

RELEASE ROULETTE: THE RURAL-URBAN PRETRIAL DETENTION DIVIDE IN FLORIDA

*Matthew Baker**

INTRODUCTION	2
I. PRETRIAL DETENTION	4
A. <i>Brief History of Pretrial Detention</i>	5
B. <i>Pretrial Detention in Context</i>	8
C. <i>Pretrial Detention Numbers on the Rise</i>	13
D. <i>Costs of Pretrial Detention</i>	14
II. RURAL-URBAN JUSTICE DISTINCTIONS	17
A. <i>Rural-Urban Sentencing</i>	19
B. <i>Rural-Urban Probation</i>	20
C. <i>Rural-Urban Juvenile Justice</i>	20
D. <i>Rural-Urban Distinctions in Pretrial Detention</i>	21
III. DATA SOURCES AND ANALYSIS.....	21
A. <i>Vera Data</i>	22
B. <i>OPPAGA Reports</i>	24
C. <i>Population and Arrest Data</i>	25
D. <i>Rural-Urban Classification</i>	25
IV. PRETRIAL RURAL-URBAN DIVIDE ACROSS STATES.....	25
A. <i>Nationwide Pretrial Detention Rates</i>	26
B. <i>Nationwide Rural vs. Urban Pretrial Rates</i>	27
V. FLORIDA’S PRETRIAL DETENTION SYSTEM	29
A. <i>Legal Structure</i>	30
B. <i>Intra-Florida Comparisons</i>	32
1. <i>Pretrial Detention and Population</i>	34
2. <i>Pretrial Incarceration Rates Within Florida</i>	35
VI. WHERE DO WE GO FROM HERE?	37
A. <i>Pretrial Release Programs</i>	38
1. <i>Comparing Counties</i>	38
2. <i>Utilization and Costs</i>	40
3. <i>Effectiveness</i>	42

* Matthew Baker is a PhD candidate at the University of Georgia’s School of Public and International Affairs and a 2013 graduate of the University of Florida Levin College of Law. He is also an Adjunct Professor of Legal Studies at the University of Central Florida. Special thanks to my advisor, Christina Boyd, for her advice and encouragement and to Kyla, Brynn and Chet who make this great adventure worthwhile.

4. Conditions43
 5. Fees43
 B. Rural Challenges.....44
 CONCLUSION.....45

INTRODUCTION

Among the 746,000 people held in county jails in 2020, 74% of them have not been convicted of any crime.¹ In 2015, Florida detained 36,228 individuals who, in the eyes of the law, are actually innocent.² The effect of pretrial detention is far more acute in rural counties in Florida, where rates of detention can be as high as 3% of a county’s population.³ In Florida, the rural-urban divide in criminal justice is very real and leads to substantially different outcomes.⁴

On top of being legally problematic, pretrial detention levies substantial costs on communities, both economically and individually.⁵ “Across the country, nearly two thirds of all inmates who crowd our county jails—at an annual cost of roughly nine billion taxpayer dollars—are defendants awaiting trial.”⁶ Detaining those charged, but not convicted, is a form of punishment because individuals lose their jobs, their families, and hope for a future. People of color likely experience these terrible consequences more acutely than their white counterparts.

1. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/U9SM-7TDT>].

2. VERA INST. OF JUST., INCARCERATION TRENDS IN FLORIDA 1 (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-florida.pdf> [<https://perma.cc/6XXU-86XF>]. The presumption of innocence is a fundamental premise in our system of criminal justice. The U.S. Supreme Court held:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.

In re Winship, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

3. See generally VERA INST. OF JUST., *supra* note 2, at 3.

4. *Id.*

5. See PRETRIAL JUST. INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017) (discussing how “taxpayers spend approximately \$38 million per day to jail people who are awaiting trial (63% of the total jail population, or more than 450,000 individuals on any given day)”).

6. Eric Holder, U.S. Att’y Gen., Address at the National Symposium on Pretrial Justice (June 1, 2011).

Poor pretrial detainees have a false hope of release because a cash bond is often out of reach. This is all in a legal system where, under the Equal Protection clause, inability to pay fines or probation costs cannot be a reason for punishment.⁷

Being detained before trial increases many pressures on defendants. Pretrial detention, enhanced by the advantages held by the government at every step of a criminal prosecution, decreases the bargaining power of defendants and limits their access to counsel leading to guilty pleas and higher sentences.⁸ Individuals, who cannot afford to pay cash bail, often face the choice of pleading guilty to a crime or potentially losing their livelihood and home.⁹

Given this bleak picture, how do we fix a system that runs afoul of many constitutional principles, especially in rural counties? In Florida, the solution already exists. Nearly thirty of Florida's sixty-seven counties utilize pretrial release programs to lower their pretrial incarceration rates, protecting the presumption of innocence while ensuring defendants appear in court.¹⁰ These programs use tools like GPS monitoring, drug and alcohol monitoring, and regular reporting to supervise individuals in the community at a substantially lower cost than the cash bond system with low rates of failures to appear and rearrests. Pretrial services supervision can also lead to shorter sentence length.¹¹

At present only three of the twenty-three rural counties in Florida have pretrial release programs,¹² part of the detention problem that exists in these locales. Pretrial release programs could provide a revenue-neutral, or close, solution to high rates of pretrial incarceration and allow those charged but not convicted to experience the reality of the presumption of innocence.

In this Article, I empirically examine pretrial detention in the rural-urban context in Florida. Part I begins with a discussion of pretrial detention, its history, the nationwide legal context of pretrial detention,

7. *Bearden v. Georgia*, 461 U.S. 660, 661–62 (1983). The Supreme Court held that courts cannot punish individuals for being unable to pay court fines and fees under the Equal Protection Clause. *Id.*

8. See Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 1 (Feb. 2018).

9. See John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, 44 H.R. MAG. AM. BAR ASS'N 6, 6 (2019).

10. *Pretrial Release Programs Generally Comply with Statutory Data Collection Requirements*, OPPAGA (Fla. Legis. Off. Program Pol'y Analysis & Gov't Accountability, Tallahassee, Fla.), Dec. 2011, at 1, <https://oppaga.fl.gov/Documents/Reports/11-27.pdf> [<https://perma.cc/6ZVR-ETJP>].

11. J.C. Oleson, et al., *The Effect of Pretrial Detention on Sentencing in Two Federal Districts*, 33 JUST. Q. 1103, 1107 (2016).

12. See discussion *infra* Parts V.B, V.B.1.

the rise in pretrial detention, and its costs.¹³ Part II discusses criminal justice differences in rural and urban jurisdictions.¹⁴ This includes comparisons to sentencing, probation and juvenile justice.¹⁵ Part III discusses the several data sources used in the empirical analysis.¹⁶

In Part IV, the empirical analysis focuses on the nationwide differences in rates of pretrial detention, highlighting rural and urban pretrial detention rates. Florida's pretrial detention system is the subject of Section V with an in-depth look at pretrial detention rates between counties, using the lens of rural-urban counties as well as those with and without pretrial release programs.¹⁷ Finally, Part VI examines Florida's pretrial release programs, comparing programs and their administration with an eye towards this as a potential solution to the high rates of pretrial incarceration in rural counties.¹⁸

I. PRETRIAL DETENTION

Before engaging in a specific discussion of the rural and urban differences in pretrial detention in Florida, it is helpful to understand the rationale behind the pretrial detention historically and where the process fits contextually in the criminal justice system. Additionally, this Article will discuss the rise in pretrial detention nationwide as well as the staggering costs of pretrial detention. With this foundation it is easier to see where Florida fits into the nationwide context of pretrial detention legally and in action.

Pretrial detention and release are often the first engagement a criminal case has with the court system. Pretrial detention occurs when an individual charged with a crime remains incarcerated before they appear for trial.¹⁹ With many cases now beginning as warrant-less arrests, rather than arrest-warrant cases with bonds set by a judge within the warrant, these hearings take on larger importance.²⁰ Pretrial detention can result from a court order to protect public safety or because an individual is unable to meet the financial requirements for release. While the intent of

13. *See infra* Part I.

14. *See infra* Part II.

15. *See id.*

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See id.*

19. *See Pretrial Detention*, NAT'L CONF. OF STATE LEGISLATURES (June 7, 2013), <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx> [<https://perma.cc/8ABE-8BSJ>].

20. William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 770, 770–854 (1993). Schroeder notes that “[o]nly a few American jurisdictions still substantially follow the common law rule limiting warrantless misdemeanor arrests to breaches of the peace committed in the arresting officer’s presence, and even these permit some minor exceptions.” *Id.* at 784.

the former is clear, the latter type of detention results from something potentially less intentional but certainly more problematic. As discussed below, this stage merits detailed examination given its importance, impact, and placement in the criminal justice system.

A. *Brief History of Pretrial Detention*

Centuries before Florida wrote its 1976 constitution emphasizing pretrial release, this notion could be found in Anglo-Saxon common law.²¹ During the Anglo-Saxon period courts ensured the accused's presence at trial through a pledge of property or a pledge by a personal surety.²² Later, local sheriffs had significant discretion in deciding under what conditions the accused might be released as they waited for trial.²³ Abuse of this system led to reform under the Statute of Westminster in 1275, which created standards under which sheriffs could exercise their discretion.²⁴ Over four hundred years later, Parliament included a prohibition against excessive bail in the English Bill of Rights.²⁵

English law concerning bail was generally adopted in the American colonies.²⁶ In *Carlson v. Landon* the Supreme Court chronicled the history of the bail clause as it translated from England to the United States, saying:

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.²⁷

21. Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 13 (2005) (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)) ("Considering the fact that a decision regarding bail must be made of every defendant, there is not a wealth of litigation on the issue. Bail is not an issue that is thoroughly appealed because '[r]elief in this type of case must be speedy if it is to be effective.'").

22. Peggy M. Toblowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 268–69 (1993).

23. *Id.* at 269.

24. *Id.* at 270 n.19.

25. *Id.* at 270–71 nn.20–21.

26. *Id.* at 271.

27. *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952).

Outside of the Eighth Amendment, the right to bail was codified for non-capital cases in the Judiciary Act of 1789.²⁸ It is important to note with the comparison of English to American common law that “the American Bill of Rights went further than its predecessor and was more sensitive to possible abuses of government.”²⁹

During the early nineteenth century, the Supreme Court recognized the purpose for bail was to secure a defendant’s appearance in court.³⁰ Monetary bail was the primary means of securing a defendant’s appearance throughout the remainder of the nineteenth century and into the twentieth century, and over time the personal surety option was replaced by the system of commercial bondsmen.³¹ Over time, the American bail system demonstrated inequity among defendants as well as major problems with a commercial bondsmen system.³² This system did not provide different defendants with individualized bail and led to widespread unnecessary pretrial detention.³³

In addition to the changes in bail on the side of defendants, over time bail determinations in the United States had to adjust because death was sought in far fewer cases.³⁴ In the 1960s, bail reform efforts reached a

28. Judiciary Act of 1789, § 33, 1 Stat. 91 (1789).

29. Lester, *supra* note 21, at 16.

30. See *Ex parte* Milburn, 34 U.S. 704, 710 (1835).

A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgement of the court thereon. It is not designed as a satisfaction for the offence, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offence.

Id.

31. Toblowsky & Quinn, *supra* note 22, at 274.

The personal surety system . . . was gradually replaced by a system of commercial bondsmen who posted a monetary bond with the court to obtain a defendant’s release—in exchange for a generally nonrefundable fee from the defendant. These commercial bondsmen obligated themselves to assure defendant’s court appearance or risk forfeiture of their bonds.

Id.

32. *Id.* at 275 nn.39–40.

33. *Id.*

34. Lester, *supra* note 21, at 17.

As American law matured, the number of capital offenses decreased and “the individual American colonies began to permit the denial of bail in non-capital cases” Death was not viewed as the only possible punishment that might provide motivation to flee, but it was still the most compelling. Bail became unavailable in certain special circumstances, such as when the charged crime carried a punishment that was substantial. That trend continues today as more

critical mass when the United States Congress chose to investigate bail reform.³⁵ The Bail Reform Act of 1966³⁶ recognized those adjustments and “required the federal courts to release any defendant charged with a non-capital offense on his or her recognizance or on an unsecured appearance bond unless the court determined that the defendant would fail to appear for trial under such minimal supervision.”³⁷ The Act made pretrial release without financial conditions the standard, not just an option.³⁸ Defendants had to be released in non-capital cases unless “the officer determines, in the exercise of his discretion, that such release would not reasonably assure the appearance of the person as required.”³⁹ While the Bail Reform Act of 1966 changed only federal courts, it started a wave of reform at the state level as well.⁴⁰

In spite of the progress made in the 1960s, the decades following were not as kind to the rights of the accused. Public concern about rising crime rates resulted in measures restricting pretrial release opportunities.⁴¹ Legislatures nationwide added “assurance of community safety as an additional and equal criterion for determining pretrial release conditions”⁴² during the 1970s and 1980s.⁴³

This practice was not always widespread. While the Eighth Amendment guarantees “excessive bail shall not be required,”⁴⁴ the meaning of the bail clause has evolved over time.

Initially, pretrial detention and release decisions focused on securing a defendant’s appearance at a later court date and individualized to the defendant before the court.⁴⁵ As noted in *Stack v. Boyle*, the

[T]raditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to

and more states are adding to the list of no-bail offenses.

Id. (quoting *Simpson v. Owens*, 85 P.3d 478, 485 n.10 (Ariz. Ct. App. 2004)).

35. *Toblowsky & Quinn*, *supra* note 22, at 282 n.60.

36. Bail Reform Act of 1966, 18 U.S.C. §§ 3146–3152.

37. *Lester*, *supra* note 21, at 17.

38. *Toblowsky & Quinn*, *supra* note 22, at 283.

39. *Id.* (quoting 18 U.S.C. § 3146(a) (1970)).

40. *Id.* at 284–85.

41. *Id.* at 289.

42. *Id.* at 290.

43. *Toblowsky & Quinn*, *supra* note 22, at 290.

44. U.S. CONST. amend. VIII.

45. *See Stack v. Boyle*, 342 U.S. 1, 5 (1951). In *Stack*, the Court considered habeas claims by twelve defendants charged under the Smith Act whose bail amounts were originally set at varying amounts but later set at a high, uniform amount. *Id.* at 3. The Court found bail amounts are individual considerations designed to assure the presence of that particular defendant. *Id.* at 5. Chief Justice Vinson noted, “[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.” *Id.* *See also*, *United States v. Motlow*, 10 F.2d 657 (7th Cir. 1926).

prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.⁴⁶

Stack provided a basis for the Court later holding that the Eighth Amendment bail clause guarantee applied to the states.⁴⁷

Later statutory changes at the federal level expanded the scope of considerations on matters of release and detention.⁴⁸ Now courts' inquiries include considerations of public safety and the ability to detail an individual pretrial.⁴⁹ This is not without the due process protection of an adversarial hearing with the opportunity to call witnesses and dispute the evidence presented.⁵⁰

B. Pretrial Detention in Context

This Article will discuss the specific legal context for pretrial detention and release in Florida, but some comparison to other states is worthwhile. States vary in the exact way they determine pretrial release and detention decisions, but the arcs of these procedures are similar.⁵¹ This Article focuses mainly on the presumptions inherent in these hearings with less attention focused on the timing and location of these

46. *Stack*, 342 U.S. at 3; see also *Hudson v. Parker*, 156 U.S. 277, 285 (1895).

47. See *Schlib v. Kuebel*, 404 U.S. 357 (1971); *Pilkinton v. Cir. Ct. of Howell Cnty.*, 324 F.2d 45, 46 (8th Cir. 1963); *Robinson v. California*, 370 U.S. 660, 666 (1962), and *Robinson*, 370 U.S. at 675 (Douglas, J., concurring).

48. Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (2018) (“If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.”).

49. *United States v. Salerno*, 481 U.S. 739, 748 (1987). In *Salerno*, the Court found the changes made under the Bail Reform Act of 1984 resulting in pretrial detention were not impermissible punishments because the Act narrowly limited detention to serious crimes. *Id.* at 747. The Court found the public safety interest of the government could, under circumstances, outweigh the liberty interest of a defendant. *Id.* at 748.

50. *Id.* at 751.

51. In Georgia, individuals must appear before a judicial officer within 48 hours of a warrant-less arrest and be informed of the charges among other matters. Ultimately the judicial officer must “Consider and announce a bail decision, if the offense is not one bailable only by a superior court judge, or so inform the accused if it is.” GA. UNIF. R. MAGISTRATE CT. § 25.1 (2021); In Washington State, preliminary hearings are conducted within 48 hours of arrest. A presumption of release on personal recognizance unless the court determines there is a need for additional assurances of appearance or other safety reasons. The Washington rule also lays out a series of “Least Restrictive Conditions of Release.” WASH. SUPERIOR CT. CRIM. R. § 3.2(b) (2021); Wisconsin statutes do not outline a specific time for an initial appearance, indicating “Any person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed.” Case law indicates that, appearance within 48 hours is appropriate. See WIS. STAT. § 970.01 (2021); *State v. Koch*, 499 N.W.2d 153 (Wis. 1993); and *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

hearings. Given this variation, this Article will look to the federal system to get an idea of how defendants navigate this process.

Between 24 and 48 hours after arrest, an individual appears before a judicial officer and is advised of the charges against them.⁵² At this hearing, a judicial officer determines if the person should be released or not and, if they are released, what appropriate conditions should apply to their release.⁵³ Generally, individuals are released on their own recognizance (akin to release without condition), released with conditions, or detained.

The federal statute, like many states' statutes, presumes release on personal recognizance or an unsecured bond unless conditions or detention are necessary to secure the appearance of the defendant or protect the community.⁵⁴ Release on recognizance (ROR) is most common for less serious charges and individuals who have ties to the community.⁵⁵ The statute lays out how to determine if escalating levels of conditions or detention are appropriate.⁵⁶

Judges can release individuals with conditions, typically a surety bond, to ensure their later appearance. Bail bonds are an industry unto themselves, with individuals paying, generally, 10% of the bond amount (a premium) to a bond agent who then provides the remaining amount to the court.⁵⁷ If an individual does not appear at a later time, the bond is

52. *See generally id.* (discussing various states' similar approach to scheduling post-arrest hearings).

53. At the federal level, judges must issue an order determining if a person should be:

- (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
- (2) released on a condition or combination of conditions under subsection (c) of this section;
- (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or
- (4) detained under subsection (e) of this section.

18 U.S.C. § 3142(a) (2018).

54. 18 U.S.C. § 3142(b) (2018).

55. *See What Does It Mean To Be Released On Your Own Recognizance?*, ABOUT BAIL, <https://www.aboutbail.com/pages/what-does-it-mean-to-be-released-on-your-own-recognizance> [<https://perma.cc/J26U-ZNEZ>] (last visited Jan. 2, 2022).

56. 18 U.S.C. § 3142(c) (2018).

57. Bonding agents also offer "payment plans" whereby an individual only needs to come up with 1% of the total bond amount and then pays the remaining 9% in installments. Once the case is resolved, regardless of the result, the bonding agent keeps the entirety of the premium. Shailla Dewan, *When Bail is Out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 11, 2015), <https://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html> [<https://perma.cc/Q7XY-4CL8>].

forfeited and the bonding agent is “on the hook” for the whole amount.⁵⁸ When a defendant’s case concludes, the court or clerk returns the bond amount to the agent, who keeps the premium as a payment for their services.⁵⁹ Reformers attack monetary bail as an economic means of detention, protected by an industry with a vested interest against reform.⁶⁰

Some other conditions include: remain in the custody of a person who will report to the court any violation, keep a job (or seek employment), continue or seek education, avoid certain people or places, restrictions on travel, regular reporting, curfews, surrendering firearms, abstaining from drugs and alcohol, and of course, a catchall provision deeming a defendant must “satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.”⁶¹ Conditions and bail bonds can be an insurmountable obstacle to release.

The statute does, however, presume release of an accused person “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”⁶² Bail reforms, like the 1984 Federal Bail Reform Act, have emphasized the importance of release in these high-stake decisions.⁶³

This process, in action, often takes far less time than explaining it. Judges set bail in minutes or even seconds.⁶⁴ Judges have limited information: often the person’s current charges and little more.⁶⁵ The

58. See Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html> [https://perma.cc/TVP6-T35K].

59. See *Bail and Bonds*, JUSTIA (Apr. 2018), <https://www.justia.com/criminal/bail-bonds/> [https://perma.cc/NED2-WHRF].

60. State after state has taken steps to reduce or eliminate the practice of making that freedom contingent on money. In response, the bond industry has worked to undermine reforms and regulations, arguing that commercial bail is still the most efficient and taxpayer-friendly way to keep the public safe and the courts running smoothly. Silver-Greenberg & Dewan, *supra* note 58. In some instances, individuals are detained and returned to jail by their bonding agent for failure to make regular payments. See *id.*

61. 18 U.S.C. § 3142(c)(B)(i)–(xiv) (2018).

62. 18 U.S.C. § 3142(b) (2018).

63. S. REP. No. 98-225, at 3 (1983).

64. See Mustafa Z. Mirza, *Dallas County’s Secret Bail Machine*, MARSHALL PROJECT (Sept. 4, 2018, 3:47 P.M.), <https://www.themarshallproject.org/2018/09/04/dallas-county-s-secret-bail-machine> [https://perma.cc/E28U-GSF6] (exploring the bail process in Dallas County, Texas where defendants had hearings lasting no more than fifteen seconds without discussion of a person’s ability to pay a bond or appear at a later court date; most of these hearings were conducted without any public oversight).

65. Jarrett Murphy, *Prisoner’s Dilemma: How NYC’s Bail System Puts Justice on Hold*, 31 CITY LIMITS INVESTIGATES 1, 14 (2007), <http://marijuana-arrests.com/docs/BAIL-ISSUE-CITY-LIMITS.pdf> [https://perma.cc/KD6R-U2XQ] (“[J]udges working arraignments have a tougher schedule than their counterparts in trial courtrooms. What’s more, the judgments made at

decision boils down to the nature of the offense, weight of evidence, record of prior flight, and ability to pay.⁶⁶

Initial appearance hearings are frequently conducted via video conference, so the judicial officer is not even in the same building, or even county, as the defendant.⁶⁷ Hearings weigh heavily on formality and efficiency with little room for inquiry or exposition.⁶⁸ Judges rely on bail schedules, essentially a list of charges with corresponding standard bond amounts, to set bail in many cases.⁶⁹

Varying judge assignment further exacerbates the arbitrary nature of these hearings. Despite bond schedules, bail-setting practices fluctuate widely, with as much as a 58% divide in the chance of being assigned cash bail in a felony case.⁷⁰ On top of the brevity and arbitrary nature of these hearings, judges retain a large amount of discretion in making these decisions as individuals have little appellate recourse.⁷¹ This is no surprise, given the extensive literature on how judge ideology,⁷² race,⁷³

arraignments are necessarily made on the fly. One quirk of the bail system is that while the decision on whether to release or set bail is crucial to how the rest of a criminal case plays out, judges must base their decision on scant, hastily assembled information of questionable reliability.”).

66. Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1034 (1954).

67. *E.g.*, WIS. STAT. § 970.01 (2020) (Wisconsin contemplates teleconferenced initial appearances in their statute: “The initial appearance may be conducted on the record by telephone or live audiovisual means . . .”).

68. *See id.* at § 970.02 (discussing the formal duties of the judge at the initial appearance such as informing of charges or right to counsel with no discussion of fact-finding or inquiry into the facts of the case).

69. John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 857 (2017).

70. Anna Maria Barry-Jester, *You’ve Been Arrested. Will You Get Bail? Can You Pay it? It May All Depend On Your Judge*, FIVETHIRTYEIGHT (June 19, 2018), <https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/> [<https://perma.cc/4BLB-8UHQ>] (exploring the disparities within New York City’s criminal courts, finding a wide-ranging difference between judge’s practices).

Bond schedules present another type of problem in the realm of pretrial detention: they do not contemplate community ties, the weight of the evidence or a person’s ability to pay a bond. One-size-fits-all approaches for bonds run contrary to the principles of individualized bail determination that the Supreme Court laid out in *Stack*. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

71. In federal cases, the U.S. Courts of Appeals use an intermediate level of scrutiny to review the district court’s determination of release conditions, a higher level of review than abuse of discretion but lower than de novo review. *See United States v. O’Brien*, 895 F.2d 810, 814 (1st Cir. 1990). This presumes, of course, that the individual detained would have quick access to a lawyer who is able to file the necessary motion in a timely manner.

72. *See* Frank B. Cross, *Decision Making in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1478 (2003); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

73. *See* Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 126–36 (1988); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of*

gender,⁷⁴ and experience impact their decision-making. The negative consequences manifest downstream as well with male and minority defendants frequently receiving less favorable outcomes than their female, white counterparts.⁷⁵

In many jurisdictions, defendants have the right to a hearing to review, reduce, or modify their conditions of release set at initial appearance.⁷⁶

Appeals: Minority Representation Under Panel Decision Making, 20 J.L. ECON. & ORG. 299, 299–330 (2004); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 167–83 (2013); Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 749–64 (2001).

74. See Jilda M. Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice*, 78 JUDICATURE 232, 232–35 (1995); Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 389–411 (2010); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 425–39 (1994); Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RSCH. Q. 137, 147–50 (2000); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1377–1500 (1998); Lydia Tiede et al., *Judicial Attributes and Sentencing-Deviation Cases: Do Sex, Race, and Politics Matter?*, 31 JUST. SYS. J. 249, 249–72 (2010); Susan W. Johnson et al., *The Gender Influence on US District Court Decisions: Updating the Traditional Judge Attribute Model*, 29 J. WOMEN POL. & POL'Y 497, 497–526 (2008); John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 308–22 (1981); Claire S.H. Lim et al., *Do Judges' Characteristics Matter? Ethnicity, Gender, and Partisanship in Texas State Trial Courts*, 18 AM. L. & ECON. REV. 302, 302–57 (2016); Donald R. Songer & Kelly A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 750–62 (2000).

75. See Meghan Sacks et al., *Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes*, 40 AM. J. CRIM. JUST. 661, 661–81 (2015); Angela K. Reitler et al., *The Effects of Legal and Extralegal Factors on Detention Decisions in U.S. District Courts*, 30 JUST. Q. 340, 340–68 (2013); Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, N.Y.U. J. LEGIS. & PUB. POL'Y 919, 919–64 (2013); John Wooldredge et al., *Ecological Contributors to Disparities in Bond Amounts and Pretrial Detention*, 63 CRIME & DELINQ. 1682, 1682–1711 (2017); Tina L. Freiburger & Carly M. Hilinski, *The Impact of Race, Gender, and Age on the Pretrial Decision*, 35 CRIM. JUST. REV. 318, 318–34 (2010); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 873–908 (2003); Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 987–1047 (1994); Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, U. KAN. L. REV. 879, 879–902 (2009); K.B. Turner & James B. Johnson, *The Effect of Gender on the Judicial Pretrial Decision of Bail Amount Set*, 70 FED. PROB. 56, 56–62 (2006).

76. E.g., WIS. STAT. § 969.08(1) (2020) (Wisconsin provides for a hearing for those still in custody after 72 hours of arrest. "Upon petition by the state or the defendant, the court before which the action is pending may increase or reduce the amount of bail or may alter other conditions of release or the bail bond or grant bail if it has been previously revoked. Except as provided in sub. (5), a defendant for whom conditions of release are imposed and who after 72 hours from the time of initial appearance before a judge continues to be detained in custody as a result of the defendant's inability to meet the conditions of release, upon application, is entitled to have the conditions reviewed by the judge of the court before whom the action against the

Some states provide for a quick hearing relative to other matters before the court. As we will see in the next section, even a few days delay in considering a reduction or modification can result in irreparable harm.

C. Pretrial Detention Numbers on the Rise

Understanding the progression of and current state of the law is but one part of understanding pretrial detention. As the data shows, Florida is not alone in having escalating levels of pretrial detention in urban and rural counties. The result of this evolution of the law can be seen in the numbers. From 2000 to 2014, “95% of the growth in the overall jail inmate population (123,500) was due to the increase in the unconvicted population (117,700 inmates).”⁷⁷

Again, 74% of individuals detained in county jails have not been convicted of any crime, amounting to 555,000 people who have not been convicted or sentenced yet.⁷⁸ As we know from *Salerno*, public safety is a primary justification for pretrial detention,⁷⁹ and yet of the 555,000 unconvicted inmates, only 27% have been charged with a violent crime.⁸⁰ The rest are detained on property, drug, or public order offenses.⁸¹ While these charges are violations of the law, what public safety aim is gained by their continued detention? Comparatively, the United States detains almost twice as many individuals pretrial than any other country in the world.⁸²

Why the rapid rise and high rate of pretrial incarceration? One culprit could be the monetary bail system, which requires defendants to pay a certain, often standardized, amount to allow for their release.⁸³ In 1990 only 53% of defendants needed to post money bail, a proportion which

defendant is pending.”); WASH. R. CRIM. P. 3.2(j)(1)–(2) (Washington State only requires this review to occur within a “reasonable time”: “Review of Conditions. (1) At any time after the preliminary appearance, an accused who is being detained due to failure to post bail may move for reconsideration of bail. In connection with this motion, both parties may present information by proffer or otherwise. If deemed necessary for a fair determination of the issue, the court may direct the taking of additional testimony. (2) A hearing on the motion shall be held within a reasonable time.”).

77. Todd D. Minton & Zhen Zeng, *Jail Inmates at Midyear 2014*, U.S. DEP’T JUST., Bull. No. 248629, June 2015, at 1, 1.

78. Sawyer & Wagner, *supra* note 1.

79. *United States v. Salerno*, 481 U.S. 739, 748 (1987).

80. *Id.*

81. *Id.*

82. ROY WALMSLEY, *WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST* (3d ed. 2017).

83. Patrick Liu et al., *The Economics of Bail and Pretrial Detention*, HAMILTON PROJECT, at 3 (Dec. 2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf [<https://perma.cc/D2L6-RKUY>].

increased to 72% in 2009.⁸⁴ The median bail for felony defendants among the 75 largest counties in the United States was \$10,000 in 2009.⁸⁵

How does the high price of bail impact individuals, considering that bail bonding agents can help post a surety bond? The premium of a \$10,000 bail order is \$1,000.⁸⁶ Almost 40% of adults in the United States cannot afford a \$400 emergency without holding a credit card balance or borrowing from family or friends.⁸⁷ Twelve percent of adults would be unable to pay this type of expense at all.⁸⁸ For 12% of adults a \$4,000 bond could bar their release regardless of their culpability and the presumption of innocence.

A 2008 study of nonfelony arrests in New York City revealed in 87% of cases where bail was \$1,000 or less, defendants were not able to post bail at their arraignment.⁸⁹ This resulted in an average pretrial detention of 15.7 days, which, as explained in the next Part, costs more than just a defendant's time.⁹⁰ Most of these charges (71.1%) were non-violent, non-weapons related.⁹¹

D. *Costs of Pretrial Detention*

Rates of pretrial detention have received increased attention from reformers, especially outside of Florida, in the last few years.⁹² The pretrial stage is important because of its numerous legal and practical implications. As noted in the Introduction, taxpayers spend nearly nine billion dollars annually detaining individuals who, in the eyes of the law, are innocent.⁹³ Pretrial detention can range from 50 to 200 days for those unable to post bail.⁹⁴

84. *Id.* at 5.

85. Brian A. Reeves, *Felony Defendants in Large Urban Counties, 2009-Statistical Tables*, U.S. DEP'T OF JUST., at 1, 19 (Dec. 2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/UZ9X-SKP9>].

86. Liu et al., *supra* note 83, at 8.

87. *Report on the Economic Well-Being of U.S. Households in 2018 - May 2019*, FED. RES. (last updated May 28, 2019), <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm> [<https://perma.cc/53ZB-P6H8>].

88. *Id.*

89. Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, H.R. WATCH, Dec. 2, 2010, at 2, <https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new> [<https://perma.cc/ZS52-URTS>].

90. *Id.*; see *infra* Part II.

91. Fellner, *supra* note 89, at 2.

92. See Bednadette Rabuy, *Pretrial Detention Costs \$13.6 Billion Each Year*, PRISON POL'Y INITIATIVE (Feb. 7, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/ [<https://perma.cc/27GA-AYFH>].

93. Holder, *supra* note 6.

94. Liu et al., *supra* note 83, at 5.

One group for whom pretrial detention results in high taxpayer expense is the homeless population. A 2014 report on homelessness in Central Florida found that detaining chronically homeless individuals cost Seminole, Osceola, and Orange counties \$641,791 annually.⁹⁵ In Osceola County the study focused on 37 individuals who were arrested 1,250 times over ten years.⁹⁶ Each arrest cost the county \$104 per booking with an average of 49.5 days spent in custody and an average per day, per person cost of \$80 to house these individuals.⁹⁷

The financial impact does not end with taxpayer expense. In this time, individuals detained pretrial find themselves facing weakened family and social ties and the loss of jobs and housing.⁹⁸ Being absent from their family also means individuals detained pretrial can risk losing custody of their children, even if they are primary caregivers.⁹⁹ These personal hardships are felt more acutely by people of color.¹⁰⁰ African American men pay 35% higher bail amounts than white men with Hispanic men paying 19% higher bail amounts than white men.¹⁰¹ Pretrial detention decreases employment and receipt of government benefits.¹⁰²

95. Gregory A. Shinn, *The Cost of Long-Term Homelessness in Central Florida: The Current Crisis and the Economic Impact of Providing Sustainable Housing Solutions*, RETHINK HOMELESSNESS, 2014, at 13, <http://www.impacthomelessness.org/resources/docs/eis/Eco-ImpactReport-LOW-RES.pdf> [<https://perma.cc/DGS4-BCMS>].

96. *Id.* at 22.

97. *Id.*

98. Alfred Allan et al., *An Observational Study of Bail Decision-Making*, 12 PSYCHIATRY PSYCH. & L. 319, 319–33 (2005).

99. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711–94 (2017).

100. *See* Jones, *supra* note 75, at 937.

101. Alex Emslie, *Kamala Harris and Rand Paul Introduce National Bail Reform Bill*, CAL. REPORT (July 20, 2017), <https://www.kqed.org/news/11577944/kamala-harris-and-rand-paul-introduce-national-bail-reform-bill> [<https://perma.cc/WZ8N-B9M5>].

102. Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201–40 (2018). Dobbie, Goldin and Yang examine the economic impact of pretrial detention using data from over 420,000 defendant's case. They connect tax and administrative tax records to case outcomes. Interestingly they find that pretrial detention has no net effect on future crime. A criminal defense lawyer noted:

Our clients work in service-level positions where if you're gone for a day, you lose your job. People in need of caretaking—the elderly, the young—are left without caretakers. People who live in shelters, where if they miss their curfews, they lose their housing. Folks with immigration concerns are quicker to be put on the immigration radar. So when our clients have bail set, they suffer on the inside, they worry about what's happening on the outside, and when they get out, they come back to a world that's more difficult than the already difficult situation that they were in before.

Nick Pinto, *The Bail Trap*, N.Y. TIMES, Aug. 13, 2015 (Magazine), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/MNG5-RRLN>].

Pretrial detention has legal consequences as well. Individuals incarcerated have less access to their attorneys, either via phone or face-to-face and experience difficulty in mounting effective legal strategies and defenses.¹⁰³ Practically, individuals detained cannot find witnesses and seek out potentially exonerating or mitigating evidence from a jail cell. Pretrial detention weakens the bargaining power of defendants during pretrial negotiations.¹⁰⁴ As a result of these numerous challenges, “a detained person may plead guilty—even if innocent—simply to get out of jail.”¹⁰⁵

The disadvantage of litigating from the jailhouse translates into harsher consequences as well. It is sad but true: “A commonly noted irony of American misdemeanor justice is that, despite the widespread implementation of bail reform . . . many more defendants are imprisoned before trial than are imprisoned after conviction”¹⁰⁶ A study of Philadelphia courts found “pretrial detention leads to a 13% increase in the likelihood of being convicted on at least one charge.”¹⁰⁷ This increase can be explained by defendants pleading guilty to end their detention when other dispositions, like diversion, plea negotiations leading to dismissal, and acquittal could lead to better outcomes.¹⁰⁸ Being detained pretrial also translates to a higher level of jail sentences, and, in one study, to a 42% increase in sentence length.¹⁰⁹ As previously discussed, pretrial

103. JOHN S. GOLDKAMP, *TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE* 11 (1979); *see also* Jones, *supra* note 75, at 938.

104. *See* Tobolowsky & Quinn, *supra* note 22, at 275 n.39.

105. Heaton et al., *supra* note 99, at 714 (citation omitted).

106. Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 931–1050 (1983) (“If a defendant is denied or cannot make bail, the length of pretrial detention may approach or even dwarf the likely sentence after trial. Thus, detained defendants strike bargains for time served instead of awaiting their day in court. Plea bargaining, then, often happens in the shadow not of trial but of bail decisions.”).

107. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511, 512 (2018).

108. *Id.* at 512–13. Even an acquittal can be accompanied with negative consequences, however, because

pretrial detention can approach or exceed the punishment that a court would impose after trial. So even an acquittal at trial can be a hollow victory, as there is no way to restore the days already spent in jail. The defendant’s best-case scenario becomes not zero days in jail, but the length of time already served.

Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2492–93 (2004).

109. Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 649 (1964).

detention's financial consequences pervade the process, with defendants detained pretrial carrying 41% higher levels of court costs and fees.¹¹⁰

Merely being present in a jail while awaiting trial translates to a scary proposition. Because of “deplorable conditions and overcrowding in some local jails, pretrial detainees are exposed to diseases, physical violence, sexual assault, and face a very real risk of death.”¹¹¹ High rates of pretrial detention can have dangerous consequences in the face of a pandemic as well.

The conditions created by the COVID-19 pandemic exacerbate the problems with massive pretrial detention.¹¹² Detainees face conditions where social distancing and other common practices are impossible.¹¹³ Some Florida jails have resorted to large releases of nonviolent inmates to prevent the spread of the virus.¹¹⁴ Those that remain in custody face delays due to closed court systems, restricted access to their counsel, and curtailed due process rights.¹¹⁵ Despite some compassionate release, large outbreaks of COVID-19 have occurred in county correctional facilities.¹¹⁶

II. RURAL-URBAN JUSTICE DISTINCTIONS

The Equal Protection Clause demands that individuals be treated equally.¹¹⁷ When geography dictates differential treatment, systems of justice run afoul of equal justice principles. Scholars have scrutinized the

110. *Id.* “Since most people who are detained pretrial are detained due to an inability to pay bail, this provides support for poverty-trap theories of criminal justice. While the median defendant must pay only \$250 to secure release, those who are convicted are expected to pay an average of \$611 in court fees. The monetary bail system acts as a sort of regressive taxation: those who cannot afford to pay for pretrial release are required to pay a larger portion of the court’s expenses.” Stevenson, *supra* note 107, at 513.

111. Jones, *supra* note 75, at 937.

112. Sarah Turberville & Katherine Hawkins, *Pretrial Detention in a Pandemic*, PROJECT ON GOV’T OVERSIGHT (June 23, 2020), <https://www.pogo.org/analysis/2020/06/pretrial-detention-in-a-pandemic/> [<https://perma.cc/S7GQ-ZHTR>].

113. *Id.* (Turberville and Hawkins note that eight of the 10 largest COVID-19 outbreaks are in correctional facilities, in part because of the woefully inadequate medical care at these facilities.)

114. Kelly Wiley, *Since March, Hundreds of Nonviolent Offenders Released to Control Virus Spread at Duval Jail*, NEWS 4 JAX (updated June 30, 2020, 6:40 PM), <https://www.news4jax.com/news/local/2020/06/30/since-march-hundreds-of-nonviolent-offenders-out-of-duval-jail-to-control-virus-spread/> [<https://perma.cc/BC5D-9SLF>] (reporting that Duval County released 500 nonviolent offenders from their pretrial detention center from mid-March through the end of June in 2020).

115. Turberville & Hawkins, *supra* note 112.

116. *Id.*

117. U.S. CONST. amend. XIV § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

divide between rural and urban locations in the United States for decades to discern why these locations have different attitudes and see different results.¹¹⁸ Rural-urban distinctions abound in social science literature, with differences in political polarization,¹¹⁹ voting patterns,¹²⁰ religiosity,¹²¹ delivery of local government services,¹²² rates of failures to appear (FTAs),¹²³ and support for environmental protection.¹²⁴ Historically, rural crime trends received less attention because urban crime rates tended to be substantially higher.¹²⁵ Scholars have suggested this scant attention to rural justice systems is harmful to policymaking and that understanding the differences in rural and urban justice is necessary.¹²⁶

Why probe the differences in rural and urban justice in pretrial detention, especially in Florida? Well, rural and urban distinctions emerge in other criminal justice contexts such as sentencing, probation and juvenile justice. Given the wide-ranging impact of these distinctions,

118. Eileen Patten, *The Black-White and Urban-Rural Divides in Perceptions of Racial Fairness*, PEW RSCH. CTR. (Aug. 28, 2013), <https://www.pewresearch.org/fact-tank/2013/08/28/the-black-white-and-urban-rural-divides-in-perceptions-of-racial-fairness/> [https://perma.cc/3VRK-AJU5].

119. Dante J. Scala & Kenneth M. Johnson, *Political Polarization along the Rural-Urban Continuum? The Geography of the Presidential Vote, 2000–2016*, 672 ANNALS AM. ACAD. POL. & SOC. SCI. 162, 163–84 (2017).

120. Paige Kelly & Linda Lobao, *The Social Bases of Rural-Urban Political Divides: Social Status, Work, and Sociocultural Beliefs*, 84 RURAL SOC. 669, 669–705 (2019) (finding that the variation in social status accounts for differences in voting choices as well as sociocultural values and beliefs).

121. H. Paul Chalfant & Peter L. Heller, *Rural/Urban Versus Regional Differences in Religiosity*, 33 REV. RELIGIOUS RSCH. 76, 76–86 (1991) (examining rural-urban impacts on variations in religiosity, finding differences in religious practice and sentiment between regions and rural-urban locations).

122. Mildred Warner & Amir Hefetz, *Rural-Urban Differences in Privatization: Limits to the Competitive State*, 21 ENV'T & PLAN. C: GOV'T & POL'Y 703, 703–18 (2003) (finding that cooperation, rather than market solutions, may provide an alternative to privatization in rural and disadvantaged communities where market-based solutions are less prevalent).

123. Brian H. Bornstein et al., *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 19 PSYCHOL., PUB. POL'Y, & L. 70 (2013).

124. George D. Lowe & Thomas K. Pinhey, *Rural-Urban Differences in Support for Environmental Protection*, 47 RURAL SOC. 114 (1982) (comparing multiple hypotheses as to why rural people show consistently lower levels of support for environmental protection; socialization of urban dwellers tended to positively influence support for social solutions to environmental problems).

125. Wojciech Cebulak, *Why Rural Crime and Justice Really Matter*, 19 J. POLICE & CRIM. PSYCH. 71, 71–81 (2004) (finding a steady increase of rural crime from the late 1960s to early 1990s in spite of urban increases and declines and that some crimes occur only in rural settings which helps account for this increase).

126. Ralph A. Weisheit & L. Edward Wells, *Rural Crime and Justice: Implications for Theory and Research*, 42 CRIME & DELINQ. 379, 379–97 (1996) (arguing that applying urban models of social organization to rural settings is ineffective and needs to be reassessed).

it is important to see the differences manifested elsewhere in the system first.

A. Rural-Urban Sentencing

Sentencing decisions are among the most studied in the criminal justice context, in part, due to the quantifiable and deliberative aspects of these decisions.¹²⁷ There is one sentencing judge in one jurisdiction with one set of lawyers and one defendant whose charges are specific and defined. This permits social scientists to easily classify and analyze data. While the same individual defendant may appear before the same judge for a pretrial detention decision and sentencing, a sentencing judge has access to more information, from both the prosecutor and the defense attorney, as well as filings in the case.¹²⁸

Research has shown “ostensibly similar offenders are punished differently, depending on whether they were convicted in urban rather than rural counties.”¹²⁹ Myers and Talarico’s research revealed that urbanization had a large effect in Georgia courts in the 1980s.¹³⁰ Urbanization was found to be a “contextual determinant of differential treatment.”¹³¹

Another study found that the distinction between rural and urban sentencing contexts translated to urban courts making sentencing decisions based on legal factors and rural courts placing emphasis on extralegal matters.¹³² Legal factors include both the charges the defendant

127. See Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME AND JUST. 303, 303–62 (1997); Frank O. Bowman III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 9 (2001); Cassia Spohn, *Race and Sentencing Disparity* in 4 REFORMING CRIMINAL JUSTICE: A REPORT OF THE ACADEMY FOR JUSTICE ON BRIDGING THE GAP BETWEEN SCHOLARSHIP AND REFORM 169, 169–86 (Erik Luna ed., 2017); Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447 (2016).

128. At a sentencing hearing, the judge can have more time to contemplate their decision, and the defendant likely has the assistance of counsel to present mitigating evidence. Sentencing hearings post-trial may provide the clearest picture of the evidence and appropriateness of a given sentence.

129. Martha A. Myers & Susette M. Talarico, *Urban Justice, Rural Injustice? Urbanization and Its Effect on Sentencing*, 24 CRIMINOLOGY 367, 367 (1986). See also John Hagan, *Criminal Justice in Rural and Urban Communities: A Study of the Bureaucratization of Justice*, 55 SOC. FORCES 597, 597, 609 (1977); Carl E. Pope, *The Influence of Social and Legal Factors on Sentencing Dispositions: A Preliminary Analysis of Offender Based Transaction Statistics*, 4 J. CRIM. JUST. 203, 217–18 (1976); Lorne Tepperman, *The Effects of Court Size on Organization and Procedure*, 10 CAN. REV. SOC. & ANTHROPOLOGY 346, 346–65; Terance D. Miethe & Charles A. Moore, *Racial Differences in Criminal Processing: The Consequences of Model Selection on Conclusions About Differential Treatment*, 27 SOC. Q. 217, 217–37 (1986).

130. Myers & Talarico, *supra* note 129, at 381.

131. *Id.*

132. Thomas L. Austin, *The Influence of Court Location on Type of Criminal Sentence: The Rural-Urban Factor*, 9 J. OF CRIM. JUST. 305, 305 (1981).

pled to and their attendant criminal history.¹³³ Extralegal factors include age, race, sex and other socioeconomic factors.¹³⁴ In theory, legal factors would provide more stability in sentencing outcomes, with the application of rules and process to a defendant's criminal history and charge.¹³⁵ In the rural context, these extralegal factors, can lead to harsher sentences.¹³⁶

B. *Rural-Urban Probation*

Probation administration has some similarities to the pretrial detention process as well. Pretrial detention decisions are made without as much information as probation processes but, much like sentencing, their similarities are important. Probation officers take in defendants and supervise their activities, much like a pretrial release program.

Upon examination, intake in a midwestern state's rural and urban counties shared many similarities in the administration of probation, with comparable sex and education levels of offenders.¹³⁷ Despite the programs being administered at the local level, there were consistent sentences and perceived treatment differences emerged between rural and urban counties.¹³⁸ Rural counties had more fees, restitution and electronic monitoring requirements on sentenced defendants.¹³⁹ In contrast, urban counties were more likely to require community service.¹⁴⁰

C. *Rural-Urban Juvenile Justice*

Juvenile justice is another area where we see judges making similar decisions regarding pretrial detention and see a clear rural-urban divide. Juvenile judges, unlike regular criminal judges, are often tasked with very child-specific decisions that have wide reaching consequences outside of the courtroom. The outputs for a juvenile case are similar in some ways to pretrial detention, with a preference for supervision rather than detention.

A study of Minnesota courts found a rural-urban divide in juvenile justice.¹⁴¹ In more heterogenous and diverse urban counties there are more formal, bureaucratized and due-process oriented justice systems.¹⁴²

133. *Id.* at 306.

134. *Id.*

135. *Id.*

136. *Id.*

137. Thomas Ellsworth & Ralph A. Weisheit, *The Supervision and Treatment of Offenders on Probation: Understanding Rural and Urban Differences*, 77 PRISON J. 209, 209–28 (1997).

138. *Id.*

139. *Id.* at 224.

140. *Id.*

141. Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 157 (1991).

142. *Id.* at 156.

This formality leads to more severity in detention and sentencing practices.¹⁴³ Rural counties are more homogenous and have fewer formal juvenile sanctions and less severe treatment.¹⁴⁴

The contrast between juvenile justice and sentencing outcomes poses an interesting question: Why do we see more severe treatment in urban contexts in one set of decisions but the reverse in another? Is this due to bureaucratization or the approach to the law? Discovering the difference is only the first part of the equation.

D. Rural-Urban Distinctions in Pretrial Detention

Insights from sentencing, probation and juvenile justice are informative to understanding what differences exist between rural and urban counties in pretrial detention. The bureaucratic resource difference between rural and urban criminal justice present in those contexts translates similarly to pretrial detention decisions. Resources available to urban courts in court administration, probation cases, and juvenile cases allow judges to make more systematic decisions where rural courts often have to rely on more intuition-based decision making.

Pretrial detention decisions can benefit from resources to evaluate the accused's ability to pay, risk of failing to appear and criminal history. While bureaucratic decision making has the drawback of smoothing over nuance, it allows policy makers to deploy consistent frameworks across cases. As we will see in the data, counties with resources related to pretrial release detain far fewer individuals at usually a far lower cost.

III. DATA SOURCES AND ANALYSIS

Prior empirical studies of bail have been rare and generally focused on state and local data.¹⁴⁵ Our original data thus represent a novel source for evaluating important but understudied federal bail decisions.

Substantive discussions of the state of the law are necessary to understanding pretrial detention in the rural-urban context in Florida but do not go far enough. In order to fully understand the practical

143. *Id.* at 157.

144. *Id.* at 162.

145. *E.g.*, Meghan Sacks & Alissa R. Ackerman, *Pretrial Detention and Guilty Pleas: If They Cannot Afford Bail They Must be Guilty*, 25 CRIM. JUST. STUD. 265 (2012); Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59 (2014); Meghan Sacks et al., *Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes*, 40 AM. J. CRIM. JUST. 661 (2015); John Wooldredge et al., *Ecological Contributors to Disparities in Bond Amounts and Pretrial Detention*, 63 CRIME & DELINQ. 1682 (2017); Rod V. Hissong & Gerald Wheeler, *The Role of Private Legal Representation and the Implicit Effect of Defendants' Demographic Characteristics in Setting Bail and Obtaining Pretrial Release*, 30 CRIM. JUST. POL'Y REV. 708 (2017); Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 U. CHI. J. LEG. STUD. 471 (2016).

implications of the processes currently in place, as well as the potential solutions, we need to engage with the data presently available. By comparing pretrial detention rates among counties with and without pretrial release programs, a clearer picture will emerge, with nuance only empirical analysis can provide.

The data examined in this Article comes from a variety of sources in order to capture a robust picture of what pretrial detention rates look like nationwide and within Florida. While Florida does regularly produce data on case names, outcomes, and other factors, pretrial release and bail data are spotty and inconsistent. In 2018, the Florida Legislature passed a law creating a more complete statewide criminal justice database.¹⁴⁶ This new data would reveal individual case and bond amounts, clearly report jail and prison populations, and note prosecutorial patterns, among many other things.¹⁴⁷ Sadly, this database is currently unavailable and seemingly bogged down with extensive delays.¹⁴⁸

A. *Vera Data*

To examine county-level pretrial detention and other jail-related information I utilized a dataset from the Vera Institute of Justice. The Vera Institute of Justice collects a variety of data related to criminal cases across the United States.¹⁴⁹ I utilized the Incarceration Trends dataset for

146. Fla. Stat. § 900.05 (2018). The new database will collect 140 data points for each case, standardizing collection across counties and publishing the data.

Florida SB 1392 (2018) amended Fla. Stat 900.05 to read:

(1) LEGISLATIVE FINDINGS AND INTENT.—It is the intent of the Legislature to create a model of uniform criminal justice data collection by requiring local and state criminal justice agencies to report complete, accurate, and timely data, and making such data available to the public. The Legislature finds that it is an important state interest to implement a uniform data collection process and promote criminal justice data transparency.

The changes also create uniform arrest and charging documents and standardize definitions across jurisdictions.

147. *Id.*

148. Andrew Pantazi, *A New Effort was Supposed to Make Florida's Criminal Justice Data Radically Transparent. So Far, It's Failed*, PALM BEACH POST (July 2, 2020, 3:02 PM), <https://www.palmbeachpost.com/news/20200702/new-effort-was-supposed-to-make-floridars-quos-criminal-justice-data-radically-transparent-so-far-itrsquos-failed/1> [<https://perma.cc/4HHP-CQLQ>]. The Florida Department of Law Enforcement (FDLE) missed several deadlines to publish this database which may result in some state agencies losing funding.

149. Vera's research focuses on criminal justice issues, ranging from policing, immigration legal systems, corrections, housing, and education. They aim to use data to support policy changes. Vera also outlines its methods more specifically in JACOB KANG-BROWN, VERA INST. OF JUST., INCARCERATION TRENDS: DATA AND METHODS FOR HISTORICAL JAIL POPULATIONS IN U.S. COUNTIES, 1970–2014 (2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/in-our-own-backyard-confronting-growth-and-disparities-in-american-jails/legacy_downloads/incarceration-trends-data-and-methods.pdf [<https://perma.cc/UG8F-A24R>].

this Article.¹⁵⁰ “This dataset was assembled using information collected by the U.S. Department of Justice Bureau of Justice Statistics (BJS), supplemented with data from state departments of correction when federal data is not available.”¹⁵¹ Vera also used the Census of Jails (COJ), conducted every five to eight years, and Annual Survey of Jails (ASJ) to fill out the information.¹⁵² The Incarceration Trends data is recorded at the county-level from 1970 to 2017.¹⁵³

The variables from the Incarceration Trends dataset used below incorporate County Jail Population, Pretrial Jail Population and resident population data.¹⁵⁴ County Jail Population is defined as the “average daily population and excludes federal jails and inmates in local jails held for federal authorities, such as U.S. Immigrations and Customs Enforcement and U.S. Marshals Service.”¹⁵⁵ The Pretrial Jail Population number is a subset of the Total Jail Population, including only those who are considered “unconvicted” in the BJS data on June 30th of each year.¹⁵⁶ Because the Total Jail Population is an average of the year on the whole and the Pretrial Jail Population is only a snapshot, they provide slightly different statistics as jail populations fluctuate day-to-day.¹⁵⁷ Vera’s population data comes from the U.S. Census as well as the American Community Survey (ACS).¹⁵⁸ Specifically, “[t]he project uses intercensal

150. VERA INST. OF JUST., INCARCERATION TRENDS DATASET AND DOCUMENTATION, https://github.com/vera-institute/incarceration_trends [<https://perma.cc/E26A-7CDH>] (last visited Aug. 12, 2020).

151. VERA INST. OF JUST., INCARCERATION TRENDS DATASET: CODEBOOK 4 (2020), https://github.com/vera-institute/incarceration_trends/blob/master/incarceration_trends-Codebook.pdf?raw=true [<https://perma.cc/PN6P-58VX>] (last visited Jan. 3, 2022).

152. *See id.* at 5–6. Vera notes:

The ASJ was fielded 27 times between 1985 and 2016 and captures data for a sample of a few hundred jails; in 2015, the sample was approximately 800 counties, which included the 250 largest jails. The COJ has only been fielded 10 times since 1970—in 1970, 1972, 1978, 1983, 1988, 1993, 1999, 2005, 2006, and 2013—but captures data for all counties. Data for years that counties did not supply data (through the ASJ or COJ) were interpolated . . . assuming a constant rate of change between the years when data was provided.

JACOB KANG-BROWN ET AL., VERA INST. OF JUST., INCARCERATION TRENDS IN LOCAL JAILS AND STATE PRISONS: DATA AND METHODS FOR STATE FACT SHEETS 4 (2019), <https://www.vera.org/downloads/publications/incarceration-trends-fact-sheets-data-and-methods.pdf> [<https://perma.cc/DH4Q-AECF>]. “Six states (Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont) do not participate in the U.S. jail survey or census because they run unified state systems that combine prisons and jails.” *Id.* at 4.

153. CODEBOOK, *supra* note 151, at 6.

154. *Id.* at 8, 10.

155. *Id.*

156. *See* KANG-BROWN ET AL., *supra* note 152, at 4.

157. *Id.*

158. KANG-BROWN, *supra* note 149, at 5.

population estimates for individual years between 1970 and 2010, and 2014 post-censal estimates, all available from U.S. Census.”¹⁵⁹

The primary output from the Vera data I rely on is the Pretrial Jail incarceration rate. This statistic, rather than a raw population count of individuals detained in the jail, allows a comparison between counties regardless of population. The Pretrial Jail incarceration rate is the number of inmates detained pretrial per 100,000 residents aged 15–64.¹⁶⁰

B. *OPPAGA Reports*

In addition to the Vera Incarceration trends dataset, I compiled a limited, unique dataset from Florida legislative reports produced by the Office of Program Policy Analysis and Government Accountability (OPPAGA). Since 1994, OPPAGA has provided statewide reports and evaluations of programs for the Florida Legislature.¹⁶¹

One of the many areas of OPPAGA’s engagement is criminal justice. In 2008, Florida’s Right-to-Know Act came into effect, requiring counties with pretrial release programs to regularly report information to OPPAGA.¹⁶² Pretrial release programs are defined as “an entity, public or private, that conducts investigations of pretrial detainees, makes pretrial release recommendations to a court, and electronically monitors and supervises pretrial defendants. However, the term ‘pretrial release program’ shall not apply to the Department of Corrections.”¹⁶³

OPPAGA requires weekly information updates on how the pretrial release programs were funded, the criminal histories and charges of defendants, FTAs, arrests, and compliance with reporting guidelines.¹⁶⁴ In addition to weekly reports, each program must also provide a detailed annual report by March 31st of each year.¹⁶⁵

To provide a snapshot of the state’s pretrial release programs, I compiled data from 2014 to 2017, identifying the number of accepted defendants, served defendants, total county pretrial program budget, warrants issued, FTAs, types of monitoring, assessment of fees and

159. *Id.*

160. *See Incarceration Trends*, VERA INST. OF JUST., <https://trends.vera.org/> [<https://perma.cc/H7M5-A8VB>] (last visited Jan. 3, 2022).

161. *About OPPAGA*, OPPAGA, <https://oppaga.fl.gov/About> [<https://perma.cc/R8SF-ECWK>] (last visited Aug. 12, 2020). OPPAGA research is used to assist legislators and other state officials in policy planning and budgeting.

162. FLA. STAT. § 907.043(3)(a) (2020). Specifically, “[e]ach pretrial release program must prepare a register displaying information that is relevant to the defendants released through such a program. A copy of the register must be located at the office of the clerk of the circuit court in the county where the program is located and must be readily accessible to the public.” *Id.*

163. FLA. STAT. § 907.043(2)(b) (2020).

164. FLA. STAT. § 907.043(3)(b) (2020).

165. FLA. STAT. § 907.043(4)(a)–(b) (2020).

recipient of fee payments. Between 2014 and 2017, twenty-eight counties reported their pretrial program data.¹⁶⁶

C. Population and Arrest Data

Supplementing the data listed above, I added additional population and arrest data from Florida's Uniform Crime Reports from 2014 to 2017.¹⁶⁷ The arrest data breaks down population and arrest rates by Florida county. I will deploy these primarily in the analysis of program effectiveness of pretrial release.

D. Rural-Urban Classification

The Incarceration Trends dataset and the OPAGGA reports contain a great deal of quantitative data that does not break counties down into rural-urban classifications. In order to accurately capture the division between rural and urban counties, I used the 2013 National Center for Health Statistics (NCHS) Urban-Rural Classification Scheme for Counties.¹⁶⁸ Their classification scheme breaks down counties into metropolitan versus nonmetropolitan counties based on population and proximity to metropolitan areas.¹⁶⁹ In short, nonmetropolitan counties comprise of counties with less than 50,000 residents. For purposes of our analysis, metropolitan counties are considered "urban" and nonmetropolitan are "rural." All counties nationally were coded with a 0 or 1 with 1 indicating a rural county.

IV. PRETRIAL RURAL-URBAN DIVIDE ACROSS STATES

As discussed above, the difference between criminal justice in urban and pretrial counties is astounding. Zip codes, more often than not, dictate the type of justice meted out to defendants. This difference manifests itself clearly in the pretrial detention context.

166. OPPAGA, REPORT NO. 18-06, COUNTY PRETRIAL RELEASE PROGRAMS: CALENDAR YEAR 2017 (Nov. 2018), <https://oppaga.fl.gov/Products/ReportDetail?rn=18-06> [<https://perma.cc/G3TL-7TFK>]

167. FLA. DEP'T OF L. ENF'T, FLORIDA'S UNIFORM CRIME REPORTS DATA, <https://www.fdle.state.fl.us/FSAC/Data-Statistics/UCR-Arrest-Data.aspx> [<https://perma.cc/ZPK4-KLUV>] (last visited Aug. 12, 2020).

168. See U.S. DEP'T OF HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, SERIES 2 NO. 166, 2013 NCHS URBAN-RURAL CLASSIFICATION SCHEME FOR COUNTIES 2 (Apr. 2014), https://www.cdc.gov/nchs/data/series/sr_02/sr02_166.pdf [<https://perma.cc/W6Y3-D4K9>]

169. The report further places counties into six subdivided categories: within "metropolitan": large central metro, large fringe metro, medium metro and small metro; within "nonmetropolitan": metropolitan (10,000–49,999) and noncore. While the six categories provide more refined distinctions, the refined distinction could scrub the data of cognizable differences. *Id.*

Let us get to the numbers. This section primarily serves as a snapshot of what trends in pretrial detention look like nationwide in order to understand how Florida fits (and does not fit) into these larger patterns. As we will see, over the last thirty years pretrial detention rates have increased nationwide in all counties.

A. Nationwide Pretrial Detention Rates

Figure 1 displays the pretrial jail population per 100,000 people (aged 15–64) averaged across states and over time. Each state is represented as a whole for each year. By utilizing a box plot we can see the general trends, the range between quartiles and the emergence of outliers.

Figure 1

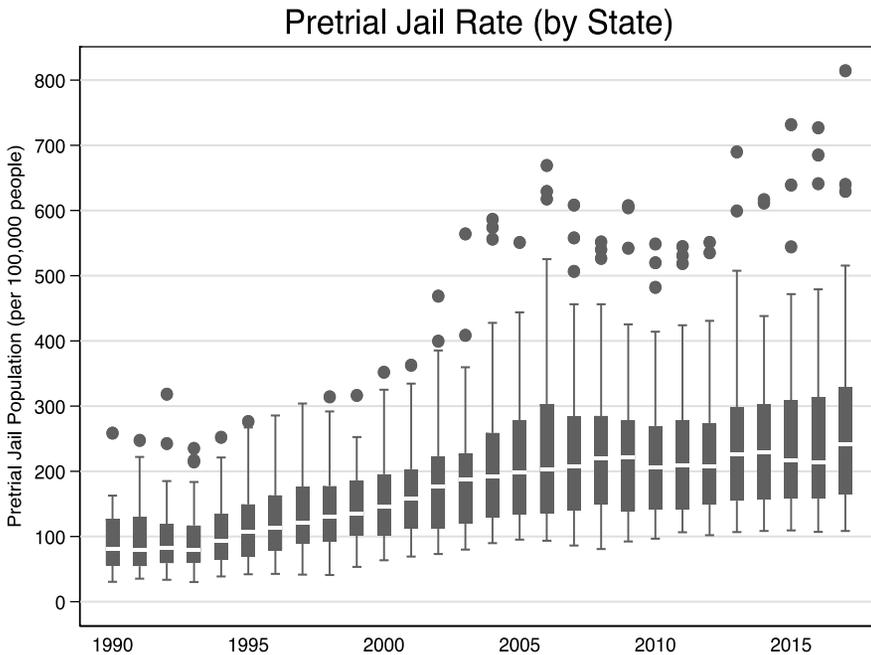


Figure 1: This box plot displays the median and quartile breakdown of the pretrial jail rate for each state from 1990-2017. Each state is considered one unit for purposes of this graph.

In 1990, the mean pretrial jail population was 91.40 per 100,000 residents, with a minimum average of 30.64 and a maximum of 258.54. Over a decade the mean increased nearly 60%, to 153.61. The rate continued to increase over time, arriving at a mean of 277.67 in 2017 with an astonishing statewide maximum rate of 814.37.¹⁷⁰ The rate changes

170. The outliers for 2017 are Louisiana with a pretrial incarceration rate of 814.37, Texas with 639.95, and New Mexico with 629.34. See *supra* Figure 1.

take population into account, meaning that in twenty-seven years the average rate tripled. While there may be a multitude of explanations for this drastic increase, our goal is to discern whether there is a rural-urban divide in detention.

B. *Nationwide Rural vs. Urban Pretrial Rates*

This leads to more questions: Do rural and urban counties track with the national rate or do they diverge? Before comparing rates, we should take note of the number of urban and rural counties in the United States. Table 1 shows the division of the nation's 3,139 counties. Within the United States rural counties outnumber urban counties almost two-to-one.

Table 1: This table lists the number and percentage of urban and rural counties nationwide.

	NUMBER OF COUNTIES	PERCENT
URBAN COUNTIES	1,162	37.02%
RURAL	1,977	62.98%
TOTAL	3,139	

As seen in Figure 2 below, rural and urban counties have seen a large upward trend in the pretrial incarceration rate since 1990. Rural pretrial incarceration rates nationwide were 85.6 per 100,000 residents in 1990, and this rate quadrupled over the course of twenty-seven years. Interestingly, before 2005 we see urban pretrial incarceration track higher than rural pretrial incarceration. This turning point for urban counties mostly stabilized the rate of pretrial incarceration in the intervening twelve years while rural rates continued a steady increase.

Given the steady increases for both categories, it may also be helpful to see if this trend reflects jail population trends generally. While pretrial incarceration is a subset of the jail population and the rates should be similar, there may be other factors at play here.

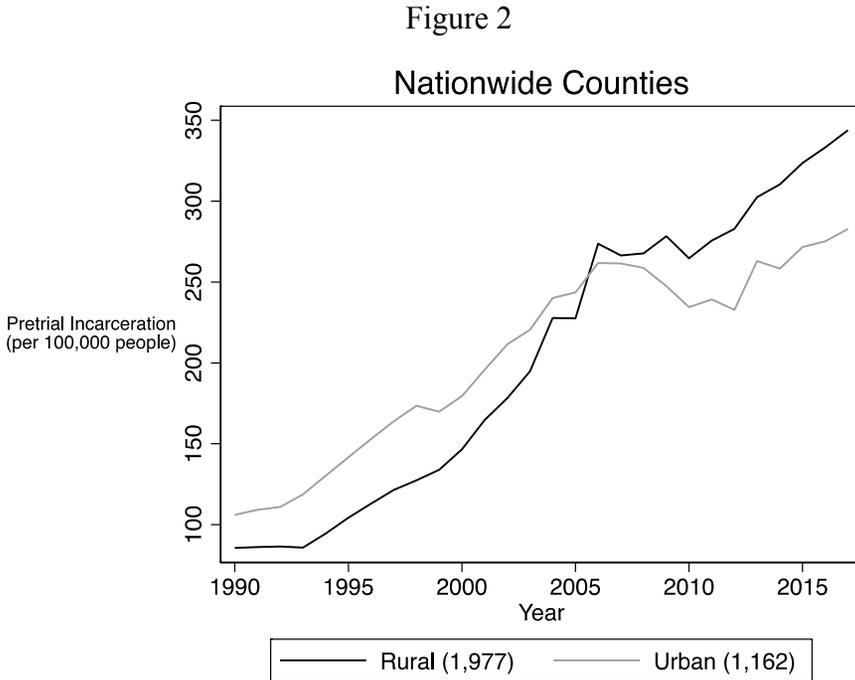


Figure 2: Here the differences in rural and urban counties' rates of pretrial incarceration are compared. These two lines represent the pretrial incarceration population (per 100,000 residents aged 15-64) among all rural and all urban counties nationwide from 1990-2017.

Figure 3 displays the Total Jail Population rate (per 100,000 residents 15–64) for counties nationwide. As with Figure 2, the rate is the average, continuous rate for each county for years 1990 to 2017. With both rural and urban counties, we see growth in the Total Jail Population whereas they differ is in the rate of increase. Urban counties steadily increased until 2006 when they leveled off for the most part. In contrast to the pretrial incarceration rate, rural counties' jail population overtook those of urban counties in 1998, eight years before we would see the same reflected in the retrial incarceration rate.

Many things could explain the increasing rates: higher levels of crime, better enforcement, or harsher sentencing. The question of why the rates are increasing matters, but our focus is on the difference between these two types of counties. One thing is clear: in the last three decades rural counties in the United State have increasingly detained individuals charged, but not convicted, at a much faster pace than urban counties. Now we shift our focus from the larger nationwide trends to see how Florida counties fit (or do not fit) with those trends.

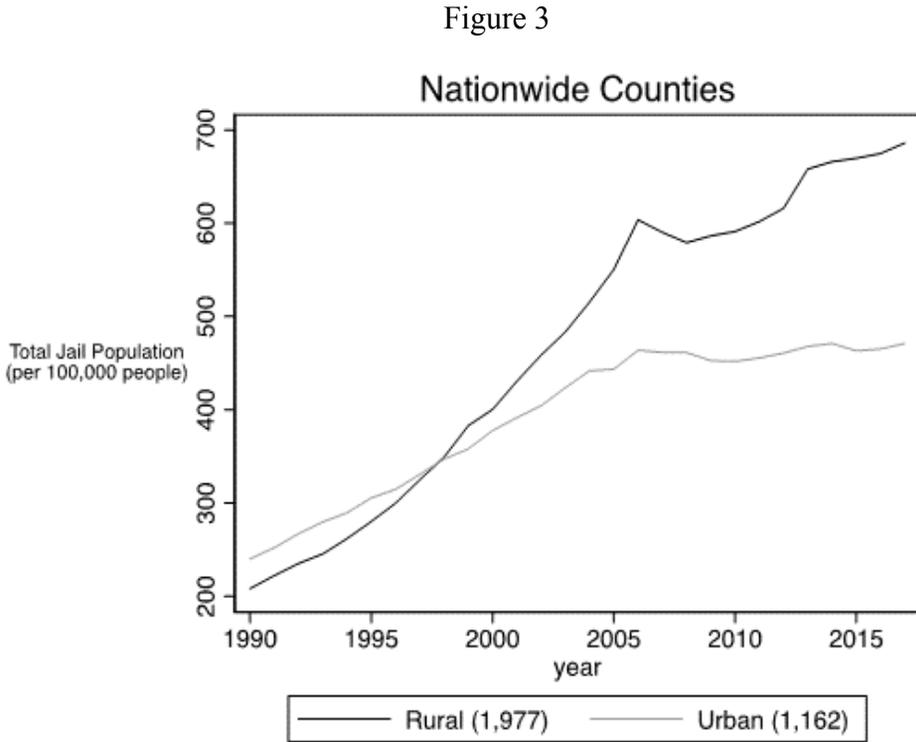


Figure 3: This figure highlights the differences in rural and urban counties' rates of total jail population. These two lines represent the average total jail population (per 100,000 residents aged 15-64) among all rural and all urban counties nationwide from 1990-2017.

V. FLORIDA'S PRETRIAL DETENTION SYSTEM

Florida is the nation's third largest state, with a population of over 21 million.¹⁷¹ Corresponding to population, Florida operates the third largest correctional system in the country and the criminal justice system costs taxpayers \$2.4 billion annually.¹⁷² Florida incarcerates defendants at a nearly 20% higher rate than the United States as a whole and almost six times higher than the United Kingdom.¹⁷³ This incarceration trend spills over into the pretrial detention rate for Florida with a clear division between rural and urban counties.

171. *QuickFacts Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/FL> [<https://perma.cc/T2GG-NYYT>] (last visited Mar. 13, 2021).

172. Skyler Swisher, *Is Florida's \$2.4 Billion Criminal Justice System Due for an Overhaul?*, S. FLA. SUN SENTINEL (Mar. 21, 2019, 7:00 AM), <https://www.sun-sentinel.com/news/florida/fl-ne-criminal-justice-reform-roundup-20190321-story.html> [<https://perma.cc/C6Y7-NFJN>].

173. PETER WAGNER & WENDY SAWYER, PRISON POL'Y INITIATIVE, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2018 (2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/Q6T7-5AGS>].

This section contains a discussion of the pertinent legal structure, intra-Florida comparisons, and a focus on the rural-urban divide in pretrial detention rates. The data presents a disparate picture of outcomes depending on where an individual is arrested. Seeing these differences provides an opportunity to assess what solutions could reduce high rates of pretrial incarceration.

A. Legal Structure

The Florida Constitution provides even greater protection for the accused at the bail stage than the Federal Constitution.¹⁷⁴ It requires pretrial release in non-capital cases with three caveats that can lead to pretrial detention.¹⁷⁵ This provision reflects the changes suggested by the 1977–1978 Constitution Revision Commission which found that defendants tended to be adversely affected by high monetary bail, especially when they could reasonably be expected to appear for trial.¹⁷⁶ In addition to defeating the presumption of innocence, this created overcrowding problems at jails and prisons who had to detain the accused.¹⁷⁷

The Florida Legislature went further in clarifying the right to bail and pretrial release in Fla. Stat. § 907.041(1)¹⁷⁸ which sets forth further considerations and creates a presumption in favor of release on non-monetary conditions. It also sets out nonmonetary condition provisions

174. FLA. CONST. art. I, § 14.

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of a municipal ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Id.

175. *Id.*

176. H.J. Res. 43-H, 1982 Sess. (Fla. 1982).

177. *Id.*

178. FLA. STAT. § 907.041(1) (2006).

It is the policy of this state that persons committing serious criminal offenses, posing a threat to the safety of the community or the integrity of the judicial process, or failing to appear at trial be detained upon arrest. However, persons found to meet specified criteria shall be released under certain conditions until proceedings are concluded and adjudication has been determined. . . . It is the intent of the Legislature that the primary consideration be the protection of the community from risk of physical harm to persons

Id.

to ensure appearance at trial or other proceedings.¹⁷⁹ The Florida Rules of Criminal Procedure reinforce this presumption.¹⁸⁰ Rule 3.131(b) provides procedures for the Initial Appearance hearing and what types of non-monetary conditions are acceptable.¹⁸¹

179. *Id.* § 907.041(3)(a).

It is the intent of the Legislature to create a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release Such person shall be released on monetary conditions if it is determined that such monetary conditions are necessary to assure the presence of the person at trial or at other proceedings, to protect the community from risk of physical harm to persons, to assure the presence of the accused at trial, or to assure the integrity of the judicial process.

Id.

180. FLA. R. CRIM. PROC. 3.131(a).

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. . . . If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Id.

181. FLA. R. CRIM. PROC. 3.131(b)(1)(A)–(F).

Unless the state has filed a motion for pretrial detention pursuant to rule 3.132 the court shall conduct a hearing to determine pretrial release. For the purpose of this rule, bail is defined as any of the forms of release stated below. Except as otherwise provided by this rule, there is a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release. The judicial officer shall impose the first of the following conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process; or, if no single condition gives that assurance, shall impose any combination of the following conditions: (A) personal recognizance of the defendant; (B) execution of an unsecured appearance bond in an amount specified by the judge; (C) placement of restrictions on the travel, association, or place of abode of the defendant during the period of release; (D) placement of the defendant in the custody of a designated person or organization agreeing to supervise the defendant; (E) execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; provided, however, that any criminal defendant who is required to meet monetary bail or bail with any monetary component may satisfy the bail by providing an appearance bond; or (F) any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

Id.

Initial Appearances take place in many settings across Florida. Some counties conduct these hearings remotely, some have courtrooms at their county jail facility, but universally, these hearings are short, informational, and relatively perfunctory. While the accused has the right to counsel at this hearing, those duties typically fall to an Assistant Public Defender, handling numerous cases in a crowded courtroom, with little to no knowledge about the individual they are representing.

B. *Intra-Florida Comparisons*

Florida is subdivided into sixty-seven counties. These sixty-seven counties vary widely in population, as well as size. The average population of a Florida county is 305,733 residents.¹⁸² Lafayette County, the smallest county, has only 8,479 residents and the largest, Miami-Dade, has 2,743,095.¹⁸³ Twenty-six Florida counties have less than 50,000 residents, and five have a population of more than one million.¹⁸⁴ Dividing these counties using the 2013 NCHS classification scheme results in Florida having twenty-three counties considered rural and forty-four considered urban. Table 2 contains a listing of all Florida counties, their 2017 populations, existence of a pretrial release program and classification of rural or urban.

Table 2: List of Florida Counties with Population, whether they have pretrial release or not and if they are classified as rural or urban.

County	Population (2017)	Pretrial	Rural or Urban
Alachua	260,003	Yes	Urban
Baker	27,191	No	Urban
Bay	178,820	Yes	Urban
Bradford	27,642	No	Rural
Brevard	575,211	Yes	Urban
Broward	1,873,970	Yes	Urban
Calhoun	15,001	No	Rural
Charlotte	172,720	Yes	Urban
Citrus	143,801	Yes	Urban
Clay	208,549	No	Urban
Collier	357,470	Yes	Urban
Columbia	68,943	No	Rural

182. FLORIDA'S UNIFORM CRIME REPORTS, *supra* note 167 (2017 population and arrest data).

183. *Id.*

184. *Id.*

DeSoto	35,621	No	Rural
Dixie	16,726	No	Rural
Duval	936,811	Yes	Urban
Escambia	313,381	Yes	Urban
Flagler	105,217	Yes	Urban
Franklin	12,161	No	Rural
Gadsden	48,263	No	Urban
Gilchrist	17,224	No	Urban
Glades	13,087	No	Rural
Gulf	16,297	No	Urban
Hamilton	14,663	No	Rural
Hardee	27,426	No	Rural
Hendry	39,057	No	Rural
Hernando	181,882	No	Urban
Highlands	102,138	Yes	Urban
Hillsborough	1,379,302	Yes	Urban
Holmes	20,210	No	Rural
Indian River	148,962	No	Urban
Jackson	50,418	No	Rural
Jefferson	14,611	No	Urban
Lafayette	8,479	No	Rural
Lake	331,724	No	Urban
Lee	698,468	Yes	Urban
Leon	287,899	Yes	Urban
Levy	41,015	No	Rural
Liberty	8,719	No	Rural
Madison	19,377	No	Rural
Manatee	373,305	Yes	Urban
Marion	349,267	No	Urban
Martin	153,022	No	Urban
Miami-Dade	2,743,095	Yes	Urban
Monroe	76,889	Yes	Rural
Nassau	80,456	No	Urban
Okaloosa	195,488	Yes	Urban
Okeechobee	41,140	Yes	Rural

Orange	1,313,880	Yes	Urban
Osceola	337,614	Yes	Urban
Palm Beach	1,414,144	Yes	Urban
Pasco	505,709	No	Urban
Pinellas	962,003	Yes	Urban
Polk	661,645	Yes	Urban
Putnam	73,176	Yes	Rural
Santa Rosa	170,835	Yes	Urban
Sarasota	402,737	Yes	Urban
Seminole	454,757	Yes	Urban
St. Johns	229,715	No	Urban
St. Lucie	297,634	Yes	Urban
Sumter	120,700	No	Urban
Suwannee	44,690	No	Rural
Taylor	22,295	No	Rural
Union	15,947	No	Rural
Volusia	523,345	Yes	Urban
Wakulla	31,909	No	Urban
Walton	65,301	No	Urban
Washington	24,985	No	Rural

1. Pretrial Detention and Population

Table 3 displays information about the number of urban and rural counties in Florida along with the intersection of pretrial release programs. Florida's urban/rural split is not reflective of the country as a whole, with most counties being considered urban. Among those urban counties, most have a pretrial release program in place. Within the rural counties, however, only three have a program designed for this purpose. Overall, the majority of counties in Florida do not have a pretrial release program.

Table 3: Tabulation of Rural/Urban and Pretrial Release among Florida's Counties.

RURAL/URBAN	NO PTR	PTR	TOTAL
URBAN	17	27	66% (44)
RURAL	20	3	34% (23)
TOTAL	55% (37)	45% (30)	67

2. Pretrial Incarceration Rates Within Florida

Before dividing the counties based on characteristics, it would be helpful to examine the general rate of pretrial incarceration statewide. Figure 4 displays the distribution of pretrial incarceration rates for Florida's 67 counties from 1990 to 2017. Within Figure 4 we see some interesting trends. The first, somewhat alarming, trend is in the frequent appearance of statistical outliers of extreme levels of pretrial incarceration. In 1990, the highest level of pretrial incarceration within the state was less than 1,000 inmates per 100,000 residents. For the last five years we see rates around and above 3,000 inmates per 100,000 people. For example, Glades County detained 2970.66 individuals pretrial, per 100,000 residents, ages 15–64, in 2017, a population of 13,087¹⁸⁵ This would equate to 3% of the population in a single county!

Figure 4

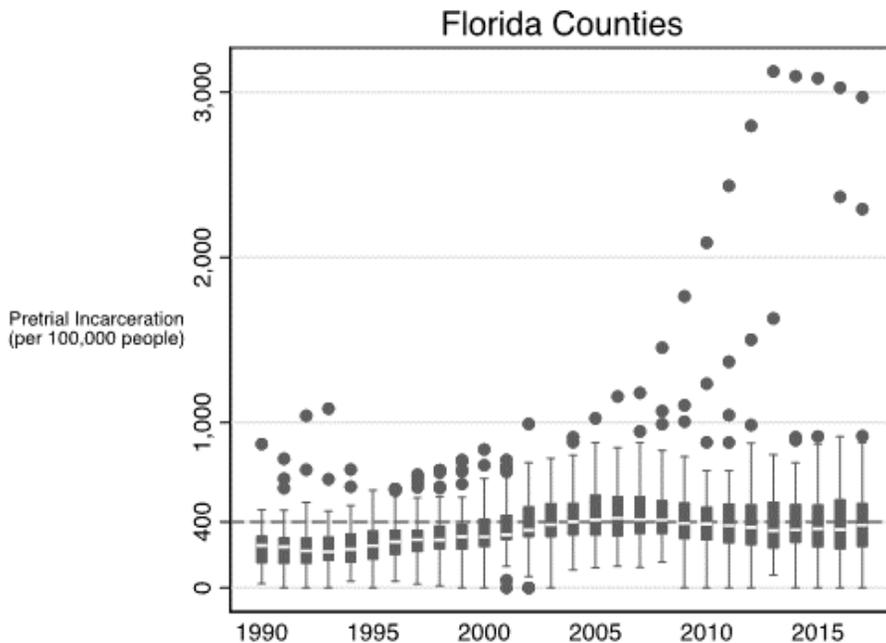


Figure 4: This boxplot of Florida counties from 1990-2017 represents the pretrial incarceration rate per 100,000 residents 15–64) for each of Florida's 67 counties.

More broadly, Figure 4 shows a general trend of increasing pretrial incarceration statewide. In 1990 the mean rate of pretrial incarceration among Florida counties was 258.53 inmates per 100,000 residents aged

185. *Id.*

15–64. The rate reached a low of 235.141 in 1993 with the rate increasing to 413.01 in 2010 and reaching a maximum mean of 462.84 in 2017. For purposes of comparison, we also have the Total Jail Population rate in Figure 5 for the same period of time. The trend is very similar to that of the pretrial incarceration rate.

Figure 5

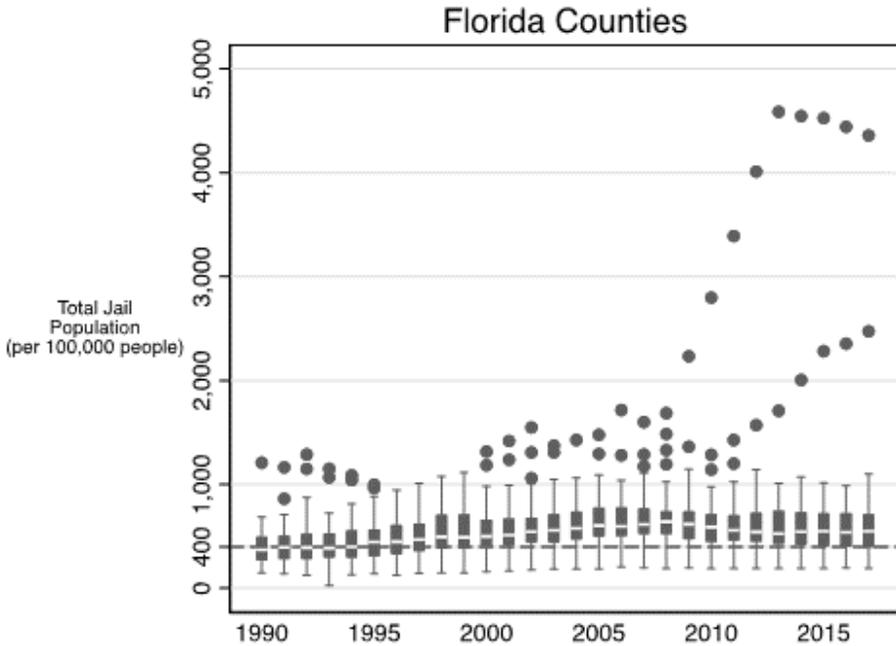


Figure 5: This boxplot reveals the pattern of total jail population rates (per 100,000 residents aged 15–64) for each of Florida’s counties from 1990–2017. Comparing Figures 4 and 5 we see similar trends in total jail population and pretrial incarceration rates.

Figure 6 contains a line graph comparing the average pretrial incarceration rates (per 100,000 residents aged 15–64) between rural and urban counties. Here we see urban and rural counties incarcerated similar rates of individuals pretrial for all of the 1990s and into the first two years of the 2000s. However, in 2002, rural counties overtook urban counties, detaining consistently more individuals than urban counties through 2017. Interestingly, urban counties saw a decline in pretrial detention rates between 2005 and 2010 with a small rebound in 2016 and 2017. At the end of the data, rural counties detained 558.81 individuals per 100,000 residents while urban counties held 412.67 individuals.

Comparing the Florida trends to nationwide trends there is a clear difference between rural and urban counties. Florida’s upward trend in

pretrial incarceration is consistent with the upward trend nationwide, with the exception of urban counties who have seen a drop-off and later increase. This difference shows that a different type of pretrial justice occurs if an individual is arrested in a rural county, with a higher likelihood an individual will be detained before trial. Given the enormous consequences of this decision, the distinction is worth further exploration. Hopefully, the advent of Florida's new criminal justice database will facilitate more detailed studies.

Figure 6

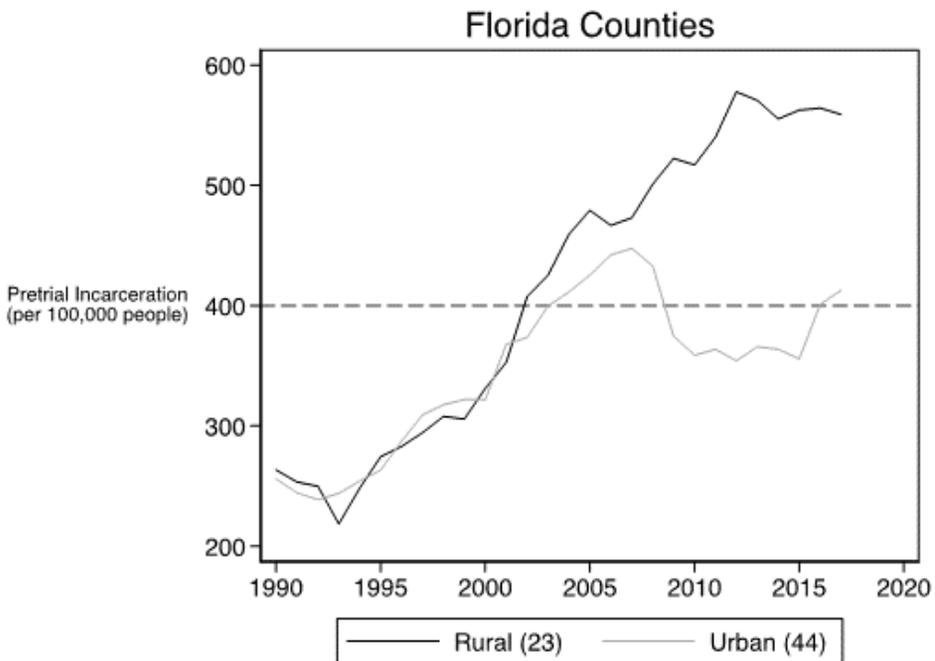


Figure 6: This figure compares the pretrial incarceration rates (per 100,000 residents 15-64) between Florida's 23 rural and 44 urban counties.

VI. WHERE DO WE GO FROM HERE?

The data reveals a large difference in pretrial detention among rural and urban counties in Florida. How can we “bridge the gap” statewide and create a more uniform system of pretrial justice? Many proposals have been floated in recent years with the goal of bail reform, including proposals to eliminate the bail bond system altogether. Eliminating monetary bail could be the so-called “silver bullet.”

The solution may already exist in the form of pretrial release programs administered by counties. In this section we will take a close look at the

thirty Florida counties which have pretrial release programs. No two programs are completely alike but there are some similarities among many of them. These programs are not the solution to all cases, as violent criminals are not eligible for participation in pretrial release programs.¹⁸⁶

A. Pretrial Release Programs

One way Florida has attempted to implement the promise of nonmonetary release is through county-level pretrial release programs. As noted previously, Florida defines the program as “an entity, public or private, that conducts investigations of pretrial detainees, makes pretrial release recommendations to a court, and electronically monitors and supervises pretrial defendants.”¹⁸⁷ These programs are funded and administered by counties and local governments.¹⁸⁸ The OPPAGA reports for 2014 to 2017 provide a snapshot on how these programs work.

1. Comparing Counties

Figure 7 presents a twenty-seven year comparison between counties with a pretrial program and counties without programs.¹⁸⁹ In 1990, the thirty counties in Florida with pretrial release had a slightly higher rate of pretrial incarceration than those counties without a program. While a pretrial release/no program distinction existed from 1990–2000—with pretrial release counties detaining more defendants pretrial—once the switch occurred, pretrial release counties maintained a significantly lower rate of incarceration. In 2010, the counties were separated by sixty-six inmates per 100,000, this divide more than doubled in size by 2017 to 168 inmates per 100,000. Unsurprisingly, counties with pretrial release programs detain fewer people, likely due to their inherent goal of release. However, it is important to establish a baseline of understanding before further comparing counties.

186. FLA. R. CRIM. PROC. 3.131(b)(4).

No person charged with a dangerous crime, as defined in section 907.041(4)(a), Florida Statutes, shall be released on nonmonetary conditions under the supervision of a pretrial release service, unless the service certifies to the court that it has investigated or otherwise verified the conditions set forth in section 907.041(3)(b), Florida Statutes.

Id.

187. FLA. STAT. § 907.043(2)(b) (2020).

188. OPPAGA, *supra* note 166, at 2.

189. *See Incarceration Trends*, *supra* note 160 (click on “Pretrial Jail Incarceration” from the webpage, then select a county from the dropdown window on the webpage to find specific county statistics). It is worth noting while the comparison runs from 1990 to 2017, the classification of a county having or not having a pretrial release program is based on having a program during 2014 to 2017. *See supra* Table 2 (listing Florida counties with and without pretrial release programs).

Figure 7

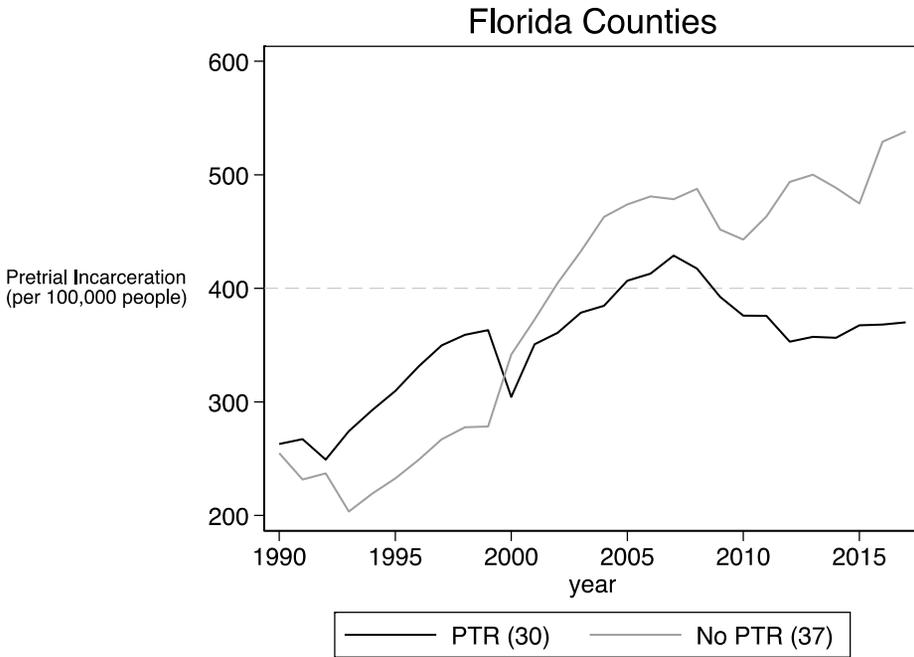


Figure 7: These two lines represent the Florida counties with and without pretrial release programs, comparing the rate of pretrial incarceration per 100,000 residents aged 15-64.

Do pretrial release programs have a similar impact on both rural and urban counties? Figure 8 contains a comparison of urban and rural counties with and without pretrial release (PTR). This data has a varying distribution among all counties with wide ranging annual swings. One general trend apparent throughout these analyses is the increase in levels of pretrial incarceration across the board over the last thirty years.

Urban Florida counties, as we saw above in Figure 5, generally detain fewer individuals before trial than their rural counterparts. Among those urban counties, we see similar peaks and valleys between counties with and without pretrial release programs. After 2000, counties with pretrial release programs detained individuals pretrial at a lower rate than their counterparts without PTR. After 2010, those urban counties show the lowest rates of pretrial incarceration, ending 2017 with a rate of 342.21.

Rural counties have a distinct, if incomplete, story. Before examining Figure 8, it is worth noting that only three of Florida's twenty-three rural counties have pretrial release programs. This small number makes it challenging to identify real trends and distinguish these rural counties from their urban counterparts. As we will see below, these three rural counties serve a very small number of individuals each year, which could

account for the seemingly skewed results when compared with urban counties. What we do see among rural counties is a steady increase over time, increasing to an average of 620.53 individuals detained pretrial (per 100,000 residents) in counties with pretrial release and those counties without pretrial release at 549.55.

While these averaged rates provide a small picture of the patterns, it is clear that, among urban counties, those with pretrial release programs detain fewer individuals before trial. Many factors could play a role in these differences: different utilization rates of these programs, different conditions, and the preferences of judges at initial appearance hearings. Remember that release decisions are at the discretion of the judge, with the statute providing a wide discretion for decision-making.

Figure 8

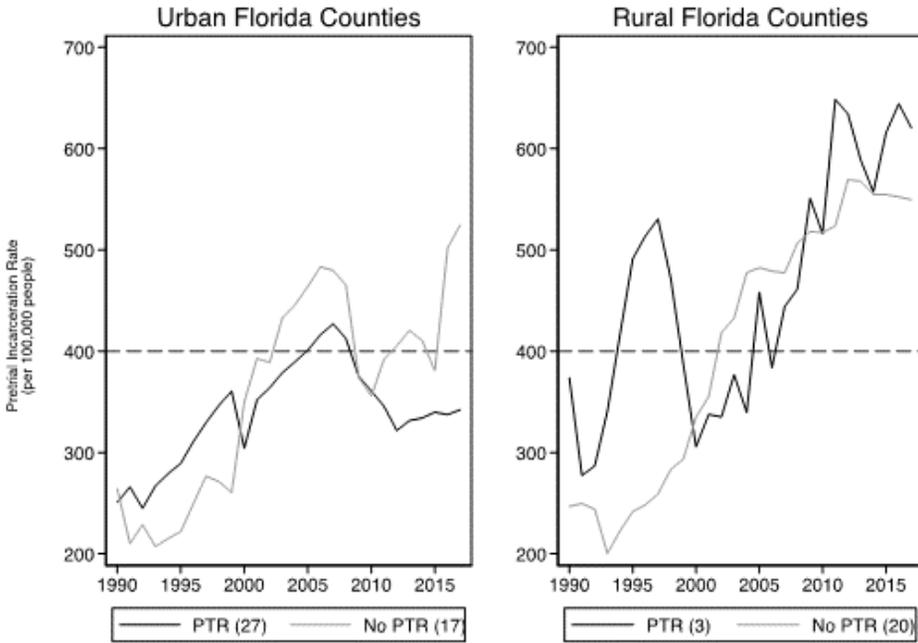


Figure 8: These two graphs represent, again, the pretrial incarceration rates per 100,000 residents aged 15-64. In these graphs, counties are grouped together both by rural/urban and those having pretrial release programs and those without.

2. Utilization and Costs

How much are these programs utilized and what do they cost per person served? In Table 4 we see a sample comparing the three rural

counties with PTR (Okeechobee, Putnam, and Monroe) with three selected urban counties (Broward, Alachua, and Santa Rosa).¹⁹⁰ Among the rural counties with PTR, it appears only Monroe County makes large use of its pretrial release program, serving over 800 individuals in each of the years observed. While Putnam County has a pretrial release program, it was rarely used between 2014 and 2017. Okeechobee County presents a slightly different case, as its program is administered by neighboring St. Lucie County.¹⁹¹

Among the urban counties, we see a per capita usage of pretrial release in 2017 (individuals served divided by the population) at 0.0032 for Broward, 0.0056 for Alachua, and 0.005 for Santa Rosa. Monroe, clearly an outlier at 0.013, has a usage double that of the urban counties. This could be explained in part due to the high level of tourism in the Florida Keys, with a daily population much larger than the permanent resident population.

Table 4: This table provides the population and number of defendants served from 2014–2017 for six Florida counties with pretrial release programs. The first three counties are classified as rural and the last three are urban.

County	Population	Defendants Served			
		2014	2015	2016	2017
Okeechobee	41,140		14	77	137
Putnam	73,173	11	1	2	3
Monroe	76,889	977	878	838	979
Santa Rosa	170,835	530	827	630	848
Alachua	260,003	1,062	1,396	1,466	1,463
Broward	1,873,970	59,34	6,171	6,180	5,981

Costs are an important metric to consider as well. Table 5 shows the average cost per person served among all Florida counties. There is wide variation in the cost per person with some counties recording no costs and others having very minimal costs. It seems safe to say, however, that pretrial release programs tend to operate for less than \$1,000 per

190. See *Incarceration Trends*, *supra* note 160 (click on “Pretrial Jail Incarceration” from the webpage, then select a county from the dropdown window on the webpage to find specific county statistics). Broward, Alachua and Santa Rosa counties were chosen given their different size and geographic locations within Florida. Santa Rosa is located in the panhandle, Alachua in the north part of central Florida and Broward in south Florida.

191. See *OPPAGA*, *supra* note 166, at 3 (explaining that St. Lucie County has supervised Defendants for Okeechobee County since August 2015). St. Lucie and Okeechobee are part of the Nineteenth Judicial Circuit, along with Martin and Indian River County. NINETEENTH JUD. CIR. OF FLA., <http://www.circuit19.org/> [<https://perma.cc/MM4P-RRFA>] (last visited Mar. 10, 2020). Martin and Indian River counties do not have pretrial release programs. See *supra* Table 2 (listing Florida counties with and without pretrial release programs).

individual served, with the vast majority of programs costing far less than that.

Table 5: Here we see the average cost per defendant served among all the pretrial release programs in Florida, as well as the standard deviation, minimum and maximum values for 2014–2017.

Year	Average Cost (Per Person Served)	Std. Deviation	Min	Max
2014	\$477.54	\$339.94	\$20	\$1,220
2015	\$640.32	\$820.78	0	\$4,318
2016	\$568.28	\$501.73	\$49	\$1,981
2017	\$543.76	\$425.86	\$46	\$1,661

3. Effectiveness

Another helpful metric for determining if these pretrial programs are effective is by examining comparative rates of failures to appear. Failures to appear can be costly for the court system as well as the defendant.¹⁹² Prior studies have found these rates can approach 25–30% in some jurisdictions.¹⁹³

Table 6 shows the relative rates of failures to appear in urban and rural counties with pretrial release programs from 2014 to 2017. As we have seen in prior examinations, the number of observations for rural programs is limited but the relative rate of FTA is very low—less than 1% of defendants in each year fail to appear on their court dates.¹⁹⁴ While urban rates are higher, they are substantially lower than those observed elsewhere.

Table 6: This table contains the relative rates of FTAs for counties with pretrial release broken down by the rural/urban classification.

	2014	2015	2016	2017	Total
Urban	2.83	2.64	2.85	3.28	98
Rural	0.97	0.68	0.35	0.65	11

Re-arrest rates can also be illustrative of the effectiveness of these programs. Among released defendants nationwide, around 16% of

192. Bornstein et al., *supra*, note 123, at 70. This study examined FTA rates and the effect of reminders. *Id.* High FTA rates can be mitigated through substantive reminders of the impact of a failure to appear. *Id.*

193. *Id.*

194. *Id.*

defendants are rearrested.¹⁹⁵ As seen in Table 7, rural and urban counties with pretrial release programs experience low levels of rearrest rates. Again, the small number of participating rural counties makes a larger pattern difficult to discern.

Table 7: This table contains the relative rates of rearrest for counties with pretrial release broken down by the rural/urban classification.

	2014	2015	2016	2017	Total
Urban	4.37	3.808	4.148	4.111	107
Rural	5	0.667	0.333	1.333	11

4. Conditions

As noted above, rural and urban counties administer probation and juvenile justice in different ways. In the context of pretrial release programs there are several types of conditions: GPS monitoring, alcohol testing, drug testing, and paying cost of supervision. Nineteen of the thirty participating counties reported the types of administration they deploy. Table 8 specifies the types of supervision for urban and rural counties.

Table 8: This table includes counts of program monitoring methods in pretrial release programs, broken down by rural and urban classification.

	GPS	Alcohol Testing	Drug Testing	Cost of Supervision
Urban	12	7	9	6
Rural	3	0	1	1
Total	15	7	8	7

GPS monitoring is used almost universally among jurisdictions, with fifteen of the nineteen reporting counties using this mode of release. This makes sense, because GPS monitoring allows the county to supervise a released person without having to bear the cost of housing, feeding and supervising the individual. Alcohol and drug testing are less frequently deployed, likely in part because these methods in certain contexts can be considered forms of rehabilitation or punishment before conviction. Cost of supervision fees are also lesser used forms of supervision.

5. Fees

Funding is also an important element to these programs, as counties must fund pretrial release programs without assistance from the state of Florida. Some counties elect to outsource supervision (and thus fees) to

195. BRIAN A. REAVES & JACOB PEREZ, BUREAU OF JUST. STATS., PRETRIAL RELEASE OF FELONY DEFENDANTS, 12 (1994).

private entities to supervise GPS monitoring or alcohol monitoring. Some counties mandate fee payments to pay for the program or to the county's general fund, with other counties using a mix of fee assessments. Table 9 breaks down the fee assessment by urban and rural counties. Again, with a low number of rural counties, it can be difficult to discern any pattern, but counties of all sizes use these fees in different ways.

Table 9: This table displays the different fee allocations for counties with pretrial release programs for 2017.

	Vendor	Program Revenue	County	Mix	Total
Urban	4	5	4	4	17
Rural	0	0	2	1	3
Total	4	5	6	5	20

B. Rural Challenges

Fixing pretrial justice in rural counties presents a series of challenges, some of which are less of a problem for urban counties. Rural counties typically have less resources, smaller populations, and often larger geographical boundaries.¹⁹⁶ Population dispersion means that individuals must travel larger distances for pretrial appointments and court, presenting challenges for defendants with transportation issues.

Perhaps the larger problem is that of limited personnel and experts. Urban jurisdictions process a larger number of cases and thus the cost of pretrial release programs can be scaled effectively to lower the overall cost to taxpayers. Rural counties must find systems to deliver pretrial justice in cost-effective ways.

Lacking bureaucratic resources can be a drawback to a certain type of administration of pretrial release, but these smaller jurisdictions retain the advantage of being small. Their small size means program creation is less costly to develop and implement and can be more flexible. Pretrial release can serve as a means of problem solving rather than a vague administration of bureaucracy.

The harsh reality for cash-strapped rural counties is that pretrial programs cost money to develop and implement. Small counties must make every program count because they cannot rely on scale to lower costs. Adjacent rural counties duplicating services can stifle the ability to innovate and create cost-effective programs. One approach to solving cost-related obstacles would be to create circuit-wide, rather than county-

196. STEPHANIE J. VETTER & JOHN CLARK, NAT'L ASS'N OF CNTYS., *THE DELIVERY OF PRETRIAL JUSTICE IN RURAL AREAS: A GUIDE FOR RURAL COUNTY OFFICIALS* (2013), <https://www.naco.org/sites/default/files/documents/The%20Delivery%20of%20Pretrial%20Justice%20in%20Rural%20Areas%20-%20A%20Guide%20for%20Rural%20County%20Officials.pdf> [<https://perma.cc/FK8M-HH2S>].

level, pretrial release programs. For instance, St. Lucie County, a mid-sized Florida county, administers the pretrial release program of its' neighbor and circuit-mate Okeechobee county. Florida's circuit courts span as many as seven counties and five circuits are comprised of one county.¹⁹⁷

Jail administration is almost exclusively county-based, with either a sheriff's office or county corrections agency overseeing those incarcerated.¹⁹⁸ Some counties contain more than one county level correctional facility, with Miami-Dade having five.¹⁹⁹ Not all of Florida's counties are part of judicial circuits with larger counties, but this type of cost-sharing can assist in implementing these programs. Judicial circuits share judges, State Attorneys, and Public Defenders, why not pretrial release administrators?

CONCLUSION

Recently, *The Florida Times-Union* (FTU) circulated an editorial titled "Save money, lives with less imprisonment," which outlines many of the reasons why Florida is an epicenter of over-incarceration.²⁰⁰ One of the primary rationales for reform is the high rate of pretrial detention, mostly due to the inability to pay bail money.²⁰¹ Among the proposals FTU suggests is the expanded use of pretrial services like pretrial release programs.²⁰²

Defendants face an uphill battle throughout the criminal justice process. The government and judges retain substantial power and resources at each stage of any given case, controlling much of the timing and terms. As the data indicates, in the rural context the accused face a system that marginalizes their options even more.²⁰³ High pretrial detention rates run roughshod over the presumption of innocence, a bedrock principle of the American criminal justice system. Disparate

197. *Trial Courts - Circuit*, FLA. CTS., <https://www.flcourts.org/Florida-Courts/Trial-Courts-Circuit> [<https://perma.cc/PSF9-64PC>] (last visited Aug. 12, 2020).

198. FLA. STAT. § 951.061 (2020).

199. BUREAU OF RSCH. & DATA ANALYSIS, FLA. DEP'T OF CORR., FLORIDA COUNTY DETENTION FACILITIES AVERAGE INMATE POPULATION 4 tbl. 2 (2020), <http://www.dc.state.fl.us/pub/jails/2020/jails-2020-05.pdf> [<https://perma.cc/6A3Z-AQGM>]. Several geographically larger or large population counties have jails spread throughout the area of their county. For example, the Monroe County Detention Center is located approximately 85 miles from the Plantation Key Detention Center, both operated by the Monroe County Sheriff's Office.

200. The Florida Times-Union, Editorial, *Save Money, Lives with Less Imprisonment*, PALM BEACH POST (Aug. 16, 2020, 12:01 AM), <https://www.palmbeachpost.com/opinion/20200816/editorial-save-money-lives-with-less-imprisonment> [<https://perma.cc/T8MS-NR4R>].

201. *Id.*

202. *Id.*

203. VETTER & CLARK, *supra* note 196.

treatment in rural versus urban contexts runs afoul of equal justice principles as well.

With an average cost per time served of around \$500, pretrial release programs could serve as a solution to widespread pretrial detention among the state's rural counties. As noted previously, the median felony bond nationwide is \$10,000 (translating to a cost of \$1,000 in the form of a premium).²⁰⁴ Even for low-level detainees the cost-savings could be great, considering it costs roughly \$135 per day to house an inmate in some of Florida's county jails.²⁰⁵ A fee assessed during a pretrial release program, unlike a bail bond, holds an individual accountable to pay for some measure of costs without it being a threshold question of release.

In addition to costing the government less money, pretrial release can have a significant upside to individuals as well. While this Article noted that pretrial detention can have a major economic cost to defendants, there is a notable net benefit of pretrial release. Dobbie, Goldin, and Yang found:

We estimate that the net benefit of pretrial release at the margin is between \$55,143 and \$99,124 per defendant. The large net benefit of pretrial release is driven by both the significant collateral consequences of having a criminal conviction on labor market outcomes and the relatively low costs of apprehending defendants who fail to appear in court. The results from this exercise suggest that unless there are large general deterrence effects of detaining individuals before trial, releasing more defendants will likely increase social welfare.²⁰⁶

This solution does not require a retooling of the current system, no major reform needs to pass through the legislature; the systems are in place already, and counties need to decide if the cost to their communities is worth it. In the context of a pandemic, health and safety resources used to supervise a jail population might be better deployed to assist counties in emergency management.

The data currently available paints an incomplete picture of the process in Florida. While county jail populations allow us to analyze the rates of pretrial detention, there is a need for defendant and case specific data to discern larger patterns. Do low-level charges receive disparate treatment in rural counties? How many defendants are detained for being unable to pay a bond of even \$100?

204. Reeves, *supra* note 85.

205. Larry Barszewski, *Millions Spent in South Florida to Jail Small-Time Offenders*, S. FLA. SUN-SENTINEL (Nov. 17, 2017, 5:35 PM), <https://www.sun-sentinel.com/news/crime/fl-reg-broward-adult-civil-citations-20171116-story.html> [<https://perma.cc/C4NF-4X2V>].

206. Dobbie et al., *supra* note 102.

Hopefully, Florida SB 1392 (2018) will help provide these answers. With the addition of over 140 data points, researchers will be better able to observe patterns. Future researchers would be hard pressed to answer some of these questions:

What charges most often result in pretrial incarceration? Do we see these charges more often in rural or urban contexts?

What is the source of racial disparity in pretrial detention? How does it relate to the rural-urban divide?

What effect does each individual judge have on pretrial incarceration? Is this related to political affiliation or other individual characteristics?