encompasses all candidates who were labeled as either a Democrat or Republican. It does, however, continue to exclude self-donations.

¹⁰² See *supra* notes 65, 82–84; see also Sam Krumholz, The Effect of District Attorneys on Local Criminal Justice Outcomes (May 9, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3243162 [https://perma.cc/WL37-VBST] (finding that the election of a Republican district attorney leads to a 6–8% increase in new prison admissions and new sentenced months per capita in the four years following their election).

¹⁰³ Hessick & Morse, *supra* note 10, at 1550 tbl.1. Hawaii and Montana permit counties to choose whether to hold non-partisan elections. See Hessick & Morse, *supra* note 10, at 1550 tbl.1. Those counties that have elected to do so are also omitted from this analysis.

Table 7. Percentage of Amount Raised by Party and Interest Group

	Republican (% of Amount Raised)	Republican (Number of Contributions)	Democrat (% of Amount Raised)	Democrat (Number of Contributions)
All Contributions (w/ Sufficient Information)	28.6%	38,890	59.0%	70,386
Real Estate	25.0%	455	61.2%	2,855
In-District Lawyers	28.2%	4,687	63.6%	12,261
Out-of-State Lawyers	15.2%	177	80.7%	927
Political	25.8%	2,066	62.9%	3,124
Bail	19.1%	196	72.8%	439
Law Enforcement	27.6%	1,118	46.5%	1,442

Overall, Table 7 indicates that contributions favor Democratic candidates. Roughly 59% of the total amount raised for which we can identify interest group affiliation went to Democratic candidates while less than 30% went to Republican candidates.¹⁰⁴ Surprisingly, every single group was more likely to donate to Democratic candidates than Republican candidates, even those where the reverse was expected. Both in-state and out-of-state lawyers directed more money to Democrats, with out-of-state lawyers giving over 80% of their contributions to Democrats. Law enforcement gave the smallest percentage of their money to Democrats, as might be expected. On the other hand, donations from the bail bond industry overwhelmingly favored Democrats, with those donations falling behind only out-of-state lawyers.

This may be explained in part because Republican and Democratic candidates are not evenly distributed across the country. Democrats may be more likely to run in and win elections in large urban jurisdictions—the jurisdictions that raise far more money than smaller or rural jurisdictions.¹⁰⁵ Thus, to understand a group's ideological donation patterns, we need to disaggregate giving by population. In Figure 1, we break districts into four population categories and compare the median amount raised by Democratic and Republican candidates in each type of district who

¹⁰⁴ This trend holds true for all contributions in partisan elections—even those contributions for which we do not have enough information to determine interest group affiliation: 59.3% of all contributions went to Democratic candidates, and 30.9% went to Republicans. (The rest went to third party or unaffiliated candidates.)

¹⁰⁵ See ANTHONY GIERZYNSKI, *MONEY RULES: FINANCING ELECTIONS IN AMERICA* 28 (L. Sandy Maisel ed., 1999) (noting that elections for candidates with relatively large electorates cost more).

are contested in either the primary or general election.

Figure 1. Median Amount Raised by Size of District

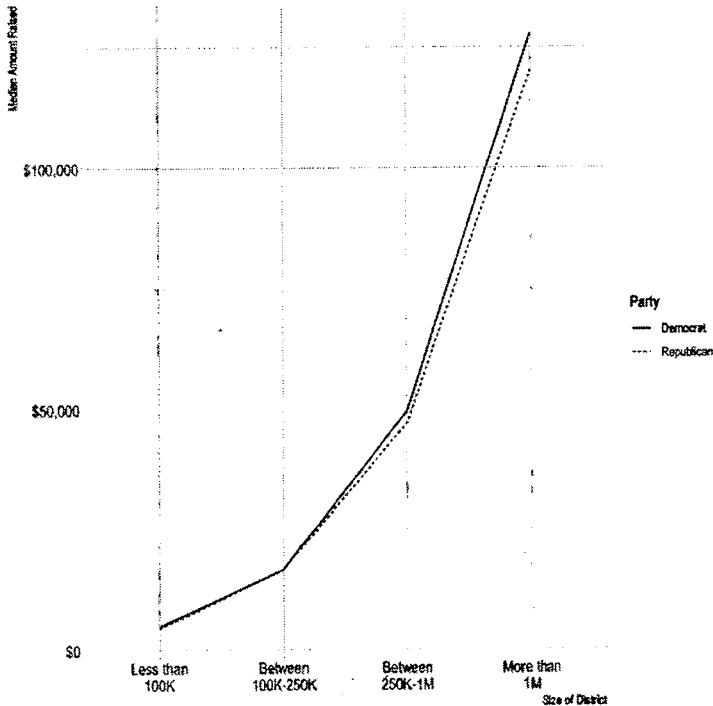


Figure 1 indicates that once we control for the relative size of the district, the median candidate, whether Democrat or Republican, raised roughly similar amounts across all sizes of districts. Although in the larger districts Democrats raised slightly more than their Republican counterparts, the difference is hardly substantial.¹⁰⁶ This indicates that it is likely the differences in the types of races in which Democrats are running that leads to their fundraising advantage, with Democrats more likely to run in the largest and most expensive districts.

To see whether this pattern holds true for interest group donations, we replicated Figure 1 for each of the interest groups, comparing the median amount raised by Democrats and Republicans across each group. Figure 2 displays those results.

¹⁰⁶ In the second largest districts (with populations of 250,000 to 1 million people), the median Democrat raised \$49,387.33 while the median Republican raised \$46,960.40. In the largest districts (of over 1 million people), the median Democrat raised \$127,866.00 while the median Republican raised \$120,210.74.

Figure 2. Amount Raised from Real Estate by Size of District

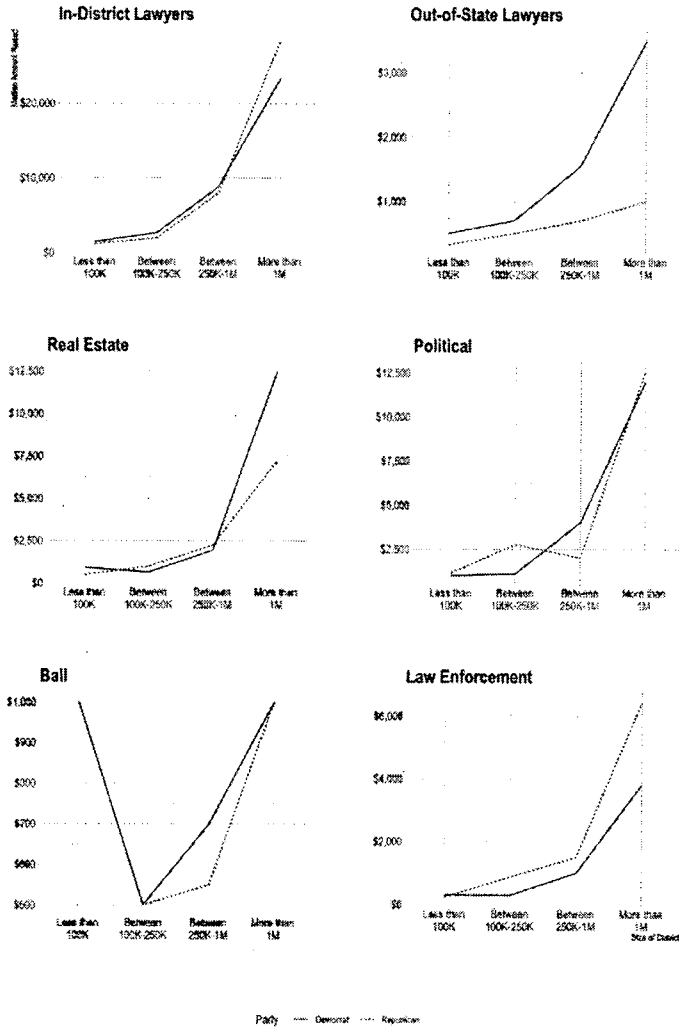


Figure 2 indicates that the results may be more nuanced than the overall numbers indicate. In the largest districts, the median Republican candidates actually raised more money from in-district lawyers and law enforcement than their Democratic counterparts, with median candidates of both parties raising roughly equal amounts from political organizations and the bail bond industry. Also, in the largest districts, the median Democrat raises more money from real estate and out-of-state lawyers, although the absolute amounts raised from out-of-state lawyers are quite small.

One takeaway from Figure 2 is the relative lack of consistency across

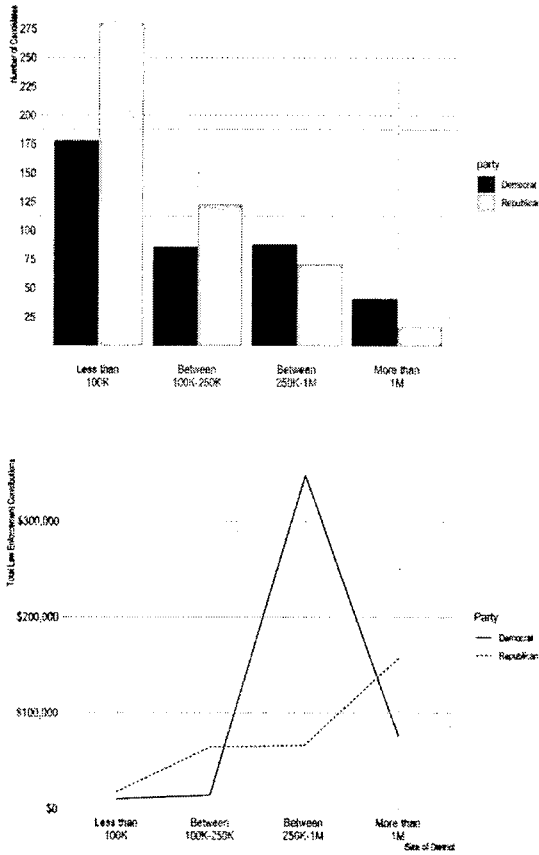
population categories. Only two relationships feature relatively consistent trends: law enforcement donations tend to favor Republican candidates across all population categories, while out-of-state lawyers tend to favor Democrats across all population categories, with the largest disparity in the largest districts. The remaining interest groups all alternate, with the median Democrat receiving more in some population categories and the median Republican raising more in others.

One possible reason for this is a relative lack of data in some population categories. Bail is the best example of this. Figure 2 reveals that no Republicans in districts with populations of less than 100,000 people received contributions from the bail bond industry. For other population categories, these figures could be representing only a few contributions or candidates. Thus, making broad conclusions about interest groups favoring one party or the other may require more data.

As a case study, however, contributions from law enforcement are illustrative. Even within a group that uniformly favors Republican candidates, the contributions are not evenly distributed. Figure 3, below, indicates that in the smallest districts there are far more Republican candidates, yet Republican candidates received only slightly more in contributions overall than do Democratic candidates. As the districts increase in size, so too do the number of Democratic candidates relative to their Republican counterparts. As a result, Democratic candidates actually outraise Republicans in the aggregate in the second largest districts. But it is the largest districts where we see the most evidence of law enforcement support for Republicans. Despite more than twice as many Democratic candidates as Republicans in those districts, Republican candidates raised almost twice as much money in the aggregate.¹⁰⁷ Thus, while law enforcement contributions largely favor Republicans overall, a small number of candidates in the largest districts are receiving the lion's share.

¹⁰⁷ The amount raised was not driven by large donations to only a few candidates. The largest single contribution to a Republican candidate running in the largest districts was only \$20,000.

Figure 3. Total Candidates and Law Enforcement Contributions by Size of District



These results also allow us to make some conclusions about how well our predictions held up. Put simply, the results were mixed. Although we expected that contributions from the real estate industry would not skew heavily towards incumbents or challengers but might benefit Republican candidates, neither of those predictions proved true. Instead, contributions from the real estate industry went overwhelmingly towards incumbents, and the median Democrat raised more from real estate interests, particularly in the largest districts. Likewise, we expected that out-of-state lawyers would be expressive in their donations, giving to candidates they aligned with ideologically rather than winners. While out-of-state lawyers give the most of any group to challengers, they also overwhelmingly favored candidates who went on to win the general election. And, although law enforcement favored incumbents over challengers as expected, we also discovered that law enforcement and real estate gave the highest percentage to unopposed candidates.

On the other hand, the bail industry, political organizations, and in-district lawyers operated roughly according to our expectations. We expected that the bail

industry would be access-oriented. It was for the most part, contributing heavily to incumbents. We thought political organizations would contribute in close elections, which they did. We anticipated that in-district lawyers would be interested in access, and thus contribute to winners, and that was what we saw. We also saw that in-district lawyers trailed only real estate and law enforcement in their giving to unopposed candidates and trailed only bail, real estate, and law enforcement in their giving to incumbents, both of which indicate access-seeking behavior.

Party affiliation saw the largest departures from our expectations. We thought we would see law enforcement favor Republican candidates, yet more law enforcement donations went to Democrats overall. We also expected that donations from political organizations would not skew heavily to one party or the other and that bail contributions, if there was any pattern, might favor Republican candidates; however, donations from both interests were more Democratic overall. However, Figure 2 suggests this may be because more Democratic candidates ran in the largest districts than did Republicans. Disaggregating the data, then, may be necessary to draw any firm conclusions about contributions and party affiliation.

On the whole, though, our instincts about the motivations of the various interest groups were largely correct. The bail industry was motivated by access, with some indications of a preference for tough-on-crime rhetoric, as were in-district lawyers. Political organizations were also motivated by access, even if it appeared that they behaved in the aggregate like ideological organizations because of more Democrats running in larger districts. Contributions from law enforcement were ideological in nature, more likely to favor Republican candidates than any other group.

At the same time, there are likely other forces at play that we did not account for. Given that law enforcement also gave large amounts to unopposed candidates, it may be that access plays a larger role in law enforcement donations than was expected. Out-of-state lawyers are likely expressive in their giving but were able to channel their expressive giving overwhelmingly to candidates who went on to win. This may be evidence of the early success of the "progressive prosecutor" movement during this time, which often received large amounts of funding through independent expenditures (usually in the form of advertising) and correspondingly large amounts of out-of-state donations. Likewise, the real-estate industry appears to be largely access-oriented in their contributions, despite lacking a clear reason to be motivated by access. More investigation will be needed to determine what is motivating real estate interests to give in this manner.

CONCLUSION

Campaign contributions reveal that the role of special interests in prosecutor elections is nuanced. Just as motivations of individual donors fall along a spectrum, ranging from access-oriented donors to expressive giving, so too do the motivations of interest groups as a whole. As a result, we were able to see aggregate patterns emerge in how those groups chose to donate and which candidates received donations from the varying special interests. Some groups favored incumbents and

unopposed candidates; other groups favored challengers and general election winners; still others favored some combination of the two.

Nonetheless, despite these differences, all of the expected interest groups were present in the contributions. And even the interest groups which did not give much in the aggregate could still have a large effect in individual races. Although law enforcement contributions totaled around 1% of all the money contributed overall, nearly \$150,000 of that money came in a single race: Michael Hestrin's 2014 challenge to the incumbent Riverside County District Attorney Paul Zellerbach. Such an enormous sum of money may have proved influential—Hestrin edged out Zellerbach in a narrow primary victory.¹⁰⁸

These sums take the impact of interest groups in prosecutor elections beyond mere academic curiosity. The political science literature indicates that campaign contributions help candidates win elections—especially candidates who are challenging incumbents.¹⁰⁹ To the extent that special interests provide the means

¹⁰⁸ *Riverside County District Attorney Paul Zellerbach Unseated After One Term*, CITY NEWS SERV. (June 4, 2014), <https://www.nbclosangeles.com/news/riverside-county-district-attorney-paul-zellerbach-unseated-after-one-term/117737/> [<https://perma.cc/L8MK-XECW>].

¹⁰⁹ As a general matter, candidates for public office who spend more money are more likely to win an election than a candidate who raises less money. For example, data from the Center for Responsive Politics shows that, in elections for the House of Representatives during the years 2000 to 2016, the candidate who spent more money won the general election at least 86% of the time; in most cycles the highest-spending candidate won more than 90% of the time. Maggie Koerth, *How Money Affects Elections*, FIVETHIRTYEIGHT (Sept. 10, 2018), <https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/> [<https://perma.cc/TXZA-GH4U>]. Similarly, Brian Adams' study of municipal elections in eleven cities found that 85% of winning candidates were the top fundraiser in the election. ADAMS, *supra* note 8, at 48. That the person who raises the most money usually wins does not necessarily tell us whether the money caused them to win—perhaps they raised the most money because donors saw them as the candidate most likely to win. Sophisticated studies, which attempt to measure the causal effect of money in races, do not tell a very clear story; the conclusions appear to be quite different for incumbents and challengers. Several studies have found that campaign spending by incumbents has little or no effect on an incumbent's vote margins. *See, e.g.*, Alan S. Gerber, *Does Campaign Spending Work? Field Experiments Provide Evidence and Suggest New Theory*, 47 AM. BEHAV. SCIENTIST 541, 541–42 (2004) (reporting the results of field experiments involving actual candidates which showed that “incumbent campaign spending has a negligible effect on candidate vote margins”) [hereinafter “Gerber, *Does Campaign Spending Work?*”]; Gary C. Jacobson, *The Effect of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469, 469 (1978) (finding no real effect of marginal spending on incumbent vote share). But not all studies reach that conclusion. Some have found that increased spending by incumbents does increase their share of the vote. *See, e.g.*, D.P. Green & J.S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, 32 AMER. J. POL. SCI. 884, 884 (1988). The studies are more consistent in finding that spending by challengers increases their vote share. *See, e.g.*, Gary C. Jacobson, *Money and Votes Reconsidered: Congressional Elections, 1972–1982*, 47 PUB. CHOICE 7, 13 (1985) (“In contests involving incumbents, the more a challenger spends, the greater his share of the vote.”); Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables*, 92 AM. POL. SCI. REV. 401, 402 (1998) (“[T]he central finding of this literature . . . [is that] [c]hallenger spending has much greater marginal returns than incumbent spending . . .”). That is not to say the studies have uniformly found an effect for challengers, but rather that even those studies which found little or no effect for incumbents sometimes found effects for challengers. And those studies that document an increase in vote share for incumbents show a greater

by which a candidate wins office, we have reason to be wary. While the candidate may not be beholden to those special interests, they may at least be sympathetic to those interests—possibly to the detriment of their district, their voters, and justice.

effect for challengers. *See, e.g.*, R.S. Erikson & T.R. Palfrey, *Equilibria in Campaign Spending Games: Theory and Evidence*, 94 AMER. POL. SCI. REV. 595, 606 (2000); *see also* Gerber, *Does Campaign Spending Work?*, *supra*, at 546 tbls.1 & 2 (collecting sources). *But see* Steven D. Levitt, *Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House*, 102 J. POL. ECON. 777 (1994) (finding that campaign spending by both incumbents and challengers had little to no effect on election outcomes). Put differently, while the effect of spending by incumbents is unclear, the balance of the evidence suggests that increased spending by challengers is more likely to improve their performance at the polls than does similar spending by incumbents.