
Donating to the District Attorney

Carissa Byrne Hessick,^{†*} Michael Morse,^{**} and Nathan Pinnell^{***}

The United States is the only country that elects its local prosecutors. In theory, these local elections could facilitate local control of criminal justice policy. But the academic literature assumes that, in practice, prosecutor elections fail to live up to that promise. This Article complicates that conventional wisdom with a new, national study of campaign contributions in prosecutor elections. The study offers a more complete empirical account of prosecutor accountability by analyzing contributions to local candidates as well as their election results. It details the amount of money in local prosecutor elections, including from interest groups, and the relationship between candidate fundraising and success. The stark differences across the country underscore that the more than two thousand local prosecutors are not a monolith; some offices are best understood as political, with contested elections and significant amounts

[†] Copyright © 2023 Carissa Byrne Hessick, Michael Morse, and Nathan Pinnell. The authors would like to thank Shima Baradaran Baughman, Jeff Bellin, Jack Chin, Beth Colgan, Don Dripps, Dan Epps, Nicole Garnett, Rick Garnett, Brandon Garrett, Ben Grunwald, Sam Kamin, Maria Maciá, Justin Marceau, Marah McLeod, Marc Meredith, Ronald Wright, the participants of faculty workshops at Chicago-Kent College of Law, Notre Dame Law School, and William & Mary School of Law, as well as the participants at the Southwest Criminal Law Workshop, the Criminal Justice Ethics Schmooze, the Duke Criminal Law Breakfast, and the annual CrimFest! conference for their helpful comments on earlier drafts of this Article. The Vital Projects Fund provided important financial support for this study. Many thanks also to Samantha Owen Baruch and Amy Ullrick, who helped to manage the data collection, as well as to the dozens of UNC law students who performed data entry.

^{*} Anne Shea Ransdell and William Garland “Buck” Ransdell, Jr. Distinguished Professor of Law and Director of the Prosecutors and Politics Project, University of North Carolina School of Law.

^{**} Harry A. Bigelow Teaching Fellow and Lecturer in Law, University of Chicago Law School, and incoming Assistant Professor of Law, University of Pennsylvania Carey Law School.

^{***} Term clerk for Chief Justice Michael P. Boggs of the Georgia Supreme Court. The views expressed in this Article are solely those of the author and do not reflect the views of Chief Justice Boggs.

of campaigning, while most appear more bureaucratic, with neither. Recognizing this distinction suggests that accountability efforts require a multifaceted approach. If some prosecutors are more akin to bureaucrats, reformers should not limit themselves to recruiting electoral challengers; they should also consider layering bureaucratic accountability on top of political accountability. Further, at least for now, money in prosecutor politics has served as a moderating, rather than punitive, force.

TABLE OF CONTENTS

INTRODUCTION	1771
I. UNDERSTANDING ELECTED PROSECUTORS	1776
A. <i>What We Know About Prosecutor Elections</i>	1776
B. <i>What Campaign Contribution Information Adds</i>	1784
II. NATIONAL DATASET OF CAMPAIGN CONTRIBUTIONS TO	
LOCAL PROSECUTORS	1788
A. <i>Data Collection</i>	1789
B. <i>Measuring Prosecutor Campaigns</i>	1797
1. <i>Magnitude of District Fundraising</i>	1798
2. <i>Identity of Donors</i>	1810
3. <i>Fundraising and Success</i>	1818
III. LESSONS FROM CAMPAIGN FINANCE DATA	1821
A. <i>Prosecutors as Politicians or Bureaucrats</i>	1822
B. <i>Accountability and Elections</i>	1826
C. <i>Campaign Contributions and Criminal Justice Reform</i> ...	1835
CONCLUSION.....	1844

INTRODUCTION

The United States is suffering from a carceral crisis.¹ No other country incarcerates as many people or as large a share of people.² Over the past four decades, the national imprisonment rate increased fivefold,³ prompted in part by rising crime rates.⁴ But when crime rates leveled off and then began to fall at the end of the twentieth century, the carceral state continued to grow.⁵ The disconnect between incarceration and crime sparked a rich academic literature that seeks to explain — and hopes to reverse — what has come to be called “mass incarceration.”⁶

¹ See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 6 (2016) [hereinafter *CAUGHT*] (“The United States is exceptional not only because it locks up so many people but also because brutal, dehumanizing practices and conditions are endemic to many U.S. jails and prisons”); NAT’L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 2 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (“The growth in incarceration rates in the United States over the past 40 years is historically unprecedented and internationally unique.”).

² GOTTSCHALK, *CAUGHT*, *supra* note 1, at 5 fig.1.1 (indicating that the incarceration rate for the United States is higher than any other country); NAT’L RSCH. COUNCIL, *supra* note 1, at 36 fig.2-2 (indicating that the incarceration rate for the United States is higher than any other European or common law country).

³ NAT’L RSCH. COUNCIL, *supra* note 1, at 42; see also *id.* at 35 fig.2-1, 41 fig.2-4 (displaying the rise in incarceration rate and total correctional population over the past four decades).

⁴ *Id.* at 111 (“The national crime rates had started to turn upward in 1961, and they continued rising through 1981.”).

⁵ Compare JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 2 fig.1 (2017) (displaying incarceration rates in the United States from 1925 to 2014), with *id.* at 3 fig.2 (displaying crime trends in the United States from 1960 to 2014). See also NAT’L RSCH. COUNCIL, *supra* note 1, at 41 fig.2-4 (displaying the growth in the total correctional population from 1972 to 2010).

⁶ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012); RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019); EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2020); PETER K. ENNS, *INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD* (2016); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); GOTTSCHALK, *CAUGHT*, *supra* note 1; CARISSA BYRNE HESSICK, *PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL* (2021); MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2009); PFAFF, *supra* note 5; JONATHAN SIMON, *GOVERNING*

Legal scholars and criminal justice reformers have increasingly focused on the role of local prosecutors in mass incarceration. As a formal matter, the vast majority of people incarcerated are arrested by local police, charged in county court by local prosecutors, and sentenced to state prison.⁷ In other words, the steep increase in incarceration over the past half century came overwhelmingly via criminal cases brought by the thousands of local prosecutors spread across the United States. As a functional matter, though, that increase was not inevitable. Prosecutors enjoy significant discretion about who to charge with what crimes because of both broad criminal laws and limited judicial review.⁸

In theory, local elections could facilitate local control over prosecutors' discretionary authority. But there is significant academic disagreement about whether, in practice, local elections are a plausible path for criminal justice reform. Some claim that local communities, if given a larger voice, will demand less punitive policies, while others insist that political pressure from those communities created the punitive policies in the first instance.⁹ At the same time, there is a growing movement to recruit and fund local prosecutor candidates who will use their discretion to reduce incarceration.¹⁰ A few local elections have become high-profile public

THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2013); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011).

⁷ See E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2020 – STATISTICAL TABLES 7 tbl.1 (2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf> [<https://perma.cc/2GHT-QYXH>] (indicating that the number of state prisoners from 2010 to 2020 ranged from around 1 to 1.4 million while the number of federal prisoners ranged from 150,000 to 200,000).

⁸ See *infra* notes 23–34 and accompanying text.

⁹ See *infra* notes 54–59 and accompanying text.

¹⁰ For example, the Real Justice Political Action Committee was created in February 2018 “to help elect ‘reform-minded prosecutors’ at the county and city levels” by providing significant financial support to “campaigns by progressives running for district attorney offices.” Daniel Marans, *Black Activist Starts Group that Aims to Elect Progressive Prosecutors*, HUFFPOST, https://www.huffingtonpost.com/entry/black-activist-elect-progressive-prosecutors_us_5a85b64ee4b0058d55670e4f (last updated Feb. 15, 2018) [<https://perma.cc/6DZ4-SXPL>]. Another political action committee, Color of Change, and billionaire George Soros have also spent significant amounts of money to elect progressive prosecutors. See Matt Ferner, *George Soros, Progressive Groups to Spend Millions to Elect Reformist Prosecutors*, HUFFPOST (May 12, 2018, 7:00 AM EDT), https://www.huffingtonpost.com/entry/george-soros-prosecutors-reform_us_5af2100ae4b0a0d601e76f06 [<https://perma.cc/J225-E2AK>]. The ACLU launched “Vote Smart Justice, a nonpartisan voter education drive to give Americans information about where candidates for state and federal office stand on key criminal justice reform issues, like bail reform, the war on drugs, and police accountability.” Udi Ofer, *Common Wants You to*

events, garnering national coverage, prominent endorsements, and an infusion of activist money.¹¹ Importantly, local prosecutors outside of big cities are starting to draw attention too.¹²

Despite the growing literature and increased profile of some prosecutor elections, our understanding of the local politics of mass incarceration is limited. Because the criminal justice system is so fractured — there are more than two thousand elected local prosecutor offices across the United States — it is difficult to know how well elections are functioning as a political check and thus whether electing different prosecutors is a plausible path to reform. This Article helps fill that empirical gap.

Specifically, the Article presents and analyzes an original, national study of campaign contributions to candidates for local prosecutor. Our dataset offers an unprecedented look at the amount of campaigning that occurs in prosecutor elections, as well as the identity of the donors who contribute to these campaigns. Campaign contribution data gives us a more nuanced picture of prosecutorial politics, allowing us to make important distinctions between offices and interest groups, suggest new accountability measures, and better evaluate how elections can lead to

Vote Smart Justice in 2018, ACLU (Oct. 11, 2018), <https://www.aclu.org/blog/smart-justice/common-wants-you-vote-smart-justice-2018> [<https://perma.cc/6MZC-URZ4>]. Although the ACLU does not endorse candidates, the voter education initiative has as its explicit goal to “cut the incarceration rate in this country by 50 percent and reduce the racial disparities in our prisons and jails.” *Id.*

¹¹ See, e.g., Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration: Philadelphia’s District Attorney Reinvents the Role of the Modern Prosecutor.*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/BH6T-RB5R>]; Allan Smith, *Parents Guilty of Murder and Raised by Radicals, Chesa Boudin Is San Francisco’s Next District Attorney*, NBC NEWS (Dec. 16, 2019, 2:28 AM PST), <https://www.nbcnews.com/politics/elections/parents-guilty-murder-raised-radicals-chesa-boudin-san-francisco-s-n1101071> [<https://perma.cc/K4AD-RNCA>]; David Weigel, *Down the Ballot, Liberal Reformers Take over the Criminal Justice System*, WASH. POST (Sept. 5, 2018, 6:17 PM EDT), <https://www.washingtonpost.com/politics/2018/09/05/down-ballot-liberal-reformers-take-over-criminal-justice-system/> [<https://perma.cc/2HW3-DVCT>].

¹² See, e.g., Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 803 (2020) (“[A]lthough such prosecutors have become more common in large cities, practitioners and scholars should not forget that reforms that occur in large jurisdictions sometimes do not extend to those suffering injustices in small communities.”); *Prosecution Beyond Big Cities*, INST. FOR INNOVATION IN PROSECUTION AT JOHN JAY COLL., <https://www.prosecution.org/beyond-big-cities> (last visited Feb. 28, 2023) [<https://perma.cc/8W53-58ZY>] (“[W]e will need more than just the commitment of big city prosecutors to create sustainable and effective change. It is imperative that we include and uplift prosecutors in smaller jurisdictions . . .”).

reform. Further, by making our national dataset public, we hope to help voters and scholars realize the informational and anti-corruption benefits long ascribed to campaign finance reform.¹³

In addition to data on campaign contributions, we also present new data on prosecutor elections. We previously released a national dataset covering one prosecutor election in each local jurisdiction between 2012 and 2017.¹⁴ This Article updates that dataset to now include every prosecutor election held in 2018 and 2019.

Our data reveals stark differences in prosecutor elections across the country. In more populous districts, elections are more likely to be contested and candidates are more likely to raise and spend substantial amounts of money to campaign. Prosecutor elections in these districts look similar to other political races. But in the many smaller, more rural districts, there are few contested elections and little fundraising. (Indeed, there is often no fundraising at all.) The candidates in these districts resemble bureaucrats more than politicians, and their constituents have few opportunities to learn about their prosecutors' policies or to hold them accountable.

Our findings lead us to conclude that accountability mechanisms beyond elections are necessary to ensure prosecutors do not exercise their significant discretionary power unchecked. We suggest that accountability mechanisms often used within bureaucracies — hierarchy, supervision, reporting requirements, and job evaluations — could be adapted for prosecutors. To highlight one possible reform, state bar associations could request that candidates answer questionnaires designed to elicit how prosecutors will use their power.¹⁵ This would facilitate oversight by local communities even if candidates do not campaign.

But while prosecutor elections do not seem to be functioning well in smaller jurisdictions, they have served as important vehicles of change in larger jurisdictions. Our data show that progressive candidates have been able to raise large amounts of money — including significant sums from out of state — to propel them to victory at the polls. These victories suggest that prosecutor elections can serve as a path to criminal justice reform. But they also suggest reformers' calls to limit campaign

¹³ See *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam).

¹⁴ See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537 app. at 1589 tbl.10 (2020) (presenting one cycle of election data for every jurisdiction in the United States).

¹⁵ As we explain in more detail below, this is already common practice for judicial elections. See *infra* note 220 and accompanying text.

contributions in prosecutor elections may be misguided. At least in the short term, such restrictions could actually stymie reform because campaign fundraising is more important for challengers than incumbents.

This Article proceeds in three parts. Part I explains why political checks are the only viable method of constraining prosecutors' power. It then canvasses the existing literature on prosecutor elections and on democracy as a tool for criminal justice reform, and it explains what campaign contribution data can add to that literature.

Part II then presents our new campaign contributions dataset and updated elections dataset. After describing the data collection and coding process, it documents how much money is contributed in prosecutor elections across the country, who donates in those elections, and the relationship between fundraising and success at the ballot box. Part II demonstrates that the vast majority of prosecutor elections are "bargain" elections that raise no money at all,¹⁶ while a small number of "marquee elections" raise millions of dollars.¹⁷ When it comes to who donates to these campaigns, we find that many rural campaigns are self-funded¹⁸ and most candidates in all districts depend heavily on donations from within their districts.¹⁹ We also present data showing that attorneys contribute a substantial amount of money in prosecutor elections, while law enforcement and the bail industry do not.²⁰ Consistent with the political science literature on campaign contributions, we find a correlation between raising more money and winning elections — a relationship that is strongest for candidates who challenge incumbents.

Part III articulates three key lessons about prosecutor elections gleaned from our national data. First, there are two very different types of prosecutors — prosecutors who face an opponent and campaign for office like other prominent elected officials, and prosecutors for whom an election is little more than a formality that they must endure. In other words, some prosecutors seem like politicians, while others seem like bureaucrats. Second, while elections can serve as important accountability mechanisms in districts where the prosecutor is a political office, bureaucratic prosecutors raise serious accountability issues that should prompt consideration of additional ways to hold them accountable. Finally, the campaign finance data give us more information about

¹⁶ See *infra* Table 6.

¹⁷ See *infra* Table 7.

¹⁸ See *infra* Table 8.

¹⁹ See *infra* Table 9.

²⁰ See *infra* Table 10.

whether (and under what circumstances) prosecutor elections can serve as an avenue for criminal justice reform. We examine the ways in which candidates who ran on platforms of criminal justice reform were able to mobilize large amounts of money to win elections. Part III also explains why campaign contributions are unlikely to be driving punitive outcomes and why, in light of the fundraising success of progressive candidates, limits on contributions might actually undermine reform, at least in the short term.

I. UNDERSTANDING ELECTED PROSECUTORS

William Stuntz famously characterized local prosecutors as “the criminal justice system’s real lawmakers.”²¹ While legislators set the content of the criminal law, prosecutors possess enormous power to shape how it operates in practice.²² There are very few legal checks on prosecutors’ power; instead, we rely on political checks — mainly in the form of local elections — to limit how prosecutors exercise it. Yet we know little about those elections. As a result, there is much disagreement in the academic literature about how and whether prosecutors specifically (and elections more generally) can serve as vehicles for criminal justice reform.

This Part canvasses the dearth of legal checks on prosecutors and the uncertainty surrounding the political checks. It concludes by explaining what campaign finance data can add to our limited understanding.

A. *What We Know About Prosecutor Elections*

Prosecutors’ power derives, in part, from how broad and overlapping most criminal codes are. Prosecutors can choose, as if from a menu, what charges to bring in a case.²³ Their choices include whether to bring charges carrying harsh penalties or mild penalties,²⁴ whether to stack multiple

²¹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) [hereinafter *Pathological Politics*].

²² *See id.* at 519-23.

²³ William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

²⁴ *See* David Bjerck, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 591 (2005) (“[P]rosecutors can use their discretion over prosecution charges to circumvent a mandatory minimum sentencing law for some defendants by prosecuting defendants who were initially arrested for the crime targeted by the sentencing law for lesser crimes not covered by the law.”); Cody Tuttle, *Racial Disparities in Federal Sentencing: Evidence*

charges or bring only a single charge,²⁵ and even whether to bring no charges at all.²⁶ Further, prosecutors are able to translate their power to charge into power to plea bargain.²⁷ Prosecutors can drop or add charges to incentivize or pressure a defendant to plead guilty,²⁸ and they can even agree to drop charges altogether as part of a deferred prosecution agreement or a treatment court regime.²⁹

The Supreme Court has condoned prosecutors' nearly limitless discretion over charging decisions.³⁰ The Court has held that "the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests *entirely* in [the prosecutor's] discretion."³¹ According to the Court, that deference is justified because "the decision to prosecute

from Drug Mandatory Minimums 1 (Feb. 19, 2023) (unpublished manuscript), https://codytuttle.github.io/tuttle_mandatory_minimums.pdf [<https://perma.cc/CP52-ZLY2>] (comparing cases sentenced before and the Fair Sentencing Act, which raised the minimum amount of crack-cocaine to trigger a 10-year mandatory minimum sentence from 50 grams to 280 grams, and finding a sharp increase in the fraction of cases sentenced at 280 grams, the point that now triggers a 10-year mandatory minimum).

²⁵ See John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 UC DAVIS L. REV. 1955, 1955 (2015) ("When the government wants to impose exceptionally harsh punishment on a criminal defendant, one of the ways it accomplishes this goal is to divide the defendant's single course of conduct into multiple offenses that give rise to multiple punishments.").

²⁶ See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 676 (2014) ("[F]ederal prosecutors and other executive officials claimed from the beginning authority to decline enforcement of federal statutes in particular cases — an important indication that the executive role has always been understood to entail such authority.").

²⁷ See HESSICK, *supra* note 6, at 35-80 (discussing prosecutorial power in plea bargaining).

²⁸ See Nancy Amoury Combs, *Rehabilitating Charge Bargaining*, 96 IND. L.J. 803, 806 (2021) ("[C]harge bargaining is coercive, according to commentators, because it encourages prosecutors to over-charge defendants — by charging them with crimes that prosecutors do not expect to be able to prove — so as to pressure them into pleading guilty to crimes the defendant actually committed."); see also Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254-55 (2008) (discussing how overcharging is used to induce defendants to plead guilty).

²⁹ See, e.g., Eugene Illovsky, *Corporate Deferred Prosecution Agreements*, 21 CRIM. JUST. 36 (2006) (describing how deferred prosecution agreements allow prosecutors to secure concessions from corporations without obtaining convictions); Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974) (describing how pretrial diversion programs operate and how they are used to effectuate rehabilitative goals).

³⁰ See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 19-59 (2007).

³¹ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (emphasis added).

is particularly ill-suited to judicial review.”³² As a result, the only real judicial limits on prosecutorial power are the requirements that charges be supported by probable cause³³ and not motivated by a defendant’s race, religion, or other protected status.³⁴

Not only do judges generally not review prosecutorial charging decisions, but rampant plea bargaining means that most charging decisions are never vetted by a jury either.³⁵ The result is that prosecutors alone end up deciding not only whether to charge most defendants, but also whether to convict them. And because those plea bargains can include both the crime for which the defendant will be convicted and what sentence he or she will serve,³⁶ judges are often shut out of the sentencing process. In other words, prosecutors decide who to charge, who to convict, and how much to punish.

Because prosecutors wield such discretion, ensuring accountability is critical. For most Americans, prosecutors are elected on the local level.³⁷ In theory, local elections empower local communities to decide how prosecutorial power should be exercised. But the legal literature suggests that local control may exist more in theory than in practice. Conventional wisdom is that prosecutor elections are rarely contested and that incumbents are reelected as a matter of course.³⁸

³² *Wayte v. United States*, 470 U.S. 598, 607 (1985).

³³ *Bordenkircher*, 434 U.S. at 364.

³⁴ See Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1372 (1987) (collecting cases).

³⁵ Only three percent of convictions are the result of trials. See HESSICK, *supra* note 6, at 24-25.

³⁶ See, e.g., FED. R. CRIM. P. 11(c)(1)(C) (recognizing that the parties can negotiate about the “specific sentence or sentencing range” and that “such a recommendation or request binds the court once the court accepts the plea agreement”).

³⁷ Forty-five of the fifty states elect local prosecutors who bear the primary responsibility for bringing felony prosecutions in their jurisdictions. See Hessick & Morse, *supra* note 14, at 1550-51, 1550 tbl.1 (describing the method of selection for local prosecutors in each state and identifying those states that do not elect their local prosecutors).

³⁸ See, e.g., PFAFF, *supra* note 5, at 134 (“[B]y and large, district attorneys are reelected with unfailing regularity. It’s hard to view elections as a way to systematically regulate prosecutorial behavior.”); *id.* at 139 (“Almost all prosecutors are elected, but those elections often seem like foregone conclusions. Incumbents rarely face challengers, and when they do they usually win.”); Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1103 (2017) (“[I]ncumbent prosecutors rarely face real accountability . . . [because] ninety-five percent of the incumbents who want to return to prosecutorial office are reelected.”); Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1690 (2017)

The existing empirical literature appears to confirm this rather grim picture of prosecutor elections. It documents that prosecutor elections are often uncontested, rarely offering voters a choice about who will serve as their district attorney. It also suggests that elections may not actually result in the election of candidates who share their constituents' policy views.

In the first empirical study of prosecutor elections, Professor Ron Wright used data from ten states to report a startling statistic: incumbents were winning 95% of general elections.³⁹ Five years later, Wright expanded his sample, including five more states and additional electoral cycles, and he found the same thing.⁴⁰ Wright observed that incumbents

(“Prosecutorial elections are notoriously uncompetitive . . .”); Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 660 (2010) (“[Prosecutor] races are distorted by huge incumbency advantages and driven by occasional scandals and unrepresentative, high-profile celebrity trials.”); R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 NOTRE DAME L. REV. 635, 657 (2006) (“It is exceptionally rare in this country for an incumbent prosecutor to be voted out of office.”); Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 245 (“When progressive prosecutors run, the amount spent on district attorney races shoots up. Of course, this is in part because many of these elections would have otherwise been uncontested.”); Gregory DeAngelo & Bryan C. McCannon, *Judicial Elections and Criminal Case Outcomes*, 49 J. LEGAL STUDS. 199, 229 (2020) (“Lower-level offices, such as county prosecutor, are typically uncontested in the general election.”); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1269 (2011) (“Prosecutorial re-election rates are high and the vast majority of incumbents go unchallenged.”); Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1478 (2018) (“Several studies suggest that prosecutorial elections are low-information affairs in which incumbency is an overwhelming advantage (indeed, many are uncontested), and in which conviction rates and other metrics of adversarial success bear little apparent relationship to electoral success.”); Janet C. Hoeffel & Stephen I. Singer, *Elections, Power, and Local Control: Reining in Chief Prosecutors and Sheriffs*, 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 319, 323 (2015) (“Unlike sitting mayors, governors, and state and local legislators, the vast majority of incumbent prosecutors and sheriffs run unopposed.”); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 592 (2017) (“Prosecutorial elections are historically low-information, low-turnout affairs. Often times, there are no opponents to vote for; even when other candidates materialize, incumbents win so often that ‘retention rates . . . would make a candidate for the Supreme Soviet blush.’” (citations omitted)); Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205, 1220 (2017) (“[I]ncumbent prosecutors win reelection the vast majority of the time . . .”).

³⁹ See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 595 tbl.1 (2009) [hereinafter *How Prosecutor Elections Fail*].

⁴⁰ See Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 601 tbl.1 (2014) [hereinafter *Beyond*].

were reelected at such a high rate, in part, because they rarely faced opponents.⁴¹

More recently, we collected a *national* dataset of prosecutor elections and found that only 30% of *all* elected prosecutors faced a challenger in either their primary or their general election.⁴² In other words, it is not just incumbency that drives uncontested elections. The likelihood that an election will be contested is closely tied to the population of the jurisdiction.⁴³ Prosecutor elections are least likely to be contested in small jurisdictions.⁴⁴ Indeed, some small jurisdictions are unable to identify even a single eligible candidate to run for local prosecutor.⁴⁵ Another recent study found evidence of a noticeable increase in the rate of contested elections from 2012 to 2020 across the 200 largest jurisdictions, although the baseline rate remains quite low.⁴⁶

It is possible that so many prosecutors are elected without opposition simply because their constituents are happy with their performance. But that seems unlikely. More likely is that voters are not particularly informed about the important decisions that their prosecutors make. Many of local prosecutors' charging and bargaining decisions are made outside of public

⁴¹ *Id.* at 601.

⁴² Hessick & Morse, *supra* note 14, at 1563 tbl.5. A study of 10,890 trial court elections from 2000 to 2008 found a roughly similar contestation rate, with less than 25% of "contestable judicial elections" being contested. See Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation in Trial Court Elections*, JUDICATURE, Mar.–Apr. 2011, at 209. However, the percentage of state legislative seats contested in elections between 2002 and 2016 ranged from 55% to 64%, or roughly double the prosecutor contestation rate. Adam S. Myers, *Explaining Increased Contestation in the 2018 State Legislative Elections*, 53 PS: POL. SCI. & POL. 429, 429 (2020).

⁴³ See Carissa Byrne Hessick, Sarah Treul & Alexander Love, *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31, 65-66 (2023) (using a logistic regression model to identify the factors that are most likely to lead to a contested prosecutor election).

⁴⁴ See Hessick & Morse, *supra* note 14, at 1563 tbl.5 (reporting that 26% of districts with less than 100,000 population have either a contested primary or a contested general election, compared to 37% in districts with between 100,000 and 250,000, 42% in districts with between 250,000 and 1,000,000, and 65% in districts with more than 1,000,000 population); Wright, *Beyond*, *supra* note 40, at 601-02.

⁴⁵ Those jurisdictions must appoint their prosecutors. Hessick & Morse, *supra* note 14, at 1575.

⁴⁶ See Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 147 (2021) ("The elections in the years 2012–2015 left incumbents unopposed in 79% of the primaries and in 72% of their general elections. In the latest four years, 2017–2020, the percentage of incumbents who ran unopposed dropped to 70% in the primaries and 55% in the general elections.").

view.⁴⁷ And, historically, the media coverage of prosecutor elections has tended to focus on topics other than office policies about how to wield prosecutorial discretion.⁴⁸

A recent study of California prosecutors supports the idea that prosecutor and constituent views diverge — particularly for more liberal voters. The study examined statewide referenda on highly salient criminal justice issues.⁴⁹ It compared the stated positions of elected district attorneys with how their constituents voted on the referenda, finding that, with one exception, the district attorneys were united in taking the more conservative position.⁵⁰ The study concluded that whether a district attorney represents their constituent's views “is almost entirely a result of whether the constituency is conservative. If so, voters get a DA in line with their views. If not, they do not.”⁵¹

Despite the evidence that elections may not be functioning well, or at least evenly, as checks on prosecutors' power, a significant group of legal academics have argued in recent years that local democracy could help reverse mass incarceration.⁵² Their “solution is to make criminal justice more community focused and responsive to lay influences.”⁵³

⁴⁷ See Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. 1071, 1084-115 (2022) (cataloguing the key prosecutorial decisions that are made without transparency).

⁴⁸ See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 984-87 (2009) [hereinafter *Prosecutorial Regulation*]; Wright, *How Prosecutor Elections Fail*, *supra* note 39, at 597-603.

⁴⁹ Michael W. Sances, *Do District Attorneys Represent Their Voters? Evidence from California's Era of Criminal Justice Reform*, 2 J. POL. INSTS. & POL. ECON. 169, 177-78 (2021).

⁵⁰ *Id.* at 181.

⁵¹ *Id.* at 187. This is consistent with a recent political science study, which concluded that “politicians from both parties dramatically overestimated their constituents' support for conservative policies.” David E. Broockman & Christopher Skovron, *Bias in Perceptions of Public Opinion Among Political Elites*, 112 AM. POL. SCI. REV. 542, 542 (2018).

⁵² See, e.g., Joshua Kleinfeld, Laura I. Appleman, Richard A. Bierschbach, Kenworthy Bilz, Josh Bowers, John Braithwaite, Robert P. Burns, R A Duff, Albert W. Dzur & Thomas F. Geraghty et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017) (arguing that the path toward a better criminal system is to democratize the system and setting forth specific proposals to achieve that end).

⁵³ Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1376 (2017).

Some academics point to the rise of “progressive prosecutors” as evidence of the promise of democratic reform.⁵⁴ Progressive prosecutors, although not running on identical platforms, are broadly committed to “reducing mass incarceration and racial disparities in the criminal justice system.”⁵⁵ Indeed, many were motivated to run by their desire to reform a system that they argue incarcerates too many people and disproportionately impacts minorities and the poor.⁵⁶ In pursuit of this goal, they have enacted a variety of policies: reducing pretrial detention by not seeking cash bail for lower-level offenses, embracing diversion and treatment programs instead of imprisonment, and declining to prosecute certain crimes, such as marijuana possession.⁵⁷

Perhaps unsurprisingly, given the empirical picture, another group of academics have lined up against the champions of local democracy. This second group believes that democracy is the cause of, rather than the solution to, punitive policies and mass incarceration. As their argument goes, punitiveness stems from the American public, who consistently vote for tough-on-crime politicians, rather than from experts who could develop sensible crime control policies that are less harsh.⁵⁸ These

⁵⁴ See, e.g., Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 *FORDHAM L. REV. ONLINE* 8, 10 (2018) (“We must change the current model of prosecution and that change will only happen if good, progressive people run for the office of District Attorney. . . . In fact, that change is taking place as progressive-minded people are winning District Attorney races across the country.”); David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 *UC DAVIS L. REV. ONLINE* 25, 25 (2017) (“[M]any criminal justice reformers are turning their eyes to state and county officials, especially to the growing number of local prosecutors who have won office by promising a more thoughtful and evenhanded application of criminal statutes.”).

⁵⁵ Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 *UCLA CRIM. JUST. L. REV.* 1, 22 (2019).

⁵⁶ Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System Is Fighting Back.*, *WASH. POST* (Nov. 9, 2019, 5:52 PM EST), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html [<https://perma.cc/3Z7Q-985N>].

⁵⁷ See, e.g., Daniel Nichanian, *The Prosecutorial Chronicles, May 2019: Durham DA Rolls Out New Policies to Reduce Pretrial Detention*, *APPEAL* (May 31, 2019), <https://theappeal.org/politicalreport/durham-da-rolls-out-new-policies-to-reduce-pretrial-incarceration/> [<https://perma.cc/TF2X-T4QG>].

⁵⁸ See, e.g., BARKOW, *supra* note 6, at 105-24; John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 *U. CHI. L. REV.* 711, 739-809 (2020).

academics also dispute the claims of those who champion local democracy as empirically unfounded.⁵⁹

That these two groups rest their theories on competing empirical claims is not surprising. The lack of relevant empirical data all but defines the study of important criminal justice issues.⁶⁰ Local prosecutors have proven particularly difficult to study. As an initial hurdle, there is the sheer number of prosecutors. There are far more elected prosecutors — 2,315 — than there are members of the U.S. Senate (100), U.S. House (435), or state senators (1,972), and they are not organized into a central body.⁶¹ Indeed, at the state level, local prosecutors are likely outnumbered only by state house members and various county-level offices, such as school board and city council members.⁶²

Some have sought to survey prosecutors, but such methods are expensive, and response rates can be a serious challenge.⁶³ The Bureau of Justice Statistics has gathered limited information from prosecutors' offices. And while their response rate is high, their data is dated and does

⁵⁹ Rappaport, *supra* note 58, at 717 (“My concern is that the pertinent empirical facts do not favor the democratizers’ designs.”); *see also id.* at 739-807 (rebutting five premises of the democratizers’ arguments by reference to empirical data).

⁶⁰ *See, e.g.*, MEASURES FOR JUST., THE POWER AND PROBLEM OF CRIMINAL JUSTICE DATA: A TWENTY-STATE REVIEW 3 (2021) (“After a decade’s worth of data collection and engagement with county agencies and state courts, it’s become abundantly clear to us that willing and motivated communities simply do not have enough access to their own data to start making sense of what’s happening in their local criminal justice systems.”); NAT’L RSCH. COUNCIL, *supra* note 1, at 431 (suggesting that criminal justice research requires “significant new data collection”); Matt Ford, *The Missing Statistics of Criminal Justice*, ATLANTIC (May 31, 2015), <https://www.theatlantic.com/politics/archive/2015/05/what-we-dont-know-about-mass-incarceration/394520/> [<https://perma.cc/JMW2-Q8MZ>] (“Statistical shortcomings like these have long vexed researchers studying the American criminal-justice system.”).

⁶¹ *See State Legislative Elections, 2022*, BALLOTPEDIA, https://ballotpedia.org/State_legislative_elections_2022 (last visited Nov. 7, 2022) [<https://perma.cc/LBF7-MC4J>] (indicating that, as of November 7, 2022, Democrats held 864 state senate seats, Republicans held 1,092, and sixteen seats were either held by Independents or were vacant).

⁶² *See id.* (indicating that, as of November 7, 2022, Democrats held 2,408 state house seats, Republicans held 2,897, and 106 seats were either held by Independents or were vacant, for a total of 5,411). Local prosecutors are part of the “hundreds of thousands of local elected officials” across the United States. Christopher Warshaw, *Local Elections and Representation in the United States*, 22 ANN. REV. POL. SCI. 461, 462 (2019).

⁶³ *See* Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 UC DAVIS L. REV. 2133, 2159 (2022) (reporting a response rate of 12%).

not include questions about elections.⁶⁴ The available data on prosecutor elections thus is limited to a few geographies or a few points in time.⁶⁵ The empirical evidence about the divergence between prosecutors' views and their constituents comes only from a single state.

In short, while the empirical literature about prosecutor elections may be grim, it is also doubtlessly incomplete. More data is needed to determine how elections are functioning as a political check on prosecutors, and thus whether they could serve as a promising path to criminal justice reform.

B. *What Campaign Contribution Information Adds*

Campaign contributions offer a promising source of additional information about the political dynamics of prosecutor elections. Campaign finance disclosure rules require most candidates for elected office, including local prosecutors, to disclose the contributions they receive.⁶⁶ The Supreme Court has repeatedly articulated the value of such disclosure, and political scientists have validated the Court's theory by demonstrating the benefits of disclosure.

The Supreme Court has upheld federal campaign finance disclosure requirements in part on the theory that disclosure informs voters.⁶⁷

⁶⁴ Their response rate was 95%, but the last collection occurred in 2005. See STEVEN W. PERRY, BUREAU JUST. STAT., PROSECUTORS IN STATE COURTS, 2005, at 10 (2006), <https://bjs.ojp.gov/library/publications/prosecutors-state-courts-2005> [<https://perma.cc/2HEH-5EM4>]. There appear to be plans to conduct a new survey, but that survey will be limited to a sample of approximately 750 offices. See Agency Information Collection Activities; Proposed Collection Comments Requested; Reinstatement, With Change, of a Previously Approved Collection for Which Approval Has Expired: National Survey of Prosecutors (NSP), 85 Fed. Reg. 49395 (Aug. 13, 2020), <https://www.federalregister.gov/documents/2020/08/13/2020-17688/agency-information-collection-activities-proposed-collection-comments-requested-reinstatement-with> [<https://perma.cc/B64Q-4FGY>].

⁶⁵ Wright's initial study of fifteen states spans from 1996 to 2012. Wright, *Beyond*, *supra* note 40, at 600 n.33. The Hessick and Morse study included one election cycle from forty-five states, which spanned the years 2012–2017. Hessick & Morse, *supra* note 14, at 1558 n.108. The Wright, Yates, and Hessick study included data on the 200 largest jurisdictions up through 2020. Wright et al., *supra* note 46, at 127.

⁶⁶ See *State Campaign Finance Disclosure Requirements*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/state-campaign-finance.aspx> (last updated July 5, 2022) [<https://perma.cc/4ZGY-SWC6>].

⁶⁷ See *Citizens United v. FEC*, 558 U.S. 310, 371 (2010); *McConnell v. FEC*, 540 U.S. 93, 196 (2003); *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (per curiam). However, the Court's conception of the benefits of disclosure of campaign contributions has been criticized as incomplete. See Abby K. Wood, *Learning from Campaign Finance Information*, 70 EMORY L.J. 1091, 1094 (2021) ("But the Court's understanding of the

According to the Court, disclosure “allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.”⁶⁸ Further, “[t]he sources of a candidate’s financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive.”⁶⁹ The Court has also upheld disclosure requirements to prevent corruption, based on the understanding that “exposure may discourage those who would use money for improper purposes.”⁷⁰

Political scientists have illustrated how the Court’s disclosure theory operates in practice. For example, Adam Bonica has shown that campaign contributions are “just as accurate[]” in predicting congressional candidates’ ideology as their voting record.⁷¹ Bonica has also used campaign contributions to place individual donors along an ideological spectrum.⁷² Other studies have subsequently used campaign contributions to estimate the ideology of political actors, such as federal and state judges and executive appointees to federal agencies.⁷³ Finally, Professors Abby Wood and Christian Grose have documented how campaign finance audits have prompted both retirements as well as more competitive elections for incumbents who had violated the law.⁷⁴

As with any other office, campaign contributions to local prosecutors can “facilitate predictions of future performance in office” and help

informational benefit is incomplete because it is too narrow. . . . [D]isclosure and compliance information help voters to learn about a dimension that the court has not considered: candidate type.”).

⁶⁸ *Buckley*, 424 U.S. at 67.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Adam Bonica, *Inferring Roll-Call Scores from Campaign Contributions Using Supervised Machine Learning*, 62 AM. J. POL. SCI. 830, 838 (2018).

⁷² See Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367 (2014).

⁷³ See, e.g., Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives*, 18 BUS. & POL. 367 (2016) (estimating the ideology of corporate executives); Adam Bonica, Jowei Chen & Tim Johnson, *Senate Gate-Keeping, Presidential Staffing of “Inferior Offices,” and the Ideological Composition of Appointments to the Public Bureaucracy*, 10 Q.J. POL. SCI. 5, 19 (2015) (estimating the ideology of bureaucrats); Adam Bonica & Maya Sen, *A Common-Space Scaling of the American Judiciary and Legal Profession*, 25 POL. ANALYSIS 114 (2017) (estimating the ideology of federal judges and the legal profession); Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J.L. ECON. & ORG. 472 (2015) (estimating the ideology of state supreme court justices).

⁷⁴ Abby K. Wood & Christian R. Grose, *Campaign Finance Transparency Affects Legislators’ Election Outcomes and Behavior*, 66 AM. J. POL. SCI. 516, 516 (2022).

“detect any post-election special favors.”⁷⁵ In fact, campaign contributions might be particularly informative in local prosecutor elections because prosecutor elections generally receive little media coverage,⁷⁶ the coverage they do receive often does not include information about candidates’ policies or platforms,⁷⁷ and even basic information about them can be difficult to locate.⁷⁸

A few examples illustrate the value of campaign finance disclosures in prosecutor elections; these examples are isolated not because their value is limited but because disclosures are often inaccessible, a point we address in the next Part. In Riverside, California, for example, a candidate recently challenged the incumbent district attorney Michael Hestrin by pointing to campaign contributions Hestrin received from the local sheriffs’ association.⁷⁹ According to the challenger, the contributions

⁷⁵ *Buckley*, 424 U.S. at 67.

⁷⁶ For a recent empirical account documenting the dearth of media coverage for prosecutors and their elections, see THE PROSECUTORS & POL. PROJECT, UNIV. OF N.C. SCH. OF L., MEDIA COVERAGE OF PROSECUTORS AND THEIR ELECTIONS: RESULTS OF A PILOT STUDY 5-6 (Feb. 2023), <https://law.unc.edu/wp-content/uploads/2023/02/REPORT-FINAL-2.15.23.pdf> [<https://perma.cc/V9M3-6FH3>].

Lack of coverage is particularly acute due to the decline in local journalism over the last two decades. See Joshua Darr, *Local News Coverage Is Declining – and That Could Be Bad for American Politics*, FIVETHIRTYEIGHT (June 2, 2021, 6:00 AM), <https://fivethirtyeight.com/features/local-news-coverage-is-declining-and-that-could-be-bad-for-american-politics/> [<https://perma.cc/PC4W-NMH2>] (“The pandemic, however, merely accelerated a crisis in local journalism that is now at least two decades old. . . . [S]ince 2004, more than 1,800 local newspapers have closed across the nation.”). Prosecutors are affected by the dearth of coverage because they sit at the intersection of state and local politics. See Ronald F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823, 823 (2020) [hereinafter *State and Local Politics*] (“This Article argues that chief prosecutors in state court systems hold competing loyalties to statewide voters and local voters.”).

⁷⁷ See THE PROSECUTORS & POL. PROJECT, *supra* note 76, at 10-11.

⁷⁸ For example, a person in North Carolina might find it difficult to discover even the name of her local district attorney. She could use the North Carolina Conference of District Attorney website to determine her prosecutorial district based on her county of residence (North Carolina is one of fifteen states that elects prosecutors to multi-county districts rather than electing one prosecutor per county). See *Find Your District Attorney*, N.C. CONF. OF DIST. ATT’YS, <http://www.ncdistrictattorney.org/yourDA.html> (last visited Jan. 6, 2023) [<https://perma.cc/E8LN-4XPP>]. The website will guide her to the official website of her elected district attorney. But some of those websites provide little more than contact information for the prosecutor’s office; they do not contain the name of the elected district attorney. See OFF. OF THE DIST. ATT’Y ORANGE & CHATHAM CNTY., N.C., <http://www.ncdistrictattorney.org/15B/jimwoodall.htm> (last visited Sept. 19, 2022) [<https://perma.cc/D76G-2KW5>].

⁷⁹ Christopher Damien, *Riverside County DA Hestrin Touts Public Safety Track Record, Says Challenger Is Unproven*, DESERT SUN (Jan. 26, 2022, 2:06 PM PT),

demonstrated Hestrin was “unprincipled” and unlikely to provide for police accountability.⁸⁰ A similar dynamic played out in New York City in 2017. In Brooklyn, reporters questioned the incumbent Eric Gonzalez’s fealty to reform in light of a prominent bail company’s contribution to his campaign.⁸¹ Gonzalez ultimately returned the contribution.⁸² In Manhattan, the disclosure of campaign contributions from former President Trump’s personal lawyer to then-incumbent district attorney Cy Vance fueled concerns about corruption.⁸³ Vance had dropped a case against the former president’s children shortly after the lawyer became one of Vance’s largest donors.⁸⁴

Importantly, campaign contributions do much more than provide information about individual candidates or elections. Aggregate patterns in campaign contributions can provide insight into broader political context — insight that is in short supply when it comes to prosecutor elections.⁸⁵ In general, the only comprehensive data about local prosecutor elections is limited to the summary election results we have collected. Whether an election is contested or not is informative about the extent to which elections are functioning as a political check on prosecutors, and vote share provides some ability to distinguish between the competitiveness of electoral contests. But election results cannot distinguish between an incumbent who barely campaigned at all and an incumbent who conducted an active campaign. Nor can vote share tell us whether a challenger worked hard on building their name recognition, but

<https://www.desertsun.com/story/news/politics/elections/2022/01/26/riverside-county-da-mike-hestrin-touts-public-safety-track-record-says-challenger-unproven/6610728001/> [<https://perma.cc/37KJ-J2KB>].

⁸⁰ *Id.*

⁸¹ Carimah Townes, *The Bail Bond Company Financing Brooklyn DA Candidate Eric Gonzalez*, APPEAL (Aug. 2, 2017), <https://theappeal.org/the-bail-bond-company-financing-brooklyn-da-candidate-eric-gonzalez-d7e265babdff/> [<https://perma.cc/X3XF-TMVF>].

⁸² *Id.*

⁸³ Andrea Bernstein, Jesse Eisinger, Justin Elliott & Ilya Marritz, *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/9T4L-U2C6>]. Political fallout from the scandal led the incumbent prosecutor to commission a study on policies that would prevent the same series of events from happening in the future. See CTR. FOR ADVANCEMENT OF PUB. INTEGRITY, COLUMBIA L. SCH., RAISING THE BAR: REDUCING CONFLICTS OF INTEREST AND INCREASING TRANSPARENCY IN DISTRICT ATTORNEY CAMPAIGN FUNDRAISING (2018), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1000&context=public_integrity [<https://perma.cc/F75B-9PFE>].

⁸⁴ Bernstein et al., *supra* note 83.

⁸⁵ See *supra* note 60 and accompanying text.

nonetheless failed to turn out voters, or whether she was merely a token candidate. And election results give us no insight into the type of interest groups that participate in prosecutor elections. Campaign contributions can provide such information and thus serve as an important complement to election results.

II. NATIONAL DATASET OF CAMPAIGN CONTRIBUTIONS TO LOCAL PROSECUTORS

While most candidates for elected office file campaign finance disclosure reports, “disclosure and transparency are not the same thing.”⁸⁶ Just because candidates disclose campaign contributions does not mean that they are readily accessible or even useful to the public or scholars. Although the Federal Election Commission has maintained a website for more than twenty years with campaign contributions to federal candidates,⁸⁷ contribution records for local candidates are considerably more difficult to obtain. To fill that gap, this Part presents the results of the first national survey of campaign contributions to candidates for local prosecutor.

We first introduce our national dataset of campaign contributions, which we merge with our updated national dataset of election results. Along with the publication of this Article, we will make both datasets — of campaign contributions and updated election results — publicly available.⁸⁸ We hope our data can help realize the informational and anti-corruption benefits described in the previous Part.

Importantly, campaign contributions promise more than information about individual candidates or elections. The analysis that follows provides a comprehensive view of the political context of prosecutor campaigns. In particular, it analyzes the amount of fundraising in prosecutor elections, who contributes in those elections, and the relationship between campaign contributions and electoral success.

⁸⁶ Wood, *supra* note 67, at 1115 n.132.

⁸⁷ See FED. ELECTION COMM’N, *40th Anniversary Timeline: 1975-2015*, https://transition.fec.gov/pages/40th_anniversary/40th_anniversary.shtml#disclosure (last visited Jan. 6, 2023) [<https://perma.cc/TA6G-BEXE>].

⁸⁸ Carissa Byrne Hessick, Michael Morse & Nathan Pinnell, *Local Prosecutor Contributions*, DATAVERSE, <https://doi.org/10.15139/S3/SUWZAG> (last visited Apr. 12, 2023) [<https://perma.cc/ZZ85-TE2K>]; Carissa Byrne Hessick, Michael Morse & Nathan Pinnell, *Local Prosecutor Elections 2018-2019*, DATAVERSE, <https://doi.org/10.15139/S3/I86FHB> (last visited Apr. 12, 2023) [<https://perma.cc/SZ32-9TDQ>].

A. Data Collection

A few years ago, we released a national dataset of election results for local prosecutors.⁸⁹ That dataset includes one election cycle for every local district that elected a prosecutor.⁹⁰ Most of the elections in the dataset took place in 2014 or 2016, although some took place as early as 2012 or as late as 2017.⁹¹

We recently collected every local prosecutor election that occurred in 2018 and 2019. As part of a parallel effort, when collecting election results we also made public information requests for campaign contributions reported by all candidates who ran in those elections. The result is an updated national dataset of prosecutor elections and a new national dataset of prosecutor campaign contributions, both of which span the period 2012 to 2019. The twin datasets include at least one election cycle for every jurisdiction that elects prosecutors, and a second election cycle for approximately half of jurisdictions.⁹²

We use our datasets to perform two types of analyses. First, except when noted otherwise, we focus on the most recent election cycle for each jurisdiction across the country. As a result, most of the data we analyze comes from elections in 2016 or 2018, although some data comes from elections that took place as early as 2014 or as late as 2019. Second, in specific instances, we compare trends in fundraising over time by looking at the subset of jurisdictions for which we have collected data for two election cycles.⁹³

Collecting a national dataset of campaign contributions required significant effort.⁹⁴ It required hundreds of public information requests and

⁸⁹ Carissa Byrne Hessick & Michael Morse, *Local Prosecutor Elections, 2012–2017*, DATAVERSE (Feb. 19, 2020), <https://dataverse.unc.edu/dataset.xhtml?persistentId=doi:10.15139/S3/ILI4LC> [<https://perma.cc/JVG4-4HJ5>].

⁹⁰ In five states — Alaska, Connecticut, Delaware, New Jersey, and Rhode Island — local prosecutors are not elected and thus do not fundraise. *See* Hessick & Morse, *supra* note 14, at 1550-51.

⁹¹ *See id.* at 1558-61 (describing the data).

⁹² We have two election cycles for jurisdictions which had elections in 2018 and 2019, since the longest term for local prosecutors in those jurisdictions is six years and elections as early as 2012 are in our study period.

⁹³ Table A.1 in the Appendix lists the election years for each state in our data, including the states for which we have multiple election cycles.

⁹⁴ That these records were so difficult to obtain draws into question whether the disclosure regimes adopted by some states are functioning well enough to provide voters with information, deter corruption, and provide information necessary to detect violations of campaign finance regulations. *See* *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (*per curiam*) (identifying these as the three “governmental interests sought to be vindicated by

thousands of hours of data entry and data cleaning to create a usable dataset. The relevant contribution records were spread across many different governments and maintained in many different formats, including physical paper records. In twenty-eight states, the relevant records for local prosecutors are held by a single statewide official. But in seventeen states, campaign finance records for local prosecutors are maintained at least in part by individual counties.⁹⁵ In total, we had to contact more than 800 governments to collect campaign contributions.

Table 1 illustrates the public data we collected and standardized into a usable format. It uses Pima County, Arizona, as an example. For each contribution in Pima County, we observe a contributor's name, address, employer, occupation, the contribution amount, and the recipient's name, among other information. Importantly, as explained below, Arizona requires candidates to collect more information from contributors than other states; only some states require candidates to report contributors' employer or occupation.

Table 1

Example of Public Contribution Data					
Donor Information					
Name	Address	Employer	Occupation	Amount	Recipient
Laura De La Torre	911 S. 3rd Ave., Tucson, Arizona	Pascua Yaqui Tribe	Medical Director	\$50	Joel Feinman
Joel Feinman	638 S. Main Ave., Tucson, Arizona	Self	Attorney	\$10,000	Joel Feinman
Marilyn Purvis	1019 N. First Dr. #331a, Phoenix, Arizona	Veridus	Assoc Director	\$200	Joel Feinman
Paul Sayre	2134 N. Camino Agrios, Tucson, Arizona	City Of Tucson	Law Enforcement	\$50	Barbara Lawall
Ted Schmidt	1531 E. Placita Abea, Tucson, Arizona	Kinerk, Schmidt & Sethi	Attorney	\$100	Barbara Lawall

the disclosure requirements" of federal campaign finance laws); *see also* Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 257-58 (2010) (listing these as the "oft-cited trilogy of government interests in disclosure of who financially supports (or opposes) candidates").

⁹⁵ Fourteen states — Arizona, California, Idaho, Indiana, Michigan, Minnesota, Missouri, North Dakota, Ohio, Pennsylvania, South Dakota, Utah, West Virginia, and Wyoming — do not collect prosecutor campaign finance records on the state level; they are collected only by local governments. Three states — Kansas, Texas, and Virginia — collect the campaign finance records for some prosecutors on the state level, but others are collected only by local officials. *Cf.* Wright, *State and Local Politics*, *supra* note 76, at 823 (explaining how prosecutors can be understood both as a local official and as a state official).

Once collected and standardized, we supplemented the public contribution records in four key ways.⁹⁶

First, we merged our contribution data with our election data. Specifically, we matched recipients in our contribution data with candidates in our election data. Thus, we know whether a given recipient was an incumbent or challenger, the recipient's vote share in both the primary and general election, and whether the election was contested in the primary election, the general election, or either election.⁹⁷ The election data also has the population of each prosecutor district, based on the 2010 Census.⁹⁸

Beyond providing the electoral context, matching recipients and candidates is critical for another, perhaps unexpected, reason: it allows us to observe which candidates for local prosecutor do not report any campaign fundraising at all. Candidates who report no fundraising will by definition not appear as recipients in the contribution data. Importantly, we distinguish between candidates who reported no contributions because they either raised no money or were otherwise exempt from campaign finance reporting requirements, and those candidates whose campaign finance reports we were unable to obtain. The latter group of candidates has been eliminated from our dataset, while the former group appears in the dataset as having raised no money. We were ultimately unable to collect contribution data from less than 4% of districts that held elections. About 44% of districts that held elections did not have any contributions to report because the candidates in those districts did not raise enough money to trigger the reporting threshold, likely because they did not raise any money at all.

Second, we geocoded contributors' addresses, such that for each geocoded address we can identify the address's corresponding Census and political districts. We used the geocoded county to identify whether contributions come from within the candidate's district, which is typically either a county or a combination of counties.⁹⁹ About 95% of contribution

⁹⁶ We also extensively cleaned the data. For example, we flagged potential duplicate contributions and compared them to the primary source records. If we could verify that the contributions were accurate, we kept the contributions. Otherwise, we dropped them.

⁹⁷ For a complete description of how the election database was created, see Hessick & Morse, *supra* note 14, at 1558-61.

⁹⁸ *See id.* at 1560 n.118.

⁹⁹ We geocoded addresses using the website geocod.io, which takes an address as an input and returns an estimate of the latitude and longitude of that address, including an accuracy score, as well as the relevant Census and political districts that include that address. *See Hassle-Free Geocoding*, GEOCODIO, <https://www.geocod.io/> (last visited Jan.

records had sufficient information to identify the county of the contributor.¹⁰⁰

Third, we measured whether a contribution was from particular interest groups, if sufficient information was available. For individual donors, we relied on the employer and occupation information that a majority of states collect;¹⁰¹ for organizational donors, we also relied on the organization's name. To measure whether a contribution came from a particular interest

6, 2023) [<https://perma.cc/M3GC-DCEB>]. We also used geocoded addresses in combination with other information such as donor name to identify discrepancies in the spelling of donor names across multiple contributions.

¹⁰⁰ More than 94% of our contribution records include either address, city, state, and zip (78%); city, state, and zip (9%); or address, city, and state (7%). In general, either a city and state or a zip code should be sufficient to identify a county, although some cities and zip codes span counties.

¹⁰¹ A total of thirty-two states requires candidates to report the employer and/or occupation of donors but, even within those states, compliance with reporting requirements is spotty.

group — namely attorneys,¹⁰² law enforcement,¹⁰³ bail companies,¹⁰⁴ realty,¹⁰⁵ or political organizations¹⁰⁶ — we generally used keyword

¹⁰² Because contributions from attorneys were so prevalent, our search for attorney contributions followed a three-step approach that was different than our search for contributions from the other interest groups. First, we examined donor occupation, if available. We identified *likely* attorneys using a case-insensitive regular expression focused on keywords such as “attorney”, “atty”, “lawyer”, “law firm”, “law office”, “legal”, and various iterations of “DA.” We then reviewed *every* donor occupation, including occupations that did not contain one of our keywords, to manually determine if the donor was an attorney. Second, we examined donor employer, if available. We initially looked for *explicit* indications that a donor was an attorney by using a case-insensitive regular expression for keywords including “law firm” or “law office” or “law practice” or “attorney”. Again, we reviewed *every* donor employer, including employers that did not contain one of our keywords, to manually determine if the donor was an attorney. We then looked for *implicit* indicators that a donor was an attorney using a case-insensitive regular expression for the ampersand symbol as well as various iterations of “LLP”, “PLLC”, and “PC.” For *only* those donor employers with an *implicit* indicator of being at attorney, we looked up the donor employer and donor address in various legal directories to confirm they were in fact an attorney. Finally, we examined donor name, if available, for organizations only. We repeated the process, initially looking for *explicit* indicators of attorneys, such as “attorney,” “law firm,” “law office,” and “law practice,” and then for the same *implicit* indicators as above. Again, for each donor with an *implicit* indicator for being an attorney, we looked up the donor employer and donor address in various legal directories to confirm they were an attorney. Ultimately, about 55% of contributions, representing about 70% of all money reported, had either an occupation or an employer or were from an organization, such that we could determine whether or not the contribution came from attorneys.

¹⁰³ For law enforcement, we used the keywords “FOP”, “PBA”, “fraternal”, “benevolent”, “SBA”, “police”, “sergeant”, “detective”, “lieutenant”, “sheriff”, “sherriff”, “enforcement”, “trooper”, “peace officer”, “patrol”, “bailiff”, “probation”, “parol”, “home detention”, “investigator”, and “deputy chief”.

¹⁰⁴ For the bail bond industry, we used the keywords “bail”, “bond”, and “surety”. (A space was intentionally left after bail to avoid returning results like “bailiff.”)

¹⁰⁵ For realty, we used the keywords “real”, “develop”, and “propert”.

¹⁰⁶ Importantly, to identify political organizations, we focused on the functional interests of the organization, rather than formal type of organization. In other words, a political organization is not defined, for example, with respect to political action committees (“PACs”), since PACs simply reflect the different types of state campaign finance regulations. Further, we cannot identify whether any particular organization is either a party committee or an authorized candidate committee or instead a nonconnected committee. See *generally* FED. ELECTION COMM’N, NONCONNECTED COMMITTEES (2008). Instead, we considered three different types of organizations with a political valence: partisan organizations, candidate organizations, and unions. For partisan organizations, we used the keywords “politic”, “party”, “Democrat”, and “Republican”, and manually reviewed all such contributions. For candidate organizations, we used the keywords “to elect”, “for”, and “friends”, and again manually reviewed all such contributions. Generally, contributions from candidate organizations were to a different candidate (e.g., Friends of

searches on employer and occupation fields, for individual donors, and name, for organizational ones. We then reviewed the results by hand to search for erroneous matches. Our process was thorough, given the information and resources available. However, our aggregate measure is likely an underestimate. Not all donors provided sufficient information, the data provided is imperfect, and we were intentionally conservative in concluding that a donor belonged to a certain interest group.

Fourth, we identified self-contributions, or instances where the contributor was also the recipient.¹⁰⁷ Our measure of self-contributions is also conservative in the sense that we focus only on contributions by the candidate and not contributions by the candidate's family members.¹⁰⁸

Table 2 illustrates the supplemental information by extending the example in Table 1.

Joe Smith contributing to Jane Doe). Finally, to identify contributions from union and other labor organizations, we used the keywords “united”, “union”, “brother”, “worker”, “labor”, “local”, “AFL”, “CIO”, “SEIU”, and “council”, and again manually reviewed all such contributions.

¹⁰⁷ In general, we first identified a contribution as a self-contribution when the donor name and the recipient name were exactly same. We then supplemented our measure in two ways. First, we manually reviewed instances where a donor's name was spelled slightly differently than a recipient's name, as measured by the Levenshtein distance. Second, we manually reviewed all donors at an address when any donation at the address was identified as a self-donation. Overall, our supplemental methods identified about 8% more contributions as self-contributions.

¹⁰⁸ Many states either fully exempt the candidate and the candidate's spouse or immediate family from any contribution limits or they set higher limits for the candidate and her family. *See, e.g.*, HAW. REV. STAT. § 11-359 (2022) (setting a \$50,000 contribution limit for the candidate's immediate family); N.C. GEN. STAT. § 163-278.13(d) (2022) (“[I]t shall be lawful for a candidate or a candidate's spouse to make a contribution to the candidate or to the candidate's treasurer of any amount of money . . .”). We did not include donations from family members as self-contributions because it is difficult to consistently identify family members.

Table 2

Example of Public Contribution Data with Supplemental Information										
Donor Name	Amount	Supplemental Donor Information				Recipient Name	Candidate Name	Supplemental Recipient Information		
		In District?	Attorney?	Law Enforcement?	Candidate?			State	District	Candidate Type
Laura De La Torre	\$50	Yes	No	No	No	Joel Feinman	Joel Feinman	Arizona	Pima	C
Joel Feinman	\$10,000	Yes	Yes	No	Yes	Joel Feinman	Joel Feinman	Arizona	Pima	C
Marilyn Purvis	\$200	No	No	No	No	Joel Feinman	Joel Feinman	Arizona	Pima	C
Paul Sayre	\$50	Yes	No	Yes	No	Barbara Lawall	Barbara LaWall	Arizona	Pima	I
Ted Schmidt	\$100	Yes	Yes	No	No	Barbara Lawall	Barbara LaWall	Arizona	Pima	I
--	--	--	--	--	--	--	Cynthia Tuell	Arizona	Pima	C

Together, Tables 1 and 2 illustrate how campaign finance disclosures provide a rich complement to election results. The first row of Table 2 shows a small contribution of \$50 from an individual in Tucson, the county seat of Pima, Arizona, to Joel Feinman, who challenged the incumbent district attorney in Pima. The second row reveals a \$10,000 contribution from Joel Feinman to himself, while the third row shows another small contribution to Feinman, but from an individual not in Pima County. The fourth and fifth rows capture contributions to the incumbent, Barbara LaWall, from a law enforcement official and an attorney, respectively. Importantly, the final row in the table captures the fact that Cynthia Tuell, the Green Party candidate, did not report receiving any campaign contributions.

Our final dataset captures all reported, itemized, direct contributions in local prosecutor elections during our study period. However, that does not mean our dataset captures every dollar that flows into prosecutorial campaigns. States have different thresholds for how much total fundraising triggers reporting requirements; we thus cannot distinguish between candidates that raise no money at all and those that raise below their state's reporting threshold. Those thresholds range from \$200¹⁰⁹ to

¹⁰⁹ LA. STAT. ANN. § 18:1495.6 (2022) (“Any candidate, for a major or district office required by this Chapter to file reports of information as provided in R.S. 18:1495.5, who did not receive a contribution in excess of two hundred dollars and who did not make expenditures totaling in excess of five thousand dollars in the aggregate during the aggregating period, may file an affidavit setting out such facts in lieu of each report . . .”). A handful of states do not appear to have minimum monetary reporting requirements. *See, e.g.*, MISS. CODE ANN. § 23-15-807(a) (2022) (stating that “[e]ach candidate . . . shall file reports of contributions” and listing no exceptions).

\$5,000.¹¹⁰ States also have different minimum thresholds for when contributions must be separately itemized.¹¹¹ For the few contributions that are unitemized, no contributor information is available, so it is not possible to determine who that contribution came from.¹¹²

Finally, our nationwide survey of campaign contributions includes only direct contributions to local prosecutors and does not include independent expenditures.¹¹³ In general, we expect that few local elections for prosecutor garner independent expenditures. But in larger jurisdictions in particular, missing independent expenditures may affect the conclusions we draw about the state of campaign fundraising in local prosecutor elections.¹¹⁴

¹¹⁰ Washington allows candidates who raise less than \$5,000 and receive no more than \$500 from any contributor except themselves to choose a “mini-reporting option” which does not require the filing of public campaign finance documents that memorialize campaign contributions. WASH. ADMIN. CODE § 390-16-105(1) (2022).

¹¹¹ Compare OR. REV. STAT. § 260.083(1) (2022) (allowing contributions less than \$100 per calendar year to be reported as unitemized lump sums), with WYO. STAT. ANN. § 22-25-106(a)(iv) (2022) (requiring all contributions from any individual in excess of \$100 to be itemized and include name of contributor, date of contribution, and the contributor’s complete address).

¹¹² Overall, less than 3% of contributions are unitemized lump sums, representing less than 2% of the total amount of direct campaign contributions.

¹¹³ We do not include this information because, in most states, it is difficult to systematically determine whether political action committees or other groups independently spent money in support or opposition of a candidate for local prosecutor. To be clear, states generally require PACs and other entities to report their independent expenditures. However, many states organize independent expenditure reports by PAC rather than by candidate supported or opposed. Thus, voters (or researchers) who wish to learn whether a PAC supported a particular candidate must know the name of the PAC in order to access records about the PAC’s spending; merely knowing the name of the candidate will not allow the researcher to request documents about which PACs made expenditures in support or opposition of that candidate. This lack of functionality in state campaign finance search engines was confirmed via telephone conversations with staff in multiple relevant state agencies.

¹¹⁴ San Francisco offers a helpful example because the county makes independent expenditures easily available online. In the 2015 election, the uncontested candidate received approximately \$185,000 in direct contributions. See *November 3, 2015 Election Dashboards – Campaign Finance Disclosure*, CITY & CNTY. OF S.F. ETHICS COMM’N, <https://sfethics.org/ethics/2015/08/campaign-finance-dashboards-november-3-2015-election.html> (last updated Feb. 21, 2017) [<https://perma.cc/T3HU-C37M>] (choose “District Attorney” in the right sidebar). The only independent expenditures in that election totaled just over \$7,000, and they were made by the local Democratic party in support of the candidate. *Id.* (choose the “Third-Party Spending” tab and then choose “District Attorney” in the right sidebar). In other words, independent expenditures did not really change the finances of that election.

B. Measuring Prosecutor Campaigns

The campaign finance information we collected, standardized, and supplemented can provide insights for both voters seeking to make an informed decision about their local prosecutor and researchers seeking to study democratic accountability in prosecutor elections. Because we seek to learn more about prosecutor elections as a whole, rather than individual prosecutors, below we examine patterns in aggregate, rather than individual, contributions. In particular, an aggregate analysis allows us to document the *magnitude* of contributions in prosecutor elections, the

But the next election, which took place in 2019, tells a different story. The election was contested and four candidates ran. The winning candidate, Chesa Boudin, raised \$765,000 in direct contributions — slightly less than the highest grossing candidate, Suzy Loftis. *Campaign Finance Dashboards – November 5, 2019 Election*, CITY & CNTY. OF S.F. ETHICS COMM'N, <https://sfethics.org/ethics/2019/06/campaign-finance-dashboards-november-5-2019-election.html> (last updated Dec. 12, 2022) [<https://perma.cc/7YKH-CLAN>] (select “DISTRICT ATTORNEY” from the dropdown menu under the “Contest” filter and select “Monetary Contributions” from the dropdown menu under the “Transaction Type” filter). But in addition to the money spent by his own campaign, Boudin benefitted from around \$300,000 of independent expenditures. *Id.* (select “DISTRICT ATTORNEY” from the dropdown menu under “Contest” and then select the “Spending” tab at the top). Loftus benefitted from only approximately \$200,000 in independent expenditures. *Id.* Further complicating the picture are a significant amount of independent expenditures in opposition to Boudin — approximately \$250,000 by a political action committee called the Committee for a Safer and Cleaner San Francisco, and more than \$430,000 by the San Francisco Police Officers Association. *Id.* No independent expenditures were made in opposition to Loftus or any other candidate in the race. *Id.*

Because we do not have systematic information about independent expenditures, we are unable to say definitively whether the San Francisco election of 2015 or 2019 is more representative of the role that independent expenditures play in the financing of prosecutor campaigns in larger districts. Nonetheless, we strongly suspect that the 2019 election may be an outlier. The 2019 election was contested, and it was decided by less than two percentage points. It was also an incredibly high-profile election, and Boudin himself garnered a significant amount of media attention. *See, e.g.,* Zak Cheney-Rice, *Chesa Boudin's Election Is an Opportunity for San Francisco. Will They Embrace It?*, INTELLIGENCER (Nov. 11, 2019), <https://nymag.com/intelligencer/2019/11/chesa-bousin-wins-sf-da-election.html> [<https://perma.cc/5G4S-ZEWC>]; Jordan Freiman, *Chesa Boudin Wins Tightly Contested San Francisco District Attorney's Race*, CBS NEWS (Nov. 9, 2019, 11:28 PM), <https://www.cbsnews.com/news/san-francisco-da-race-chesa-boudin-wins-tightly-contested-election-over-suzy-loftus-2019-11-09/> [<https://perma.cc/5X6Y-9BAS>]; Vivian Ho, *Son of Jailed Radicals, Reviled by the Police Union. Now, Chesa Boudin Is San Francisco's Top Cop*, GUARDIAN (Nov. 17, 2019, 1:00 PM EST), <https://www.theguardian.com/us-news/2019/nov/16/son-of-jailed-radicals-reviled-by-the-police-union-now-chesa-boudin-is-san-franciscos-top-cop> [<https://perma.cc/Z8S4-RAWR>].

identity of donors, and the relationship between fundraising and candidate *success*.

1. Magnitude of District Fundraising

In general, local prosecutor elections are a relative bargain compared to other political offices.¹¹⁵ We first focus on the latest prosecutor election in each local jurisdiction between 2012 and 2019.¹¹⁶ Across more than 2,200 local jurisdictions, roughly 3,000 candidates raised about \$133 million. In contrast, candidates for the U.S. House of Representatives collectively raise about a billion dollars each electoral cycle, while candidates for state legislator raise between about half and three-quarters of a billion dollars.¹¹⁷

¹¹⁵ Cf. Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 708 (2020) (“District attorney races offer a rare bargain in the money-fueled arms race of American politics. District attorney elections are characterized by low voter interest. Candidates regularly run unopposed. In some jurisdictions it is difficult to find anyone willing to take the job.”).

¹¹⁶ As explained above, the vast majority of such elections are in 2016 or 2018, although some are before or after.

¹¹⁷ Candidates for U.S. House seats collectively raised slightly less than a billion dollars in 2014 (\$957,170,430) and slightly more than billion dollars in 2016 (\$1,002,588,484). *Election Overview – 2014 Federal Elections*, FOLLOW THE MONEY, <https://www.followthemoney.org/tools/election-overview?s=US&y=2014> (last visited Feb. 28, 2023) [<https://perma.cc/V82S-YLDC>]; *Election Overview – 2016 Federal Elections*, FOLLOW THE MONEY, <https://www.followthemoney.org/tools/election-overview?s=US&y=2016> (last visited Feb. 28, 2023) [<https://perma.cc/58F5-95L6>]. A direct comparison to fundraising by candidates for state legislature is more difficult because elections are held in different years across states and the term for an incumbent can be either two or four years. Given these institutional differences between the state and federal context, we pool state legislative fundraising across two years. Candidates for state representative collectively raised slightly less than three-quarters of a billion dollars between 2014 and 2015 (\$712,912,457) and slightly more than three-quarters of a billion dollars between 2016 and 2017 (\$791,099,663). *Contributions to State House/Assembly Candidates – 2014 and 2015*, FOLLOW THE MONEY, <https://www.followthemoney.org/show-me?dt=1&y=2014,2015&c-exi=1&c-r-t=1&c-r-ot=H%5B%7B1%7Cgro=c-t-id> (last visited Feb. 28, 2023) [<https://perma.cc/YXM2-375D>]; *Contributions to State House/Assembly Candidates – 2016 and 2017*, FOLLOW THE MONEY, <https://www.followthemoney.org/show-me?dt=1&y=2016,2017&c-exi=1&c-r-t=1&c-r-ot=H%5B%7B1%7Cgro=c-t-id> (last visited Feb. 28, 2023) [<https://perma.cc/Q9MC-VYEX>]. Candidates for state senator collectively raised slightly less than half a billion dollars between 2014 and 2015 (\$436,241,897) and between 2016 and 2017 (\$462,723,888). *State Senate Candidates – 2014 and 2015*, FOLLOW THE MONEY, <https://www.followthemoney.org/show-me?dt=1&y=2014,2015&c-exi=1&c-r-t=1&c-r-ot=S%5B%7B1%7Cgro=c-t-id> (last visited Feb. 28, 2023) [<https://perma.cc/NR24-DZNW>]; *State Senate Candidates – 2016 and 2017*, FOLLOW THE MONEY, <https://www.followthemoney.org/show-me?dt=1&y=2016,2017&c-exi=1&c-r-t=1&c-r-ot=S%5B%7B1%7Cgro=c-t-id>

Importantly, local prosecutor elections garner dramatically different amounts of campaign contributions. In short, that’s because the *local* context of prosecutor elections is enormously varied. Before detailing patterns in prosecutor campaign contributions, it is helpful to consider the extent of local contestation and competition in each election in our study period. Our prior work introduced an aggregate metric that examines whether there was contestation or competition in either the general *or* the primary election. This “either election” metric captures the political realities of many communities — namely, that the only real electoral choice for voters in local elections will sometimes occur in the primary, because voters in that district so heavily favor one party. Following our prior work, throughout the Article, we treat the primary and general election in each district as a single contest and deem a district contested if either election was contested.¹¹⁸

Table 3 reports how often elections were contested and competitive¹¹⁹ and includes the number of districts in each category in parentheses. The table is divided into three sets of columns. The first set considers every district, while the second and third sets consider districts where the incumbent did and did not seek reelection, respectively. The rows correspond to district population categories. Following the convention in prior analyses of local prosecutors,¹²⁰ the table groups prosecutor districts into four population categories: less than 100,000 people, between 100,000 and 250,000 people, between 250,000 and 1,000,000 people, and above 1,000,000 people.

As Table 3 demonstrates, in the vast majority of districts a single candidate runs uncontested.¹²¹ Across all districts, only 30% of elections

ot=S#%5B%7B1%7Cgro=c-t-id (last visited Feb. 28, 2023) [<https://perma.cc/C8CD-RVRX>].

¹¹⁸ We previously followed the same approach. *See* Hessick & Morse, *supra* note 14, at 1564 (“This ‘either election’ metric captures the political realities of many communities — namely that voters in local elections will sometimes only have an electoral choice in the primary election because voters in that district so heavily favor one party.”).

¹¹⁹ A competitive election is defined as one where the winner received less than 60 percent of the vote. We previously followed that approach too. *See id.* at 1545 n.41.

¹²⁰ We follow the Bureau of Justice Statistics’ convention, *see, e.g.*, STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 1 tbl.1, 4 tbl.2 (2011) (reporting various quantities by offices serving 99,999 or less people, 100,000 to 249,999 people, 250,000 to 999,999 people, and 1,000,000 or more people), as well as our own prior reporting, *see, e.g.*, Hessick & Morse, *supra* note 14, at 1560 & n.118 (same).

¹²¹ We find that only 30% of elected prosecutors faced an opponent in their most recent primary or general election. This number appears to be relatively stable over recent years.

were contested. Further, the likelihood of a contested election increases as the district population size increases — from about 25% in the smallest jurisdictions to more than 80% in the largest.¹²² Importantly, there are far more small population districts than large population districts, as the parenthetical numbers make clear.¹²³

Table 3

Contestation and Competition in Prosecutorial Elections						
Examining Either the Primary or the General Election						
	All Elections		Open Seats		Incumbent Running	
	Contested	Competitive	Contested	Competitive	Contested	Competitive
All Districts	30%	19%	45%	28%	26%	17%
	(684)	(433)	(202)	(128)	(482)	(305)
Districts By Population						
< 100K	25%	15%	36%	20%	23%	14%
	(431)	(261)	(119)	(67)	(312)	(194)
100K - 249K	37%	26%	65%	49%	30%	20%
	(126)	(88)	(45)	(34)	(81)	(54)
250K - 1M	45%	28%	74%	51%	37%	22%
	(92)	(57)	(32)	(22)	(60)	(35)
1M+	81%	63%	100%	83%	78%	59%
	(35)	(27)	(6)	(5)	(29)	(22)

Against this backdrop of electoral contestation and competition, Tables 4 and 5 summarize the distribution of campaign fundraising per district by district contestation and district population levels. Again, because we treat the primary and general election in each district as a single contest, we use

See, e.g., Hessick & Morse, *supra* note 14, at 1563 tbl.5 (finding only 30% of prosecutors faced an opponent in either their general or primary election).

¹²² *See id.*; *see also* Hessick et al., *supra* note 43 and accompanying text. The number of contested elections has also increased in the largest districts in recent years. Using election data primarily from 2016 and 2018 elections, we find that 81% of prosecutors in districts with more than a million inhabitants faced an opponent in either their primary or general election. This is an increase from the previous election cycle. *See* Hessick & Morse, *supra* note 14, at 1563 tbl.5 (reporting only 65% of those elections were contested using data primarily from 2014 and 2016 elections). It is also consistent with the finding from the recent study of 200 prosecutor jurisdictions. *See* Wright et al., *supra* note 46, at 147.

¹²³ Hessick & Morse, *supra* note 14, at 1573 & fig.1 (illustrating the population skew in prosecutorial districts).

the terms “election” and “district” synonymously. Tables 4 and 5 display fundraising quantiles, with the 50th quantile, also known as the median, offering a measure of fundraising in the typical district, while the 25th and 75th quantiles show the range of fundraising patterns across districts.

The first row of Table 4 focuses on all districts with sufficient contribution information. It reveals that the typical district involved just about \$500 in total campaign contributions to candidates for local prosecutor. At least a quarter of districts involved no reported fundraising at all, while a quarter of districts involved more than \$19,000 in contributions. The next two rows distinguish between contested and uncontested elections. As noted in Table 3 above, most districts are uncontested: of the prosecutor districts we studied, about 30% had contested elections, while about 70% had uncontested elections.¹²⁴ If a district is uncontested, then there is only a single candidate for prosecutor, who may not be particularly motivated to solicit campaign contributions. While there are far fewer contested elections for local prosecutor, far more money is raised in them. Comparing the second and third rows in Table 4, the median contested district involved more than \$34,000 in campaign contributions, while the median uncontested district involved no reported fundraising at all. As a result, the bulk of campaign contributions to local prosecutor candidates comes from a minority of contested elections.¹²⁵

Table 4

Magnitude of Campaign Fundraising				
	Districts	Quantiles of Amount Raised		
		25th	50th	75th
All Elections	2,205	\$0	\$490	\$19,315
Contested Elections	667	\$8,900	\$34,387	\$116,431
Uncontested Elections	1,538	\$0	\$0	\$1,346

It appears that campaign contributions in prosecutor elections have increased in recent years, especially in the most expensive races. Figure 1 focuses on the *subset* of districts which had two election cycles between

¹²⁴ See *supra* Table 3.

¹²⁵ This pattern appears to be stable over time. We saw no noticeable difference between the elections earlier in our study period and later in our study period.

2012 and 2019, with the first election occurring sometime between 2012 and 2017, and the second election taking place in either 2018 or 2019. For these districts, the median contested election raised around 70% more in the second election cycle than the first, and the election in the 75th percentile raised in excess of 100% more in the second cycle than the first.

Figure 1

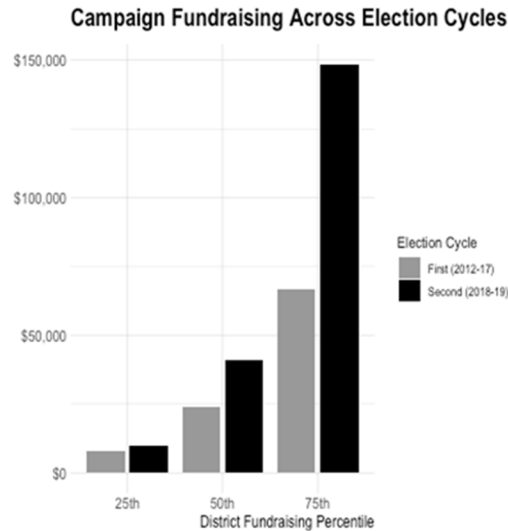


Table 5 emphasizes the importance of district population in addition to district contestation in understanding the dynamics of local prosecutor campaigns. In general, the level of campaign contributions increases sharply with the population of the district.¹²⁶ For example, focusing on a single column in the table, the median amount of campaign contributions in contested elections rises from less than \$15,000 in districts with a population of less than 100,000 to about \$85,000 in districts with a population between 100,000 and 250,000, more than \$250,000 in districts with a population between 250,000 and 1 million, and finally to about \$830,000 in districts with a population over one million. While fundraising

¹²⁶ The fact that rural and urban districts feature different levels of fundraising — by all candidates and between incumbents and challengers — is not particularly surprising, since the cost of campaigning increases with the population size of a district. See ANTHONY GIERZYNSKI, *MONEY RULES: FINANCING ELECTIONS IN AMERICA* 28 (1999) (noting that elections for candidates with relatively large electorates cost more).

varies by population in uncontested districts too, the magnitude of fundraising is substantially less.

Table 5

Magnitude of Campaign Fundraising				
Population	Districts	Quantiles of Amount Raised		
		25th	50th	75th
Contested Elections				
< 100K	416	\$4,608	\$14,600	\$36,845
100K - 249K	124	\$40,509	\$85,017	\$154,038
250K - 1M	92	\$129,593	\$254,462	\$499,506
1M+	35	\$351,773	\$830,204	\$1,900,117
Uncontested Elections				
< 100K	1,205	\$0	\$0	\$182
100K - 249K	212	\$0	\$1,266	\$11,859
250K - 1M	113	\$1,935	\$19,325	\$84,029
1M+	8	\$39,287	\$308,535	\$419,173

Table 5 also reveals substantial variation within a row, across otherwise similar districts, as captured by contestation and population category. One simple reason for the variation is that population category is a very coarse measure. For example, Albemarle County, Virginia, home to Charlottesville, had approximately 99,000 people in 2010, while Arthur County, Nebraska, had just 460, but both districts are considered small-population districts in the table.

Still, breaking down district fundraising by contestation and population category helps highlight two important, contrasting trends in local prosecutor elections. First, there are only a few contested, million-plus-population districts (row four), but they involve a substantial amount of fundraising. Second, while there are many more uncontested, low-population districts (row five), these districts involve little-to-no reported fundraising. Below, we address each dynamic in more detail.

In total, we identified nearly 1,000 districts, or 44% of the districts with sufficient contribution records, where no candidate reported receiving any campaign contributions. As explained above, we cannot distinguish between candidates that raise no money at all and those that raise below their state's reporting threshold. Either way, dividing districts into those that involved no reported campaign contributions and those that reported raising some campaign contributions is only somewhat helpful to our project. If fundraising is a useful proxy for campaigning, a district that raised only \$500 likely had little campaigning too. In fact, elections with less than \$1,000 likely involved no campaigning at all because that money may simply have gone to administrative costs, such as the candidate filing fee, rather than to any campaign activity.¹²⁷ Finally, those candidates who reported no campaign contributions had to pay those same administrative costs, even if they were exempt from reporting requirements.¹²⁸

To better measure low-dollar elections — what we call “bargain elections”¹²⁹ — Table 6 shows the number and percent of districts which involved less than or equal to \$1,000 in reported fundraising. We assume that those jurisdictions with less than \$1,000 in reported fundraising *likely* had no campaigning, as we assume the funds went to administrative costs.

¹²⁷ This is confirmed by a closer look at some campaign filings in these low-dollar elections, in which the only reported contribution is an in-kind contribution from the candidate paying the filing fee. *See, e.g.*, FINANCIAL CAMPAIGN REPORT FOR PATRICK FINLINSON, CANDIDATE FOR COUNTY ATTORNEY, MILLARD COUNTY, UTAH (Nov. 30, 2014) (on file with authors) (reporting \$517.09 paid for the candidate filing fee as the only contribution or expenditure).

¹²⁸ Of course, this assumes that candidates are complying with the relevant reporting and disclosure laws and not incorrectly failing to report payment of the filing fee.

¹²⁹ *See* Bellin, *supra* note 115, at 708 (“District attorney races offer a rare bargain in the money-fueled arms race of American politics.”).

Table 6

Bargain Elections			
		Raised < \$1,000	
Population	Districts	Number	Percent
All Elections	2,205	1,170	53%
Contested Elections			
< 100K	416	63	15%
100K - 249K	124	2	2%
250K - 1M	92	0	0%
1M+	35	0	0%
Uncontested Elections			
< 100K	1,205	984	82%
100K - 249K	212	100	47%
250K - 1M	113	21	19%
1M+	8	0	0%

The first row of Table 6 considers all prosecutor elections, regardless of contestation. The remaining rows separate contested and uncontested elections because the two phenomena are substantively different with respect to bargain elections. When a contested election has few or no campaign contributions, it suggests that the public had a choice between candidates, although those candidates likely did not campaign. If a contested bargain election is considered unexpected, an uncontested bargain election might be expected. After all, the sole candidate in an uncontested election is destined to win — she need not engage in any campaigning, and thus may rationally decide to forgo the time and effort associated with wooing voters.¹³⁰ As in earlier tables, Table 6 considers district population levels too because the dynamics of prosecutor elections are best understood in the context of both contestation and population.

Table 6 makes clear that the majority of elections in our dataset are bargain elections: of the elections we study, more than 1,100 involved less than \$1,000 in campaign fundraising, or more than half of all elections.

¹³⁰ Of course, whether a candidate will face an opponent may be unknown until the candidate filing date has passed.

That is because few people live in the vast majority of prosecutor districts. There are more than 1,600 local prosecutor offices in jurisdictions with less than 100,000 people, as compared to only 45 prosecutor offices in jurisdictions with more than one million people.¹³¹ Given the relationship between contestation, population, and fundraising shown above, bargain elections are much more likely in small-population districts. In these districts, about 82% of uncontested elections and about 15% of contested elections involved less than \$1,000 in reported contributions. Bargain elections are less likely in large-population districts, and only happen when there is no contestation. For example, in districts between 250,000 and 1 million people, about 19% of uncontested elections were bargain elections, while no contested elections involved less than \$1,000.

Importantly, because states differ in the relative size of their districts, bargain elections are typical in some states and rare in others. North Dakota presents the most extreme example. The average district in the state has about 13,000 people — the second lowest average population in the country after South Dakota.¹³² In 2014, North Dakota held 48 local elections,¹³³ of which 45 were uncontested and 3 were contested, but no candidate in any of the elections for which we were able to obtain records reported any campaign contributions.¹³⁴ On the other hand, a state like Florida, which combines counties to form larger prosecutor districts,¹³⁵ had far fewer bargain elections. Florida has the largest districts in the country, with an average of about 940,000 people per district. Only 1 of

¹³¹ Hessick & Morse, *supra* note 14, at 1573.

¹³² In South Dakota, the average prosecutor district had 12,359 people as of 2010. But state law exempts candidates running in districts with less than 10,000 people from filing campaign finance disclosure reports — which likely applied to 55 of the state's 64 districts. See S.D. CODIFIED LAWS § 12-27-39 (2022) (“The provisions of this chapter apply to each statewide office, legislative office, statewide ballot question, county offices and ballot questions in counties with population greater than ten thousand according to the most recent Federal census . . .”).

¹³³ Although North Dakota has 51 districts, in three of those districts not a single candidate ran for local prosecutor in 2018. In two of the districts, the election was decided by write-in votes; in the remaining district, a prosecutor was appointed. The pattern was very similar in 2014. See Hessick & Morse, *supra* note 14, at 1575 & nn.176-77.

¹³⁴ It is possible that there were, in fact, some contributions. Three counties were unable to provide us with their campaign finance disclosure reports: Barnes County and LaMoure County reported their reports missing; Traill County had already destroyed their records.

¹³⁵ See generally Hessick & Morse, *supra* note 14, at 1550 tbl.1 (identifying the selection mechanism of prosecutors by state, including whether districts are single counties or multiple counties).

its 12 uncontested elections and none of its 8 contested elections were bargain elections.

In contrast to bargain elections, a few districts generate the bulk of all prosecutor fundraising. These campaigns not only raise, but also spend, large amounts of money, presumably allowing voters in those districts to learn more about the candidates. We call elections which generated more than \$1,000,000 in campaign contributions “marquee elections” because this level of fundraising allows candidates to spend money on advertisement, mailers, and other campaign activities that raise the profile of the election within the local community, rather than allowing the election to fly under the radar.¹³⁶

Table 7 lists the twenty-five marquee elections in our data. The top-grossing district — Queens, New York — involved more than \$7 million in campaign contributions. Together, the top-five grossing districts are responsible for more than 15% of all reported campaign contributions. Further, of the more than 2,000 prosecutor districts across the country, the top thirty-five grossing districts generated about half of all reported campaign contributions.

¹³⁶ Cf. ALICIA BANNON, CATHLEEN LISK & PETER HARDIN, THE BRENNAN CTR. FOR JUST., WHO PAYS FOR JUDICIAL RACES? 2 (2017), www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf [<https://perma.cc/W9DB-8UFR>] (characterizing state supreme court races as “big-money elections” if the total raised in the election exceeds \$1 million).

Table 7

Marquee Elections				
State	District	Year	Population	Total Raised
New York	Queens	2019	2,230,722	\$7,118,519
Illinois	Cook	2016	5,194,675	\$6,562,628
Pennsylvania	Philadelphia	2017	1,526,006	\$4,034,911
New York	Kings	2017	2,504,700	\$3,303,095
Texas	Bexar	2018	1,714,773	\$2,958,160
Texas	Harris	2016	4,092,459	\$2,597,455
New York	Nassau	2019	1,339,532	\$2,342,948
California	San Francisco	2019	805,235	\$2,313,335
Ohio	Franklin	2016	1,163,414	\$2,301,676
California	Sacramento	2018	1,418,788	\$2,089,410
Maryland	Baltimore City	2018	620,961	\$2,081,249
Colorado	2	2016	600,158	\$1,842,569
Louisiana	22	2014	280,908	\$1,800,893
New York	Suffolk	2017	1,493,350	\$1,710,825
Massachusetts	Suffolk	2018	722,023	\$1,645,037
California	San Diego	2018	3,095,313	\$1,550,765
California	Alameda	2018	1,510,271	\$1,465,738
Virginia	Fairfax	2019	1,081,726	\$1,439,531
California	Orange	2018	3,010,232	\$1,430,704
Louisiana	15	2014	341,350	\$1,391,162
Virginia	Loudoun	2019	312,311	\$1,277,041
Wisconsin	Jefferson	2016	83,686	\$1,045,542
Virginia	Arlington	2019	207,627	\$1,033,376
Nevada	Clark	2018	1,951,269	\$1,018,977
Pennsylvania	Delaware	2019	558,979	\$1,008,898

As with bargain elections, district population has a strong influence on marquee elections. The marquee elections featured in Table 7 feature some of the largest prosecutor jurisdictions in the country. Cook County is the second largest prosecutor district in the country, San Diego is the fifth largest, while Harris, Kings, and Queens counties feature in the top 10

largest districts by population across the country.¹³⁷ But not all high-population districts hold marquee elections. Los Angeles, for example, the largest prosecutor district with almost ten million people, featured just \$6,675 in fundraising in 2016. But Los Angeles' election involved an incumbent who ran unopposed. In contrast, all but one of the marquee elections were contested.¹³⁸

In addition to district population, state contribution limits — or the lack of limits — also help explain which larger districts held a marquee election. For example, although Illinois has relatively modest contribution limits, those limits are waived if there is a self-funded candidate in the race.¹³⁹ The 2016 election in Cook County included a self-funded candidate, Donna Moore, who contributed roughly half of her \$1.1 million haul. As a result, the other candidates were not subject to the contribution limits. The incumbent, Anita Alvarez, ended up raising \$2.3 million, including 38 contributions of more than \$10,000. Alvarez ultimately lost to Kim Foxx, who raised \$3 million, including 35 contributions of more than \$10,000. New York, which has two of the top five grossing districts, provides another example of the role that campaign contribution limits play. New York's contribution limits vary based on population — they can be as high as \$50,000 in the largest districts. (For comparison, there is a \$5,800 contribution limit for individuals in federal elections.¹⁴⁰) The state

¹³⁷ See THE PROSECUTORS & POL. PROJECT, UNIV. OF N.C. SCH. OF L., NATIONAL STUDY OF PROSECUTOR ELECTIONS 357 (2020), <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf> [<https://perma.cc/3S6A-PDAG>] (ranking the largest prosecutor districts by population).

¹³⁸ Further, 20 of the 24 contested, marquee elections were competitive, with the victor receiving no more than 60% of the vote. See Hessick & Morse, *supra* note 14, at 1559 & n.113 (explaining the definition of a competitive election).

¹³⁹ See 10 ILL. COMP. STAT. 5/9-8.5(h) (2022). A candidate is self-funded under Illinois law if the candidate or the candidate's immediate family contributes or loans money to the candidate or candidate's committee or makes independent expenditures on behalf of the candidate during the twelve months prior to the election that are in an aggregate amount of more than \$250,000 for statewide office or \$100,000 for all other offices. *Id.* If a candidate in a race is self-funded, then "all candidates for that office, including the [nominee] who filed a Notification of Self-funding, shall be permitted to accept contributions in excess of any contribution limits . . ." *Id.*

¹⁴⁰ To be precise, the federal limit is adjusted for inflation and is \$2,900 per election for the 2021-22 election cycle. FEC Notice, 86 Fed. Reg. 7867, 7869 (Feb. 2, 2021). However, primary elections and general elections are each considered a separate election with a separate limit. See 52 U.S.C. § 30101(1)(A) (2018) ("The term 'election' means — (A) a general, special, primary, or runoff election . . ."). As a result, individuals may contribute up to \$5,800 per candidate each election cycle, assuming that there is no runoff election.

also places no limits on campaign contributions by political parties.¹⁴¹ As a result, the Nassau County Republican Party was able to contribute \$350,000 to Kate Murray, the Republican candidate for prosecutor in 2015. Further, Texas has no campaign contributions limits at all.¹⁴² So the Texas Safety and Justice PAC contributed about \$883,000 directly to candidate Kim Ogg in Harris County in 2016, while the Texas Organizing Project added roughly \$256,000.

Of course, while placing no limits or high limits on the amount of campaign contribution *allows* for a marquee election, it is certainly not sufficient to result in high-dollar races. Small-population districts still involve little fundraising, contribution limits or not. To return to an earlier example, North Dakota places no dollar limits on individual campaign contributions. And yet, as we noted above, we did not find even a single campaign contribution in any of the state's 2014 prosecutor elections.¹⁴³

2. Identity of Donors

While the magnitude of campaign contributions helps inform our understanding of the political dynamics of prosecutor elections, magnitude is a rough measure which obscures the identity of particular contributors. In this Subsection, we turn our attention to *who* donates to prosecutors. The identity of contributors is a rich source of additional information that we can only partly mine here. For example, the identity of specific contributors can be used to better understand the preferences of particular

¹⁴¹ N.Y. ELEC. LAW § 14-114(3) (2022).

¹⁴² *Federal and Texas Campaign Contribution Limits*, TEX. POL. PROJECT, https://texaspolitics.utexas.edu/archive/html/vce/features/0702_01/cfrules.html (last visited Jan. 6, 2023) [<https://perma.cc/894Z-XJDY>] (noting that individuals may contribute an “unlimited” amount of money to candidates in Texas).

¹⁴³ *See supra* text accompanying note 134. Similarly, Iowa and Nebraska also do not have campaign contribution limits. *Candidates*, IOWA ETHICS & CAMPAIGN DISCLOSURE BD., <https://ethics.iowa.gov/campaigns/candidates> (last visited Jan. 6, 2023) [<https://perma.cc/CDP6-M95S>] (“Iowa does not have campaign contribution limits.”); *Campaign Finance Requirements in Nebraska*, BALLOTPEdia, https://ballotpedia.org/Campaign_finance_requirements_in_Nebraska (last visited Jan. 6, 2023) [<https://perma.cc/T656-UUUR>] (noting that Nebraska has “no limits on contributions to candidates for office”). But 93 of Iowa's 99 counties and 90 and Nebraska's 93 counties have a population less than 100,000. The highest grossing elections in those states were less than \$40,000 (Dubuque, 2018) and about \$110,000 (Douglas, 2018), respectively.

candidates¹⁴⁴ or to scrutinize subsequent official decisions — especially decisions involving the donor.¹⁴⁵

Contributors can also be grouped together to better understand aggregate patterns in prosecutor campaigns. Below, we identify contributors by whether they are themselves candidates, whether they live in the district in which they contribute, and their relevant interest group, if any. These measures allow us to understand how often candidates are self-funded, how often they run a locally funded campaign, and which interest groups support particular candidates.

Table 8 focuses on the percentage of candidates who are their own main contributors.¹⁴⁶ The table defines self-financing candidates as those who contribute at least half of their total campaign funds. Importantly, Table 8 likely underestimates the extent of self-financing. For one thing, the table focuses on candidates who reported raising at least some campaign contributions. Those candidates who did not report any fundraising likely paid their filing fee out of pocket. However, because we do not have confirmation of that fact, they are not counted as running a self-financed campaign.¹⁴⁷ Additionally, the table does not capture contributions by candidate family members.¹⁴⁸

¹⁴⁴ See *supra* notes 71–74 and accompanying text.

¹⁴⁵ For examples of such scrutiny, see Bernstein et al., *supra* note 83 (raising questions about donations to a Manhattan district attorney’s campaign from a lawyer who represented high profile defendants who were not indicted); 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/8QD8-LBSG>] (raising questions about a donation to an Alameda County prosecutor from a police union while the DA was investigating a police shooting of a civilian).

¹⁴⁶ We did not classify contributions from one of a candidate’s multiple authorized campaign committees to another or from a candidate’s prior campaign committee to their current campaign committee to be self-contributions.

¹⁴⁷ See *supra* note 127 and accompanying text.

¹⁴⁸ It was time prohibitive to determine whether any particular donor is a candidate’s family member. As a rough measure of whether any particular donor is a candidate’s family member, we identified donors who shared the same last name and address as a donor identified as a candidate. Based on this rough measure, we would be missing approximately one quarter of the total amount of “self” donations.

Table 8

Self-Financing Candidates				
Reported Contributions?				
	No	Yes	Self-Financing	Percent
All Districts	1,360	1,882	432	23%
Districts by Population				
< 100K	1,100	1,045	338	32%
100K - 249K	93	412	64	16%
250K - 1M	32	321	25	8%
1M+	7	104	5	5%

With those caveats, Table 8 indicates that self-financing a campaign for prosecutor is largely a rural phenomenon. Similarly, smaller-population districts are more likely to hold uncontested elections, which involve substantially less fundraising. The first row of Table 8 reports that 23% of reporting candidates were self-funded according to our measure.¹⁴⁹ In small-population districts with less than 100,000 people, about a third of contested candidates who report at least some campaign contributions are responsible for at least half of their total campaign funds. The percentage of self-financing candidates steadily declines as population increases, to 16% of contested and reporting candidates in districts with between 100,000 and 250,000 residents and less than 10% of contested and reporting candidates in districts with between 250,000 and 1 million residents. There are just five majority-self-funded-candidates in districts with more than 1 million people. The same geographic pattern holds if we measure self-financing by the percentage of candidates who contribute at least three-quarters of their campaign funds, rather than half of their campaign funds.

Self-funding is far more prevalent in elections with limited total fundraising. In bargain elections, slightly more than a third of candidates who report some fundraising self-finance at least half of their campaign — that is to say, they are responsible for at least 50% of their total funds

¹⁴⁹ If we assume that candidates who did not report campaign contributions were self-funded, then about three-quarters of all candidates would be self-funded.

raised. Interestingly, the phenomenon of self-financing is not limited to bargain elections — in elections that raised up to \$10,000, a similar percentage of candidates donated at least half of the total amount raised to their own campaigns. In contrast, only about 7% of the candidates in marquee elections are responsible for 50% or more of the money they raise.

Although there are very few majority-self-funded candidates in larger districts, the unequal distribution of campaign contributions means that a few self-funded campaigns are responsible for the bulk of all self-contributions across the country.¹⁵⁰ In fact, about a tenth of all self-contribution dollars are the result of just one self-funded candidate: Michael Untermeyer, a candidate for prosecutor in Philadelphia in 2017. He contributed more than \$1.2 million to his own campaign. In total, about 10% of all direct contributions to prosecutor candidates come from the candidates themselves. Although prosecutor elections involve an order of magnitude less money than elections for state-level offices, the percentage of direct contributions which come from candidates themselves appears to be similar to state-level offices.¹⁵¹

If self-financing speaks to the relationship between candidates and contributors as a whole, the geography of fundraising helps distinguish between a candidate's constituents and contributors. Constituents and contributors are “not the same people” because a person may be contributor to a prosecutor candidate even if they do not live in the

¹⁵⁰ Self-funded campaigns are not limited to state and local elections. There are, for example, a couple dozen candidates for federal office who donate a million dollars or more to their own campaigns each election cycle. John J. Martin, *Self-Funded Campaigns and the Current (Lack of?) Limits on Candidate Contributions to Political Parties*, 120 COLUM. L. REV. F. 178, 188 & n.75 (2020) (noting that “in 2002 . . . there were twenty-two major self-funded candidates for federal offices who spent a combined total of \$54,056,504 of their own money, an average of approximately \$2,457,000 per candidate”, and that “[i]n 2018 . . . forty-one major self-funded candidates spent a combined total of \$240,250,850 of their own money, an average of approximately \$5,860,000 per candidate,” and defining a “‘major’ self-funded candidate as one who spent at least \$1 million of their own money in support of their campaign”).

¹⁵¹ A study of state-level offices similarly found that 10% of all direct contributions came from candidates themselves. J T Stepleton, *The (Mostly) Unchanged Efficacy of Self-Funding a Political Campaign*, FOLLOW THE MONEY (July 28, 2016), <https://www.followthemoney.org/research/institute-reports/the-mostly-unchanged-efficacy-of-self-funding-a-political-campaign> [<https://perma.cc/LD7R-7Y2L>] (analyzing contributions to candidates who ran for state-level office from 2010 through 2015 and excluding candidates who raised less than \$1,000).

prosecutor's jurisdiction.¹⁵² Of the roughly \$133 million we observe in total direct contributions, about \$85 million came from contributors within a candidate's district. Further, the out-of-district dollars raised came mostly from within the candidates' home states (approximately \$35 million), rather than from out of state (approximately \$11 million).

Table 9 focuses on the number and percentage of candidates who were primarily funded by in-district contributions. It defines a locally financed candidate as a candidate who collects 75% or more of their total fundraising from within their district. As with Table 8, the percentage of locally financed candidates reported in Table 9 is limited to candidates who reported at least some campaign contributions.

Table 9

Locally Financed Candidates				
Reported Contributions?				
	No	Yes	Locally Financed	Percent
All Elections	1,360	1,882	1,074	57%
Districts by Population				
< 100K	1,100	1,045	601	58%
100K - 249K	93	412	253	61%
250K - 1M	32	321	173	54%
1M+	7	104	47	45%

In general, prosecutor elections appear to be distinctly local affairs.¹⁵³ The first row of Table 9 reports that 57% of reporting candidates were locally financed.¹⁵⁴ As a point of comparison, the median U.S. House

¹⁵² Richard Briffault, *Of Constituents and Contributors*, 2015 U. CHI. LEGAL F. 29, 31 (2016).

¹⁵³ *Cf. id.* at 32 (“[N]on-constituents provide the bulk of itemized individual contributions — that is, donations of \$200 or more — to candidates for Congress.”). Briffault observed that “[t]he data concerning non-constituent donations in state and local elections is more anecdotal than systematic, but there is considerable evidence that non-constituent, particularly out-of-state, money plays a large part in financing state and local elections too.” *Id.*

¹⁵⁴ That percentage would rise to about 75% if we assume that candidates who did not report campaign contributions were locally financed too.

candidate during this period raised only 27% of total contributions from within her district in the 2017–18 election cycle.¹⁵⁵

Although most money raised by prosecutor candidates comes from within their districts, plenty of prosecutor candidates receive significant amounts of money from out-of-district donations. Further, in the subset of districts for which we observe two election cycles, out-of-district contributions appear to be increasing in the largest districts. The percentage of locally financed candidates in districts with more than a million residents dropped from roughly half of all candidates to a third.

Out-of-district financing might be explained, at least in part, by the apparent dominance of attorneys as contributors, which we discuss more below. Attorneys sometimes practice in jurisdictions in which they do not reside. For example, an attorney may reside in a suburban county and practice in a neighboring urban county. Or an attorney may reside in a rural county and practice in all of the nearby rural counties. In addition, because all prosecutor candidates are themselves attorneys, the out-of-district attorneys giving to their campaign may be personal acquaintances, such as law school classmates or former coworkers.

An alternative explanation for out-of-district financing may be the nationalization of some local prosecutor elections. Table 9 shows that the largest-population districts are somewhat more likely to have candidates who rely on out-of-district financing. This alternative explanation may also account for the increased reliance on out-of-district financing over time. Large-population districts are more likely to receive national attention, and that is where the drop in locally funded candidates has been the largest.

Several of the successful candidates from the marquee elections listed in Table 7 received significant out-of-district financing.¹⁵⁶ For example,

¹⁵⁵ In the 2017–18 cycle, the median U.S. House candidate received 26.34% of their contributions from in-district sources. *All House Candidates, 2017-2018 in In-District vs. Out-of-District*, OPEN SECRETS, <https://www.opensecrets.org/elections-overview/in-district-vs-out-of-district?cycle=2018&display=A> (last visited Jan. 6, 2023) [<https://perma.cc/ECV9-ZFED>]. In the 2019-2020 cycle, the percentage was 27.24%. *Id.* at *All House Candidates, 2019-2020*. In the 2015–2016 cycle, the percentage was higher, approximately 35.12%. *Id.* at *All House Candidates, 2015-2016*.

¹⁵⁶ Because our study captures only direct contributions, the statistics in this paragraph do not account for additional PAC spending from outside the district. We can glimpse some of that PAC spending in media reports, which detail how various George Soros-affiliated PACs contributed a substantial amount to these progressive candidates: \$1.4 million to Ogg (about 63% of her direct contributions); \$1.7 million to Krasner (more than 200% of his direct contributions); and \$333,000 to Foxx (about 10% of her direct contributions). Rory Fleming, *Legitimacy Matters: The Case for Public Financing in Prosecutor Elections*, 27

Kim Ogg raised only 42% of her \$2.2 million in direct contributions within Harris County. Eric Gonzalez raised only 44% of his \$2.1 million from within Brooklyn (Kings County). And Larry Krasner raised about 63% of his roughly \$700,000 in direct contributions from within Philadelphia. However, not all marquee candidates followed this pattern. 91% of Kim Foxx's total came from within Cook County. Overall, candidates in marquee elections raised roughly \$7 million of the total \$11 million of out-of-state money.

For those states that collect occupation and employer information for donors, we can also observe what interest groups donate to prosecutor elections. Table 10 considers candidates' support by interest group, rather than location. Importantly, not all contributions have sufficient information to identify an interest group. The table reports the total amount and number of contributions for which there is sufficient information to identify each interest group, as well as the observed amount and number of contributions from that interest group. Once again, because we were conservative in estimating contributions from interest groups, these numbers offer an approximation of the *total* amount contributed and are likely an underestimate. Moreover, because many states do not report sufficient information for us to identify contributors' occupation, the information in Table 10 is limited and does not include all candidates who raised money.

WASH. & LEE J. CIV. RTS. & SOC. JUST. 1, 16, 18 (2020) (reporting Soros expenditures for Ogg and Foxx); Victor Fiorillo, *Nearly 3/4 of All Contributions to Larry Krasner This Year Came from Outside Philly*, PHILA. MAG. (May 17, 2021, 2:40 PM), <https://www.phillymag.com/news/2021/05/17/larry-krasner-carlos-vega/> [<https://perma.cc/63K6-JEKF>] (reporting Soros expenditures for Krasner).

Table 10

Contributions by Interest Group				
Interest Group	Total Amount		Number of Contributions	
	Sufficient Information	Observed Contributions	Sufficient Information	Observed Contributions
Individuals or Organizations				
Attorney	\$93,030,978	\$22,205,602	154,795	42,765
Bail	\$93,604,043	\$182,022	156,335	305
Law Enforcement	\$93,604,043	\$1,635,655	156,335	3,299
Realty	\$93,604,043	\$4,035,084	156,335	4,903
Political Organizations				
Partisan Groups	\$41,854,347	\$2,167,772	35,259	952
Candidate Groups	\$41,854,347	\$2,388,786	35,259	1,780
Unions	\$41,854,347	\$2,223,100	35,259	905

Based on our limited data, it appears that attorneys are the largest interest group in prosecutor elections. In the aggregate, attorneys contributed about \$22 million of the contributions for which we have sufficient information. The level of attorney funding in prosecutor elections is roughly consistent with what has been observed in judicial races. Studies of judicial elections have found that attorneys donate approximately 35% of the total money raised in those races.¹⁵⁷

It is not clear what attorney participation says about the political dynamics of local prosecutor elections. Attorneys may interact with the local prosecutor in a professional setting — for example, they may be criminal defense lawyers or assistant district attorneys. But they may also simply work in private practice or in business and contribute to the election because they take a more active interest in legal issues than the average citizen.

¹⁵⁷ See BANNON ET AL., *supra* note 136, at 11 (reporting that “lawyers and lobbyists” account for 31.7% of contributions to candidates in state supreme court elections during the 2015–2016 cycle); Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 STATE POL. & POL’Y Q. 281, 282 (2007) (“In state supreme court races across the country in 2002, lawyers were the source of 37 percent of all funds, ranging from a high of 66 percent in Texas to less than 10 percent of contributions in Wisconsin and Minnesota.”).

While attorneys appear to contribute more than we would have expected, punitive interests contribute less. In particular, the bail and law enforcement industries are responsible for less than \$2 million of the \$93 million for which we have sufficient information. The top three recipients of bail and law enforcement funds were all in California: Anne Marie Schubert in Sacramento, Michael Hestrin in Riverside, and Nancy O'Malley in Alameda, each of whom received more than \$100,000. As a point of comparison, though, the realty industry is responsible for about twice as much money contributed by the bail or law enforcement industries.

Finally, political organizations also are not responsible for many contributions. Collectively, contributions from organizations with a political valence amount to about \$6.5 million. While our measure is conservative — we did not individually investigate each contributing organization — political organizations still contribute substantially less than attorneys, although more than the bail and law enforcement industries combined.

3. Fundraising and Success

Although our study is not designed to causally estimate whether candidates are able to translate their financial advantages into an electoral advantage, our data does allow us to report how often candidates who outspend their opponents go on to win their election.

As a general matter, candidates for public office who raise more money are more likely to win an election than candidates who raise 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.¹⁵⁸ Similarly, Brian Adams' study of municipal elections in eleven cities found that 85% of winning candidates were the top fundraiser in the election.¹⁵⁹

In light of the existing evidence, it is unsurprising that successful prosecutor candidates generally outraised their opponents. Table 11 focuses on contested elections which involved at least some reported

¹⁵⁸ Maggie Koerth, *How Money Affects Elections*, FIVETHIRTYEIGHT (Sept. 10, 2018, 5:56 AM), <https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/> [<https://perma.cc/76YD-THEV>].

¹⁵⁹ BRIAN E. ADAMS, *CAMPAIGN FINANCE IN LOCAL ELECTIONS: BUYING THE GRASSROOTS* 48 (2010).

fundraising. The first row reports the number of contested elections in which the victor outspent their opponent(s) as well as the distribution of victors' fundraising advantage. The following rows report the same statistics by district population levels.

Table 11

Victor Fundraising					
	Districts	Victor Outspent Opponent	Victor Fundraising Margin		
			25th	50th	75th
All Districts	621	68%	-\$2,039	\$5,429	\$28,502
Districts by Population					
< 100K	372	66%	-\$1,350	\$2,785	\$9,699
100K - 249K	122	70%	-\$5,227	\$13,360	\$38,121
250K - 1M	92	68%	-\$12,594	\$54,934	\$143,803
1M+	35	83%	\$47,921	\$201,437	\$597,073

Overall, roughly two-thirds of elected prosecutors outspent their competitors.¹⁶⁰ The percentage of elected prosecutors who outspent their opponent generally increases with population size — from about two-thirds in the smallest districts to more than four-fifths in the largest. The level of fundraising in small-population districts is low enough that the median victor's fundraising advantage is about \$2,800. Because elections in large-population districts generate more campaign contributions, the median elected prosecutors' fundraising margin steadily increases with population, to about \$13,000 in districts with a population between 100,000 and 250,000 people, approximately \$55,000 in districts with between 250,000 and 1 million people, and more than \$200,000 in districts with more than 1 million people.

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. When political scientists have attempted to isolate the effect of campaign contributions, the results have been mixed. Several studies

¹⁶⁰ However, most prosecutor elections are *not contested* and so there is no competitor to outspend.

have found that campaign spending by incumbents has little or no effect on an incumbent's vote margins.¹⁶¹ But not all studies reach that conclusion. Some have found that increased spending by incumbents does increase their share of the vote.¹⁶²

Political science studies are more consistent in finding that spending by challengers increases their vote share.¹⁶³ 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 effect for challengers.¹⁶⁴ 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.

Our data is consistent with that finding. In general, incumbents across the country won 95% of their latest elections.¹⁶⁵ Or, as one commentator carefully put it, "mostly, incumbents just win until they quit."¹⁶⁶ Table 12 examines the relationship between fundraising and winning among incumbents, challenger, and candidates vying for an open seat. As with Table 11, Table 12 focuses on contested districts in which there was some reported fundraising.

¹⁶¹ See, e.g., Alan S. Gerber, *Does Campaign Spending Work?*, 47 AM. BEHAV. SCIENTIST 541, 542 (2004) (reporting the results of field experiments involving actual candidates which showed that "incumbent campaign spending has a negligible effect on candidate vote margins"); Gary J. 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).

¹⁶² See, e.g., Donald Philip Green & Jonathan S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, 32 AM. J. POL. SCI. 884, 884 (1988) (finding a significant marginal effect of incumbent spending after controlling for quality of challenger, interaction effects, and reciprocal causation).

¹⁶³ See, e.g., Gerber, *supra* note 161, at 541-42 (reporting the results of field experiments involving actual candidates).

¹⁶⁴ See, e.g., Robert S. Erikson & Thomas R. Palfrey, *Equilibria in Campaign Spending Games: Theory and Data*, 94 AM. POL. SCI. REV. 595, 595 (2000); Gerber, *supra* note 161, at 542; see also *id.* 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, 777 (1994) (finding that campaign spending by both incumbents and challengers had little-to-no effect on election outcomes).

¹⁶⁵ See Hessick & Morse, *supra* note 14, at 1561 tbl.4 (reporting election results for incumbent candidates in prosecutorial elections).

¹⁶⁶ BAZELON, *supra* note 6, at 80 (quoting Yale Law Professor David Schleicher).

Table 12

Candidate Success by Fundraising Status			
	Number of		
	Candidates	Winners	Percent
Raised Most Money			
Incumbent	239	184	77%
Challenger	200	109	54%
Open Seat	185	129	70%
Outraised by Opponent			
Incumbent	204	86	42%
Challenger	334	60	18%
Open Seat	301	56	19%

The table categorizes each candidate in these contested districts as either the top fundraiser or a candidate who was outraised and calculates the number and proportion of each type of candidate who goes on to win the general election. The top panel shows that top fundraisers are more likely than not to win their election. Challengers who are the top fundraisers win election about 54% of the time, while incumbents who are the top fundraisers win election almost more than 75% of the time. Open-seat candidates who are the top fundraisers are somewhere in between, winning election 70% of the time. The bottom panel focuses on candidates who were not the top fundraisers. Challengers and open-seat candidates who do not win the money race go on to win at the ballot box less than 20% of the time, while more than 40% of incumbents in the same situation are ultimately successful.

III. LESSONS FROM CAMPAIGN FINANCE DATA

The legal literature has tended to offer a single characterization of prosecutor elections as largely uncontested, rubber stamps to extend the

terms of incumbents, who are reelected as a matter of course.¹⁶⁷ But our national data shows prosecutors are not a monolith. The conventional characterization of prosecutor elections obscures important differences between local prosecutors that matter for how we should not only conceptualize the democratic accountability of prosecutors, but also how we approach criminal justice reform.

This Part explains why it is helpful to conceptualize some prosecutors as politicians and others as bureaucrats. It then uses that insight to delve deeper into the questions of prosecutorial accountability and criminal justice reform.

A. Prosecutors as Politicians or Bureaucrats

Our national data shows significantly different dynamics in prosecutor elections across the country — both the rate at which elections are contested, and the amount of campaigning that occurs in those elections. These different dynamics lead us to conclude that prevailing academic discussions of prosecutor elections paint with too broad of a brush. It is certainly true that most prosecutor elections are uncontested, sleepy affairs. But that characterization does not accurately describe prosecutor elections in *all* districts. As we explain more fully below, prosecutor elections are best understood as falling along a spectrum.¹⁶⁸ Some prosecutor offices are more political, while others are more bureaucratic. The distinction between politicians and bureaucrats may help explain why we see only modest contributions from political organizations.

On the one end of the spectrum are the large-population districts which are more likely to be contested and involve candidates who raise campaign contributions and appeal to voters for their support. Importantly, even when candidates in these districts are uncontested, they are more likely to raise money — sometimes significant amounts of money.¹⁶⁹ This

¹⁶⁷ See *supra* Part I.A.

¹⁶⁸ Local prosecutor offices also fall along a wide spectrum in terms of cases, budget, and staffing. See PERRY & BANKS, *supra* note 120, at 4 tbl.2 (reporting differences in budget and staffing by population served); *id.* at 5 tbl.4 (reporting differences in felony cases by population served). For example, in 2005, prosecutors' offices which served 250,000 or less people had a median staff size of only ten, while offices serving one million people or more had a median staff size of 419. See PERRY, *supra* note 64, at 3 tbl.2. Likewise, the median budget of the largest offices (\$33 million) was eighty-five times larger than that of the smallest offices (\$389,000). *Id.* at 4 tbl.4.

¹⁶⁹ The median uncontested candidate raised about \$308,000 in jurisdictions with populations above one million people. In contrast, the median uncontested candidate in jurisdictions with populations between 100,000 and 249,999 raised less than \$1,500, and

fundraising makes sense if the office of prosecutor in larger jurisdictions is seen as a political position, like a mayor or state senator. If prosecutor is a political position, then candidates likely perceive themselves as needing to campaign even when there is no opponent on the ballot. For one, candidates may perceive a need to campaign in order to ward off potential challengers.¹⁷⁰ For another, they may also perceive the office of prosecutor as one of several potential elected offices they could hold: candidates who have aspirations to run for other offices may choose to campaign to increase their name recognition for future elections.¹⁷¹

On the other end of the spectrum are the low-population elections which are largely uncontested and feature little or no campaigning. In those districts, the election amounts to little more than a formality that occurs every few years. The only election spending consists of a small filing fee to appear on the ballot — a cost that the candidate often pays for herself.¹⁷² And in some states, these uncontested elections do not even appear on the ballot.¹⁷³ In this respect, elections tend to resemble the renewal of a bar license or a similar ministerial task that the incumbent must complete in order to retain his or her position.

the median uncontested candidate in jurisdictions with populations below 100,000 reported raising no money at all. *See supra* Table 5.

¹⁷⁰ The conventional wisdom is that building a “war chest” by setting aside money for a coming election may serve as a powerful deterrent to political challengers. Jay Goodliffe, *War Chests as Precautionary Savings*, 26 POL. BEHAV. 289, 289-90 (2004). Empirical evidence for this theory, however, is mixed. *Id.* at 290.

¹⁷¹ The office of prosecutor is often seen as a stepping stone to other governmental positions. *See Hessick & Morse, supra* note 14, at 1569 (reporting a significant number of elected prosecutors who did not complete their full terms and observing that “a common reason” for this phenomenon “was that the prosecutor had been elected or appointed as a judge”); 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://shugerblogger.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/F85B-GXX3>] (collecting systematic information about federal and state officials who previously worked as prosecutors).

¹⁷² *See supra* note 127 and accompanying text.

¹⁷³ *See Hessick & Morse, supra* note 14, at 1554-57 (cataloguing how “[a] number of states do not require candidates to appear on the general election ballot if they are unopposed” and that “[m]any more states do not put unopposed candidates on the ballot for primary elections”).

Even when candidates in these districts face opponents, they are still unlikely to raise much if any money.¹⁷⁴ Raising no money despite facing a challenger makes sense if the office is seen more as a bureaucratic office, like an executive agency. Indeed, fundraising and campaigning might be seen as inconsistent with the image of a bureaucratic public servant.¹⁷⁵ The bargain elections in which the only reported campaign contribution represents the candidate paying his or her own filing fee are also consistent with the understanding that the election is a formality, rather than a political contest.¹⁷⁶

How governments maintain and disclose campaign finance records also suggest a difference in how the office is perceived. For example, in those states where counties serve as the custodians of campaign finance records, we had to obtain campaign finance records from local governments.¹⁷⁷ As a rule, larger jurisdictions made campaign finance documents available online alongside the disclosures for all other local offices. San Francisco, for example, aggregates campaign finance data for district attorney, mayor, board of supervisors, sheriff, board of education, and similar offices as a searchable database on its Ethics Commission's website.¹⁷⁸ Los Angeles,¹⁷⁹ Maricopa County (Phoenix, Arizona),¹⁸⁰ and Harris County (Houston, Texas)¹⁸¹ do the same.

In contrast, smaller jurisdictions had to be contacted directly, sometimes by telephone, in order to obtain campaign finance documents. The

¹⁷⁴ See *supra* Table 6 (reporting that all but two of the sixty-five contested bargain elections took place in districts with populations under 100,000).

¹⁷⁵ See E-mail from William F. Shubat, Dir., Belmont Cnty., Ohio, to Carissa Byrne Hessick (Dec. 11, 2018, 3:31 PM) (on file with author) (“The Prosecuting Attorney of Belmont County Dan Fry runs unopposed in all of the races he has had, therefore he files no campaign finance reports with this office. Mr. Fry is as dedicated a public servant as you will ever find and it shows in the elections.”).

¹⁷⁶ See *supra* note 127 and accompanying text.

¹⁷⁷ See *supra* note 95 and accompanying text.

¹⁷⁸ *Campaign Finance Disclosure*, CITY & CNTY. OF S.F. ETHICS COMM’N, <https://sfethics.org/disclosures/campaign-finance-disclosure> (last updated Nov. 18, 2021) [<https://perma.cc/VP8B-R8AS>].

¹⁷⁹ *Campaign Finance Reports*, CNTY. OF L.A. REGISTRAR-RECORDER/CNTY. CLERK, https://efs.lacounty.gov/public_search.cfm (last visited Jan. 6, 2023) [<https://perma.cc/ZHP6-N6KP>].

¹⁸⁰ *Campaign Finance Document Search*, MARICOPA CNTY. ELECTIONS DEP’T, <https://recorder.maricopa.gov/campaignfinance/campaignfinancesearch.aspx> (last visited Jan. 6, 2023) [<https://perma.cc/GQ6M-5ZJ2>].

¹⁸¹ *Campaign Finances*, HARRIS CNTY., ELECTIONS ADM’R’S OFF., <https://www.harrisvotes.com/candidatesethics#SearchFilings> (last visited Jan. 6, 2023) [<https://perma.cc/6MSF-VGU7>].

candidates' forms were often stored in paper format,¹⁸² sometimes located in basements.¹⁸³ In the smallest jurisdictions, local clerks sometimes seemed confused about whether such information was subject to public disclosure and which institution was supposed to collect candidate reports,¹⁸⁴ while others responded with the suggestion that “public servants” such as their local prosecutor had no need to campaign and thus raised no money.¹⁸⁵

The distinction between politicians and bureaucrats should guide future research and commentary about prosecutor elections. In the Sections that follow, we consider how the distinction clarifies both the challenge of

¹⁸² See E-mail from Linda Jarvis, Cnty. Clerk, Freestone Cnty., Texas, to Carissa Byrne Hessick (Sept. 11, 2019, 2:01 PM) (on file with authors) (stating that clerk would only be able to find campaign finance records if supplied with the date on which the candidate filed a report because she keeps reports in folders organized by date).

¹⁸³ The clerk in Trinity County, Texas, was unable to provide campaign finance information for several weeks because the relevant documents were stored in the basement and she had broken her leg.

¹⁸⁴ In Virginia, several local officials originally denied our request for records because of a misunderstanding of state law. Specifically, those officials believed that campaign finance records could be obtained only by citizens of Virginia or representatives of the media. See, e.g., E-mail from Melissa D. Welch, Dir. of Elections & Gen. Registrar, Middlesex Cnty., Virginia, to Carissa Byrne Hessick (Apr. 15, 2019, 6:44 PM) (on file with authors) (denying request); E-mail from Emily Mounce, Freedom of Information Act (FOIA) Officer, Warren Cnty., Virginia, to Carissa Byrne Hessick (Apr. 15, 2019, 5:05 PM) (on file with authors) (denying request); E-mail from Melinda Mayo, Comm’ns and Media Officer/FOIA Officer, City of Roanoke, Virginia, to Carissa Byrne Hessick (Apr. 12, 2019, 8:23 PM) (on file with authors) (denying request and providing alternative method to access records). We ultimately obtained clarification from state officials that this reading of state law was incorrect. See E-mail from Arielle Schneider, Chief Freedom of Information Act (FOIA) Officer & ELECT Pol’y Analyst, Virginia Dep’t of Elections, to Carissa Byrne Hessick (May 3, 2019, 3:33 PM) (on file with authors) (confirming that the belief that only Virginia citizens could request copies of campaign finance reports was mistaken and offering assistance with obtaining records from those offices who persisted in their misunderstanding). In Kansas, the State Ethics Commission collects campaign finance information for the six counties that elect *district* attorneys; the counties that elect *county* attorneys are responsible for collecting their own campaign finance forms. See E-mail from Karina Renna, State Campaign Fin. Supervisor, Kansas Governmental Ethics Comm’n, to Carissa Byrne Hessick (Nov. 29, 2018, 8:46 AM) (on file with authors). Yet, multiple county officials erroneously directed us to the State Ethics Commission when we requested the campaign finance reports for their county attorney candidates. See E-mail from Janet Hale, Cnty. Clerk, Meade Cnty., Kentucky, to Samantha Owen (May 24, 2019, 12:25 PM) (on file with authors); E-mail from Ruth A. Elliott, Cnty. Clerk, Harper Cnty. Courthouse, to Carissa Byrne Hessick (Nov. 30, 2018, 1:07 PM) (on file with authors).

¹⁸⁵ See E-mail from Belmont Cnty., Ohio, to Carissa Byrne Hessick, *supra* note 175.

prosecutorial accountability and the effect of campaign contributions and local democracy on criminal justice reform.

B. Accountability and Elections

One major reason to elect prosecutors, rather than to appoint them, is that elections make prosecutors directly accountable to the public. Accountability, as used by legal scholars, generally means the ability to demand an explanation or justification for actions, as well as the ability to reward or punish for those actions.¹⁸⁶ In this sense, elections provide an opportunity for voters to hear incumbent prosecutors explain their actions and register their approval or disapproval. Local elections in particular allow prosecution to “be adapted to local conditions and local tastes.”¹⁸⁷ This decentralization is often characterized as providing more accountability.¹⁸⁸

Understood in these terms, campaigning by local prosecutor candidates can facilitate accountability. Sometimes campaigning may do little more than increase name recognition among voters, such as when campaigns spend money for yard signs.¹⁸⁹ But other times campaigning may inform voters about substantive issues. Spending on direct-mail materials can serve this informational purpose, as can spending on events at which the candidate speaks. Thus, campaign activity can increase accountability by creating an opportunity for more informed voters.

Of course, campaign contributions are far from a perfect proxy for the extent of campaigning. Campaign contributions tell us how much money candidates bring in, not how much they spend. There are candidates in our dataset who either did not spend all the money they raised or whose spending came from war chests — money that they had left over from previous elections. Campaign contributions are also not a perfect proxy because campaign dollars will not go as far in some districts as in others.

¹⁸⁶ See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005).

¹⁸⁷ See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDER'S DESIGN* (1987)).

¹⁸⁸ Rubin, *supra* note 186, at 2098-99 (“Accountability arguments for the devolution of authority from the central government to localities are based on the idea that a political entity that governs a small group of people can be more readily controlled by those people than one that governs a larger group. In other words, small governmental units are more accountable to their constituents.”).

¹⁸⁹ It also increases awareness of the fact that prosecutor is an elected office — a fact which is apparently not widely known. See *infra* note 199 and accompanying text.

For example, it is likely more expensive to run television and radio ads in major media markets. It is also more expensive to engage in direct mail campaigning in districts with large populations — the mailing costs for such activities accrue for each piece of mail. Candidates in low-population districts may also effectively communicate with voters using inexpensive methods, such as knocking on doors.

Perhaps in part because of the different campaigning costs, we found that the amount of money raised is closely correlated to the number of people within a district. But differences in campaigning costs alone do not explain the differences in amount raised. Even in small-population districts, we saw much higher levels of fundraising in contested elections than in uncontested elections. For example, among districts with less than 100,000 people, the median uncontested election generated \$0 in reported fundraising, while the median contested election saw more than \$14,000.¹⁹⁰ That candidates in contested elections tend to raise money suggests that candidates who raise little or no money are not campaigning.¹⁹¹ Indeed, about 75% of the candidates who reported raising no money ran unopposed.¹⁹² And because campaigning facilitates more informed voters, districts where candidates do not fundraise likely suffer from a more acute accountability deficit.¹⁹³

¹⁹⁰ See *supra* Table 5.

¹⁹¹ It might seem unremarkable that unopposed candidates often did not raise any money — after all, they have no need to communicate with voters since voters have no other choice. But while it may be rational for unopposed candidates not to raise any money for their campaigns, a failure to communicate with voters has accountability consequences. If candidates are not campaigning, then voters may be unaware of who the candidate for local prosecutor even *is*, let alone their platforms and policies. If voters are aware of those platforms and policies, and if they do not like them, then they can express their disagreement outside of the ballot box, such as by calling the prosecutors' office or helping to recruit a challenger.

¹⁹² About 75% percent of candidates who reported raising less than or equal to \$1,000 ran in an uncontested election.

¹⁹³ Although the accountability deficit is larger when candidates do not campaign, that does not mean that voters have *no* information in those districts. They may learn about their prosecutors' activities through media coverage or through word-of-mouth. Unfortunately, local news coverage has significantly deteriorated in the past two decades, and the lack of any local news media in some communities — especially rural communities — has led to news deserts. PENELOPE MUSE ABERNATHY, *THE EXPANDING NEWS DESERT* 10-11 (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf [<https://perma.cc/62X7-828W>]. As a result, some communities see little or no media coverage of their prosecutors or candidates running for the office. See *THE PROSECUTORS & POL. PROJECT*, *supra* note 76, at 5 (reporting the results of a pilot study of prosecutor media coverage in an election year and finding that “[t]he median incumbent

In the jurisdictions where prosecutor is a more political office, elections seem to be functioning relatively well as an accountability mechanism. Not only do these elections usually provide voters with a choice at the polls, but the campaigning that candidates undertake helps educate voters on prosecutorial power and policy. This is not to say the current level of prosecutor accountability is sufficient. Many important decisions made by prosecutors occur outside of the public eye,¹⁹⁴ and media coverage about prosecutors rarely gives voters insight into the policies and practices of prosecutors' offices.¹⁹⁵

Whatever the shortcomings in those more political districts, there is a separate, particularly acute accountability deficit in districts with "bureaucratic" prosecutors. This deficit makes it difficult for people to control criminal justice policy in their communities, and the deficit disproportionately exists in rural America. The accountability deficit can be seen in the small number of contested elections; in 75% of jurisdictions with populations under 100,000, voters didn't have a choice in either the primary *or* the general election.¹⁹⁶ It can also be seen in the campaign finance data. That data shows that about 40% of candidates raise (and thus presumably spend) nothing on their campaigns, while roughly 47% raised less than \$1,000. Given that some candidates use their campaign funds to pay registration fees to appear on the ballot,¹⁹⁷ those candidates who raise less than \$1,000 may be doing little campaigning with that money, if they are campaigning at all.

was mentioned in only 24 articles during the entire election year" and that "the incumbent with the least coverage was mentioned in no articles at all"). Word-of-mouth may also not prove effective at informing voters in rural communities: Some prosecutor districts are geographically large, as most states elect their prosecutors on a county-by-county basis, and a minority aggregate counties into even larger prosecutorial districts. The ten largest counties in the United States are larger than the state of Vermont. Rolando Y. Wee, *Largest Counties in the US by Area*, WORLDATLAS (Oct. 3, 2020), <https://www.worldatlas.com/articles/largest-counties-in-the-united-states-by-total-area.html> [<https://perma.cc/K3EN-6MQU>]. In general, the jurisdictional boundaries of prosecutor districts usually "do not delineate community ties." Hessick & Morse, *supra* note 14, at 1582. In any event, even if voters obtain *some* information about their prosecutors, deficits in that information decrease their ability to hold local prosecutors accountable.

¹⁹⁴ Ouziel, *supra* note 47, at 1073 ("The more impactful earlier actions — decisions on whether to investigate, whom to target, and whether and what crimes, to charge — are made in secret . . .").

¹⁹⁵ See Wright, *How Prosecutor Elections Fail*, *supra* note 39, at 597-603; PROSECUTORS AND POLITICS PROJECT, *supra* note 76, at 3-12.

¹⁹⁶ See *supra* Table 3.

¹⁹⁷ See *supra* note 127 and accompanying text.

To be sure, some candidates who raise no money may already be known within their communities. The vast majority (about 70%) of candidates who raised no money were incumbents, while only about 15% were running for an open seat.¹⁹⁸ Those candidates who ran as incumbents may have already enjoyed some name recognition from prior elections, or from the exposure they receive from simply holding the office. Thus, it may be tempting to assume that those incumbent prosecutors who run unopposed face no challengers because their constituents are happy.

But there are reasons to be skeptical of that assumption. For one, there is evidence that many Americans do not realize that their local prosecutor is an elected official.¹⁹⁹ Those voters may not realize that they could vote for someone else if they are unhappy with prosecutorial policy in their communities. For another, even if voters know their local prosecutor is an elected office, they may not know what a prosecutor does, much less that the prosecutor wields wide-ranging discretion. And the very fact that an incumbent runs unopposed may result in less informed voters. A recent study found that prosecutors who ran for reelection unopposed received less media coverage in an election year than those who faced a challenger.²⁰⁰

Because elections are not serving as effective accountability mechanisms for bureaucratic prosecutor offices, we should consider forms of accountability for prosecutors *in addition to* elections. In particular, reformers should consider the broad range of tools used to promote accountability in bureaucracies. Bureaucracies ensure accountability through hierarchy and supervision,²⁰¹ as well as through reporting requirements, internal rules, formal investigations, and job evaluations.²⁰² Those tools could improve prosecutor elections too.

¹⁹⁸ Among all candidates who raised less than or equal to \$1,000 and ran in an uncontested election, about 84% were incumbents and about 12% ran in an open seat.

¹⁹⁹ See BAZELON, *supra* note 6, at 78 (“In a poll paid for by the ACLU, half of sixteen hundred likely voters said they didn’t know the D.A. was elected.”).

²⁰⁰ See THE PROSECUTORS & POL. PROJECT, *supra* note 76, at 7 (“The median incumbent running in a contested election was mentioned in 135.5 news articles. In contrast, the median incumbent who ran for reelection uncontested was mentioned in only 15 news articles.”).

²⁰¹ See Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT’L L. 211, 233 (2014) (“Accountability mechanisms include five general institutional structure types: electoral, hierarchical, supervisory, fiscal, and legal. Each mechanism involves an account holder who can require administrative decision makers to account for their decisions and who has the ability to impose discipline or sanctions for deficient performance.”).

²⁰² Rubin, *supra* note 186, at 2075.

Some states have already adopted alternative accountability mechanisms that make local prosecutors accountable to others based on hierarchy and supervision. For example, some states allow a state official to direct a local prosecutor to take an action in a criminal case, or even remove a local prosecutor from a case and reassign the case to someone else — a power that is sometimes referred to as “supersession.”²⁰³ Some states also have statutory provisions for removing elected prosecutors from office through court proceedings.²⁰⁴ These tools make prosecutors accountable. For example, a prosecutor in North Carolina was removed after families of alleged rape and murder victims accused him of mishandling cases and failure to prosecute.²⁰⁵

Notably, while these mechanisms allow for greater accountability, the accountability flows to people beyond local communities.²⁰⁶ Supersession empowers state officials to take over a local prosecutor’s duties. Judicial removal of prosecutors can do the same, depending upon how judges are selected.

There are, however, downsides to these hierarchy and supervision mechanisms. For one thing, they are not limited to districts where elections are uncontested or campaigning is sparse — districts with an

²⁰³ Tyler Quinn Yeagain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 110-26 (2018) (defining supersession and cataloguing which states afford which types of this power to their state officials).

²⁰⁴ See, e.g., N.C. GEN. STAT. § 7A-66 (2022) (setting forth the grounds and procedures for removal of district attorneys). Prosecutors can also be removed under more general statutes permitting the removal of officials from office. See, e.g., *Jones v. Eighth Jud. Dist. Ct.*, 219 P.2d 1055, 1056. (Nev. 1950) (involving attempt to remove district attorney of Clark County under a state statute stating “[a]ny person now holding or who shall hereafter hold any office in this state, who shall refuse or neglect to perform any official act in the manner and form prescribed by law, or who shall be guilty of any malpractice or malfeasance in office, may be removed therefrom . . .”); see also 63C AM. JUR. 2D *Prosecuting Attorneys* § 14 (2022) (“A prosecuting attorney may be removed from office for breach of official duties amounting to misfeasance, malfeasance, or nonfeasance in office.”).

²⁰⁵ Karen Chávez, *District Attorney Greg Newman Removed from Office; Only 3rd Removal in NC History*, CITIZEN TIMES, <https://www.citizen-times.com/story/news/local/2021/04/27/north-carolina-district-attorney-greg-newman-removed-office-3rd-time-nc/7299267002/> (last updated Apr. 27, 2021, 3:40 PM ET) [<https://perma.cc/VMZ4-BA3J>].

²⁰⁶ See Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 939 (2017) (“Accountability is a relational concept; it is meaningless unless one specifies *to whom* the relevant actor is accountable.” (emphasis added)).

accountability deficit. For another, the mechanisms empower state or judicial officials to intervene even when the prosecutor is following the wishes of her constituents. For example, Aramis Ayala, who ran on a platform of criminal justice reform, defeated the incumbent prosecutor in the Democratic primary in Orlando, Florida.²⁰⁷ Soon after taking office in 2017, Ayala declared that she would not seek the death penalty.²⁰⁸ Florida's Republican governor responded by using his supersession power to remove more than twenty murder cases from Ayala and reassign them to other prosecutors in the state.²⁰⁹ Because Ayala did not specifically run on an anti-capital punishment platform,²¹⁰ her electoral victory does not provide clear evidence that her constituents agreed with her specific death-penalty policy. But Ayala's district is much more politically liberal than other parts of the state. In fact, the Republican governor lost the popular vote in Ayala's district.²¹¹

²⁰⁷ See Scott Powers, *Aramis Ayala Becomes First Black State Attorney in Florida's History*, FLA. POL. (Nov. 8, 2016), <https://floridapolitics.com/archives/226799-aramis-ayala-becomes-first-black-state-attorney-floridas-history> [https://perma.cc/Y5LT-N275] (describing Ayala's campaign and surprise victory).

²⁰⁸ Brief of Amicus Curiae The Florida Prosecuting Attorneys Association Opposing Emergency Petition for Extraordinary Writ at 3, *Ayala v. Scott*, 224 So.3d 755 (Fla. 2017) (SC 17-653) ("What has become abundantly clear through this process is that while I currently do have discretion to pursue death sentences, I have determined that doing so is not in the best interest of this community or the best interest of justice.").

²⁰⁹ *Ayala v. Scott*, 224 So.3d 755, 756 (Fla. 2017). This was not the only time a Florida governor used his power to punish a prosecutor who would not pursue certain criminal cases. See Sue Carlton & Dan Sullivan, *In Warren vs. DeSantis, Here's What the Judge Might Be Considering*, TAMPA BAY TIMES, <https://www.tampabay.com/news/florida-politics/2023/01/10/warren-vs-desantis-heres-what-judge-might-be-considering/> (last updated Jan. 10, 2023) [https://perma.cc/3UV3-N4Q2] (discussing how Governor Ron DeSantis suspended prosecutor Andrew Warren from office for "incompetence and neglect of duty"); see also *Warren v. DeSantis*, No. 22CV302-RH, 2023 WL 345802, at *1 (N.D. Fla. Jan. 20, 2023) (concluding that Governor DeSantis violated the federal and state constitution in suspending Andrew Warren, but dismissing Warren's suit because the federal constitutional violations were "not essential" to the suspension and the Eleventh Amendment prohibited relief based only on a violation of state law).

²¹⁰ See Jordan Smith, *The Power to Kill*, INTERCEPT (Dec. 3, 2019, 5:31 AM), <https://theintercept.com/2019/12/03/death-penalty-reform-prosecutors/> [https://perma.cc/U9G9-J3TL] ("Notably, Ayala had not campaigned on the death penalty — mostly, she said, because there was no functional death penalty in Florida at the time. . . . It was after Ayala assumed office in January 2017 that she realized capital punishment was no longer just a matter of front-line prosecution or defense . . .").

²¹¹ See David Weigel, *The Six Political States of Florida*, WASH. POST (Sept. 8, 2020), <https://www.washingtonpost.com/graphics/2020/politics/florida-political-geography/> [https://perma.cc/3PBN-E6XP] (describing the area surrounding Ayala's district as "one

A third problem is that the existing tools of hierarchy and supervision seem to function as a punitive ratchet. For example, some states only allow the removal of cases from prosecutors based on their failure or refusal to prosecute.²¹² Similarly, the North Carolina statute providing for the judicial removal of district attorneys from office lists “persistent failure to perform his duties,”²¹³ but does not allow for removal based on decisions that are overly harsh. And even when the relevant statutes do allow for supervision or removal based on overly harsh policies or tactics,²¹⁴ in practice, the power is more likely to be exercised when the prosecutors are perceived as being too lenient.²¹⁵

Especially in light of the findings from California demonstrating that prosecutors are more punitive than their constituents,²¹⁶ it is important to consider whether we need additional checks on overly harsh prosecutors to facilitate accountability. Pardons provide one possible check on overly punitive prosecutors — though it is a check that has fallen into disuse.²¹⁷ Shifting the financial costs of harsh prosecutorial decisions from the state to local governments could provide another check.²¹⁸ Notably, neither of

of the state’s deep blue strongholds” and noting that, politically, “[b]lue Florida has gotten bluer” while “red Florida has gotten redder”).

²¹² Yeargain, *supra* note 203, at 122-23.

²¹³ N.C. GEN. STAT. § 7A-66(3) (2022).

²¹⁴ Yeargain, *supra* note 203, at 113-15 (identifying states where state officials can take over cases from local prosecutors for any reason).

²¹⁵ Cf. Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 81 (2017) (explaining that judges have more discretion to reject proposed plea bargains that are too lenient than those that are too harsh, in part, because the prosecutor’s charging decision sets “an implicit baseline”).

²¹⁶ See Sances, *supra* note 49, at 181.

²¹⁷ Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, 32 LITIGATION 25, 27-28 (2006) (“In the states, available records confirm a pattern of generous pardoning by most governors until about 1990, and a precipitous trend downward in most states thereafter; the numbers hit bottom about the turn of the century. While pardons and commutations are still granted in a handful of states, notably those whose constitutions give the pardon decision maker some protection from the political process, pardon for the most part has ceased to play an operational role in the American justice system.”).

²¹⁸ California’s Criminal Justice Alignment could provide a model for this approach. See W. David Ball, *Tough on Crime (on the State’s Dime): How Violent Crime Does Not Drive California Counties’ Incarceration Rates—and Why It Should*, 28 GA. ST. U. L. REV. 987, 1039 (2012). One study of the effect of California’s Criminal Justice Alignment on juvenile incarceration found that “shift[ing] the cost burden of juvenile incarceration from state to counties . . . resulted in a stark drop in incarceration, and no increase in arrests.” Aurélie Ouss, *Misaligned Incentives and the Scale of Incarceration in the United States*, 191 J. PUB. ECON. 104285, 104285 (2020).

these mechanisms empower local communities either, and they also are not limited to jurisdictions where there is an accountability deficit.

Given the limits of hierarchy and supervision, reformers should also consider how additional bureaucratic accountability measures, such as reporting requirements and job evaluations, could be implemented. For example, local election officials could require all candidates — even unopposed candidates — to provide detailed position statements covering multiple areas of prosecutorial power, and then publish those statements as part of a voter guide.²¹⁹ They could even provide a financial subsidy for all candidates to produce or publish such a statement.

Of course, the government is not the only organization able to create and distribute voter guides. Any organization could decide to collect and disseminate information about candidates, and many already do. For example, some state and local bar associations provide public evaluations of candidates in judicial elections.²²⁰ And other private organizations provide information²²¹ or ratings of candidates.²²²

But if candidate statements are not required by election officials, there is no guarantee candidates will cooperate. That is what appears to have happened in Vermont. The ACLU attempted to provide a voter guide for

²¹⁹ Most states create official voter guides for ballot measures, and a majority of those guides include a neutral explanation or analysis. See *Features of Official Voter Guides, Compared by State*, BALLOTPEDIA, https://ballotpedia.org/Features_of_official_voter_guides_compared_by_state (last visited Feb. 12, 2022) [<https://perma.cc/7TDJ-9QUQ>].

²²⁰ See, e.g., *Judicial Elections Evaluation Committee*, L.A. CNTY. BAR ASS'N, <https://lacba.org/?pg=judicial-elections-evaluation> (last visited Feb. 12, 2022) [<https://perma.cc/MKN9-BJAB>] (explaining that the committee “[p]repare[s] an evaluation of candidates in contested Superior Court judicial elections in Los Angeles County; makes evaluations by interviewing candidates and communicating with lawyers, judges, and others; [and] publishes ratings of candidates”); *Judicial Evaluation*, SONOMA CNTY. BAR ASS'N, <https://sonomacountybar.org/judicial-evaluation> (last visited Feb. 22, 2022) [<https://perma.cc/J8HQ-WJSL>] (“The purpose of the Judicial Evaluation Committee (‘JEC’) is to evaluate the qualifications of all candidates seeking appointment to the office of Judge of the Sonoma County Superior Court; to the office of Justice of the First District Court of Appeal of the State of California; and to the office of Justice of the Supreme Court of the State of California.”).

²²¹ For example, the League of Women Voters asks candidates questions and then provides those answers to voters. *Be an Informed Voter*, LEAGUE OF WOMEN VOTERS (Oct. 22, 2012), <https://www.lwv.org/newsroom/news-clips/be-informed-voter> [<https://perma.cc/S672-5R32>].

²²² See, e.g., RATE MY JUDGE, <https://ratemyjudge.la/> (last visited Dec. 9, 2022) [<https://perma.cc/8YLW-NUMF>] (allowing lawyers and community members to rate judges); ROBIN ROOM, <http://www.therobingroom.com/> (last visited Dec. 9, 2022) [<https://perma.cc/YN78-EPK8>] (allowing attorneys to rate judges on a website owned by attorneys).

the 2018 election by asking candidates for local prosecutor to answer a number of questions about transparency, racial disparity, and other criminal justice issues.²²³ But none of the incumbent candidates provided individualized responses.²²⁴ Perhaps a group that is seen as less ideological — such as a bar association — would receive more cooperation from candidates and could make that information broadly available. Indeed, some bar associations already provide this information for candidates for judicial office.²²⁵

In a similar fashion, incumbent prosecutors could be required to report aggregate data or other information about their handling of cases. Some states have recently taken steps to require reporting from prosecutors,²²⁶ and other prosecutors appear to be making information available voluntarily.²²⁷ Criminal justice data is notoriously hard to locate, and making prosecutors report information themselves could be a reminder that their performance will be evaluated by others.

These alternative accountability mechanisms may not give voters the opportunity to remove their local prosecutor, at least in the short term. But democracy is not the only source of accountability.²²⁸ Thus, to the extent

²²³ *ACLU of Vermont Voter Guide – 2018 State’s Attorney Elections*, ACLU VT., <https://www.acluvt.org/en/aclu-vermont-voter-guide-2018-states-attorney-elections> (last visited Feb. 22, 2023) [<https://perma.cc/6UUD-TBGG>].

²²⁴ *See Vermont State’s Attorneys Respond to ACLU Voter Education Survey*, ACLU (July 17, 2018), <https://www.aclu.org/press-releases/vermont-states-attorneys-respond-aclu-voter-education-survey> [<https://perma.cc/4XSL-M8DG>]. Of the twenty candidates, three challengers responded to the survey in full. *Id.* Eight incumbents provided a collective response coordinated through the Department of State’s Attorneys and Sheriffs, which largely refused to grapple with the content of the questions. *Id.* Four incumbents responded individually, but used language pulled heavily from the collective response. *Id.* And four candidates (two incumbents and two challengers) did not respond to the survey at all. *Id.*

²²⁵ *See* sources cited *supra* note 220.

²²⁶ *See, e.g.*, UTAH CODE ANN. § 63M-7-216(2) (2022) (“Beginning July 1, 2021, all prosecutorial agencies within the state shall submit the following data with regards to each criminal case referred to it from a law enforcement agency to the commission for compilation and analysis”); *see also* OR. REV. STAT. § 8.705 (2022) (directing district attorneys to “develop and formally adopt written office policies” on several enumerated subject areas and to make the policies “available to the public on the district attorney’s website”).

²²⁷ *See, e.g.*, *Public Data Dashboard*, PHILA. DIST. ATT’Y’S OFF., <https://data.philadao.com/> (last visited Dec. 22, 2022) [<https://perma.cc/VMK3-DN3W>]; *see also* PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org/> (last visited Dec. 22, 2022) [<https://perma.cc/67E6-MX4E>] (introducing a “suite of modern indicators for prosecutors committed to measuring effectiveness, efficiency & fairness”).

²²⁸ *See supra* notes 201–02 and accompanying text.

that local democracy is not providing accountability in certain areas, other accountability mechanisms should be layered on top. Ultimately, reinforcing the accountability mechanisms available will require different approaches that reflect the different nature of prosecutor offices across the county.

C. *Campaign Contributions and Criminal Justice Reform*

There is broad agreement that local prosecutors are one of the prime culprits in mass incarceration.²²⁹ But, as noted above, there is strong disagreement about the promise of local democracy as a path towards unraveling the carceral state. Some believe that more local democracy will result in less punitive policies, while others believe that reform is possible only if prosecutors and other criminal justice actors are insulated from political pressure.²³⁰ This empirical disagreement is not easy, or perhaps even possible, to resolve. Nonetheless, recent campaigns by candidates who ran on reform platforms offer a modest vantage point to inform the current debate.

On a general level, the recent success of progressive prosecutors seems to support democratizers' hope that local democracy can offer a path to reform.²³¹ Progressive candidates ran on platforms diametrically opposed to many of the law-and-order policies of traditional prosecutors and the punitive politics of crime.²³² Not only did these progressives win, but they won at a high rate. While non-progressive challengers won only 30% of the time, progressive challengers won 55% of the time. And progressives did even better when running for open seats — of the twenty progressive candidates in races without an incumbent, only two lost. In contrast, open seat candidates generally won only 36% of the time. The election of progressive prosecutors brought different perspectives and genuine reform to prosecutor offices around the country. Thus, at least in these elections, democracy in its most political form served as a moderating, rather than a punitive, force.

²²⁹ See, e.g., BAZELON, *supra* note 6; PFAFF, *supra* note 5; Bibas, *Prosecutorial Regulation*, *supra* note 48; Davis, *supra* note 54, at 9. *But see* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 845 (2018) (maintaining that other government officials bear greater responsibility).

²³⁰ See *supra* text accompanying notes 52–59.

²³¹ See *supra* notes 52–53 and accompanying text.

²³² For more on the punitive politics of crime, see BARKOW, *supra* note 6; SIMON, *supra* note 6; TONRY, *supra* note 6.

Our dataset of campaign contributions offers a more nuanced picture of the political dynamics in these elections by revealing how much progressive candidates raised relative to other candidates and how they raised it.

Constructing a list of progressive candidates for prosecutor was no easy task. No uniform definition of “reform prosecutor” or “progressive prosecutor” exists, in part because of the infancy of the movement and the variety of jurisdictions in which progressive candidates have run. Positions that are popular in the blue cities of Philadelphia or Boston, for example, may be much less popular in red, rural Texas counties.²³³ We ultimately identified candidates as progressive based on three primary academic sources, as well as media reports, and then supplemented our list of progressives with a similar list recently compiled by Professor John Pfaff.²³⁴ There was usually a great deal of consensus among our sources. However, the label “progressive prosecutor” is not without controversy — our list includes some candidates who have subsequently been criticized

²³³ For example, on capital punishment, reform-minded prosecutors differ. See Timothy Bella, *The Most Unlikely D.A. in America*, POLITICO MAG. (May 6, 2018), <https://www.politico.com/magazine/story/2018/05/06/most-unlikely-district-attorney-in-america-mark-gonzalez-218322> [<https://perma.cc/8V3T-J5YR>] (detailing that Mark Gonzalez has struggled to formulate a clear position on capital punishment and has ultimately brought several death penalty cases to trial); see also Howard Cohen, *Serial Killer Suspect Gave His Gun to McDonald's Boss, Cops Say. Now, He Could Face Death Penalty.*, MIA. HERALD, <https://www.miamiherald.com/news/state/florida/article196292854.html> (last updated Jan. 24, 2018, 5:24 AM) (indicating that State Attorney Andrew Warren of Hillsborough County, Florida, would be pursuing the death penalty in the case of a 24-year-old accused of four murders).

²³⁴ Our primary academic sources for the list we created were three articles — one by Rachel Barkow, see Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1369, 1371-72, 1376-78, 1387, 1391 (2021) (reviewing EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019)), one by Angela Davis, see Davis, *supra* note 54, at 10-11, and the other by David Sklansky, see Sklansky, *supra* note 54, at 25-26. For media reporting, we relied on a variety of national media reports, see, for example, Scott Bland, *George Soros' Quiet Overhaul of The U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM EDT), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519> [<https://perma.cc/T4KR-EX2S>]; Maurice Chammah, *These Prosecutors Campaigned for Less Jail Time – and Won*, MARSHALL PROJECT (Nov. 9, 2016, 6:14 AM), <https://www.themarshallproject.org/2016/11/09/these-prosecutors-campaigned-for-less-jail-time-and-won> [<https://perma.cc/LU9K-GJ36>]. Professor Pfaff's more recent list of progressive prosecutors can be found online. John Pfaff, *ReformProsecutorRaces*, https://docs.google.com/spreadsheets/d/1iSs_8gSOYGzLaxvFLFMdkUNhsqv1at6--FuK4w2Dc5U/edit#gid=0 [<https://perma.cc/M5VH-DTAZ>].

as insufficiently progressive or not truly dedicated to reform.²³⁵ Further, because our dataset ends in 2019, our list omits progressive prosecutors running in more recent elections.

With those caveats in mind, Table 14 sets out our list of reform-oriented candidates, including the total amount of campaign contributions they raised, the percent of contributions that came from within the district and within the state, and whether the candidate won or lost.

²³⁵ For example, our list includes candidates like Kim Ogg and Mark Gonzalez, even though others have challenged whether they are truly progressive prosecutors. Barkow, *supra* note 234, at 1372-73 (criticizing Ogg and Gonzalez for failing to deliver on their progressive promises).

Table 14

Progressive Prosecutor Elections							
Recipient	District	State	Year	Total	Geography		Outcome
					District	State	
Kimberly Foxx	Cook	Illinois	2016	\$3,012,031	91%	96%	W
Kim Ogg	Harris	Texas	2016	\$2,228,583	42%	99%	W
Eric Gonzalez	Kings	New York	2017	\$2,132,795	44%	90%	W
Joe Gonzales	Bexar	Texas	2018	\$1,848,805	19%	96%	W
Noah Phillips	Sacramento	California	2018	\$1,147,943	12%	98%	L
Buta Biberaj	Loudoun	Virginia	2019	\$1,109,350	7%	17%	W
Chesa Boudin	San Francisco	California	2019	\$978,202	44%	74%	W
Tiffany Caban	Queens	New York	2019	\$955,500	15%	53%	L
Stephen Descano	Fairfax	Virginia	2019	\$906,617	15%	32%	W
Parisa Dehghani-Tafti	Arlington	Virginia	2019	\$856,470	6%	18%	W
Lawrence Krasner	Philadelphia	Pennsylvania	2017	\$699,623	63%	74%	W
Marilyn Mosby	Baltimore City	Maryland	2018	\$636,180	43%	71%	W
Cyrus Vance	New York	New York	2017	\$621,092	72%	93%	W
Genevieve Jones-Wright	San Diego	California	2018	\$520,643	66%	76%	L
Beth Mccann	2	Colorado	2016	\$494,144	71%	95%	W
Jack Stollsteimer	Delaware	Pennsylvania	2019	\$465,937	20%	66%	W
Pamela Price	Alameda	California	2018	\$447,757	39%	94%	L
Kimberly Gardner	St. Louis City	Missouri	2016	\$413,830	14%	26%	W
Rachael Rollins	Suffolk	Massachusetts	2018	\$400,772	41%	81%	W
Andrew Warren	13	Florida	2016	\$399,644	45%	79%	W
Raul Torrez	2	New Mexico	2016	\$384,453	63%	69%	W
Lisa Middleman	Allegheny	Pennsylvania	2019	\$353,385	62%	68%	L
Wesley Bell	St. Louis County	Missouri	2018	\$343,057	57%	73%	W
Sherry Boston	Stone Mountain	Georgia	2016	\$339,637	37%	92%	W
Amy Ashworth	Prince William	Virginia	2019	\$326,191	32%	79%	W
John Cruzot	Dallas	Texas	2018	\$308,936	68%	86%	W
Simarjit Gill	Salt Lake	Utah	2018	\$288,860	--	--	W
Jeffrey Rosen	Santa Clara	California	2018	\$287,079	87%	99%	W
James Hingeley	Albemarle	Virginia	2019	\$273,265	62%	89%	W
Aisha Braveboy	Prince George's	Maryland	2018	\$236,840	68%	85%	W
Diana Becton	Contra Costa	California	2018	\$200,702	44%	96%	W
John Chisholm	Milwaukee	Wisconsin	2016	\$199,463	71%	98%	W
Dave Clegg	Ulster	New York	2019	\$187,058	65%	93%	W

Progressive Prosecutor Elections (Continued)							
Recipient	District	State	Year	Total	Geography		Outcome
					District	State	
Hobie Crystle	Lancaster	Pennsylvania	2019	\$179,090	68%	72%	L
Andrea Harrington	Berkshire	Massachusetts	2018	\$153,942	68%	90%	W
Daniel Satterberg	King	Washington	2018	\$153,204	95%	99%	W
Mark Haase	Hennepin	Minnesota	2018	\$137,718	71%	80%	L
Kelly Miles	Chesterfield	Virginia	2019	\$133,709	42%	92%	L
Jody Owens	7	Mississippi	2019	\$119,224	55%	78%	W
John Bradley	Plymouth	Massachusetts	2018	\$118,040	54%	93%	L
Brian Middleton	268	Texas	2018	\$109,519	2%	100%	W
Santana Deberry	16	North Carolina	2018	\$107,320	49%	66%	W
Shani Mitchell	Monroe	New York	2019	\$98,863	54%	73%	L
David Leavitt	Utah	Utah	2018	\$85,992	55%	95%	W
Mark Gonzalez	105	Texas	2016	\$76,431	95%	100%	W
Richard Berube	Dutchess	New York	2019	\$67,112	72%	95%	L
Tori Salazar	San Joaquin	California	2018	\$57,000	100%	100%	W
Aramis Ayala	9	Florida	2016	\$50,764	58%	85%	W
Cory Williams	9	Oklahoma	2018	\$49,448	44%	99%	L
Charles Henderson	10	Alabama	2016	\$43,603	45%	100%	W
Turahn Jenkins	Allegheny	Pennsylvania	2019	\$39,450	68%	80%	L
Jake Lilly	1	Colorado	2016	\$36,515	71%	85%	L
Ferris Dixon	3	North Carolina	2018	\$32,059	27%	41%	W
Jenny Proehl-Day	14	Oklahoma	2018	\$32,014	78%	84%	L
Sarah George	Chittenden	Vermont	2018	\$28,276	55%	90%	W
Diego Rodriguez	Maricopa	Arizona	2016	\$26,636	85%	93%	L
Victor Minjares	Thurston	Washington	2018	\$21,218	69%	82%	L
Mark Dupree	Wyandotte	Kansas	2016	\$21,108	45%	81%	W
Darius Pattillo	Flint	Georgia	2016	\$20,256	16%	100%	W
Scott Colom	16	Mississippi	2019	\$16,986	45%	68%	W
Gregory Underwood	Norfolk City	Virginia	2017	\$16,123	37%	95%	W
Justin Kollar	Kauai	Hawaii	2016	\$16,082	77%	100%	W
Robin Davis	Merrimack	New Hampshire	2018	\$5,361	92%	99%	W
Michael Conlon	Hillsborough	New Hampshire	2018	\$2,850	9%	9%	W
Stephanie Morales	Portsmouth City	Virginia	2017	\$0	--	--	W
John Hummel	Deschutes	Oregon	2018	\$0	--	--	W

The candidates who ran on criminal justice reform platforms were among the most prolific fundraisers in our dataset. Two of the top five highest-grossing candidates were progressives: Foxx reported raising over \$3 million, more than any other candidate, while Ogg raised about \$2.2 million. (Gonzalez was the sixth-highest grossing candidate, at \$2.1 million.) Krasner raised roughly \$700,000 in direct contributions, enough to put him in the top forty candidates by amount raised.²³⁶ Overall, of the progressive candidates we identified, only about a quarter of candidates raised less than the median candidate type in similar population categories, and more than 30 of them raised more than \$150,000. Further, in more than half of elections featuring a progressive candidate, the progressive candidate outraised his or her opponent. Because progressives raised so much money, four of the top five highest-grossing elections featured a progressive candidate who ultimately won the race²³⁷: Foxx in Cook County (Chicago), Krasner in Philadelphia, Eric Gonzalez in Kings County (Brooklyn), and Joe Gonzales in Bexar County (San Antonio).

Reformers' campaigns seem to realize democratizers' hope of more engagement with the public (at least measured here using campaign fundraising) as a path to criminal justice reform.²³⁸ Nevertheless, progressive prosecutors do not fully vindicate the democratizers' theory. The success of progressive prosecutors in some of the largest jurisdictions across the country — the jurisdictions which we characterize as more political than bureaucratic — does not say anything about whether similar candidates can succeed in the vast areas of the county where the local prosecutor is more like a bureaucrat. On the one hand, perhaps progressive candidates can infuse more politics into otherwise bureaucratic offices. On the other, it is not clear if the playbook so far could be so easily adapted.

Importantly, democratizers hope that *local* communities will serve as catalysts for reform. Although progressives received many small contributions from individuals in their districts, significant portions of their funds came from outside of their district and outside of their state. For example, Kimberly Gardner, who successfully ran for prosecutor in

²³⁶ As noted below, our data likely understates the fundraising power of reform candidates because it does not include independent expenditures. *See infra* text accompanying notes 241–42. The significant donation from Texas Safety and Justice PAC to Kim Ogg is the exception — in other states, with different campaign finance regimes, such contributions would likely have been made as independent expenditures. *See Bland, supra* note 234 (noting that Soros generally gives via a variety of state-specific PACs, “each named a variation on ‘Safety and Justice’”).

²³⁷ *See supra* Table 7.

²³⁸ *See supra* text accompanying notes 52–53.

St. Louis, raised nearly three times as much money from donors outside her state as from those within Missouri.²³⁹ Andrew Warren, who won in a Florida district including Tampa, received the majority of his donations from contributors outside of his district. So did a variety of other progressives, such as Eric Gonzalez and Kim Ogg. As a group, the progressive candidates raised 20% of their money from out-of-state donors.²⁴⁰ In contrast, out-of-state donors account for 8% of the total amount raised in prosecutor elections.

If anything, our data understates the influence of outsiders financing progressive prosecutor campaigns.²⁴¹ Some of these reform candidates have attracted powerful political patrons, such as George Soros. By 2018, Soros had spent at least \$19.27 million on behalf of twenty-one progressive prosecutors' campaigns.²⁴² Other philanthropists and nonprofit organizations have also contributed large sums of money to the broader cause of reform through prosecutorial policies.²⁴³ It seems unlikely that this is the local democracy the democratizers were thinking of. Instead, it looks more like the nationalization of local politics that is fueling reform.

The fundraising power of progressive prosecutors has significance for activists as well. Campaign financing in prosecutor elections has been the subject of a much more practical debate in which some reformers have called for limits to campaign contributions in prosecutor elections. For

²³⁹ Gardner's reliance on out-of-state contributors is likely in part because the St. Louis metropolitan area includes parts of Illinois. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB BULL. NO. 15-01, REVISED DELINEATIONS OF METROPOLITAN STATISTICAL AREAS, MICROPOLITAN STATISTICAL AREAS, AND COMBINED STATISTICAL AREAS, AND GUIDANCE ON USES OF THE DELINEATIONS OF THESE AREAS 47 (2015), <https://www.bls.gov/bls/omb-bulletin-15-01-revised-delineations-of-metropolitan-statistical-areas.pdf> [<https://perma.cc/M2S5-FYBZ>] (noting that the St. Louis Metropolitan Area includes the Illinois counties of Bond, Calhoun, Clinton, Jersey, Macoupin, Madison, Monroe, and St. Clair).

²⁴⁰ This percentage is based on the contributions to progressive prosecutors for which we have addresses, which is not all. Of all contributions to progressive prosecutors, about 97% had sufficient information to determine whether they came from the same district or state.

²⁴¹ See *supra* note 156.

²⁴² Paige St. John & Abbie Vansickle, *Here's Why George Soros, Liberal Groups Are Spending Big to Help Decide Who's Your Next D.A.*, L.A. TIMES (May 23, 2018, 7:00 AM PT), <https://www.latimes.com/local/california/la-me-prosecutor-campaign-20180523-story.html> [<https://perma.cc/RD79-XSGL>]; see Fleming, *supra* note 156, at 16-21 (reporting Soros' expenditures in various races).

²⁴³ See St. John & Vansickle, *supra* note 242. At least one group, the Open Philanthropy Project, directed \$6.6 million to "prosecutorial reform" between 2014 and 2017. *Id.*

example, in California, there was a recent effort to have the state bar prohibit local prosecutors and candidates for prosecutor from accepting police union donations.²⁴⁴ The proponents of the rule argued that police union contributions could influence prosecutors' charging decisions: because prosecutors had often failed to charge police officers for using unjustified force against civilians, it was necessary to ban such contributions.²⁴⁵ Individual candidates have likewise sometimes made pledges or decisions to not accept contributions from certain groups. For example, the winning candidate in the 2021 Manhattan district attorney election placed limits on the amount that any lawyer could contribute to his campaigns, and he pledged not to accept *any* contributions from a lawyer who had represented a client with a criminal case before the office in the previous four years.²⁴⁶

These calls to restrict campaign contributions to local prosecutors are best understood as part of the broader discussion about the financial incentives for government officials to be punitive. Part of that broader discussion includes claims that America's incarceration explosion was driven by the profit motive of private prisons.²⁴⁷ Relatedly, some argue that the financial windfalls of civil asset forfeiture drive policing decisions.²⁴⁸ And others argue that governments increase criminal law enforcement in order to fund other services through the collection of fines and fees.²⁴⁹ Implicit in all of these arguments is the idea that America would be less punitive if financial incentives to punish did not exist.

²⁴⁴ 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/62RR-VXRJ>].

²⁴⁵ *See id.*

²⁴⁶ *Donation Restrictions - Attorneys*, ALVIN BRAGG MANHATTAN DA-ELECT (Feb. 7, 2022), <https://www.alvinbragg.com/restrictions-for-attorneys> [<https://perma.cc/YW6X-SNFZ>].

²⁴⁷ *See* PFAFF, *supra* note 5, at 79-104 (discussing and ultimately dismissing such claims).

²⁴⁸ *See, e.g.*, LISA KNEPPER, JENNIFER McDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* (3d ed. 2020), <https://ij.org/report/policing-for-profit-3/> [<https://perma.cc/UK6T-M5UR>].

²⁴⁹ *See, e.g.*, *Policing and Profit*, 128 HARV. L. REV. 1723, 1726-33 (2015) (providing three examples of governments raising revenue through policing); *see also* Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71 (2009) (using a panel of annual data for North Carolina counties from 1990 to 2003 and finding that significantly more tickets are issued in the year following a decline in revenue); Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES,

There is value in limiting campaign contributions to avoid even the appearance of impropriety.²⁵⁰ But our findings do not appear to support the idea that campaign contributions in particular lead to more punitive policies or that limiting contributions will necessarily help the cause of criminal justice reform. We simply did not find many contributions by interests that seem to skew punitive. In total, we identified less than \$2 million in contributions from law enforcement and less than \$200,000 in contributions from the bail industry. To the extent that prosecutors are pursuing punitive policies in their districts, it does not seem to be because of the financial incentive provided by campaign contributions. To the contrary, those low-population areas that have continued to increase the number of people they send to prison²⁵¹ are also the places where we see little or no campaign fundraising.²⁵² Perhaps punitive interests are so well represented in the status quo that contributions are not necessary. Regardless, if punitive interests do not typically contribute to prosecutors, limiting campaign contributions is unlikely to have any effect on mass incarceration. As a result, criminal justice reformers should likely spend their time and political capital on other measures.

More generally, limiting campaign contributions could actually stymie reform, at least in the short term, because it could decrease the ability of outsiders to build the name recognition that they need to win office. As noted above, candidates who run as challengers to incumbents and those who run for open seats are less likely to win if they are outspent.²⁵³ In other words, if criminal justice reform depends on getting new, less punitive candidates into office, then limiting the ability to fundraise in prosecutor

<https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html> (last updated Nov. 2, 2021) [<https://perma.cc/VFB2-6BEQ>] (“Many municipalities across the country rely heavily on ticket revenue and court fees to pay for government services, and some maintain outsize police departments to help generate that money, according to a review of hundreds of municipal audit reports, town budgets, court files and state highway records.”).

²⁵⁰ See *CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY*, *supra* note 83, at 1 (providing suggestions for how to reduce potential conflicts of interest by reducing or limiting campaign contributions).

²⁵¹ See *JESSICA T. SIMES*, *PUNISHING PLACES* 9, 77-78 (2021) (documenting that small-population counties sent a disproportionately high number of people to the state’s prisons — a shift from earlier studies which had found that prisons were largely populated by people from large metropolitan cities); *Hessick & Morse*, *supra* note 14, at 1566-67 (reporting that incarceration is increasing in small population districts while decreasing in the large population districts).

²⁵² See *supra* Table 5.

²⁵³ See *supra* Table 12.

elections is likely to disproportionately harm those candidates who are running to reform the system.

Limits on large contributions would also have disproportionately harmed the progressive candidates in our dataset.²⁵⁴ Progressives were the top beneficiaries of large-dollar contributions, excluding self-contributions: Ogg was the recipient of the two largest non-self-contributions in our dataset — \$550,000 and \$300,000 from the Texas Safety and Justice PAC — while Kim Foxx received three contributions of \$200,000 apiece from businessman Fred Eychaner.

Of course, our data is limited to less than a decade of campaign finance data. It is possible that punitive interests may begin to donate more money in prosecutor campaigns as the “surface politics”²⁵⁵ of criminal law shift from punitive to progressive.²⁵⁶ And now that the progressive prosecutor movement has become more high profile, reform candidates may not need to spend as much money to win over voters. But, at least in the short term, limits on campaign contributions are unlikely to make the criminal justice system less punitive, and such limits may actually be more detrimental to candidates running on platforms of criminal justice reform.

CONCLUSION

This Article shows how campaign contributions can help us better understand the local politics of mass incarceration. Specifically, it collects and analyzes hundreds of thousands of contributions to local candidates for prosecutor across 45 states along with the results of their elections. In general, we find that prosecutor elections are a relative bargain compared to other political offices. There are, however, stark differences in fundraising across the country. In many large, urban jurisdictions, local prosecutor’s offices seem to function as we would expect a political office might: multiple candidates run for the office, campaign for votes, and try to convince voters to select them for the office. But most prosecutor offices

²⁵⁴ Of course, limits on large contributions can be circumvented through independent expenditures. See *Citizens United v. FEC*, 558 U.S. 310, 312 (2010). Therefore, it is unclear how great this harm would be.

²⁵⁵ Stuntz, *Pathological Politics*, *supra* note 21, at 510.

²⁵⁶ For example, in the 2022 recall election of progressive San Francisco district attorney Chesa Boudin, outside groups spent more than double to recall Boudin as the groups trying to defeat the recall effort. See Dario McCarty, *Big Donors Fueled High Profile Recall of Progressive San Francisco District Attorney Chesa Boudin*, OPEN SECRETS (July 7, 2022, 2:14 PM), <https://www.opensecrets.org/news/2022/07/big-donors-fueled-high-profile-recall-of-progressive-san-francisco-district-attorney-chesa-boudin/> [https://perma.cc/FC3D-9TG9].

appear more bureaucratic: in these jurisdictions, prosecutors rarely face challengers, and even when they do, campaigning tends to be minimal. The result is that local elections provide much more democratic accountability in some places than in others.

Because prosecutors wield significant power, and because there are few legal checks on that power, those interested in criminal justice reform should consider forms of accountability for prosecutors *in addition to* elections. In particular, the accountability mechanisms that are frequently employed in bureaucracies — including hierarchy, supervision, reporting requirements, and job evaluations — offer another avenue to ensure that prosecutors do not exercise their power without scrutiny or feedback.

That is not to say local democracy cannot usher in reform. Progressive candidates for prosecutor have enjoyed stunning success. Many of these candidates were prolific fundraisers, and few, if any, punitive interest groups lined up in opposition to their campaigns. In that sense, money in prosecutor politics has served as a moderating, rather than punitive, force. But while local democracy may prove to be a fruitful path to reform, outside moneyed interests, rather than grassroots local activism, seem to fuel that success.

Importantly, our analysis of local prosecutor elections offers just one application of how our data can inform the growing interest in reforming prosecution. Our data provides detailed information about individual prosecutor elections across the country, the candidates in those elections, and the donors who contributed to each candidate. The data we have collected is now publicly available, and we hope it will inform voters and scholars alike.

Table A.1

Data Coverage		
State	Election Year	
	First Cycle	Second Cycle
Alabama	2016	--
Arizona	2016	--
Arkansas	2014	2018
California	2014-16	2018-19
Colorado	2016	--
Florida	2014-16	2018
Georgia	2014-16	2018-19
Hawaii	2016	--
Idaho	2016	--
Illinois	2016	--
Indiana	2014	2018
Iowa	2014-14	2018
Kansas	2016	--
Kentucky	2012	2018
Louisiana	2014	--
Maine	2014	2018
Maryland	2014	2018
Massachusetts	2014	2018
Michigan	2016	--
Minnesota	2014	2018
Mississippi	2015	2019
Missouri	2014-16	2018

Data Coverage (Continued)		
State	Election Year	
	First Cycle	Second Cycle
Montana	2014-16	2018
Nebraska	2014-14	2018
Nevada	2014	2018
New Hampshire	2016	2018
New Mexico	2016	--
New York	2014-17	2018-19
North Carolina	2014-16	2018
North Dakota	2014-14	2018
Ohio	2016	--
Oklahoma	2014-14	2018
Oregon	2014-16	2018
Pennsylvania	2015-17	2019
South Carolina	2014-16	2018
South Dakota	2016	--
Tennessee	2014	--
Texas	2014-17	2018
Utah	2014-14	2018
Vermont	2014	2018
Virginia	2015-17	2018-19
Washington	2014	2018
West Virginia	2016	--
Wisconsin	2016	--
Wyoming	2014-16	2018