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Arrested Development: Political Barriers to Modern Pretrial Reform

A thesis submitted in partial fulfillment of the requirement
for the degree of Bachelor of Arts in Public Policy from
The College of William and Mary

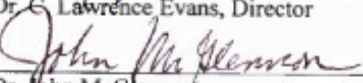
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Across the United States, pretrial incarceration is a major driver of climbing jail populations. One specific reform, called pretrial services is being instituted to some degree all across the country; however, most Americans still do not have access to these reforms. This paper will examine the distribution of pretrial reform and the partisan factors that influence access to pretrial services. Using both state-level analysis and county-level analysis of Virginia, this paper shows that areas with higher proportions of Republican voters are less likely to have pretrial services. The final chapter shows that this effect is partially explainable in Virginia due to the fact that more conservative counties are less likely to cooperate with other nearby counties and prefer to cooperate with other conservative counties. These findings imply that pretrial reform must be viewed as not simply a criminal justice or procedural problem, but as a distinctly political issue. States like Virginia that desire more widespread reform should alter inducements to encourage county cooperation for conservative districts to ensure that pretrial services is available to all citizens.

Introduction

When Kalief Browder was 16 years old, he was accused of stealing a backpack. He was sent to Rikers Island Jail Complex where he stayed for three years, two of those in solitary confinement, while he endured abuse by both prisoners and guards. He was never convicted of a crime. After three years, the prosecutors dropped the charge and he was released; but he could not escape from the experience he had in jail. He began to recreate the conditions of solitary confinement in his parent's house, and in June 2015, he took his own life (Schwartz & Winerip, 2015). This story is disturbing, but not unique. Sixty percent of the current American jail population is

awaiting trial (Jones & Alysia, 2018). The average defendant will wait ten months in jail before getting to trial (Dalakian, 2018) all while ostensibly being presumed innocent by the government. If they are too poor to pay their bail, they will remain in jail, losing jobs, friends and community connections. If they have the means to pay, they can be released within 48 hours.

What is Pretrial?

The time between a person's arrest and when a case is disposed, through jury trial or a guilty plea, dropped charges or otherwise is called pretrial. Many people are released from custody pending their trial because they have been deemed to not be a threat to society or they have been able to secure enough money to pay bail. Bail serves as a guarantee. If a defendant is able to pay the amount of money set by a judicial officer, they are released and when they appear for their trial, they are given the money back. In 2006, the average bail amount in large counties in the United States was \$55,500. For comparison, raising \$400 in the event of an emergency would be a challenge for almost half of Americans (Board of Governors of the Federal Reserve System, 2016).

Faced with these facts, many Americans turn to bail bondsmen, who generally charge a non-refundable 10% fee in exchange for posting the entire bail amount. These bondsmen therefore take on the responsibility of ensuring a defendant's appearance in court, which can take many forms (see: Jones & Alysia, 2018). Bail is set by judicial officers, generally magistrates or judges. These officers must quickly determine an amount of money sufficient to ensure the appearance of a defendant but not so large that the defendant will remain imprisoned simply

because they cannot pay. Often, a judicial officer must make this determination without any knowledge of a defendant's financial situation (Dalakan, 2018).

Across the country, criminal courts at all levels are creating pretrial services offices. These offices serve two purposes: risk assessment and supervision. While risk assessment has traditionally been strictly the purview of judicial officers, more and more criminal justice systems are implementing actuarial risk assessment instruments (ARAI). These instruments are computer models, developed to predict the risk of a defendant absconding or reoffending. There are many different types of ARAI and they will be discussed in detail in the second chapter of this study.

No analysis of American criminal justice systems can withstand scrutiny without including a discussion on the role of race. Many scholars have explored the pervasive role of conscious and subconscious bias in justice systems, specifically as it relates to pretrial release (see: Heaton, Mayson, and Stevenson 2017; Dobbie, Goldin and Yang 2018). Generally, these studies show that discretion granted to judicial officers in the determination of pretrial release or bond amount is ripe for subconscious bias to play a role. Judges systematically deem black defendants as more risky than white defendants forming another link in a long chain of race-based failures of our justice system. Pretrial reform is therefore doubly valuable to communities of color as it can provide judicial officers with race-neutral¹ ways of evaluating risk. Although race will not always be at the forefront of this study, it is important to consider that justice systems throughout the United States often do not treat people of different races consistently or fairly.

¹ The race-neutrality of risk assessment methods is often at issue, and will be explored further in Chapter 1

The expanded use of ARAI as part of a pretrial services program with the intention of increasing bail-free release, or Release on Own Recognizance (ROR), has tremendous potential to reduce the burden placed on defendants by the justice system. Prosecutors, Chiefs of Police and the American Civil Liberties Union have all voiced their support for the increased use of pretrial services. The cooperation of these organizations is notable, especially because they are often on opposite sides of divisive issues. Their support is prima facie evidence for a consensus among practitioners about the positive value added to the criminal justice process by pretrial services.

Is this support shared by the general public and, by extension, politicians? It has been well established that liberal constituencies produce more liberal local policy (Wright, Erikson, McIver 1987). However, the mechanism is subject to debate. People are generally ignorant of state and local government issues, and state policy issues are often abstruse. How can citizens influence their state and local representatives on a range of issues on which they have no knowledge? Wright, Erikson and McIver propose that voters have an understanding of archetypal party candidates so, while they may not be aware of a specific candidate's position, they have a general sense of what a typical Republican and a typical Democrat supports. This can go to explain some of the correlation between partisan outcomes and the partisanship of constituent groups. This of course is an incomplete picture (see Tausanovitch, 2019), but this explanation continues to represent the most likely mechanism for state and local representation.

To be sure, elected legislators have control over pretrial services expansion. Reforms in New Jersey, California and Kentucky have shown that legislative action can quickly transform the level and type of access that citizens have to pretrial services. However, gaps in legislative action or lack of action can shift the locus of reform onto bureaucrats that administer court services.

Berkman and Plutzer (2010) provide a framework for the mechanism by which legislation and bureaucratic discretion interact. A legislative standard provides a baseline of service that will be provided. Above it exists a range of possible services that go above and beyond those mandated by law. The range of these possibilities is determined by the level of discretion wielded by the bureaucrats tasked with carrying out these services. In the context of pretrial services, many localities simply provide the statutory minimum; in Virginia, there is no mandate for pretrial services, so the minimum is no service at all. However, some bureaucrats use their discretion to coordinate county cooperation, apply for partial funding from the State and operate a pretrial services office. Why do some bureaucrats exercise discretion in this way while others do not? Does partisanship play a role in this decision? This study will seek to establish a link between partisanship and availability of pretrial services using multiple units of analysis.

This Study

The analysis done in this study will be divided into three sections: (1) National Trends, (2) a Case Study of Virginia and (3) a Cooperation Model for Virginia counties. Each section uses a mixed method combining personal interviews with stakeholders from all corners of the justice system including judges, prosecutors and scholars with quantitative analysis analyzing factors that impact the availability of pretrial services.

In the first chapter, I will explore how the practice of bail in America has shaped the pretrial process and describe the function and creation of pretrial services offices. I establish a framework adapted from existing work on bureaucratic functioning wherein unelected decision makers such as prosecutors are constrained by statutory guidelines for procedure but are afforded

a great deal of discretion. Discretion provides avenues for partisan values to impact the pretrial process. Traditionally, pretrial reform has not been coded as a Republican or Democratic issue. However, data analyzed in this chapter will begin to suggest large disparities in access to pretrial Reform between states with liberal constituencies and those with conservative constituencies.

To better understand the difference in availability of pretrial services, the next chapter is a case study of pretrial services in Virginia. Virginia lends itself particularly well to this study due to a number of factors. Roughly three quarters of Virginia counties have access to pretrial services, which represents a level of variation that is significant enough to warrant further attention.

Additionally, a group of Prosecutors in Virginia have taken up reforms to the pretrial system, which was made possible by the presence of the pretrial services offices. Studying these activist Prosecutors will help to examine the partisan flavor of pretrial reform. Virginia also was one of the first states to create and validate its own ARAI. This chapter will examine the creation and implementation of this tool. Finally, statistical analysis will show that the partisanship of a Virginia county is effective at predicting if that county will have a pretrial services office and the level at which that office is funded by both the Commonwealth of Virginia and the county itself.

In the final chapter, I will propose one explanation for the predictive power of partisanship established in the preceding chapter. Namely, that counties with more conservative constituencies are less likely to cooperate with surrounding counties. In Virginia, 33 pretrial services offices serve 100 counties. Often, the burden of establishing a pretrial services office is too much to bear for a single county. Cooperation between counties is able to offset costs and provide those arrested in each cooperating county with pretrial services. Maximum likelihood analysis will show that less conservative counties are more likely to cooperate and that

conservative counties tend not to partner unless they can partner with another conservative county.

Ultimately, access to pretrial services follows recognizable patterns. These patterns are strongly associated with measures of partisanship across states as well as counties in Virginia. Such a correlation could be surprising to scholars who emphasize lack of public opinion on local and procedural issues. However, the presence of such a strong relationship goes to show the power of partisan differences in determining seemingly non-partisan goals and structures through both outright opposition as well as more nuanced considerations like decisions to cooperate between counties.

Chapter 1: National Trends

A Brief Legislative History of Federal Pretrial

Since the advent of bail in agrarian England, pretrial problems have been primarily understood as bail problems. This is likely due to the close relationship between the two. Historically, the main purpose of bail has been to guarantee the appearance of a defendant while they await their trial outside of jail. The creation of a landless underclass made absconding from trial a viable option, thus bail was born. In the modern age the practice of bail began to be used not just to insure appearance in court, but to detain people who were unable to pay the bail amount. This chapter will analyze the relevant history of pretrial reform in America as context for changes happening currently, then it will investigate factors that can promote or prevent reform.

The practices surrounding modern American bail were first identified as problematic by scholars in the late 1920s, who documented abuses of the pretrial system. In *The Bail System in Chicago*, Arthur Beeley found defendants being held for long periods of time before charges were filed and were often refused the ability to post cash bail themselves. Beeley highlighted the close relationship between bondsmen, judges and jailers. These relationships often funneled defendants to certain bondsmen and resulted in prohibitively high bail amounts. While this closeness may not have been explicitly illegal, in Beeley's view, it was certainly unethical. This incisive report and others like it prompted the first regulation of the bail bond industry. However, the industry was successful in shaping the outcome of the legislation to a point where it mostly put up barriers to entry and entrenched existing bondsmen (Beeley, 1927).

After World War II the issue of bonds resurfaced with renewed scholarly interest; by 1950, money bonds were nearly ubiquitous and often well outside of a defendant's ability to pay (Thomas, 1976). Research began to focus on the adverse effects of high bail amounts, even beyond the pretrial phase. Pennsylvania law professor Caleb Foote published a study showing that those who were too poor to pay their bail were significantly more likely to both be convicted and serve longer sentences (Foote, Markel & Woolley, 1954). In response to these revelations, activists formed the first ever pretrial services agency in New York to investigate arrestees and recommend that they be released on their own recognizance if they had sufficient community connections. The efforts of these activists were rigorously monitored and in the small treatment population there was no rise in the failure to appear rate (Vera Institute of Justice, 1972) as was predicted by opponents of the project. This project, called the Vera Institute, conducted rudimentary reports of an arrestee's so-called community ties through interviews with arrestees and verification. If the arrestee's community ties were sufficiently strong, the Institute would recommend release on own recognizance (ROR). The Institute also stayed in contact with participants, notifying them about approaching court dates and other deadlines. The structure developed by the Vera Institute would go to form the template for other efforts across the country.

In 1964, the New York Office of Probation took over the screening process from the Vera Institute as part of an effort by the state to reduce jail population. The program was extended to more defendants in more boroughs, yet the number of recommendations for ROR fell dramatically. This goes to highlight a fundamental barrier to broad based pretrial detention reform. No system makes definitive judgments about the characteristics of a defendant. However, if even one defendant deemed suitable for pretrial release were to reoffend, especially

in a violent or sensationalist manner, administrators worry that even one failure would be deemed a failure of the system as a whole by the public. Due to the fear of public backlash, the Office of Probation recommended fewer and fewer arrestees for ROR. This worry would appear to affect public administrators more than private ones, since the Vera Institute recommended many more arrestees than the Office of Probation, including famously, David Berkowitz, the “Son of Sam” serial killer. In fact, by 1970, judges were largely disregarding the Office of Probation’s recommendations; 32% of recommendations for ROR were granted while 28% of defendants not recommended for ROR by the Office of Probation were still granted ROR (Feeley, 2013). Since judicial officers must make a final determination, pretrial programs are only effective to the extent that risk reports are trusted by judicial officers and prescriptions made by pretrial services are followed. In 1973, the program was transferred back to control by the Vera Institute, this time with major funding from the Law Enforcement Assistance Administration.

In 1961, the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary began studies that five years later would lead to major reform. Contemporaneous studies by Professor Caleb Foote uncovered many practices in violation of statute, last updated in 1789. Chief among them was the widespread use of bail for other purposes than to insure the presence of the individual at trial. Additionally, bail was set using schedules rather than individual assessment. Particularly disturbing to the Senate committee was the fact that many defendants were being detained for failure to pay what seemed like reasonable bail amounts. A report was completed in 1963 and submitted to the Justice Department. Upon receiving the report Attorney General Robert Kennedy instructed U.S. Attorneys “to take initiative in recommending the release of defendants on their own recognizance when they are satisfied that there is no

substantial risk of the defendants' failure to appear at the specified time and place." (Hearings on S. 1357). The following year, S. 2838, S. 2839 and S. 2840 were introduced on behalf of all members of the Judiciary committee (Ervin, 1967). The first bill mandated that no person was to be denied bail simply because they could not pay; it also established the presumption of eligibility for release. One of the bill's authors explained: "Release on recognizance was not a new device by any means, but it was rarely used in practice." "The object of S.2838 was to find some way to encourage the courts to utilize their existing authority" (Ervin, 1967). The second bill's purpose was to increase the practice of crediting time spent in pretrial detention towards a defendant's conviction. The final bill provided for a court-maintained bonding system as opposed to private bondsmen. This recommendation was not followed, but ultimately the principles underlying these bills were incorporated in the next session into S. 1357, the Omnibus Bail Reform Bill. Notably, the Bail Reform Bill intentionally avoided the topic of preventive detention. The Department of Justice concluded:

Under all the circumstances, legislative authorization of preventive detention at this time seems unwarranted. Too much progress has been made and can be made within the framework of the techniques available under present law and the proposed conventional approach to risk the great uncertainties, legal and practical, which follow preventive detention (Hearings on S. 1357).

Therefore, the 1966 Act can be viewed as granting non-capital defendants the statutory right to release. The financial resources of the defendant were allowed to be considered but "danger to the community" was not a permissible factor (Ervin, 1967).

In the years to come legislative reluctance would prove to create problems because judges who wanted to detain seemingly dangerous defendants still had no choice but to set unreasonably high bail. The workaround devised by judges caused Congress to revisit bail reform in 1984. The 1984 Bail Reform Act authorized the use of pretrial detention for defendants who "present a risk

of flight”. Additionally, judicial officers were permitted to consider “the nature and seriousness of the charges, the substantiality of the Government's evidence, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by his release.” (1984 Act §§ 3142(b), (c), (e), (f).).

This Act faced a legal challenge when the Supreme Court heard *United States v. Salerno*. Lower courts ruled that the provision in the 1984 Bail Reform Act that granted judges the right to consider the future dangerousness of a defendant was an unconditional violation of the Fifth Amendment’s substantive due process guarantee. The lower court ruling was reversed by the Supreme Court, who ruled that pretrial detention did not constitute punishment, rather it was “a potential solution to the pressing societal problem of crimes committed by persons on release” (481 U.S. 739 (1987)). This decision cemented the judicial implications of the 1984 Bail Reform Act, and to this day allows judges (and ARAI) to consider future dangerousness as part of a bail determination.

During this period of reform, the Pretrial Services Act of 1982 was voted into law by voice vote in both houses of Congress. The Act provisioned for the hiring of pretrial services personnel for federal courts who were to “collect, verify, and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense...” (18 US.C §3154). In 2009, an actuarial instrument was developed which analyzed “number of prior felony convictions, number of prior failure- to-appears, pending charges, current offense type, current offense level, age at interview, highest educational level, employment status, home ownership, and substance use” to predict failure to appear and new criminal arrests (Lowenkamp, 2009).

Over 35 years after the federal courts extended pretrial services to all federal defendants, only seven states have adopted legislation that makes risk assessment available to all citizens.

Figure 1: Pretrial Detention Rate and Access to Risk Assessment by State

	Pretrial Detention Rate		Use of Validated Pretrial Assessment	
	Rate per 10,000 residents	Score	% Living in county using assessment	Score
Alabama	19.4	1	0	0
Alaska	20.1	0	0	0
Arizona	16.7	1	100	4
Arkansas	13.1	1	0	0
California	11.7	1	2.9	1
Colorado	10.5	1	87.4	4
Connecticut	10.2	1	100	4
Delaware	n/a	n/a	0	0
Florida	17.6	1	8.9	1
Georgia	19.5	1	0	0
Hawaii*	6.8	2	100	4
Idaho	11.5	1	0	0
Illinois	10.8	1	46.2	2
Indiana	15.7	1	0	0
Iowa	9.9	2	0	0
Kansas	14.1	1	20.1	1
Kentucky	16.1	1	100	4
Louisiana	29.9	0	8.4	1
Maine	5.1	2	0	0
Maryland	12.8	1	27.6	2
Massachusetts	7.7	2	0	0
Michigan	6.8	2	27.2	2
Minnesota	7	2	22.3	1
Mississippi	17.7	1	0	0
Missouri	14.6	1	0	0
Montana	12.8	1	0	0
Nebraska	13.1	1	0	0
Nevada	17.9	1	89.1	4
New Hampshire	8.4	2	0	0
New Jersey	14	1	100	4
New Mexico	21.8	0	32.5	2
New York	9.1	2	43.2	2
North Carolina	15.5	1	10.4	1
North Dakota	11.5	1	0	0
Ohio	9.1	2	29.3	2
Oklahoma	13.4	1	0	0
Oregon	8	2	19.5	1
Pennsylvania	15.9	1	9.6	1
Rhode Island	7.4	2	100	4
South Carolina	17.5	1	0	0
South Dakota	13.2	1	34.3	2
Tennessee	16.4	1	0	0
Texas	18	1	16.5	1
Utah	9.3	2	100	4
Vermont	7	2	0	0
Virginia	13.8	1	85.3	4
Washington	9.1	2	3.4	1
West Virginia	11.7	1	0	0
Wisconsin	10.1	1	25.7	2
Wyoming	16.1	1	0	0

While some states do offer partial coverage, broad-based access to risk assessment is not the norm in America. This chapter will investigate states' relative unwillingness to adopt reforms similar to those in the federal system. To that end, I will show how pretrial decisions are made from both a legislative and bureaucratic perspective. Then, I will explain who makes pretrial decisions by showing how judicial officers, prosecutors and pretrial services offices operate to generate and utilize risk reports. Finally, I will explore how partisanship affects the pretrial decision-making process.

Who Makes Decisions About Pretrial Policy?

Some pretrial policy comes from new laws passed by the state legislature. States like New Jersey and California have captured headlines by instituting statewide reforms to their pretrial systems. These reforms deserve their own individual analysis, but notable in each case is the level of bipartisanship involved. In the case of New Jersey, Republican Governor Chris Christie was a key instigator in pressing for legislative action. The current chapter will seek to understand if conservative legislatures are less likely to pass reform than liberal legislatures, but there are many opportunities for ideology to seep into the criminal justice system below the legislative level in more complex ways.

This study will focus on three main non-legislative actors: prosecutors, pretrial administrators and judges. While defense attorneys inevitably play a role in the process, a level of complexity can be removed from this analysis by regarding defense attorneys as always seeking the least restrictive pretrial agreement for their clients. However, it should be noted that defense attorneys,

especially public defenders, do affect the outcome insofar that they may not have adequate resources to zealously represent all clients, making plea deals more attractive.

Each player in the justice system has some degree of latitude to adjust policy as they see fit. The Constitution as well as statutes narrow the range of acceptable policies and practices so that they must meet a certain threshold. Of course, the threshold set by the constitution or legislature is not always met. For example, a judge in New York who explained her bond decision making process as “you sit and you stare at the defendant, you get a sense that this defendant is just going to take a hike” (Dalakian, 2017) was found to be constitutionally out of line. Judges have a set of elements that are the only factors they may consider; the look or feel of the defendant is not one of them. In most cases, the constitutional threshold is not very restrictive at all, as most judges are not as forthcoming about their decision-making process as the judge in this example. Additionally, as described in the historical background, constitutional protections have been routinely ignored when they prove to be inconvenient. Before the reforms of 1984, judges routinely made bail determinations prohibitively high as an (unconstitutional) means of detaining dangerous defendants pretrial. Above the threshold exists a wide variety of practices. There is no constitutional right to risk assessment, so states must pass laws for risk assessment to be implemented. Zooming in, individual decision makers also play a role as they too are afforded latitude as long as their practices remain above the constitutional threshold.

Prosecutors

Perhaps the most important players in the pretrial system are prosecutors, who generally make bail recommendations to the judicial officer. As will be addressed in the Virginia case study, prosecutors also have the power to institute policy surrounding pretrial practices to the extent

that they can begin requesting lower bond amounts or increased ROR. Prosecutors are constrained by judicial officers, who must ultimately approve bail recommendations. However, prosecutors wield considerable power because it is unusual for a judge to revise a prosecutor's bond recommendation upward.

Judicial Officers

Judicial officers include judges and magistrates (who often handle preliminary hearings). Judicial officers have the power to make final determinations of release conditions. These officers are bound by a number of factors. Legally, only a small number of factors that vary by state can be considered when assessing release or bail amount. Additionally, elected judges must be concerned with their public image. Judge Ronald Kessler explained judges' concern with image in an article bluntly titled "I Set a Defendant Free And Got Blamed When He Raped Someone". Kessler explains "Whenever a judge's photograph appears on the front page along with a felon's photo, it's bad news" (2017). Elected judges like Kessler rationally seek to balance these concerns with constitutional obligations. Therefore, reliance on recommendations can vary dramatically. In speaking with judicial officers from multiple districts, most agreed that they did not pay attention to pretrial reports themselves and rather relied on prosecutors to factor in risk scores when making their recommendations.

Additionally, in personal interviews, many judges have expressed that they put little to no weight into the consideration of pretrial services recommendations because they believe that the actuarial risk assessment does not or cannot consider factors that they deem important. One recurring theme was that actuarial risk assessment (in Virginia) does not take into account seriousness of the offense or weight of the evidence. Obviously, an actuarial tool cannot

accurately absorb subjective variables like the weight of the government's evidence against a defendant and many of these factors need to be carefully considered by a judicial officer.

However, I suggest that there is a separate issue at play with "seriousness of the crime". The tool these judges were speaking about does add additional risk points if the crime the defendant is being accused of was felony drug, theft or fraud, but does not make any additional distinctions within those categories. Judges may be over-sensitive to the seriousness of the crime because small details that may not be relevant to an actuarial assessment could go to inflame the passions of the public if details were to be released. While there is no substitute for individualized assessment by judicial officers, factors that may distort the process such as these must be considered.

Pretrial Services Offices

In addition to generating risk reports, pretrial services offices provide the important service of enforcing conditions for release set by a judge. For example, a judge may instruct a defendant to physically check in to a pretrial services agency once a week to confirm they have not absconded or submit to drug testing. These agencies also often provide court date reminders in an effort to increase court attendance rate. One federal judge called federal risk assessment (PTRA) "the best thing that ever happened to me"². This judge was expressing his gratitude surrounding both risk assessment and pretrial supervision and how those additions changed the nature of generating release conditions by making him feel more comfortable releasing defendants.

Pretrial administrators serve as a catch-all for recommendations made by evidence-based risk assessments. Administrators personally impact the system to the extent that they must obtain

² Interview notes on file with the author

grants or other sources of funding; but, for the purposes of the current study, there is no ideological influence ascribed to pretrial services offices themselves. In the same way that prosecutors' power is dependent on the willingness of the judge to entertain changes in policy, the ability of pretrial reports to influence outcomes depends on judges' willingness to take these reports into account when making a decision. Risk scores often face credibility challenges. Although the level of education varies by state, judges are generally not expected to know exactly how these models were created, or the underlying data that supports the validity of the model and therefore less likely to defer to the recommendation of a pretrial services agency. Alternatively, judges may be more willing to rely on their own experience than a model that has been validated using cases in aggregate or simply ideologically opposed to higher rates of ROR.

How Are Pretrial Policy Decisions Made?

Many scholars have investigated the proliferation of reform or lack thereof. Specifically, in the context of criminal procedure, Donald Dripps (1993) focuses on the failure of American legislatures to promulgate statutory rules of criminal procedure. Using public choice theory, Dripps constructs two possible reasons why legislatures may expand defendant protections. In one, legislatures will make new statutory rules to continue the use of a law enforcement method disallowed by the courts and only permitted if subjected to legislative constraints. An example is that legislatures are often unwilling to pay for the quality and quantity of public defense services required by the courts, so they write new statutes that provide more protections than previous statutes, but do not go as far as the judicial rulings. In the second, the method offends an interest group powerful enough to motivate the legislature. Dripps goes on to propose that benefits accrue to criminals and apparent criminals while costs accrue to members of the law enforcement

bureaucracy, giving opponents of reform more legitimacy and promoting the idea that the people who are most vulnerable are generally unorganized and politically uninterested (Dripps, 1993). However, this analysis, like many others, completely omits the role of partisanship. In Dripps' view, legislatures are monolithic bodies trying to appease the same constituents.

Dripps is critiqued by Walter B. Miller, who clarifies different archetypal ideological concerns for both Democrats and Republicans. Miller shows that Republicans have “crusading issues” such as rallying against excessive permissiveness, erosion of discipline and excessive leniency toward lawbreakers. While Democrats crusade over discriminatory bias, over-institutionalization, and over-criminalization (Miller, 1973). These ideological positions imply that there should be at least some variance in lawmaker support for reform, regardless of the level of involvement of their constituents. Clearly, partisanship plays a role in the development of preferences concerning crime and law enforcement.

To better understand how discretion is used by the various players in the system, it is instructive to draw links between the behavior of prosecutors and that of street-level bureaucrats; not only because of the large amount of literature on bureaucrat behavior, but because prosecutors experience largely the same forces. Lipsky (1983) defines street-level bureaucrats as those who work directly with members of the public. These bureaucrats are unelected (as are lower-level prosecutors) but may have elected managers. While many scholars do not classify judicial officers as bureaucrats, Lipsky explains that in his typology, judges fit the description of a street-level bureaucrat. Multiple researchers have undertaken careful studies to examine how these bureaucrats' actions come to reflect the will of the people. Berkman and Plutzer (2010) propose three ways public school teachers' decisions to teach evolution or intelligent design reflect the

partisanship of the local area. The question of how public opinion can percolate into bureaucratic or quasi-bureaucratic decision making is also important to this study. Accordingly, multiple links between Berkman and Plutzer's study can be drawn to judicial decision making. The authors propose three factors that influence teachers, and each can be applied to prosecutors. They are: assortative hiring, pressure, and contextual effects.

Assortative hiring is the process by which staff are recruited and retained. Simply put, if prosecutors are members of the community that they represent, they will be more likely than a random selection to share the community's values and beliefs. Additionally, employees who do not feel that their work reflects their personal opinions about how policy should be carried out may be more likely to leave their job. Assortative hiring only increases representation to the extent that the employee opinion actually reflects the opinion of the community and is therefore the weakest of the three effects.

In addition, pressure is directed at prosecutors through local advocacy groups and individuals who exert influence on prosecutorial decisions. Sabatier, Loomis and McCarthy (1995) show that interest groups are effective at influencing the operations of both elected officials and front-line employees; in this case, chief prosecutors and lower-level prosecutors respectively. The criminal justice landscape is filled with interest groups with strong positions on a multitude of different issues. Corporate groups such as the American Bail Coalition distribute funds to sympathetic politicians and mount legal challenges to new policies that decrease the usage of monetary release. Conversely, groups like the American Civil Liberties Union and the Pretrial Justice Institute lobby politicians to adopt practices that increase the usage of ROR. At the local level,

groups similarly attempt to influence decision making by both elected and unelected judicial actors.

Meier and Rutherford summarize contextual effects succinctly by explaining: “Discretion is ubiquitous in bureaucracy... if bureaucrats exercise their discretion, it will reflect their own values” (2017). Bureaucratic discretion is often not malicious or even intentional; rather, legal mandates and duties are often ambiguous and require interpretation and implementation. Alternatively, evidence has been produced that local public employees may alter policy implementation to bring it into better alignment with what they see as the local sentiment or needs of the community (Percival, Johnson and Neiman 2009). Contextual effects can be a strong driver of variation in pretrial practices. One Virginia Commonwealth Attorney who was implementing the practice of never requesting monetary bail for low-level offenses explained that he had no political motivations; rather, he believed that this policy would best serve the citizens of his county. His sentiment perfectly reflects how the wide amount of latitude given to prosecutors can allow contextual effects to influence the way that policy is implemented.

Some authors suggest that the acceptance of reforms “has more to do with the fame of symbolic politics... Judges and prosecutors have a common interest in avoiding responsibility for detaining people who cannot afford to post bond and for released defendants who subsequently fail to appear in court” (Feeley, 1983). Under Feeley’s conception, reform is attractive because both prosecutors and judges can point to the pretrial services office as the malefactor when there is a failure in the system.

The teacher-prosecutor/judge metaphor can be extended further when professional opinion is taken into consideration. Berkman and Plutzer note that virtually every biologist and academic group strongly support the teaching of evolution in the classroom, this however is sharply contrasted with a populace that largely prefers the teaching of both evolution and intelligent design. In terms of pretrial policy, the National Association of Counties, the International Association of Chiefs of Police, numerous prosecutors' associations and the American Civil Liberties Union all have voiced support for reforms that emphasize ROR. Their support is doubly notable because of the diverse ideological alignments of the supportive groups. This suggests that among criminal justice professionals, there exists at least some degree of agreement on reform proposals, which can be contrasted with divergent public opinion. Going forward, it will be important to understand how actors may respond differently to elite and mass pressure.

There are notable differences between the behavior of teachers and participants in the justice system. Firstly, prosecutors generally face more electoral pressure than teachers because both judges and top-level prosecutors are directly elected. Additionally, public opinion of pretrial policy is much less solidified than that of teaching evolution. Prosecutors and judges therefore experience much less mass pressure and therefore must act in a way that they think comports with mass opinion without being as assured as public-school teachers can be.

While bureaucrats are free to exercise their discretion, legislators typically are viewed as responsible for representing the will of the people, at least to the extent that it is a path to reelection. Arnold (1992) provides a useful framework for understanding issues that generally do not capture the public's attention by dividing any legislator's constituents into attentive and inattentive publics. The preferences of attentive publics, usually interest groups or people who

stand to be directly impacted by a policy, are easy to understand but must be weighed against those of the inattentive publics. More specifically, they must be weighed against the anticipated preferences of the inattentive publics were they to become mobilized on a specific issue.

Inattentive publics present the challenge of understanding and anticipating non-disclosed public opinion. Legislators must therefore “estimate three things: the probability that an opinion might be aroused, the shape of that opinion and its potential for electoral consequences” (Arnold, 1992). Arnold’s framework will help to explain how conservative public opinion in general could go to influence specific policies. For instance, if legislators believe that if reform were passed then their constituents would be mobilized against reform, this could present a mechanism by which conservative mass opinion influences pretrial policy.

Examining State Variance in Pretrial Services

Considering the multitude of factors outlined above, it is no surprise that a tremendous variety of pretrial processes and outcomes currently exist in the US. At the federal level, all defendants have pretrial risk assessment available to them. However, in state courts, only 25% of people live in a county that provides evidence-based pretrial risk assessment (PJI, 2017). Some states, like New Jersey and Kentucky, have mandated pretrial risk assessment in every county. Others, like Virginia, provide some funding to county pretrial programs but do not have a uniform mechanism for instituting statewide reform. Twenty-two other states do not employ pretrial risk assessment in any county.

Each reform tells a story. Politicians, activists, prosecutors and judges all across the country have fought for a system they see as more equitable. By looking at the variation in the percentage of

the population in each state with access to validated risk assessment, this allows us to understand trends and factors that may influence the development of reform.

Sample and Measures

In the case of pretrial reform, public opinion has not been aroused in similar ways to many of the example policies like teaching evolution. However, there are many issues that share this quality. Therefore, rather than explicit incorporation of public opinion, for example, people calling their representatives to urge them to support reform, public opinion becomes reflected in policy through multiple complex processes.

Erickson, Wright and McIver (1993) explain the prevailing scholarly viewpoint as “because state politics is beyond the attention of most citizens most of the time, there is little reason to expect state policies to reflect public preferences”. In this line of thought, Jack Treadway explains the lack of congruence between policy outputs as the result of uninformed voters, inability of voters to communicate preferences to politicians, apathy towards public preferences on the part of public officials and voter ignorance regarding their preferences actually being represented or not (1985). Erickson, Wight and McIver offer a rebuke to Treadway’s argument and clearly establish the association between the state’s general political attitude and policy enacted in that state through pooling survey data. They show that “state electorates control the ideological tone of the state policy by rewarding the state parties closest to their own ideological views and party control does have policy effects...” (Erickson, Wright and McIver, 1993).

Additionally, Weber and Shaffer (1972) show that policies enacted by state legislatures closely mirror the public opinion in that state. In fact, they find that measures of public opinion are more useful in predicting policy outcomes than characteristics of the state political system and socio-economic measures. Their findings lend credence to the claim that variation in state level pretrial policy is in part due to differences in ideology.

This analysis will compare access to pretrial across states that vary with respect to their partisan makeup, to understand the observed variation in pretrial policy. For the state-level analysis, the dependent variable used is the percentage of population that has access to validated risk assessment as measured by the Pretrial Justice Institute in 2017. The independent variables used are listed below:

Table 1: Independent Variables Used for Analysis

VARIABLES	DESCRIPTION
Coverage	Percentage of state population with access to validated risk assessment
Trump	State vote share of Donald Trump for 2016 presidential election
Population	State population in millions as measured by 2016 census estimates
Incarceration	Pretrial incarceration rate per 10,000 residents
hou_chamber	State House Ideological Median. Scale is -1 (Liberal) to +1 (Conservative)
sen_chamber	State Senate Ideological Median. Scale is -1 (Liberal) to +1 (Conservative).
ranney_control	Five-Year Average (2012-2017) of variables for Proportion of Democratic Control in State Senate, House, Governor's Office, and overall Government

The measures `sen_chamber` and `hou_chamber` are measures of partisanship for States' House and Senate bodies in 2016 as measured by Shor and McCarty in *The Ideological Mapping of*

American Legislatures (2011). The final measure of partisanship is the Ranney Index for party control as calculated by Gray, Hanson and Kousser (2017). The Ranney Index combines the average party vote for Governor, percent of seats held in each house of the legislature and how each party stood in terms of control of the combination of governor and two legislative chambers. The index takes in to account the period from 2012 to 2017 and looks at all the elections during that time to produce a state number from 1.000 (perfect Democratic control) to 0.000 (perfect Republican control). Additional information about demographic factors and the share of the population that voted for Donald Trump in the 2016 presidential election are also included.

Based upon this discussion, two hypotheses are generated that I test in the empirical analysis below:

H_{1A}: States that show stronger support for Donald Trump will be less likely to have access to Pretrial services.

H_{1B}: States with Republican controlled governments will be less likely to have access to Pretrial services.

Methods

To estimate the effect of partisanship on the availability of pretrial services, an ordinary least squares regression is used. A concern with this method is that multicollinearity between partisanship measures could produce incorrect standard errors or produce coefficients with incorrect signs so three models will be used, each with only one partisanship measure: Trump vote percentage, Senate partisanship, House partisanship and Ranney Control Index.

Table 2: OLS Regression Examining Converge on Multiple Dimensions of Partisanship

VARIABLES	(1) Trump Vote	(2) House Partisanship	(3) Senate Partisanship	(4) Party Control	(5) Full Model
Population (millions)	-0.0103 (0.00736)	-0.00613 (0.00689)	-0.00426 (0.00697)	-0.00559 (0.00718)	-.0000000142** (6.93e-09)
Incarceration Rate	0.00591 (0.0120)	-0.00154 (0.0116)	-0.00527 (0.0116)	0.00213 (0.0122)	0.00394 (0.0109)
Trump Vote	-1.744*** (0.588)				-2.644*** (0.894)
House Partisanship		-0.220** (0.0841)			-0.133 (0.138)
Senate Partisanship			-0.169** (0.0819)		0.0948 (0.143)
Partisan Control				0.796** (0.335)	-0.300 (0.635)
Constant	1.136*** (0.279)	0.405** (0.159)	0.412** (0.162)	-0.0677 (0.264)	1.790*** (0.639)
Observations	49	44	45	49	44
R-squared	0.183	0.175	0.124	0.132	0.341

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

Below are the elasticities for each measure of partisanship these measures show the percent change in coverage for a one percent change in each measure of partisanship for each partisanship variable in the individual models 1-4.

Table 3: Elasticities for Measures of Partisanship

VARIABLES	(1) Elasticity
Ranney Control Index	1.276** (0.587)
House Partisanship	-0.299** (0.128)
Senate Partisanship	-0.212* (0.111)
Trump Vote	-3.139** (1.198)

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Results

The first regression shows that a 1% increase in vote share for Trump corresponds with a 3.139% decrease in the predicted population with access to validated pretrial assessment. This estimate is larger than the corresponding estimates for party control, House, and Senate partisanship. Where the Senate effect is a .212% decrease in access to risk assessment and the House effect is a .299% decrease. The effect of a 1% increase in Democratic Party control corresponds with a 1.276 percentage point increase in risk assessment. The variables for incarceration rate and population control for these factors but are not significant to the model. This is likely influenced by the small sample size. These findings comport with both hypotheses outlined above.

Additionally, the finding of significance for the Trump vote variables robustness is bolstered by the fact that even in the full model, where multicollinearity is present³, significance is found. This further shows that missing variable bias is minimized.

³ Partisanship variables are correlated with each other with coefficients around .8

Discussion

If partisan preference had no impact on the presence of criminal justice reform, then one would expect to see small estimates for all four partisanship measures. However, this is not the case.

Three measures of party control all show that increased Republican control yields decrease access to pretrial services. If pretrial reform were simply a bureaucratic phenomenon, measures of party control should not have such a strong impact on pretrial services. It remains possible that bureaucratic decision making is tapping in to some underlying conservative public opinion, which is correlated with more conservative legislatures through the processes of assortative hiring, pressure and contextual effects discussed above. However, given the power of legislatures to influence pretrial reform, perhaps the relationship is more direct. The next chapter will explore reform in Virginia and attempt to descriptively show how bureaucrats and legislators share power.

Still, the largest effect and determinate of access to pretrial services is the percentage of Trump voters. The most simplistic answer is to show that more conservative legislatures are less likely to enact reform. This itself is interesting because these specific pretrial reforms generally are not included in party platforms and have not been previously conceived as a partisan issue. In this view, partisanship is simply a rudimentary proxy for public opinion concerning pretrial reform. Accordingly, one would expect to see significance for those ideology variables. This is a sensible conclusion; Republican opposition to pretrial reform is likely borne out of an opposition to

expansion of government bureaucracy rather than fiscal concerns. This analysis supports that conclusion but could be taken a step further.

It appears that support for Trump has an effect on risk assessment coverage above and beyond its effect on the ideological makeup of legislatures due to the large difference in the effect of the partisanship variables and the effect of the Trump vote variable. This finding aligns with the theoretical findings of scholars who emphasize the role of partisanship in the construction of preferences surrounding criminal justice.

While the exact mechanism remains undetermined, it is clear that these preferences are not solely being expressed through the election of state representatives. Instead, the ideology of Trump voters likely permeates through bureaucratic positions responsible for the enactment of reforms like risk assessment. What is this ideology and what are its links to pretrial policy? Trump vote in the current study is used as a rudimentary proxy for the partisanship of the public, but it is potentially capturing much more. Trump voters have been shown to be disproportionately from rural areas (Monnatt and Brown, 2017) and place high on measures of racial resentment (Sides, Tesler, and Vavreck, 2017). Surely, these factors could be correlated with opinion about pretrial reform. However, due to the limited awareness of pretrial reform, these factors more likely serve as a signal to both elected representatives and bureaucrats as to the response the public would have if public opinion were to be mobilized in the way described by Arnold.

These results beg the question of how these preferences are being expressed. Most voters are blissfully unaware of the minutiae of criminal procedure. The most likely answer is that any publicity would likely be due to a high-profile re-offense and politicians prevent that negative

publicity by maintaining the status quo. To be sure, implementing reform is politically risky, but parties approach the issue in very different ways with Republicans showing much more reluctance, especially in deep red states with many Trump voters. But we should avoid the narrative that pretrial reform is a Democratic issue because statutes have gone into place through the work of Republican legislatures all around the country in states like Kentucky and South Dakota and deep blue states like Vermont and Massachusetts remain without any risk assessment. These findings have meaningful implications for activists and legislators who seek to implement reforms and points to the importance of voter preference for non-electoral issues.

The findings shown here go to show that a single, homogenous set of Republican values regarding criminal procedure reform does not exist. Rather, there is some unique facet of Trump support that compels politicians to resist promulgating reform. To help answer the question of why, this paper will examine a state with large amounts of variation in availability of pretrial services from county to county: Virginia. An in-depth analysis of these states will further explore the link between pretrial reform and ideology with a more granular focus on individual decision makers.

Chapter 2: The Pretrial System in Virginia

Among the nationwide reformist energy surrounding pretrial reform, Virginia lies squarely in the middle on most metrics. This makes Virginia particularly apt for the study of pretrial reform. The study of pretrial services began in Virginia in 1989, pursuant to authorizing language in the Appropriations Act of that year. In 1995, pretrial services were authorized to begin operation by statute with the passage of the Pretrial Services Act, which also called for the creation of a risk assessment instrument. (§19.2-152.2 Code of Virginia). To construct the instrument, data collection took place from 1996 to 1999, and the instrument now known as the Virginia Pretrial Risk Assessment Instrument (VPRAI) implemented in 2005 (Rose, 2016).

It is worthwhile to discuss in detail the way that actuarial risk assessment instruments (ARAI), and specifically the VPRAI, are constructed as a way of contrasting actuarial risk assessment with the current practice of clinical assessment by judicial officers. First, the VPRAI must be put into context with the larger discussion of actuarial risk assessment instruments in general. “Risk assessment” is a broad term and ARAIs are used in many contexts beyond pretrial. The entire pretrial process is, at its heart, risk assessment. Whether it is a judge or an actuarial model, each must use available information to make a determination about the risk inherent in any individual defendant. Accordingly, the term “risk assessment” is insufficient to describe the ARAI because risk assessment may be clinical, meaning it is done by a judicial officer or actuarial, thus produced by an actuarial model.

Actuarial risk assessment instruments have enjoyed widespread acceptance for a reason, they promise to improve the current functioning of the criminal justice system in a variety of ways. One benefit of using ARAI in tandem with clinical assessment is the potential of actuarial

assessments to be calibrated. A judicial officer may have an idea of why some defendants are more dangerous than others, but an ARAI can give a specific percentage prediction, allowing judicial officers and policymakers to decide what constitutes acceptable risk. A 2012 study examining 116,000 defendants over a 16-year period showed that defendants with a 30 percent or less chance of re-offense constituted 85 percent of the pretrial population and that releasing defendants who met this bar would have resulted in significantly more releases than actually took place (Baradaran and McIntyre, 2011). Thirty percent may not be the preferred level, but it goes to show that setting a calculable risk level could not only improve equity in the pretrial process, but potentially aid the presumption of release.

ARAI may also be able to alleviate current socio-economic inequities if it can allow judicial officers to calibrate their decision making in such a way that increases ROR. In a randomized trial by the Virginia Department of Criminal Justice Services (DCJS), judges who were informed by Virginia's updated risk assessment tool were 1.9 times more likely to offer a defendant non-monetary release. Additionally, judges' decisions to release defendants on nonfinancial conditions increased 8.8 times when pretrial officers recommend release, when controlling for risk level, charge category, and demographic characteristics (Rose, 2016).

Critiques of ARAI

A common criticism of ARAI is the lack of individualized assessment. Because models compare defendants to population means rather than examine the defendant's behavior itself, some critics argue that models fail to take into account certain immeasurable qualities and therefore deprive defendants of their constitutional protections. For example, a common parable is that of the

defendant with a broken leg which proves he was unable to have committed the crime he is accused of, even though an actuarial model indicates otherwise. However, as Dalakan argues, “judges are just as likely to ‘rely on irrelevant factors or to include appropriate factors incorrectly’” than they are to be able to incorporate some sort of other unique factor (2017). In fact, concerning the earlier parable, Pfaff writes “For every case where the human sees the broken leg and makes a better call there is more than one case in which the human takes into account something irrelevant that the model ignores and thus reaches a worse conclusion.” (2015).

An even more common argument is that actuarial models will exacerbate racial disparities already present in the justice system. Sonia Starr predicts that ARAI “can be expected to contribute to the concentration of the criminal justice system’s punitive impact among those who already disproportionately bear its brunt, including people of color. . . Group-based generalizations about dangerousness have an insidious history in our culture” (2014). While few models explicitly use race, gender or national origin, many do include things like criminal history, zip code or housing status, which can be strongly correlated to race. These factors could serve to induce a disparate impact by predicting more danger for black or poor defendants. These arguments are valid and made in good faith, however they neglect the present reality of judicial discretion. Judges also consider criminal history and housing status, along with a host of other factors that are unknown or unknowable. Any bias introduced by these variables into an actuarial model would also be contained within a clinical assessment.

Another consideration is labeling. Pfaff notes that “For example, while men are more likely to commit crimes than women, most men will not commit crimes. But including ‘male’ as a risk

factor could encourage people to view all men as risky.” (2015). This delves into an interesting sociological argument; Pfaff writes that critics of ARAI may say “while judges may rely on impermissible factors, it may be less harmful for judges to use them less accurately but less explicitly”. Therefore, while the addition of some factors may in fact improve the accuracy of some model, collateral damage like the creation of negative associations or stereotypes should also be considered.

There is also a methodological argument to be made against ARAI, especially in regard to the synthesis of ARAI and artificial intelligence. In his book *Against Prediction: Profiling, Policing and Punishing in an Actuarial Age*, Bernard Harourt warns of the possibility of actuarial models informing criminal behavior. Specifically, if a person is aware of the factors that contribute to higher risk scores, she may behave in such a way to manipulate the scores to avoid detection or to seem less risky than is actually the case. Overreliance on models could cause criminal justice systems to focus too much on risky defendants who are risky because of factors included in the model while ignoring defendants who are risky for unknown reasons or because of random chance. Harcourt’s argument is credible in that models should avoid myopia and creating groupings of people who fit the typology of a criminal. However, these conclusions have limited applicability to pretrial risk assessment specifically. This is because the factors used in pretrial risk assessment are, for the most part, immutable, and those that can be manipulated are factors such as criminal record, drug abuse and past failure to appear. Surely a defendant who purposely avoids a criminal record or drug abuse would be considered a success story rather than someone manipulating the system.

Perhaps the most pressing issue affecting the fidelity of ARAIs is non-representative data. Ezekiel Edwards of the American Civil Liberties Union (ACLU) explains, “Algorithms and predictive tools are only as good as the data that’s fed into them . . . Much of that data is created by man, and that data is infused with bias.” (Simonite, 2017). Because these models rely on regression to produce risk scores, basic assumptions about the data must be satisfied for risk scores to be representative of the population as a whole. Many models rely on past arrests as a proxy for criminal behavior, however this relationship can break down if, for example, African Americans are arrested at a higher rate than Whites while the base crime rate is comparable.

In 2009, the Virginia Pretrial Risk Assessment Instrument (VPRAI) went through validation and further implementation becoming the first research-based pretrial risk assessment to be deployed on a large scale. Despite its name, the VPRAI is used in at least one jurisdiction in four states (Florida, Maryland, Michigan, and Virginia). The VPRAI weighs the criminal, appearance, drug and employment history of the defendant to sort defendants into six levels based on risk (VanNostrand, Rose & Weibrecht, 2011). The tool has been shown to be an effective predictor and race neutral.

The risk assessment consists of eight factors including measures of the following: (1) current charge, (2) pending charges, (3) criminal history, (4) failure to appear, (5) violent convictions, (6) length at residence, (7) employment/primary caregiver, and (8) history of drug abuse. The eight factors are weighted to create a risk score and defendants are assigned to one of six risk levels ranging from low to high (VanNostrand, Rose & Weibrecht, 2011).

The category current charge reflects the fact that defendants charged with a felony are more likely to fail (failure to appear, re-offense, or violate terms of pretrial) than those charged with a misdemeanor. Similarly, defendants who were on release when they allegedly committed a new offense are more likely to fail. The criminal history is included because defendants with one or more adult criminal conviction fail at a higher rate. More than two thirds of all defendants have at least one previous conviction. If a defendant has failed to appear in court two or more times this adds to their risk score. However, only five percent of defendants have failed to appear two or more times. Risk assessment defines violent convictions as “any act that causes or intends to cause physical injury to another person and includes felony and misdemeanor violent convictions”. This case increases the risk of a defendant. Defendants who lived at their current residence for less than one year are more likely to fail pending trial compared to defendants who lived at their residence for one year or more.

Defendants who did not maintain continuous employment at one or more jobs prior to their arrest, or were not a primary caregiver, are more likely to fail than defendants who were employed or a primary caregiver at the time of their arrest. Defendants with a history of drug abuse were shown to be more likely to fail than those without a history of drug abuse. DCJS defines drug abuse to include any illegal or prescription drugs. More than one-third (36.3%) of defendants were determined to have a history of drug abuse while the remaining 63.7% of the defendants were determined not to have a history of drug abuse.

Each of these factors are binary but are weighted differently to reflect various levels of importance. Factors with the weight of one are: Failure to appear, violent convictions and employment. Pending charges, criminal history and drug abuse have a weight of two and felony

charge has a weight of three. These add to a total possible risk score of 14. Pretrial services divides risk scores in to six categories, shown in figure 1 with the percentage of defendants who fall into each category.

Table 4: Failure Rate by Risk Level in Virginia⁴

RISK LEVEL	(1) SCORE	(2) TOTAL %	(3) ANY FAILURE %
1	0-2	21.8	6.1
2	3-4	22.9	9.8
3	5-6	22.8	14.9
4	7-8	19.5	21.4
5	9-10	10.0	29.3
6	11-14	3.0	37.1

In Virginia, these pitfalls have been mostly mitigated through careful selection of variables that are being considered. In 2009, when the VPRAI was revised, a study was presented showing the new factors of race and gender were neutral. First, it showed that whites and non-whites fail pretrial at the same rate (15.2% and 15.3%, respectively). However, separate multivariate regressions for whites and people of color show that the factors that contribute to the VPRAI model do have a stronger predictive ability for whites than people of color. The difference between these two models is also statistically significant⁵. The authors of this model solve the problem of racial differences in their models by weighting, summing and collapsing risk scores into the six categories discussed above. After this, the difference is no longer statistically significant⁶. Considered in total, these discrepancies do weaken the model, and go to reinforce

⁴ Source: Virginia DCJS, 2017

⁵ p=.002

⁶ p=.332

the fact that while risk categories do come from precise predictions, these precise predictions cannot be utilized because of their bias.

It is important to emphasize the fluid nature of actuarial models. Sample populations and risk coefficients must be continuously validated and updated for these tools to remain valid and avoid the worst of the collateral damage that ARAI are capable of.

Pretrial Reform in Virginia

While the creation and implementation of VRPAI was a major step for pretrial reform, recent reformist energy has been focused on a primary goal of pretrial services: the presumption of release. Some reformers have gone further than the creation of pretrial services offices to expand their efforts to include the elimination of the practice of monetary bail. The elimination of monetary bail is related to pretrial services to the extent that pretrial supervision is often seen as a replacement for the supervision and assurances given by bail bondsmen.

In January of 2019, Alexandria City Commonwealth Attorney Bryan Porter announced that he was instituting a new departmental policy of suggesting that defendants charged with misdemeanors be released on ROR with pretrial supervision. In this, he joined prosecutors in Richmond, Chesterfield and Arlington and a judge in Fairfax, all of whom have committed to similar policies. In Virginia, the practice of prosecutors initiating reform is relatively new. In April of 2018 the commonwealth's Attorney for Richmond announced the first departmental policy on pretrial. This policy included mandatory ROR for misdemeanors, but also mandated that prosecutors can only request detention if they can show that a defendant is dangerous. The

new policy is more restrictive than the current policy because statute provides for detention of defendants based on dangerousness or suspicion of absconding. Notably, the Richmond reforms also included a blanket ban on requesting monetary bail. To formulate these policies, Virginia Attorney General Mark Herring relied in part on his personal experience. In an interview he said, “when I was a junior commonwealth’s attorney and the judge looked down at me and said, ‘Mr. Herring, what’s your recommendation on bond?’ I literally pulled it out of my ass,” he says. “I’d think, ‘OK, it’s a felony, seems like it ought to be four figures, \$3,500 sounds right’” (Oliver, 2019). In this situation, Mr. Herring was one of the clinicians taking part in a clinical risk assessment. His comments go to show that often the authors of these bail terms do not have the information, time or capability to accurately and fairly assess all of the factors that must be taken into consideration. Mr. Herring took these limitations to be a compelling reason to put in place reforms that would restrict the acceptable range of prosecutorial and judicial decision making.

Returning to the model discussed in the previous section is helpful for understanding these reforms. The statutes of Virginia allow for a large degree of judicial and prosecutorial discretion. However, decisions by actors restrict the range of acceptable behavior further by imposing institutional rules. In the case of Commonwealth’s Attorneys, these actors are elected representatives who campaign explicitly on issues of reform in criminal justice. While few legislators stake out positions on specific reforms, the actions of these prosecutors may give us a clearer view into the partisan flavor of reform efforts.

To that end, it is worth noting that each of the commonwealth’s attorneys who have instituted reforms mentioned above are members of the Democratic party. As of February 2019, these four

prosecutors represent the only prosecutors who have instituted departmental bans on pretrial detention.

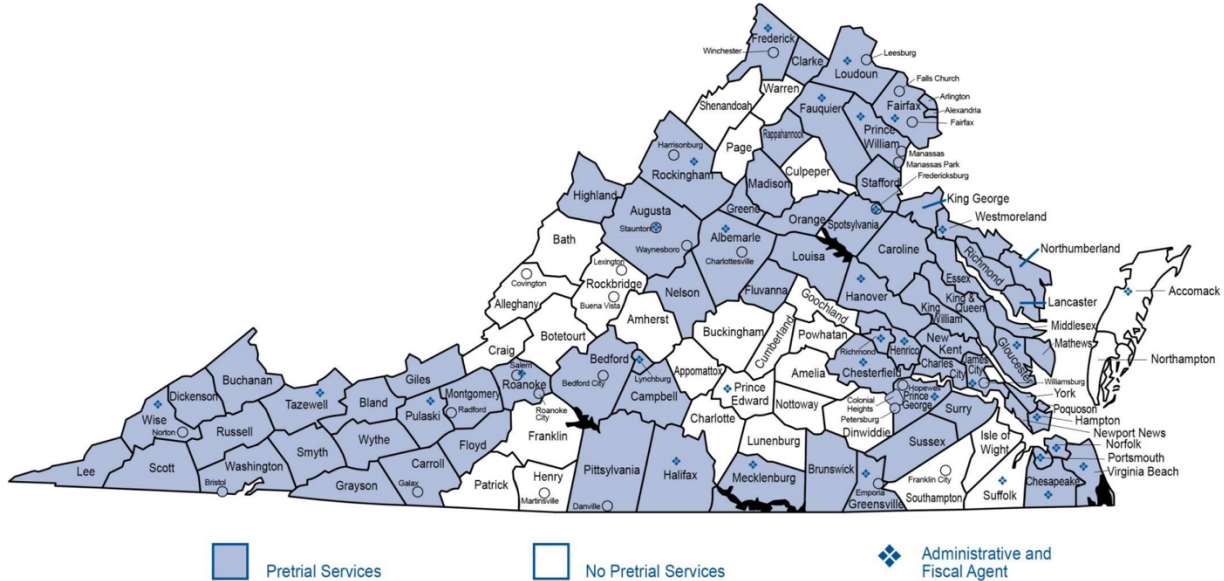
This raises an important question: can prosecutorial discretion serve as a model for reform going forward? Wright shows that in 85% of prosecutor general elections analyzed, the incumbent ran unopposed and the incumbent won 95% of the time (2009). Additionally, by drawing on a database of debate topics, Wright argues that even when an incumbent is challenged, chief prosecutor debates usually focus around single events or defendants that are viewed as failures by the incumbent rather than systemic change. These challenges cast doubt on the likelihood of a broad-based reform taking place purely by electing reformist prosecutors.

Reforms like the ones discussed above are, for the most part, too specific to be captured in the models used in this study which examine funding level and presence of pretrial services. Regardless, these stories help us to understand why counties with a more conservative voting population may be less likely to see the benefits of reform.

Examining Variance in Virginia

Virginia is divided into 95 counties and 38 independent (not included in a county) cities. Because the census regards cities as county-equivalents, I will use the term locality to refer to either counties or cities. 85.3% of Virginia citizens have access to validated risk assessment, which is administered by one of thirty-three offices (PJI, 2016). Virginians who do not have access to risk assessment are in that position because they live in one of the 33 localities not served by a pretrial services office. Figure one shows counties that do not have pretrial services in white.

Figure 2: Virginia Pretrial Services Availability by County



One pretrial services office often serves multiple localities, areas without risk assessment are generally geographically clustered. Additionally, they have the common trait of having lower population density. Localities without pretrial services have a median population of 18,236, whereas counties with pretrial services have a median population of 23,185.

Because of the skewed distribution of pretrial offices, meaning that most counties do have pretrial services and the tendency for offices to serve high population areas, there is no clear relationship between the ideological makeup of a locality and the mere presence of pretrial services. This is likely due to the number of confounding factors. Demographic factors as well as local crime rates could all impact the demand for pretrial services. However, offices and localities vary greatly with respect to the level of funding and number of referrals, which could

be impacted by partisan factors due to the nature of the discretion exercised by elected county officials as well as bureaucrats involved in the system.

Currently, 63% of the funding for pretrial services comes from the state of Virginia. The remaining share is paid by the localities using the pretrial services office. State funding is distributed by the Department of Criminal Justice Services (DCJS) as a grant. Grants are distributed through biennial appropriations from the General Assembly of Virginia. These continuation grants are only available to localities that have previously received funding from the DCJS. These funds are generally granted in a consistent way and are only revised if there is a performance problem in the locality requesting the funds. Increases in these funds generally arise only if there is a new jail construction project. This occurred most recently in 2012 when the Southwest Regional Jail was built, and funding was provided to expand pretrial services to the residents of that area. In 2016, the General Assembly provided additional appropriations for the expansion of pretrial services to areas previously unserved. Only 15 out of 33 unserved localities applied for the new funding, indicating a mixed desire to expand pretrial services. Funding for this grant was competitive due to the large amount of interest and small amount of funding and after counties were selected to receive the grant, there was a budget shortfall and the House of Delegates cut the program entirely resulting in a total lack of expansion.

Given these factors, two hypotheses will be tested by this analysis:

H₂: Localities in Virginia with larger Republican constituencies will be less likely to have a pretrial services office.

H₃: Out of the localities that do have pretrial services, those with larger Republican constituencies will receive less funding in total.

Sample and Measures

To analyze variance in funding for pretrial services, I will primarily rely on DCJS reports of pretrial services offices' performance. These reports summarize levels of state and local funding as well as caseload for fiscal year 2018. Culpeper County is omitted from these measures because they did not report their caseload or funding to the DCJS as they are entirely funded by Culpeper County. Therefore, there are 32 pretrial service offices included in this study. There are an additional 32 localities that do not have pretrial services, which are included in the dataset as censored observations with values of zero for funding and caseload. These measures are merged with demographic information in counties including the population and percentage of residents who identified to the Census as Black. While the population of each county or district is potentially explanatory, it is omitted from this model due to excessive correlation with the caseload of each district. This variable is preferable because it not only captures the demand in the district (which population would) but it also captures the actual work being done by each office.

Methods

First, a maximum likelihood, binary choice model will be used with a dependent variable of 1 if the county has pretrial services and 0 if not⁷. The next task is to model funding that is received by localities or groups of localities cooperating. To do this, the localities that do not have a pretrial services office are treated as left-censored observations because their true willingness to

⁷ Probit and logit models were compared using the Akaike Information Criterion calculated as $-2\ln(L)+2K$. For this specific set of data, the AIC was lower for the logit model, meaning that the logit model was a better fit for the data.

accept pretrial services may not be zero. Rather, some counties may in fact be willing to give money to avoid implementing pretrial services. Because of the presence of censored observations, a Tobit regression is used for the first analysis. This method has been validated in similarly studies where it has been shown that this regression can be reliably applied when datasets are censored (McDonald and Moffitt, 1980).

There are analytical limitations in the available dataset. Perhaps most importantly, there is a possible simultaneity problem with using the number of investigations as an independent variable because it is possible that funding impacts number of investigations which in turn affects funding. Unfortunately, the number of investigations is important to this model because it serves as a main control for the actual work being done by the office, additionally, these measures were collected for the first time in 2018, eliminating the possibility of using lagged variables⁸.

Further, a multi-state sample could improve issues related small sample sizes but would need to be carefully specified to avoid issues arising from the fact that there may be unobservable political or bureaucratic realities in different states.

Results

First, a logit model is used to model the decision to have a pretrial services office or not. There are certain limits on this model, primarily because, in most cases, localities that do not have pretrial services are being compared to groups of localities that do. For that reason, it is not

⁸ As these measures were collected as part of an ongoing study by the Virginia DCJS, in the future, lagged variables will be available.

viable to compare population, and caseload cannot be compared because counties without pretrial services have no caseload. Even given these limitations, the statistically significant and negative effect of GOP votes is notable because it goes to show that counties higher percentages of GOP voters are less likely to have a pretrial services office.

Table 5: Binary Choice Model for Pretrial Services Office

VARIABLES	(1) Logit Coefficient	(2) Odds ratio	(3) Marginal effects ⁹
Pretrial services			
GOP Vote Percentage	-9.037*** (2.768)	0.000119*** (0.000329)	-1.708*** (0.344)
Black Percentage	-2.822 (2.304)	0.0595 (0.137)	-0.533 (0.419)
Constant	5.426*** (1.861)	227.2*** (422.9)	
Observations	64	64	64
Standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1			

Because the marginal effect is negative and statistically significant, this shows that counties with higher proportions of Republican voters are less likely to have pretrial services.

Next, to calculate a model to understand the level of funding provided to the various localities in Virginia. Consistent Tobit expected values can be calculated where 0 is the censoring point (McDonald and Moffitt, 1980). This formula can be used to create a model where GOP vote percentage, African American percentage, number of investigations and the presence of a city

⁹ These are elasticities calculated by calculating the elasticity for each observation then averaging to produces the sample elasticity. Since this is a linear model, this is equivalent to calculating E[y] for an average case and these coefficients show how the model would change at the sample means.

(either a city is contained in the pretrial district or the city itself does not have pretrial services) are used as explanatory variable. Below is the Tobit regression using annual funding in thousands of dollars as the dependent variable:

Table 6: Tobit Regression of Presence of Pretrial Services

VARIABLES	(1) Tobit	(2) Elasticities
GOP Vote Percentage	-350.9** (156.3)	-.7170565** (.32402)
Percent Black Population	-313.1** (137.6)	-.2576817** (.11488)
Investigations	0.301*** (0.0216)	.7061435*** (.07391)
Presence of City	65.40 (44.10)	.1118022 (.07586)
var(e.funding)	24,189*** (4,276)	
Constant	296.1** (112.2)	
Observations	64	64

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

From this analysis, we can see that the percentage of people in a county who voted for Donald Trump in the 2016 presidential election has a large, negative and statistically significant effect on the amount of funding a pretrial office receives even after controlling for the amount of work the agency is doing. The number of investigations does indeed have a large t-score indicating the number of investigations plays a large role in the funding of an office. Calculating the elasticity of the independent variables will show what percentage change in funding is caused by a 1%

change in each independent variable¹⁰. The elasticities for each independent variable are listed in the second column of the chart above. For every 1% increase in Republican vote share, this model predicts a .71% decrease in funding.

Discussion

These results are consistent with the theoretical foundations laid out in this chapter as well as the regressions performed at the statewide level in the previous chapter. This result adds credence to the claim that Republican consistencies are an obstacle to pretrial reform even when controlling the caseload of individual offices. I will focus on three possible dynamics which can explain the observed differences in finding: demographic factors, political will, and lack of cooperation.

Firstly, although this model controls for the presence of cities and the African American population, there is still the potential for demographic factors not included in this model to have an impact on the level of funding for a pretrial services office. If such a variable could have an effect on both partisanship and the level of funding, this could be not captured in the model.

Political will is a broad term I will use to describe directly political factors that influence county managers and other political actors who impact grant writing and fulfillment. Grant allotments are primarily based on previous funding, so decisions to apply for the funding in the first place are a key driver of funding in the present. The models presented above go to support a

¹⁰ This is calculated as: $E_k = \frac{\delta E[\ln(y)]}{\delta \ln(x_k)}$. Where y is the amount of funding and x is the independent variable

conclusion that more conservative counties may be less likely to apply for funding, therefore contributing to the conservatism marginal effect.

Finally, a main driver of funding for pretrial services, especially for rural counties is the fact that multiple counties can unite together in cooperation, sharing a pretrial services office. While cooperation takes place often among counties that also share a regional jail, that is not always the case. In fact counties that have a similar partisan makeup to the counties around them are more likely to cooperate and jointly form a pretrial services office, this may be a driver of the difference observed among liberal and conservative counties. Alternatively, it may be that it is simply liberal counties that are more likely to cooperate, regardless of the partisan makeup of their adjacent partners. The next section of this study will focus on modeling interactions between counties in forming joint pretrial services office and factors that may affect the decision among county administrators to cooperate or not.

Chapter 3: County Cooperation in Virginia

County cooperation¹¹ occurs when multiple municipalities partner to provide joint services to the residents of the municipalities participating in the cooperative agreement. County cooperation is a strategy widely used on a variety of issues, usually municipal services like trash removal or city water. The previous chapter has shown that the majority (69%) of pretrial services offices serve more than one locality and have come about because of cooperative funding and management between localities. Given that financial burdens prevent most counties from establishing a single-county pretrial services office, it is important to understand factors that promote or prevent county cooperation. In fact, this chapter will examine the hypothesis that more conservative counties are less likely to cooperate with surrounding counties due to differences in preference for pretrial services and beliefs about the role of pretrial services and local government broadly.

Does Cooperation Help?

Scholars generally agree that two conditions determine the likelihood of county cooperation: the seriousness of the underlying problem and the aggregate gains from solving the problem (Lubbell et al., 2002). Therefore, it is key to assess pretrial services' suitability for gains from cooperation by examining the question of economies of scale.

¹¹ County cooperation is used here to refer to counties or cities cooperating with another county or city, not just cooperation between counties.

In fact, the question of potential gains from cooperation has been asked before. In 2012, the Joint Legislative Audit and Review Committee (JLARC) of Virginia published a report analyzing costs and benefits of state inducements for county-level cooperation. Among the programs researched as potential cost-saving measures was the use of pretrial services. This report found that “Expanding pretrial services to more localities has the potential to reduce State and local public safety costs, and could best be accomplished through regional collaboration” (JLARC, 2012). Additionally, the committee found that most counties lack the scale required to justify a single pretrial services office. Rather, operating in the same area already served by a regional jail may provide a path forward, especially for smaller counties. JLARC surveyed 44 county administrators, 22 of whom indicated that they were “very interested” in expanding pretrial services to their county, indicating that there is at least some level of interest among county managers in expanding pretrial services. As discussed in the earlier chapter, interest on a survey may not translate to actionable interest. In 2016, when additional grant money became available only 15 out of 33 counties without pretrial services applied for additional funding. The committee concluded by recommending that more funds be appropriated to encourage both the establishment of pretrial services and regional cooperation surrounding pretrial services offices, explaining that expansion of pretrial services will ultimately save Virginia money in the long run through jail diversion.

Scholarly Thought on County Cooperation

Many scholars have studied interlocal cooperation (Feiock, 2007; Zeemering 2009). These studies have produced important takeaways and uncovered multiple factors that influence cooperation between and within counties. These studies primarily focus on municipal services

like waste removal or water treatment, which could benefit from the economies of scale that come with cooperation. While the fact that municipal services like trash collection must be taken on by some entity can be contrasted with the fact that it is possible for pretrial services to be absent; in both cases the county administrator must make the decision to cooperate or not. Since these studies focus on the decision-making process of county administrators, they contain many important insights.

Additionally, these studies place an emphasis on counties working with cities that are within the county border. Because of the unique layout of Virginia municipalities, that is, cities are their own unit rather than being contained in a county, many of these conclusions must be slightly adapted before being applied to Virginia. For the purposes of this study, I identify three factors that have been shown to influence cooperation among municipalities: Administrator tenure, transaction costs, and homogeneity.

In his 2009 study, Zeemering used surveys of county administrators in California to model factors that promote cooperation. Using an OLS model, Zeemering tested many factors ranging from opinion on the importance of intergovernmental relations to incumbent reelection rate and number of cities in a county. However, this study found that county homogeneity (using a proxy of percentage of people who identify as non-Hispanic whites) and population over 65 were the only two factors that achieved statistical significance. Increases in both of these factors were found to positively influence the likelihood that a county administrator would act as a broker in deals to expand county services through cooperation.

Transaction costs also play an important role in cooperative coordination. One can think of many services provided by local governments that are not coordinated, simply because of prohibitively

high transaction costs. It would be unusual to see counties fifty miles apart from each other entering a joint garbage collection venture, yet we may observe these same counties cooperating with a regional jail or pretrial services program. This is because while transaction costs push counties to pursue goals individually, economies of scale incentivize counties to work together. Specifically, as it relates to pretrial services, physical buildings and staff can be shared by multiple counties, especially if they share a regional jail or are in close proximity to each other. For the purposes of this study, transaction costs will be modeled by county adjacency. County distance is a large driver of transaction costs in the context of pretrial services, especially because defendants will all need to access the same physical location, making geographically distant partnerships untenable.

Finally, the influence of both internal (intra-county) and external homogeneity has been well documented in the research literature. Factors such as racial makeup, income and age have been shown to have a statistical relationship to the willingness of county administrators to enter into joint ventures with other counties. Zeemering suggests that this is due to the fact that homogenous county pairs will, in general, have more uniform goals and come to agreement more easily about how a service should be provided. For this analysis the percentage of black residents in each county will serve as a measure of homogeneity; this measure is the same used by Zeemering and has been shown in other studies to have a statistical and theoretical relationship to the presence of county cooperation.

The Role of Partisanship in County Cooperation

Economic rationale for interlocal collaboration and cooperation are generally well researched and accepted; however, one area that is less researched is how partisan factors may influence cooperation. To be sure, racial makeup, income, and age are strong drivers of partisan

preference. Could partisan attitudes impact cooperation above and beyond these components? I have shown in previous chapters that partisan preferences have a strong impact on both availability of pretrial services and the level of funding provided for pretrial services; yet it remains unclear if conservatives are ideologically opposed to the expansion of pretrial services. If partisan factors influence decisions to cooperate, whether conservative counties are more resistant to cooperation, or that counties prefer to cooperate with counties that are politically homogenous to themselves, cooperation effects could be a reasonable explanation for the differences in funding and availability observed in Virginia. The explanation of cooperation effects would be particularly powerful because it would explain the mechanism by which conservative counties are under-served without relying on the ideological platform of Republicans, which has not historically included explicit opposition to pretrial services.

The first question that must be answered is how do political, if not partisan, factors influence decisions to cooperate or not. Policy entrepreneurs may agree to cooperative agreements if they believe that a cooperative arrangement can provide meaningful benefits to their constituents and that costs can be dispersed throughout the counties in the agreement. These agreements may be pursued by politicians who wish to advance their careers by promoting themselves to a larger constituency. Recent evidence has supported this contention by showing that politicians who engage in more interlocal cooperation are more likely to be successful in running for higher office (Bickers, Post, and Stein, 2009). In the same study, the authors note a dearth of empirical evidence to support the contention that political factors shape interlocal cooperation. This is most likely because most municipal services being studied such as trash collection, water, sewer, roads and fire departments are much less contentious than national issues like abortion, welfare and healthcare that dominate the public debate. Bickers et al. astutely note that “there is no Democratic or Republican way to collect garbage”. Their view may explain the lack of

compelling research on the subject but is a challenge to apply to the facts of pretrial services because the expansion of these programs has the potential to be more politically contentious than other municipal services.

Bickers (2009) shows that conservative districts are indeed less likely to cooperate with surrounding districts and offers multiple explanations for this phenomenon. Firstly, he suggests that Republican districts prefer service contracting with private entities rather than other municipalities. Second, he proposes that Republicans may simply prefer different types of cooperation based on their constituents. He explains, “At the local level, inter-jurisdictional arrangements that lead to economic development are likely to be more strongly preferred by Republicans, whereas such arrangements that provide social welfare benefits are more likely to be preferred by Democrats”. Bickers’ theory could provide a theoretical explanation for a hypothesis suggesting that conservative constituencies are indeed less likely to cooperate with other counties on the issue of pretrial services specifically.

One additional consideration provided by Bickers is to examine county choice by liberal counties. He writes, “A more liberal community surrounded by more conservative counterparts may find its potential partners to be less compatible choices”. This consideration could have a confounding effect on the statistical analysis in this chapter and will have to be carefully considered when interpreting the results.

Given these factors, I will test hypotheses similar to Bickers et al.:

H₄: Counties with stronger Republican constituencies will be less likely to enter into pretrial services cooperative agreements.

H₅: When conservative counties do enter into pretrial services cooperative agreements, they will be more likely to do so with other conservative counties.

Measures and Methods

The cooperation analysis in this chapter relies on the same underlying data as the Virginia county analysis. For the regression used here, data about pretrial services were combined with geospatial data to create a dataset of county pairs that are adjacent to each other¹². This creates a list of candidate counties that could reasonably cooperate with each other with a binary variable for if the counties are indeed cooperating to fund a pretrial services office. Independent variables are recorded for each county then differenced to detect the impact of political or demographic difference in counties' decisions to cooperate. Additionally, the percentage of votes for Trump in 2016 in the first county is multiplied by the percentage of votes in the second county to create an interaction measure. Analysis will be run on two models: unrestricted and restricted. In the unrestricted model, duplicates are used to form a more complete picture of disparities in partisanship or demographic factors that may impact the decision to cooperate. For example, in the dataset there is an entry for both Williamsburg-York cooperation and the York-Williamsburg cooperation because the value of differenced independent variables will be different between those two observations. A restricted model without these duplicates will also be run to ensure that duplicating the information has not induced bias into the analysis; 27% of the candidate counties in the sample are cooperating.

¹² Because some pretrial districts are quite large, some counties that are cooperating are not adjacent. All pretrial service districts are contiguous, but each county is not necessarily adjacent to each cooperating county. All counties currently cooperating were selected in to this dataset.

To analyze the binary choice for counties cooperating or not, a maximum likelihood logit model is used and elasticities are calculated to better understand the effects of changes on the margins.

Results

Table 7: Unrestricted Model

VARIABLES	(1) Logit Coefficients
GOP Percentage for County A	-8.168*** (1.715)
GOP Percentage for County B	-4.241*** (1.628)
GOP Vote Percentage Interaction	14.86*** (2.775)
Black Percentage Difference	.0000000129 (0.459)
Total Population Difference	-0 (.000000719)
Constant	1.019 (0.917)
Observations	1,141

Standard errors in parentheses
 *** p<0.01, ** p<0.05, * p<0.1

Table 8: Restricted Model

VARIABLES	(1) Logit Coefficients
GOP Percentage for County A	-8.470*** (2.485)
GOP Percentage for County B	-3.920* (2.353)
GOP Vote Percentage Interaction	14.84*** (3.952)
Black Percentage Difference	0.396 (0.753)
Total Population Difference	.000000784 (.00000103)
Constant	1.011 (1.306)
Observations	571

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Discussion

These results clearly show that more conservative counties are averse to cooperation and, when they do cooperate, they prefer to cooperate with other conservative counties. This finding is consistent with Bickers et al., who find that “The selection of partners for entering into... interlocal agreements is likely to be facilitated by having potential jurisdiction partners who share [the] same incentives” (2009).

The elasticities of the first two variables, the percent GOP vote in county A and county B show that, in general conservative counties avoid entering in to cooperative pretrial services arrangements. Previous literature suggests that lack of cooperation on the part of Republican counties is due to Republican’s opposition to social welfare programs. *The Encyclopedia of Political Science* (Kurian, 2011) defines social welfare programs broadly as “any policy that

improves the welfare of citizens”. However, pretrial services may not be viewed explicitly as a social welfare program by some because it does not target any specific group of people segmented by income. Nevertheless, if pretrial services expansion is coded as a social welfare program by either politicians or members of the public, this could go to explain Republican opposition.

The sign of the coefficient for the interaction coefficient is also instructive. Higher interaction values represent district pairs that are jointly more conservative. This finding also comports with the framework provided by Bickers et al., even if the authors did not explicitly provide for this kind of effect. If localities seek to cooperate only on issues that they deem important, it follows that when conservative counties do cooperate, they would cooperate with other conservative counties whose vision for pretrial services may be more in line with theirs. In Virginia, the risk recommendation process is routinized so one would not expect to see differences in recommendation rates, but pretrial services offices that come out of conservative county cooperation may receive less funding or have more restrictive supervision terms if there was meaningful differentiation between conservative and liberal service districts for pretrial services offices.

Ultimately, these results provide a compelling explanation for the relationship between conservative constituencies and lack of pretrial services that has been uncovered in the preceding chapters. Because conservatives generally do not explicitly stake out positions against the expansion of pretrial services, the strong relationship between the two seems odd. However, if some part of that cooperation can be explained by county-level opposition to cooperation, it follows that there is a genuine non-policy specific reason why conservatism curtails pretrial services expansion.

Conclusion

Pretrial reform efforts have made news across the country, especially in 2018 and 2019. These reforms show great promise to reduce the number of people in America detained pre-trial. New actuarial tools as well as supervisory offices provide promising opportunities to routinize the risk determination process and make structural changes that increase the safety of the community when allowing release.

However, when examining the distribution of states and counties that benefit from pretrial services offices, interesting patterns emerge. Popular support and endorsements from practitioners ranging from prosecutors to judges to defense attorneys are sharply contrasted with what would appear to be public opposition to pretrial reform. There are two possible avenues for action or lack thereof: legislative and bureaucratic.

Legislative inaction is fairly straightforward to explain. Taking any policy position is risky. Legislators calculate that groups of supporters are too small, too disconnected or too apathetic for it to be worthwhile to stake out a policy position. Legislators in states that have passed reform have overcome these challenges largely through the assurances from activist communities, or attentive publics. These attentive publics provide pressure on inactive politicians and support for politicians who are supportive of reform, shifting the legislative calculus in favor of instituting pretrial reform. However, reform is not a binary decision. Between states with full statewide reform and those with a total lack of funding for pretrial services lie a plurality of states which have partial coverage. These states are particularly influenced by bureaucratic decision because legislators do not provide statewide funding but do make some form of funding available.

Bureaucrats may then decide if they want to cooperate with other counties to create a pretrial services office or even if they want to apply for pretrial services funding from the state. When bureaucrats are tasked with exercising their discretion, a number of outcomes are possible, but patterns that reflect how decisions are impacted by partisan factors may emerge over large areas. This is what we observed in Virginia pretrial services. This study has shown that measures of partisanship have strong predictive power in explaining which districts have pretrial services offices and how much funding those offices receive. This is likely due to cooperation effects; districts with stronger conservative constituencies are less likely to cooperate with other districts and favor cooperating with other conservative districts.

These findings hold lessons for scholars of partisanship. Public opinion on expansion of pretrial services is virtually nonexistent. Yet, there is recognizable sorting among party lines for counties that have pretrial services. Is this a triumph of democracy or simply a coincidence? The answer likely lies in between. Surely, politicians and bureaucrats are influenced by what they expect to be the political sentiment of their district, and expansion of pretrial services could easily be coded as an unwanted social welfare policy. This political explanation is complicated by evidence from chapter 3 that shows that even though cooperation is necessary for most counties to have pretrial services, conservative counties are less willing to cooperate than their liberal counterparts. Additionally, the fact that when conservatives do cooperate, they tend to do it with other conservative counties lends credence to the idea that there is an effect specific to cooperation that goes above and beyond simple willingness to have pretrial services.

Ultimately, this study goes to show that opposition to pretrial reform is asymmetric. Reformers and activists should carefully consider the causes and sources of opposition to reform when

crafting bureaucratic or legislative remedies to the problem of pretrial detention. And pretrial detention is a problem in desperate need of remedies and attention.

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