

JUSTICE DESERTS: SPATIAL INEQUALITY AND LOCAL FUNDING OF INDIGENT DEFENSE[†]

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This Article maps legal conceptions of (in)equality onto the socio-geographic conception of spatial inequality in relation to the funding and provision of indigent defense services in the State of Arizona. In particular, we examine county-to-county variations in funding and structures for providing this constitutionally mandated service. Our analysis focuses on disparities in funding among five Arizona counties, and we also scrutinize those counties' provision of indigent defense for several problems commonly associated with underfunding: caseloads and competency, financial conflicts of interest, lack of parity with prosecution, and the risk that a single case will overwhelm a county's defense system. Despite some gaps in publicly available information detailing the funding and provision of indigent defense across all Arizona counties—information that could be developed through discovery should litigation be initiated—we argue that evidence of county-to-county variations in funding and delivering indigent defense is sufficient to suggest that the systems of some Arizona counties are at risk of violating the U.S. Constitution's Sixth Amendment right to counsel and Fourteenth Amendment Equal Protection Clause.

† Thanks to Alan Brownstein, Lisa Cimbaluk, Holly Cooper, Robin Crawford, Floyd F. Feeney, Katherine J. Florey, Dana P. Hlavac, Claudine Pease-Wingenter, Ezra Rosser, and Melissa Tatum for helpful discussions and comments on earlier drafts. Thanks to Ashley DeFranco, Lauren Sible, Jennifer Ward, Yooli Choi, Janet L. Wallace, Kathleen Kenney, John Tan, Jim Beck, Justin Kochan, and Rebecca Lovell for research assistance. The staff of the Mabie Law Library were indispensable; particular thanks to Erin Murphy. Xong Vang patiently worked through many drafts with us, and she also created the illustrations and figures. Julie Young was our mapmaker. Special thanks to the many Arizona state and county government officials who responded to our requests for information.

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INTRODUCTION

In November, 2008, eight-year-old Christian Romero was charged with the shooting deaths of his father and another man, Tim Romans, at the Romero home in rural Apache County, Arizona.¹ These shocking events drew national and worldwide attention,² primarily because of the child's age. Another attention-getting angle was the rural locale: St. Johns, Arizona, a town of about 3500 residents³ and the county seat of Apache County, a vast, sparsely populated county of 70,000.⁴ A *New York Times* reporter described St. Johns as "a windy hamlet of horse ranches, low-slung houses and double-wide trailers about 170 miles east-northeast of Phoenix. The largest buildings are a few churches and schools along the single main road, which has no stoplights."⁵

Not discussed in the media, however, was the strain that trying the case against young Christian Romero would put on the local government budget. Indeed, that strain may have influenced the case's disposition. In an early hearing, the juvenile court judge expressed dismay at the high cost of providing professional mental health services for the boy.⁶ Just three months after the killings, Christian Romero pled guilty to negligent homicide in the death of Tim Romans, and the State dropped the charges against him for his father's death.⁷

The financial challenge facing Apache County if it tried a double-murder case—particularly one against a juvenile—is not unique among Arizona counties. In Arizona, the primary funding source for the local court system, the County

1. Court filings for *In re Romero*, No. SC0100-JV2008065 (Ariz. Super. Ct. 2008), available at <http://apps.supremecourt.az.gov/docs/Default.aspx>.

2. See, e.g., Solomon Moore, *Mother Baffled in Arizona Murders*, N.Y. TIMES, Nov. 13, 2008, at A18; John Dougherty & Anahad O'Connor, *Prosecutors Say Boy Methodically Shot His Father*, N.Y. TIMES, Nov. 11, 2008, at A19; John Dougherty, *Experts Doubt that 8-Year-Old's Taped Confession in Double Killing is Admissible*, N.Y. TIMES, Nov. 22, 2008, at A10 (noting that the matter had attracted international attention, particularly after a videotaped confession by the boy was made public).

3. U.S. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "St. Johns, Arizona"; then refer to 2000 data) (last visited Feb. 13, 2010) (reporting a 2000 population of 3269).

4. *Id.* (search "Apache County, Arizona"; then refer to 2006–2008 ACS data) (reporting a 2006–2008 population estimate of 69,728).

5. Moore, *supra* note 2.

6. See Transcript of Status Conference at 20, *In re Romero*, No. SC0100-JV2008065 (Ariz. Super. Ct. Jan. 6, 2009), available at <http://apps.supremecourt.az.gov/docs/Default.aspx> (reporting a request was for purely therapeutic services that would be confidential and could not be used in the proceedings against Romero).

7. Dennis Wagner, *Lesser Plea Ends Boy's St. Johns Murder Case*, ARIZ. REPUBLIC, Feb. 20, 2009, available at <http://www.azcentral.com/arizonarepublic/news/articles/2009/02/20/20090220stjohns0220.html>. The judge who accepted the plea was subsequently removed from the sentencing phase of the Romero matter when he indicated that that he would revoke the plea deal. Both the judge's comments and media coverage of the matter included many references to the expense of keeping the boy in Apache County, where costs associated with the case would have continued to be borne by the county.

Attorney's Office (prosecutor), and indigent defense services is local tax revenue.⁸ An inconsequential amount of funding for indigent defense comes from centralized state revenue.⁹ That amount varies with legislative whim, and it has decreased in recent years.¹⁰

Trying high-profile, complex, or numerous cases imposes great financial strain on many counties in the eighteen states—including Arizona—that fund indigent defense services entirely or primarily at the county government level.¹¹ Local funding of indigent defense presents particular challenges to counties with smaller tax bases. These challenges are aggravated by the expectation that county governments will finance and deliver a wide array of services—including discretionary ones such as road maintenance, libraries, and health and human services.¹² When indigent defense needs compete for the limited funds in local public coffers with discretionary services that residents value and desire, indigent defense and other justice system functions may be short-changed.

In 1963, the U.S. Supreme Court held that the U.S. Constitution's Sixth Amendment required states to provide counsel for indigent defendants.¹³ State and federal courts have since grappled with what precisely fulfills this obligation. Despite years of litigation and the \$3.5 billion states and counties spend on it each year,¹⁴ commentators are in widespread agreement that systems for providing indigent defense are generally in poor condition.¹⁵ Because these systems vary

8. See *infra* Part II.A.

9. *Id.*

10. See *infra* Part II.A.2.

11. Sixteen states, including Arizona, fund indigent defense primarily at the county level, while Pennsylvania and Utah fund it entirely at the county level. Twenty-eight states fully fund indigent defense with state revenue, another four use primarily state monies. THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 54 (2009); see also JENNIFER M. SAUBERMANN & ROBERT L. SPANGENBERG, THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2005, at 5 (2006).

12. See Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1 (forthcoming 2010) (manuscript at 5–6).

13. *Gideon v. Wainwright*, 372 U.S. 335 (1963) discussed at *infra* Part I.C.

14. Barbara Mantel, *Public Defenders: Do Indigent Defendants Get Adequate Legal Representation?*, 18 CONG Q. RESEARCHER 337, 337 (2008). Indigent defendants make up at least 80% to 85% of all criminal defendants. *Id.* In at least some Arizona counties, the percentage of criminal defendants who are indigent may be as high as 95%. Letter and Comments from Dana P. Hlavac, Deputy County Manager, Mohave County, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Feb. 23, 2010) (on file with author).

15. See, e.g., THE CONSTITUTION PROJECT, *supra* note 11; Mantel, *supra* note 14, at 337; AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* iv (2004); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 816 (1999); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004).

from state to state and even from county to county within a given state, a wide array of problems has been identified. Among these are underfunding; failure to limit caseloads; insufficient attorney autonomy; lack of ancillary services such as investigators and experts; and lawyers who are ill-prepared and unsupervised.¹⁶

This Article explores legal remedies for spatial inequalities in the provision of indigent defense with particular attention to differences between metropolitan and nonmetropolitan counties. We first address whether an equal protection challenge may be viable when a state's indigent defense system is adequate in some places, but not in others. We then consider ways in which the Sixth Amendment right to counsel and Fourteenth Amendment Equal Protection Clause might provide a remedy for inferior indigent defense systems in Arizona's more rural counties. We thus present the legal basis for a claim that, where spatial inequality in the provision of indigent defense services creates a likelihood of inadequate counsel, the result may be a violation of either or both the Sixth Amendment and the Equal Protection Clause.¹⁷

Courts have rarely considered place-to-place variability in access to indigent defense services,¹⁸ and they have not analyzed indigent defense systems through the critical lens of spatial inequality or, in particular, in relation to the rural–urban axis. Courts have focused exclusively on adequacy, ignoring parity or relative equality. We assert, however, that an equal protection violation should be a viable claim in response to significant place-to-place variability in expenditures for these services when underfunding puts delivery of constitutionally adequate representation at serious risk.

16. See *infra* Part I.I.C (detailing these problems).

17. Spatial inequality in the provision of indigent services creating a likelihood of inadequate counsel could also run afoul of the Equal Protection Clause of the Arizona Constitution, titled “Equal privileges and immunities.” That provision states: “No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.” ARIZ. CONST. art. II, § 13. Alternatively, a provision of the Arizona Constitution that prohibits “local or special laws” might be relevant. It applies to a number of matters including “Regulating the practice of courts of justice”; “punishment of crimes and misdemeanors”; and “assessment and collection of taxes”. ARIZ. CONST. art. IV, part 2, § 19. See also, e.g., *Long v. Napolitano*, 53 P.3d 172 (Ariz. Ct. App. 2002) (holding that population-based classification had to be rationally related to each of the state's four articulated purposes for it); *Harwood v. Wentworth*, 42 P. 1025 (Ariz. Terr. 1895) (upholding act of territorial legislature that classified counties according to equalized assessed valuation of property and fixed salaries of county officers at differing amounts according to class).

18. See *infra* notes 89–104, 414–29 and accompanying text (discussing *Smith*). As this Article goes to press in April 2010, however, the New York Supreme Court is considering a class action challenge to the constitutionality of its indigent defense system. See William Glaberson, *Key New York Suit Calls Public Defender Programs Inadequate*, N.Y. TIMES, Mar. 16, 2010, at A18. That lawsuit, which scrutinizes the provision of indigent defense in several different counties—most of them relatively rural—was initially based on both the Sixth Amendment right to counsel and the Fourteenth Amendment Equal Protection Clause. The latter claim was dropped on appeal. Amended Class Action Complaint, *Hurrell-Harring v. State of N.Y.*, Index No. 8866-07 (N.Y. Sup. Ct. Apr. 28, 2008).

Equal protection lawsuits that challenge county-to-county variations in indigent defense have generally been successful where plaintiffs are attorneys conscripted into serving as defense counsel.¹⁹ In addition, counsel who have sought relief from very heavy caseloads have succeeded on Sixth Amendment grounds.²⁰ A class challenge brought by indigent defendants seeking prospective injunctive relief, rather than reversal of individual case outcomes can also achieve systemic change.²¹ Individual indigent defendants challenging their representation have typically been less successful.²² Where they have succeeded, decisions have been based on findings of inadequacy of a particular defendant's representation.²³

We illustrate how a case challenging the constitutionality of some counties' indigent defense systems might be argued and established. Our analysis could be applied to the public defender systems of any of the eighteen states that finance indigent defense solely or primarily at the county level, and perhaps to other states' systems as well. We use specific data from Arizona to demonstrate how and why nonmetropolitan counties are disadvantaged in their quest to provide legal assistance to indigent criminal defendants. Our analysis illustrates how financing indigent defense systems at the county level leaves less affluent and/or more sparsely populated counties less able to afford the costs associated with sound and vigorous defense. This is evident when cases require extended trials and significant ancillary services, although underfunding has consequences for the handling of more mundane criminal matters, too. In the context of this analysis, we also consider briefly how rural spatiality can complicate and increase the cost of providing indigent defense services.

We are unable to provide a complete data portrait because of differences in accounting, reporting, and availability of information among Arizona counties. Nevertheless, the county-level data we present suggest dramatic disparities among counties, particularly across the rural-urban axis. This data could be the basis for an equal protection claim. It shows how nonmetropolitan counties can become justice deserts²⁴—places where justice is inferior or hard to come by—because of inadequate funding of indigent defense.

As an alternative or companion to an equal protection claim, we argue that Sixth Amendment focus on adequacy could also provide a remedy based on a comparison among indigent defense systems. That is, when metropolitan indigent

19. See *infra* Part I.

20. See, e.g., *Zarabia v. Bradshaw*, 912 P.2d 5, 8 (Ariz. 1996).

21. See, e.g., *Best v. Grant County*, No. 042001890, slip. op. at 5 (Wash. Super. Ct. Oct. 14, 2005) (order granting summary judgment in favor of class of indigent criminal defendants in a rural Washington county seeking prospective relief regarding the provision of public defense services).

22. See *infra* Part I.

23. See *infra* Part I.

24. The term "justice deserts" is a play on the term "food deserts," which is used to describe a community in which there is little or no access to food choices needed to maintain a healthy life. See, e.g., Kai A. Schafft et al., *Food Deserts and Overweight Schoolchildren: Evidence from Pennsylvania*, 74 RURAL SOC. 153 (2009) (finding that school districts in areas with no nearby supermarket were "structurally and economically disadvantaged" and had higher rates of childhood obesity).

defense systems feature certain institutional safeguards and levels of funding, they can be said to have set a standard of adequacy or at least to have met some criteria for adequacy on a systemic level. When nonmetropolitan indigent defense systems fall far short of those funding levels and lack critical institutional safeguards present in metropolitan systems, the nonmetropolitan schemes are necessarily inadequate.

By focusing on the potential and actual structural problems of indigent defense in rural areas, our intention is not to say that metropolitan counties are performing as well as they should with respect to the provision of indigent defense, or even that they meet the Sixth Amendment adequacy standard.²⁵ Rather, we look for ways in which metropolitan public defense systems feature safeguards—including higher levels of funding—that better protect the rights of indigent defendants. We do so to inform how nonmetropolitan systems might be improved.

We envision county-based, legislative and judicial remedies to the problems we identify. Such remedies might respond to litigation, initiated by criminal defense counsel and/or civil rights litigators, that identifies inadequacies and inequalities among county-based systems. The data we present indicate gross disparities in funding for indigent defense among counties. This data could be the basis for finding a constitutional violation in some nonmetropolitan jurisdictions.²⁶

In Part I, we explore the relationships among uneven development and spatial inequality concepts, the Sixth Amendment right to counsel, and equal protection law. Part II illustrates the consequences of uneven development and local funding on delivery of indigent defense. This Part demonstrates how Arizona's scheme for financing local government creates inequalities among counties—inequalities that enormously influence the funding of indigent defense services and result in significant variations from county to county. We illustrate these inequalities by examining the demographic and economic situations of two metropolitan counties (Maricopa and Coconino) and three nonmetropolitan counties (Navajo, Apache, and Greenlee).²⁷ Here we compare relative levels of

25. A claim based solely on the fact that the specific form by which indigent defense is provided in one area is different from another is also unlikely to be a basis for a challenge. Some jurisdictions set up public defender offices, others rely on assigned counsel, and still others issue contracts to attorneys of firms to handle indigent defense. As a general matter, none of these systems is necessarily deficient. See generally Floyd F. Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361 (1990–1991) (detailing existing studies that analyze distinctions among systems, e.g., assigned counsel, retained counsel, and public defender offices, and concluding no significant differences in quality of services rendered).

26. A more complete set of data could be gathered by request under Arizona's Public Records law or through discovery in litigation. See ARIZ. REV. STAT. ANN. §§ 39-101 through 39-128.

27. We tend to use "metropolitan" and "nonmetropolitan" (and also the abbreviations "metro" and "nonmetro") to refer to counties because the U.S. government has designated these county-level terms. Metropolitan counties contain urbanized areas of 50,000 or more with a total population of at least 100,000. All counties that do not meet the definition of metropolitan are nonmetropolitan. U.S. Census Bureau, Metropolitan and

funding for indigent defense, and we consider in detail the means by which these counties provide counsel to those who cannot afford to pay their own lawyers. On the basis of this close examination, we explore the possibility of Sixth Amendment and equal protection violations in Arizona's nonmetropolitan counties. Part III details proposed reform of Arizona's system for funding indigent defense. In particular, we advocate centralized funding that would allow Arizona's less affluent counties to provide the caliber of defense that the U.S. Constitution requires—a defense system funded in a way that levels the playing field among indigent defendants across the metro-nonmetro divide by raising it through increased state funding overall. We also explore the roles of the various branches and scales of government, as well as that of litigants, in responding to the problems we identify with some nonmetropolitan systems.

I. SPATIAL INEQUALITY IN THE RIGHT-TO-COUNSEL CONTEXT

A. A Primer on Uneven Development and Spatial Inequality

Inequality has long been a subject of analysis and scrutiny in both law and sociology. While “[i]nequality—the study of who gets what and why—has been at the heart of sociology since its inception,”²⁸ its focus—like that of equal protection jurisprudence—has typically been on “class, race, [and] gender [as bases for] social stratification.”²⁹ More recently, sociologists³⁰ have shown renewed interest in inequalities dictated by space or place—that is, uneven

Micropolitan Statistical Areas, <http://www.census.gov/population/www/metroareas/metroarea.html> (last visited Mar. 4, 2010). We use “rural” and “urban” to refer more generally to the difference between places with sparse and low populations on the one hand and those with dense and high populations on the other. As explained in more detail in Part II.B, we also use the USDA’s Rural–Urban Continuum Codes to express more precisely the degree of a place’s urbanicity or rurality.

Regarding the time period examined, we have, to the extent possible, looked at county and caseload data for FY 2009, which in Arizona runs from July 2008 to June 2009. For the most part, we have matched this fiscal data with 2008 U.S. Census Bureau data, the most recent demographic and economic data available. In some instances, however, the most recent economic data available is for a different period. For example, the most recent U.S. Census Bureau data for retail sales is from 2002, so we have relied on that data as the best indicator we have of retail economic activity during the period we examine.

28. Linda M. Lobao, Gregory Hooks & Ann R. Tickamyer, *Advancing the Sociology of Spatial Inequality*, in *THE SOCIOLOGY OF SPATIAL INEQUALITY* 1–2 (Linda M. Lobao et al. eds., 2007).

29. *Id.* at 3.

30. See Linda Lobao, *Continuity and Change in Place Stratification: Spatial Inequality and Middle–Range Territorial Units*, 69 *RURAL SOC.* 1, 4 (2004) (noting that “many nongeographer social scientists take this spatial turn as innovative, though certainly it builds from older traditions”); Lobao et al., *supra* note 28, at 5–8, 13–79; Ann R. Tickamyer, *Space Matters! Spatial Inequality in Future Sociology*, 29 *CONTEMP. SOC.* 805, 806 (2000) (“Space can be conceptualized in three ways: as *place*—the particular locale or setting; as *relational units* that organize ideas about places and implicitly or explicitly compare locations, and as *scale*, or the size of the units to be compared.”).

development and associated “inequality among territorial units.”³¹ The geographic turn represented by spatial inequality thus shifts the core sociological inquiry from “who gets what” to “who gets what, where?”³²

Spatial inequality is closely associated with uneven development—that is, place-to-place variations in degree and type of development. As a result of uneven development, location dictates employment and other market-related opportunities.³³ Depending on the level or scale of financing, uneven development can also result in spatial inequality in terms of access to government services.³⁴

The capacity of local governments to deliver services varies across the nation, as well as within any given state. Rural areas face particular challenges in this regard,³⁵ challenges that stem in part from a relative absence of development³⁶ and a consequent lack of private wealth.³⁷ The fiscal capacity of a local government to generate tax revenue is indicated by residents’ per capita income,³⁸ making the local labor market a key predictor of a county’s or municipality’s fiscal capacity.³⁹ Limited local labor markets translate into small public coffers for local

31. Lobao, *supra* note 30, at 1.

32. Lobao et al., *supra* note 28, at 2. Spatial inequality analysis thus reveals how place can be a marker or axis of stratification. Lobao, *supra* note 28, at 1. Law, too, has seen something of a geographic turn in recent years. *See, e.g.*, THE LEGAL GEOGRAPHIES READER (Nicholas Blomley, David Delaney & Richard T. Ford eds., 2001).

33. *See, e.g.*, Lobao et al., *supra* note 28, at 3; NEIL SMITH, UNEVEN DEVELOPMENT: NATURE, CAPITAL AND THE PRODUCTION OF SPACE (3d ed. 1984).

34. *See, e.g.*, JOHN E. COONS, WILLIAM H. CLUNE III & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970) [hereinafter COONS ET AL.]; Pruitt, *supra* note 12, at 58.

35. *See* Lisa Cimbaluk & Mildred Warner, What is the Role of State Aid? Redistribution vs. Development 1–2 (July 30, 2008) (unpublished manuscript, on file with author) (paper presented to 2008 Annual Meeting of Rural Sociological Society); Linda Lobao & David S. Kraybill, *The Emerging Roles of County Governments in Metropolitan and Nonmetropolitan Areas: Findings from a National Survey*, 19 ECON. DEV. Q. 245, 247 (2005).

36. *See* Lisa Cimbaluk, Developmental Effects of Federal Aid and Local Effort under Devolution, 1987–2002, at 10–11 (July 31, 2009) (unpublished manuscript, on file with author) (paper presented to 2009 Annual Meeting of Rural Sociological Society).

37. Spatial inequality is often discussed in relation to uneven development; the former is to some extent a consequence of the latter. *See* LINDA M. LOBAO, LOCALITY AND INEQUALITY: FARM AND INDUSTRY STRUCTURE AND SOCIOECONOMIC CONDITIONS 90 (1990); SMITH, *supra* note 33; *see also* Pruitt, *supra* note 12 (illustrating uneven development, spatial inequality, and the consequent lack of services to many poor children and families in Montana).

38. Mildred E. Warner & James E. Pratt, *Spatial Diversity in Local Government Revenue Effort Under Decentralization: A Neural-Network Approach*, 23 ENV’T AND PLAN. C: GOV’T & POL’Y 657, 662 (2005); Mildred E. Warner, *Local Government Financial Capacity and the Growing Importance of State Aid*, 13 RURAL DEV. PERSP. 27, 31 (1999).

39. Lisa Cimbaluk, Fiscal Devolution and U.S. County Governments, 1997–2002 (Jan. 2009) (unpublished M.S. thesis, Cornell University) (on file with author); *see also* Cimbaluk & Warner, *supra* note 35, at 3 (noting that “rural poverty is disproportionately high among counties with a smaller, slower growing, or declining population; a less educated populace; a higher proportion of the elderly; female-headed families; work-limiting disabilities; and unemployment”).

governments.⁴⁰ Counties with high poverty rates and low per capita income typically struggle most.⁴¹ Unless their public coffers are supplemented by transfers from higher levels of government, nonmetropolitan county governments struggle to provide services—even those non-discretionary services that they are under a mandate to provide.⁴² Difficulties in achieving economies of scale to serve spatially dispersed populations aggravate these challenges in rural locales.⁴³ In short, nonmetropolitan local governments often have smaller budgets with which to serve needier populations. Further, state and local governments historically have not been as vigilant as the federal government in protecting civil liberties.⁴⁴ To make matters worse, spatial inequalities at the county level have been aggravated in recent years due to devolution—the shifting of governmental responsibility from the federal to the state level.⁴⁵

Higher levels of government have a greater capacity to smooth out economic inequalities by collecting taxes from both highly developed and relatively undeveloped places—often affluent and relatively impoverished, respectively.⁴⁶ States may ameliorate the public spending consequences of uneven

40. See COONS ET AL., *supra* note 34 (linking private wealth with the quality of public education when funding for the latter is based on local tax revenue); Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1706 (1979); Andrew E. Haughwout & Robert P. Inman, *Should Suburbs Help Their Central City?*, BROOKINGS-WHARTON PAPERS ON URB. AFF. 45, 45 (2002).

41. Cimbaluk & Warner, *supra* note 35, at 8 (observing that residents in low income areas are likely to bear higher fiscal burdens for government).

42. See Sarah Dewees, Linda Lobao & Louis E. Swanson, *Local Economic Development in an Age of Devolution: The Question of Rural Localities*, 68 RURAL SOC. 182, 195–96 (2003) (discussing difficulties rural counties have in responding to devolution without significant federal or state revenue transfers).

43. See Lisa R. Pruitt, *Place Matters: Domestic Violence and Rural Difference*, 23 WIS. J.L. GENDER & SOC'Y 347, 372–78 (2008) (collecting sources); Lisa R. Pruitt, *Missing the Mark: Welfare Reform and Rural Poverty*, 10 J. GENDER RACE & JUST. 439, 472 (2007) (citing Nancy M. Pindus, The Urban Inst., *Implementing Welfare Reform in Rural Communities* 12 (2001), <http://www.urban.org/UploadedPDF/rural-welfarereform.pdf>); see also Lobao, *supra* note 30, at 22–23.

44. Cimbaluk & Warner, *supra* note 35, at 1–2 (citing Louis E. Swanson, *Rural Opportunities, Minimalist Policy and Community-Based Experimentation*, 29 POL'Y STUD. J. 96 (2001)). The federal government is better situated to address inequalities, in part by limiting local control and the greater tendency to faction associated with it. THE FEDERALIST NO. 10 (James Madison). “Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.” *Id.*

45. See Jeffrey S. Sharp & Domenico M. Parisi, *Devolution: Who is Responsible for Rural America?*, in CHALLENGES FOR RURAL AMERICA IN THE 21ST CENTURY 353 (David L. Brown & Louis E. Swanson eds., 2003) (defining devolution and providing brief history of it in the U.S. context); Dewees, Lobao, & Swanson, *supra* note 42, at 195–96 (discussing difficulties rural counties have in responding to devolution without significant federal or state revenue transfers).

46. Cimbaluk & Warner, *supra* note 35, at 1–2 (citing Mildred E. Warner, *State Policy under Devolution: Redistribution and Centralization*, 54 NAT'L TAX J. 541 (2001)); Warner, *supra* note 38; John P. Pelissero & David R. Morgan, *Targeting Intergovernmental Aid to Local Schools: An Analysis of Federal and State Efforts*, 45 W. POL. Q. 985 (1992).

development by redistributing tax revenue to less affluent areas. One study concludes redistribution can be achieved at the scale of the state if state funding for functions delegated to county government is sufficiently high.⁴⁷ Yet many states underfund municipal and county governments, leaving them reliant on local taxation and other revenue sources.⁴⁸

Spatial inequalities may be assessed from global down to individual scales.⁴⁹ Such inequalities may also be scrutinized in relation to the rural–urban axis.⁵⁰ We analyze spatial inequalities in relation to state and county governments. We discuss the state because the U.S. Supreme Court has charged states with providing counsel to indigent defense.⁵¹ We discuss counties because states like Arizona have delegated to them both funding and delivery of this service. The resulting spatial inequalities are reflected in county-to-county variations. Finally, we discuss spatial inequalities across the rural–urban axis, a comparison invited by Arizona’s dramatically uneven development.

B. Spatial Inequality and Equal Protection Law

Law has long shared sociology’s concern for inequality,⁵² as reflected in the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. While the Equal Protection Clause protects the rights of individuals, analysis based on it is often linked to an individual’s membership in a protected class or group as defined by race, ethnicity, or gender.⁵³ Equal protection analysis may implicate the spatial phenomenon of segregation in relation to one of these personal characteristics, but the constitutional analysis is not principally about space. Instead, courts tend to view spatial segregation as a consequence of discrimination on the basis of a suspect classification, and therefore as evidence of that discrimination.⁵⁴ Spatial inequalities or segregation apart from these

47. Mildred Warner, *State Policy Under Devolution: Redistribution and Centralization*, 54 NAT’L TAX J. 541, 553–54 (2001). One study shows that Arizona’s provision of funding for services is more centralized than the average degree of state centralization and that the level of state aid is slightly higher than the national average. Cimbaluk & Warner, *supra* note 35, at 6, 9 (noting that most counties with high fiscal burdens due to low centralization are in the West and Great Plains).

48. Cimbaluk & Warner, *supra* note 35, at 12–15. Other revenue sources for county governments include licenses and fees, such as building permits.

49. See Lisa R. Pruitt, *Gender, Geography and Rural Justice*, 23 BERKELEY J. GENDER, L. & JUST. 338 (2008) (collecting sources and providing examples).

50. Lobao, *supra* note 30, at 2.

51. See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

52. This concern with equality is pervasive in the Anglo-American legal tradition. See generally Denise Meyerson, *Equality Guarantees and Distributive Inequity*, 19 PUB. L. REV. 32, 32 (2008) (discussing legal remedies for inequitable distribution of government services in English, Indian, Australian, and South African jurisprudence).

53. See *infra* note 86 and accompanying text; see also *Serrano v. Priest*, 487 P.2d 1241, 1250 (Cal. 1971) (noting the Supreme Court’s “antipathy toward legislative classifications which discriminate on the basis of certain ‘suspect’ personal characteristics”).

54. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960) (holding that African-Americans were denied equal protection

characteristics has not been seen as problematic in the relatively rare instances in which it has been considered. In *San Antonio Independent Schools v. Rodriguez*, for example, the Court held that children whose schools received less funding than others because of a school finance scheme that relied heavily on local property tax revenue—essentially children living in poor neighborhoods—were not a discrete and insular minority such that strict scrutiny should be applied in considering the constitutionality of the funding scheme.⁵⁵

In spite of a lack of judicial concern regarding equal protection as it relates to spatiality, courts have occasionally considered whether differences in rural and urban places justify different laws, legal treatment, or legal institutions.⁵⁶ Some cases grappling with equal protection and the rural–urban axis have involved administration of justice issues. Courts have typically been deferential to state and local governments by holding that differences between rural and urban places justify different justice systems.⁵⁷ In *North v. Russell*, the Supreme Court held that equal protection was not violated by a state law that created two types of police court, depending on the population of the area served.⁵⁸ The law required police

when the city boundaries of Tuskegee, Alabama were redrawn to exclude them); *White v. Regester*, 412 U.S. 755, 770 (1973) (holding that a multimember district violated equal protection because it “invidiously excluded Mexican-Americans from effective participation in political life”); cf. Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 268–69 (1987) (noting that the earliest cases considering territorial discrimination saw an equal protection problem only when “territorial distinctions” are “rooted in discrimination against some race or class *not* geographically defined”).

55. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); see also *infra* notes 65–68 (discussing *Rodriguez* and so-called territorial discrimination).

56. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 427–28 (1961) (rejecting challenge to laws preventing sales of goods on Sundays because legislature could have rational basis for the statute at issue); *Tigner v. Texas*, 310 U.S. 141, 149 (1940) (finding a law differentiating between agriculture and other economic areas “matters within legislative competence”; writing that “traditions of a society, the habits of obedience to law, the effectiveness of the law enforcing agencies, are all peculiarly matters of time and place”).

57. Differences between rural and urban justice systems have sometimes been addressed by courts, though not necessarily as equal protection problems. See *People v. Caruso*, 2002 N.Y. Slip Op. 40027(U) (N.Y.Co.Ct. Mar. 04, 2002) (noting lack of court clerk, which necessitated filing of accusatory instrument with the judge instead); *People v. Murrin*, 494 N.Y.S.2d 630 (N.Y. 1985) (finding that it would be “unduly burdensome upon the District Attorney’s office” to require the prosecutor to attend every town court every day and using this to support decision to deny defendant’s motion for arraignment and trial on the same day); *State v. Hogan*, 311 N.Y.S.2d 38 (N.Y. 1970) (finding that lack of a stenographic record from a village court conviction on a traffic violation did not create a problem on appeal; court noted that neither defendant nor his lawyer had requested such a “verbatim stenographic record” and that the town justice had “taken minutes”); *Idaho v. Wright*, 775 P.2d 1224 (Idaho 1989) (Bakes, C.J., dissenting) (dissenting from holding that a young child’s out-of-court statement about sexual abuse was inadmissible under the confrontation clause and observing that “many rural communities do not have the financial means to set up extensive videotape facilities to aid in the preparation of criminal cases”).

58. 427 U.S. 328, 338–39 (1976). The *North* Court thus did not require equality at the municipal court level because it permitted municipalities to provide different judicial services based on city size and resources. In this sense, the *North* decision is similar to that

judges in larger cities to be lawyers, while those in less populous areas need not be.⁵⁹ Police court decisions were subject to de novo review by a circuit court as a matter of right.⁶⁰ The Court engaged in an apparent rational basis analysis of the equal protection question, reasoning that “all people within a given city and within cities of the same size are treated equally.”⁶¹ The rational basis for the distinction between rural and urban appeared to be that larger cities had greater financial resources and/or more ready availability of lawyers to serve as police judges.⁶²

Another group of rural–urban axis equal protection cases also involved the administration of justice—in particular, the provision of indigent defense. In these cases, one group of rural residents—individual indigent defense attorneys—had considerable success in eliciting court solicitude and obtaining a remedy. By attacking systems that conscripted attorneys to provide indigent defense in less populous counties while using Public Defenders’ Offices in urban counties, rural attorneys prevailed by convincing courts that the greater burden they carried for providing indigent defense—as compared to their metropolitan/urban counterparts—constituted a violation of the Equal Protection Clause.⁶³

in *Rodriguez*, which also did not require spatial equality among government services and, indeed, expressly sanctioned different quality of services based on variations in private wealth. The *North* holding is also consistent with *Missouri v. Lewis*, 101 U.S. 22 (1880), which held “there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory.” *Id.* at 31. Further, the *Lewis* Court wrote that “no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.” *Id.* Professor Gerald Neuman notes that the *Lewis* decision came at time when equal protection jurisprudence was especially nascent—indeed, in its first decade. Neuman asserts, in light of that context, that many courts have been insufficiently critical in their reliance on *Lewis*, thereby permitting what he calls “territorial discrimination.” Neuman, *supra* note 54, at 269.

59. *North*, 427 U.S. at 330.

60. *Id.* at 331.

61. *Id.* at 338.

62. *Id.* at 338–39. Other cases have also considered the constitutionality of justice systems that are different in rural locales than in urban ones. *See Dolen v. Pitt*, 546 N.Y.S.2d 324, 325–26 (N.Y. Co. Ct. 1989) (making an exception for compliance with mandatory statutory provisions for a rural county because no town justices there were attorneys and the court found it reasonable that they were not aware of the specific statutory requirements of filing an appeal); *Canaday v. State*, 687 P.2d 897, 900–01 (Wyo. 1984) (finding no violation of due process rights when a non-attorney justice of the peace presided over misdemeanor trials). *But see Gordon v. Justice Court*, 525 P.2d 72, 79 (Cal. 1974) (holding that defendants charged with an offense carrying a possible jail sentence were entitled to have an “attorney judge . . . preside over proceedings”).

63. *See, e.g., Arnold v. Kemp*, 813 S.W.2d 770, 775 (Ark. 1991) (applying rational basis review in holding that where some counties used public defender offices and others used attorney appointment, in the resulting inequitable distribution of the burden of providing indigent defense services among the state’s attorneys violated equal protection); *Jewell v. Maynard*, 383 S.E.2d 536, 541 (W. Va. 1989) (holding that county judges’ appointment of private attorneys to serve as indigent defense counsel violated equal protection principles because in rural circuits attorneys were routinely conscripted to serve as defense counsel, whereas attorneys in metropolitan circuits were not conscripted because

C. The Equal Protection Underpinnings of the Right to Counsel

If equal protection principles may be offended when the compensation of an attorney for an indigent client is at stake, surely those same principles must be honored when a client's enumerated right to counsel is at stake. Indeed, some commentators have suggested that equal protection violations should be recognized when the violation stems from place-to-place variation in provision of services that implicate fundamental rights.⁶⁴ In particular, Gerald L. Neuman calls for what he labels "fundamental rights equal protection,"⁶⁵ and he provides a framework for equal protection analysis of "territorial discrimination" involving fundamental rights. Professor Neuman argues for heightened scrutiny of state revenue schemes that rely heavily on local tax structures to finance public services that implicate fundamental rights.⁶⁶ "If there is a fundamental right in the equal protection sense to receive some government benefit or service," Professor Neuman asserts, "then to the extent that substantial inequalities going to the essence of the right would result from unequal constraints on the revenue-raising abilities of local government units," heightened scrutiny should apply.⁶⁷ Among fundamental rights to which this analysis could apply, Professor Neuman specifically mentions "rights to counsel."⁶⁸

Indeed, various U.S. Supreme Court decisions have discussed the links between equal protection and the operation of the criminal justice system. In *Coppedge v. United States*, the Court noted that, given the criminal justice system's power to deprive defendants of life and liberty, the "methods we employ in the enforcement of our criminal law have aptly been called the measures by

those circuits utilized Public Defender offices to provide indigent defense). In a third case, *State ex. rel. Stephan v. Smith*, 747 P.2d 816, 831, 845 (Kan. 1987), the court found Kansas's system for providing indigent defense services by conscripting attorneys in rural counties but not in urban ones violated the Equal Protection Clause; it failed rational basis review. *Id.* at 845. The court also found that equal protection was violated because attorneys were treated differently than other professionals, such as architects and physicians, by being forced to donate their knowledge and services. *Id.* at 844-45. While finding an equal protection violation for the attorneys, the court rejected an equal protection challenge by the indigent clients of those attorneys because of lack of evidence showing inadequate performance in their particular cases. *Id.* at 846.

64. See, e.g., COONS ET AL., *supra* note 34; John E. Coons, William H. Clune, III & Stephen E. Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969).

65. Neuman, *supra* note 54, at 276-83 (1987). Neuman sees the decision in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) as "launch[ing] the fundamental rights branch of equal protection." *Id.* at 272. He observes that the *Rodriguez* Court approved "of fundamental rights equal protection analysis with regard to rights 'explicitly or implicitly guaranteed by the Constitution.'" *Id.* at 279 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1971)).

66. *Id.* at 379 (offering education as one obvious right to which his theory would apply and extensively discussing its application in that context).

67. *Id.*

68. *Id.* at 379 (mentioning "constitutionalized welfare rights" and education as other fundamental rights to which strict scrutiny should apply).

which the quality of our civilization may be judged.”⁶⁹ As such, that system must adhere to equal protection of the laws. The Court wrote in 1956 in *Griffin v. Illinois*:

Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. . . . [O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, “stand on an equality before the bar of justice in every American court.”⁷⁰

The importance of the Equal Protection Clause in the Sixth Amendment context first came to the fore in *Griffin* in relation to indigent defendants’ access to appellate review.⁷¹ The *Griffin* Court held that “the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations” throughout all stages of a criminal proceeding.⁷² The Court reasoned that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”⁷³ Three years later, in *Burns v. Ohio*, the Court held that a state law requiring the payment of a filing fee in order to perfect a criminal appeal also had “no place in our heritage of Equal Justice Under Law.”⁷⁴ In 1961, in *Smith v. Bennett*, the Court relied on the equal protection principles articulated in *Griffin* and *Burns* to strike down a law denying the writ of habeas corpus to defendants who could not pay a \$4.00 filing fee.⁷⁵ In determining that imposition of the fee violated equal protection, the *Smith* Court noted that “the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each.”⁷⁶

69. *Coppedge v. United States*, 369 U.S. 438, 449 (1962); *see also Avery v. Alabama*, 308 U.S. 445, 447 (1940) (“Consistently with the preservation of constitutional balance between State and Federal sovereignty, this Court must respect and is reluctant to interfere with the State’s determination of local social policy. But where the denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that we scrupulously review the record.”) (footnotes omitted).

70. 351 U.S. 12, 16–17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)); *see also N.Y. County Lawyers Ass’n v. State*, 763 N.Y.S.2d 397, 399 (N.Y. Sup. Ct. 2003) (“Equal access to justice should not be a ceremonial platitude, but a perpetual pledge vigilantly guarded.”).

71. 351 U.S. 12 (1956) (holding that the Due Process and Equal Protection Clauses were violated by the requirement that appellants pay for transcripts necessary to perfect an appeal).

72. *Id.* at 18.

73. *Id.* at 19.

74. 360 U.S. 252, 258 (1959).

75. *Smith v. Bennett*, 365 U.S. 708, 710–11, 714 (1961).

76. *Id.* at 714.

Two years later, in *Gideon v. Wainwright*,⁷⁷ overtones of the equal protection concepts articulated in *Griffin* and its progeny were woven into the Court's determination that the Sixth Amendment right to counsel is "fundamental and essential"⁷⁸:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁷⁹

77. 372 U.S. 335 (1963); *see also* U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). The Sixth Amendment guarantees that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

78. *See Gideon*, 372 U.S. at 344. The fundamental nature of the right to counsel is a theme that resonates throughout Supreme Court precedence on the Sixth Amendment right to counsel. *See, e.g.*, *Penson v. Ohio*, 488 U.S. 75, 84 (1988); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243–44 (1936); *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

79. *Gideon*, 372 U.S. at 344 (emphasis added). The right to counsel is not limited to felony cases; it also extends to misdemeanors and petty offenses that carry the possibility of incarceration, and to juvenile adjudications. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967). Nor is the right to counsel limited to trial; rather, "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226 (1967); *see also id.* at 224 (recognizing that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality"). Critical stages at which the right to counsel attaches include arraignment (*White v. Maryland*, 373 U.S. 59, 60 (1963); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961)); pretrial hearings where probable cause to proceed with trial is determined, pleas entered, and bail set (*Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970)); pretrial lineups (*Wade*, 388 U.S. at 223–237; *Moore v. Illinois*, 434 U.S. 220, 231 (1977)); pretrial custodial interrogations (*Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966)); post-charge custodial and non-custodial interrogations (*Massiah v. United States*, 377 U.S. 201, 206 (1964)); plea negotiations (*McMann v. Richardson*, 397 U.S. 759, 770–71 & n.14 (1970)); and sentencing (*Mempha v. Ray*, 389 U.S. 128, 137 (1967)). Further, in jurisdictions where an appeal as of right from a conviction exists, the Due Process Clause of the Fourteenth Amendment guarantees individual defendants the right to counsel on the first appeal. *Douglas v. California*, 372 U.S. 353, 357–58 (1963); *see also Halbert v. Michigan*, 545 U.S. 605, 610 (2005); *Swenson v. Bosler*, 386 U.S. 258, 259 (1967); *Anders v. California*, 386 U.S. 738, 744 (1967); *Entsminger v. Iowa*, 386 U.S. 748, 752 (1967). In *Roe v. Flores-Ortega*, the Court held that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. 528 U.S. 470, 480 (2000). The right to counsel does not attach for petty offenses where there is no risk of incarceration. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 112–13 (1996).

Together, these four cases place the right to counsel squarely within the realm of cases involving fundamental rights, which merit heightened scrutiny when an equal protection violation is alleged.⁸⁰ At first glance, this protection is inferior to that established by the Sixth Amendment itself, given that the Court has ruled that denying the poor access to the courts or to counsel in situations where the Sixth Amendment attaches is a *per se* constitutional violation. For example, the Court undertook no review of the interests of the state in *Griffin* or *Gideon*, finding that the denial of Sixth Amendment protections were in and of themselves invidious discrimination.⁸¹ As the Court summarized in *Mayer v. City of Chicago*, which extended *Griffin* to petty offenses:

Griffin does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective [a criminal process] as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentence that may be imposed. The State's fiscal interest is, therefore, irrelevant.⁸²

This is typically the case for some misdemeanors such as traffic offenses. Petty offenses of that nature are beyond the scope of this Article.

80. See *supra* notes 65–68 and accompanying text (discussing Professor Neuman). Outside the context of fundamental rights, the Court weighs the interest of the individual against those of the state, with varying levels of scrutiny depending on the nature of the claim and the personal characteristics of the plaintiff. Equal protection challenges involving suspect classifications such as race and gender are also subject to a heightened degree of scrutiny. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (racial classifications are subject to the “most rigid scrutiny”); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (gender classifications subject to intermediate scrutiny). All other equal protection claims require a determination of whether the state has a rational basis for the law being challenged. See, e.g., *M.L.B.*, 519 U.S. at 120–21 (“[W]e inspect the character and intensity of the individual interest, on the one hand, and the State’s justification for its exaction, on the other.”). Equal protection claims brought by defense counsel, rather than indigent defendants, are subject to rational basis review. See, e.g., *Arnold v. Kemp*, 813 S.W.2d 770, 776 (Ark. 1991); *State ex rel. Stephan v. Smith*, 747 P.2d 816, 844, 846 (Kan. 1987).

81. See generally *Gideon*, 372 U.S. 335 (undertaking no analysis of state’s interest in denying counsel to indigent defendants); *Smith*, 365 U.S. 708 (undertaking no analysis of state’s interest in requiring filing fee in habeas cases); *Burns v. Ohio*, 360 U.S. 252, 257–58 (1959) (stating, without analysis, that there could be no rational basis for assuming that appeals brought by indigent defendants would be less meritorious than those brought by defendants capable of paying filing fees); *Griffin v. Illinois*, 351 U.S. 12 (1956) (undertaking no analysis of state’s interest in assessing fees for transcripts necessary for appeal).

82. 404 U.S. 189, 196–97 (1971) (rejecting state’s fiscal argument for rule that provided free transcripts to indigent defendants only in cases where a defendant could be subject to incarceration, reasoning that the state could not justifiably deny an indigent person an adequate record from which to appeal a conviction); see also *M.L.B.*, 519 U.S. at 110–11, 124 (explaining that its “cases solidly establish” an “exception[] to that general rule” that rational basis review be applied, so that “access to judicial processes in cases

Nevertheless, employing an equal protection challenge—in addition to one based on the Sixth Amendment—may allow a broader attack than that based solely on a Sixth Amendment claim.⁸³ For example, in a class action challenging an entire defense system—which is largely our focus here—an equal protection challenge is not just complementary to the Sixth Amendment; it may also justify the plaintiffs' reliance on a wider array of precedent than would a challenge based entirely on the Sixth Amendment.⁸⁴

The Court has viewed the question of equal protection in the Sixth Amendment context as one comparing rich and poor individuals.⁸⁵ More precisely, cases compare individuals with sufficient funds to pay for their own defense with indigent defendants who must rely on the state to provide that service. Our analysis similarly compares the rich and poor, but at a scale higher than that of the individual. We compare degrees of affluence and their consequences for indigent defense at the county level.

We recognize that the Court has rejected this analysis in some contexts. In *Salsburg v. Maryland*, for example, the Court applied the rational basis test in upholding territorial variations in whether illegally seized evidence was admissible. The Court wrote, “[T]he Equal Protection Clause relates to equality between persons as such rather than between areas.”⁸⁶ Professor Neuman criticizes *Salsburg* as resting on an outdated notion. He refers to the “equality between persons . . . rather than between areas” language as a “popular new epigram” that is not well grounded.⁸⁷

Our argument that heightened scrutiny should apply to spatial inequality when the fundamental right to counsel is at stake similarly discounts decisions such as *Salsburg*. We assert that examining inequality at the county level is appropriate because it is the county level of government that is charged with providing indigent defense services, in terms of both funding and means of delivery. Some counties' tax bases generate more income than others, leaving poor counties with far inferior capacities to provide this service. A claim based on the disparity between the quality of public defense services provided to poor people in rural counties and the quality of those services provided to poor people in urban counties is thus appropriate. Cases such as *Salsburg* fail to acknowledge extreme income inequality among areas, which can easily doom any approximation of

criminal or ‘quasi criminal in nature,’ . . . [may not] turn on an ability to pay”); *Lindsey v. Normet*, 405 U.S. 56, 70–71 (1972) (noting that equal protection is offended where the State’s “objective itself is beyond the State’s power to achieve” such as a denial of the right to counsel on first appeal as of right set as required by *Douglas v. California*).

83. See Neuman, *supra* note 54, at 285 (“[E]qual protection analysis *can* provide a more powerful check on discrimination respecting fundamental rights than direct substantive review affords.”). Counsel considering a case of this nature should also consider whether due process claims might be brought.

84. See *supra* notes 63–68 and accompanying text.

85. See also *Gaines v. Manson*, 481 A.2d 1084, 1094 (Conn. 1984) (finding equal protection violation where state appellate defender’s office delayed filing appeals due to understaffing).

86. 346 U.S. 545 (1954).

87. Neuman, *supra* note 54, at 273–74.

parity—let alone literal equality—among individuals receiving locally funded services in and from local government units. In short, the fiscal capacity of the county to provide services has consequences for individual residents. As Professor Neuman has argued, the “state should *not* be able to escape responsibility for its unequal fiscal endowment of its” local government units.⁸⁸

At first blush, the Arizona Supreme Court appears to have rejected equal protection as the basis for challenging the provision of rural indigent defense due to significant variations among counties. In *State v. Smith*,⁸⁹ the court examined an individual defendant’s equal protection challenge regarding the adequacy of rural indigent defense. It compared Mohave County’s system of contracting for indigent defense services with the systems used by other Arizona counties.⁹⁰ At the time, Mohave County awarded public defense contracts to the lowest bidders without limiting caseloads or considering access, qualification, or complexity issues.⁹¹

The *Smith* court did not grant relief to the individual defendant, determining that there was not a sufficient showing that his counsel was ineffective.⁹² The court held, however, that Mohave’s public defense system was troubling enough to warrant an inference that “the adequacy of representation is adversely affected by the system.”⁹³ The court also observed that Mohave’s system was “the least desirable [among the counties] and can result in inadequate representation by counsel.”⁹⁴ But the court stopped short of holding that Mohave County’s deficiencies violated equal protection principles.⁹⁵ The court reasoned:

As long as there is adequate representation for each defendant it is immaterial whether the system in one county is better or worse than the system in another, and we know of no case in which the variance in quality of representation from county to county within a state has been held to constitute a violation of equal protection of law.⁹⁶

In reaching this conclusion, the *Smith* court relied on the notion that the Equal Protection Clause does not require territorial uniformity.⁹⁷ It relied on *Salsburg*’s “popular new epigram,” in a particularly uncritical fashion. Instead of acknowledging the links between equal protection and cases such as *Gideon*, *Griffin*, and their progeny, the *Smith* court relied on *McGowan v. Maryland*, a case

88. Neuman, *supra* note 54, at 378.

89. 681 P.2d 1374 (Ariz. 1984).

90. *Id.* at 1379, 1382–83. Mohave County’s 1980 population was 55,865, making it nonmetropolitan. U.S. Census Bureau, National Atlas Map Maker, <http://www.nationalatlas.gov/natlas/Natlasstart.asp> (select “Arizona”; then select “Boundaries,” “Counties”; then select “People”; then select “Population Density 1980”; and then click “redraw the map”).

91. *Smith*, 681 P.2d at 1379.

92. *Id.* at 1383.

93. *Id.* at 1381.

94. *Id.* at 1383.

95. *Id.*

96. *Id.*

97. *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420, 427 (1961), which cites *Salsburg v. Maryland*, 346 U.S. 545, 552-53, discussed *supra* notes 86-87).

upholding Sunday closure laws that applied in some parts of the state but not in others.⁹⁸ The *Smith* court appeared not to recognize that the Sixth Amendment issues are far weightier than the implications of laws which limit what people can buy on a given day of the week. The court apparently did not consider the argument for heightened scrutiny when territorial discrimination implicates a fundamental right.⁹⁹

Putting aside for a moment the shaky foundation of the *Smith* court's equal protection analysis, the opinion nevertheless does not foreclose an equal protection challenge that compares the quality of indigent defense systems from one territorial unit to another. Even if the court was correct that being the least effective system was *in and of itself* an insufficient basis for an equal protection finding,¹⁰⁰ an equal protection challenge is tenable when a state's system for providing indigent defense results in constitutionally inadequate representation in some jurisdictions. Local funding of representation, which can result in county-to-county variability is one cause of such inadequacies.

Further, *Smith* provides strategic guidance for future challenges to Arizona's indigent defense system. The plaintiff in *Smith* challenged his individual conviction, requiring him to meet the onerous two-prong standard set forth in *Strickland v. Washington*: (1) that the attorney's "performance was deficient" and (2) "that the deficient performance prejudiced the defense."¹⁰¹ In contrast, a class action that seeks prospective relief rather than the overturning of a conviction need not meet the *Strickland* test.¹⁰² As explained by the Eleventh Circuit:

98. State v. Smith, 681 P.2d 1374 (Ariz. 1984).

99. See *supra* notes 65–68 and accompanying text.

100. *Id.*; see also State v. Bryant, 324 So.2d 389, 393 (La. 1976) (Louisiana legislature did not intend reference to a "uniform" system of public defense to require identical systems "except in furnishing 'qualified counsel for indigents'"). The Equal Protection Clause does not require precise uniformity. The Court has been careful to limit its holdings to allow states and legislatures to develop systems that account for local differences, so long as they afford "adequate and effective" access to the criminal justice system for rich and poor alike. See Griffin v. Illinois, 351 U.S. 12, 20 (1956); see also Draper v. Washington, 372 U.S. 487, 496 (1984) (requiring for indigent defendant "as adequate and effective an appellate review as that given appellants with funds"); United States v. MacCollum, 426 U.S. 317, 324, 326 (1976) (equal protection does not require precise equality; rather "the basic question is one of adequacy of respondent's access to procedures for review of his conviction"). In other words, in the provision of indigent defense services, "a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to . . . an 'invidious discrimination'" prohibited by the Equal Protection Clause. Douglas v. California, 372 U.S. 353, 356 (1963).

101. 466 U.S. 668, 687 (1984). This standard is "highly deferential" to trial counsel. *Id.* at 689.

102. Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988) (overturning the dismissal of a 42 U.S.C. § 1983 complaint by a class of indigent criminal defendants challenging systemic deficiencies, including inadequate funding); see also White v. Bd. of County Comm'rs, 537 So. 2d 1376, 1378 (Fla. 1989) (ordering additional funding for state's system of indigent defense despite lack of *Strickland* claim); State v. Lynch, 796 P.2d 1150, 1160 (Okla. 1990) (ordering additional funding for indigent defense system despite lack of *Strickland* claim); Jewell v. Maynard, 383 S.E.2d 536, 546 (W. Va. 1989) (declaring

[The *Strickland*] standard is inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the “ineffectiveness” standard may nonetheless violate a defendant’s rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively.¹⁰³

Therefore, to successfully challenge the provision of rural indigent defense resulting from county-based underfunding, plaintiffs would have the burden of showing “the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law”¹⁰⁴ as a result of the deficiency in funding. Given the *Smith* court’s willingness to order prospective, systemic relief, an equal protection challenge (likely in conjunction with a Sixth Amendment challenge) would be viable upon a showing that the expenditure of significantly less money on indigent defense in some Arizona counties than in others will result in a likelihood of ineffective assistance of counsel.

II. JUSTICE BY GEOGRAPHY IN ARIZONA

As Stephen Holmes and Cass Sunstein wrote in *The Cost of Rights*, “A legal right exists, in reality, only when and if it has budgetary costs.”¹⁰⁵ Certainly, the Sixth Amendment right to counsel creates real fiscal burdens. Indeed, it is widely accepted that the indigent defense crisis is caused by the failure of government at all levels—local, state, and federal—to ensure adequate funding for public defense systems.¹⁰⁶ This crisis is particularly dire in states where counties bear the burden of paying for indigent defense from limited county coffers. In its 2009 *Justice Denied* report, the Constitution Project observed:

As numerous statewide indigent defense studies have shown, when counties primarily fund indigent defense, there are certain to be inequities among the locally funded systems. Inevitably, urban counties have far more cases than rural counties and are often overburdened. At the same time, a rural county, with fewer

indigent defense system unconstitutional and ordering additional funding despite absence of *Strickland* claim).

103. *Luckey*, 860 F.2d at 1017.

104. *Id.* (quoting *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

105. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* 19 (1999).

106. See, e.g., Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734 (2005); Rodger Citron, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 484 (1991); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 483 (1982).

resources, may be financially crippled by the need to fund the defense of a single serious homicide case.¹⁰⁷

In Arizona, the vast majority of revenue used to provide indigent defense comes from counties, with the state paying little more than the proverbial drop in the bucket.¹⁰⁸ In fiscal year 2005, for example, the total cost of indigent defense in Arizona was nearly \$104 million.¹⁰⁹ County budgets contributed more than 99% of this sum (about \$103 million), while the State paid only about three-quarters of a percent (\$802,900).¹¹⁰

Arizona is one of the states hardest hit financially when it comes to providing indigent defense services.¹¹¹ The heavy burden placed on counties to fund indigent services is no doubt one very significant aspect of that problem. When a higher scale of government levies taxes, it can rely on a broader range “of progressive tax instruments across all regions and economic sectors” to generate revenue and then distribute it according to need.¹¹² By leaving the funding of indigent defense to counties, the State of Arizona can essentially ignore the revenue and cost implications of the federal constitutional mandate to provide this service. Instead of drawing on the State’s considerable tax base—much of it concentrated in urban areas—to ensure that indigent defense is adequately funded across the entire state,¹¹³ Arizona leaves counties to rely on their own tax bases, which are sometimes quite small.

In this Part, we explain Arizona’s local and state funding mechanisms for indigent defense in order to set the stage for our spatial inequality analysis. We then closely examine indigent defense funding and services in five Arizona counties that run the gamut from most urban to most rural to illustrate the consequences of spatial inequality by considering several deficiencies in the

107. THE CONSTITUTION PROJECT, *supra* note 11, at 54–55.

108. SAUBERMANN & SPANGENBERG, *supra* note 11, at 5 (“Over 99 percent of all funding for indigent defense representation in Arizona is provided by the counties.”). While we focus in this Article on state and local funding of indigent defense, it is important to note that the federal government woefully underfunds public defense in the states despite the right to counsel guarantee in the U.S. Constitution.

109. *Id.* at 35.

110. *Id.* The State’s contributions to indigent defense that year included \$150,100 in general fund appropriations (RSAID) to all counties except the two most urban, Pima and Maricopa. The State distributed \$670,800 in fine revenues (SAIDF) to all counties. *Id.* at 5.

111. Mantel, *supra* note 14, at 340. Of course, the state of Arizona is currently experiencing a broader budgetary crisis due to the recent economic downturn. See Jennifer Steinhauer, *Closing of Rest Stops Stirs Anger in Arizona*, N.Y. TIMES, Mar. 5, 2010, at A1 (reporting that Arizona has the largest budget gap of any state in that nation when measured as a percentage of its overall budget).

112. Cimbaluk & Warner, *supra* note 35, at 1–2 (citing Warner, *supra* note 46, at 541); Warner, *Local Government Financial Capacity*, *supra* note 38; Pelissero & Morgan, *supra* note 46.

113. Arizona’s tax revenues have declined dramatically during the current recession, leaving the State in a budgetary crisis. See Steinhauer, *supra* note 111; Christopher L. Hering, Note, *Playing a Leading Role: How Recent Cases Are Thrusting the Arizona Courts into the State’s Budget Drama*, 52 ARIZ. L. REV. 173, 174–78 (2010). Nevertheless, the State’s tax base remains far broader than that of any single county.

provision of indigent defense—deficiencies that could be cured with a higher level of funding. While these deficiencies have been litigated on some basis in Arizona in the past, we assert they have the potential to arise again due to Arizona’s reliance on local funding and the increasing place-based economic stratification in the State. Finally, we consider how funding disparities might form the basis for an equal protection claim related to the provision of indigent defense services. We model a claim based on funding that varies dramatically from county to county.

A. The Funding and Provision of Indigent Defense in Arizona

The State of Arizona confers on each county the authority to decide how it will provide indigent defense services.¹¹⁴ As a result, counties varyingly use Public Defenders, appointed counsel, and/or contract counsel, either solely or in some combination.¹¹⁵ The state authorizes each county to establish a Public Defender’s Office and appoint a Public Defender,¹¹⁶ but only ten of Arizona’s fifteen counties do so.¹¹⁷ Many of these counties also have an “alternative to the Public Defender’s office”—usually called the Legal Defender—for cases with multiple defendants and others in which a conflict of interest may exist.¹¹⁸ Counties with high volumes of indigent defense cases may also have institutions such as Maricopa County’s Office of Contract Counsel to administer contracts with outside counsel.¹¹⁹

Counties without a Public Defender rely exclusively on private attorneys to represent indigent defendants,¹²⁰ sometimes using year-to-year contracts,

114. ARIZ. REV. STAT. ANN. § 11-581 (2009) (“In any county the board of supervisors may establish the office of Public Defender and appoint a suitable person to hold that office.”); *see also* SAUBERMANN & SPANGENBERG, *supra* note 11, at 5.

115. ARIZ. CRIMINAL JUSTICE COMM’N, THE RISING COST OF INDIGENT DEFENSE IN ARIZONA 13 (2003), *available at* http://azcjc.gov/pubs/home/052803_IndigentDefenseReport.pdf. [hereinafter RISING COST OF INDIGENT DEFENSE].

116. ARIZ. REV. STAT. ANN. § 11-581 (2009).

117. Ariz. Pub. Defender Ass’n, Statewide Offices, <http://www.apda.us/offices.htm> (last visited Sept. 24, 2009) (listing these as Cochise, Coconino, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Yuma, and Yavapai). La Paz is surely the most rural Arizona county to appoint a Public Defender. La Paz County has a population of just over 20,000. U.S. Census Bureau, *supra* note 3 (search “La Paz County, Arizona”; then refer to 2006–2008 data).

118. In several counties these are called “legal defenders.” For example, Pima County identifies this office as the “‘legal’ defender.” Pima.gov, Welcome to the Legal Defender’s Office, <http://www.pima.gov/legaldef/> (last visited July 25, 2009); RISING COST OF INDIGENT DEFENSE, *supra* note 115, at 6.

119. *See* Office of Contract Counsel, Maricopa County, <http://www.maricopa.gov/OPDS/Assets/Documents/Home/Administration/CCOrgChart.pdf>. Similarly, Pima County has an Office of Court Appointed Counsel to assign matters to the appropriate office or to a contract attorney, as well as to assess financial eligibility for indigent defense services. *See* Pima.gov, Pima County Office of Court Appointed Counsel, <http://www.pima.gov/ocac/> (last visited July 25, 2009) (reporting that the office also assesses fees to help defray indigent defense costs).

120. RISING COST OF INDIGENT DEFENSE, *supra* note 115, at 6.

sometimes employing attorneys on a case-by-case basis, and sometimes both.¹²¹ The Arizona Criminal Justice Commission (ACJC) observes that the counties without a Public Defender are “generally the smaller rural counties,” and that hiring attorneys on a contract basis “may save on overhead costs.”¹²² Five counties currently use contract attorneys exclusively to provide indigent defense: Apache, Gila, Graham, Greenlee, and Santa Cruz.¹²³

Arizona law makes a couple of key distinctions between counties with Public Defenders and those without. First, counties with Public Defenders receive training funds from the state, while those using other means of delivering indigent defense services do not.¹²⁴ Second, the state imposes certain reporting requirements on Public Defenders that it does not impose on any equivalent or related individuals or institutions in counties without Public Defenders.¹²⁵ These include a requirement to track the cost per case defended, which necessarily requires an accurate count of cases handled. Counties with Public Defenders are thus both better supported by the State and, at least in theory, better monitored by the State.

While these laws help explain some of the differences among counties’ indigent defense delivery systems, the more significant source of spatial inequalities lies in the nature and value of various county government funding sources. These sources include the tax revenue streams by which county governments raise general fund revenues, from which some 99% of indigent defense costs are paid. They also include funds earmarked for indigent defense, most prominently a type of special fund called “Fill the Gap” (FTG), which is comprised primarily of fine and fee revenue levied on court filings at both the appellate (state) and superior (local) court level.

1. County Funding

Most funding for indigent defense comes from a given county’s primary operating fund,¹²⁶ typically called the general fund.¹²⁷ The greatest portion of the revenue stream for a county’s general fund comes, in turn, from local property

121. See Cochise County, Office of Indigent Def. Coordinator, Survey of Arizona Indigent Defense Contracts, revised Sept. 1, 2009, available at http://cochise.az.gov/cochise_indigent_defense.aspx?id=468 (follow link to “Survey to Arizona Indigent Defense Contracts”) (last visited Mar. 26, 2010).

122. RISING COST OF INDIGENT DEFENSE, *supra* note 115, at 6.

123. Ariz. Pub. Defender Ass’n, *supra* note 117.

124. See *infra* notes 148–50 (discussing ARIZ. REV. STAT. ANN. § 12-117).

125. See *infra* note 398 (discussing ARIZ. REV. STAT. ANN. § 11-584).

126. See, e.g., COCONINO COUNTY ARIZONA, ANNUAL ADOPTED BUDGET FISCAL YEAR 2009 L6, K43, K51–52 [hereinafter COCONINO COUNTY BUDGET FY 2009]; MARICOPA COUNTY, FY 2008-09 ANNUAL BUSINESS STRATEGIES ADOPTED BUDGET 586 [hereinafter MARICOPA COUNTY FY 2008-09 BUDGET]; PIMA COUNTY FY2008/2009 ADOPTED BUDGET, SUPPLEMENTAL INFORMATION SUMMARY 15-9 [hereinafter PIMA COUNTY FY 2008/2009 ADOPTED BUDGET].

127. See COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at L6, L11, Glossary (defining “general fund” and “special revenue fund”).

tax.¹²⁸ Each county's ability to raise revenue, then, depends heavily on the assessed value of property and the rate at which it is taxed; both vary greatly from county to county.¹²⁹ Sales tax revenue also plays a significant role,¹³⁰ usually including both local sales tax revenue and a share of state sales tax revenue.¹³¹ Arizona's state sales tax revenue is allocated to counties according to a statutory formula.¹³² The principal determinants of the percentage of the shared state sales tax revenue that each county receives are (1) its population, (2) its retail sales, and (3) its property tax valuation, each as a percentage of the state's total.¹³³

This tax distribution formula is not redistributive and necessarily puts nonmetropolitan counties at a revenue disadvantage because they have smaller populations. Nonmetropolitan counties also tend to have lower retail sales per capita, in part because their residents are typically less affluent and, in part, because some types of economically significant retail transactions, e.g., auto sales, are concentrated in metropolitan counties. Finally, nonmetropolitan places tend to have lower property tax valuations than metropolitan counties because of the lack of private wealth that accompanies the low level of development in rural areas.

In addition to distributing a share of the state sales tax revenue to the counties, the state also distributes to county governments a share of auto licensing fees, the amount determined by a formula indexed to county population.¹³⁴ Local

128. MICHAEL A. JONES, COUNTY HOME RULE IN ARIZONA 30 (Inst. of Pub. Admin., Ariz. State Univ. 1974).

129. The assessed value of property in Maricopa County, for example, is \$49.8 billion. Telephone Conversation with Linda Schaffer, Data Sales Coordinator, Maricopa County Assessor's Office (Feb. 12, 2010). Coconino County's assessed value is just under \$2 billion (Ariz. Dept. of Revenue, Coconino, Abstract by Tax Authority for the County of Coconino, FY 2009), while that for Navajo County is just under \$1 billion. Telephone Conversation with Marlene Sample, Land Appraiser, Navajo County Office of the Assessor, (Feb. 12, 2010). At the same time, the tax rates for less populous counties are often higher. Maricopa County's property tax rate for FY 2009 was 1.0125. MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126, at 124. The total property tax rate for Coconino County for FY 2009 was 0.6457, while that for Navajo County was 1.5241, and that for Apache County was 2.3738. COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at K5; NAVAJO COUNTY ARIZ., FINANCE DEP'T, 2008-2009 BUDGET BOOK, at sched. B [hereinafter NAVAJO COUNTY FY 2008-09 BUDGET]; APACHE COUNTY ARIZ., FINANCE DEP'T, ADOPTED BUDGET 2008-2009, at sched. B, *available at* <http://www.co.apache.az.us/pdfs/Finance/2009Budget.pdf> [hereinafter APACHE COUNTY, ADOPTED BUDGET 2008-2009]; *See* COONS ET AL., *supra* note 34, at 316-17 (discussing the greater taxes that poor locales must pay, in comparison to rich locales, in order to afford equivalent services); Cimbaluk & Warner, *supra* note 35, at 8.

130. *See, e.g.*, PIMA COUNTY FY 2008/2009 ADOPTED BUDGET, *supra* note 126.

131. *See* Figure 7 (showing each county's local sales tax revenue).

132. ARIZ. REV. STAT. ANN. § 42-5010 (1988).

133. *Id.*; *see also* E-mail from Elaine Smith, Ariz. Dep't of Revenue, Office of Research & Analysis, to Lauren Sible, Law Student, Univ. of Cal., Davis Sch. of Law (Sept. 22, 2009) (on file with author).

134. ARIZ. REV. STAT. ANN. § 28-5801; *see also* YUMA COUNTY ARIZ., RECOMMENDED BUDGET 2009-10. This amount is a significant revenue source for some counties. In Apache County, for example, it is \$55,000. APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129, at 12, 14 & sched. C.

fees from various licenses and permits, including those associated with buildings, businesses, and zoning, constitute significant revenues in some counties.¹³⁵ In addition, Arizona counties receive various federal transfers, including some earmarked funds for health and human services and law enforcement initiatives. These transfers also include Payments in Lieu of Taxes (PILT), which are a type of general fund revenue intended to compensate counties for the presence of public lands, which are not subject to local property tax.¹³⁶

Each county's general fund is used to pay for a wide array of services. These include public safety, probation services, parks and recreation, planning and development, public health, elections, and environmental services.¹³⁷ They also include the County Attorney, the Superior Court, and indigent defense.

Some earmarked funding for indigent defense is also generated locally, through court fees. Specifically, Arizona Revised Statute section 41-2421(C) provides that "five per cent of any monies collected by the Superior Court, including the clerk of the court and the justice courts in each county for the payment of filing fees, including clerk fees, diversion fees, adult and juvenile probation fees, juvenile monetary assessments, fines, penalties, surcharges, sanctions and forfeitures" go to the county treasurer.¹³⁸ By statute, the county treasurer allocates 20.53% of these monies to indigent defense.¹³⁹ In theory, then, the greater the level of court activity, the greater the pool of local FTG fine revenue available for use by indigent defense and other functions.

135. These vary from about \$243,000 in Apache County to more than \$43 million in Maricopa County. See APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129, at sched. C (see "Licenses and Permits"); MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126, at Budget Summary Schedules, 114.

136. U.S. Dep't of the Interior, Payments in Lieu of Taxes (PILT) FAQ, <http://www.doi.gov/pilt/faq.html> (Oct. 21, 2008). In 2008, Congress distributed \$228.5 million in PILT money to approximately 1850 local governments. *Id.*; see also COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at Glossary of Terms, L8. PILT, like a similar state program related to state-owned lands, does not typically compensate the county at the level it would receive if the land were taxed at the usual county rate.

137. MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126, at 106 (listing consolidated revenues and other sources by department and fund type); NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129, at sched. E (listing expenditures/expenses within each fund type).

138. ARIZ. REV. STAT. ANN. § 41-2421(C) (2009). This statute is part of the so-called Fill the Gap legislation. See ARIZ. CRIMINAL JUSTICE COMM'N, FILL THE GAP FY 2008 REPORT, app. C at 75 (2009) [hereinafter FILL THE GAP FY 2008 REPORT]. These funds are "kept and administered locally for county court use." *Id.* at 5. Unfortunately, these funds are not clearly indicated on each county's budget. One county budget where they are shown as a line item is Coconino County. See COCONINO COUNTY BUDGET FY 2009, *supra* note 126.

139. ARIZ. REV. STAT. ANN. § 41-2421(E)(2) (2009). These monies are not part of SAIDF and are not appropriated by the legislature. They are generated locally, and they remain local. ARIZ. CRIMINAL JUSTICE COMM'N, GENERAL FUND AND OTHER APPROPRIATED FUNDS 85, <http://www.azleg.gov/jlbc/approps/jus.pdf> (last visited Feb. 18, 2010). "The board of supervisors in each county shall separately account for all monies received pursuant to [Sections 41-2421(C) and (E)]." ARIZ. REV. STAT. ANN. § 41-2421(F).

Coconino County is the only county among the five we examined to show a line item in its budget for this levy on fines and local court filings. For fiscal year 2009, Coconino County reported \$39,145 in local fine revenue for indigent defense¹⁴⁰—just more than 1% of its total \$3.5 million indigent defense expenditures.¹⁴¹ Other counties did not clearly report FTG local fine revenue on their budgets.¹⁴² We can assume, however, based on the Coconino County figures, that local fine revenues contribute very little overall to indigent defense budgets.¹⁴³

140. COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at E77, E85 (reporting \$5145 in 5% Local FTG Fund revenue in the Legal Defender's budget and \$34,000 in 5% Local FTG Fund revenue in the Public Defender's budget). Navajo County reported a total of almost \$245,000 in "5% Fill the Gap" going to its Public Defender and Legal Defender budgets. NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129, at sched. E (listing \$53,077 in "5% Fill the Gap" under the Legal Defender budget and \$189,725 in "5% Fill the Gap" under the Public Defender budget). It is not clear, however, that this is local fine revenue just for indigent defense in Navajo County because these numbers are far out of proportion to Coconino County's. The latter are more precisely labeled as 5% Local FTG and are roughly 20% of a Coconino County revenue source called "5% Local Fill the Gap," which is presumably all of the local fine surcharge that is distributed among the different functions, e.g., superior court, county attorney, pursuant to § 41-2421(E)(2). See COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at K22.

The FY 2009 Fill the Gap Annual Report indicates that counties are spending more in FTG funding than they are receiving from the state. See FILL THE GAP FY 2009 REPORT, *infra* note 161, at 70 tbl. 94, 84 tbl. 96 (showing, for example, that Maricopa County spent more than \$1.5 million in SAIDF, though it received only \$538,000 in SAIDF; Yavapai County spent more than \$156,000 though it received only \$62,000). These inconsistencies may be because some counties report to the Arizona Criminal Justice Commission their entire FTG expenditures—both state and local—and not only their expenditure of state allocations.

141. Figure 11.

142. In many cases, county officials failed to respond to repeated requests for information. See, e.g., E-mail to Greenlee County Bd. of Supervisors (Dec. 3, 2009) (on file with author); E-mail to Apache County Treasurer's Office (Dec. 1, 2009) (on file with author). The recipients of these emails, among many others, failed to respond to the authors' requests for information about local FTG revenue. The Arizona Criminal Justice Commission also does not collect information from the counties about their local FTG fine revenue. E-mail from Karen Ziegler, Deputy Dir., Ariz. Criminal Justice Comm'n, to Lisa R. Pruitt, Prof., Univ. of Cal., Davis Sch. of Law (Dec. 16, 2009) (on file with author). The Arizona County Supervisors Association was also unable to provide this information. E-mail from Elizabeth Hegedus-Berthold, Res. Analyst, County Supervisors Association, to Yooli Choi, Research Assistant, Univ. of Cal., Davis, Sch. of Law (Jan. 29, 2010) (on file with author).

Dana Hlavac, Deputy County Manager of Mohave County and the county's former Public Defender, refers to local FTG fine revenue as a "secret that no one wants you to know about" because (1) the counties are under no accountability or reporting requirements for these funds, and (2) these funds give the county something to fall back on if needed. He reported that local courts collect these monies throughout the year and then go to the Board of Supervisors asking them to accept the funds. Counties then either place the funds into a separate account or they combine them with other FTG funds. Mr. Hlavac reported that he did not know about the funds until seven years ago when the Arizona Criminal Justice Commission asked him to account for the Mohave County funds. At that point, he discovered that the Public Defender's FTG fund had far more money than the county had

Other sources of special revenue that appear on counties' indigent defense budgets include "fees for services,"¹⁴⁴ and "Public Defender fees."¹⁴⁵ These funds include assessments that courts levy on defendants.¹⁴⁶ Some counties also report training budgets.¹⁴⁷ Under Arizona law, the state Supreme Court administers training funds,¹⁴⁸ which are allocated to Public Defenders' Offices based on the number of felony cases assigned to the office in the last fiscal year.¹⁴⁹ Because only counties with Public Defenders' Offices are eligible to receive the funds, most of the state's least developed and least populous counties are excluded.¹⁵⁰

2. State Funding

While most of the funds that pay for indigent defense come from county general funds and a small portion is derived from locally generated fine revenue, each Arizona county also receives some state funding earmarked for indigent defense. This occurs through a series of bills the Arizona legislature passed in 1999 that are commonly and collectively referred to as "Fill the Gap" (FTG).¹⁵¹ The stated purpose of the legislation was "to correct imbalances created when earlier criminal justice funding efforts emphasized the 'front-end' of the system, i.e. police."¹⁵² The legislation also responded to a dramatic 23.5% increase in the state's population from 2000 to 2007,¹⁵³ a period during which felony case filings increased by 43.1%.¹⁵⁴ This increased caseload created a "gap between arrest and

received in state FTG monies. Since then, Mr. Hlavac has ordered tracking of local FTG fine revenue. Telephone Interview with Dana P. Hlavac, Deputy County Manager of Mohave County & former Mohave County Pub. Defender (Feb. 9, 2010).

143. *But see* Telephone Interview with Dana P. Hlavac, *supra* note 142 (suggesting that local FTG revenue is two to three times the amount of state FTG revenue for any given county).

144. COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at E77, E85.

145. NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129, at sched. F (showing \$151,753 in Public Defender fees).

146. Telephone Interview with Dana P. Hlavac, *supra* note 142 (reporting that courts assess these fees under ARIZ. REV. STAT. ANN. § 11-584 and that the amounts may be levied as a condition for probation; according to Hlavac, only Maricopa County has the means to do indigency screening).

147. *See* COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at E77 (showing a Legal Defender training fund of \$3502), E85 (showing a Public Defender training fund of \$39,100); NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129, at sched. E (showing \$91,746 for Public Defender training and \$23,278 for Legal Defender training).

148. ARIZ. REV. STAT. ANN. § 12-117.

149. *Id.* § 12-117(C).

150. *See* Supreme Court of the State of Ariz., Administrative Order 2006-95, Arizona Code of Judicial Administration Section 5-105, Public Defender Training, at Part D.1.

151. 1999 Ariz. Sess. Laws Ch. 1836; ARIZ. SUPREME COURT, ADMIN. OFFICE OF THE COURTS, COURT SERVS. DIV., FILL THE GAP ANNUAL REPORT 2008, at 3 (2008).

152. RISING COST OF INDIGENT DEFENSE, *supra* note 115, at 5.

153. FILL THE GAP FY 2008 REPORT, *supra* note 138, at 1.

154. *Id.*

disposition,” which FTG legislation aims to help close, thereby bringing case disposition times into line with standards set by the Arizona Supreme Court.¹⁵⁵

FTG legislation allocates fine revenue to funds that ultimately flow in part to the counties to supplement (specifically not to supplant) the counties’ budgets for County Attorneys’ Offices (prosecutors), indigent defense services, and Superior Courts.¹⁵⁶ Three state funds—one for each agency or function—receive a portion of fine revenue generated by a 47% penalty assessment on “all fines, penalties, and forfeitures imposed by the courts for both criminal and civil cases, including traffic violations, as well as an additional 7 percent fine on specified cases.”¹⁵⁷ Five percent of the 47% surcharge is distributed in the following way: 21.61% to the State Aid to County Attorneys Fund (SACAF); 20.53% to the State Aid to Indigent Defense Fund (SAIDF); and 57.37% to the State Aid to the Court Fund (SACF).¹⁵⁸ Revenue raised by the 7% additional assessment to fines and other court fees is also distributed to the three funds, but in lower proportions than for the distributed share (5%) of the 47% penalty assessment. The lion’s share of this 7% additional assessment goes to the State Aid to Courts Fund, which receives 40.97%. Only 14.66% is allocated to SAIDF.¹⁵⁹

Although these revenue streams generated by fines and court fees are set aside by statute, they remain “subject to legislative appropriation.”¹⁶⁰ For fiscal year 2009, the state allocated just under \$1 million in SAIDF funds to counties.¹⁶¹

155. *Id.* at 1, 4.

156. *Id.* (citing ARIZ. REV. STAT. ANN. § 41-2421 and discussing subsections (A), (B) and (J)). This legislation created State Aid to County Attorneys Fund, State Aid to Indigent Defense Fund, and the State Aid to the Courts Fund. *Id.* at 4 (citing ARIZ. REV. STAT. ANN. §§ 11-539, 11-588, and 12-102.02, which establish these funds).

157. *Id.* (citing ARIZ. REV. STAT. ANN. § 12-116.01, which mandates funding for FTG). Note that courts receive a far greater proportion of FTG revenue than do either indigent defense services or the county attorney.

158. *Id.* (discussing ARIZ. REV. STAT. ANN. § 41-2421(B)). Less than one half of one percent goes to the “Department of Law for the processing of criminal cases.” *Id.*

159. *Id.* at 4–5 (discussing ARIZ. REV. STAT. ANN. § 41-2421(J)). Specifically, 15.44% goes to the State Aid to County Attorneys Fund; 14.66% to State Aid to Indigent Defense Fund; 40.97% to the State Aid to the Courts Fund; 0.35% to the Department of Law for the processing of criminal cases; and 14.29% to the Arizona Supreme Court for allocation to the municipal courts. *Id.* (citing ARIZ. REV. STAT. ANN. § 41-2421(J), which references funds collected pursuant to ARIZ. REV. STAT. ANN. § 12-1106.01(B)).

160. ARIZ. CRIMINAL JUSTICE COMM’N, *supra* note 139.

161. ARIZ. CRIMINAL JUSTICE COMM’N, FILL THE GAP FY 2009 REPORT 70, tbl.94 (2010) [hereinafter FILL THE GAP FY 2009 REPORT]; ARIZ. CRIMINAL JUSTICE COMM’N, FISCAL YEAR 2009 APPROPRIATIONS REPORT 108, <http://www.azleg.gov/jlbc/09app/jus.pdf> [hereinafter FY 2009 APPROPRIATIONS REPORT]. ACJC notes that it “does not receive a break down of the fines from the State Treasurer’s Office. Monies are deposited into the appropriate funds on a monthly basis, and then ACJC distributes the funds per the formula up to the appropriation.” E-mail from Karen Ziegler, Deputy Dir., Ariz. Criminal Justice Comm’n, to Lauren Sible, Law Student, Univ. of Cal., Davis Sch. of Law (Sept. 21, 2009) (on file with author). This \$1 million was a reduction of more than \$1.5 million from what had initially been allocated. ARIZ. CRIMINAL JUSTICE COMM’N, LEGISLATIVE SUMMARY, 48TH ARIZONA STATE LEGISLATURE, SECOND REGULAR SESSION 2008, at 3 (July 2008), http://72.32.210.188/pubs/home/2008_final.pdf (reporting that \$1,550,000 was “swept” or

Because of budget cuts, however, only about 85% of that appropriation was distributed.¹⁶²

In addition to SAIDF, a state general fund appropriation provides monies for “Rural State Aid to Indigent Defense” (RSAID).¹⁶³ Maricopa and Pima counties are ineligible for any part of this smaller fund¹⁶⁴ as it targets assistance to less populous counties. In fiscal year 2009, the legislature appropriated slightly more than \$150,000 for this “rural” funding stream.¹⁶⁵ Even though these funds are paid only to Arizona’s less densely populated counties, the amounts disbursed are *de minimis*. For example, Greenlee County, the state’s least populous county with about 8000 residents,¹⁶⁶ received approximately 0.5% of the total RSAID appropriation—only \$870—for fiscal year 2009.¹⁶⁷

The ACJC distributes SAIDF and RSAID funds to the various counties according to a composite index formula set forth by statute.¹⁶⁸ The amount of SAIDF funding that each county gets is a function of (1) felony caseload, in particular a given county’s percentage of the state’s total felony filings, and (2) population or, more specifically, the percentage of the state’s population residing in the particular county.¹⁶⁹

Under the FTG distribution formula, the higher the total percentage (or index) for the population and felony filing metrics, the greater the amount of money the county receives. The formula is thus skewed in favor of metropolitan

transferred from SAIDF by legislation in the summer of 2008 in response to an emerging state budget crisis).

162. E-mail from Karen Ziegler, *supra* note 161 (noting that \$841,667 was the amount actually distributed); *see also* FILL THE GAP FY 2009 REPORT, *supra* note 161.

163. FY 2009 APPROPRIATIONS REPORT, *supra* note 161. This fund is also called “Indigent Defense Fill the Gap Funding, General Fund Appropriations.” FILL THE GAP FY 2008 REPORT, *supra* note 138, at 5–6, app. A. It is referred to in the FY 2008 Report as FTG general fund appropriation. *Id.*

164. “[C]ounties with populations exceeding 500,000 (i.e., Maricopa and Pima) were not eligible for general fund Fill the Gap appropriations in FY 2007. These counties still receive fine revenue.” FILL THE GAP FY 2008 REPORT, *supra* note 138, at 5–6.

165. FY 2009 APPROPRIATIONS REPORT, *supra* note 161 (reporting an appropriation of \$150,100); *see also* FILL THE GAP FY 2009 REPORT, *supra* note 161.

166. *See* Figure 1.

167. *See* Figure 12. Apache County received about 3.5% of the total (\$5324). *Id.*

168. ARIZ. REV. STAT. ANN. § 12-102.02 (2009); ARIZ. REV. STAT. ANN. § 41-2409(C) (2009). *See* FILL THE GAP FY 2009 REPORT, *supra* note 161, at 4–5.

169. The first step in this three-step formula is to divide each county’s three-year average of total felony filings in superior court by the statewide three-year average of total felony filings in superior court. FILL THE GAP FY 2008 REPORT, *supra* note 138, at 5. The next step is to divide that county’s population by the total statewide population. ARIZ. REV. STAT. ANN. § 41-2409(C)(1)–(2) (2009). The population as adopted by the Arizona Department of Economic Security is used to reach these results. FILL THE GAP FY 2008 REPORT, *supra* note 138, at 5.

The results from these two steps are added together to reach the composite index. ARIZ. REV. STAT. ANN. § 41-2409(C)(3) (2009). The composite index is then used as the multiplier against the total SAIDF funds to determine the amount distributed to each county. *Id.* § 41-2409(C)(4).

counties. The population figure is a clear proxy for urbanicity, at least as defined by the ecological metric of population size. To some extent, the felony caseload figure is also a proxy for urbanicity. This is because more populous counties are likely to experience more felonies in terms of raw numbers, even if their per capita crime rates are lower than nonmetropolitan counties.¹⁷⁰ In fact, felony filings per 1000 residents are as high or higher in several of Arizona's nonmetropolitan counties as in urban Maricopa County,¹⁷¹ but this does not lead to a significant increase in the FTG funds that flow to the high-crime nonmetropolitan counties.

Further, the FTG funding formula's reliance on felony counts, to the neglect of misdemeanors, also appears to disserve nonmetropolitan counties because a great deal of any county's indigent defense budget goes to defense of misdemeanor charges.¹⁷² In particular, the ratio of misdemeanors to felonies appears to be higher in counties with significant American Indian populations, and these counties tend to be nonmetropolitan.

It is apparent from looking at the fiscal year 2009 appropriations that the FTG funding formula favors more populous counties. Maricopa County received the greatest amount of FTG indigent defense funding that year, about \$540,000, which was entirely from SAIDF, generated by state fine revenue.¹⁷³ Greenlee County received the least: \$2019, comprised of \$870 in RSAID and \$1149 in SAIDF.¹⁷⁴

While the FTG formula seems fair in the sense of being proportionate to apparent need, it does not respond to several problems facing many nonmetropolitan counties. These problems include poor tax bases for raising revenue generally; high crime rates and potentially high use of indigent defense services among defendants because of high poverty rates;¹⁷⁵ and increased costs associated with rural spatiality and the markets for professional services. Related to the latter is the inability to achieve economies of scale in the delivery of services when the low volume of cases in a sparsely populated county might not justify, on

170. See, e.g., Lisa R. Pruitt, *The Forgotten Fifth: Rural Youth and Substance Abuse*, 20 STAN. L. & POL'Y REV. 359 (2009) (collecting information about higher youth substance abuse rates in rural places).

171. As reported to the Arizona Supreme Court for FY 2009, the rate of felony filings per 1000 population was as high in Navajo County as it was in Maricopa County, at 9.4. Greenlee County exceeded both with a rate of 12.5. When adjusted to exclude the counties' American Indian populations because they tend to consume fewer indigent defense services, the rate of felonies per 1000 population in Coconino (10.91), Navajo (17.22) and Apache (12.61) counties all exceed the rate in Maricopa County. See Appendix, Table 2. Higher crime rates in some nonmetropolitan counties may be a function of poverty rates. See, e.g., Morgan Kelly, *Inequality and Crime*, 82 REV. ECON. & STATS. 530 (2000); Britt Patterson, *Poverty, Income Inequality, and Community Crime Rates*, 29 CRIMINOLOGY 755 (1991).

172. See E-mail from Betty Smith, Adm'r., Superior Court of Ariz., Apache County, to Erin Murphy, Librarian, Univ. of Cal., Davis Sch. of Law (Oct. 23, 2009) (on file with author).

173. FILL THE GAP FY 2009 REPORT, *supra* note 161, at 70, app. A.

174. *Id.*; see also Figure 12 (showing some other counties' appropriations).

175. See Appendix, Table 2 (showing the proportion of felony filings that involved use of indigent defense services, by county).

strictly economic terms, the establishment of a Public Defender's Office or some other institutional arrangement that would separate the Public Defender function from the Superior Court. The absence of an institutional arrangement that provides greater checks on and oversight of indigent defense services may lead to the delivery of services that are inferior in comparison to those provided in more populous areas. Indeed, these services may be constitutionally inadequate.

B. Spatial Inequality and Indigent Defense: A Comparison of Five Counties

According to the U.S. Office of Management and Budget's (OMB) system for characterizing counties, six Arizona counties are metropolitan, and nine are nonmetropolitan.¹⁷⁶ Among the latter nine, six are micropolitan,¹⁷⁷ a label for a category at the cusp of the metro/nonmetro divide.¹⁷⁸ Just less than 12% of Arizona's residents—about 600,000 persons—live in places that are “nonmetropolitan” under the OMB's definition.¹⁷⁹ About the same number reside in places that are “rural” according to the U.S. Census Bureau standard: population clusters with 2500 or fewer residents or are in open space.¹⁸⁰

The broad metro–nonmetro binary aside, Arizona's counties also run a more nuanced gamut from highly urban to very rural.¹⁸¹ The USDA's Rural–Urban Continuum measures rurality by classifying counties on a scale of one to nine. Classification on the Continuum is based upon size of population cluster (also

176. U.S. Dep't of Agric., Econ. Research Serv., *Data Sets, Rural Definitions: State Level Maps*, <http://www.ers.usda.gov/Data/Ruraldefinitions/maps.htm> (select “Arizona”) (“Rural definition based on Office of Management and Budget (OMB) metro counties.”) [hereinafter U.S. Dep't of Agric., *Rural Definitions*].

177. U.S. Census Bureau, *State and County QuickFacts*, <http://quickfacts.census.gov/qfd/index.html> (last visited Mar. 20, 2010) (select “Arizona”; select each county in Arizona and refer to “Metropolitan or Micropolitan Statistical Area”) (reporting that Cochise, Gila, Graham, Greenlee, Mojave, and Santa Cruz are parts of micropolitan statistical areas) [hereinafter U.S. Census Bureau, *State and County QuickFacts*].

178. Micropolitan counties are nonmetro counties with a population cluster between 10,000 and 50,000 and a surrounding, economically interdependent population of 100,000 or more. See U.S. Dep't of Agric., Econ. Research Serv., *Briefing Rooms, Measuring Rurality: What is a Micropolitan Area?*, <http://www.ers.usda.gov/Briefing/Rurality/MicropolitanAreas> (last visited Apr. 12, 2010). The OMB classification scheme further includes six categories within the broad “nonmetro” category and three sub-classifications within the broad category of “metro.” The nonmetro subcategories vary according to the presence and size of urban populations within a given nonmetro county and the county's proximity to a metropolitan area. See U.S. Dep't of Agric., *Measuring Rurality: Rural-Urban Continuum Codes*, <http://www.ers.usda.gov/Data/RuralUrbanContinuumCodes/> (select “Lookup the 2003 Code for a county”) (last updated Apr. 28, 2004) [hereinafter U.S. Dep't of Agric., *Rural-Urban Continuum Codes*].

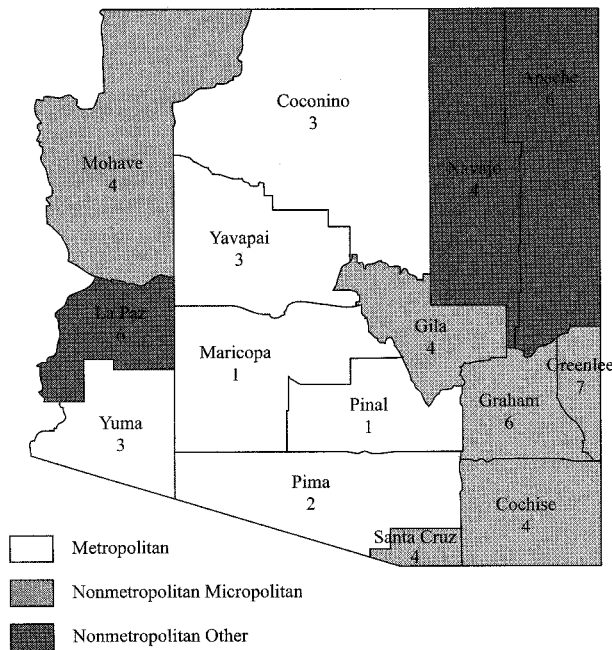
179. U.S. Dep't of Agric., *Rural Definitions*, *supra* note 176.

180. *Id.* at 8.

181. For extended discussions of the various meanings of “rural,” see Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 199–202 (2006) (discussing legislative efforts to impose different criminal laws and other types of regulations in rural areas as opposed to urban ones); Pruitt, *supra* note 49, at 343–48 (discussing the contested nature of the rural).

called “degree of urbanization”) and the proximity to a metropolitan area.¹⁸² At the most urban end are metropolitan counties with populations of one million or more, which are designated “one.” At the other end are “completely rural” counties, designated “nine,” which means they have fewer than 2500 residents in any given population cluster and are not adjacent to a metropolitan county.¹⁸³ Because Arizona has relatively few counties and most cover vast areas, many sparsely populated counties are nevertheless contiguous to metropolitan counties, leaving Arizona with no counties at the most rural end of the spectrum as defined by the USDA.

Map 1:
Arizona Rural–Urban Continuum Codes



As of 2003, only Maricopa County and contiguous Pinal County were designated “one” on the Rural–Urban Continuum, as counties “in a metro area with one million population or more.”¹⁸⁴ Pima County, home of Tucson, would presumably also now be so categorized based on its 2008 population estimate, which exceeds 1 million.¹⁸⁵ Among Arizona counties, Greenlee is the most rural with a designation of “seven,” which is defined as a nonmetropolitan county with an urban population between 2500 and 19,999, which is not adjacent to a

182. U.S. Dep’t of Agric., *Rural-Urban Continuum Codes*, *supra* note 178.

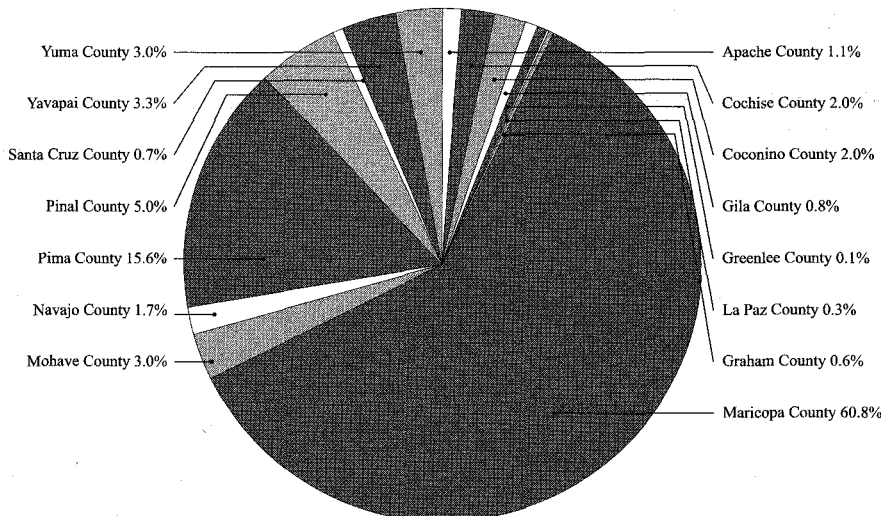
183. *Id.*

184. U.S. Dep’t of Agric., *Rural-Urban Continuum Codes*, *supra* note 178.

185. *See infra* note 211.

metropolitan county.¹⁸⁶ Three counties are designated “six,” which means that they are nonmetropolitan, with an urban population of 2500 to 19,999, and are adjacent to a metropolitan county.¹⁸⁷ These counties are Apache, Graham, and La Paz.¹⁸⁸ Thus, the urban extreme of the Continuum is represented in three Arizona counties, and a range of nonmetropolitan counties are present in the state.

**Chart 1:
Percentage of Arizona Population by County¹⁸⁹**



To illustrate the phenomenon of spatial inequality with respect to the provision of indigent defense services in Arizona, we compare five counties.¹⁹⁰ We selected counties that represent different points on the Rural–Urban Continuum and feature differing degrees of affluence. In some cases, the selected counties are demographically and economically similar but employ different systems for delivering indigent defense services. We examine Maricopa County, the most urban jurisdiction, and Coconino County, a metropolitan county that until the 2000 census was nonmetropolitan.¹⁹¹ We also look in detail at three nonmetropolitan

186. U.S. Dep’t of Agric., *Rural-Urban Continuum Codes*, *supra* note 178 (reporting that in 1993, two other counties, Graham and La Paz, were also designated seven; they were re-designated six in 2003).

187. *Id.*

188. *Id.*

189. FILL THE GAP FY 2009 REPORT, *supra* note 161.

190. Arizona is the sixth largest state in land area, yet it is divided into only 15 counties. U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (showing a land area of 113,634 square miles); Official Website of the State of Arizona, Counties, <http://az.gov/webapp/portal/displaycontent.jsp?name=county> (last visited July 11, 2009).

191. U.S. Dep’t of Agric., Econ. Research Serv., *Briefing Rooms: Measuring Rurality: 2004 County Typology Codes, Nonmetro Recreation Counties 1999*, <http://www.ers.usda.gov/Briefing/Rurality/Typology/Maps/Recreation.htm> (last visited Sept. 29, 2009) [hereinafter U.S. Dep’t of Agric., *2004 County Typology Codes, Nonmetro Recreation Counties 1999*]. Coconino’s most recent Rural–Urban Continuum Code

counties: Navajo, Apache, and Greenlee. Navajo and Apache counties are economically and demographically similar (with significant American Indian populations and high poverty rates),¹⁹² but we considered both because they use different systems for delivering indigent defense services. Apache and Greenlee were selected because, while they both provide counsel to indigent defendants with contract counsel, Greenlee has a far smaller yet far more affluent population than Apache. We explore whether and how Greenlee's relative affluence might lead it to dedicate greater resources to indigent defense, even as it appears to face greater challenges from an economy-of-scale perspective.

By looking closely at these five counties' financing and provision of indigent defense services, we are in a better position to assess the adequacy of and relative parity among their efforts. This also permits us to assess the best options for nonmetropolitan counties, which are challenged by both spatiality and impediments to achieving economies of scale, to respond to the constitutional requirement that they provide adequate and vigorous defense to indigents charged with crimes.

The following sections detail the five counties' demographic and economic profiles. These sections also provide a sense of each county's degree and type of development. In addition to textual descriptions, Figures 1–6 depict graphically the demographic and economic profiles of the focus counties. Each graph shows county level detail, from most urban to most rural, sometimes following Arizona and national data when available. Next are Figures 7–13, which show county-level fiscal detail, including total operating budgets, general fund and special fund portions, and budgets for indigent defense. Finally, Figures 14–16 show each county's case volume and cost per felony case defended. Figure 17, comparing per capita prosecution and indigent defense expenditures, is in Part II.C.3.

A caveat regarding these comparisons is necessary. Comparing “apples to apples” among Arizona counties is extremely challenging for several reasons. First, counties track and report budgetary and crime data in varying degrees of detail. As a general rule, the more urbanized the county, the greater the detail. For example, Maricopa County is the only county among the five studied that tracks and reports misdemeanor caseloads to the Arizona Supreme Court.¹⁹³ Like Maricopa County, Coconino and Navajo counties were also able to provide information about misdemeanor and juvenile caseloads for their Public Defenders' and Legal Defenders' Offices. Maricopa County's budget is also far more detailed than, for example, those of Apache or Greenlee counties.

designation is three. U.S. Dep't of Agric., *Rural-Urban Continuum Codes*, *supra* note 178 (reporting that its 1993 code was five; the 2003 code of three is a county “in a metropolitan area with fewer than 250,000 population”).

192. Navajo County's Rural-Urban Continuum Code is four and Apache County's is six. U.S. Dep't of Agric., *Rural-Urban Continuum Codes*, *supra* note 178.

193. FY 2009 caseload reports to Arizona Supreme Court (on file with author); Telephone Interview by Erin Murphy, Librarian, Univ. of Cal., Davis Sch. of Law Librarian, with Humberto (Bert) Cisneros, Research & Stats. Specialist, Caseflow Mgmt. Unit, Ariz. Supreme Court.

Another challenge to county-to-county comparisons is the significant tribal lands and American Indian populations in several of the counties. The sovereignty of American Indian tribes is a complicating factor in relation to both counties' fiscal circumstances and their criminal justice systems. American Indian lands are not taxed by the state or county, which diminishes the tax bases of counties whose territory overlaps with tribal lands.¹⁹⁴ At the same time, American Indian populations may not be served by county government in all of the ways that non-Indians are served. Tribes provide services to their members, and the federal government also provides supplemental services for American Indian populations.¹⁹⁵

American Indian defendants do not use the services of state justice systems at the same rate as their non-Indian counterparts. American Indians charged with crimes in Indian Country are not subject to the jurisdiction of state courts except in extremely rare circumstances.¹⁹⁶ Federal and/or tribal courts have jurisdiction over those charged with crimes enumerated under the Major Crimes Act¹⁹⁷ or the Indian Country Crimes Act,¹⁹⁸ both of which apply only to crimes committed in Indian Country.¹⁹⁹ Other crimes that Indians commit in Indian Country are under the jurisdiction of tribal courts.²⁰⁰ State courts thus have jurisdiction over American Indians only when they commit crimes not subject to

194. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.02[2][d][iii] (2005) [hereinafter COHEN, FEDERAL INDIAN LAW] (citing *Bd. of County Comm'rs v. Seber*, 318 U.S. 705 (1943)).

195. The Bureau of Indian Affairs provides services directly or through various grants and contracts to the 562 federally recognized tribes. Although tribal self-governance has recently been emphasized, the Bureau still provides an array of services on which Tribes rely. These include training, social services, Indian education, and economic development. The Bureau provides funds directly to tribes to operate schools, empower Indian school boards, and permit local hiring of teachers and staff. In regards to economic development, the Bureau provides funds to assist tribes in accessing energy and mineral resources help tribes stimulate job creation, increase tribal business knowledge, increase business, increase capital investment, and economic development. Bureau of Indian Affairs, www.bia.gov (select What We Do) (last visited Jan. 4, 2010). Indian Health Services serves 1.9 million American Indians and provides for 73 compacts, totaling \$1 billion in funding. U.S. Dept. Health & Human Servs., *Indian Health Services*, <http://www.ihs.gov> (select About us, then fact sheet, then 2009 IHS Profile) (last visited Mar. 1, 2009); see also COHEN, FEDERAL INDIAN LAW, *supra* note 194, at Chapter 22, Government Services for Indians.

196. COHEN, FEDERAL INDIAN LAW, *supra* note 194, § 9.03.

197. 18 U.S.C. § 1153 (2006). The MCA applies only to crimes committed in Indian country. COHEN, FEDERAL INDIAN LAW, *supra* note 194, § 9.02[2][a] (citing *United States v. Torres*, 733 F.2d 449, 453–54 (7th Cir. 1984)).

198. COHEN, FEDERAL INDIAN LAW, *supra* note 194, § 9.04.

199. "Indian country" is defined to include "(1) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, (2) dependent Indian communities, and (3) all Indian allotments the Indian titles to which have not been extinguished." *Id.* § 9.02[b] (citing 18 U.S.C. § 1151 (a)–(c)).

200. 18 U.S.C. §§ 1152–53, discussed in COHEN, FEDERAL INDIAN LAW, *supra* note 194, § 9.04 (2005).

federal jurisdiction outside Indian Country.²⁰¹ Because the Navajo reservation is vast and monolithic, unlike the territorial checkerboards that typically exist where smaller pockets of Indian Country meet state territory elsewhere in the United States, Navajo may come under state court jurisdiction very rarely because they have more opportunities to work as well as to live in Indian Country. Accordingly, when they commit crimes, they are also more likely to do so in Indian Country. Thus, while we initially calculate per capita costs of county government generally and indigent defense systems in particular using counties' entire populations, the presence of significant American Indian populations—as in Coconino, Navajo and Apache Counties—skews both revenue and service consumption data in ways that are impossible to untangle or identify with precision. In an effort to better compare “apples to apples” in terms of populations served by state justice systems, we also provide and analyze per capita calculations for some counties based entirely on those counties' non-Indian populations.²⁰²

Just as it is not possible to identify the extent to which American Indians utilize state justice system services, it is also not possible to identify the poverty and unemployment rates among discrete populations in these counties. It would not, in any event, be appropriate to separate Indian and non-Indian populations because they are somewhat enmeshed in terms of funding and service delivery. The counties deliver some services in Indian Country to American Indians, though these services are often financed by the federal government. Apache County, for example, has two administrative service centers on the Navajo Reservation.²⁰³ In addition, both Navajo and Apache counties have justice courts deep in the Navajo Reservation.²⁰⁴

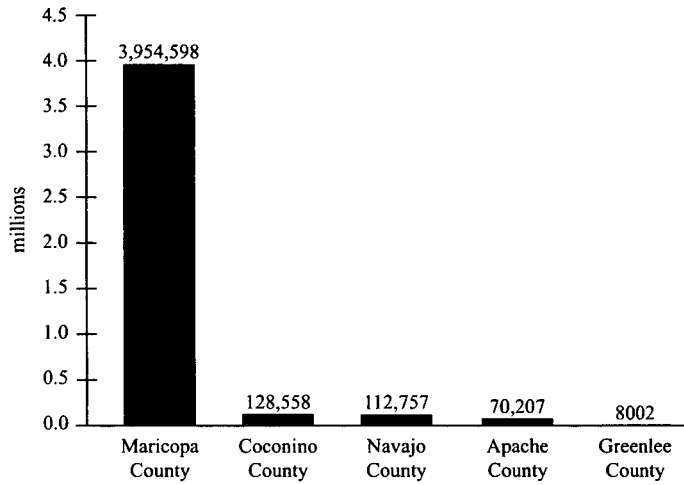
201. The state also has jurisdiction over crimes committed against American Indians when those crimes occur outside Indian Country. Because American Indians experience a rate of per capita violence that is twice that of the U.S. resident population, the more significant presence of American Indians may drive up crime rates—not because Indians commit the crimes, but because they are more often crime victims. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATS., AMERICAN INDIANS AND CRIME, A BJS STATISTICAL PROFILE, 1999-2002 at iv (Dec. 2004).

202. *See infra* notes 379, 381 and accompanying text.

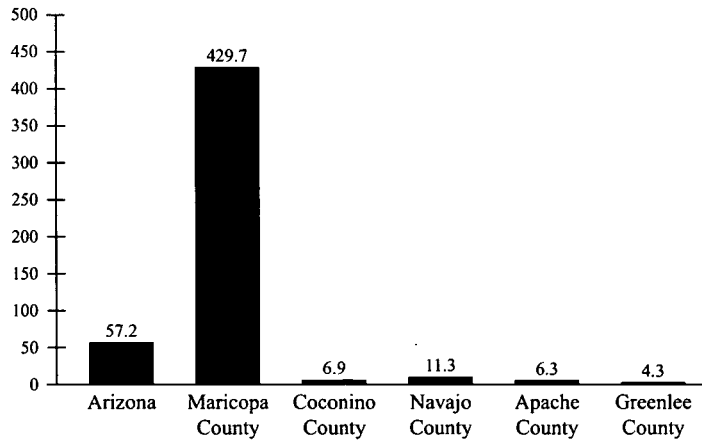
203. APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129, at 5 (comments of Delwin Wengert, Apache County Manager, regarding new administrative offices in Ganado and Chinle). Further, two of Apache County's three districts or wards are in Navajo Nation territory, so American Indians are represented in county government.

204. There are currently justice courts on Arizona Reservations in both Chinle, in Apache County, and Kayenta, in Navajo County. Apache County Homepage: Chinle Justice Court, <http://www.co.apache.az.us/Departments/Justice/Chinle/ChinleJP.htm>; Navajo County Justice Courts, <http://navajocountyjusticecourts.org/index.htm>; *see also* E-mail from Marsha Gregory, Counsel for Apache County, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Feb. 2, 2010) (on file with author); E-mail from Laree Saline, Office Manager, Navajo County Pub. Defender's Office, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Jan. 5, 2010) (on file with author).

**Figure 1:
Estimated Population, 2008²⁰⁵**



**Figure 2:
Population Density²⁰⁶**



205. U.S. Census Bureau, State and County QuickFacts, *supra* note 177.

206. *Id.*

Figure 3:
2007 Poverty Rates²⁰⁷

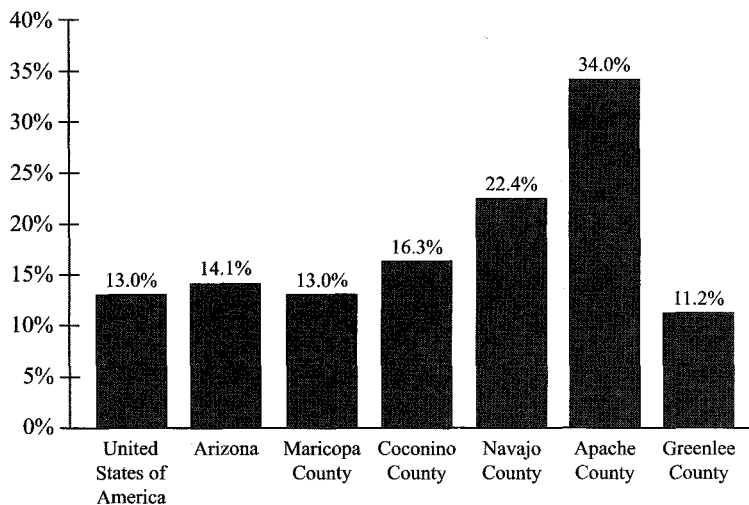
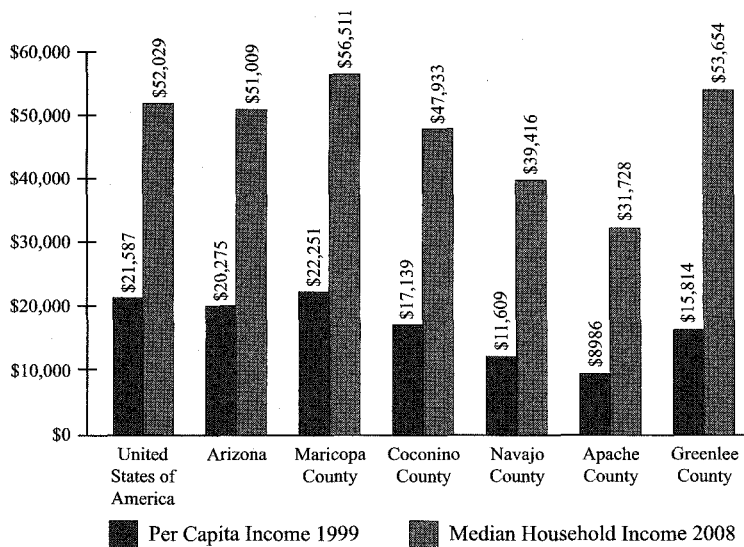


Figure 4:
1999 Per capita Income and 2008 Median Household Income²⁰⁸



207. *Id.*
208. *Id.*

Figure 5:
Sales and Manufacturing Data for Fiscal Year 2002²⁰⁹

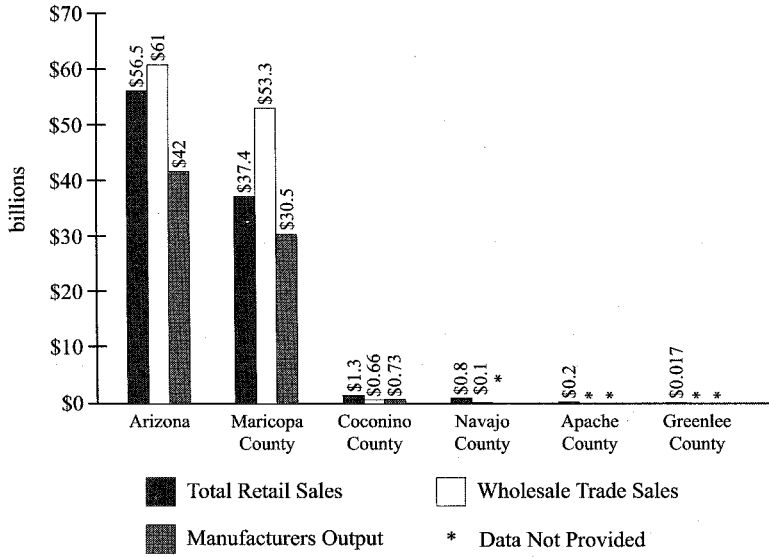
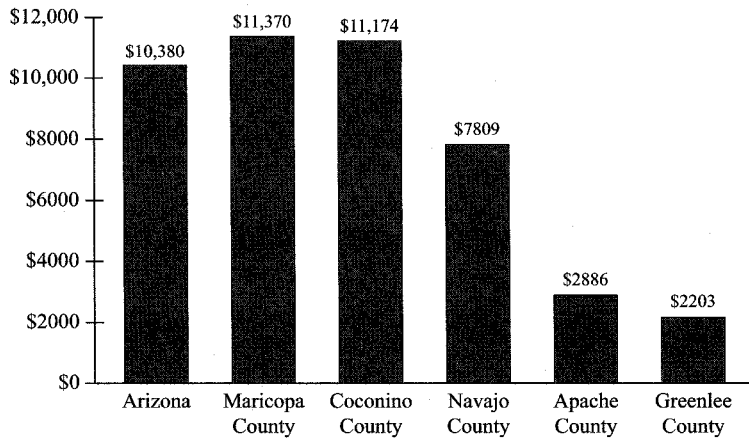


Figure 6:
Retail Sales Per Capita for Fiscal Year 2002²¹⁰



209. *Id.*

210. *Id.*

1. Metropolitan Counties

Arizona's two most populous and densely populated counties are Maricopa and Pima, home to Phoenix and Tucson respectively. Estimates from 2008 indicate that about three-quarters of the state's residents live in these contiguous counties in the central and south central part of the state,²¹¹ although they cover only 16.2% of Arizona's land area.²¹² Maricopa County in particular is a behemoth population-wise, with 61% of the state's population.²¹³ While Arizona's population has burgeoned almost 27% between the 2000 Census and 2008, Maricopa County's population grew even more quickly, by 28.7%, from just over 3 million to almost 4 million.²¹⁴ Maricopa and Pima counties also dominate Arizona's retail and manufacturing sectors, together accounting for nearly 82% of the state's retail transactions²¹⁵ and 89% of its manufacturing output.²¹⁶ We limit our detailed discussion to Maricopa County because Pima County has similarly robust public coffers and uses similar systems for providing indigent defense.

a. Maricopa County

Maricopa County covers more than 9200 square miles²¹⁷ in the southwestern part of the state,²¹⁸ and it encompasses most of the Phoenix-Mesa-Scottsdale Metropolitan area.²¹⁹ The county's 2008 population was just under 4

211. FILL THE GAP FY 2008 REPORT, *supra* note 138, at 35 (showing Maricopa County with 61.2% of the state's population) and 47 (showing Pima County with 15.3% of the state's population); *see also* U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select "Arizona"; then select "Maricopa County" and "Pima County"); *Id.* (select "Pima County"). In 2008, the population of Maricopa County was 3,954,598, and the population of Pima County was 1,012,018. In that year, Arizona's total population was 6,500,180. *Id.*

212. *See id.*

213. FILL THE GAP FY 2009 REPORT, *supra* note 161, at 36.

214. *See* U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (refer to "Population, percent change, April 1, 2000, to July 1, 2008").

215. Figure 5. *See also* U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select "Arizona"; then select "Pima County").

216. *See* U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select "Arizona"; then select "Maricopa County" and "Pima County").

217. U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select "Arizona"; then select "Maricopa County") (reporting an area of 9203.14 square miles).

218. *Id.* *See also* Map 1, *supra*.

219. U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select "Arizona"; then select "Maricopa County").

million,²²⁰ and its population density was about 430 persons per square mile,²²¹ placing Maricopa County at the most urban end of the Rural–Urban Continuum.²²²

Because Phoenix is the state’s capital, Maricopa County is a major center of political and economic activity with a highly diversified economy.²²³ The county boasts a growing high-tech industry, fifteen higher education institutions, and an international airport.²²⁴ Major industries are retail trade, administrative, support, waste management and remediation services, and construction.²²⁵ Maricopa County is relatively affluent, with one of the lowest poverty rates among Arizona counties.²²⁶ The county’s 1999 per capita income²²⁷ and 2008 median household income²²⁸ both exceed the respective national figures. Thus, it is not surprising that Maricopa County’s total retail sales for 2002 were robust, at almost \$37.4 billion,²²⁹ with per capita retail sales at \$11,370.²³⁰

Maricopa County adopted a total operating budget of over \$2.25 billion in fiscal year 2009.²³¹ About half of the revenues to fund that budget came from property and sales tax, of which about half a billion dollars derived each from property tax and the county’s share of the state sales tax.²³² Maricopa County’s budget was, not surprisingly, the largest among Arizona’s counties, although on a per capita basis, the county spent only \$571 per resident on services.²³³ This relatively low figure presumably reflects the economies of scale that counties with large and dense populations can achieve. At the same time, Maricopa County

220. *Id.* (reporting a 2008 population of 3,954,598). About 80% of the county’s residents are White, while about 30% are Hispanic or Latino/a of any race. Less than 2% of the county’s residents are American Indian and just over 4% are African American. U.S. Census Bureau, *supra* note 3 (search “Maricopa County, Arizona”; then refer to 2006–2008 data).

221. Figure 2. This figure is reached by dividing the population of 3,954,598 by the county’s land area of 9200 square miles.

222. U.S. Dep’t of Agric., *Rural-Urban Continuum Codes*, *supra* note 178.

223. ARIZ. DEP’T OF COMMERCE, PROFILE: MARICOPA COUNTY 1, available at <http://www.azcommerce.com/SiteSel/Profiles/County+Profiles.htm>.

224. *Id.*

225. *Id.*

226. U.S. Census Bureau, *supra* note 3, (search “Maricopa County, Arizona”; then refer to 2006–2008 ACS data) (reporting poverty rate of 13.0%). Arizona counties with lower poverty rates are Greenlee, Pinal, and Yavapai. *Id.*

227. See Figure 4

228. See Figure 4.

229. See Figure 5.

230. Figure 6.

231. See Figure 8; MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126, at 87.

232. See Figure 7.

233. See Figure 10. Almost 94% of services that Maricopa County provides are mandated by the state or federal government via statute, or provide support for those mandated services. These services are not, however, directly funded by the higher levels of government. MARICOPA COUNTY ANNUAL BUSINESS STRATEGIES, FY 2009-10 ADOPTED BUDGET 191 (2009).

provides its residents a much broader array of services than do the state's nonmetropolitan counties.²³⁴

Maricopa County budgeted nearly \$79.1 million for indigent defense in fiscal year 2009,²³⁵ of which 95% was from the county's general fund.²³⁶ These general fund expenditures on indigent defense represented 5.2% of the county's general fund for the year, the highest percentage among the counties studied.²³⁷ General fund allocations for indigent defense included funding for several divisions of Maricopa County's indigent defense infrastructure: almost \$40 million for the Public Defender, \$10.6 million for the Legal Defender, \$9.5 million for the Legal Advocate, \$15.4 million for the Office of Public Defense Services, and \$3.65 million for the Juvenile Defender.²³⁸ The county received almost \$540,000 in special revenue funds from the SAIDF Fill the Gap state funding stream in fiscal year 2009.²³⁹

Maricopa County's infrastructure for providing indigent defense is comprehensive and multi-faceted. Indigent defendants in Maricopa County are typically represented by the county's Public Defender's Office, with conflict and overflow cases going to the Legal Defender's Office or a separate Legal Advocate Office.²⁴⁰ The county also operates a separate Juvenile Defender's Office.²⁴¹ Any remaining cases are assigned to contract attorneys through the Office of Public Defense Services, which independently oversees defense contracts.²⁴²

234. See MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126, at 106 (listing consolidated revenues and other sources by department and fund type); NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129, at sched. E (listing expenditures/expenses within each fund type).

235. Figure 11.

236. See Figure 11 (showing \$75.3 million indigent defense budget from general funds).

237. See Figure 13.

238. MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126, at 131.

239. See Figure 12.

240. MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126, at 25. See Maricopa.gov, <http://www.maricopa.gov/MenuDetail.aspx?Menu=deptView&a=dept1> (last visited July 11, 2009); Maricopa County Arizona Office of the Public Defender, About the Office, <http://www.pubdef.maricopa.gov/about.html> (follow "Areas of Practice" hyperlink) (last visited July 11, 2009); see also Ariz. Quality Alliance, 2005 Showcase in Excellence Awards Recipient, Office of the Legal Advocate - Maricopa County, http://www.arizona-excellence.com/SQA_Program/Recipient%20Application%20Summaries/2005%20Legal%20Advocate%20-%20MC.pdf (noting that the Legal Advocate Office also handles certain dependency cases). The Legal Advocate serves the same purpose as the Legal Defender; when both the Public Defender and Legal Defender have conflicts in a matter, the Legal Advocate serves as an additional option to assigning a case to a contract attorney.

241. The Juvenile Defender represents indigent minors facing delinquency charges in juvenile court. See E-mail from Christina Phillis, Dir. of the Maricopa County Juvenile Pub. Defender Office, to Lauren Sible, Law Student, Univ. of Cal., Davis Sch. of Law (Sept. 14, 2009) (on file with author).

242. MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126, at 25. See Maricopa.gov, <http://www.maricopa.gov/MenuDetail.aspx?Menu=deptView&a=dept1> (last

b. Coconino County

At more than 18,500 square miles,²⁴³ Coconino County is the second largest county in the United States (after San Bernardino County, California). Sprawling across north central Arizona and stretching hundreds of miles along the Utah state line,²⁴⁴ Coconino County is vast enough to encompass the state of Connecticut or the nation of Denmark. With just 128,558 residents in 2008,²⁴⁵ however, the county's population density is one of the lowest in Arizona, at 6.9 persons per square mile.²⁴⁶ In spite of the sparseness of its population, Coconino County is a three on the Rural–Urban Continuum by virtue of its metropolitan classification.²⁴⁷ Almost half of the county's residents live in Flagstaff, the county seat, which has a population of nearly 60,000.²⁴⁸

Coconino County encompasses Grand Canyon National Park and other significant public lands.²⁴⁹ Indeed, the federal government controls 32% of the county's land. American Indian lands comprise another 46% of the county's territory, including those controlled by the Navajo, Hopi, Paiute, Havasupai, and Hualapai.²⁵⁰ Just over a quarter of the county's residents are American Indian.²⁵¹

The 2007 poverty rate for Coconino County was 16.3%, which exceeded state and national averages.²⁵² Both per capita and median household income levels for the county were slightly below the corresponding national figures.²⁵³ In spite of these lackluster economic indicators, Coconino County has grown rapidly in the past few decades, and it is sometimes held out as an example of rural

visited July 11, 2009); Maricopa County Arizona Office of the Public Defender, *supra* note 240.

243. ARIZ. DEP'T OF COMMERCE, PROFILE: COCONINO COUNTY, ARIZONA 1 [hereinafter PROFILE: COCONINO COUNTY], available at <http://www.azcommerce.com/SiteSel/Profiles/County+Profiles.htm>.

244. U.S. Census Bureau, State and County QuickFacts, Arizona County Selection Map, http://quickfacts.census.gov/qfd/maps/arizona_map.html (last visited July 31, 2009).

245. See Figure 1; U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select "Arizona"; then select "Coconino County").

246. Figure 2. This figure is reached by dividing the population, 127,291, by the land area, 18,617.42 square miles.

247. U.S. Dep't of Agric., *Rural-Urban Continuum Codes*, *supra* note 178 (showing Coconino as a three because it is a county in a metropolitan area with a population under 250,000).

248. U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select "Arizona"; select "Flagstaff") (reporting Flagstaff's population at 58,213).

249. PROFILE: COCONINO COUNTY, *supra* note 243, at 1.

250. *Id.*

251. U.S. Census Bureau, *supra* note 3 (search "Coconino County, Arizona"; then refer to 2006–2008 ACS data) (reporting an American Indian and Alaska Native population of 28.2%). About 12% of county residents are Hispanic or Latino/a of any race and about 62% are White. *Id.*

252. See Figure 3.

253. See Figure 4.

gentrification.²⁵⁴ Because Coconino County is home to the Grand Canyon, it is not surprising that its primary economic engines are accommodation and food services.²⁵⁵ Leisure and hospitality follows government, however, as the sector with the second greatest number of employees.²⁵⁶ The significance of tourism to Coconino County's economy is also reflected in high per capita retail sales; at \$11,174, this falls just short of the Maricopa County figure.²⁵⁷

Given Arizona's scheme for funding county government, such robust retail sales are a boon to Coconino County because they generate local sales tax revenue and increase the county's share of state sales tax revenue. From a revenue perspective, this helps compensate for the county's relatively low population, as well as for the fact that its vast public and American Indian lands are not subject to property tax, though the former bring federal PILT transfers into the county coffers. Indeed, the largest portion of the county's general fund is \$18.2 million in state shared sales tax.²⁵⁸ Revenues from the county's 1.13% general sales tax²⁵⁹ were estimated at almost \$13 million in fiscal year 2009.²⁶⁰ In addition, Coconino County levied and collected almost \$14.4 million in primary and secondary property taxes in 2009.²⁶¹ The county's total budgeted expenditures for fiscal year 2009 were more than \$163 million.²⁶²

Coconino County budgeted almost \$3.5 million for indigent defense services in fiscal year 2009.²⁶³ The county received almost \$29,000 in SAIDF and RSAID Fill the Gap funds for fiscal year 2009.²⁶⁴ It also received state grants for training, and it collected fees for services from some clients.²⁶⁵

Like Maricopa County, Coconino County has a primary Public Defender's Office to provide representation to indigent criminal defendants, juvenile delinquents, and persons in mental health commitment proceedings.²⁶⁶ The county also has an Office of Legal Defender to handle conflict and overflow cases.²⁶⁷ All remaining cases are assigned to contract counsel at the expense of the

254. See Daniel Kraker, *Around Resorts, Boomlet Towns Thrive, Too*, NAT'L PUB. RADIO, Aug. 20, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=93769999> (noting that Flagstaff has been discovered by "wealthy second homeowners").

255. PROFILE: COCONINO COUNTY, *supra* note 249, at 2.

256. *Id.* at 3.

257. See Figure 6.

258. Figure 7.

259. PROFILE: COCONINO COUNTY, *supra* note 249.

260. Figure 7.

261. Figure 7.

262. COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at K45.

263. See Figure 11; COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at K39.

264. COCONINO COUNTY BUDGET FY 2009, *supra* note 126, at K23.

265. *Id.* at E77, E85 (showing a total training budget for both Public Defender and Legal Defender of \$42,602 and total fees for services of \$130,978).

266. Coconino County Public Defender, <http://www.coconino.az.gov/pubdefender.aspx?id=404> (last visited July 25, 2009). The office also assists persons involved in dependency actions and in termination of parental rights litigation. *Id.*

267. Coconino County Office of the Legal Defender, <http://www.coconino.az.gov/legaldefender.aspx?id=403> (last visited July 25, 2009).

Legal Defender's budget.²⁶⁸ Currently, the Legal Defender contracts jointly with three Flagstaff law firms to provide this service.²⁶⁹

2. Nonmetropolitan Counties

Among Arizona's nine nonmetropolitan counties, we looked closely at Navajo, Apache, and Greenlee. While Navajo and Apache counties have significant American Indian populations and are highly impoverished, Greenlee County is somewhat affluent in comparison, particularly in light of its status as Arizona's most rural county. Compared to their metropolitan counterparts, all of the counties have relatively undiversified economies and significantly lower levels of economic activity. While Navajo County's population is growing, the populations of Apache and Greenlee County have fallen in the past decade.²⁷⁰

a. Navajo County

Navajo County is a vast, deeply impoverished county with a large American Indian population. The county's estimated 2008 population was 112,757, with a population density of 11.3 persons per square mile.²⁷¹ It falls at four on the Rural-Urban Continuum.²⁷² Navajo County spans almost 10,000 square miles in northeast Arizona,²⁷³ bordering Apache County to the east, Coconino County to the west, and Utah to the north.²⁷⁴ A large section of the northern part of the county is Navajo Reservation, and Hopi lands also lie within the county.²⁷⁵ Nearly half the county's residents are American Indian.²⁷⁶ Navajo

268. See, e.g., Coconino County, Indigent Criminal Defense Contract Counsel Agreement Fiscal Year 2008-2009 (on file with author) [hereinafter Coconino Contract].

269. *Id.*

270. See U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select Navajo County, Arizona; Apache County, Arizona; and Greenlee County, Arizona and refer to "Population, percent change, April 1, 2000 to July 1, 2008").

271. Figures 1 and 2.

272. U.S. Dep't of Agric., *Rural-Urban Continuum Codes*, *supra* note 178 (showing Navajo County as a nonmetropolitan county with an urban population of 20,000 or more, adjacent to a metropolitan county).

273. U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select "Arizona"; then select "Navajo County") (reporting 9953.18 square miles).

274. U.S. Census Bureau, State and County QuickFacts, Arizona County Selection Map, http://quickfacts.census.gov/qfd/maps/arizona_map.html (last visited July 31, 2009).

275. ARIZ. DEP'T OF COMMERCE, PROFILE: NAVAJO COUNTY 1 [hereinafter PROFILE: NAVAJO COUNTY] (reporting that 55% of the county is Indian reservation).

276. U.S. Census Bureau, *supra* note 3 (search "Navajo County, Arizona"; then refer to 2006-2008 ACS data) (reporting an American Indian and Alaska Native population of 45.6%, while about 10% of county residents are Hispanic or Latina/o of any race, and about 45% are White).

County has no metropolitan or micropolitan areas,²⁷⁷ and the largest population cluster, Winslow, has only about 9500 residents.²⁷⁸

Navajo County's 1999 per capita income²⁷⁹ and 2008 median household income were both well below the corresponding national figures.²⁸⁰ Almost a quarter of the county's population were living in poverty in 2007.²⁸¹ Not only is poverty high in Navajo County, it is an enduring economic and social feature: the county is a "persistent poverty" county,²⁸² which means that more than 20% of county residents have been living below the poverty line in each of the last four decennial censuses.²⁸³ As further evidence of the dire circumstances of its residents, the USDA designates Navajo a housing stress county.²⁸⁴

The USDA Economic Research Service classifies Navajo County's economy as non-specialized.²⁸⁵ The county's principal industries are tourism, coal mining, manufacturing, timber production, and ranching,²⁸⁶ but the greatest number of the county's employees work in government.²⁸⁷ Other major employment sectors include educational and health services, and construction.²⁸⁸ Total retail sales in Navajo County in 2002 were almost \$800 million, or about

277. U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select "Arizona"; then select "Navajo County").

278. U.S. Census Bureau, *supra* note 3 (search "Winslow City, Arizona"; then refer to 2000 data) (reporting a population of 9520). Holbrook, the county seat, has a population about half that size. *Id.* (search "Holbrook, Arizona"; then refer to 2000 data) (reporting a population of 4917).

279. Figure 4.

280. *Id.*

281. Figure 3.

282. U.S. Dep't of Agric., Econ. Research Serv., *Briefing Rooms, 2004 County Typology Codes, Persistent Poverty Counties, 1970-2000*, <http://www.ers.usda.gov/Briefing/Rurality/Typology/Maps/Poverty.htm> (last visited Apr. 12, 2010).

283. Calvin Beale & Robert Gibbs, *Severity and Concentration of Persistent High Poverty in Nonmetro Areas*, AMBERWAVES, Feb. 2006, <http://www.ers.usda.gov/AmberWaves/February06/DataFeature>.

284. U.S. Dep't of Agric., Econ. Research Serv., *Briefing Rooms, Measuring Rurality: 2004 County Typology Codes, Housing Stress Counties, 2000*, Aug. 24, 2004, <http://www.ers.usda.gov/Briefing/Rurality/Typology/Maps/Housing.htm> [hereinafter U.S. Dep't of Agric., *Housing Stress Counties*] (defining "housing stress county" as one where 30% or more of households had one or more of the following housing conditions in 2000: lack complete plumbing, lack complete kitchen, paid 30% or more of income for owner costs or rent, or had more than one person per room).

285. U.S. Dep't of Agric., Econ. Research Serv., *Briefing Room, Measuring Rurality: 2004 County Typology Codes, Economic Type of All Counties, 1998-2000*, Aug. 26, 2004, <http://www.ers.usda.gov/Briefing/Rurality/Typology/Maps/Econtype.htm>. Counties with economies not classified as dependent upon farming, mining, federal or state government, manufacturing, or services are termed "nonspecialized." U.S. Dep't of Agric., Econ. Research Serv., *Briefing Room, Measuring Rurality: 2004 County Typology Codes, Methods, Data Sources, and Documentation*, June 26, 2004, <http://www.ers.usda.gov/Briefing/Rurality/Typology/Methods/>.

286. PROFILE: NAVAJO COUNTY, *supra* note 275.

287. *Id.* at 3.

288. *Id.*

\$7809 per capita.²⁸⁹ This relatively high level of retail activity in a low population and high poverty context may be attributable to tourism.

Navajo County's total operating budget for fiscal year 2009 was about \$121.7 million,²⁹⁰ of which more than \$71 million—or 58%—was special revenue.²⁹¹ The large proportion of special revenue in Navajo County's budget may be attributable to the significant American Indian population, which tends to attract greater federal transfers.²⁹² For fiscal year 2009, Navajo County estimated receipt of \$11.2 million in shared sales tax revenues and approximately \$7.2 million in revenue from a county half-cent general sales tax.²⁹³ The county also levied and collected more than \$11 million in primary and secondary property taxes that year,²⁹⁴ a relatively small figure consistent with the low level of development and the presence of federal public lands and untaxed Indian territory.

Navajo County budgeted a total of just more than \$2 million for indigent defense in fiscal year 2009, including \$1.5 million from the general fund.²⁹⁵ The budget showed almost \$440,000 in special revenue funds for the Public Defender and another \$100,000 in special revenue for the Legal Defender.²⁹⁶ These special revenues included fees for service and training funds, in addition to local and state FTG revenue.²⁹⁷ The proportion of the county's indigent defense budget that is attributable to special revenue—more than a quarter—is considerably higher than any other county we studied, but Navajo County officials were unable to explain the sources of these high levels of special revenue.

b. Apache County

Like Navajo County, neighboring Apache County is vast, sparsely populated, and impoverished. Apache County extends east from Navajo County to the New Mexico state line, where it stretches from the Four Corners area in the north to more than half way to the U.S.–Mexico border. The county covers more than 11,000 square miles.²⁹⁸ The U.S. Census Bureau estimated Apache County's

289. Figures 5 and 6.

290. Figure 8.

291. Figure 9.

292. See COHEN, *FEDERAL INDIAN LAW*, *supra* note 194, at Ch. 22 (discussing federal support for Indian tribes); Joanna Wagner, *Improving Native American Access to Federal Funding for Economic Development Through Partnerships with Rural Communities*, 32 AM. INDIAN L. REV. 525 (2007–2008) (listing federal grant programs available to Indian tribes).

293. NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129, at sched. C (listing \$7,215,248 in revenue from county half-cent sales tax).

294. *Id.* at sched. B (showing \$11,235,249 levied). Navajo County's total 2009 revenue from sources other than property taxes was about \$66.4 million. *Id.* at sched. A.

295. *Id.* at sched. E (reporting \$399,552 for the legal defender and \$1,090,357 for the Public Defender).

296. *Id.* (reporting \$103,744 for the Legal Defender and \$439,188 for the Public Defender). For fiscal year 2009, the county received almost \$28,000 in State FTG funds. See Figure 12.

297. NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129, at sched. F.

298. U.S. Census Bureau, State and County QuickFacts, Arizona County Selection Map, http://quickfacts.census.gov/qfd/maps/arizona_map.html (last visited July

2008 population at 70,207,²⁹⁹ making its population density just 6.2 persons per square mile.³⁰⁰ With no metropolitan or micropolitan cluster,³⁰¹ Apache County falls at six on the Rural–Urban Continuum.³⁰²

As with Navajo County, the northern half of Apache County’s territory is Navajo Reservation.³⁰³ Indian reservations, including Apache territory, cover almost two-thirds of the county,³⁰⁴ and almost three-quarters of Apache County’s residents are American Indian.³⁰⁵ Indeed, a quarter of Arizona’s American Indian population lives in Apache County.³⁰⁶

Like Navajo County, Apache County is a persistent poverty county, but Apache’s economic indicators are even more alarming than those of its neighbor to the west.³⁰⁷ Apache County has the highest poverty rate among Arizona’s counties, with more than one-third of its residents living in poverty in 2007,³⁰⁸ a rate about two and half times as great as that for all Arizonans.³⁰⁹ The 1999 per capita income in Apache County was well under half the national average,³¹⁰ and the county’s 2008 median household income was less than 60% of the national median figure.³¹¹ The USDA Economic Research Service designates Apache County a low-education,³¹² high-unemployment,³¹³ and housing-stressed county.³¹⁴

25, 2009); U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select “Arizona”; then select “Apache County”).

299. Figure 1.

300. Figure 2.

301. U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select “Arizona”; then select “Apache County”). The county seat is St. Johns, population 3269, but the largest city is Chinle, population 5366. U.S. Census Bureau, *supra* note 3 (search “St. Johns, Arizona” and “Chinle, Arizona”; then refer to 2000 data).

302. U.S. Dep’t of Agric., *Rural-Urban Continuum Codes*, *supra* note 178 (designating Apache County as a six because it is nonmetropolitan with an urban cluster between 2500 and 19,999 and is adjacent to a metropolitan county).

303. Discover Navajo, Maps, <http://www.discovernavajo.com/maps.html> (last visited Nov. 19, 2009).

304. ARIZ. DEP’T OF COMMERCE, PROFILE: APACHE COUNTY 1 [hereinafter PROFILE: APACHE COUNTY], *available at* <http://www.azcommerce.com/SiteSel/Profiles/County+Profiles.htm>.

305. U.S. Census Bureau, *supra* note 3 (search “Apache County, Arizona”; then refer to 2006–2008 ACS data) (reporting an American Indian and Alaska Native population of 73.8%).

306. PROFILE: APACHE COUNTY, *supra* note 304, at 1. Just fewer than 6% of the county’s residents are Latino/a, and almost a quarter are white. U.S. Census Bureau, *supra* note 3 (search “Apache County, Arizona”; then refer to 2006–2008 ACS data).

307. U.S. Dep’t of Agric., Econ. Research Serv., *Briefing Rooms, 2004 County Typology Codes, Persistent Poverty Counties, 1970-2000*, Aug. 26, 2004, <http://www.ers.usda.gov/Briefing/Rurality/Typology/Maps/Poverty.htm>.

308. Figure 3.

309. *Id.*

310. Figure 4.

311. *Id.*

312. U.S. Dep’t of Agric., Econ. Research Serv., *Briefing Room, Measuring Rurality: 2004 County Typology Codes, Low-Education Counties, 2000*, Aug. 26, 2004, <http://www.ers.usda.gov/Briefing/Rurality/Typology/Maps/Education.htm> (defining “low-

Apache County's economy is undiversified, but driven primarily by trade, transportation, and utilities.³¹⁵ The greatest number of those in the labor force work in government.³¹⁶ Retail sales per capita in 2002 were just \$2886, a bit more than a third of the per capita figure for Navajo County and less than a third of that for Maricopa County.³¹⁷

Given Apache County's poor economic indicators, it is not surprising that the county's total operating budget for fiscal year 2009 was a meager \$64 million.³¹⁸ In spite of the presence of significant untaxed public and American Indian lands, property taxes comprised the greatest single source of the county's general fund revenue, \$11 million in 2009.³¹⁹ The county also estimated almost \$5.2 million as its share of state sales tax revenue³²⁰ and \$1.25 million from a half-cent county sales tax.³²¹

The county's general fund allocation for indigent defense in fiscal year 2009 was \$575,000.³²² The county expected to receive about \$15,000 in state FTG revenue,³²³ but it received only about 80% of that amount due to state budget cuts.³²⁴ Apache County received no training funds. The county budget shows no line items for fees paid by indigent defendants, nor any for local FTG revenue.

Of the \$664,248 fiscal year 2009 expenditures for indigent defense, almost \$375,000 (about 56% of the total) paid for the county's contracts with four law firms. Apache County spent another \$182,000 (about 27%) paying attorneys with whom it did not have ongoing contracts but who handled cases on an

education county" as one where 65% or more of residents 25–64 years old had neither a high school diploma nor GED in 2000).

313. *Id.* (defining "low-employment county" as one where less than 25% of residents 25–64 years old were employed in 2000).

314. U.S. Dep't of Agric., *Housing Stress Counties*, *supra* note 284 (defining "housing stress county" as one where 30% or more of households had one or more of the following housing conditions in 2000: lacked complete plumbing, lacked complete kitchen, paid 30% or more of income for owner costs or rent, or had more than one person per room).

315. PROFILE: APACHE COUNTY, *supra* note 304, at 2.

316. U.S. Dep't of Agric., Econ. Research Serv., *Briefing Room, Measuring Rurality: 2004 County Typology Codes, Federal/State Government-dependant Counties, 1998-2000*, Aug. 26, 2004, <http://www.ers.usda.gov/Briefing/Rurality/Typology/Maps/fedstgov.htm>. This is followed by "other private service—producing." PROFILE: APACHE COUNTY, *supra* note 304, at 3.

317. *See* Figure 6.

318. *See* Figure 9; APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129, at sched. E (showing total budgeted expenditures of \$63,931,617).

319. APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129, at sched. B (\$10,847,772). This property tax levied figure is up from about \$8 million in FY 2008. *Id.*

320. *Id.* at sched. C.

321. *Id.*

322. *Id.* at sched. E.

323. *Id.* at sched. C. This \$15,000 was shown as FTG Indigent Defense expenditure. *Id.* The amount actually received was \$12,457.05. *See* Figure 12.

324. *See* Figure 12; *supra* note 162 and accompanying text (discussing budget cuts to state FTG funding streams).

overflow basis or due to conflicts.³²⁵ In addition, almost \$46,000 went to mitigation services, and more than \$60,000 paid for psychological evaluations of various indigent defendants. Of the remainder, almost \$9000 paid for investigative or expert fees, about \$7500 paid for interpreter services, and \$6600 paid for transcription costs.³²⁶

c. Greenlee County

Greenlee County is located in southeastern Arizona, along the New Mexico state line and just south of Apache County. With only about 1800 square miles,³²⁷ it is tiny by Arizona standards—just about one-fifth of the size of Maricopa, Apache, or Navajo counties. Greenlee County’s estimated population is also tiny, just over 8000,³²⁸ which represents a decrease of more than 6% since the 2000 Census.³²⁹ The county’s population density is 4.3 persons per square mile,³³⁰ and it falls at seven on the Rural–Urban Continuum.³³¹

Greenlee County defies economic trends associated with nonmetropolitan counties in that its populace is relatively affluent. Greenlee’s 2007 poverty rate was the lowest among all Arizona counties, at 11.2%.³³² The median household income for Greenlee County in 2008 was right on par with the national figure, while the county’s 1999 per capita income was about three-quarters of the national average.³³³

The county’s affluence appears to be attributable to the presence of copper, which is the major contributor to Greenlee County’s mining-dependent economy.³³⁴ Ranching, agriculture, and tourism are factors as well.³³⁵ In 2008, the

325. Fax from Betty Smith, Adm’r, Superior Court of Ariz., Apache County, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Dec. 4, 2009).

326. *Id.*

327. ARIZ. DEP’T OF COMMERCE. PROFILE: GREENLEE COUNTY 1 [hereinafter PROFILE: GREENLEE COUNTY], available at <http://www.azcommerce.com/SiteSel/Profiles/County+Profiles.htm> (reporting an area of 1837 square miles, of which 63.5% is controlled by the U.S. Forest Service, 13.6% by the Bureau of Land Management, and 14.8% by the state of Arizona).

328. See Figure 1; see also U.S. Census Bureau, *supra* note 3 (search “Greenlee County, Arizona”; then refer to 2000) (reporting a population that is 50.9% non-Hispanic white, 44.9% Hispanic or Latino of any race, 2.4% American Indian, and 1.3% African American).

329. U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select “Arizona”; then select “Greenlee County”).

330. Figure 2.

331. U.S. Dep’t of Agric., *Rural-Urban Continuum Codes*, *supra* note 178 (noting that Greenlee County is a seven on the rural–urban continuum because it is a nonmetropolitan county with an urban population cluster between 2500 and 19,999 and is not adjacent to a metropolitan county).

332. See Figure 3.

333. Figure 4.

334. U.S. Dep’t of Agric., Econ. Research Serv., *Briefing Rooms: Measuring Rurality, 2004 County Topology Codes, Nonmetro Recreation Counties 1999*, <http://www.ers.usda.gov/Briefing/Rurality/Topology/Maps/Mining.htm> (last visited Jan. 1, 2010) (defining “mining-dependent” county as one with an average of 15% or more of total

“goods producing” sector was the sector with the greatest number of employees,³³⁶ distantly followed by government,³³⁷ trade, transportation and utilities,³³⁸ and other private service.³³⁹ In spite of its relative affluence, retail sales in Greenlee County are very low. In 2002, they totaled only about \$17.3 million,³⁴⁰ just more than \$2200 per capita.³⁴¹ This is even lower than Apache County, which may reflect Greenlee County’s lack of tourism, as well as its residents’ relatively easy access to the Safford micropolitan area, in neighboring Graham County, for major purchases.³⁴²

Given its diminutive size and population, it is not surprising that Greenlee County’s total operating budget, just \$16.6 million³⁴³ for fiscal year 2009, was only about a quarter of that for neighboring Apache County. This included \$1.6 million in property tax levied and \$3.6 million in state shared sales tax, along with about \$1 million in local sales tax.³⁴⁴ The county did not show any amount for indigent defense on its fiscal year 2009 budget,³⁴⁵ but a court administrator reported that it spent more than \$230,000 to provide this service,³⁴⁶ of which only \$2019 is traceable to special revenue: State Fill the Gap SAIDF and RSAID.³⁴⁷ All county expenditures for indigent defense covered only attorney fees. The county was unable to say how much, if any, it spent for investigation, expert, mitigation, or other fees.³⁴⁸

county earnings derived from mining in 1998–2000); *see also* Pruitt, *supra* note 12, (manuscript at 73–76) (discussing mining–dependent Stillwater County, which is also remarkably affluent for a remote rural county).

335. PROFILE: GREENLEE COUNTY, *supra* note 327.

336. *Id.* at 2.

337. *Id.*

338. *Id.*

339. *Id.*

340. Figure 5.

341. Figure 6.

342. U.S. Census Bureau, State and County QuickFacts, *supra* note 177 (select “Arizona”; then select “Greenlee County”) (reporting that Greenlee County is part of the Safford micropolitan area).

343. *See* Figure 8.

344. *See* Figure 7.

345. GREENLEE COUNTY, ARIZONA, RESOLUTION FOR THE ADOPTION OF THE FINAL BUDGET, FISCAL YEAR 2008-2009, available at <http://www.co.greenlee.az.us/bos/pdfs/budgetfy0809.pdf> (last visited Feb. 2, 2010). Presumably, indigent defense expenditures come out of the county’s \$446,538 budget for the Superior Court Judge. *Id.* at sched. E (1 of 3).

346. Telephone Interview with Cristina O’Coyne, Adm’r, Superior Court of Ariz., Greenlee County (Dec. 12, 2009).

347. *See* Figure 12.

348. Telephone Interview of Cristina O’Coyne, *supra* note 346.

Figure 7:
Property and Sales Tax Revenue for Fiscal Year 2009³⁴⁹

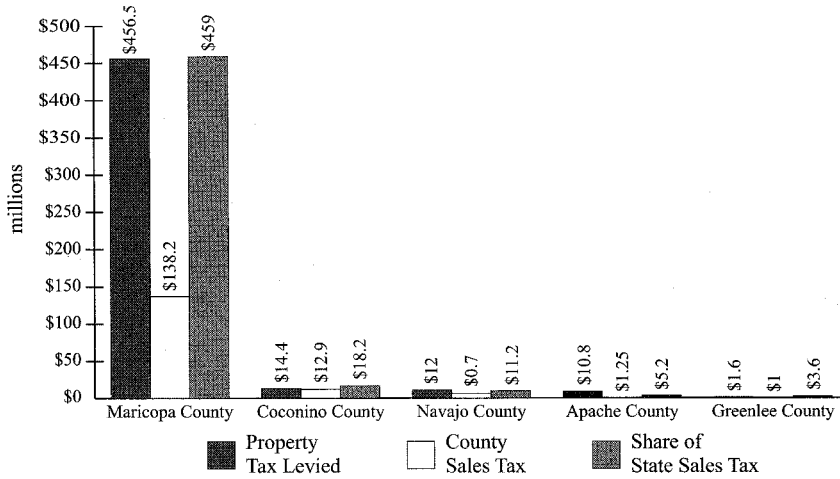
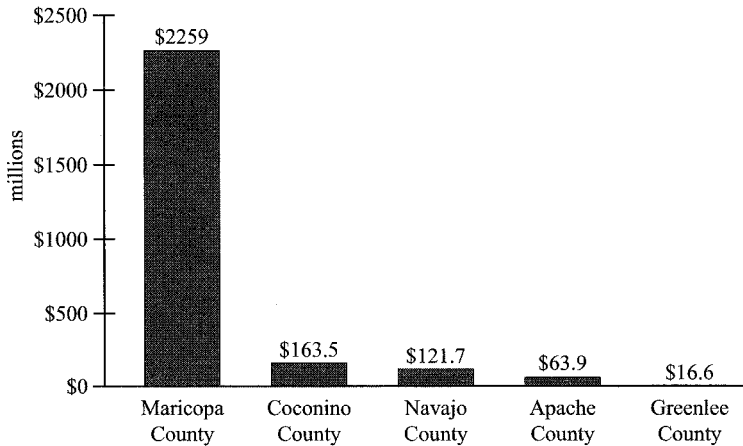


Figure 8:
Total County Operating Budget for Fiscal Year 2009³⁵⁰



349. See COCONINO COUNTY BUDGET FY 2009, *supra* note 126; MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126; PIMA COUNTY FY 2008/2009 ADOPTED BUDGET, *supra* note 126; NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129; APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129.

350. *Id.*

Figure 9:
Total General and Special Funds for Fiscal Year 2009³⁵¹

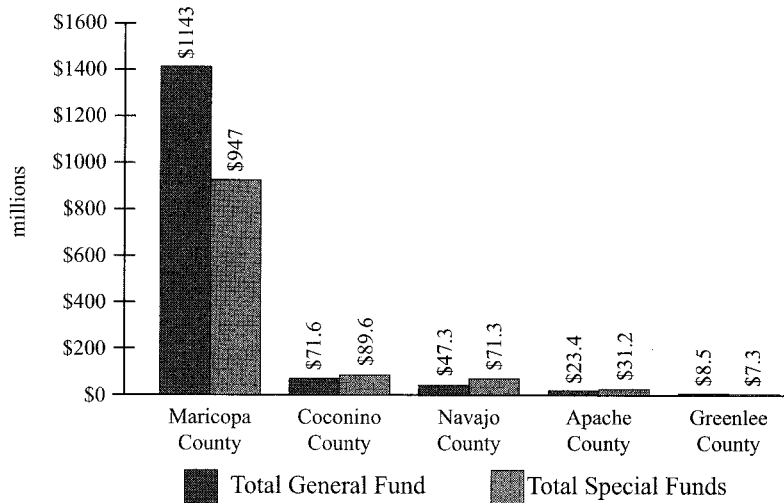
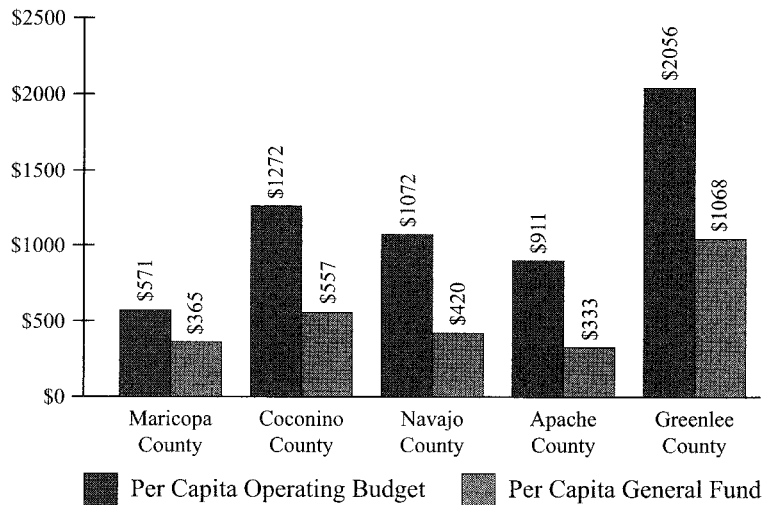


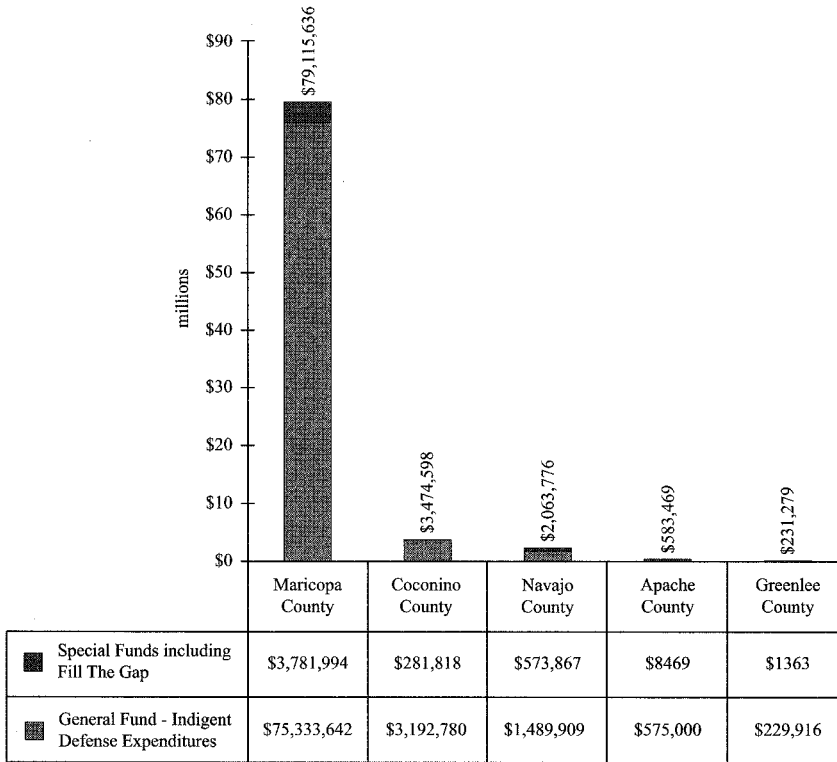
Figure 10:
Per capita Budget Data for Fiscal Year 2009³⁵²



351. *Id.*

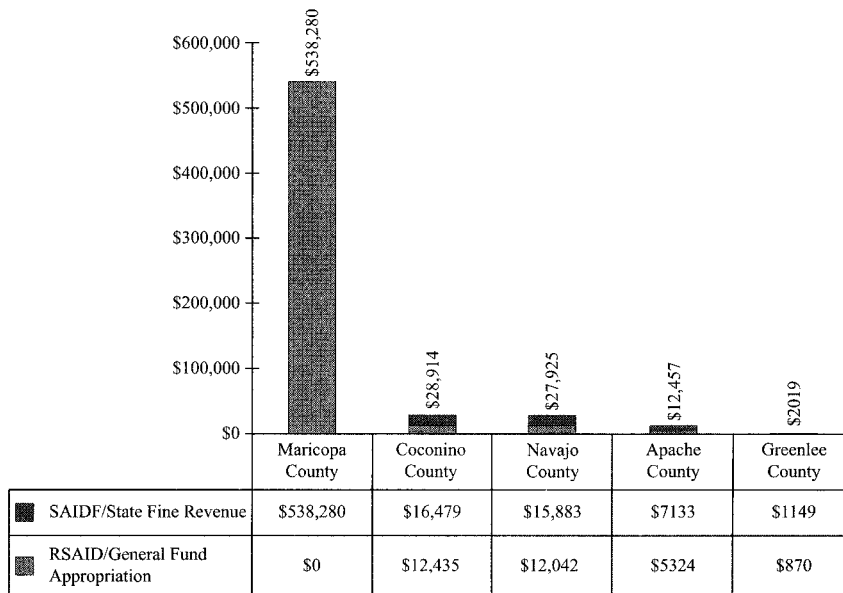
352. *Id.* Population data is from 2008. U.S. Census Bureau, State and County QuickFacts, *supra* note 177.

Figure 11:
Total County Spending on Indigent Defense for Fiscal Year 2009³⁵³



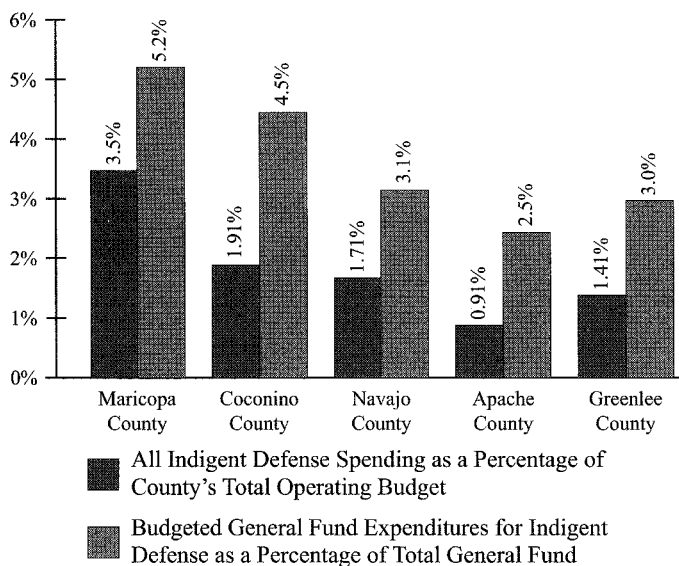
353. See COCONINO COUNTY BUDGET FY 2009, *supra* note 126; MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126; PIMA COUNTY FY 2008/2009 ADOPTED BUDGET, *supra* note 126; NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129; APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129.; FILL THE GAP FY 2009 REPORT, *supra* note 161. Whether or not Special Funds include local FTG revenue is unclear and may vary from county to county.

Figure 12:
FTG: State Funding for Indigent Defense
for Fiscal Year 2009³⁵⁴



354. FILL THE GAP FY 2009 REPORT, *supra* note 161. This does not include local FTG fine revenue. See *supra* notes 138–43 and accompanying text.

Figure 13:
Indigent Defense Spending as a Percentage of County Budget
For Fiscal Year 2009³⁵⁵



3. *The Consequences of Uneven Development for Arizona's County Governments*

These detailed descriptions of the economic and demographic situations in five Arizona counties illustrate the state's grossly uneven development. This uneven development produces great disparities in private wealth from place to place. Counties, in turn, experience corresponding spatial inequalities in their capacities to raise revenue and provide services.

Maricopa County's total operating budget, for example, is 35 times that of Apache County's and 136 times that of Greenlee County's.³⁵⁶ This is partly a consequence of Maricopa County having a population 56 times that of Apache County and nearly 500 times that of Greenlee.³⁵⁷ Population size influences not only service demand but also a county's ability to meet it by taxing residents. But disparities among county budgets are a factor of more than population size. Disparities in fiscal capacity also correspond to relative levels of economic activity, which influence counties' ability to generate tax revenue and dictate the level of funding each county receives from the state in, for example, share of state sales tax.³⁵⁸ That share is calculated based on the county's taxable sales,

355. See COCONINO COUNTY BUDGET FY 2009, *supra* note 126; MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126; PIMA COUNTY FY 2008/2009 ADOPTED BUDGET, *supra* note 126; NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129; APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129.

356. See Figure 8.

357. See Figure 1.

358. See *supra* notes 132-33 and accompanying text.

population, and property value.³⁵⁹ Maricopa County's figure for each of these dwarfs the figures of nonmetropolitan counties.³⁶⁰

Retail sales volume, in particular, is highly significant because most counties impose a local sales tax and because a great deal of the revenue that states turn back to the counties is in the form of a shared portion of the state sales tax.³⁶¹ Retail sales are higher in metropolitan places because of greater affluence and a wider availability of goods, including big-ticket items. This is reflected in Figure 6, which shows that Maricopa County's 2002 retail sales were \$11,370 per person,³⁶² while Apache County's figure was barely a quarter of that (\$2886) and Greenlee County's was only about one-fifth of it (\$2203).³⁶³

As reflected in Figure 7, local property tax revenue is similarly likely to be much higher in metropolitan than in nonmetropolitan counties. Counties like Maricopa County tend to have higher property values because metropolitan counties are, by definition, developed, and feature more commercial and residential improvements to land. This is illustrated by reference to the five counties' property tax revenues. While Maricopa, Navajo, and Apache counties all cover similarly vast amounts of territory (between 9000 and 11,000 square miles), Maricopa County levied \$456 million in property taxes, while Navajo County levied just \$12 million and Apache County only \$10.8 million.³⁶⁴ Even assuming that half of each Navajo and Apache County is untaxed tribal land, property values in Maricopa County nevertheless far exceed those in these relatively undeveloped counties.³⁶⁵ To add insult to injury for nonmetropolitan counties, property tax revenues are not only a pillar of county general fund revenue, they also influence the distribution of the state sales tax to the counties.³⁶⁶

Inequalities among Arizona counties' fiscal capacities are thus created and aggravated because of the significance of retail sales and property values, in addition to population, in determining county government funding. Both metrics reflect biases that disserve nonmetropolitan areas, particularly those that are most remote or that have especially low levels of development. Further, the funding formulas do not consider particular challenges to rural service delivery, including spatially dispersed populations and the difficulty of achieving economies of scale.

While this property- and sales-tax oriented scheme for funding county government is particularly detrimental to less developed counties, the funding system's links to population make sense at first blush in that counties with high populations need greater revenue to serve more residents. What population-based funding fails to take into account, however, is that every county must provide certain services to its residents. All counties face certain fixed costs, such as those

359. See *supra* notes 132–33 and accompanying text.

360. See Figures 1, 7.

361. See *supra* notes 130–34 and accompanying text.

362. See Figure 6 (data from U.S. Census Bureau, QuickFacts).

363. *Id.*

364. See Figure 7.

365. See *supra* note 129 (detailing assessed values of property in various counties).

366. See *supra* note 132–33 and accompanying text.

associated with county offices that are constitutionally mandated, e.g., treasurer, sheriff, assessor.³⁶⁷ They also face other considerable costs associated with public safety and the criminal justice system. Because nonmetropolitan counties are often unable to achieve economies of scale in relation to service delivery—and because they are additionally challenged by the spatially dispersed character of their populations—the cost per person of service delivery tends to be much higher than in metropolitan counties.

These factors are reflected in the higher per capita costs of county government for those in Arizona's sparsely populated counties. Highly urbanized Maricopa County has by far the largest operating budget of any Arizona county,³⁶⁸ but as depicted in Figure 10, its per capita expenditures are significantly lower than any of the other four counties studied. While Maricopa County spends \$571 per person, tiny Greenlee County spends more than three times that amount, \$2056.³⁶⁹ Between these is Coconino County, which spends twice as much per capita (\$1272) as Maricopa, while Navajo (\$1072) and Apache (\$911) each spends nearly double per capita what Maricopa spends.³⁷⁰

The per capita spending from each county's general fund varies from a low of \$333 in Apache County to a high of \$1068 in Greenlee County. Between them are Coconino at \$557, Navajo at \$420, and Maricopa at \$365.³⁷¹ The relatively low general fund expenditures in the counties with the greatest American Indian populations—low particularly in relation to their per capita total operating budget expenditures—may reflect the extent to which Apache and Navajo counties' total operating budgets are greatly enhanced by special revenue funding streams from the federal government, funds associated primarily with the American Indian populations.³⁷² The opportunity for discretionary spending in these counties—spending, for example, on indigent defense services—is thus especially low.

In short, the formula by which Arizona finances county government re-creates any given county's private wealth—typically a function of urbanization or some other type of development (e.g., the tourism infrastructure to accompany natural attractions, as in Coconino County)—in that county's public coffers. The funding scheme similarly replicates lack of affluence, as indicated by low incomes and high poverty among the populace, in the public coffers of nonmetropolitan counties. Because funding for county government is not centralized at the state level and therefore not redistributive, rich counties remain rich while poor counties remain poor.

It is in the context of these fiscal and structural challenges—not least poor tax bases—that nonmetropolitan counties must provide indigent defense. *Gideon's Broken Promise*, a publication of the ABA Standing Committee on Legal Aid, illustrates the dilemma facing many rural counties with this quote from a South

367. ARIZ. CONST. art. XII, § 3.

368. See Figure 8.

369. See Figure 10.

370. *Id.*

371. *Id.* (per capita general fund).

372. See *supra* note 195 and accompanying text.

Dakotan's testimony: "The overall budgets of the state's largely rural counties are so limited that counties must often choose between 'whether the roads are going to be graveled or the defendants are going to be defended.'"³⁷³

4. *Spatial Inequality in Local Funding of Indigent Defense*

As noted above, funding for indigent defense comes almost entirely from a given county's general operating fund, which consists primarily of locally generated revenue. The data presented in the prior Sections illustrate the enormously varied capacities of Arizona counties to generate revenue. In light of these structural realities, it is perhaps not surprising that Arizona's nonmetropolitan counties tend to spend significantly less than their metropolitan counterparts on indigent defense. That is, among the nonmetropolitan counties we considered, most spend less on indigent defense as a percentage of their general fund and as a percentage of their entire operating budgets. Most also spend less than their metropolitan counterparts on a per capita basis.

Figure 13 shows two calculations for each county: (1) total indigent defense spending as a percentage of total operating budget and (2) indigent defense spending from the general fund as a percentage of the entire general fund.³⁷⁴ Both calculations show Maricopa County spending the greatest portion of its budget on indigent defense, with Apache County spending the lowest portion. Maricopa County's general fund indigent defense expenditure is 5.2% of its total general fund, while Apache County spends just 2.5% of its general fund on indigent defense.³⁷⁵ The gap between rich/metro and poor/nonmetro is even more dramatic when considering all indigent defense expenditures as a percentage of the total operating budget. This metric ranges from a high of 3.5% in Maricopa County to a low of 0.91% in Apache County.³⁷⁶ Indeed, the proportion of the general fund that is spent on indigent defense declines with population among the counties studied until we reach tiny Greenlee County. Greenlee County devotes to indigent defense a level of spending commensurate with that of Navajo County and exceeding that of Apache County.³⁷⁷

Some might presume that this disparity in level of expenditure is attributable to lower crime rates, which are popularly associated with rural places, but this is probably not the case. As measured by the rate of felonies filed in state courts per 1000 persons, most nonmetropolitan counties are on par with the rate for

373. AM. BAR ASS'N, *supra* note 15, at 9.

374. We believe the latter figure is a better indication of the county's spending because it excludes special revenues that are earmarked for particular purposes such that the county has no discretion to divert them to indigent defense or any other use. While these special revenues include FTG funds that are earmarked for indigent defense, FTG revenue represents a pittance in relation to total indigent defense expenditures and so its presence amidst other special revenue funds has little impact.

375. See Figure 13. If adjusted for the additional funds that the Superior Court of Apache County diverted to indigent defense in Fiscal Year 2009, see *infra* note 552-53 and accompanying text, this percentage would increase to 2.8%.

376. Figure 13.

377. See Figure 13.

Maricopa County.³⁷⁸ Indeed, if American Indian populations are excluded from the population counts of Coconino, Navajo, and Apache County on the assumption that charges against them will more likely be brought in federal or tribal courts, all of these sparsely populated counties show rates of felonies that exceed Maricopa Counties.³⁷⁹ Navajo County's non-Indian crime rate is almost double that of Maricopa.

The metric of per capita spending on indigent defense, depicted in Figure 17, also shows a trend for spending levels to decline as degree of rurality increases. This trend is especially striking in light of the contrary trend for overall per capita spending levels (reflecting spending on all services) to increase with degree of rurality.³⁸⁰ So, even as nonmetropolitan counties tend to spend more per capita on delivery for all services, they tend to spend less per capita than their metropolitan counterparts on delivery of indigent defense in particular. Thus, indigent defense looks like a particularly low budget priority in more rural counties.

The counties that defy the trend to spend less on indigent defense as degree of rurality increases are Coconino and Greenlee counties. At \$29, Greenlee's per capita expenditure on indigent defense is the highest among the counties studied, with Coconino County following at \$25.³⁸¹ The high per capita cost of providing indigent defense in Coconino County may be related to the fact that the county bears certain fixed costs associated with having both Public Defenders' and Legal Defenders' Offices, and these costs are spread among a relatively low and sparse population. Its rate of indigent felony cases is also the highest among the counties studied.³⁸² By these very measures, however, Coconino County is quite similar to Navajo County in terms of population density, indigent defense infrastructure, and felony case volume. It is possible, therefore, that Coconino's higher per capita cost is due to an appropriately greater investment in this service, reflected perhaps with higher staffing levels in the Public Defenders' and Legal Defenders' Offices. As a related matter, the greater costs might be

378. According to felony filings per county as reported to the Arizona Supreme Court, the rate of felonies per 1000 residents was as follows: Maricopa, 9.4; Coconino, 7.8; Navajo, 9.4; Apache, 3.3; Greenlee, 12.5. SUPERIOR COURT CASE ACTIVITY FY 2009, ARIZONA SUPREME COURT (2009) (on file with author). Crime data collected by the Arizona Criminal Justice Commission similarly illustrate that crime rates in nonmetropolitan counties sometimes exceed those in metropolitan counties. For example, Graham County reported 782 violent crimes per 100,000 population, while La Paz County reported 513, and Maricopa County 473. This data also shows total crime in Coconino and La Paz counties approaching the levels of Maricopa and Pima counties. Ariz. Criminal Justice Comm'n, Internet Mapping and Analysis Project, FY 2008, <http://72.32.210.188/sac/imap.asp> (last visited Apr. 18, 2010).

379. When the numbers for Coconino, Navajo, and Apache counties are adjusted to exclude American Indian populations (on the assumption that they will more often be subject to federal or tribal court jurisdiction), the numbers of felonies per non-American Indian population are Coconino, 10.91; Navajo, 17.22; and Apache, 12.61. *Id.*

380. See *supra* notes 369–71 and Figure 10.

381. Figure 17. If adjusted to show per capita cost for the non-American Indian population only, Coconino's cost would be \$36, while costs for Navajo and Apache counties would be \$24 and \$31, respectively.

382. Figure 15.

associated with a higher cost of living in Coconino County, consistent with the rural gentrification phenomenon.³⁸³ That could lead to more generous compensation for contract attorneys providing indigent defense.³⁸⁴

Unlike Coconino County, Greenlee County's high per capita expenditures for indigent defense are not due to fixed costs associated with a Public Defender's Office because Greenlee County uses only contract counsel on a case-by-case basis. This high per capita cost is also not explained by an unusually high rate of felonies requiring indigent defense.³⁸⁵ As with the high per capita cost of delivering other services to its sparse and small population,³⁸⁶ the high cost of indigent defense in Greenlee County suggests the inability to achieve any economy of scale by, for example, retaining a single lawyer to provide indigent defense services on an ongoing basis in the way that Apache County engages several under ongoing contracts.³⁸⁷ Instead, Greenlee County retains six attorneys or firms and pays each a flat fee per case.³⁸⁸ Further, Greenlee County's fees are among the highest paid by Arizona's counties. This may reflect the fact that Greenlee County is in a better position to afford these fees than are less affluent nonmetro counties. More likely, however, the high fee rate is a function of the local or regional market for attorneys; that is, given a shortage of local attorneys, Greenlee County may have to pay more to entice Graham County Attorneys to provide services.³⁸⁹ Indeed, the higher fee might implicitly include compensation for travel costs.³⁹⁰

Of course, expenditure level—however parsed—is a highly imperfect proxy for quality of the service delivered. Some counties will spend less not because they are delivering an inferior service, but because they are able to achieve economies of scale or other efficiencies. The economy of scale point may help

383. See Kraker, *supra* note 254 (noting that many who work in Flagstaff cannot afford to live there and so reside in Winslow, in Navajo County).

384. Coconino Contract, *supra* note 268 (showing additional fees of \$1600 for trial preparation and up to \$1600 per full week of trial, depending on the complexity of the case).

385. See Figure 14.

386. See Figure 10.

387. This is not to suggest that Greenlee County necessarily should engage a single lawyer on an ongoing basis, paying a monthly fee in the way that Apache does. Because of the County's small population and attendant likelihood of conflicts, attempts to use a single attorney for most cases might require numerous cases to be outsourced from that single lawyer and thus ultimately fail to achieve any efficiency. On the other hand, La Paz County, with a population of just more than 20,000, provides indigent defense services through a Public Defender office, which presumably employs very few lawyers.

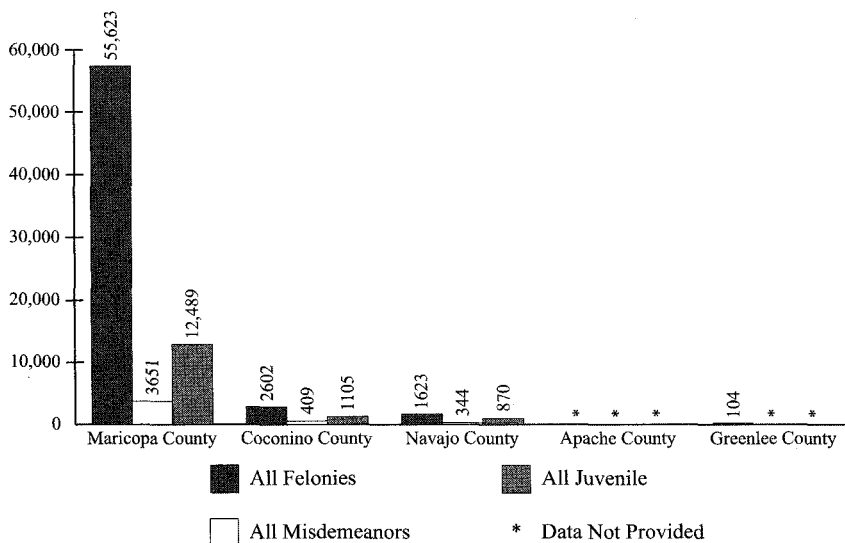
388. Greenlee County, Contract for Provision of Indigent Representation (on file with author).

389. See Appendix, Table 1.

390. In an implicit recognition of rural spatiality in counties like Coconino, Apache, and Navajo, these counties' contracts invariably address travel costs, typically requiring attorneys to absorb travel costs up to a relatively high number of miles, e.g., 65 miles. Interestingly, the Gila County contract pays an additional fee to the defense lawyers with whom it contracts to provide services to indigents if those lawyers are based in Gila County. This suggests that few lawyers in Gila County are seeking the contract. Court-Appointed Counsel Contract, Gila County, at 1 (referring to "local office subsidy" of \$500 per month).

explain why Navajo County spends less per case compared to Greenlee, with its tiny and sparse population.³⁹¹ At the same time, large but sparsely populated counties such as Coconino, Navajo, and Apache are likely to incur significant costs in overcoming the spatial challenges associated with providing services to relatively few residents out of far-flung service centers.³⁹²

Figure 14:
Indigent Defense Cases for Fiscal Year 2009³⁹³



391. See E-mail from Laree Saline, Jan. 5, 2010, *supra* note 204 (suggesting that Navajo County saves taxpayers money by having a Public Defender system rather than by employing contract counsel).

392. See E-mail from Marsha Gregory, Feb. 2, 2010, *supra* note 204 (describing schedule for appearing in different justice courts, as well as obstacles to meeting or otherwise communicating with clients who live deep on the Navajo Reservation); Telephone Interview with Sue McLean, Adm'r, Coconino County Pub. Defender's Office (Feb. 2, 2010) (describing how justice courts in Page and Williams are staffed); E-mail from Laree Saline, Jan. 5, 2010, *supra* note 204 (describing justice courts in Show Low and Kayenta); FILL THE GAP REPORT FY 2009, *supra* note 161 (reporting that Navajo County uses FTG revenue to pay for travel costs to justice court in Kayenta).

393. Maricopa County Indigent Defense Case Load, FY 2009 [hereinafter Maricopa Case Load, FY 2009] (on file with author); Navajo County Indigent Defense Case Load, FY 2009 [hereinafter Navajo Case Load, FY 2009] (on file with author); and Coconino County Indigent Defense Case Load, FY 2009 [hereinafter Coconino Case Load, FY 2009] (on file with author); Telephone Interview with Cristina O'Coyle, *supra* note 346.

Figure 15:
Indigent Defense Felony Cases per 1000 Population
for Fiscal Year 2009³⁹⁴

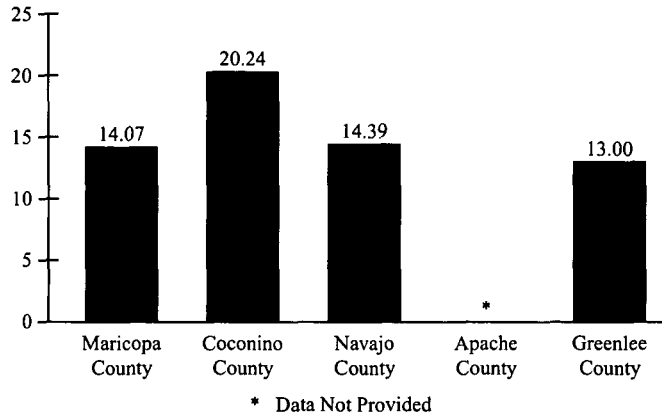
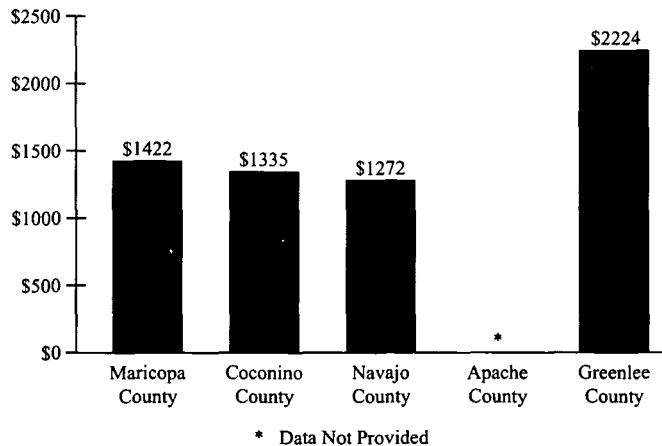


Figure 16:
Cost per Case of Felony Filings for Which Indigent Defense Services Used,
for Fiscal Year 2009³⁹⁵



394. Maricopa Case Load, FY 2009, *supra* note 393; Navajo County Case Load, FY 2009, *supra* note 393; and Coconino Case Load, FY 2009, *supra* note 393; Telephone Interview with Cristina O'Coynne, *supra* note 346; U.S. Census Bureau State and County QuickFacts, *supra* note 177.

395. See Maricopa Case Load, FY 2009, *supra* note 393; Navajo Case Load, FY 2009, *supra* note 393; and Coconino Case Load, FY 2009, *supra* note 393; Telephone Interview with Cristina O'Coynne, *supra* note 346; COCONINO COUNTY BUDGET FY 2009, *supra* note 126; MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126; PIMA COUNTY FY 2008/2009 ADOPTED BUDGET, *supra* note 126; NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129; APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129.

C. Some Consequences of Local Funding

The analysis that follows illustrates that leaving the funding and design of indigent defense in the hands of Arizona's counties puts defense systems in nonmetropolitan counties at particular risk for four deficiencies. Each of these deficiencies can be linked to inadequate funding.³⁹⁶ The first is the feasibility of providing meaningful representation where excessive caseloads exist or attorney competency is lacking. The second is the creation of financial disincentives for zealous representation, which occurs when attorneys are forced to choose between their own financial well-being and expenses necessary for the defense. The third is the manner in which the adversarial nature of the criminal justice system is undermined by a lack of parity between resources afforded to defense counsel and those of the prosecution. And the fourth is the risk of deprivation of the right to counsel where a single major case overwhelms a county's indigent defense budget and system. All four problems undermine the adversarial system³⁹⁷ contemplated in Sixth Amendment jurisprudence by, in turn, impairing defense counsel from engaging in an adversarial contest, compelling defense counsel to choose disengagement from the adversarial contest, skewing the adversarial playing field, or overwhelming the adversarial system in its entirety.

Each of these issues has arisen in Arizona litigation in the past three decades. The data we have been able to gather suggest they could arise again. As already noted, however, our data are incomplete and one reason for this is the State of Arizona's failure to require counties to collect and report some of the very data, e.g., misdemeanor caseloads, that could prevent overburdening counsel for indigent defendants.³⁹⁸ If available, that same data could be used to establish when and if counsel are, in fact, overburdened.

1. Feasibility of Defense: Caseloads & Competency

Arizona courts have recognized that “[a]ssigning an attorney incapable, for whatever reason, of providing effective assistance [of counsel] violates a

396. See *Effectively Ineffective*, *supra* note 106, at 1735; Citron, *supra* note 106, at 484–85 (“Identifying the various problems afflicting the provision of defense services—heavy Public Defender caseloads, inadequate compensation for contract attorneys and assigned counsel, and a shortage of attorneys to represent criminal defendants in capital and misdemeanor cases—Professor Lefstein stated in 1986 that “[a]ll of these problems stem from a lack of appropriated funds.”) (quoting NORMAN LEFSTEIN, KEYNOTE ADDRESS, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 9 (1986)).

397. See, e.g., *United States v. Cronin*, 466 U.S. 648, 656 (1984); *Herring v. New York*, 422 U.S. 853, 862 (1975).

398. Arizona law requires those counties with public defender offices to keep case cost data. ARIZ. REV. STAT. ANN. § 11-584. While it may be possible to extract caseload data from those figures, no equivalent requirement exists for counties without public defender offices. Some indications exist that contract counsel report caseload data in counties without public defenders, but the Superior Court does not necessarily compile it. E-mail from Marsha Gregory, Feb. 2, 2010, *supra* note 204; E-mail from Betty Smith, Adm’r, Superior Court of Ariz., Apache County, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Mar. 24, 2010) (on file with author).

defendant's constitutional rights."³⁹⁹ An inability to provide competent counsel may stem from overwhelming caseloads. Alternatively, or additionally, it may be due to an attorney's lack of competence to handle a given case.

In many ways, excessive caseloads are the proverbial canary in the coal mine for a constitutionally deficient system. When an attorney has too many cases, he or she must ration time, particularly among activities that occur outside of the courtroom, e.g., case investigation,⁴⁰⁰ motion and trial preparation,⁴⁰¹ and client communication.⁴⁰² Overloaded attorneys generally must pick and choose among clients, giving more attention to some clients at the expense of others.⁴⁰³ In other cases, the overwhelming nature of a caseload may compel an attorney to push a client toward a plea that is not in the client's best interest.⁴⁰⁴ Even the most

399. *Zarabia v. Bradshaw*, 912 P.2d 5, 7 (Ariz. 1996).

400. The Sixth Amendment guarantee of counsel includes a "duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *see also* *Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (defense counsel is "bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial"); AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING FOR DEFENSE SERVICES § 5-1.4 (3d ed. 1992) [hereinafter ABA STANDARDS: PROVIDING DEFENSE SERVICES] ("The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.").

401. *See, e.g., Strickland*, 466 U.S. at 688 ("Counsel also has a duty to bring to bear such skills and knowledge as will render the trial a reliable adversarial testing process."); *Powell v. Alabama*, 287 U.S. 45, 65 (1932) (provision of counsel on the day of trial with no opportunity to prepare for trial violated the Sixth Amendment right to counsel).

402. Defense counsel has a duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688; *see also* *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1978) ("Adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant."); AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 4-3.1(a), 4-3.8(a)-(b), 4.51(a), 4-6.2 [hereinafter ABA STANDARDS: PROSECUTION & DEFENSE FUNCTION]; NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 1.3(c) [hereinafter NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE]; NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSES SYSTEMS IN THE UNITED STATES § 5.10 [hereinafter NLADA, GUIDELINES FOR LEGAL DEFENSES]. *Cf.* *Mounts*, *supra* note 106, at 486 ("[I]t is often difficult to find time to keep the client informed of even the bare minimum of information necessary to effective representation.").

403. *See, e.g.,* THE CONSTITUTION PROJECT, *supra* note 11, at 65; *see also* Erin V. Everett, *Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis*, 74 MISS. L.J. 213, 222-23 (2004) (noting that caseloads force defense attorneys to "juggle clients and priorities"); *Mantel*, *supra* note 14, at 342 (when caseloads rise, attorneys stop conducting thorough investigations and fewer cases go to trial).

404. *See, e.g., Citron*, *supra* note 106, at 485. *Cf. Mounts*, *supra* note 106, at 479 (discussing some consequences of low payment for appointed counsel).

dedicated attorney cannot manage an excessive caseload.⁴⁰⁵ Under the weight of such a caseload, the zealous representation mandated by the Sixth Amendment often falls by the wayside, leaving clients unprotected at critical stages.⁴⁰⁶ The caseload problem is so pervasive that the American Bar Association (ABA) issued a formal ethics opinion requiring that attorneys not accept new clients and that they move to withdraw from cases if their caseload threatens the provision of “competent and diligent” representation.⁴⁰⁷ The opinion also requires supervising attorneys to monitor caseloads to ensure that they do not become excessive.⁴⁰⁸

Likewise, the Sixth Amendment requires that counsel be more than merely present; counsel must be competent and provide an adequate defense.⁴⁰⁹ As the U.S. Supreme Court explained in *Strickland v. Washington*:

405. See *State v. Peart*, 621 So.2d 780, 791 (La. 1993) (creating a rebuttable presumption that indigent defendants are receiving ineffective assistance of counsel); see also *id.* at 789 (“As the trial judge put it, ‘[n]ot even a lawyer with an S on his chest could effectively handle this docket.”); Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 436 (2003–2004) (“Although there are many dedicated and competent Public Defenders, they often face staggering caseloads that prevent them from devoting their best efforts to every client.”).

406. See *United States v. Cronin*, 466 U.S. 648, 659 (1984) (“The presumption that counsel’s assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.”); *id.* at 659 n.25 (“The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.”).

The repercussions of crushing caseloads cannot be overstated. A startling number of juvenile and adult indigent defendants are charged, tried, and convicted without ever having spoken to a defense attorney. See THE CONSTITUTION PROJECT, *supra* note 11, at 84–85. In addition to delays resulting from overwhelming caseloads, in many jurisdictions delays in appointment result in defendants receiving counsel too late for representation to be meaningful. See, e.g., Robert C. Boruchowitz, *Lawyers for Juveniles Not Automatic*, SEATTLE POST-INTELLIGENCER, Jan. 2, 2008 (“[M]any children facing criminal charges or truancy contempt of court proceedings have no lawyers.”); ABA JUVENILE JUSTICE CTR., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 3 (Oct. 2003). See generally N.Y. County Lawyers Ass’n v. New York, 763 N.Y.2d 397 (N.Y. 2003).

407. ABA Formal Opinion 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation (May 13, 2006); see also Am. Bar Ass’n, Eight Guidelines of Public Defense Related to Excessive Workloads (Aug. 2009) (issued to provide directions related to Ethics Opinion 06-441); ABA STANDARDS: PROVIDING DEFENSE SERVICES, *supra* note 400 § 5-5.3(b); NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR DEFENSE, Standard 13.12; NLADA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSES, *supra* note 402, at Guideline 1.3(a). Withdrawal from representation has been utilized in at least one case. *In re Pub. Defender’s Certification of Conflict*, 709 So.2d 101, 103 (Fla. 1998) (determining that delays in appellate representation were of a “constitutional magnitude that must be immediately addressed”).

408. ABA Formal Opinion 06-441, *supra* note 407.

409. See *Evitts v. Lucey*, 469 U.S. 387, 395 (1985) (“Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.⁴¹⁰

Attorneys also have ethical obligations not to accept cases for which they are not competent.⁴¹¹

The Arizona Supreme Court addressed both crushing caseloads and assignment of cases to counsel lacking competency in *State v. Smith*⁴¹² and again in *Zarabia v. Bradshaw*.⁴¹³ In *Smith*, the court considered the caseload of a public defense attorney to determine whether an individual defendant had received effective assistance of counsel in then-nonmetropolitan Mohave County.⁴¹⁴ The defense counsel at issue was one of four attorneys who contracted with Mohave County to provide indigent defense for one quarter of the County's cases, regardless of the number of total cases.⁴¹⁵ In the course of eleven months, the attorney had handled 149 felony cases, 160 misdemeanors, 21 juvenile adjudications, and 33 other cases.⁴¹⁶ He had also handled appointed cases from a municipal court and his own civil private practice.⁴¹⁷ The court contrasted this caseload with national standards set out by the ABA and the National Legal Aid and Defender Association (NLADA), which suggested that the maximum allowable total caseload for an attorney should not exceed 150 felonies per year, or 300 misdemeanors per year, or 200 juvenile cases per year, or 200 mental commitment cases per year, or 25 appeals per year.⁴¹⁸ Under the standards, attorneys who handle a mix of cases—like the attorney at issue in *Smith*—are to

merits."); *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *McMann v. Richardson*, 397 U.S. 759, 771 & n.14 (1970); *Powell v. Alabama*, 287 U.S. 45, 65 (1932). *Cf. Avery v. Alabama*, 308 U.S. 445, 446 (1940) (affirming denial of continuance where appointment of counsel occurred three days before a murder trial, even while recognizing "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance" with the Constitution) (footnote omitted).

410. 466 U.S. 668, 685 (1984); *see also Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (criminal justice "system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("Indeed, an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.").

411. *See, e.g., ARIZ. R. PROF'L CONDUCT DR 6-101 and 7-101; Am. Bar Ass'n RPCs 06-441*. For further discussion of the ethical obligations of indigent defense counsel, *see Mounts, supra* note 106.

412. 681 P.2d 1374 (Ariz. 1984).

413. 912 P.2d 5 (Ariz. 1996).

414. 681 P.2d at 1380–81.

415. *Smith*, 681 P.2d at 1379.

416. *Id.* at 1380.

417. *Id.*

418. *Id.* The court noted that it relied not just on the standards, but on their own experience as attorneys and in reviewing requests for compensation by other counsel. *Id.* at 1380–81.

adjust their caseloads to be in proportion with these standards.⁴¹⁹ The *Smith* court astutely observed:

It is obvious that the caseload of defendant's attorney was excessive, if not crushing. . . . We reach this conclusion even though the record in this case does not indicate that the defendant was inadequately represented. The fact that one felony defendant out of 149 felony defendants was given minimum adequate representation does not mean that others were properly represented. The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads.⁴²⁰

The court also analyzed attorney competency in addressing the failure of the Mohave County system to assure that the complexity of a case was accounted for in assigning attorneys, noting that the NLADA guidelines require that "the degree of professional ability, skill, and experience called for" be considered.⁴²¹ The court found that Mohave County's system was deficient because the low-bid contract system did not allow for consideration of attorney competency when awarding contracts, noting that an attorney "newly-admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned."⁴²² Given the caseload crisis and the failure to account for attorney competency and case complexity, the court held that—absent changes to Mohave County's indigent defense system—appellate courts were to employ an inference that "the adequacy of representation is adversely affected by the system."⁴²³

419. *Id.* at 1380.

420. *Id.* at 1380–81. The court also noted that the caseload problem was exacerbated because Mohave County defense attorneys were not provided "any support costs . . . , such as investigators, paralegals, and law clerks." *Id.* at 1381. Such support systems are typically provided in public defense offices.

421. *Id.* at 1380–81.

422. *Id.* at 1381.

423. *Id.* Similarly, in *State v. Peart*, the Louisiana Supreme Court addressed a New Orleans Public Defender who represented 418 defendants in a seven-month period. He entered guilty pleas at arraignment for almost one-third of the matters, some 130 cases. The attorney had no assistance from expert witnesses, and the department's three investigators were of little use, as they handled more than 7000 cases each year. 621 So.2d 780, 784 (La. 1993). The court determined that under the circumstances presented, indigent defendants were "generally not provided with the effective assistance of counsel the constitution requires." *Id.* at 790. Therefore, the court created a rebuttable presumption that indigent defendants were not receiving effective assistance of counsel. *Id.* at 791. "[I]f the State was unable to overcome that presumption, the trial judge was instructed not to permit the case to proceed to trial." See *Effectively Ineffective*, *supra* note 106, at 1737. In subsequent cases, however the Louisiana courts declined to apply the rebuttable presumption. *Id.* (citing *State v. Jeff*, 761 So.2d 574 (La. Ct. App. 1999); *State v. Hughes*, 653 So.2d 748 (La. Ct. App. 1995)); see also *Bright*, *supra* note 15, at 817.

The caseload and qualification conundrum arose again twelve years after *Smith*, this time in Yuma County.⁴²⁴ The county had a population of just over 100,000 at the time, and so was at the cusp of the metropolitan–nonmetropolitan divide.⁴²⁵ Yuma County had no Public Defender’s Office and instead utilized a combination of contract counsel and individual attorneys appointed from the private bar.⁴²⁶ A group of those appointed and contract defense counsel, along with indigent defendants, challenged the system for assigning counsel. The system in place assigned counsel on a rotational basis “with apparently little or no individual consideration for matching lawyers possessing particular experience or training with specific cases.”⁴²⁷ The court ultimately determined that the appointment system was insufficient because it failed to ensure that qualified attorneys were appointed, despite the fact that “mentors” were available for inexperienced attorneys.⁴²⁸ The court then ordered that qualified counsel be appointed in the case at bar and that evidentiary hearings be held for attorneys who reasonably assert that they are not qualified to handle criminal matters.⁴²⁹

The *Zarabia* decision also reinforced the *Smith* court’s reliance on national caseload standards. One *Zarabia* plaintiff was a Yuma County contract attorney who had requested that the Yuma Superior Court cease assigning cases to her due to her excessive caseload.⁴³⁰ The court refused.⁴³¹ On appeal the *Zarabia* court declined to determine whether the lawyer’s caseload was in fact excessive, commenting upon a dearth of information in the record. The Arizona Supreme Court determined, however, that the lower court should not have denied her request to avoid future assignments absent a hearing to determine whether her caseload exceeded the standards outlined in *Smith*.⁴³² The court further ordered that evidentiary hearings be held for other attorneys who allege that excessive caseloads would prevent competent representation in assigned criminal cases.⁴³³

424. *Zarabia v. Bradshaw*, 912 P.2d 5, 5 (Ariz. 1996). *Zarabia* echoed some themes similar to those litigated in West Virginia, Kansas, and Arkansas several years earlier. See *supra* note 63.

425. U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: ARIZONA 290, available at <http://www.census.gov/prod/cen1990/cp1/cp-1-4.pdf> (showing a population of 106,895). The rural–urban continuum code for Yuma County in 1993 was 3, a county in a metropolitan area with a total population of 250,000 or less. U.S. Dep’t of Agric., *Rural-Urban Continuum Codes*, *supra* note 178 (select “Arizona”; then refer to “Yuma County”).

426. *Zarabia*, 912 P.2d at 5.

427. *Id.* at 7.

428. *Id.* (“We do not share Respondent’s optimism that an attorney . . . who has no trial or criminal experience, can become reasonably competent to represent a defendant . . . charged with a very serious crime, simply by having a mentor with whom to consult as the need may be perceived and the occasion arise. Indeed, one wonders whether even a very able probate and estate planning lawyer will know when or on what issue to seek help and advice.”).

429. *Id.* at 8–9.

430. *Id.* at 8.

431. *Id.*

432. *Id.* at 8–9.

433. *Id.*

The extent to which the caseload standards adopted in *State v. Smith* are adhered to in Arizona's counties is unknown, due largely to the fact that the state does not require counties to maintain data on felony caseload per attorney or any case count of misdemeanors.⁴³⁴ As such, several nonmetropolitan counties track neither the number of misdemeanors filed nor the number of misdemeanants who use indigent defense services.⁴³⁵ Yet we know that significant indigent defense services are consumed by misdemeanor cases.⁴³⁶ The ratio of misdemeanors to felonies appears to be particularly high in counties with significant American Indian populations.⁴³⁷

County-level data regarding the number of felonies filed for fiscal year 2009 is available both from the Arizona Supreme Court and in the Annual FTG Report produced by the Arizona Criminal Justice Commission. However, the data reported to these two entities is inconsistent, and it rarely indicates how many of those charged with felonies use indigent defense services.⁴³⁸ Further, that data typically varies from the data some county Public Defenders' Offices supplied to us regarding use of indigent defense services.⁴³⁹ Finally, Apache County was unable to supply any data regarding the number of cases or defendants using indigent defense services,⁴⁴⁰ and Greenlee County was able to supply only the number of felony cases for which it supplied such services.⁴⁴¹ In light of these data gaps and inconsistencies, we offer a limited comparison among counties that track use of indigent defense services by several categories of cases: felony, misdemeanors, and juvenile. This data is reflected in Figure 14.

Absent discovery to determine caseload figures per attorney, the best indicators of whether a caseload problem exists in Arizona are the contracts by which indigent defense services are procured. A review of the defense contracts provided by the five counties considered raises concerns regarding the potential for

434. E-mail from Betty Smith, Oct. 23, 2009, *supra* note 172; Telephone Interview with Cristina O'Coyle, *supra* note 346. Except for Maricopa County, the counties also do not report misdemeanor data to the Arizona Supreme Court. Only felony data is reported to the Arizona Criminal Justice Commission for inclusion in the FTG Report.

435. E-mail from Betty Smith, Oct. 23, 2009, *supra* note 172; Telephone Interview with Cristina O'Coyle, *supra* note 346.

436. E-mail from Betty Smith, Oct. 23, 2009, *supra* note 172.

437. For example, in Maricopa County, the ratio of felonies to misdemeanors using indigent defense services was 15.24 to 1, while in Coconino County it was 6.36 to 1 and in Navajo County it was 4.72 to 1. Coconino and Navajo counties have significant American Indian populations. These calculations are made based on the case data presented in Figure 14.

438. See Appendix, Table 2.

439. *Id.*

440. Although she was unable to supply any data on the number of defendants or cases utilizing indigent defense services, Betty Smith, the Superior Court Administrator, indicated that the county was in the process of installing case management software, which might improve the county's ability to track cases for which indigent defense counsel was appointed. E-mail from Betty Smith, Oct. 23, 2009, *supra* note 172.

441. Greenlee County was able to provide only the number of felonies for which defendants used indigent defense services. Telephone Interview with Cristina O'Coyle, *supra* note 346.

caseload crises, particularly in rural locales. For example, the Greenlee County contract requires the contracting attorney to accept all appointments made by the court with no upward limit.⁴⁴² The Apache County contract states that an attorney may not be required to violate the caseload limitations set out in *State v. Smith*, but it does not prohibit such a violation.⁴⁴³ Neither the Superior Court nor any other agency of the County tracks caseloads to monitor compliance with this provision.⁴⁴⁴

Navajo County, which contracts with three attorneys to cover cases that cannot be assigned to the Public Defenders' or Legal Defenders' Offices due to conflicts,⁴⁴⁵ does set a strict caseload limit for its contractors at 75 cases per year.⁴⁴⁶ However, Navajo County's contract does not in any way limit practice outside of cases assigned by Navajo County;⁴⁴⁷ as a result, one of its contractors serves as indigent defense counsel in Greenlee and Apache County as well.⁴⁴⁸ While there is no reason to assume from available records that the contractor is violating the caseload limits mandated by *State v. Smith* and endorsed by the NLADA, the absence of any limitation regarding cases outside of those assigned pursuant to the contract creates an opportunity for such a violation.

In contrast, both metropolitan counties that we considered in detail, Maricopa and Coconino, utilize Public Defenders' Offices to provide indigent defense services, with separate Legal Defenders' Offices to handle conflict and overflow cases.⁴⁴⁹ While exact caseload figures per attorney were not available, defense counsel staffed in the Public Defenders' and Legal Defenders' Offices in these metropolitan counties presumably operate within the caseload limits established in *State v. Smith* because the counties provide backup entities and

442. Greenlee County, Contract for Provision of Indigent Representation ¶ 1 (on file with author).

443. Apache County, Letter of Understanding § IV.E (on file with author).

444. E-mail from Betty Smith, Oct. 23, 2009, *supra* note 172; E-mail from Betty Smith, Mar. 24, 2010, *supra* note 398.

445. Telephone Interview with Ron Wood, Wood Law Firm, Show Low, Arizona, by Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Dec. 15, 2009) [hereinafter Wood Interview].

446. Navajo County, Indigent Legal Services Agreement § II.D, Attachment A (on file with author).

447. *See generally id.*

448. Wood Interview, *supra* note 445.

449. *See generally* Maricopa County Arizona Office of the Public Defender, *supra* note 240; Maricopa County Legal Defender, <http://www.maricopa.gov/LegalDef/> (last visited Jan. 21, 2010); Coconino County Public Defender, *supra* note 271; Coconino County Office of the Legal Defender, *supra* note 267. Maricopa County also has the Legal Advocate's Office for this purpose.

contract counsel for overflow and conflict cases.⁴⁵⁰ Any remaining cases—likely a very small fraction of overall filings—are assigned to contract attorneys.⁴⁵¹

For contract attorneys who handle overflow and conflict cases, Maricopa boasts the strongest contract, as it explicitly limits contract attorney caseloads and bars the contractor from holding more than one contract.⁴⁵² Coconino County is not as restrictive regarding caseloads as Maricopa County's contract, nor is its contract as deficient as the contracts utilized in the nonmetropolitan counties. Coconino County takes the step of utilizing case equivalents, with the value of the cases assigned weighed more heavily for complex cases.⁴⁵³ The contract pays a flat fee for up to 80 case equivalents, which may be more or less than 80 cases, depending on the nature and complexity of the cases assigned.⁴⁵⁴ However, the contract also allows the attorney to accept more than 80 case equivalents for a negotiated additional payment, and it sets no maximum limit to the total number of cases an attorney could take.⁴⁵⁵

It is also worth noting that the remote nature of many rural counties may exacerbate caseload problems. In Apache County, for example, each contract attorney is required to be available in court in St. Johns three days a week as well as one day a week each in Sanders and Chinle.⁴⁵⁶ Attending the required hearings allows an opportunity for attorneys to meet with clients in each locale, but it also requires significant travel time. This pulls the attorney away from other important matters, such as case investigation, legal research, and motion preparation. As a result, attorneys must choose between opportunities for meaningful client communication on the one hand, and other important forms of advocacy on the other.

The nonmetropolitan counties are also at significant risk that cases will be assigned to attorneys who are not competent to handle a given matter. Despite the *Zarabia* court's warning against use of rotational schedules where assignments are made without consideration of competency, Apache County and Greenlee County utilize rotational schedules for the assignment of all cases.⁴⁵⁷ Navajo County

450. See *supra* notes 240–42, 266–69 and accompanying text. But see Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008 (reporting that public defender offices in seven states were rejecting new cases because attorneys' caseloads were already too heavy).

451. Maricopa County's indigent defense contract for cases charged in superior court is available online, as is the juvenile court contract. See Maricopa County Office of Pub. Defense Servs., Contract Indigent Representation (Adult Criminal) Attorney Services – OPDS (Aug. 6, 2009) [hereinafter Maricopa Adult Contract]; Maricopa County Office of Pub. Defense Servs., Contract Indigent Representation (Juvenile) Attorney Services – OPDS (Aug. 5, 2009) [hereinafter Maricopa Juvenile Contract]. Coconino County's Contract for indigent defense services is on file with the author.

452. Maricopa Adult Contract, *supra* note 451, § II.24.L.

453. Coconino Contract, *supra* note 268, §§ 1.F, 1.I.

454. *Id.* §§ 1.B, 1.F, 1.H-1, 1.K.

455. See generally *id.*

456. Wood Interview, *supra* note 445.

457. Apache County, Letter of Understanding, *supra* note 443, § VII.B; Wood Interview, *supra* note 445; Telephone Interview with Cristina O'Coynne, *supra* note 346;

utilizes a rotational schedule for overflow and conflicts cases that cannot be sent to the Public Defenders' or Legal Defenders' Offices.⁴⁵⁸ Exacerbating this problem is a shortage of attorneys and a dearth of criminal law specialists in particular. Greenlee County has only one resident attorney who does not work for the County Attorney's Office, and it draws on neighboring Graham County for attorneys to represent indigent defendants.⁴⁵⁹ Apache County has only six resident attorneys in private practice, and it draws on neighboring Navajo County for some of its indigent defense counsel.⁴⁶⁰ None of these counties has a single attorney who is registered as a criminal law specialist.⁴⁶¹

While rotational assignment of attorneys is endorsed by the ABA, the organization's *Standards for Criminal Justice: Providing Defense Services* indicate that "where the nature of the charges or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case."⁴⁶² Further, the Arizona Rules of Criminal Procedure provide that when a private attorney is appointed to handle a case, the appointments should be made "in a manner fair and equitable to the members of the bar, taking into account the skill likely to be required in handling a particular case."⁴⁶³ This principle was relied on in *Zarabia*, yet counties using a strictrotational basis are not in

Telephone Interview with Channen Day, Contract Counsel for Greenlee County, Ariz., by Yooli Choi, Research Assistant (Feb. 23, 2010); Telephone Interview with Mike Peterson, Contract Counsel for Greenlee County, Ariz., by Yooli Choi, Research Assistant (Jan. 15, 2010).

458. E-mail from Laree Saline, Office Manager, Navajo County Pub. Defender's Office, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Jan. 25, 2010) (on file with author).

459. Of the six law firms who have contracts to provide indigent defense to Greenlee County, only one is in Greenlee County. The other five have offices in Safford, Arizona, the county seat of Graham County. Indeed, the 2009 FTG Annual Report notes Greenlee County's need to contract with Graham County attorneys to "ensure the availability of counsel for indigent defendants in Greenlee County because there is only one attorney in Greenlee County not already employed by the County Attorney's Office." *FILL THE GAP FY 2009 REPORT*, *supra* note 161, at 30.

460. Of the four law firms that have contracts to provide indigent defense to Apache County, only two have offices in Apache County. The four are Marsha Gregory in Eagar (Apache County); Riggs & Ellsworth in Show Low (Navajo County); the Ron Wood Law Office in Show Low (Navajo County); and D. Bryce Patterson in St. Johns (Apache County). In addition to six attorneys in private practice in Apache County, five other lawyers work for the Apache County Attorney's Office. E-mail from Marsha Gregory, Contract Counsel for Apache County & President of the Apache County Bar Ass'n, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Feb. 12, 2010) (on file with author).

461. State Bar of Ariz., Bd. of Legal Specialization, Criminal Law Certified Specialists, http://www.myazbar.org/Members/BLS/SpecialistPDFs/criminal_list.pdf (last visited Feb. 3, 2010); *see also* Standards for Certification of Lawyers Specializing in Criminal Law, <http://www.azbar.org/FindingLawyer/criminal.cfm> (last visited Feb. 3, 2010). Ron Wood, who practices in Navajo County, was previously a Criminal Law Certified Specialist, but he let the certification lapse due to associated costs. E-mail from Ron Wood, Wood Law Firm, Show Low, Arizona, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Feb. 7, 2010) (on file with author).

462. ABA STANDARDS: PROVIDING DEFENSE SERVICES, *supra* note 400, § 5-2.3.

463. 16A ARIZ. REV. STAT., RULES CRIM. PROC., Rule 6.5.

compliance with it. The Christian Romero case illustrates the point. It is hard to imagine a more sensitive or complex case than that in which an eight-year-old was charged in a double homicide. Yet the lawyer initially assigned to Christian Romero based on a strict rotation system had no particular experience handling juvenile matters. Because the assigned lawyer was on vacation at the time, the case was soon re-assigned to Ron Wood, another of the four attorneys who contracts with the county to provide indigent defense services.⁴⁶⁴ Wood is Apache County's most experienced contract counsel, and also the only one who is death certified,⁴⁶⁵ but his representation of Romero came about by chance, not design.

In contrast, cases in Maricopa County are assigned to contract counsel through the Office of Public Defense Services, which independently oversees defense contracts and may therefore assign cases based on the skill and experience of a given contract attorney.⁴⁶⁶ Likewise, case assignments in Coconino County are

464. E-mail from Betty Smith, Adm'r, Superior Court of Ariz., Apache County, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Jan. 21, 2010) (on file with author); Wood Interview, *supra* note 445.

465. E-mail from Betty Smith, *supra* note 464; Wood Interview, *supra* note 445.

466. Maricopa County Office of Public Defense Services, <http://www.maricopa.gov/OPDS/TheBusiness.aspx> (last visited Sept. 13, 2009). In fiscal year 2008, the Office of Public Defense Services assigned over 23,000 cases to contract attorneys. Another way in which Maricopa County addresses qualifications in a manner that may result in superior services is by utilizing a specialized office for juvenile representation. See E-mail from Christina Phillis, Maricopa Juvenile Pub. Defenders Office, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Feb. 1, 2010) (describing in details the years of experience of attorneys in the office). In some jurisdictions, juvenile cases are seen as a training ground before public defenders move up to felony representation in adult courts. However, representation of juveniles is extremely complex, as it requires an understanding of scientific evidence related to adolescent brain and psychosocial development which may both complicate the attorney-client relationship and relate to a number of issues regarding culpability including the unique susceptibility of youth to give false confessions. See, e.g., ROBIN WALKER STERLING, *ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT*, NATIONAL JUVENILE DEFENDER CENTER 4 (Spring 2009) ("juvenile defenders must: understand child and adolescent development to be able to communicate effectively with their clients, and to evaluate the client's level of maturity and competency and its relevancy to the delinquency case"); ABA JUVENILE JUSTICE CTR., *supra* note 406, at 22-23; Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions from Juvenile Suspects*, in 20 PERSP. IN LAW & PSYCHOL., INTERROGATIONS, CONFESSIONS & ENTRAPMENT 127 (G. Daniel Lassiter ed., 2004). Juvenile Defenders also need to have a firm understanding of effective treatment options that may be utilized in lieu of incarceration. See Barbara Mantel, *Crisis Seen in Juvenile Defense*, in PUBLIC DEFENDERS: DO INDIGENT DEFENDANTS GET ADEQUATE LEGAL REPRESENTATION?, 18 CONG. Q. RESEARCHER, No. 15, at 348 (Apr. 18, 2008); STERLING, *supra* (Juvenile Defenders must have knowledge of programs in the community in order to develop community placement plans). As a result, counties that have the resources to fund programs that allow defense attorneys to develop specialization in juvenile defense (including the trial of juveniles in adult court) have a significant advantage over counties that utilize generalists in these cases. For an excellent analysis of the unique manner in which indigent defense systems have ignored the special needs of juveniles, see Katayoon Majd & Patricia Puritz,

made by a contract administrator housed in the Legal Defender's Office.⁴⁶⁷ Both are consistent with the ABA recommendations in its *Standards for Criminal Justice, Providing Defense Services*.⁴⁶⁸ Those Standards specifically indicate that contractors should be supervised, but not by a judge. They further stipulate that a board of trustees, not a judge, should oversee the attorney selection process.⁴⁶⁹

In sum, the lack of detailed data impedes us from determining conclusively whether Arizona's nonmetropolitan counties are experiencing a caseload crisis. Indeed, the dearth of caseload data both proves and disproves the very problem we identify. Failure to track caseloads—or even the number of cases handled by the indigent defense system—makes it impossible to prove either that attorneys are overburdened or that their caseloads are reasonable. The failure to track this data should create an inference of inadequate assistance of counsel.

The failure to restrict caseloads reveals significant potential for such a crisis, particularly in Apache and Greenlee Counties, where indigent defense is provided entirely by contract or appointed counsel. Likewise, the rotational assignment systems utilized in the three most rural counties—where there is a shortage of lawyers with significant criminal experience—are at a much higher risk than their urban counterparts of allowing cases to be assigned to counsel who are not competent to handle a given matter.

2. Financial Disincentives to Providing Zealous Representation

Despite the U.S. Supreme Court's dictate that defense counsel "owes a client a duty of loyalty, a duty to avoid conflicts of interest,"⁴⁷⁰ conflicts in

The Cost of Justice: How Low-Income Youth Continue To Pay the Price of Failing Indigent Defense Systems, 16 GEO. J. ON POVERTY L. & POL'Y 543 (2009).

467. Coconino Contract, *supra* note 268 § 1.D; Letter and Comments from Dana P. Hlavac, *supra* note 14.

468. See ABA STANDARDS: PROVIDING DEFENSE SERVICES, *supra* note 400, § 5-2.1.

469. *Id.* § 5-3.2.

470. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); see also *Wheat v. United States*, 486 U.S. 153, 163 (1988) (holding that courts must be allowed wide latitude in rejecting a defendant's waiver of conflicts of interest where a potential for conflict could become an actual conflict as the cases progress); *Wood v. Georgia*, 450 U.S. 261, 271, (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflict of interest."); *Cuyler v. Sullivan*, 446 U.S. 335, 337, 342, 346 (1980) (two privately retained attorneys represented three co-defendants; "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of the trial."). *But see* *Mickens v. Taylor*, 535 U.S. 162, 174 (2002) (to prove Sixth Amendment violation resulting from conflict, defendant must show that the conflict adversely affected counsel's performance); see also ABA STANDARDS: PROSECUTION AND DEFENSE FUNCTION, *supra* note 407, § 4-3.5 (general rules regarding multiple representation or prior representation conflicts); *id.* § 4-6.2(d)–(e) (prohibiting plea discussions that favor one client and are detrimental to another and joint agreements absent consent of both clients); NLADA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSES, *supra* note 402, Guideline 1.3(b) ("Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client.").

indigent defense cases may arise where the financial or personal interest of the attorney is at odds with the defense needs of the indigent client.⁴⁷¹ Financial conflicts “threaten the adversarial process by creating an unacceptable tension between adherence to professional standards and the financial burden an attorney assumes when” representing indigent defendants.⁴⁷² At worst, this may push attorneys to neglect an indigent client’s most basic rights in the criminal process, including the right to maintain one’s innocence through trial.⁴⁷³

A typical manner in which financial disincentives may arise occurs where a defense attorney is forced to choose between using the money provided for defense services for his or her own salary or for the retention of expert witnesses or investigators.⁴⁷⁴ For example, if an attorney is paid the same flat fee regardless of whether the client pleads guilty on the day a case is charged or goes through trial, there is a financial disincentive to spend the time and resources necessary to take a case to trial.⁴⁷⁵

Financial disincentives can also occur where flat-fee contracts require an indigent defense attorney to pay for litigation expenses such as experts and investigators from his or her own salary.⁴⁷⁶ The U.S. Supreme Court has interpreted the command that defense counsel be effective to mean that indigent defendants must have “access to the raw materials integral to the building of an

471. See *United States v. Hearst*, 638 F.2d 1190 (1981) (determining that plaintiff Patti Hearst was entitled to a hearing on whether her Sixth Amendment right to counsel was violated where her attorney allegedly acted to secure personal publishing rights rather than her acquittal); ABA STANDARDS: PROSECUTION AND DEFENSE FUNCTION, *supra* note 407, § 4-3.5(a); AM. BAR ASS’N, *supra* note 15, at 7. Of course, conflicts may also arise as a result of the representation of multiple defendants or previous representation of a defendant, victim, or witness. See, e.g., *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978); *Glasser v. United States*, 315 U.S. 60, 72–76 (1942). Multiple and previous representation conflicts are particularly problematic in rural communities, where few attorneys are available to cover conflict cases. See, e.g., *Smith v. Mississippi*, 666 So.2d 810, 812 (Miss. 1995); *Weaver*, *supra* note 410, at 436.

472. *N.Y. County Lawyers Ass’n v. State*, 763 N.Y.S.2d 397, 411 (N.Y. Sup. Ct. 2003).

473. See *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (“Perhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.”).

474. See, e.g., *State ex rel. Stephan v. Smith*, 747 P.2d 816, 831 (Kan. 1987) (noting that funding systems in rural counties forced attorneys to “subsidize the defense of those accused of crime, and to do so at the risk of losing their regular or potential paying clients. The financial burden thus could well create a conflict of interest.”); *State v. A.N.J.*, No. 81236-5, 2010 WL 314512 (Wash. 2010) (defense counsel rendered ineffective assistance of counsel in part due to the use of a flat fee contract from which he was required to pay for experts and investigators).

475. See, e.g., *A.N.J.*, 2010 WL 314512, at *9 (determining that a flat fee contract contributed to the rendering of ineffective assistance of counsel and stating that such a system “effectively paid a bounty for every guilty plea delivered by assigned defense counsel to the county prosecutor”).

476. *Id.*

effective defense,”⁴⁷⁷ such as access to investigators and experts.⁴⁷⁸ Indeed, a thorough investigation of facts or engaging an expert witness may well make or break a criminal defense.⁴⁷⁹ In some jurisdictions, however, appointed counsel or contract counsel are required to pay for experts, investigators, conflicts counsel, and other defense costs from a flat rate or contract amount received from the local government entity, thereby creating a conflict between the attorney’s financial interest and the client’s interest in a zealous defense.⁴⁸⁰

The Arizona Supreme Court addressed this issue in *State v. Smith*, where Mohave County public defense contracts required attorneys to pay for investigators out of their own flat fee.⁴⁸¹ Additionally, attorneys were required to pay from their flat fee the costs of reassigning the case, if necessary, to a non-contract attorney.⁴⁸² While flat fees appeal to counties because they help manage the cost of providing indigent defense, they also “reduce the likelihood that an attorney will seek outside help when needed.”⁴⁸³ As a result of this litigation, Mohave County switched from a flat-fee system to payment on an hourly basis.⁴⁸⁴

Despite the warning provided by *State v. Smith* about the use of flat-fee payment structures, Greenlee County pays contract counsel on a per case, flat fee basis. Attorneys receive \$850 per felony, \$600 per misdemeanor or juvenile delinquency matter, \$500 per probation revocation, \$1000 per post-conviction challenge, and \$1200 per direct appeal.⁴⁸⁵ While additional funds will be granted under some circumstances, the contract provides no guaranteed financial incentive

477. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); *see also Powell v. Alabama*, 287 U.S. 45, 52 (1932) (“However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial.”).

478. In cases where assistance of an expert is needed for case preparation or to adequately defend a client at trial, the Tenth Circuit, for example, has held the use of experts “indispensable if [a] defendant [is] to receive a reasonably fair trial.” *United States v. Crews*, 781 F.2d 826, 834 (10th Cir. 1986).

479. *See THE CONSTITUTION PROJECT*, *supra* note 11, at 93; ABA STANDARDS: PROSECUTION AND DEFENSE FUNCTION, *supra* note 407, § 4-4.1(a); NLADA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSES, *supra* note 402, Guideline 4.1(a), 4.1(b) (7).

480. *See, e.g., State v. Smith*, 681 P.2d 1374, 1382 (Ariz. 1984) (“Should an attorney need assistance from an investigator or should a case on a contract attorney’s docket need to be assigned to a non-contract attorney, the fees for the investigator or outside attorney are paid by the contracting attorney, thereby reducing the likelihood an attorney will seek outside help when needed.”). Conflicts also exist where compensation schemes provide reduced funding for work performed outside of the courtroom, such as investigation and motion preparation. *See, e.g., N.Y. County Lawyers’ Ass’n v. State*, 763 N.Y.S.2d 397, 409 (N.Y. Sup. Ct. 2003) (“The lower rate operates as a disincentive to perform necessary out-of-court work.”).

481. *Smith*, 681 P.2d at 1382.

482. *Id.*

483. *Id.*; *see also Effectively Ineffective*, *supra* note 106, at 1731 (noting that funding caps on compensation levels “have effectively rendered many lawyers ineffective”).

484. *See Citron*, *supra* note 106, at 502.

485. Greenlee County, Contract for Provision of Indigent Representation ¶ 8 (on file with author) [hereinafter Greenlee Contract].

to take a case through trial.⁴⁸⁶ Likewise, Apache County pays its contract attorneys a flat annual amount, with no guaranteed additional monetary incentives to take cases to trial.⁴⁸⁷ Both Greenlee and Apache County contractors are expected to pay for administrative and overhead costs from the flat fee provided.⁴⁸⁸ As a result, attorneys may not earn enough on a flat fee to cover administrative costs. Navajo County includes a set base salary for its contract attorneys, and it also allows for payment of some routine administrative expenses.⁴⁸⁹

Each of these contracts allow the contract attorneys to seek additional funds for “extraordinary” expenses—investigators, experts, and in Navajo County additional compensation—by petitioning the trial judge.⁴⁹⁰ It also should be noted that in two recent high profile cases in Apache County, one of which is the Christian Romero case, the contract attorney was paid on an hourly basis rather than a flat fee basis.⁴⁹¹ However, the payment of such extraordinary expenses is entirely dependent upon approval by the trial court, with the possible exception of Navajo County, where the Public Defender’s Office maintains a fund that can be used to pay extraordinary expenses if the court denies a request.⁴⁹² Conflicts may arise where courts control the purse strings for attorney compensation and reimbursement of litigation costs because the necessity of making such a request may put an attorney in the untenable position of having to decide between expending his or her own resources for such costs or revealing case strategy by making the request.⁴⁹³ Further, counsel may be reluctant to engage in zealous

486. See *id.*; Telephone Interview with Channen Day, *supra* note 457; E-mail from Betty Smith, Mar. 24, 2010, *supra* note 398. *But see* Telephone Interview with Mike Peterson, *supra* note 457.

487. Apache County, Letter of Understanding, *supra* note 443 §§ III.A, III.B.1.

488. See *id.* § III.A; Greenlee Contract, *supra* note 485; *see also* Wood Interview, *supra* note 445 (stating that his expenses are not covered in Apache).

489. Navajo County, Indigent Legal Services Agreement §§ I.A–B.1 [hereinafter Navajo Contract].

490. See *generally* Apache County, Letter of Understanding, *supra* note 443, § III.B.2; Greenlee Contract, *supra* note 485 ¶ 8; Navajo Contract, *supra* note 489, §§ I.B.2–C.

491. Wood Interview, *supra* note 445; E-mail from Betty Smith, Jan. 21, 2010, *supra* note 464 (noting that Wood is being paid an hourly fee for his work on the Romero case, as is the guardian *ad litem*, who is also one of the county’s contract attorneys).

492. See E-mail from Laree Saline, Jan. 5, 2010, *supra* note 204.

493. See, e.g., Mounts, *supra* note 106, at 480 (1982) (noting that “the power of appointment held by the judge [could become] a source of patronage”); *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (indigent defense counsel “testified that the requirement for prior court approval before they can expend more than the \$500 in direct trial preparation costs requires counsel to expose trial strategy in cases involving indigents when such disclosure would not be made in cases involving paying clients”); *see also* AM. BAR ASS’N, *supra* note 15, at 14 (“In . . . many states, unlike prosecutors, neither Public Defenders nor assigned counsel have access to expert assistance, except by demonstration of need.”). Attorneys may also be wary to request extraordinary cost reimbursement where they are aware that the court has limited funds to dispense. *See, e.g.*, Telephone Interview with Channen Day, *supra* note 457; Telephone Interview with Mike Peterson, *supra* note 457.

advocacy—such as filing motions and objecting at trial—where doing so might alienate the court that will later decide just compensation and reimbursement.⁴⁹⁴

Proponents of flat-fee contract systems may argue that the flat fees offered in these counties are sufficient in nonmetropolitan counties given the lower cost of living in rural communities. While the extent to which the cost of living is lower in rural places than in urban ones is debatable,⁴⁹⁵ little evidence exists that professional services such as those offered by experts and investigators cost less in the former. Indeed, there is reason to believe that costs may be greater in nonmetropolitan counties, given the additional expense of bringing in service providers from metropolitan locales.⁴⁹⁶ Services such as psychiatric evaluations and mitigation services will not necessarily be lower in rural areas because the firms engaged to provide them are often urban-based, charging the same fees regardless of county.⁴⁹⁷ As such, flat-fee contracts that either require or allow payment of those services to come out of the flat fee create an unacceptable financial disincentive to zealous advocacy.

In comparison, the financial disincentives that exist for all indigent defense counsel in Apache and Greenlee Counties and for contract counsel in Navajo County are not present in most Public Defenders' Offices where defender salaries do not decrease per hour spent on the case or dollar spent on expenses. As a result, Public Defenders' Offices are typically more insulated from financial conflicts than are contract counsel.

The contracts in Maricopa and Coconino Counties also provide mechanisms that make financial disincentives less likely than in the three nonmetropolitan counties. In Maricopa County, for example, attorneys are paid on an hourly basis for the most complex cases which are likely to require significant time; the rate is \$125 for lead counsel on capital cases and \$70 for other major

494. See, e.g., ABA STANDARDS: PROVIDING DEFENSE SERVICES, *supra* note 400, § 5-1.6 (“Under no circumstances should the funding power interfere with or retaliate against professional judgments made in the proper performance of defense services.”); ABA JUVENILE JUSTICE CTR., *supra* note 406, at 31 (“[E]specially in small communities, attorneys feel like they need to be cautious, so they do not lose credibility with judges by asking for investigative funding too often.”); Mounts, *supra* note 106, at 480 (noting charges that judges appointed “attorneys who took a less adversary role and were more ‘cooperative’ with the court”). The disincentive to challenge the court may be particularly strong in counties such as Apache County where the court awards indigent defense contracts. See E-mail from Betty Smith, Adm’r, Superior Court of Ariz., Apache County, to Erin Murphy, Librarian, Univ. of Cal., Davis Sch. of Law (Oct. 26, 2009).

495. See generally Dean Jolliffe, USDA Econ. Research Serv., *The Cost of Living and the Geographic Distribution of Poverty* (Sept. 2006); Dean Jolliffe, *Poverty, Prices, and Place: How Sensitive is the Spatial Distribution of Poverty to Cost of Living Adjustments*, 44 ECONOMIC INQUIRY 296 (2006).

496. See, e.g., Telephone Interview with Channen Day, *supra* note 457 (investigators utilized in Greenlee County are typically brought in from Phoenix or Tucson).

497. See, e.g., E-mail from Laree Saline, Navajo County Pub. Defender’s Office, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Feb. 8, 2010) (on file with author).

felonies tried in Superior Court.⁴⁹⁸ A flat rate or cap in such cases would create a disincentive for attorneys to spend the time needed to zealously litigate such cases. However, that disincentive does exist for juvenile delinquency matters and less serious adult offenses, ranging from low level felonies (flat rate of \$900 to \$1250 for adult court, \$500 for juvenile court) to misdemeanors (flat rate of \$400 for adult court, \$350 in juvenile court).⁴⁹⁹ Appeals are also paid on a flat rate as follows: \$20,000 for capital appeals; \$2000 for adult felony appeals; \$1000 for juvenile felony appeals; and \$1250 for misdemeanor appeals.⁵⁰⁰ And while Maricopa's contract attorneys are also expected to pay administrative costs from the rates listed above,⁵⁰¹ requests for extraordinary compensation for certain necessary expenses, including expert and investigative services, are made to an administrator in the Office of Public Defense Services. Those requests get elevated to the Superior Court only if the administrator does not approve payment.⁵⁰²

In Coconino County, contract attorneys receive a total annual lump sum of \$52,000 for coverage of 80 weighted case equivalents in 2009.⁵⁰³ However, the risk that the flat fee could create a disincentive to invest necessary time in a given case is lessened by a contractual incentive to take cases to trial; attorneys are eligible to receive up to an additional \$1600 for trial preparation and an additional \$1600 for a full trial week.⁵⁰⁴ Additional funds are also available for extraordinary expenditures, including expert and investigator fees. As in Maricopa County, requests for such funds are first made to the Legal Defender's Office.⁵⁰⁵ And for homicide cases or other cases not contemplated by the agreement, the contract attorney is provided an opportunity to negotiate a separate fee apart from the lump sum payment.⁵⁰⁶ However, a risk of conflict is created by a contractual provision requiring the contract attorney to pay for substitute counsel should the need

498. Maricopa Adult Contract, *supra* note 451, § IV.1. An hourly rate of \$60 an hour is also provided to Juvenile Defenders who cover the detained youth advisory calendar. Maricopa Juvenile Contract, *supra* note 451, § IV.1.

499. Maricopa Adult Contract, *supra* note 451, § IV.1; Maricopa Juvenile Contract, *supra* note 451, § IV.1. Lower flat fees also exist in juvenile court for probation violations (\$250), incorrigibility (\$200), inpatient placement (\$150). *Id.* § IV.1. The Maricopa defense contracts place some limitation on payment where a single defendant has multiple cases, but that limitation does not apply to situations where each case is tried separately. Maricopa Adult Contract, *supra* note 451, § IV.2-3.

500. Maricopa Adult Contract, *supra* note 451, § IV.1; Maricopa Juvenile Contract, *supra* note 451, § IV.1.

501. Maricopa Adult Contract, *supra* note 451, §§ II.1.B.2, II.1.M, II.6.K; Maricopa Juvenile Contract, *supra* note 451, §§ II.1.B.2, II.1.M, II.6.K.

502. Maricopa Adult Contract, *supra* note 451, §§ II.1.B., II.1.H, II.1.M, II.6.K-M, II.24.B-D, III.7; Maricopa Juvenile Contract, *supra* note 451, §§ II.1.B., II.1.H, II.1.M, II.6.K-M, II.24.B-D, III.7. Requests for extraordinary expenditures are made to and negotiated with a contract administrator housed in the county's Public Defender's Office. *Id.*; see also Letter and Comments from Dana P. Hlavac, *supra* note 14.

503. Coconino Contract, *supra* note 268, § 2.A.

504. *Id.* § 2.C.

505. The contract attorney is to request such funds from a contract administrator; if the request is denied he or she may apply to the court for payment. *Id.* §§ 2.E, 2.I.a; Telephone Interview with Dana P. Hlavac, *supra* note 142.

506. Coconino Contract, *supra* note 268, § 1.F.

arise—a problem at issue in *State v. Smith*—which may result in contract counsel being less likely to withdraw from a case even where doing so is in the client's best interest.⁵⁰⁷

Each of the payment structures described above allows for the possibility of financial conflicts of interest, but the likelihood of such conflicts occurring is greater in rural counties than urban. For Apache and Greenlee, the fact that all indigent defense cases are paid on a flat fee absent approval of additional fees or costs from the court puts those counties at the greatest risk. Navajo, Coconino, and Maricopa utilize public defense offices, the design of which insulates attorneys from financial conflicts, for the majority of their cases. For those cases assigned to contract counsel, the number of potential conflicts decreases as the counties become more urban. Navajo County surpasses its nonmetropolitan peers by using a side fund maintained by the Public Defender to accommodate some extraordinary cost requests denied by the court, which provides some cushion for indigent counsel. Coconino County's guaranteed monetary incentives for taking matters to trial and use of an independent administrator for extraordinary expense requests, rather than the court, decreases the risk of conflict even further. Two features of the Maricopa County system make it the system where financial conflicts are least likely to occur: (1) use of hourly rates, rather than flat fees, for its most time-consuming cases, and (2) use of an independent administrator for extraordinary expense requests.

3. Lack of Parity Between Defense and Prosecution

The adversarial nature of criminal justice is a critical component of indigent defense services.⁵⁰⁸ Indeed, the link between funding parity and the adversarial quality of the criminal defense system was a foundational principle for the Sixth Amendment right to counsel granted in *Gideon v. Wainwright*:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend, are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.⁵⁰⁹

Yet in many jurisdictions, funding for the prosecutor is significantly greater than that for indigent defense.⁵¹⁰ Under some indigent defense systems,

507. See *id.* § 1.R.

508. In *Herring v. New York* the Supreme Court stated, "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." 422 U.S. 853, 862 (1975); see also *United States v. Cronin*, 466 U.S. 648, 656 (1984); AM. BAR ASS'N, *supra* note 15, at 7.

509. 372 U.S. at 344.

510. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 231 (2004).

defense counsel are paid considerably less and work with fewer support services than prosecutors in the same jurisdiction.⁵¹¹ Further, prosecutors often have greater access to expert witnesses and investigative support services, both of which are readily available through state law enforcement.⁵¹² In jurisdictions where indigent defense is underfunded in comparison to prosecution, the fairness of process afforded to indigent defendants is questionable.⁵¹³ As detailed below, those problems are likely to be particularly exacerbated in nonmetropolitan counties that do not have established Public Defenders' Offices.

In 2000, then-Chief Justice Zlaket of the Arizona Supreme Court noted the particular risk of lack of funding parity in rural areas in *State v. Hoskins*.⁵¹⁴ The majority in *Hoskins* upheld the imposition of the death penalty based largely on the testimony of the state's psychiatric experts.⁵¹⁵ Chief Justice Zlaket, in dissent, criticized what he saw as the majority's wholesale reliance on expert testimony, reasoning that all admissible evidence present should be weighed, without undue reliance on science that is fraught with subjectivity, resulting in the fate of capital defendants being "placed almost exclusively in the hands of expert witnesses who are paid to appear and testify, and who more often than not disagree in important ways."⁵¹⁶ In doing so, the Chief Justice called attention to rural disadvantage, despite the fact that *Hoskins* arose out of metropolitan Maricopa County.⁵¹⁷ After noting the "clear advantage the state has in procuring such witnesses"⁵¹⁸ regardless of locale, Chief Justice Zlaket continued, "[s]uperior resources for prosecutors and the constant battle for funds faced by indigent defendants and their counsel, especially in rural counties, will perpetuate or perhaps even exacerbate the disparity that already exists between rich and poor."⁵¹⁹

The parity problem also arises with regards to compensation of defense counsel.⁵²⁰ Again, the lack of parity is likely to be exacerbated in jurisdictions where indigent defense is done on a piecemeal basis through appointment or by

511. *Id.*

512. *Id.*

513. The underfunding of indigent defense is an enormous problem across the country. See *Effectively Ineffective*, *supra* note 106, at 1734 (as of 1999 more than \$97.5 billion was spent on criminal defense in the United States: "More than half of that goes to the police and prosecution . . . Indigent defense, by contrast, receives only 1.3 percent of annual federal criminal justice expenditures, and only 2 percent of total state and federal criminal justice expenditures.").

514. *State v. Hoskins*, 14 P.3d 997 (Ariz. 2000).

515. *Id.* at 1118–20 (Zlaket, J., dissenting).

516. *Id.* at 1119 (Zlaket, J., dissenting).

517. *Id.*

518. *Id.*

519. *Id.*

520. The salaries of prosecutors and indigent defense counsel need not be equal, but instead should be comparable when considered in conjunction with overall responsibilities, level of experience, and caseload. See Wright, *supra* note 510, at 235–36. By simply accepting the lowest bidder, jurisdictions open themselves up to significant liability. See, e.g., William Glaberson, *The Right to Counsel: Woman Becomes a Test Case*, N.Y. TIMES, Mar. 21, 2010, at MB1.

individually negotiated contracts going, typically, to the lowest bidder,⁵²¹ as compared to jurisdictions with public defense offices where attorneys are salaried employees.⁵²²

The lack of parity between prosecution and defense counsel appears to be a significant issue in Arizona's nonmetropolitan counties, particularly those without Public Defenders' Offices. The precise extent to which a lack of parity exists is difficult to ascertain absent significant discovery. First, among the counties we review here, only Maricopa separates out its County Attorney's criminal expenditures versus the office's civil expenditures.⁵²³ As such, we utilize total County Attorney budgets, including both criminal and civil functions.⁵²⁴ Second, even if criminal budgets could be separated from civil, those figures would not represent a direct comparison to indigent defense budgets. This is because all cases filed are handled by the prosecuting body, whereas some percentage of those cases will be handled by retained counsel. Given, however, estimates in at least one county that approximately 95% of all cases require indigent defense representation,⁵²⁵ this likely would skew a comparison to only a small degree. Third, for each of the counties, including Maricopa, the figures may not account for differences in resources available without cost to the prosecution (e.g., investigative support by law enforcement) that must be paid for from the indigent defense budget. As such, the cost ratio in even Maricopa County may be more skewed in favor of the prosecution than the publicly available data utilized here reveals.

However, even without exact data, the figures reveal distinctions among the counties that raise concern. For example, in Apache County, the per capita budget for the County Attorney is four and a half times higher than the indigent defense budget, with only \$8 per capita spent on indigent defense and \$36 per capita spent on the County Attorney.⁵²⁶ Navajo County is nearly as unbalanced, with the County Attorney's (\$63 per capita) budget at nearly three and a half times the amount spent on indigent defense (\$19 per capita).⁵²⁷ Greenlee County ranks just slightly higher on the parity continuum, with the County Attorney's budget

521. See, e.g., *State v. Smith*, 681 P.2d 1374 (Ariz. 1984).

522. See, e.g., *State v. Lynch*, 796 P.2d 1150, 1160–61 (Okla. 1990) (requiring a statewide compensation system for appointed counsel with compensation levels tied to the hourly rate of the prosecutors and public defenders in the county of appointment; further requiring that appointed counsel be eligible for coverage of overhead expenses to bring parity for coverage of administrative support services that were provided within prosecutor and public defender offices).

523. MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126, at 131.

524. The County Attorney budget for Maricopa County in FY 2009 was \$97,098,421; Coconino County was \$4,464,061; Navajo County was \$7,011,433; Apache County was \$2,537,113; and Greenlee County was \$583,660. MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126; COCONINO COUNTY BUDGET FY 2009, *supra* note 126; NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129; APACHE COUNTY ARIZONA, ADOPTED BUDGET 2008-2009; STATE OF ARIZ., COUNTY OF GREENLEE, RESOLUTION FOR THE ADOPTION OF THE FINAL BUDGET, FISCAL YEAR 2008-2009.

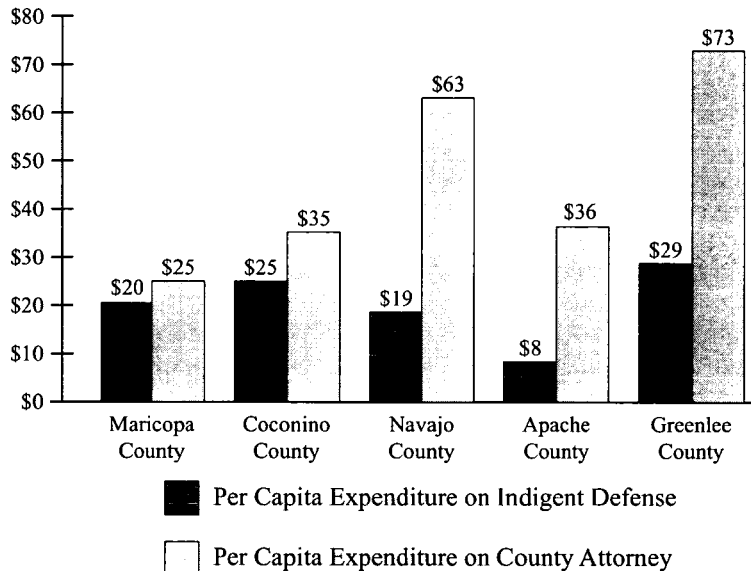
525. Letter and Comments from Dana P. Hlavac, *supra* note 14.

526. See Figure 17.

527. See *id.*

(\$73 per capita) at two and a half times that of indigent defense (\$29 per capita).⁵²⁸ In sharp contrast, Maricopa County spends \$20 for indigent defense for every \$25 spent for the County Attorney's office for a parity rate of one and a quarter, and Coconino County spends \$25 on indigent defense for every \$35 spent on the County Attorney for a parity rate of one and a half.⁵²⁹

Figure 17:
Per capita Expenditure on Indigent Defense and County Attorney
for Fiscal Year 2009⁵³⁰



4. Potential of a Single, Complex Case to Overwhelm an Indigent Defense System

Funding schemes like Arizona's that are so heavily weighted to local revenue leave nonmetropolitan counties at great fiscal risk from just one major case. Attorney fees and other defense costs arising from an extraordinary case are a much higher percentage of a rural county's total general fund or indigent defense budget compared to their metropolitan counterparts. Such a case may therefore decimate a rural county's finances.

Arizona provides a concrete example of how this inadequate funding problem can have a significant effect on the provision of justice. In 1980,

528. *See id.*

529. *Id.*

530. U.S. Census Bureau, State and County QuickFacts, *supra* note 177; COCONINO COUNTY BUDGET FY 2009, *supra* note 126; MARICOPA COUNTY FY 2008-09 BUDGET, *supra* note 126; PIMA COUNTY FY 2008/2009 ADOPTED BUDGET, *supra* note 126; NAVAJO COUNTY FY 2008-09 BUDGET, *supra* note 129; APACHE COUNTY, ADOPTED BUDGET 2008-2009, *supra* note 129.

nonmetropolitan Cochise County⁵³¹ was the site of a violent confrontation between “a contingent of Cochise County sheriff deputies and a large number of black members of a religious sect,” resulting in numerous injuries and the shooting of two church members.⁵³² The resulting case, *State v. Hanger*, was removed from Cochise County to Pima County, although the burden of paying defense costs remained with the former after the state legislature rejected a special appropriation to cover those expenses.⁵³³ Cochise County paid in excess of \$225,000 in defense-related fees and costs in the run up to trial.⁵³⁴ At jury selection, however, with an anticipated three-to-four month trial looming, the county balked at paying any further expenses. When Cochise County announced it would not provide any additional funds for defense services,⁵³⁵ the trial court dismissed the cases with prejudice.⁵³⁶

The Arizona Court of Appeals upheld the dismissal, reasoning that a continuation of the case until funds were made available would result in a violation of the defendants’ right to a speedy trial.⁵³⁷ In doing so, the Court of Appeals expressed regret at the result and “recognize[d] that extraordinarily complicated cases, such as this one, can severely strain resources in rural counties.”⁵³⁸ While not approving of it, the court expressed understanding of “Cochise County’s decision that other county needs had to take precedence over the provision of defense services in this case,” as well as the “trial judge’s decision to defer to the judgment of the county on the utilization of county resources.”⁵³⁹

The court further observed that the circumstances of *Hanger* could be avoided if the state were to pay defense costs or supply a Public Defender for “those cases beyond the means of rural counties to fund.”⁵⁴⁰ Indeed, in a strongly worded opinion, the court expressed obvious frustration at the failure of the state to pay for public defense:

[W]e must respond to the intimation that the trial judge thwarted the public’s interest in resolution of the charges against the defendants. It was not the judge that thwarted resolution of the case. Rather, it was the state. The state is constitutionally obligated to fund defense services. It has chosen to fulfill that obligation by imposing it on counties within the state. Such devolution does not, however, end responsibility. The state cannot disclaim its constitutional obligation. That stricture applies with particular force on the facts of this case where the

531. The 1980 population of Cochise County was 85,686. U.S. CENSUS BUREAU 1980 CENSUS.

532. *State v. Hanger*, 706 P.2d 1240, 1243 (Ariz. Ct. App. 1985) (Hathaway, J., dissenting).

533. *Id.* at 1240, 1243.

534. *Id.* at 1244 (Hathaway, J., dissenting).

535. *Id.* at 1242.

536. *Id.*

537. *Id.* at 1243.

538. *Id.*

539. *Id.*

540. *Id.*

state legislature voted against a special appropriation to cover defense fees and costs.⁵⁴¹

Recent events in Apache County illustrate the ongoing risk of a nonmetropolitan county being overwhelmed by one or more complex cases. In September of 2006, the Apache County prosecutor filed capital charges against Steven Licon in Apache County. Given that the death penalty is a possible outcome of the charges, the Apache County Superior Court has authorized hourly payment for indigent defense counsel, as well as significant expenditures for mitigation services.⁵⁴² As of January 2010, the County had spent more than \$111,000 in indigent defense related expenditures on pre-trial matters related to that single case.⁵⁴³

Adding to the strain on Apache County's indigent defense budget since 2008 have been the defense and guardian *ad litem* costs for Christian Romero. As discussed in the Introduction, the boy pled guilty to one count of negligent homicide in February 2009, after the prosecution and defense agreed that he should not be incarcerated but instead should be subject to intensive probation, including treatment programs and parole through the age of eighteen.⁵⁴⁴ The parties then spent eight months searching for an affordable treatment facility, estimating that the costs of the treatment contemplated in the plea would reach \$100,000.⁵⁴⁵ Those costs only added to the tens of thousands of dollars the county spent for indigent defense services, including the defense attorney's hourly rate,

541. *Id.* at 1242–43. The *Hanger* court is not alone in its irritation at the lack of state funding. *See, e.g., In re Public Defender's Certification of Conflict*, 709 So.2d 101, 104 (Fla. 1998) (Overton, J., concurring) (“I write separately to suggest that the time has come to reevaluate the structure of how we provide Public Defender representation to indigent defendants as well as how we provide representation to death-sentenced defendants in collateral proceedings.”); *N.Y. County Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 399 (N.Y. Sup. Ct. 2003) (expressing exasperation regarding the “pusillanimous posturing and procrastination of the executive and legislative branches [that] created the assigned counsel crisis impairing the judiciary's ability to function”); *State v. Green*, 470 S.W.2d 571, 580 (Mo. 1971) (Finch, J., dissenting) (“Hopefully, the General Assembly will provide a permanent solution by a statewide Public Defender system or some other method of providing paid counsel for indigent defendants.”); *Barron v. County Comm'rs of Lewis & Clark County*, 522 P.2d 70, 77 (Mont. 1976) (Harrison, J., concurring) (“The time has come . . . for the legislature to either adopt a set fee system as is done under the Federal Criminal Justice Act or to provide full time defense counsel in each judicial district of Montana.”).

542. E-Mail from Betty Smith, Adm'r, Superior Court of Ariz., Apache County, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Jan. 8, 2010) (on file with author); E-Mail from Betty Smith, Adm'r, Superior Court of Ariz., Apache County, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Jan. 19, 2010) (on file with author).

543. *Id.*

544. *See, e.g., Jim Bemish, Arizona Judge Wants to Sentence 9 Year Old to Prison Rather than Treat Him*, PHOENIX LAW ENFORCEMENT EXAMINER (Nov. 12, 2009).

545. *Id.*

the cost of a guardian *ad litem*, and expenses related to psychiatric evaluations of the boy.⁵⁴⁶

Then, in October 2009, the Apache County judge who accepted the plea announced that he had decided belatedly to reject the plea and send Christian to a state run (and financed) juvenile correctional facility, despite an Arizona Department of Juvenile Corrections official's testimony that state facilities were not equipped to incarcerate a child so young.⁵⁴⁷ In an unusual twist, the prosecutor joined in a defense motion to have the judge removed, with the prosecutor arguing that the judge's change of heart was directly related to funding.⁵⁴⁸ The joint motion was granted, the judge was removed, and the Greenlee County presiding judge was assigned to determine the sentence.⁵⁴⁹ Ultimately, Christian was sentenced to the terms of the plea agreement,⁵⁵⁰ after expenditures of over \$70,000 from the Apache County indigent defense budget.⁵⁵¹

As a result of the *Licon* and *Romero* cases, Apache County exceeded its indigent defense budget in 2009 by about \$75,000.⁵⁵² About \$39,000 of the shortfall was transferred from the budget for the Apache County Superior Court, and another \$34,000 came from grant funds.⁵⁵³ Such expenditures—which will likely continue and even increase until the capital case against *Licon* is tried—presumably affect the County's ability to provide discretionary public services, putting pressure on the Board of Supervisors when they set the annual indigent defense budget.⁵⁵⁴ The funding problems that Apache County has

546. E-Mail from Betty Smith, Jan. 8, 2010, *supra* note 542; E-Mail from Betty Smith, Jan. 19, 2010, *supra* note 542.

547. Bemish, *supra* note 544; Dennis Wagner, *Judge OKs Request for New Judge in St. Johns Case*, ARIZ. REPUBLIC (Nov. 18, 2009).

548. Dennis Wagner, *Both Sides Back Ouster of Judge Who Would Reject Plea Deal*, ARIZ. REPUBLIC (Nov. 10, 2009).

549. See Order Granting Motion to Enforce the Plea Agreement, *In re Romero*, No. JV2008-065 (Apache County Super. Ct. Dec. 3, 2009).

550. *Id.* (reporting that Romero would go to a "treatment center with schooling and psychological counseling until authorities there determine he no longer requires that level of care"; "intensive probation" will continue until Romero is eighteen or unless a court lifts that requirement). Romero will continue to be represented by counsel and by a guardian *ad litem*, paid for by Apache County, as long as he is under the superior court's jurisdiction. E-mail from Betty Smith, Jan. 8, 2010, *supra* note 542.

551. E-Mail from Betty Smith, Jan. 8, 2010, *supra* note 542; E-Mail from Betty Smith, Jan. 19, 2010, *supra* note 542; E-Mail from Betty Smith, Jan. 21, 2010, *supra* note 464.

552. Fax from Betty Smith, *supra* note 325.

553. *Id.* The only additional detail that Apache County was able to provide about these grant funds was that some of the funding to pay for Christian Romero's psychiatric evaluation came from state grant funds awarded to the county's juvenile probation department. E-mail from Betty Smith, Adm'r, Superior Court of Ariz., Apache County, to Lisa R. Pruitt, Professor, Univ. of Cal., Davis Sch. of Law (Mar. 6, 2010) (on file with author).

554. E-Mail from Betty Smith, Jan. 21, 2010, *supra* note 464; Wood Interview, *supra* note 445 (negotiated between Superior Court judge and Board of Supervisors).

experienced are by no means unique to Arizona,⁵⁵⁵ but in light of its poor tax base, the County simply does not have the revenue cushion to absorb extraordinary case expenditures as would a county with deeper pockets and more funding flexibility.⁵⁵⁶

Comparing the experience of Apache County in funding these two cases to the ability of Maricopa County to undertake similar expenditures illustrates that metropolitan counties have a far superior capacity to absorb extraordinary case costs than do their nonmetropolitan counterparts. As observed in Part II.B.3, Maricopa County's total indigent defense expenditure is 5.2% of its total general fund, while that of Apache County represents less than half that proportion of its general fund—just 2.5%.⁵⁵⁷ With an indigent defense budget of more than \$79 million, Maricopa County is in a much better position to handle major cases without a significant redistribution of county funds.⁵⁵⁸ In contrast, when faced with the Licon and Romero cases, Apache County was forced to transfer large sums of money from the county's Superior Court budget to supplement the indigent defense allocation.⁵⁵⁹ The good news is that the Superior Court has been willing to do this. The court also does not appear to have cut corners in responding to the needs of the defendants in these two high-profile cases,⁵⁶⁰ although the attempt to rescind Romero's plea agreement may have reflected financial concerns by the judge who was removed from the case.

III. RECOMMENDATIONS FOR REFORM

The data we present indicate that Arizona's county-level funding scheme of indigent defense leaves the state susceptible to both Sixth Amendment and equal protection challenges. Our analysis reveals that metropolitan counties tend to fund indigent defense more generously than their nonmetropolitan counterparts and that more urbanized counties also have in place certain safeguards to protect the interests of indigent defendants. These safeguards include institutional arrangements that separate oversight of indigent defense funds from the judicial

555. See, e.g., *State v. Quitman County*, 807 So.2d 1338 (Miss. 1990), *discussed in* Everett, *supra* note 403 (describing how the trials of two men accused of a quadruple homicide necessitated an increase in county taxes); *Corenevsky v. Superior Court of Imperial County*, 36 Cal. 3d 307 (1984) (lack of county funding to pay for more experienced counsel for an indigent defendant charged with capital murder resulted in reduction of charges; state supreme court ultimately ordered county auditor to pay for expert witnesses, law clerks, and investigators over protests by the county Board of Supervisors that doing so would bankrupt the county).

556. Further, one or more extraordinary cases can exacerbate existing problems in a county's indigent defense system. For example, despite assignment of such a complex matter to a given attorney, the use of a strict rotational system in which attorney caseloads and prior assignments are not considered may cause the assigned attorney to become overloaded with work.

557. See *supra* Figure 13.

558. See *supra* Figure 11 (showing Maricopa's indigent defense budget to be more than 130 times that of Apache County's, which was less than \$600,000).

559. Fax from Betty Smith, *supra* note 325; E-Mail from Betty Smith, Jan. 8, 2010, *supra* note 542.

560. See *supra* notes 542–46.

function. Metropolitan counties are also more likely to use an entity separate from the court to assign cases to contract attorneys, administer the contracts, and monitor caseloads. The absence of such safeguards in nonmetropolitan counties, coupled with low levels of funding and acute disparities between prosecution and defense spending in several such counties, signals a constitutional problem.

The State should not “assign operational and fiscal responsibility to local units without giving them comparably adequate revenue sources.”⁵⁶¹ We therefore propose that Arizona’s legislature centralize primary funding for defense services at the state level. Further, in order to assure that funding levels account for the varying practical realities of providing defense services in metro and nonmetro locales, we recommend that funding be based on weighted caseload counts reflecting all cases handled through indigent defense offices and weighting each based on case complexity. This would include—but not be limited to—felonies, misdemeanors, and juvenile delinquencies.

Funding determinations should also be responsive to higher costs that rural jurisdictions may encounter in seeking to provide services that are comparable to those of their metropolitan counterparts.⁵⁶² That is, funding levels need to respond to certain antecedent inequalities associated with rurality. Among these are expenses associated with rural spatiality, including markets for professional services that increase fees, as well as higher transportation costs. Finally, state budgeting for indigent defense should plan for the contingency of extraordinary cases in order to ensure sufficient funding for any county faced with such a need.

We acknowledge that the centralization of primary funding carries risks. First, it makes the bulk of indigent defense funding vulnerable to political whim at a higher scale. That is, funding would become vulnerable in the hands of the state legislature, even as it is now vulnerable in the hands of county Boards of Supervisors. This could be especially dangerous during economic downturns. Second, centralized funding risks the unintended consequence of lowering the standard of indigent defense services in counties that are currently better funded instead of raising the bar in counties with a shortage of defense dollars and the necessary services and infrastructure they could buy. In order to protect against those possibilities, we recommend that legislation centralizing funds include a requirement that state funding may not be reduced in a manner that would decrease funds available in the county with the highest level of funding at the time of enactment.⁵⁶³ Also, periodic increases should adjust for inflation.

561. Neuman, *supra* note 54, at 379.

562. See *supra* Part II.C.2 (noting cost of attorneys in nonmetropolitan counties, as well as of ancillary services such as mitigation and investigation); Appendix, Table 1. Greater travel costs associated with rural spatiality may also be a component of this, as reflected in Navajo County’s report that it used part of its FTG state funding to pay for “travel to the courthouse in Kayenta.” *FILL THE GAP FY 2009 REPORT*, *supra* note 161, at 46.

563. The highest level of current funding might be assessed by several measures, taking into account county population and case volume among other factors. One of the most probative metrics for setting a funding floor is likely to be cost per case. However, Greenlee County’s cost per felony defended is twice as high as that of Maricopa County,

In Arizona, this will most likely set the floor for funding indigent defense at a level reflective of spending by metropolitan counties. Under this proposal, metropolitan counties may be seen as manifesting the standard of adequacy required by the Sixth Amendment.⁵⁶⁴ To be clear, we do not have sufficient evidence to establish that all metropolitan systems (in Arizona or elsewhere) are adequate—in either some or all regards—and we have not set out to establish that they are. But if metropolitan systems are not adequate, then surely nonmetropolitan systems which labor under lower funding levels and an absence of institutional safeguards are also inadequate.⁵⁶⁵

The metrocentricism inherent in this funding proposal is reflected in many aspects of the American legal landscape. The United States has become an essentially urban nation,⁵⁶⁶ and our laws are often assessed based solely on how they operate in urban settings.⁵⁶⁷ In the indigent defense context, this metrocentricism could be used to the benefit of rural justice systems because it would provide funding to nonmetro counties that would permit them to provide indigent defense services that are at least roughly on par with those of their metropolitan counterparts.

Even if enhanced state funding is achieved, policymakers and the defense bar should be diligent in assessing the funding and provision of counsel in both rural and urban areas to ensure that the standard is not set too low. We therefore

and so using solely this metric might be inappropriate. That is, the cost per felony defended may be particularly high in Greenlee County for reasons discussed above; it would thus not necessarily be the best indication of an appropriate funding floor. More case volume data from the individual counties—including counts of all categories of cases, not only felonies—would be needed to inform any calculation of a minimum of level of funding.

564. A similar argument could be made in the context of litigation. Even if a court refuses to compare counties' systems for providing indigent defense under an equal protection theory, a comparative analysis could come in by the back door if the levels of funding and safeguards associated with metropolitan systems are seen as setting the standard of adequacy under the Sixth Amendment. Whenever a nonmetropolitan system falls short of that metropolitan adequacy standard, it would signal a presumptive Sixth Amendment violation. After all, county Boards of Supervisors are unlikely to allocate more funding for indigent defense than is constitutionally required, given that these are not politically popular expenditures. Thus, the county with the highest level of funding—assuming that it is in fact an adequate standard—can be said to have essentially set the minimum adequacy threshold.

565. An exception, of course, would be a situation where a particular public defender's office fails to monitor caseloads, permitting individual attorneys to be overloaded. *See* Eckholm, *supra* note 450. In other words, metropolitan systems could still experience particular failures within fundamentally well-designed systems. This would not establish similar infirmities within the context of nonmetropolitan systems.

566. According to the 2000 Census, 79% of the U.S. population lived in urban areas and 21% lived in rural areas. Along the metro/nonmetro divide, 80.3% lived in the former, while 19.7% lived in the latter. U.S. CENSUS BUREAU, GCT-P1 URBAN/RURAL AND METROPOLITAN/NONMETROPOLITAN POPULATION: 2000 (2000), http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=&-ds_name=DEC_2000_SF1_U&-lang=en&-mt_name=DEC_2000_SF1_U_GCTP1_US1&-format=US-1&-CONTEXT=gct.

567. *See* Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 Wisc. L. REV. 969, 970.

recommend that the legislature create a task force to undertake a review of indigent defense systems to identify deficiencies and establish meaningful standards. Again, this will require accurate and detailed case volume (for the entire county) and caseload (per attorney) counts. Further, this review should include an analysis of the manner in which cases are assigned, how defense counsel are supervised, the likelihood that funding mechanisms could create financial conflicts of interest, and relative parity in resources afforded to the prosecution and the defense.

It is also important to note that centralized funding and state oversight need not eliminate local autonomy, which is often articulated as a justification for local funding of services. Fiscal policy is distinguishable from the substantive policy related to that which it finances, for example, administration of justice or education.⁵⁶⁸ We acknowledge the value in permitting states to delegate local affairs to political subdivisions,⁵⁶⁹ and our proposal to centralize funding would not limit county autonomy to determine how to provide indigent defense services—so long as those services are consistent with constitutional mandates.

Indeed, we invite counties to remedy the structural shortcomings we have identified. Although making the necessary changes ultimately may require additional state funding, counties can take steps to reduce systemic deficiencies. For example, counties could modify their contracts with indigent defense counsel to explicitly restrict caseloads, including private practice caseloads. Counties could employ an independent administrator—perhaps by pooling funds with adjacent nonmetropolitan counties—who could oversee case assignments. This would eliminate the strict rotational system in favor of one that takes into account attorney qualifications and competencies. The same administrator could also be authorized to approve expenditures for necessary costs such as experts and investigators, thereby insulating those funding decisions from the Superior Court and ensuring that attorneys do not have to choose between seeking such services on the one hand and personal financial interests or disclosure of case strategy on the other. Counties could further reduce financial disincentives to vigorous defense by eliminating flat-fee payments and creating financial incentives to go to trial. Finally, with very little financial strain, counties could ensure meaningful parity between prosecutors and defense attorneys by adjusting existing budgets to provide commensurate salaries, as well as administrative and other necessary expenses.

568. Professor Neuman observes that, even in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), where the Supreme Court applied the rational basis test, it “upheld the Texas finance scheme on the grounds that local fiscal control was rationally related to fostering local autonomy in setting *educational* policy, not *fiscal* policy,” and that it found the scheme “*not* necessary to achieving any compelling government interest.” *Id.* at 378 (emphasis original); see also *supra* notes 65–68 and accompanying text.

569. Neuman acknowledges that *Missouri v. Lewis*, 101 U.S. 22 (1880) and decisions relying on it reflect the Court’s concern that states have sufficient flexibility “to regulate local affairs by creating political subdivisions.” Neuman, *supra* note 54, at 268; see also, e.g., *Avery v. Alabama*, 308 U.S. 445, 447 (1940) (noting the Court’s reluctance to “interfere with the State’s determination of local social policy,” consistent “with the preservation of constitutional balance between State and Federal sovereignty”).

Until the Arizona legislature and counties act to remedy the infirmities we have identified, litigators and the Arizona courts have the power and duty to play a critical role in reforming indigent defense funding and delivery. At the individual case level, defense counsel should take care to establish a record of funding and service deficiencies that may be useful on appeal. Upon a more detailed showing that the problems suggested herein exist, the Arizona courts should follow the lead of *State v. Smith* and adopt an inference in individual cases that “the adequacy of representation is adversely affected by the system,”⁵⁷⁰ and a Sixth Amendment violation is thus presumed.⁵⁷¹ Likewise, where funds are essentially unavailable, courts should follow *State v. Hanger* and dismiss the pending charges.⁵⁷² Finally, Arizona courts should consider amending the state’s rules of professional conduct to prohibit the use of flat-fee contracts that require counsel to pay for experts and investigators out of their own pockets, thereby creating disincentives to take cases to trial.⁵⁷³

At a systemic level, counsel—whether representing a class of indigent defendants or a class of underfunded counties—should analyze whether the lack of funding in certain counties has created a likelihood that ineffective assistance of counsel will be rendered, making viable a class action that seeks prospective relief under the Sixth Amendment and/or Equal Protection Clause.⁵⁷⁴ Courts should apply heightened scrutiny to equal protection claims that allege significant spatial or territorial disparities in the provision of counsel because the right to counsel is a fundamental right. Such disparities have been found to be tantamount to the invidious discrimination prohibited by *Gideon*, *Griffin*, and their progeny.⁵⁷⁵ Sixth Amendment claims should also be considered, given the infirmities discussed in Parts II.C.1–4 and other problems that may be identified through discovery. Ultimately, the expense of litigating individual appeals and defending against class actions may provide the greatest incentive for the legislative and county-level reforms we advocate.⁵⁷⁶

570. *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984).

571. *See supra* notes 89–101, 414–29 and accompanying text (discussing *State v. Smith*); notes 405, 423 (discussing *Louisiana v. Peart*).

572. *See supra* notes 532–36 and accompanying text (discussing *State v. Hanger*).

573. *See, e.g.*, *State v. A.N.J.*, No. 81236-5, 2010 WL 314512, at *9 (Wash. Jan. 28, 2010) (noting that such contracts now violate WASH. RULE OF PROF’L CONDUCT 1.8(m)).

574. *See, e.g.*, *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988); *Best v. Grant County*, No. 042001890, slip. op. at 5 (Wash. Super. Ct. Oct. 14, 2005).

575. *See, e.g.*, Summary Judgment Order, *Best v. Grant County*, No. 042001890, slip. op. at 5 (Wash. Super. Ct. Oct. 14, 2005); *supra* Part I.C (discussing invidious discrimination under the Sixth Amendment).

576. *See, e.g.*, Settlement Order, *Best v. Grant County*, No. 042001890, slip. op. at 5 (Wash. Super. Ct. Nov. 2, 2005) (settlement of class action litigation against rural county for failure to provide adequate indigent defense services included \$500,000 in attorney fees and the possible requirement to pay additional fees if the terms of the settlement were not met); *see also* *Powers v. Hamilton*, 501 F.3d 592 (6th Cir. 2007) (finding cognizable indigent defendant’s claim under 42 U.S.C. § 1983 that public defense office’s policy of failing to seek certain hearings on behalf of indigent defendants); *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003) (finding the head of public defender’s office

CONCLUSION

Nonmetropolitan counties across the nation face particular challenges to funding and delivering justice—challenges that stem from characteristics such as sparse populations and the related inability to achieve economies of scale in service delivery. In states like Arizona, those problems are aggravated by the vast territory that many counties cover. These challenges can be met only with adequate funding, yet the State of Arizona effectively turns a blind eye to this problem by requiring counties to finance their own justice systems—from public safety (including jails and probation services) to County Attorneys and indigent defense.

Low levels of funding for these and other services in some nonmetropolitan counties result largely from Arizona's scheme for funding county government, which is heavily skewed to population size (for example, distribution of state sales tax and auto licensing fee revenue) and to private wealth (as reflected in property value and retail sales). The funding strain on nonmetropolitan counties is aggravated when counties face increased responsibility for delivering myriad discretionary and mandatory services. Because nearly all funding for indigent defense is from county general funds, the funding biases carry over to indigent defense. While per capita-based funding of county government generally (e.g., state sales tax distribution) and of indigent defense specifically (e.g., FTG) may seem instinctively fair and equitable, it does not respond to the particular challenges that face nonmetropolitan counties. These often include the inability to achieve economies of scale to justify establishing a separate institution to assign, monitor, and supervise counsel for indigent defendants, which leaves these functions to the Superior Court. Nonmetropolitan challenges may also include higher costs associated with rural spatiality and limited markets for professional services.

Our analysis has demonstrated that Arizona's nonmetropolitan counties are at greater risk of systematic deprivation of adequate counsel than their urban counterparts. Our review of contracts for indigent defense in five counties reveals the potential for a significant caseload crisis, particularly in Apache and Greenlee Counties where indigent defense is provided entirely by contract or appointed counsel. Those counties, along with Navajo County, are also at greater risk of providing incompetent counsel given the use of strict rotational assignment systems that do not take into account the nature and complexity of the case. The contracts also illuminate the risk of financial conflicts of interest arising in the indigent defense context, given the use of flat-fee payments and primary reliance on the Superior Court's approval of additional expenditures. Financial data from the counties also show a decided lack of parity between expenditures on indigent defense and prosecution in rural counties, which upsets the balance required in the adversarial process. Finally, the inability of counties with limited tax bases to absorb the financial consequences of extraordinary cases exacerbates problems in the indigent defense systems.

subject to suit under 42 U.S.C. § 1983 where policies resulted in a staff attorney's provision of ineffective assistance of counsel).

Ironically, Arizona's failure to ensure adequate funding for indigent defense may ultimately create more expense for Arizona and its counties. Unacknowledged costs may include lengthy appeals of criminal convictions;⁵⁷⁷ the costs of incarcerating individuals who may have been released on bail or not convicted at all had adequate counsel been afforded;⁵⁷⁸ the expense of compensating innocent people convicted and incarcerated due to inadequate defense counsel;⁵⁷⁹ and the costs of litigating a systemic challenge to the provision of indigent defense.⁵⁸⁰ The State's incentives to avoid these costs are obviously enormous.

Rural sociologist Linda Lobao has articulated three manifestations of spatial inequality as among the reasons to study the phenomenon. She writes of "new inequality 'hot spots' in the wake of growth," "persistent poverty across regions," and "seemingly aspatial government policy [that] may have important spatial outcomes."⁵⁸¹ The problems associated with Arizona's funding of indigent defense illustrate all three.

First, Arizona's rapid but uneven development in recent decades has created inequality "hot spots." The vast majority of the State's growth—as a percentage and in sheer numbers—has occurred in urbanized Maricopa, Pima, and

577. See, e.g., Eric Holder, Attorney Gen., Remarks as Prepared for Delivery at the 2009 American Bar Association Convention (Aug. 3, 2009) ("This growing crisis is troubling not just because of the government's constitutional duty to ensure the right to counsel. When defendants fail to receive competent legal representation, their cases are vulnerable to costly, and time-consuming mistakes. Lawyers on both sides can spend years dealing with appeals arising from technical infractions and procedural errors. When that happens, no one wins."); Michael S. Spearman, Chief Criminal Judge, King County Superior Court, Seattle, Washington, Remarks Presented in Testimony at the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, Hearing: Are We Keeping the Promise? A Hearing on the Right to Counsel 40 Years After *Gideon v. Wainwright* 4 (Feb. 7, 2003), available at <http://www.nlada.org/DMS/Documents/1070486596.02/Gideon%20Hearing%20Transcript.rtf> ("[T]here can be no doubt that the cost of prosecuting the case again, several years later, is more expensive in many ways. It is more costly to the defendant, to the alleged victim and to the justice system as a whole, in terms of both money and, perhaps even more significantly, in terms of public confidence.").

578. See THE CONSTITUTION PROJECT, *supra* note 11, at 2 ("Not only does this failure deny justice to the poor, it adds costs to the entire justice system. State and local governments are faced with increased jail expenses, retrial of cases, lawsuits, and a lack of public confidence in our justice systems.") (emphasis omitted).

579. See, e.g., Benjamin Weiser, *9/11 Wrongful-Accusation Suit Settled*, N.Y. TIMES, Sept. 24, 2009 (payment of \$250,000 to man jailed for a month due to false allegation that he had been involved in 9/11 terrorist attacks); Paula McMahon, *Broward Sheriff's Office to Pay \$2 Million to Wrongly Imprisoned Man*, MIAMI HERALD, Sept. 22, 2009 (reporting \$2 million settlement to mentally challenged man who spent 22 years in prison for murders that DNA later proved he did not commit).

580. See Settlement Order, *Best v. Grant County*, No. 042001890, slip. op. at 5 (Wash. Super. Ct. Oct. 14, 2005).

581. Lobao, *supra* note 30, at 2.

Pinal counties.⁵⁸² Some less populous counties like Coconino, Mohave, and Yuma have also seen growth—growth that has put some of them over the metropolitan threshold.⁵⁸³ That population growth has been accompanied by economic growth which, by and large, has enabled their county governments to raise revenues sufficient to meet their residents' needs. Yet other counties—such as nonmetropolitan Greenlee and Apache—have experienced population stasis or loss.⁵⁸⁴ Their tax bases are not expanding and the demand for indigent defense services is not contracting. Thus Arizona itself has become an inequality hot spot, with some counties increasingly able to better fund government services and others decreasingly able to provide a minimal level of services, including a constitutionally adequate system for administration of justice functions such as indigent defense.

Persistent poverty counties such as Apache and Navajo are another component of Arizona's story of uneven development and spatial inequality. High and enduring poverty in these counties greatly inhibits their ability to generate sufficient revenue to meet the service needs of residents. While some revenue deficits are met by federal transfers aimed at assisting their significant American Indian populations, these counties struggle to provide even rudimentary services. They also lack the depth of resources necessary to absorb significant indigent defense costs, including those associated with a single major case.

Finally, what we can see in Arizona—as a consequence of devolution and a heavy reliance on local funding for all sorts of services—are “important spatial outcomes” that result from a “seemingly aspatial government policy.”⁵⁸⁵ That is, the policy of requiring counties to pay for indigent defense may appear “aspatial” at first glance, but it creates gross inequalities among the counties and their residents in terms of service provision. In short, it makes county boundaries the arbitrary lines that determine the caliber of a constitutionally mandated service. This is surely an “important spatial outcome,” and it is one with legal significance. Given the critical character of the constitutional right to counsel, Arizona's legislative and judicial bodies—as well as its defense counsel and the civil rights bar—should act to ensure both adequacy and relative equality in the provision of indigent defense services.

582. FILL THE GAP FY 2009 REPORT, *supra* note 161, at 36, 48, 52 (showing population growth for each of these counties).

583. *Id.* at 16, 40, 64.

584. See sources cited *supra* note 270 and accompanying text (noting Greenlee County's 6.4% population drop between 2000 and 2008). Apache County's population has remained largely static since 1990. *Id.*

585. Lobao, *supra* note 30, at 2.

APPENDIX

Table 1:
Payment of Contract Counsel in Select Arizona Counties

County	Felony	Misdemeanor	Other
Apache	\$7791.16/month, all case types (case limits consistent with <i>State v. Smith</i>)		
Coconino	\$52,000/year for 80 cases (all case types) = \$650/case; \$1600 for trial prep; \$1600/week of trial; capital cases upon consent, with separately negotiated fee	1/2 felony	Additional fees: \$55/hour (or fixed amount)
Gila (2008 Figures)	\$85,440/year C1-4; \$74,880/year C1-6; \$70,260/year C4-6 (no minimum or maximum cases)	\$18,000/year; \$2450/month (one attorney); \$1500/month for the one with fewer cases	Additional \$6000/year for local office
Graham	65-case limit; \$45,000/year = \$692/case	1/4 felony	\$50/hour after 40 hours expended on each case (first degree murder and charges against inmates excluded)
Greenlee	\$850	\$600	
Maricopa	Capital offenses: \$125/hour (lead), \$95/hour (cocounsel); major felonies \$70/hour; CLS 1, 2, 3 felony \$1200; CLS 4, 5, 6 felony, DUI \$900	\$400/case	
Mohave	\$770/case; \$440/subsequent felony case when related to the first case	\$440/case	\$55/hour if over 25 hours
Navajo	\$60,000/year for 75 "non-complex" criminal cases = \$800/case; \$55/hour for excess hours (some costs allowed); fee for complex cases to be negotiated		
Santa Cruz	\$65/hour		
Yavapai	\$81,673/year for 130 cases = \$628/case	1/2 felony	\$50/hour after 40 hours/case; complex cases \$75/hour; capital cases \$100/hour (first chair), \$90/hour (second chair)
Yuma	\$750/case (10 cases per month) = \$750/case; if case is "extraordinary" additional compensation is negotiated	\$240/case	

Table 2:
Felonies per County FY 2009⁵⁸⁶

County	Reported to Arizona Supreme Court	Reported to Arizona Criminal Justice Commission (FTG)	Reported to Authors by County Public Defender or Superior Court
Maricopa	37,162	36,997	55,623
Coconino	1007	1070	2602
Navajo	1056	1635	1623
Apache	232	213	*
Greenlee	100	91	104

* No data provided.

586. SUPERIOR COURT CASE ACTIVITY FY 2009, *supra* note 378; FILL THE GAP FY 2009 REPORT, *supra* note 161, at 10, tbl.5 (Apache); 18, tbl. 18 (Coconino); 30, tbl.36 (Greenlee); 39, tbl.48 (Maricopa); 46, tbl.59 (Navajo); Maricopa Case Load, FY 2009, *supra* note 393; Navajo Case Load, FY 2009, *supra* note 393; and Coconino Case Load, FY 2009, *supra* note 393; Telephone Interview with Cristina O’Coyne, *supra* note 346.

The data in the final column indicates the number of felonies for which indigent defense services were provided, whereas the first two columns show all felonies filed. These discrepancies between the Arizona Supreme Court data and the Arizona Criminal Justice Commission data may be due to definitional differences; if so, those differences are not readily apparent. These data appear unreliable not only because counties report different data to the two state institutions, but also because several counties show the number of accused felons for which indigent defense services were provided exceeding the total number of felonies filed in several counties, e.g., Maricopa, Coconino, and Greenlee.