Trusting the Courts: Redressing the State Court Funding Crisis

Michael J. Graetz

Abstract: In recent years, state courts have suffered serious funding reductions that have threatened their ability to resolve criminal and civil cases in a timely fashion. Proposals for addressing this state court funding crisis have emphasized public education and the creation of coalitions to influence state legislatures. These strategies are unlikely to succeed, however, and new institutional arrangements are necessary. Dedicated state trust funds using specific state revenue sources to fund courts offer the most promise for adequate and stable state court funding.

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Let justice be done though the heavens fall.

– Lord Mansfield (1768)[1]

We Americans take it for granted that if we buy an automobile or marry someone and the car or spouse turns out to be a lemon, we can go into court to obtain relief. If we get into a dispute with our landlord or a tenant or with our family over a relative's estate, a judge will be sitting in the local courthouse to resolve it. Surely, if confronted with domestic violence, we can promptly obtain a restraining order from a court nearby. If we are wrongfully arrested and charged with a crime, we take comfort in the fact that our constitution provides us the rights to counsel and a speedy trial, and we look forward to our day in court to vindicate ourselves. If we want to validate our rights to speak and worship freely, bear arms, or contribute vast sums to the political contender of our choice, we expect our claims to be heard promptly and fairly in a convenient courthouse.

The judiciary is the indispensable third branch of our democratic government, the one that peacefully resolves our disputes and most vigorously guarantees our liberty. Well-functioning courts are integral to our democracy. Our expectation that we can resolve

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our legal rights in a court of law is so ingrained in our culture that we never give a second thought to the prospect that we might not be able to do so.

But many years of tight and frequently declining funding have exacted a substantial toll on the capacity of our courts to function as they should. In 2003, the Conference of State Court Administrators described state courts as facing "the worst fiscal crisis in many decades."[2] Of course, the crisis intensified when state budgets were decimated in the wake of the Great Recession. The heavens may not have fallen, but justice has suffered serious blows from the budget ax.

Except in rare and extraordinary circumstances, only federal courts – especially the U.S. Supreme Court – grab the media's attention. This is hardly surprising: federal court rulings frequently have nationwide consequences. But it is the state courts that we count on to resolve the vast majority of our legal disputes, to ensure justice day-to-day. State courts hear more than 95 percent of all court cases filed in the United States. During 2011, about 370,000 civil cases were filed in federal courts. By comparison, California, Florida, Maryland, New York, and Virginia each had one million or more new civil cases filed in 2011.[3] Total cases filed in our nations' state courts grew from just under 90 million in 1995 to more than 108 million in 2008.[4]

Until the budget sequestration hit the courts in 2013, federal funding for the judiciary had generally increased to match its caseload, as had the number of federal court personnel. Even during the Great Recession, federal court funding held relatively steady at about $7 billion a year (two-tenths of 1 percent of the total federal budget).[5] But in 2013, the federal spending sequestration legislation cut $350 million from federal court budgets, producing furloughs and layoffs of court personnel and causing reductions in drug testing, mental health services, probation services, court security services, and background checks, as well as periodic closures of the courts that delayed their ability to resolve cases.[6] Even so, the federal courts have fared much better than state courts, which in recent years have had their budgets sharply reduced.

In 2010, more than forty states cut their courts' funding. In most states, courts received 10 to 15 percent less funding in the years 2008 through 2011 than they did in 2007. These cumulative budget cuts have taken a harsh toll on state courts' ability to function properly: more than forty states froze salaries; more than thirty laid off or furloughed judicial staff and stopped filling clerk vacancies; nearly thirty increased their case backlogs; and more than twenty reduced court operating hours and increased filing fees and fines.[7] Michigan cut forty-nine judgeships, New York laid off five hundred employees, Alabama closed its state courts on Fridays, and New Hampshire essentially suspended civil jury trials.[8]

Delays are ubiquitous. In much of Minnesota, for example, it now takes more than a year for a misdemeanor case to be set for trial. Criminal cases in Georgia routinely take more than a year to resolve, while civil trials there have been suspended indefinitely. Personal injury cases in New Hampshire are commonly delayed two to three years.[9] Steve White, presiding judge of the Sacramento County Superior Court, told *The New York Times* that, due to reduced staff, people commonly wait five to six hours to see a clerk, and residents frequently wait a full day for help in family courts, only to leave without having seen anyone. Simultaneously, unemployment and the threat (or the reality) of foreclosures and bankruptcy have increased family stress, making this economic downturn an especially bad time for courts to be unable to promptly resolve legal issues related to debtor-creditor relations, domestic rela-

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tions, and parenting-time disputes. Criminal defendants have a constitutional right to a "speedy" trial, and domestic violence and parental misconduct cases require immediate judicial attention, so other civil litigation goes to the back of the line. If a state civil case filed in 2007 took one and a half years to be resolved, the same case filed in 2013 would require nearly four and a half years. In Los Angeles, the average case disposition time increased from just under two years to four and a half years in 2012.[10] Accounts of dysfunction in the state courts could fill this volume. If justice delayed is, in fact, justice denied, injustice abounds.

The National Center for State Courts (NCSC), the American Bar Association (ABA), and many state courts and bar associations have well documented the deleterious consequences of the declines in state court budgets. The NCSC and ABA have both conducted and funded excellent reports on the effects of inadequate funding of state judiciaries and have advanced several proposals to address the problems they uncovered.[11] The NCSC concluded that due to decreased state budgets for the judiciary, "the public's access to justice is being jeopardized."[12] Both organizations have published numerous calls for greater efforts by judicial officials and their allies to obtain adequate funding from state legislatures.

David Boies and Ted Olson – the famous adversaries in *Bush v. Gore* (2000) who subsequently joined forces to contest California's ban on gay marriage – teamed up again (far from the national spotlight) to cochair the ABA's Task Force on Preservation of the Justice System. At the ABA's annual meeting in August 2011, Boies and Olson received the association's highest honor for their leadership of this task force, which, after conducting numerous factfinding hearings around the country, concluded that "the courts of our country are in crisis" due to the "failure of state and local legislatures to provide adequate funding."[13] In 2011, the task force obtained unanimous approval for ABA House of Delegates Resolution 302, which urges state and local bar associations "to document the impact of funding cuts to the justice systems in their jurisdictions, to publicize the effects of those cutbacks, and to create coalitions to address and respond to the ramifications of funding shortages to their justice systems."[14]

No one now denies that the funding problems of state courts are causing serious harm. The adverse consequences have spread far beyond litigants and court personnel. The ABA Task Force Report documented detrimental effects on public safety, ranging from increased travel and delays for police officers waiting to testify at criminal trials to releases of criminal defendants when their speedy trial clocks run out. Cutbacks in courthouse security personnel have increased the risks inside courthouses. Delays in domestic violence cases can have tragic consequences.

State court funding reductions are also costly to the regional economy. Economic losses include not only the direct effects of state employment reductions and lower revenues for the adjacent legal community, but also decreased investment, since funds are held in reserve for longer pending resolution of legal disputes.[15] When uncertainty rises regarding the likelihood of efficacious judicial enforcement of property and contract rights, investment financing becomes more difficult to obtain, economic risks increase, and economically beneficial transactions simply may not occur. Writing in the *Journal of Public Economics*, economist Matthieu Chemin concluded that "[f]inding ways to speed up judiciaries is . . . fundamental to economic growth."[16] One microeconomic study estimated that in 2012, cutbacks in state judiciary funding would eventually "result in estimated losses of $53.3 billion from increased un-

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certainty on the part of litigants," not including "losses from declines in employment at state judiciaries, law firms and the resulting declines in economic output . . . resulting from the funding cutbacks."[17]

The ongoing shrinkage of state court resources also encourages those who can afford it to seek alternatives to courts for resolving disputes. Increasing use of arbitration, mediation, and "private" judges raises complex and cross-cutting issues well beyond the scope of this essay. It suffices here to observe that, advantages to litigants notwithstanding, the emergence and evolution of a two-tier system of justice poses substantial risks for state judicial systems. If complex business cases and other controversies among those who can afford private adjudication flee the judicial system, leaving state courts to resolve cases principally involving criminal defendants and the poor and powerless, it will become increasingly difficult to attract and retain high-quality state court judges (and other personnel). In turn, the temptation for state legislatures to further decrease state court funding will grow. As U.S. District Court Judge Jack Weinstein has observed, "This would create a situation analogous to what has happened to public education in some of our central cities because of the middle class exodus to private schools and the suburbs."[18]

In 1970, Warren Burger, then the Chief Justice of the United States, told the American Bar Association:

> A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe that the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.[19]

These threats to our system of justice are now being posed a generation later by the inadequate funding of state courts.

The facts of diminished funding of state courts are indisputable. The harmful consequences of funding cutbacks have been well-documented and are now clear. The question of how to redress this situation, however, remains.

State courts obviously must improve their efficiency and enhance their cost-effectiveness. Approximately 95 percent of annual state court costs are for personnel, which means that the diminished funding has left vacancies unfilled and has produced furloughs and firings. It also implies that too little is being spent on technology. In some cases, funding reductions have produced efforts to "re-engineer" state courts, reorganizing them in order to curtail duplicative costs (perhaps most notable among these efforts is the consolidation of trial courts in California). The push for cost savings has also stimulated more electronic payment, document management, and filings of court documents; video conferencing in rural areas; forms downloadable from the web; and online answers to questions – in short, a general increase in the online accessibility of court services. Procedures and forms for straightforward cases, like uncontested divorces and small claims, have been greatly simplified in some states. So, the funding reductions have stimulated some improvements in the courts, prompting them to enhance and streamline services in order to better serve the public. Such enhancements should continue to be implemented and spread to other states.

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But on a less positive note, many state courts have responded to cuts by endeavoring to increase their self-funding, principally by raising filing and other fees, but also by raising fines. In Washington, the imposition of new surcharges and increased fees spurred the state Supreme Court in 2013 to reaffirm indigent litigants' rights to waiver of all fees.[20] To be sure, although increases in fees may deter low- and middle-income litigants from seeking relief, they may be necessary in some cases. But on the other hand, raising fines to fund court functions is never apt: it conflicts with the impartiality in setting punishments that we expect and deserve from the judiciary.

Historically, state and local judicial functions were largely conducted by judges elected and funded locally. But the court reform movement of the mid-twentieth century changed that, and state courts are now typically unified, and in most states are under the administrative control of the state Supreme Court and at least partly funded by the state.[21] This unification, along with political pressure to limit property taxes (the prime source of local funds), and a striving for greater stability and uniformity of funding statewide, has provided an impetus to shift funding of state courts to state rather than local budgets. Today, although there are variations among the states, the vast bulk of state court funds are supplied through state budgets.[22] These budgets are determined (usually annually) by state legislators. Funds allocated to the judiciary are generally 1 to 2 percent of state budgets, although in a few states they range as high as 3 or 4 percent.

There is a surprising consistency in the recommendations for redressing the state court funding crisis and avoiding similar deficits in the future. The recommendations of the ABA Task Force in their report "Crisis in the Courts," which were endorsed unanimously by the ABA House of Delegates, are typical. Echoing the findings of virtually all such analyses, the Task Force first urges achieving operating efficiencies in the courts. The task force report also urges state and local bar associations to: 1) "document the impact of funding cutbacks to the justice systems in their jurisdictions"; 2) "publicize the effects of those cutbacks"; and 3) "create coalitions to address and respond to the ramifications of funding shortages to their justice systems." The ABA also recommends that state and local governments "develop principles that would provide for stable and predictable levels of funding." Furthermore, it urges both the courts and bar associations to better communicate with and educate public officials and the public about the "value of adequately funding the justice system."[23] The NCSC has endorsed a similar strategy, calling for more engagement with the legislatures by state chief justices, "regular meetings" between the judiciary and legislative bodies, and "strong alliances" between state and local bar associations and other constituents.[24] State bar associations and other independent analysts have advanced similar recommendations.

Mustering any confidence in the potential success of such strategies, however, is difficult, not least because of a lack of public concern. As Paul De Muniz, the former Chief Justice of the Oregon Supreme Court, observed in a report for the NCSC: "The court funding crisis is 'not being talked about around the dinner tables of America.'"[25] Putting aside the fact that the American public rarely gathers around dinner tables anymore, such calls for greater public engagement as a response to inadequate state court funding of state judicial systems face serious obstacles. First, only 13 percent of the public has a "great deal of confidence" in state courts (although by this metric, they fare twice as well as state legislatures and four times better than Congress).[26] Moreover, state court funding is not a salient issue with the American peo-

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ple, who are dealing with far more immediate concerns. When Americans are asked about needs for greater state funding, public schools, roads and bridges, health insurance, public transportation, and the police all enjoy at least twice as much public support as state courts.[27] At most, the public will give media articles about acute judicial funding shortages and their consequences a brief glance. Public contact with state courts is episodic, and (in family, probate, or traffic courts, for example) can often be disappointing or even distressing. Endeavoring to engage the public in creating an effective ongoing political coalition to convince state legislatures to provide "adequate, stable, and predictable" judiciary funding is a distracting delusion.

Only fundamental institutional change has the potential to protect the judiciary from the vagaries of annual state legislative budgeting. But despite all the time, energy, and ink devoted to the crisis in funding state judiciaries – including widespread complaints about the threats funding shortages pose to the constitutional independence of the judiciary and the separation of powers, as well as a few instances where funding cutbacks have served as "payback" for judicial decisions key legislators disliked – new institutional arrangements have not been advanced. To be sure, achieving successful institutional change is easier said than done.

What new institutional arrangements would significantly enhance protections for stable judiciary funding? First, a multiyear perspective seems necessary. This suggests that a state "trust fund" might be a viable solution. Trust funds, which typically earmark a specific source of revenue for a particular spending purpose, are widely used by the federal and state governments. At the federal level, the trust funds directing payroll taxes to Social Security and Medicare and the trust fund allocating gasoline and diesel fuel taxes to fund highways are the best known, but the United States Code lists ninety-one trust funds, including, for example, funds for the Philippines, the Library of Congress, Puerto Rico, and certain veterans' benefits.[28] The states also maintain trust funds for a large variety of purposes: Wyoming has a trust fund for wildlife and natural resource conservation; Wisconsin and several other states use them for prevention of child abuse and neglect; and California and many other states employ them to pay for affordable housing, to name just a few examples. Many states have created trust funds for spending the proceeds of their settlements with tobacco companies, and all the states maintain trust funds for unemployment insurance.

As political scientist Eric Patashnik has reported, trust funds – while frequently neither legally binding on the legislature nor necessarily economically significant – have been quite successful in producing politically stable long-term funding commitments.[29] A state trust fund with earmarked revenues devoted to funding the state's judicial branch would provide state judiciaries with much more stable and predictable funding over time. Trust fund financing would also help insulate the judicial branch from funding cuts from state legislators who may disapprove of specific court decisions. A state trust fund would also serve to fortify the judiciary's independence from the executive and legislative branches' political pressures, thereby strengthening the separation of powers mandated in state constitutions.

Calling for trust fund financing for the judiciary raises two additional questions: 1) from what revenue sources will the trust funds come; and 2) who will determine the level and timing of withdrawals? The second question is considerably easier to answer than the first. Allowing the judicial branch itself to manage withdrawals would have the salutary effect of freeing the ju-

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diciary from detailed legislative directives about how its budget must be spent. It would also discourage "pork-barrel" legislative politics and executive line-item vetoes. This kind of judicial budgetary independence would also better position legislatures to hold the judicial branch responsible for serving the public interest. Spending flexibility and control should be granted to the judicial branch on the condition that it achieve efficiency and economy in the adjudication process. The judicial branch would thus benefit from its own successes but also bear the costs of its failures.

Given the wide variations in public finance among the states, determining the revenue sources for the trust funds is considerably more difficult. These variations include not only differences in the sources and levels of state funds and the share of each state's budget dedicated to financing the judiciary, but also interstate disparities in the proportion and levels of state versus local financing of the courts. As a general observation, two criteria emerge: 1) the funding source should be adequate; and 2) the revenue should come from a source that will not be dramatically affected by changes in the state's economic well-being. For most states, dedicating a portion of state sales tax revenues equal to 1 to 2 percent of overall state expenditures to a state court trust fund would satisfy both criteria.[30] Court filing and other fees should also go into the trust fund. (Court fines, however, should be directed to general revenues because of the potential for conflicts of interest and risk of undermining the public's confidence in judicial integrity.) This combination of revenues should provide an adequate and relatively stable and predictable source of funds for courts in most states.

The political difficulties of convincing state legislatures to create such trust funds for funding their judiciaries loom large. If the endeavor to secure annual funding is any indication, creating a coalition that can persuade state legislatures is an immense challenge. But if successful, such efforts would not need to be repeated annually. Creating a trust fund for state court finances would be a far more fruitful avenue than relying on successful public education and annual coalition-building, which have up to this point been at the forefront of efforts to address the crises caused by inadequate state court funding. The deleterious effects of recent shortfalls in state court funding may have opened up new opportunities for fundamental institutional change. The courts and their allies should endeavor to take advantage of such opportunities wherever they exist.

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ENDNOTES

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1 Frequently quoted Latin maxim popularized by (and often attributed to) Lord Mansfield in *Rex v. Wilkes* (1768). See Fred Shapiro, *The Yale Book of Quotations* (New Haven, Conn.: Yale University Press 2006), 489. This quotation was used, for example, by Jonathan Lippman, Chief Judge of New York, in his report "The State of the Judiciary 2013," available at http://www.nycourts.gov/ctapps/soj.htm.

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3 John J. Broderick and Lawrence Friedman, "Courts and Public Justice: New Changes, New Choices," *Kentucky Law Journal* 100 (2011–2012): 848.

4 Nate Pearsall, Bo Shippen, and Roy Weinstein, "Economic Impact of Reduced Judiciary Funding and Resulting Delays in State Civil Litigation," Micronomics, March 2012, p. 11, http://www.micronomics.com/articles/Economic_Impact_of_Reduced_Judiciary_Funding_and_Resulting_Delays_in_State_Civil_Litigations.pdf.

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7 Pearsall, Shippen, and Weinstein, "Economic Impact of Reduced Judiciary Funding," 4.

8 Ibid., 3–8.

9 American Bar Association, "Report on Resolution 302," August 8–9, 2011, http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_302.authcheckdam.pdf; and Greg A. Rowe, "Keeping Courts Funded: Recommendations on How Courts Can Avoid the Budget Ax," http://www.sji.gov/PDF/Keeping_Courts_Funded.pdf. Numerous reports by or on behalf of state courts and state bar associations, along with several newspaper articles, document the harmful effects of funding reductions for various states.

10 Pearsall, Shippen, and Weinstein, "Economic Impact of Reduced Judiciary Funding," 15.

11 American Bar Association, "Report on Resolution 302"; and Justice at Stake and National Center for State Courts, *Funding Justice: Strategies and Messages for Restoring Court Funding*, http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/Analysis_Strategy/Funding-Justice.aspx. See also, for example, New York State Bar Association, "Report of the Executive Committee on the Impact of Recent Budget Cuts in New York State Court Funding," January 2012, http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=62096&Template=/CM/ContentDisplay.cfm.

12 American Bar Association, "Report on Resolution 302"; National Center for State Courts, "State Budget Cuts Threaten Public's Access to Courts," November 29, 2011, http://www.ncsc.org/Newsroom/Backgrounder/2011/Court-Budget-Cuts.aspx.

13 American Bar Association, "Report on Resolution 302," 1; and Justice at Stake and National Center for State Courts, *Funding Justice*.

14 American Bar Association, "Report on Resolution 302."

15 See Pearsall, Shippen, and Weinstein, "Economic Impact of Reduced Judiciary Funding," 15.

16 Matthieu Chemin, "The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan's Access to Justice Programme," *Journal of Public Economics* 93 (2009): 114–125.

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19 Warren E. Burger, "Remarks of Warren E. Burger to the American Bar Association," St. Louis, Missouri, August 10, 1970.

20 *Jafar v. Webb*, 303 P.3d 1042 (Wash. 2013).

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22 National Center for State Courts, Fiscal Year 2013 COSCA Budget Survey Analysis, January 2013, http://www.ncsc.org/information-and-resources/budget-resource-center/~/media/files/pdf/

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[23] American Bar Association, "Report on Resolution 302."

[24] Justice at Stake and National Center for State Courts, *Funding Justice*. See also Rowe, "Keeping Courts Funded"; and Paul De Muniz, "Maintaining Institutional Independence: Funding Sustainable State Courts During Economic Crisis," http://www.ncsc.org/Services-and-Experts/Court-leadership/Harvard-Executive-Session/~/media/Files/PDF/Services%20and%20Experts/Harvard%20Executive%20Session/Maintaining-Judicial-Indepdence.ashx.

[25] Ibid. De Muniz is here quoting former Chief Justice of the New Hampshire Supreme Court John T. Broderick, Jr.

[26] Justice at Stake and National Center for State Courts, *Funding Justice*, 3. "Great deal of confidence" ratings were 13 percent for state courts, 6 percent for state legislatures, and 3 percent for Congress.

[27] Ibid., 4. Seventeen percent supported funding increases for state courts, compared to 66 percent for public schools, 52 percent for roads and bridges, 49 percent for health insurance, 43 percent for public transportation, and 43 percent for police.

[28] United States Code, Title 31 (Money and Finance), sec. 1321.

[29] Eric M. Patashnik, *Putting Trust in the U.S. Budget: Federal Trust Funds and the Politics of Commitment* (Cambridge: Cambridge University Press, 2000). An empirical analysis of state earmarked taxes in the period 1997–2005 by Susannah Camic Tahk confirms the effectiveness of such arrangements. Susannah Camic Tahk, "Public Choice Theory and Earmarked Taxes," University of Wisconsin Legal Studies Research Paper, March 17, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311372.

[30] Corporate and personal income tax revenues fluctuate more with economic conditions than does sales tax revenue.

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