# THE BILL FOR RIGHTS: STATE AND LOCAL FINANCING OF PUBLIC EDUCATION AND INDIGENT DEFENSE

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## I.
## INTRODUCTION

For decades, activists in the seemingly unrelated fields of public education

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and indigent defense have waged the same battle: they have tried to shift the financing of these public services from local entities to states. They have cited a wide range of reasons for doing so, from the vagaries of local politics to fundamental fairness.[1] They have argued on behalf of residents of the biggest cities and the most remote hamlets.[2] They have used litigation and they have used legislation.[3] One approach these advocates have rarely tried, however, is talking to one another.[4] As reform efforts in one area or the other have succeeded or failed in various states over the years, advocates have missed valuable opportunities to capitalize on each other's experiences.

This article aims to help begin such a dialogue. Consider a school finance system like that challenged in Michigan in the early 1970s,[5] in which one school district could raise $10,125 per student per year while another could levy the same tax rate and raise just $54.13.[6] Even if, as some studies suggest, district expenditures are not directly related to such "result" measures as test scores,[7] it

1. *See, e.g.*, Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 372–82 (1987) (arguing that some locally based school finance systems create unconstitutional discrimination); Noreen O'Grady, *Toward a Thorough and Efficient Education: Resurrecting the Pennsylvania Education Clause*, 67 TEMP. L. REV. 613, 661 (1994) (arguing that states should finance education in part because "school budgets are often subject to direct voter approval, making these budgets . . . vulnerable" to cuts); Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1, 42 (1999) (advocating state financing of indigent defense in part to reduce disparities among localities); Alissa Pollitz Worden & Robert E. Worden, *Local Politics and the Provision of Indigent Defense Counsel*, 11 L. & POL'Y 401, 415 (1989) (studying indigent defense financing in Georgia and concluding, in part, that "the provision of indigent defense is influenced by the political resources of interested parties").

2. *See, e.g.*, Games v. State, 684 N.E.2d 466, 478–81 (Ind. 1997), *modified on other grounds*, 690 N.E.2d 211 (Ind. 1997) (challenge to indigent defense financing in urban county); Skeen v. State, 505 N.W.2d 299, 301–02 (Minn. 1993) (challenge to school finance system brought by rural districts); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 362 (N.Y. 1982) (challenge to school finance system by four largest cities in New York); Richard Klein & Robert Spangenberg, THE INDIGENT DEFENSE CRISIS 25 (American Bar Association 1993) ("Justice often does not reach impoverished urban centers or poor rural counties where limited funding for indigent defense cannot provide effective representation to those accused of crimes.").

3. *See, e.g.*, 2002 Md. Laws 288 (school finance legislation); 1971 Md. Laws 209 (codified at MD. ANN. CODE art. 27A, § 1 (1997)) (indigent defense finance legislation); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (school finance litigation); Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn. 1996) (indigent defense finance litigation).

4. For exceptions, see *infra* text accompanying notes 27–29, 68–72, 435–437. *See also* Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2066 (2000) (including school finance litigation in a list of structural reform movements that indigent defense advocates should emulate); Worden & Worden, *supra* note 1, at 414, 421 n.24 (noting that equal protection arguments based on disparate financing across jurisdictions have been raised in both indigent defense and public education contexts).

5. *See infra* text accompanying notes 112–168.

6. Milliken v. Green, 203 N.W.2d 457, 463 (Mich. 1972) (*Milliken I*), *vacated*, 212 N.W.2d 711 (Mich. 1973) (*Milliken II*). For other examples of interdistrict financing disparities, see David M. Engstrom, *Civil Rights Paradox? Lawyers and Educational Equity*, 10 J.L. & POL'Y 387, 388 n.6 (2002).

7. *See, e.g.*, Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28

strains credulity to claim that disparities like these do not affect the quality of the education children receive. Basing indigent defense on local revenues leads to similar problems. Such systems, poorly financed, can cause their direct users—students and criminal defendants—great harm. Moreover, education and indigent defense are services that benefit the broader community. It is not in any school district's or county's interest to allow its neighbor's children to go unschooled or its defendants to go uncounseled; all localities would benefit from financing at the state level, where high tax revenues from one region can compensate for low tax revenues from another. Economic disparities are not the only reason to favor state financing; local politics present a significant threat to funding, especially in the case of indigent defense. Forcing local voters to choose between financing criminal defense counsel or the town fire department will lead to the same result every time. This problem exists for school financing as well: many small towns are home to retirees on fixed incomes who frequently oppose young parents with children in the schools in debates over tax rates.[8] A full examination of whether state financing necessarily produces better results than local financing in each field is beyond the scope of this discussion. Such an examination would likely take the form of two separate studies, if for no other reason than that "better results" in public education and indigent defense would need to be defined in different—and not directly comparable—ways.[9] Nonetheless, these are powerful reasons to support greater state support of both public education and indigent defense.

What follows is, primarily, a close examination of two states: Michigan, which has largely taken over school financing but left indigent defense to the counties, and Maryland, which has long paid for indigent defense but—until a recent possible breakthrough—has left school finance to individual school districts. Their stories reveal that reformers in these fields can in fact learn from each other. Advocates for indigent defendants can benefit from a litigation strategy that has sometimes succeeded in the schools, while school reformers should consider emulating the effective legislative tactics of their counterparts in the criminal bar.

The most recent available statistics on state and local financing in school finance and indigent defense point to Michigan and Maryland as informative case studies. During the 2000–01 school year, local sources—usually property taxes imposed by school districts—accounted for anywhere from 15% (in New

HARV. J. ON LEGIS. 423, 437–38 (1991) (collecting studies and concluding that there is "no strong or systematic relationship between school expenditures and student performance").

8. *See, e.g.*, Louisa Handle, *Town Votes Tonight on Contested Budget*, PROVIDENCE J., May 7, 2003, at C3 (citing local official opposed to increase in education budget because of fear of "overtaxing the elderly on fixed incomes").

9. *See generally, e.g.*, ANALYTIC ISSUES IN THE ASSESSMENT OF STUDENT ACHIEVEMENT (David W. Grissmer & J. Michael Ross eds., 2000); George F. Cole, *Performance Measures for the Trial Courts, Prosecution, and Public Defense, in* PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 86–107 (1993).

Mexico) to 66% (in Nevada) of school financing in the various states.[10] Most states, thirty-three, relied on local sources for between one-quarter and one-half of education financing. In fiscal year 2002, states ranged from complete reliance on local funding sources for indigent defense (two states) to complete reliance on state sources (twenty-two states).[11] Most of the remaining states rely heavily on local sources.

Combining these statistics reveals two groups of states that take dramatically different approaches to financing schools and financing indigent defense. These states provide the most fertile ground for communication between reformers in the two fields. Six states could be characterized, roughly, as having state-financed schools and locally financed indigent defense.[12] Michigan is the most extreme of these, relying on local sources for only 28.32% of its education funding and for 100% of its indigent defense funding at the trial level.[13] Eight states do the opposite: they have locally financed schools and state-financed indigent defense. Maryland is the extreme example, with local sources accounting for 56.59% of its education financing and none of its indigent defense financing.[14]

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10. All statistics that appear in this article ignore the anomalous case of Hawaii. Hawaii historically has had extremely weak local government; it has four counties but no independent cities or towns. In 2000–01 the state's schools relied on local sources for just 1.79% of their financing.

The school finance statistics cited throughout this article are derived from the Common Core of Data collected by the Department of Education, *available at* http://nces.ed.gov/ccd/bat/. The site allows users to create a table listing, for each state, total school revenues and revenues from local sources for the 2000–01 school year. I divided the local revenues by the total revenues to arrive at the percentages of school financing derived from local sources cited here.

11. The indigent defense financing statistics cited throughout this article appear at SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2002 app.2 (Sept. 2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf.

12. Using the available statistics to make such categorizations involves inherently arbitrary determinations of what constitutes "roughly state-financed" and "roughly locally financed." In light of the distribution of states along the spectrum from fully state-financed to fully locally financed in each field, I have decided to call school systems "state-financed" when they are less than 50% locally financed and "locally financed" when they are more than 50% locally financed. (I have disregarded federal aid to education, which is very limited.) I call indigent defense systems "state-financed" when they are more than 90% state-financed and "locally financed" when they are more than 90% locally financed. As a result of these decisions, readers should be aware that references to state- and locally financed indigent defense systems are more literally accurate than references to state- and locally financed school systems. I believe the latter characterizations are fair in the context of the current spectrum of school financing systems, while recognizing that no school system is as dependent as almost all indigent defense systems on either state or local financing alone.

13. The State of Michigan provides some funding for indigent defense at the appellate level. SPANGENBERG GROUP, *supra* note 11, at 15. The other states with state-financed schools and locally financed indigent defense are, in order of decreasing reliance on local money for schools, Texas, Arizona, Utah, California, and Washington.

14. The other states, in order of decreasing reliance on local money for schools, are Connecticut, Missouri, New Jersey, Colorado, Virginia, Rhode Island, and Massachusetts.

Certain states finance both services in a similar manner. Three states finance both public schools and indigent defense essentially with local revenues, and fourteen finance both services essentially with state revenues. I have included brief sketches of the most extreme state in each category—Nevada and New Mexico, respectively—to round out the discussion.[15]

These comparisons are not meant to suggest that public schools and indigent defense, in particular among all public services, should be financed the same way. There may be reasons to finance them differently. They serve, at least directly, different populations; the types of costs they face are very different; and the financing of indigent defense may be tied to financing of prosecutors or courts, factors that of course do not affect financing of public schools. More importantly, the relevant local unit is not always the same in both fields: indigent defense is traditionally a county responsibility, while schools are based in school districts, which may or may not follow county borders. Despite these differences, observers in both fields advocate state financing for many of the same reasons, most notably the inequities that result from reliance on local property taxes when different localities within the same state have widely varying tax bases.[16] Comparing how individual states finance the two services is not to argue that governments should treat them the same way; it is to suggest that reformers in each field should consider whether their counterparts in the other have something to teach them. This article contends that they do.

The article proceeds in several parts. Part II describes the seminal events at the national level—mostly Supreme Court decisions—that influenced developments in the states in both school finance and indigent defense. The detailed history appears in Parts III through VI, describing, first, the history of school finance and indigent defense in Michigan, and then their very different histories in Maryland. Parts VII through X trace, in more summary fashion, the stories of funding of education and criminal defense for the poor in Nevada and New Mexico. Finally, Part XI explores the lessons to be learned from this history.

## II.
## NATIONAL CURRENTS

A review of the most important national developments in each field provides a useful background to the histories of each state. In school finance, one Supreme Court decision proved crucial. In indigent defense, a series of

15. The other states in which both schools and indigent defense are locally financed are, again in order of decreasing reliance on local money for schools, Nebraska and Pennsylvania. The other states in which both services are state financed are, in order of decreasing reliance on local money for schools, Maine, North Dakota, New Hampshire, Wisconsin, Oregon, Minnesota, Arkansas, Alabama, West Virginia, Alaska, North Carolina, Delaware, and Vermont.

16. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 11–13 (1973); Rigg, *supra* note 1, at 42.

decisions over the course of a decade, along with a pair of reports examining the provision of counsel to the poor, colored events at the state level.

In *San Antonio Independent School District v. Rodriguez*, parents brought a class-action suit on behalf of their poor and minority schoolchildren throughout Texas who lived in school districts with low property-tax bases, claiming that the Texas school finance system violated the Equal Protection Clause of the Fourteenth Amendment.[17] In its analysis, the Supreme Court used statistics primarily from 1970–71,[18] a year in which local taxes accounted for 41.1% of public school funds across Texas.[19] Disparities in taxing power were wide. The least affluent district in the San Antonio area levied a tax of $1.05 per $100 of assessed property and produced just $26 per student.[20] The most affluent district in the area levied a tax of $0.85 per $100 of valuation and produced $333 per student.[21] Every Texas school district levied taxes for education beyond the minimum required under state law.[22]

Texas conceded that its financing system could not survive strict scrutiny, so *Rodriguez* focused on whether the facts involved a suspect class and whether education was a fundamental right, either of which, if answered in the affirmative, would have trigged strict scrutiny and meant victory for the plaintiffs challenging the school finance system.[23] First, the Court considered whether the alleged wealth discrimination involved a suspect class.[24] Texas's financing system, the Court reasoned, might theoretically discriminate against any of three groups: (1) the poor in an absolute sense, that is, those whose incomes fell below a particular level; (2) the poor in a relative sense; or (3) all residents of poor school districts, regardless of their individual income.[25] The Court characterized its previous wealth discrimination cases as involving classes of individuals who "were completely unable to pay for some desired benefit," and, therefore, were absolutely deprived "of a meaningful opportunity to enjoy that benefit."[26] Among several examples of such cases, the Court cited *Douglas v. California*, which held that criminal defendants were entitled to appointed counsel for direct appeals as of right.[27] The Court's brief discussion of *Douglas* is one of the few times that the school finance debate has referred to indigent defense financing. *Douglas*, the *Rodriguez* Court noted, granted appointed

17. 411 U.S. at 4–5.

18. *Id.* at 9 n.21.

19. *Id.*

20. *Id.* at 12. This figure, unlike most others cited in *Rodriguez*, was based on the 1967–68 school year. *Id.*

21. *Id.* at 13. Again, this figure was based on the 1967–68 school year. *Id.*

22. *Id.* at 10–11.

23. *Id.* at 16–17.

24. *Id.* at 18–29.

25. *Id.* at 19–20.

26. *Id.* at 20.

27. *Id.* at 21 (citing Douglas v. California, 372 U.S. 353 (1963)).

counsel only to defendants who could afford no counsel at all; it did not grant appointed counsel to defendants for whom hiring counsel was merely difficult but not impossible, nor did it address differences between more and less expensive counsel.[28] The Court concluded that school financing in Texas did not completely deny anyone an education or discriminate against any identifiable class of "poor" individuals; thus, the first potential form of discrimination the Court reviewed did not operate against a suspect class.[29] The Court next concluded that the evidence did not demonstrate discrimination against the "relative" poor because, in all districts other than the richest and the poorest few, money spent on education actually increased as family income declined.[30] Considering the third possible form of discrimination, against all residents of poor districts, the Court first noted that the principle did not lend itself to an obvious definition of "poor," and might therefore include residents of all districts except the wealthiest one.[31] The Court dismissed other standards of "poor," such as districts with property valuation below the state average or median, as "artificially defined."[32] The Court described the class that would result from any of these definitions as "large, diverse, and amorphous."[33] Finally, the Court noted that the class would not be similar to those recognized in the past: it did not have sufficient "disabilities, . . . history of purposeful unequal treatment, or . . . political powerlessness" to justify the "extraordinary protection from the majoritarian process" conferred by characterization as a suspect class.[34] For these reasons, the Court concluded that the third potential form of discrimination did not implicate a suspect class.[35]

Having eliminated all three possible claims that the school finance system disadvantaged a suspect class, the Court next considered whether education is a fundamental right.[36] The Court characterized fundamental rights as those protected, either implicitly or explicitly, by the Constitution.[37] The Court held that education was not such a right.[38] The Court rejected plaintiffs' arguments that education was a corollary right, necessary to the effective exercise of First Amendment rights and the right to vote.[39] The Court noted that such logic

28. *Id.* *Douglas* is thus one of the reasons for the maxim that the most unfortunate criminal defendant is the one with just enough money to hire a bad lawyer.

29. *Id.* at 22–25.

30. *Id.* at 25–27.

31. *Id.* at 27–28.

32. *Id.* at 28.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 29–37.

37. *Id.* at 33–34.

38. *Id.* at 35.

39. *Id.* at 35–37.

would also suggest a right to "decent food and shelter."[40] Because the Texas system did not implicate a suspect class or a fundamental right, it would be subject only to rational basis review.[41]

The Supreme Court held that the Texas system rationally furthered a legitimate state interest that it termed "local participation."[42] Local financing, in the Court's view, was necessary to maintain local control over the substance of education.[43] The Court invoked Justice Brandeis's description of the federal system as creating a laboratory in each state to reason that local control of education would lead to innovation.[44] Acknowledging the plaintiffs' argument that inequities in financing in fact barred exactly that innovation in poor districts, the Court reasoned that "some inequality" in the rational pursuit of a legitimate objective did not violate the Equal Protection Clause,[45] and noted that Texas had tried to reduce the disparities among districts.[46] The Court therefore held the Texas system—and, by extension, public education supported by local taxation—constitutional.[47]

The Court made clear that *Rodriguez* was not merely a dispute between one student—or even a discrete class of students—and one school district. The Court noted repeatedly that Texas's school finance system was no different from that of most other states, and suggested—sometimes explicitly—that if Texas's system was unconstitutional, so were many other states' systems throughout the country.[48] The Court also observed that if local taxation to support education were unconstitutional, so might be local taxation to support "local police and fire protection, public health and hospitals, and public utility facilities of various kinds."[49] Despite the Court's citation of *Douglas v. California* and indigent defense elsewhere in the opinion,[50] the Court did not mention the issue in this passage. The Court declared that it had never "nullif[ied]" a state's system of financing public services simply because citizens benefited from that system unevenly based on the wealth of their political subdivisions.[51]

The first and most significant Supreme Court case in the field of indigent defense was *Gideon v. Wainwright*, the 1963 decision in which the Court established a federal constitutional right to appointed trial counsel for indigent

40. *Id.* at 37.
41. *Id.* at 40.
42. *Id.* at 55.
43. *Id.* at 49–50, 51–53.
44. *Id.* at 50 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting)).
45. *Id.* at 50–51 (quoting McGowan v. Maryland, 366 U.S. 420, 425–26 (1961)).
46. *Id.* at 55.
47. *Id.* at 54–55.
48. *Id.* at 17, 44, 46 n.101, 47–48, 55, 56.
49. *Id.* at 54.
50. *Id.* at 21, 24 n.57
51. *Id.* at 54.

felony defendants in state court.[52] The same day the Court issued *Gideon*, it declared in *Douglas v. California* that indigent defendants had a right to appointed counsel to pursue appeals to which they were entitled.[53] Over the next seven years, the Court extended the right to appointed counsel to suspects who have become the subject of focused police investigation,[54] alleged juvenile delinquents subject to commitment,[55] convicts who violate the terms of their probation and are brought before a court for sentencing or revocation,[56] and any defendant at any "critical stage" of a proceeding, meaning any stage that could prejudice the defendant's trial.[57]

In 1971, the year after the last of these decisions, the federal Advisory Commission on Intergovernmental Relations issued a specific endorsement of statewide indigent defense systems financed by states.[58] The commission noted that many other organizations, including the American Bar Association, the National Conference of Commissioners on Uniform State Laws, and the United States Civil Rights Commission, either favored local systems or expressed no preference on the matter.[59] Nonetheless, the commission announced its belief that *Gideon*'s eight-year-old mandate had not been fulfilled largely because states had "left it up to" local governments to respond.[60] The commission argued that local governments had either less money or less political will than states to finance indigent defense counsel.[61] It also argued that direct state management would lead to better services than mere state standards, and even suggested that a state's efforts to enforce standards against local officials would lead to greater tensions between state and local officials than a complete state takeover.[62]

In 1976, the National Legal Aid and Defender Association (NLADA) published extensive guidelines for what it viewed as the proper provision of indigent defense.[63] Among many other points, the guidelines discussed at some length why states should pay for indigent defense.[64] NLADA first noted that federal financing was minimal, covering less than 10% of indigent defense

52. 372 U.S. 335, 338–39, 344 (1963).

53. 372 U.S. 353, 357–58 (1963).

54. Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964).

55. In re Gault, 387 U.S. 1, 41 (1967).

56. Mempa v. Rhay, 389 U.S. 128, 137 (1967).

57. Coleman v. Alabama, 399 U.S. 1, 9–10 (1970).

58. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 52–53 (1971).

59. *Id.* at 52.

60. *Id.*

61. *Id.*

62. *Id.* at 52–53.

63. NAT'L LEGAL AID & DEFENDER ASS'N, NAT'L STUDY COMM'N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976) [hereinafter 1976 NLADA GUIDELINES].

64. *See id.* at 242–58.

costs.[65] It then argued that because most of the criminal justice system enforces state statutes, states rather than localities should bear the cost of that enforcement, including providing counsel to the accused.[66] NLADA also contended that inequities arose because indigent defense was simply too expensive for many local governments to provide, especially because "counties with a low tax base often have a higher incidence of crime. . . . Hence where the need may be the greatest, the financial ability tends to be the least."[67]

In its 1976 report, NLADA also considered whether *Rodriguez* could be used to support a constitutional argument for state financing.[68] After *Gideon*, the criminal defendant's right to counsel, unlike the right to education, is a fundamental right under the federal constitution.[69] Any system that distributes the right to counsel unequally, as does a system in which defendants in wealthy counties receive better services than those in poor counties, should therefore be subject to strict scrutiny. But NLADA concluded that *Rodriguez* might have done more harm than good.[70] The *Rodriguez* Court resisted the equal protection challenge, in part, because the schoolchildren had not been subjected to a total deprivation of their rights;[71] as NLADA noted, the right to counsel is not completely denied to indigent criminal defendants charged in underfunded counties.[72] *Rodriguez* itself had made a similar point with its reference to *Douglas v. California*.[73] NLADA suggested that the then-nascent ineffective assistance of counsel doctrine might be used to overcome this problem if equal protection claimants could argue that underfunding works a complete denial of the right to effective assistance.[74] In Part XI.A, I will explain why this idea, which seemed so promising thirty years ago, does not provide a useful avenue for reform today.[75]

Legal academics watched courtroom battles in these and other areas, such as school desegregation, employment discrimination, and prisoners' rights, and concluded that they represented a new form of legal advocacy, which the scholars termed "public law litigation"[76] or "structural reform."[77] Eschewing the traditional structure of a lawsuit, in which one party contended that it had

65. *Id.* at 243.

66. *Id.* at 247.

67. *Id.* at 247–48 (quoting NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS 265–66 (1973)).

68. *Id.* at 248–49.

69. *Gideon*, 372 U.S. at 344.

70. 1976 NLADA GUIDELINES, *supra* note 63, at 248–49.

71. *Rodriguez*, 411 U.S. at 20–25.

72. 1976 NLADA GUIDELINES, *supra* note 63, at 249.

73. *See supra* text accompanying notes 27–29.

74. 1976 NLADA GUIDELINES, *supra* note 63, at 249.

75. *See infra* text accompanying notes 582–584.

76. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281–84 (1976).

77. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2–5 (1979).

been wronged by another and was due compensation, the plaintiffs in these suits sought wide-ranging, prospective relief in the implementation of public policy.[78] As soon as this development was identified, the academy erupted in debate over its propriety, debating, among other issues, the courts' competence and authority to issue structural injunctions and lawyers' ability to pursue both "public law" and their clients' interests.[79] Commentators taking part in this debate have sometimes considered what might be called the theoretical propriety of litigation pursuing school finance and indigent defense reform.[80] This article, however, is concerned with a more practical goal: finding an effective form of advocacy whether through litigation or legislation.

## III.
## MICHIGAN PUBLIC SCHOOLS: STATE SCHOOLS

### *A. The Current System*

During the 2000–01 school year, local sources accounted for only 28.32% of revenues going into the Michigan public-school system.[81] This figure was the lowest among states that left more than 90% of indigent-defense financing to local sources in fiscal year 2002. Michigan, therefore, exemplifies states with state-financed education and locally financed indigent defense.

Property in Michigan is divided into two categories: homestead, which includes primary residences, and nonhomestead, which includes all other property.[82] The state levies a State Education Tax of six mills—i.e., six dollars for every $1000 of assessed value—on both types.[83] The revenues from this tax support a statewide education fund.[84] Several other statewide revenue streams are also dedicated to the fund: the full revenue produced by two percentage

78. *See* Chayes, *supra* note 76, at 1282–83, 1302.

79. *See, e.g.*, Susan Poser, *What's a Judge to Do? Remedying the Remedy in Institutional Reform Litigation*, 102 MICH. L. REV. 1307, 1307–08 (2004) (book review) (summarizing scholarly literature); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 469–73 (1999) (same).

80. *See* Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 286–87 (1998) (advocating "caution" and modest judicial intervention in school finance); Note, *supra* note 4, at 2072–73 (arguing that indigent defense is well suited to reform through public law litigation).

81. This figure represents the statewide total; at the district level, the local share of revenues ranged from 5% to 49%. C. PHILIP KEARNEY & MICHAEL F. ADDONIZIO, A PRIMER ON MICHIGAN SCHOOL FINANCE 6 tbl.3 (4th ed. 2002).

82. MICH. COMP. LAWS ANN. § 206.508(2) (West 2003); OFFICE OF REVENUE & TAX ANALYSIS, MICH. DEP'T OF TREASURY, SCHOOL FINANCE REFORM IN MICHIGAN, PROPOSAL A: RETROSPECTIVE 1, 1–2 (Dec. 2002), *available at* http://www.michigan.gov/documents/propa_3172_7.pdf.

83. MICH. COMP. LAWS ANN. § 211.903 (West 1998).

84. *Id.* § 211.905(3).

points of the statewide sales tax,[85] 60% of revenues produced by four percentage points of the statewide sales tax,[86] and a portion of the cigarette tax.[87] A share of the statewide income tax is also dedicated to the fund.[88] Local school districts may supplement the revenue they receive from the statewide fund by levying up to 18 additional mills on nonhomestead property.[89] In addition, certain school districts may levy up to three more mills on both homestead and nonhomestead property,[90] although as of December 2002 only one school district levied this additional tax.[91]

The state distributes the education fund to school districts according to a complex formula that took effect in 1994.[92] State officials say the formula increases equity among districts by establishing a minimum allowance per pupil and increasing funding of low-revenue districts faster than funding of high-revenue districts.[93]

### *B. The History*

In 1842, the Michigan legislature created the state's first free public schools, which were supported by local taxes and by fees assessed on the parents of students.[94] (The schools were "free" in the sense that districts could exempt indigent parents from paying the fees.)[95] When the state constitution was reformed eight years later, several members of the constitutional convention proposed a statewide tax that would fully finance free schools.[96] One opponent of such a tax pointed out that it would transfer money from nineteen wealthier counties to twelve poorer ones.[97] Another argued that maintaining local taxes

85. *Id.* § 205.75(3).

86. *Id.*; MICH. CONST. art. IX, § 11. These two sales tax provisions would produce the following hypothetical situation. If the total statewide sales tax rate were 10%, the total tax on a $100 purchase would be $10. The full revenue produced by two percentage points—$2—plus 60% of the revenue produced by four percentage points—$2.40—would be dedicated to schools: a total of $4.40.

87. MICH. COMP. LAWS ANN. § 205.432(3) (c) (West 2003).

88. *Id.* § 206.51(2).

89. *Id.* § 380.1211(1). If a school district levied fewer than 18 mills in 1993, the year before the formula took effect, it may levy only up to the number of mills it levied that year. *Id.*

90. *Id.* § 380.705.

91. OFFICE OF REVENUE & TAX ANALYSIS, *supra* note 82, at 7.

92. MICH. COMP. LAWS ANN. § 388.1622a.

93. OFFICE OF REVENUE & TAX ANALYSIS, *supra* note 82, at 32, 36. For a concise explanation of the formula, see Ronald C. Fisher & Robert W. Wassmer, *Centralizing Educational Responsibility in Michigan and Other States: New Constraints on States and Localities*, 48 NAT'L TAX J. 417, 419, 420 tbl.1 (1995).

94. ARTHUR RAYMOND MEAD, THE DEVELOPMENT OF FREE SCHOOLS IN THE UNITED STATES AS ILLUSTRATED BY CONNECTICUT AND MICHIGAN 88–89 (1918).

95. *Id.* at 89.

96. *Id.* at 93.

97. *Id.* at 95.

was preferable because it would better ensure local interest in the schools.[98] An early twentieth-century commentator describing the convention explained that the proposal was rejected because it "was too wide a departure from local autonomy for men schooled in the politics of New York and New England local government to readily accept."[99] In the end, the convention adopted a provision permitting, but not requiring, a statewide tax of up to two mills to support education.[100] The revenues from this tax were not, however, distributed on a per-pupil or other equitable basis; instead, the state simply returned to each district the monies that its residents had paid.[101] The statewide tax was thus not a redistributive scheme, but merely enabled the state legislature to require localities to support education, if it chose to do so.

In the early 1860s, the state superintendent of education called for an equitable distribution of the tax revenues, to no avail.[102] He argued that an equal tax effort produced unequal results, such that "many districts raise more money than they know how to use, while others are forced to curtail their school terms, or are burdened with [local fees] for tuition."[103] He noted that without redistribution, "the heavy burden of [additional local fees] falls upon the small and feeble districts which are the least able to bear them."[104] In 1869, the state eliminated fees charged to students' families but maintained local funding; districts were required by statute to tax all of their property owners at a level sufficient to support the schools.[105] This rule would be added to the state constitution in 1909.[106]

In the 1870s, this system faced at least one legal challenge from taxpayers contesting taxes imposed by the school district in which they lived.[107] In *Stuart v. School District No. 1 of Village of Kalamazoo*, the plaintiffs argued simply that the government did not have the authority to tax the general population to support free high schools.[108] In their view, the education these schools provided, which included foreign language instruction, was not a necessity but a luxury that should be available only to those who could afford it.[109] The court surveyed the history of education in the state and concluded that state policy,

98. *Id.*
99. *Id.* at 93.
100. *Id.* at 93–94.
101. *Id.* at 114.
102. *Id.* at 114–16.
103. *Id.* at 159–60.
104. *Id.* at 116.
105. *Id.* at 117–19.
106. *Id.* at 122–23.
107. Stuart v. Sch. Dist. No. 1 of Vill. of Kalamazoo, 30 Mich. 69, 70–71 (1874).
108. *Id.* at 75. The plaintiffs also argued that the school district's creation more than a decade earlier had been improper. *Id.* at 71. The court rejected this challenge as untimely. *Id.* at 72–74.
109. *Id.* at 75.

embodied in both statute and the state constitution, had long been to provide free schools to all children.[110] The court thus rejected the challenge to the district's taxing power.[111]

A century later, in 1971, a very different sort of school finance lawsuit was filed, called *Milliken v. Green*.[112] In the 1970–71 school year, all school districts received state grants according to a formula that ensured that poor districts received more state money than wealthy districts.[113] The formula included just two categories of districts: those with less than $15,500 in taxable property per student and those with more.[114] The former received a grant per student of $623.50 minus what they could have raised with a 20-mill tax.[115] The latter received $530.50 per student minus what they could have raised with a 14-mill tax.[116] Because the formula was based on such broad categories of districts and depended on hypothetical rather than actual tax rates, it did not adequately compensate poor districts where actual the tax effort – that is, the tax rate – was equal to or greater than that of their wealthier neighbors but produced lower revenues.[117]

Both the attorney general, who had his eye on a seat in the United States Senate, and the governor believed reform would play well with voters; when legislative efforts failed, they filed suit together.[118] Parents and taxpayers from poor districts, a resident of a median-wealth district, and a resident of a rich district joined as intervenors on the plaintiffs' side.[119] The suit named the state treasurer and three relatively wealthy districts as defendants.[120] It argued that the state's school finance system violated the equal protection clauses of the state and federal constitutions.[121] According to the complaint, the system violated the parents' rights by forcing them to pay higher taxes than parents in wealthier districts to obtain the same educational expenditures.[122] The system violated the children's rights, the complaint argued, by failing to equalize

110. *Id.* at 76–84.

111. *Id.* at 84–85.

112. 203 N.W.2d 457 (1972) (*Milliken I*), *vacated*, 212 N.W.2d 711 (Mich. 1973) (*Milliken II*).

113. *See* Elwood Hain, Milliken v. Green: *Breaking the Legislative Deadlock*, 38 LAW & CONTEMP. PROBS. 350, 350 n.2 (1974). Professor Hain served as co-counsel for intervening plaintiffs in the case, challenging the school finance system. *Id.* at 350 n.*, 352 n.15.

114. *Id.* at 350 n.2.

115. *Id.*

116. *Id.*

117. *Id.* at 350.

118. *Id.* at 351.

119. *Id.* at 352 n.15.

120. *Id.* at 352.

121. Milliken v. Green, 203 N.W.2d 457, 459 (Mich. 1972) (*Milliken I*), *vacated*, 212 N.W.2d 711 (Mich. 1973) (*Milliken II*).

122. Hain, *supra* note 113, at 352.

expenditures per student.[123]

In November, a month after the governor and attorney general filed suit, voters rejected a referendum to require centralized state financing of education.[124] If the referendum had passed, a graduated income tax would have raised the necessary revenue, and districts would have been permitted a small local tax to supplement the state money.[125] According to one of the lawyers for the intervening plaintiffs, Professor Elwood Hain, the plan's reliance on a graduated income tax, long a controversial idea in Michigan, was largely responsible for its failure.[126] He also cites fear that centralized funding would threaten local control of schools and resistance to a recent desegregation order issued by a federal court as additional reasons why the referendum failed.[127] Professor Hain suggests that some voters may have opposed centralization because they believed that multidistrict desegregation would be less likely as long as each district relied on its own financing and that other voters may simply have confused the issues and voted against any change to the status quo in the schools.[128]

In December, the governor proposed that the trial court find facts and certify certain questions to the state supreme court.[129] The questions the governor suggested, however, did not quite match the claims in the complaint; they asked whether the system's tendency to raise unequal revenue per student violated the students' rights under the equal protection clauses of the state or federal constitution.[130] The questions did not refer to taxpayers or parents.[131] Professor Hain suggests that the shift in the court's focus from expenditures to revenues may have been an effort to suggest a remedy other than state funding, which voters had so recently rejected.[132] The state supreme court instructed the trial court to issue findings and certify the governor's questions.[133]

The Michigan Supreme Court did not issue a decision until a year later, and when it did, it chose to shift the focus of its inquiry away from revenues and back toward expenditures.[134] The court decided that the appropriate question was whether the system's creation of a "substantial inequality of maintenance and support of the elementary and secondary schools" violated the state

123. *Id.* at 352–53.

124. *Id.* at 351.

125. *Id.* at 360.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 353 n.23.

130. *Id.* (quoting in full the question citing the state constitution, which was identical except for the citation to the question citing the federal constitution).

131. *Id.*

132. *Id.* at 353, 355–56.

133. *Milliken I*, 203 N.W.2d at 459–60.

134. *Id.* at 460–61.

constitution's equal protection clause.[135] The question, as presented by the court, did not specifically refer to students, parents, taxpayers, or the federal constitution.[136]

The court noted the "extreme inequality" among districts' ability to finance education.[137] Citing the findings of the trial court, the state supreme court observed that if the poorest district in the state levied the statewide average local tax rate of 25 mills, it would bring in revenues of $54.13 per student.[138] The richest district, meanwhile, could levy the same tax rate and reap $10,125 per student.[139] In addition, the court pointed out, many poor districts were effectively barred from raising the same revenue as wealthier districts because the Michigan Constitution prohibited taxes in excess of 50 mills.[140] The court concluded that up to 67% of the school population was "adversely affected in a significant manner" by these disparities.[141]

The court then conducted an equal protection analysis.[142] The court concluded that education was a fundamental interest under Michigan law, given its prominent place in the state constitution, compulsory attendance laws, and criminal penalties for parents who did not send their children to school.[143] The court also noted that it "strongly align[ed] itself with the eloquent statement of the United States Supreme Court on the basic importance of education as expressed in *Brown v. Board of Education*."[144] Though the status of education as a fundamental interest would have been sufficient to trigger strict scrutiny,[145] the court also asserted that wealth was a suspect classification.[146]

According to the court, the state interest cited to justify Michigan's school finance system was "local control," which the court understood to mean local voters' authority to approve the tax rate and, more specifically, to approve higher taxes to pay for desired services.[147] The court concluded that determining how much money can be spent on education within a school district "based *solely* on the fortuitous circumstance that the district has more or less valuable properties per pupil within its borders" did not bear even a rational relationship to the interest of local control.[148] The court observed that, given the high proportion of

135. *Id.* at 460 (emphasis omitted).
136. *Id.*
137. *Id.* at 463.
138. *Id.*
139. *Id.*
140. *Id.* at 464–65 (citing MICH. CONST. art. IX § 6).
141. *Id.* at 466.
142. *Id.* at 468–72.
143. *Id.* at 468–69.
144. *Id.* at 469.
145. *Id.* at 468.
146. *Id.* at 469–70.
147. *Id.* at 470–71.
148. *Id.* at 471 (emphasis in original).

financing derived from local taxes, those taxes were not used to finance special additional services, but were instead used to cover basic costs.[149] In the court's metaphor, the local tax "is not a pleasure horse to ride into greener pastures, it is the work horse to cover the everyday rocky road of school finance."[150] Perhaps more importantly, the court noted that the "option" to raise taxes was simply not available to poor districts because of the 50-mill tax limit.[151]

Having found that the finance scheme in place during the 1970–71 school year could not survive either rational basis review or strict scrutiny, the court held that the scheme violated the state equal protection clause.[152] Because the court's formulation of the question had not specified to whom equal protection might have been denied, neither did its holding.[153] The court also noted that a new formula had taken effect since the start of the suit and that it had not considered the legality of that new system.[154] According to Professor Hain, however, this new system was similar in structure to the old.[155]

A month after the court issued its decision, it granted rehearing.[156] The original decision had been the result of a 4-3 split, and within the month after its issuance, two justices, one from the majority and one from the dissent, left the bench.[157] The new justices voted with the dissenters from the earlier decision for rehearing.[158] Before the court could issue a new decision, however, two significant events took place.

First, the Michigan legislature completely revamped the school finance system, effective with the 1973–74 school year. Under the new system, the state made up any difference between what a poor school district could raise per student per mill of tax and what a hypothetical wealthy district could raise, up to a specified maximum.[159] In the first three years, the guaranteed return per student per mill was increased from $38 to $40 and the number of guaranteed mills was increased from 22 in the first year to 25 in the second to an unlimited number thereafter.[160] As a result, in its first year, the new system guaranteed that any district willing to levy at least 22 mills of tax would generate revenue equal to or greater than all but 3% of districts in the state.[161] Because at least

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 471–72.
153. *Id.* at 460, 471–72.
154. *Id.* at 474.
155. Hain, *supra* note 113, at 358 n.56.
156. Milliken v. Green, 212 N.W.2d 711, 712 (Mich. 1973) (*Milliken II*) (Kavanagh and Levin, JJ., concurring).
157. Hain, *supra* note 113, at 354.
158. *Id.*
159. *Id.* at 361.
160. *Id.*
161. *Id.* at 361 n.67.

half the districts in the state already levied more than 22 mills, they were able to reap the full benefits of the new system without a tax hike.[162] The second significant event that took place in this time period was the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*,[163] discussed in Part II, *supra*.

Following Michigan's revamping of its school financing system and the Supreme Court's *Rodriguez* decision, the reconstituted Michigan Supreme Court issued a one-paragraph order vacating its previous opinions in *Milliken*, declaring the governor's request for certification of questions "improvidently granted," and dismissing the case.[164] Two justices—one who had concurred in the original decision and one who had just joined the court—concurred with the dismissal but did so after reaching the merits.[165] These justices concluded that *Rodriguez* required rejection of the plaintiffs' original claim under the federal constitution.[166] They also concluded that the proven facts did not demonstrate that students in poor districts were substantially denied an equal educational opportunity and that, therefore, there was no equal protection violation under the Michigan Constitution.[167] Finally, the concurring justices concluded that the Michigan Constitution neither barred one school district from raising taxes to support educational spending beyond that available to other districts nor required the state to supplement the revenues of poor districts.[168]

Although the new school finance system enacted by the legislature in 1973 initially produced dramatic results, twenty years later, disparities in per pupil spending had soared.[169] For example, in the first year of the new system's operation, more than 90% of school districts received state aid.[170] Twenty years later, however, only 66% of districts were receiving aid. Most significant for political purposes, property-tax rates skyrocketed, reaching within four mills of the constitutional limit in nearly a quarter of the state's districts.[171] Despite worsening conditions, voters rejected twelve reform proposals put to them in referenda.[172]

In July 1993, following two years of pressure from the governor,[173] the

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162. *See id.* at 361.

163. 411 U.S. 1 (1973). For a discussion of *Rodriguez*, see *supra* text accompanying notes 17–51.

164. *Milliken II*, 212 N.W.2d at 711. Professor Hain argues that the court should have remanded the case but did not do so to avoid political credit or blame for the new school finance system. Hain, *supra* note 113, at 359.

165. *Milliken II*, 212 N.W.2d at 711 (Kavanagh and Levin, JJ., concurring).

166. *Id.* at 713–14 (Kavanagh and Levin, JJ., concurring).

167. *Id.* at 721 (Kavanagh and Levin, JJ., concurring).

168. *Id.*

169. KEARNEY & ADDONIZIO, *supra* note 81, at 1.

170. *Id.*

171. *Id.*

172. *Id.* at 2.

173. Oscar Suris & Laurie McGinley, *Legislature Repeals Michigan's Taxes for School*

legislature forced voters to act by passing a bill that eliminated local property taxes as a source of school financing without providing a replacement for the lost revenue.[174] The legislature then presented a new referendum to voters called Proposal A.[175] If they rejected this proposal, a backup plan would go into effect that would make personal income taxes the primary source of school financing and raise tax rates by 1.6 percentage points.[176] Voters approved Proposal A in a landslide, 69% to 31%,[177] establishing the school financing system that is in place today.[178] In the first year under the new plan, local property taxes accounted for just 21% of school district revenues, compared to 66% the year before.[179]

## IV.
## MICHIGAN INDIGENT DEFENSE: LOCAL COUNSEL

### *A. The Current System*

Indigent defense at the trial level in Michigan is fully financed by counties.[180] State law creates no uniform system for compensating appointed counsel; it was only in 2002 that the Michigan Supreme Court took the modest step of requiring individual trial courts to standardize and make public their processes for appointing and compensating counsel for the indigent.[181] Most counties employ an assignment system, in which individual trial judges appoint individual lawyers to each case.[182] Some counties employ a contract program, whereby the county contracts with a group of lawyers to provide trial services to the indigent.[183] Only six counties have public defender offices, in which the county directly employs trial counsel for the indigent.[184]

At the appellate level, counties finance the compensation of indigent defense counsel in most cases, but the state finances all administrative costs, as well as the compensation of counsel in the 25% of cases handled by the State

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*Finance*, WALL ST. J., July 23, 1993, at A3C.

174. 1993 Mich. Pub. Acts 145; KEARNEY & ADDONIZIO, *supra* note 81, at 2.

175. KEARNEY & ADDONIZIO, *supra* note 81, at 2.

176. *Id.*

177. *Id.* at 2–3.

178. *See supra* text accompanying notes 82–93.

179. *See* KEARNEY & ADDONIZIO, *supra* note 81, at 3 tbl.1.

180. MICH. COMP. LAWS ANN. § 775.16 (West 1998).

181. MICH. CT. R. 8.123.

182. TASK FORCE ON IMPROVING PUB. DEF. SERVS. IN MICH., MICH. COUNCIL ON CRIME & DELINQUENCY, MODEL PLAN FOR PUBLIC DEFENSE SERVICES IN MICHIGAN 4 (Oct. 2002) [hereinafter MODEL PLAN], *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/mi-modelplan.pdf.

183. *Id.*

184. *Id.*

Appellate Defender Office.[185] The Appellate Defender Commission, a state body whose members are appointed by the governor,[186] oversees the Appellate Defender Office and the Appellate Assigned Counsel System.[187] The Appellate Defender Office is composed of indigent defense counsel who conduct appeals and pursue other post-conviction remedies when assigned to do so;[188] they are barred from performing any other legal work within the state.[189] The office must, by statute, accept only as many cases as will ensure quality services consistent with state appropriations, but it must handle at least 25% of pending appellate cases.[190] The state pays the cost of operating the office, except for trial transcript fees, which are the responsibility of the counties.[191] Under the Appellate Assigned Counsel System, the commission maintains a statewide roster of counsel available for appointment to indigent appellate work.[192] Though the state pays the administrative costs of this system, counties pay for the actual compensation of appointed counsel.[193] The chief judge of each circuit assigns appellate counsel, appointing a member of the Appellate Defender Office to every third, fourth, or fifth assignment, and the remainder to private counsel on the Appellate Assigned Counsel System's list.[194]

### *B. The History*

#### *1. Representation at Trial*

Every version of the Michigan Constitution, the first of which was adopted in 1835, has proclaimed that criminal defendants "shall have the right to . . . have the assistance of counsel."[195] This provision, however, was not originally understood to give indigent defendants the right to appointed counsel paid for by the government. In the 1840s, when an indigent murder defendant appeared in court in Detroit, the judge, in the word of the state supreme court, "requested"

185. SPANGENBERG GROUP, *supra* note 11, at 15; MICH. COMP. LAWS ANN. § 780.716(c) (West 1998).

186. MICH. COMP. LAWS ANN. § 780.712(1) (West 1998). The commission is made up of seven members, two recommended by the state supreme court, one by the court of appeals, one by the Michigan judges' association, two by the state bar, and one non-lawyer selected solely by the governor. *Id.*

187. *Id.* at § 780.712(4); SPANGENBERG GROUP, *supra* note 11, at 15.

188. MICH. COMP. LAWS ANN. § 780.716(a) (West 1998).

189. *Id.* § 780.714(1) (e).

190. *Id.* § 780.716(c).

191. *Id.* § 780.718.

192. *Id.* § 780.712(6).

193. Frederick v. Presque Isle County Circuit Judge, 476 N.W.2d 142, 148 (Mich. 1991).

194. Administrative Order No. 1989-3, In re the Appointment of Appellate Assigned Counsel, 432 Mich. cxx, cxxii (1989).

195. MICH. CONST. of 1963, art. I, § 20; MICH. CONST. of 1908, art. II, § 19; MICH. CONST. of 1850, art. VI, § 28; MICH. CONST. of 1835, art. I, § 10.

that a local lawyer take his case.[196] The lawyer did, and he later presented a $50 bill for his services to county officials, who refused to pay.[197] The lawyer appealed their decision to the local court, which reserved the question for the state supreme court.[198] The lawyer admitted that his claim against the county "was not a strictly legal claim," but argued the county should provide and pay for an attorney "as a part of its just expenses in the administration of the criminal laws."[199] The supreme court noted that it need not decide whether a county had the authority to pay the bill presented by the lawyer, but only whether the courts had the authority to force the county to do so.[200] Because, as the lawyer admitted, he had no legal right to payment, the court held that it could not enforce the lawyer's bill.[201] The court apparently never considered ordering the state to pay the lawyer's bill; an unidentified commentator later described the question before the court as "whether the state is not liable (through its proper political subdivision, the county board of supervisors) for [the lawyer's] pay."[202]

The legislature abrogated this decision in 1857, requiring counties to compensate defense counsel appointed to indigent defendants.[203] The new statute established fixed rates of $25 for murder cases, $10 for other felonies, and $5 for misdemeanors.[204] Before the end of the century, the legislature eliminated the fixed fees in favor of "reasonable compensation for the services performed," up to $50.[205] The cap was later raised and, in 1927, eliminated.[206]

In 1923, the Michigan Supreme Court interpreted the compensation statute to mean merely that courts were permitted to appoint counsel to represent the indigent at public expense, not that they were required to do so.[207] The court concluded that the state constitution similarly meant only that defendants had the right to employ counsel and have that counsel appear at trial; it did not mean, the court held, that defendants were entitled to counsel paid by the government.[208] The court construed in the same manner a statute specifically allowing defendants to be heard through counsel.[209] The court continued for more than a

196. Bacon v. County of Wayne, 1 Mich. 461, 461 (1850).

197. *Id.*

198. *Id.*

199. *Id.* at 461–62.

200. *Id.* at 462.

201. *Id.*

202. *Id.* at 1850 WL 3359, at *2. This unsigned commentary, which cites sources as recent as 1873, is appended to the case in Westlaw but does not appear in the Michigan Reports.

203. 1857 Mich. Pub. Acts 109.

204. *Id.*

205. 1893 Mich. Pub. Acts 96.

206. 1927 Mich. Pub. Acts 175, ch. XV, § 16.

207. People v. Williams, 195 N.W. 818, 819 (Mich. 1923) (citing C.L. 1915, § 15912). The court also concluded that the statute applied only to defendants pleading not guilty; courts did not have the power to appoint counsel for defendants pleading guilty. *Id.*

208. *Id.*

209. *Id.* (citing C.L. 1915, § 15623).

decade to maintain that courts were only permitted, not required, to appoint defense counsel.[210]

In 1957, the legislature again overruled the court, requiring, six years before the United States Supreme Court's decision in *Gideon v. Wainwright*,[211] that judges appoint counsel to represent all indigents, whether charged with felonies or misdemeanors.[212] The new statute required that appointed counsel receive "reasonable compensation" as determined by the trial judge, but responsibility for this compensation remained with the counties.[213] The legislature revised the statute two months after *Gideon* to require that defendants appearing without lawyers be advised of their right to appointed counsel.[214] Again, responsibility for the cost of defense remained with the counties.[215]

Michigan defense lawyers have occasionally sued individual courts, contending that they failed to award the "reasonable compensation" state statute demands. Finding in favor of Detroit-area defense counsel in one such case in 1993, the Michigan Supreme Court noted that "a potential myriad of local considerations" might contribute to the determination of what compensation is reasonable, and that this determination might vary from one circuit to another.[216] The court also found that "budgetary concerns" were legitimately among those local considerations, but it declared that such concerns "should seldom, if ever, be controlling."[217] The court announced that the counties have "a duty" to finance whatever compensation the courts "deem appropriate."[218]

In November 2000, the American Bar Association brought its Gideon Initiative program to Michigan.[219] With the help of the Initiative, a fifty-member task force, including lawyers and non-lawyers, convened to study indigent defense in Michigan and find ways to improve the system.[220] In October 2002, the task force issued a series of recommendations, including one calling for a new state agency to manage indigent defense statewide.[221] Other

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210. People v. Crandell, 258 N.W. 224, 226 (Mich. 1935) (reaffirming *Williams*); People v. Harris, 253 N.W. 312, 312 (Mich. 1934) (same).

211. 372 U.S. 335, 338–39, 344 (1963).

212. 1957 Mich. Pub. Acts 256.

213. *Id.*

214. 1963 Mich. Pub. Acts 132. The revision also explicitly limited the right to counsel to defendants who plead not guilty, consistent with the Michigan Supreme Court's conclusion forty years earlier in *Williams*, 195 N.W. at 819.

215. 1963 Mich. Pub. Acts 132.

216. Recorder's Court Bar Ass'n v. Wayne Circuit Court, 503 N.W.2d 885, 894 (Mich. 1993). A decade later, the court rejected a similar challenge to the fees paid in that same Detroit-area circuit. Wayne County Criminal Def. Bar Ass'n v. Chief Judges of Wayne Circuit Court, 663 N.W.2d 471, 472 (Mich. 2003).

217. *Recorder's Court Bar Ass'n*, 503 N.W.2d at 894 n.27.

218. *Id.*

219. MODEL PLAN, *supra* note 182, at 3.

220. *Id.* at 4.

221. *Id.* at 9.

recommendations addressed client eligibility, workload, and continuity of counsel, among other issues.[222] Most importantly for the purposes of this article, the task force recommended that the state should take over financing indigent defense in Michigan.[223] The task force contended, with little elaboration, that the state bore responsibility for providing defense services and therefore should bear the cost.[224]

*2. Representation on Appeal*

In 1857, the Michigan legislature required that appointed counsel who brought their clients' cases to the supreme court receive additional compensation; a somewhat modified version of the statute then enacted remains in place today.[225] That statute, however, does not indicate which government entity must pay that compensation, and as it stood in the 1890s, it did not indicate which entity could determine what the compensation should be.[226] In 1894 the supreme court held that county officials alone had the authority to set the compensation, without review by any court.[227] Today the statute indicates that the supreme court should determine the compensation in such cases.[228]

In 1897, in *De Long v. Board of Supervisors of Muskegon County*, the supreme court implied that if responsibility for the cost of an indigent's appeal rested anywhere, it rested with the county.[229] In *De Long* the trial court

222. *Id.* at 10–14.

223. *Id.* at 7.

224. *Id.* Among four sources for this proposition, the task force cited *Gideon*, the Model Public Defender's Act adopted by the National Conference of Commissioners of Uniform State Laws in 1970, and the standards for defense services adopted by the ABA in 1992. *Id.* at 15 n.7. These three sources do not, in fact, support the argument. *Gideon* simply did not address the question of how appointed counsel should be financed. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963). The Model Act, similarly, calls for an "integrated state system" headed by a statewide defender general, but does not specify how the system is to be financed. MODEL PUB. DEFENDER ACT § 10(a), cmt. (1970). As Michigan's own Appellate Defender Commission and the Nevada Public Defender demonstrate, a statewide system need not be state-financed. *See supra* text accompanying notes 185–194; *infra* text accompanying notes 502–507. The ABA standards merely acknowledge that "[c]onditions may make it preferable to create a statewide system of defense." ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-1.2(c) (3d ed. 1992). The ABA does not specify whether a statewide system, if preferable, should be state-financed. *Id.* at 8–10. In fact, the commentary on the Standard appears to favor statewide standards and administrative assistance, with actual implementation left to counties. *Id.* at 9. The fourth source cited does discuss at some length why states should pay for indigent defense. *See* 1976 NLADA Guidelines, *supra* note 63, at 242–58.

225. MICH. COMP. LAWS ANN. § 775.17 (West 1998).

226. Springer v. Bd. of County Auditors of Wayne County, 58 N.W. 471, 471 (Mich. 1894) (quoting How. § 9047 (current version at MICH. COMP. LAWS ANN. § 775.17 (West 1998))), *overruled by* People v. Hanifan, 59 N.W. 611, 612 (Mich. 1894).

227. *Hanifan*, 59 N.W. at 612.

228. MICH. COMP. LAWS ANN. § 775.17 (West 1998).

229. 69 N.W. 1115, 1116 (Mich. 1897).

appointed defense counsel for an indigent defendant, who was convicted.[230] Without an order to do so from the trial court, counsel appealed to the supreme court (unsuccessfully, as it turned out).[231] The county refused to pay counsel for the unauthorized appeal. The supreme court held that the county was not liable for the fee, concluding, "It seems impossible of belief that the legislature intended that any attorney defending an indigent prisoner [at trial] under the order of the circuit court should, upon his own motion, subject the county to the expense of an appeal to this court."[232] Therefore, the court held, defense counsel was entitled to added compensation by the county for appellate work only if the trial judge ordered the appeal.[233] If the trial court—for these purposes, apparently, a guardian of the county's interests—did not issue an order authorizing counsel to appeal its judgment, counsel could look only to his or her indigent client for compensation.[234]

In March 1963, the United States Supreme Court declared in *Douglas v. California* that indigent defendants had a right to appointed counsel to pursue appeals to which they were entitled.[235] Nine months later, the 1963 Michigan Constitution—the constitution still in place today—took effect and provided defendants one appeal as a matter of right.[236] It would be nearly thirty years before the Michigan Supreme Court considered the effects of these developments on the rule of *De Long*. When it finally did, in 1991, the court concluded that the state constitution's requirement that defendants be permitted an appeal as of right was equivalent to the order authorizing appeal that the trial judge in De Long's case had refused to grant.[237] The court also concluded that this new, blanket "order" imposed the burden of counsel's fees on the county, not the state.[238] This second conclusion did not quite fit the reasoning of *De Long*; if the state, via the state constitution, rather than the county, via the judge, grants the order to appeal, then *De Long* suggests that the state should be responsible for the bill.

In the meantime, Michigan had already moved to cover some of the costs of appellate defense for the indigent. In 1969, the Michigan Commission on Law Enforcement and Criminal Justice, chaired by the governor, had identified the creation of a statewide appellate defender as one of its top priorities.[239] The

230. *Id.*

231. *Id.* (referring to the court's earlier decision in People v. Smith, 64 N.W. 200, 201 (Mich. 1895)).

232. *Id.*

233. *Id.*

234. *Id.*

235. 372 U.S. 353, 357–58 (1963).

236. *Compare* MICH. CONST. art. 1, § 20 *with* MICH. CONST. of 1908, art. II, § 19.

237. Frederick v. Presque Isle County Circuit Judge, 476 N.W.2d 142, 145 (Mich. 1991).

238. *Id.*

239. MICH. COMM'N ON LAW ENFORCEMENT & CRIMINAL JUSTICE, FIRST COMPREHENSIVE LAW ENFORCEMENT AND CRIMINAL JUSTICE PLAN FOR MICH. 1969–70, at III-ii, III-E-7–III-E-8

commission pledged to finance a statewide system if one were created, and it set aside federal grant money to support the project.[240] The following year, the state supreme court responded by ordering the establishment of the Appellate Public Defender Commission.[241]

In 1978, the legislature enacted a statute codifying the Appellate Defender Commission in essentially the form it retains today.[242] The purpose of the statute, according to the legislative analysis office of the state House of Representatives, was primarily to give statutory authority to the system the state supreme court had put in place eight years earlier.[243] The bill did, however, newly empower the commission to establish minimum standards for private counsel appointed to represent indigents and require trial courts to appoint lawyers on the committee's roster.[244] Though the analysis office's form report set aside space for arguments both for and against bills, its analysis of the Appellate Defender Act included no arguments against, and it noted that the bill had the support of the state bar, the counties, and the existing Appellate Defender Commission.[245]

In 1989, the Michigan Supreme Court provided trial judges with an order explaining how they should divide cases between the Appellate Defender Office's full-time staff and the private counsel overseen by the Appellate Assigned Counsel System.[246] The method laid out in this order, which relies on the chief judge of each circuit to appoint counsel, remains in place today.[247] When the court issued the order, one justice dissented, primarily because of a standing disagreement with the other justices about the court's authority to issue such orders.[248] She also noted that the court had not found that trial judges had previously appointed counsel inadequately, and she argued, echoing *De Long*, that taking appointments out of their hands in the absence of such a finding would "sever[] the tie of political accountability between the local funding unit and locally elected judicial officers."[249]

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(1969) [hereinafter FIRST PLAN FOR MICH.].

240. Admin. Order No. 1970-1, In the Matter of Establishment of State-Wide Defender Sys., 383 Mich. xxxvi (1970); FIRST PLAN FOR MICH., *supra* note 239, at III-E-7–III-E-8.

241. *In the Matter of Establishment of State-Wide Defender Sys.*, 383 Mich. at xxxvi.

242. *Compare* 1978 Mich. Pub. Acts 620 *with* MICH. COMP. LAWS ANN. § 780.712 (West 1998).

243. HOUSE LEGISLATIVE ANALYSIS SECTION, ANALYSIS – S.B. 230, at 1 (Mich. 1978). One argument advanced in favor of the bill was that it "preserv[es] the status quo". *Id.* at 2.

244. *Id.* at 1.

245. *Id.* at 2.

246. *See* Administrative Order No. 1989-3, In re the Appointment of Appellate Assigned Counsel, 432 Mich. cxx, cxx–cxxvii (1989).

247. *See supra* text accompanying note 192.

248. *See In re the Appointment of Appellate Assigned Counsel*, 432 Mich. at cxxviii (Boyle, J., dissenting).

249. *Id.*

## V.
## MARYLAND PUBLIC SCHOOLS: LOCAL SCHOOLS

### *A. The Current System*

During the 2000–01 school year, local money accounted for 56.59% of revenues going into the Maryland public school system. This figure was the highest such figure among states that paid more than 90% of the costs of indigent defense in fiscal year 2002, making Maryland the most extreme example of a state with locally financed schools and state-financed indigent defense. In 2002, however, legislation took effect that may dramatically change the structure of school financing in Maryland. This part will first describe the system that produced the most recent available statistics and then describe the current system.

State aid to education in Maryland has several components. The first is a foundation formula, through which the state guarantees that every district has a minimum, "foundation" level of financing per student.[250] The state fulfills this guarantee by providing grants to make up the difference between the foundation level and revenues that each district would produce with a preset minimum local tax.[251] In fiscal year 2000, foundation grants accounted for approximately 60% of state aid.[252] Poor districts received certain other grants, accounting for 4.6% of state aid.[253] Finally, additional state aid—approximately one-third of the total—was divided among several dozen types of categorical aid, such as payments toward teachers' retirements, much of which was not based on the wealth of the districts receiving it.[254]

In May 2002, the governor signed a bill to revamp this system.[255] Under the new structure, the foundation level is much higher.[256] The new structure also eliminates nearly all categorical aid and the regulation of spending that accompanied it,[257] redirecting money to the foundation program and three broad new programs[258] that target state aid to students who fit into categories deemed to require increased funding: poor students, students with limited English skills,

250. COMM'N ON EDUC. FIN., EQUITY, & EXCELLENCE, PRELIMINARY REPORT app.1 (Jan. 2000) [hereinafter THORNTON PRELIM. REPORT], *at* http://mlis.state.md.us/other/education/Toc.htm (last visited Sept. 24, 2005).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. 2002 Md. Laws 288.

256. MD. CODE ANN., EDUC. § 5-202(a) (2)–(13) (2004).

257. 2002 Md. Laws 288, §§ 2 (codified as amended at MD. CODE ANN., EDUC. § 5-206 (2004)), 9.

258. DEP'T OF LEGISLATIVE SERVS., MD. GEN. ASSEMBLY, FISCAL NOTE, REVISED: SB 856 (2002 Session).

and special education students.[259] The amount of aid distributed in these programs is further adjusted to account for the wealth of each district, so that poor districts with many covered students receive the most aid, while wealthy districts with few such students receive the least.[260] Finally, the new system creates an additional grant of state aid available to any county in which the wealth per student is less than 80% of the statewide wealth per student, so long as the county levies more in taxes to support local schools than is required to reach the foundation level.[261] The legislature did not establish funding streams to support this new, vastly more generous aid program. Instead, the legislature must appropriate the needed money each year.

In exchange for this new money, each school district must submit a plan to the state detailing how it will improve student performance, as defined by state standards.[262] The state superintendent may require the district to revise the plan, and the state may withhold state money from any district that fails both to develop an adequate plan and to demonstrate improvements in student performance.[263] Under the new scheme, the counties' annual audits, previously submitted only to the state superintendent and a county fiscal authority, must also be submitted to several committees of the state legislature.[264]

### *B. The History*

The first Maryland Constitution, promulgated in 1776, did not address public education.[265] In 1813, however, the legislature established an education fund, the proceeds of which were divided equally among the counties.[266] Shortly thereafter, the legislature called for the appointment of commissioners in each county to manage this money.[267] It was not until 1825 that the legislature established a state superintendent of education. When it did so, the legislature also permitted Baltimore City to set up its own separate school system, and it announced that any county could decline to establish public schools if its voters

259. 2002 Md. Laws 288, § 2 (codified at MD. CODE ANN., EDUC. §§ 5-207, 5-208, 5-209 (2004)).

260. MD. CODE ANN., EDUC. §§ 5-207(c) (3), 5-208(d) (3), 5-209(c) (3) (2004).

261. 2002 Md. Laws 288, § 2 (codified at MD. CODE ANN., EDUC. § 5-210(a) (6), § 5-210(c) (2004)).

262. MD. CODE ANN., EDUC. § 5-401(b) (1) (2004).

263. *Id.* § 5-401(f), (j).

264. 2002 Md. Laws 288, § 2 (codified at MD. CODE ANN., EDUC. § 5-109(c) (2) (2001)).

265. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 770 (Md. 1983). In 1983, in the central education financing case in Maryland, *Hornbeck v. Somerset County Board of Education*, the court engaged in a detailed debate about the history of education in the state. Compare *id.* at 770–76 with 458 A.2d at 792–97 (Cole, J., dissenting). The majority argued for a history of primarily local control, while a dissenter, Judge Harry A. Cole, argued that the state had long favored centralization. The following overview of Maryland public education history before the 1983 decision in Hornbeck is derived largely from a combination of the two accounts.

266. *Hornbeck*, 458 A.2d at 770 (citing 1813 Md. Laws 122).

267. *Id.* at 771 (citing 1816 Md. Laws 256).

so desired.[268] The state's largest city did indeed opt for its own system, while some counties chose to establish no public schools at all.[269] In 1833, the legislature altered the distribution of the state school fund so that it would reflect the school-age population of each district.[270]

When the state enacted a new constitution in 1851, a proposed provision requiring a "uniform system of common school education" was rejected.[271] Two years later, the legislature failed to enact a bill that would have done the same.[272] Finally, when another constitution was adopted in 1864, a new provision called for a state superintendent of public instruction to develop "a uniform system of free public schools."[273] The 1864 constitution required the legislature to maintain an annual, statewide education tax of at least ten cents per $100 of taxable property, the proceeds of which were distributed among the counties and Baltimore City according to their school-age population.[274] The same provision barred the legislature from levying any additional education tax on individual counties unless its residents voted in favor of one.[275] The 1864 constitution also established an education endowment, to be financed by a statewide tax of at least five cents per $100.[276] Once the endowment reached $6 million, the legislature would be permitted (but not required) to abolish the ten-cent tax, and the interest earned from the endowment thereafter would be earmarked for educational purposes.[277] The year after adopting this constitution, the legislature, as required, enacted a tax of fifteen cents per $100 to support public schools.[278] It also prohibited the counties and Baltimore City from imposing their own taxes to support local schools.[279]

The current Maryland Constitution was enacted in 1867, and it contains provisions for education very different from its predecessors'. This new constitution did not call for a "uniform" education but instead required only that the statewide education system be "thorough and efficient."[280] The 1867 constitution mandated neither statewide taxes nor the appointment of state education officials, nor did it specify how state monies might be distributed

268. *Id.* (citing 1825 Md. Laws 162). The act established county school officials, who had the authority to create one or more school districts within their counties. *See* 1825 Md. Laws 162, §§ 3, 5.

269. *Hornbeck*, 458 A.2d at 771.

270. *Id.* (citing Gen. Assem. Res. 47 (Md. 1833)).

271. *Id.*

272. *Id.*

273. *Id.* (citing MD. CONST. of 1864, art. VIII, § 1).

274. *Id.* (citing MD. CONST. of 1864, art. VIII, § 5).

275. *Id.* (citing MD. CONST. of 1864, art. VIII, § 5).

276. *Id.* (citing MD. CONST. of 1864, art. VIII, § 6).

277. *Id.*

278. *Id.* at 772 (citing 1865 Md. Laws 160).

279. *Id.*

280. *Id.* (citing MD. CONST. art. VIII, § 1).

among school districts.[281] It noted that the state must provide for the maintenance of the education system "by taxation, or otherwise."[282] In addition, under the 1867 constitution, the legislature had the option of maintaining the statewide system already in effect. If the legislature failed to do so, however, the system would dissolve.[283] Finally, the new constitution required that the state school fund be preserved and used only to support education.[284]

The judges of the Court of Appeals of Maryland later split over the cause of the sudden shift in the state constitution's approach to education in 1867. According to the majority, "historians speculate" that the 1864 constitution was enacted only with the help of Union soldiers then quartered in Maryland and permitted to vote. These soldiers and other "Unionists," the majority suggested, limited local control of education against the will of most local citizens.[285] The majority understood local resentment of centralized authority to be the main cause of the subsequent rejection of the 1864 scheme.[286] For support of this view, it quoted a delegate to the 1867 convention: "it would be right to commit the expenditure of the funds to those who contributed them," rather than "plac[ing them] beyond the control of every parent and guardian in the State" as the redistributive 1864 system had done.[287] The majority also noted that convention members rejected proposals to maintain the uniform system of the 1864 constitution.[288] Finally, the majority cited the criticisms of some delegates to the 1867 constitutional convention regarding not only the cost and form of the state administration that had been created in 1864 but also the performance of the Superintendent of Public Instruction.[289]

A dissenter, on the other hand, blamed exactly this animus toward the Superintendent for the changes of the 1867 constitution: to him, these were neither policy based nor a dramatic departure from the 1864 constitution. He argued that "[t]he only problem" that arose under the 1864 constitution "was the way in which it was implemented" by the Superintendent.[290] To support his account, the dissenter cited one historian who described political opposition to "the seeming autocratic domination of this man"[291] as deriving in part from state law in place between 1864 and 1867 so complex that it required school buildings

281. *Id.* (citing MD. CONST. art. VIII).

282. *Id.* (citing MD. CONST. art. VIII, § 1).

283. *Id.* (citing MD. CONST. art. VIII, § 2).

284. MD. CONST. art. VIII, § 3.

285. *Hornbeck*, 458 A.2d at 772 n.6 (citing L. Blauch, *The First Uniform School System of Maryland, 1865–1868*, 26 MD. HIST. MAG. 205, 225–26 (1931)).

286. *Id.* at 772–74.

287. *Id.* at 773 (quoting PHILIP B. PERLMAN, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, at 200–01 (1923) (quoting convention delegate Kilbourne)).

288. *Id.* at 773, 774.

289. *Id.* at 772.

290. 458 A.2d at 794 (Cole, J., dissenting).

291. *Id.* at 794–95 (Cole, J., dissenting) (quoting A. CREWE, NO BACKWARD STEP WAS TAKEN 35-36 (1949)).

either to follow plans issued by the Superintendent or to meet with his approval.[292] Thus, when the dissenter cited the 1867 convention's rejection of proposed amendments, he noted especially a proposal that would have authorized county boards of education to establish their own, locally financed education systems, and another that would have permitted public schools to vary from district to district based on local needs.[293]

Whatever the cause of the change in approach, in 1868 the legislature passed a bill to put the 1867 constitution into effect, creating boards of county school commissioners to manage schools.[294] It also established a statewide education tax of ten cents per $100, the proceeds of which were distributed to the counties and Baltimore City in proportion to their school-age population.[295] This tax rate was the same as that required by the 1864 constitution, but was in fact lower than the rate that had actually been in effect.[296] If the state money was insufficient, the statute permitted the counties—not the newly created school boards—to impose a local property tax to supplement it.[297] Finally, the legislation permitted Baltimore City to establish its own independent school system and to levy property taxes to support it.[298]

Legislation enacted in 1872 effectively transferred the power to levy additional taxes when state financing proved insufficient from county boards to school boards. Under the new law, school boards could direct county commissioners to levy additional taxes of up to ten cents per $100, unless the county commissioners approved a higher rate.[299] The county board had no choice but to assess this tax and pass the proceeds on to the school board; the county was not even permitted to charge the school board for the costs of collection.[300]

Eventually, this discretionary taxation led to great disparities in counties' spending per student.[301] As a result, in 1914, the legislature called for a study of school financing,[302] which reported that from 1870 to 1914, local taxes had accounted for two-thirds of school financing across the state.[303] Because some counties were wealthier than others, this reliance on local financing led to varied spending on education in different parts of the state.[304] The report

292. *Id.*
293. *Id.* at 795–96.
294. 458 A.2d at 774 (citing 1868 Md. Laws 407).
295. *Id.*
296. 458 A.2d at 796 (Cole, J., dissenting).
297. *Id.*
298. 458 A.2d at 774–75.
299. 1872 Md. Laws 377.
300. Bd. of County Comm'rs v. Gantt, 21 A. 548, 549 (Md. 1891).
301. *Hornbeck*, 458 A.2d at 775.
302. *Id.* (citing 1914 Md. Acts 844).
303. *Id.* (citing ABRAHAM FLEXNER & FRANK P. BACHMAN, PUBLIC EDUCATION IN MARYLAND (5th ed. 1921)).
304. *Id.*

recommended that state money be distributed not solely based on school-age population, but on a combination of school-age population, actual school attendance, and the relative wealth of school districts.[305]

In 1922, the legislature adopted a provision along these lines.[306] The new statute created a second state education fund, called the Equalization Fund, designed to ensure that each county board could afford to pay the minimum teacher salaries required by the statute.[307] To qualify for the additional money, a county was required to levy a school tax of at least sixty-seven cents per $100 of valuation and to spend no more than 76% percent of its budget on teachers' salaries.[308]

In the late 1930s, the black principal of a black elementary school in a county neighboring Baltimore City sued the State Board of Education and various state officials in federal court.[309] The principal, Walter Mills—represented by the young Thurgood Marshall—sought equal pay for black and white teachers.[310] Even though the county had hired him and paid his salary, Mills argued that the state was responsible for the pay differential that he alleged violated the Fourteenth Amendment. Mills pointed to the state's minimum-salary statute, which set separate minimums for teachers in white schools and teachers in black schools; the minimums for the former were nearly twice those for the latter.[311] He also challenged the state Equalization Fund, through which the state provided aid only up to the minimum salary levels.[312] Because sovereign immunity barred Mills from simply suing the state for the wages he had lost under the discriminatory policy, he sought, in the words of the district court, "an injunction against [the] enforcement of unconstitutional laws."[313] The court responded that the only manner in which the state could be said to "enforce" the minimum-salary statute was in its distribution of the Equalization Fund, and that this fund did not deny Mills the equal protection of the laws.[314] The court maintained that the state's constitution did not require the state to provide any equalization grants at all.[315] Indeed, the *Mills* court pointed out that the actual effect of the fund was to help counties equalize the salaries of white and black teachers.[316] (Similarly, the *Rodriguez* Court would note decades later that periodic revisions to Texas's school aid formula had reduced disparities,

305. *Id.*
306. 1922 Md. Laws 382.
307. *Id.*
308. *Id.*
309. Mills v. Lowndes, 26 F. Supp. 792, 794–95, 800 (D. Md. 1939).
310. *Id.* at 794.
311. *Id.* at 797.
312. *Id.* at 796–97.
313. *Id.* at 802.
314. *Id.*
315. *Id.*
316. *Id.* at 798.

even if they had not eliminated them; Marshall, by then Justice Marshall, would dissent and take sharp issue with this point.)[317] "The counties have local self government with respect to the teachers," the *Mills* court concluded, "and if their practice denies the equal protection of the laws, theirs is the responsibility, and not the [state] defendants'."[318] The court dismissed Mills's complaint.[319] Mills—again represented by Marshall—quickly returned to court with a suit against his county's Board of Education and superintendent, alleging discrimination in their pay scales.[320] This time he won.[321] The two *Mills* cases together demonstrate the continued responsibility of Maryland's counties, not the state, for school finance.

In 1973, the legislature substantially revised the formula governing distribution of state aid.[322] Under the new formula, state law set a "foundation level," the minimum that each district is obliged to spend on education per year per student.[323] The state was required to pay a certain share of this amount for every district; by 1983, the state paid slightly less than 55% of the foundation level for every district.[324] The state was also required to pay for a portion of the remaining spending needed to reach the foundation level, but the size of that portion depended on the wealth of the district: the poorer the district, the larger the portion.[325] The state also provided additional "targeted aid" to the twelve poorest school districts.[326] Districts were free to levy additional taxes without limitation to support education, and their decision to do so had no effect on the state's contribution to their foundation spending.[327]

Within a few years of the 1973 reforms, the legislature had created a large new category of state aid—categorical aid—that was distributed outside the foundation formula and did not vary according to district wealth. This aid amounted to near complete state financing for certain categories of spending, such as payments toward teachers' retirements, vocational education, and student

317. Compare San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1972), with 411 U.S. at 72 (Marshall, J., dissenting).

318. *Mills*, 26 F. Supp. at 802.

319. *Id.* at 806.

320. Mills v. Bd. of Educ. of Anne Arundel County, 30 F. Supp. 245, 245–46 (D. Md. 1939).

321. *Id.* at 251.

322. 1973 Md. Laws 360 (codified as amended at MD. CODE ANN., EDUC. § 5-202 (2004)).

323. *Hornbeck*, 458 A.2d at 763.

324. *Id.*

325. *Id.* Under the statute as originally enacted, wealth was defined as the sum of net taxable income and adjusted assessed value of real property. 1973 Md. Laws 360 (codified at MD. ANN. CODE art. 77, § 128A(a) (4) (1974)). The current statute defines wealth as the sum of net taxable income, the assessed value of the operating property of real public utilities, 40% of the assessed value of all other real property, and half of the assessed value of personal property. MD. CODE ANN., EDUC. § 5-202(a) (14) (2004).

326. *Hornbeck*, 458 A.2d at 763.

327. *Id.*

transportation costs.[328] In fiscal year 1980, categorical aid of $480 million, distributed without reference to county wealth, outweighed the aid allocated based on the wealth of recipient districts: that year, aid to foundation spending amounted to $332 million and targeted and other state aid aimed at poor districts amounted to $26 million.[329]

This financing system was the subject of *Hornbeck v. Somerset County Board of Education*, filed in 1979.[330] The plaintiffs in the case were the boards of education of three poor counties, the school commissioners of Baltimore City, and taxpayers, students, parents, superintendents, and other public officials in each jurisdiction.[331] Naming the comptroller of the treasury and the state superintendent of schools as defendants, the plaintiffs alleged that Maryland's school finance system violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the equal protection clause of the Maryland Declaration of Rights, and the provision of the Maryland Constitution requiring the maintenance of a "thorough and efficient System of Free Public Schools."[332] The suit thus combined federal equal protection claims, state equal protection claims, and state adequacy claims—what are known today as the "three waves" of education finance litigation.[333] The plaintiffs sought a declaration of the system's unconstitutionality and, if the legislature failed to respond to such a declaration, injunctive relief.[334]

Specifically, the plaintiffs alleged that the system discriminated against all students in poor school districts, and especially against poor students in those districts, by providing them a lesser and inadequate education.[335] Plaintiffs also alleged that the system discriminated against all poor students in the state by systematically providing unequal education to most of them.[336] Finally, the plaintiffs alleged that the system discriminated against residents and taxpayers of Baltimore City who, because of the city's low tax base and high number of students, were required to pay the highest tax rates in the state while receiving

328. *Id.*

329. *Id.*

330. *Id.* at 764.

331. *Id.*

332. *Id.* (quoting MD. CONST. art. VIII, § 1). One wealthy county intervened as a defendant. *Id.*

333. The three waves were first identified in William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Litigation*, 19 J.L. & EDUC. 219, 222–38 (1990). At least one commentator has contested this view of the development of school finance litigation, arguing that "despite changes in the emphasis of plaintiff complaints, all of these cases are part of the same movement, and that cases in the third wave are being decided on the same issues as those in the second were." Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 556–57 (1999).

334. *Hornbeck*, 458 A.2d at 766.

335. *Id.* at 764.

336. *Id.*

below-average spending per student.[337] In support of their claims, the plaintiffs cited the wide variety in districts' taxable wealth, the "municipal overburden" of Baltimore City that resulted from its alleged need to devote a large share of its spending to services such as police and fire protection, and the low proportion of actual spending included in the foundation level, which led to a low proportion of state aid sensitive to district wealth.[338] The plaintiffs also contended that poor students needed more educational assistance than wealthy students, but instead received less.[339]

After a four-month trial, the court found a variety of facts supporting the plaintiffs' claims.[340] It found that one wealthy county had $138,318 in property wealth per student, while four others had less than $35,000 per student.[341] At a property-tax rate of $2 per $100 of assessed value, that wealthy county would raise $2766 per student, while one of its poor neighbors would raise just $699.[342] The trial court found that the 1978–79 school year's foundation level of $690 was less than half the statewide average spending per student and approximately one-fourth the spending of one wealthy district.[343] The trial court found one county that, because of its poverty, received six times as much foundation aid as its much wealthier neighbor but that, after categorical aid, received only $71 more per pupil in total state aid—$595 to $524.[344] A student in the wealthiest district, the court found, "has approximately twice the amount spent on his education" as a student in the poorest district.[345] The trial court held that Maryland's financing system violated the state constitution's equal protection clause and education provision but did not violate the federal Equal Protection Clause.[346]

The Court of Appeals, Maryland's highest court, vacated the trial court's decision, holding that the financing scheme violated neither the state nor the federal constitutions.[347] The court held that the state constitution's education provision did not mandate uniform funding or spending per student.[348] Instead, the "thorough and efficient" language meant, "at most," that the state must provide a system, "effective in all school districts, as will provide the State's youth with a basic public school education."[349] The court contended that its

337. *Id.* at 764–65.
338. *Id.* at 765.
339. *Id.*
340. *Id.* at 766.
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.* at 767 (internal quotation marks omitted).
346. *Id.*
347. *Id.* at 790.
348. *Hornbeck*, 458 A.2d at 776.
349. *Id.*

conclusion was consistent with eight other states' analyses of similar state constitutional provisions.[350]

The Court of Appeals also held that *San Antonio School District v. Rodriguez* disposed of the plaintiffs' federal constitutional claim,[351] again citing several other state courts of last resort that had reached the same conclusion in similar cases.[352] The court also pointed to more recent precedents outside the education context in which the United States Supreme Court had established that federal equal protection claims could not succeed without demonstrating purposeful discrimination.[353] The *Hornbeck* plaintiffs, the court noted, had not demonstrated or even alleged that the inequities in the state's education system were the product of any discriminatory purpose.[354]

Finally, the court held that the financing system did not violate the state constitution's equal protection clause. The court first held that the Maryland Constitution's education provision did not create a fundamental right to education.[355] Once again buttressing its reasoning with that of other state courts, the court observed that state constitutions, unlike the federal constitution, are not by their nature "restricted to provisions of fundamental import."[356] As a result, *Rodriguez*'s definition of fundamental rights as those explicitly or implicitly guaranteed in the federal constitution cannot be transferred directly to the state context.[357] Therefore, the mere fact that education appeared in the Maryland Constitution did not render it a fundamental right.[358] The court also noted that many public services provided by state and local governments, such as police and fire protection, welfare, and health care, are as important as education but are often not mentioned in state constitutions.[359] The court assumed that there was no fundamental right to any of these services, and reasoned that as a result there could be no fundamental right to education.[360] Because the plaintiffs did not argue before the Court of Appeals that wealth was a suspect classification,[361] the conclusion that education was not a fundamental right meant that the court

350. *Id.* at 777–80 (discussing decisions from Arizona, Colorado, Georgia, New Jersey, New York, Ohio, Oregon, Pennsylvania, and West Virginia).

351. *Id.* at 782. *Rodriguez* is discussed *supra* text accompanying notes 17–51.

352. *Hornbeck*, 458 A.2d at 783 (citing decisions from Arizona, California, Colorado, Connecticut, Idaho, Illinois, Michigan, New Jersey, New York, Washington, and West Virginia).

353. *Id.* at 783 (citing Washington v. Davis, 426 U.S. 229 (1976), and its progeny).

354. *Id.* at 783–84.

355. *Id.* at 786.

356. *Id.* at 784–85 (citing decisions from Colorado, Georgia, Idaho, Michigan, New York, Ohio, and Oregon).

357. *Id.* at 786.

358. *Id.*

359. *Id.* at 785.

360. *Id.* at 786.

361. *Id.* at 787. The court nonetheless announced in dicta that no suspect class was present in the case. *Id.*

would not apply strict scrutiny to Maryland's system of financing education.[362]

The court proceeded to apply rational basis review and to hold the finance system constitutional,[363] concluding that a "primary objective" of the system was to maintain substantial local control over public schools, that this was a legitimate state objective, and that the means chosen were reasonably related to it.[364] This objective was attained, the court reasoned, by granting local residents influence over officials' determination of how much money should be raised for education and how that money should be spent.[365] The plaintiffs argued that the financing disparities were so wide as to inhibit, rather than promote, local choice for most districts.[366] The court answered this allegation by noting that rational basis review grants statutes a presumption of constitutionality, which plaintiffs can overcome only with clear and convincing evidence that the statute's classification is "essentially arbitrary."[367] The *Hornbeck* plaintiffs, the court held, could not meet this requirement.[368] The financing scheme was therefore constitutional.

In 1993, four years after the *Hornbeck* decision, the governor created a commission to develop a new school finance system.[369] The commission called for increasing the foundation level to reflect the actual cost of education and to include certain types of categorical aid and targeted aid for schools with poor children, among other changes.[370] These changes would eventually have doubled state aid to education, to $1.2 billion, so the commission also offered a

362. *Id.*

363. Maryland constitutional law includes a "heightened scrutiny" standard, which lies between strict scrutiny and rational basis review. *Id.* at 781–82. Maryland courts apply heightened scrutiny when a statute (1) affects important (but not fundamental) rights, (2) depends on a sensitive (but not suspect) classification, or (3) "works a significant interference with liberty or a denial of a benefit vital to the individual." *Id.* (internal quotation marks omitted). To survive heightened scrutiny, a statute must be reasonable and its classification must have a fair and substantial relation to the object of the legislation. *Id.* at 782. The analysis depends on the actual ends and means of a statute, rather than on any that might theoretically be attributed to it. *Id.*

The *Hornbeck* court held that heightened review did not apply to the state's school financing scheme because "there has been no significant interference with, infringement upon, or deprivation of the underlying right" to a thorough and efficient education established by the Maryland Constitution. *Id.* at 788. The court did not address the "important rights" or "sensitive classification" routes to obtaining heightened scrutiny. The court did, however, issue dictum that even if heightened scrutiny applied, the state's school finance system would survive. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 789.

367. *Id.* at 789–90. As had the *Rodriguez* Court, *Rodriguez*, 411 U.S. at 55, the *Hornbeck* court noted in other parts of its opinion that the legislature had continually tried to reduce disparities between poor and wealthy districts. *Hornbeck*, 458 A.2d at 775, 787.

368. *Id.* at 790.

369. Diane W. Cipollone, *Gambling on a Settlement: The Baltimore City Schools Adequacy Litigations*, 24 J. EDUC. FIN. 87, 91 (1998).

370. *Id.* at 92 n.23.

more modest plan.[371] The legislature, however, adopted only a tiny fraction of the suggested increases and did not revise the formula for determining foundational aid.[372]

In December 1994, parents of poor Baltimore City schoolchildren sued the state Board of Education and the state Superintendent of Schools, alleging that the state was not providing the adequate level of education that the Maryland Constitution required under *Hornbeck*.[373] In September of the following year, the mayor, the City Council of Baltimore, and the Board of School Commissioners of Baltimore City filed a separate suit against the same defendants, making similar allegations.[374] A month later the state defendants, acting within the parents' suit, filed a third-party complaint against the city plaintiffs, arguing that the city's mismanagement was to blame for any educational failures in Baltimore.[375] The city had been under fire for several years for its management of the schools, and had even been held in contempt in federal court in a decade-old suit on behalf of students with disabilities.[376] The trial court consolidated the claims and set a November 1996 trial date.[377]

A few months before the trial, several rounds of settlement negotiations broke down when the mayor opposed proposals that would reduce his authority over the school board.[378] The parents filed a motion for partial summary judgment.[379] The court granted it three weeks before the trial date, holding that children in Baltimore schools were not receiving an adequate education under the Maryland Constitution.[380] The court also held, however, that the parties presented a genuine dispute over the cause of this failure:[381] city officials had cited inadequate state financing, state officials had cited city mismanagement, and the parents had blamed a "combination of factors" and requested a remedy that would address problems at both the state and city levels.[382]

Finally, after the court postponed the trial for six days, the parties

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371. *Id.* at 93.

372. *Id.*

373. Bradford v. Md. State Bd. of Educ., No. 94340058/CE189672, at 1–2 (Cir. Ct. Balt. City June 30, 2000) (*Bradford II*). The plaintiffs also named the governor and the state comptroller of the treasury as defendants, but the trial court dismissed them from the case almost immediately. *Id.* at 2.

374. *Id.*

375. Cipollone, *supra* note 369, at 96–97.

376. *Id.* at 97 n.43, 98 (citing Vaughn G. v. Mayor & City Council, Civ. Act. No. MJG 84-1911 (D. Md. 1988)).

377. *Id.* at 97, 100.

378. *Id.* at 99–100.

379. Bradford v. Md. State Bd. of Educ., No. 94340058/CE189672, at 1 (Cir. Ct. Balt. City Oct. 18, 1996) (*Bradford I*).

380. *Id.* at 2.

381. *Id.*

382. Bradford v. Md. State Bd. of Educ., No. 94340058/CE189672, at 2–3 (Cir. Ct. Balt. City June 30, 2000) (*Bradford II*).

announced a settlement and signed a consent decree.[383] The decree established a city-state partnership, under which the governor and the mayor would jointly appoint members of a new board of school commissioners for Baltimore City.[384] The consent decree also increased state aid to the city schools in each of the next five years.[385] This money would be provided on top of the ordinary state aid due the city under the foundation system and other grants.[386] The decree also allowed the reconstituted school board to ask the state for even more money. If the board presented a detailed plan explaining why it needed the money and how it would be spent, the state was obligated to use its "best efforts" to provide it.[387] Finally, the state and the board were required to hire an independent consultant to assess the schools, including the sufficiency of state aid, midway through the five-year term of the decree.[388] The board would be permitted to ask for more state aid based on the consultant's report.[389] On June 1, 2000, four months after the consultant's report was due, if the state had not satisfied the board's requests for extra money, the board could go back to court to seek a compliance order.[390]

The governor and mayor both claimed victory, as did the American Civil Liberties Union, which represented the parent plaintiffs.[391] Others saw the settlement differently. Baltimore residents, including some parents, thought the mayor had given too much control to the state.[392] Concerned about protecting their collective bargaining rights, the teachers' union filed a motion to intervene in the suit.[393] Most significantly, perhaps, many state legislators opposed the consent decree simply because they wanted state aid for their districts too.[394] The bill implementing the decree was not passed until the final day of the legislative session, and it ultimately included extra state aid for every county in the state.[395]

In October 1999, the new board asked the state for $265 million in extra aid.[396] After the state Superintendent and state legislators suggested that the Board reduce the request to its top priorities, in December the Board submitted a new request for just $49.7 million.[397] A few months later, the independent

383. Cipollone, *supra* note 369, at 100.
384. *Bradford II*, at 3.
385. *Id.*
386. Cipollone, *supra* note 369, at 101.
387. *Bradford II*, at 3–4.
388. *Id.* at 4.
389. *Id.*
390. *Id.* at 3–4.
391. Cipollone, *supra* note 369, at 95, 103.
392. *Id.* at 104.
393. *Id.*
394. *Id.* at 104–05.
395. *Id.* at 105; 1997 Md. Laws 105, § 28.
396. *Bradford II*, at 7.
397. *Id.* at 8–9.

consultants published their report, confirming that Baltimore City schools needed "substantial additional funding."[398] When the state failed to respond, the Board threatened to go back to court, as permitted by the consent decree.[399] Finally, the state announced that it would provide $27.4 million in additional funding.[400] On June 9, 2000, the new board and the plaintiffs returned to court, as they had threatened to do.[401]

The trial court adopted the "overall conclusions" of the consultants' report, including the specific finding that the Baltimore schools needed an additional $2698 per student per year, for a total of $10,274 per student, to provide a constitutionally adequate education.[402] While the court did not address the possibility of city mismanagement directly, it adopted the consultants' conclusion that "Baltimore schools spend their resources in about the same way that other school systems spend theirs."[403] The court concluded that the $265-million request had been a detailed plan, as required by the consent decree,[404] and that in light of the state's $940-million surplus, the legislature had not made its "best effort" to meet the request.[405] The court held that Baltimore schoolchildren were still not receiving the "thorough and efficient" education the Maryland Constitution promised them, and that the state's plans to provide more aid were insufficient.[406] The court declared that additional state aid was needed, and specified that in each of the next two years, that aid should amount to between $2000 and $2600 per student.[407] Rather than demanding any specific action, however, the court's opinion noted that "the Court trusts that the State will act to bring itself into compliance with its constitutional and contractual obligations . . . without the need for Plaintiffs to take further action."[408]

One commentator has suggested that the court refrained from granting a more precise remedy because it did not want to upset state-level reform efforts that were well underway by the time of its decision.[409] In May 1999, the legislature had created a new commission, known as the Thornton Commission, to study school finance.[410] The Commission was charged both with monitoring the adequacy and equity of funding of public schools across the state and with

398. *Id.* at 4.
399. *Id.* at 12.
400. *Id.* at 13.
401. *Id.* at 4.
402. *Id.* at 14.
403. *Id.* at 15.
404. *Id.* at 16–17.
405. *Id.* at 23–24.
406. *Id.* at 25.
407. *Id.* at 26.
408. Bradford v. Md. State Bd. of Educ., No. 94340058/CE189672, at 26 (Cir. Ct. Balt. City June 30, 2000) (*Bradford II*).
409. PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA'S SCHOOLS 170 (2003).
410. 1999 Md. Laws 601.

"ensuring that local property tax policies [did] not affect the equitable allocation of funding."[411] The Commission included representatives of both urban and rural counties and a parent of a public school student.[412] It had submitted a preliminary report to the legislature in January 2000, shortly after the Baltimore parents had submitted their revised aid request to the state.[413] That report included an examination of the finance system then in place, a review of previous Maryland studies, and a plan for future investigation.[414] The Commission was scheduled to submit a final report by October 15, just four months after the judge issued his opinion in the Baltimore suit.[415]

As it happened, the Commission did not issue anything by October, and issued only an interim report in December.[416] That interim report called for $133 million in new state aid for 2002 and asked the legislature to maintain various aid programs, otherwise scheduled to expire, until it could issue its final report.[417] Though the legislature did maintain the programs, it failed to provide the new funding.[418] The Commission issued its final report more than a year later, in January 2002,[419] calling essentially for the system in place today.[420]

Though the legislature did eventually put into place aid formulas similar to those the Thornton Commission proposed,[421] it did not create revenue systems to finance those grants beyond the first year.[422] As a result, in May 2002, Baltimore parents and city officials returned to court to ask the judge to maintain supervision over their consent decree with the state beyond its expiration date, set for the following month.[423] The court noted that, in 2000, it had "declared" that the state was not providing Baltimore children a constitutionally adequate education.[424] Two years later, the court continued, "the State has yet to comply with this Court's order."[425] The court declared that it would continue

411. *Id.* § 1(b) (1), (b) (2), (b) (6).

412. *Id.* § 1(c) (15), (c) (21).

413. THORNTON PRELIM. REPORT, *supra* note 250.

414. *Id.*

415. 1999 Md. Laws. 601, § 1(f) (2).

416. COMM'N ON EDUC. FIN., EQUITY, & EXCELLENCE, INTERIM REPORT (Dec. 2000), *available at* http://mlis.state.md.us/other/education/121500_Final_Report.pdf.

417. *Id.* at 14, 31–33.

418. COMM'N ON EDUC. FIN., EQUITY, & EXCELLENCE, FINAL REPORT ix (Jan. 2002), *available at* http://mlis.state.md.us/other/education/final/2002_final_report.pdf.

419. *See id.*

420. DEP'T OF LEGISLATIVE SERVS., *supra* note 258, at 1.

421. For a discussion of the legislative maneuvering required to pass the bill, see SCHRAG, *supra* note 409, at 171–75.

422. An increase in the cigarette tax paid for the first year of increased state aid. 2002 Md. Laws 288, § 16 (codified as amended at MD. CODE ANN., TAX-GEN. § 12-105 (2004)).

423. Bradford v. Md. State Bd. of Educ., No. 94340058/CE189672, at 3 (Cir. Ct. Balt. City June 25, 2002) (memorandum opinion) (*Bradford III*).

424. *Id.* at 5.

425. *Id.*

supervision of the case "until such time as the State has complied with this Court's June 2000 order."[426]

## VI.
## MARYLAND INDIGENT DEFENSE: STATE COUNSEL

### *A. The Current System*

Indigent defense in Maryland is fully funded by the state at both the trial and appellate level. The Office of Public Defender, a statewide executive agency, is responsible for representing indigent defendants whenever they are entitled to counsel.[427] The Office provides representation through either its own full-time public defenders or "panel attorneys," private lawyers appointed on a case-by-case basis.[428] The state budget sets the salaries of public defenders, and the Office sets fees paid to panel attorneys and pays them out of its own budget.[429] Both public defenders and panel attorneys, once assigned, continue to represent clients through all proceedings, including appeal.[430] State law requires that the state budget provide money for the Office's operations, including salaries of public defenders, investigators, clerical assistants, and other personnel.[431]

### *B. The History*

In the late nineteenth century, Maryland statute granted trial judges the power to appoint counsel to defend "any person in the trial of any criminal case . . . whenever in the judgment of the court in which any such case is pending a just regard for the rights of the accused requires it."[432] The statute also instructed county commissioners to pay the counsel's fee, up to $100.[433]

In 1899, the Court of Appeals held that this statute required county commissioners to pay fees set by trial judges.[434] The court compared the statute to another requiring that county commissioners finance any spending needed for public schools not covered by state monies.[435] According to the court, that statute, as well as several others, demonstrated that the state legislature could require the county commissioners to pay bills even though the commissioners

426. Bradford v. Md. State Bd. of Educ., No. 94340058/CE189672, at 1 (Cir. Ct. Balt. City June 25, 2002) (order) (*Bradford IV*).

427. MD. ANN. CODE art. 27A, §§ 3(a), 4(b) (2003).

428. *Id.* §§ 3(b), 4(a), 6(a).

429. *Id.* §§ 3(b), 5(2), 6(d).

430. *Id.* § 4(d).

431. *Id.* §§ 3(b), 13.

432. MD. CODE PUB. GEN. LAWS art. 26, § 7 (1888).

433. *Id.* § 8.

434. County Comm'rs of Worcester County v. Melvin, 42 A. 910, 912 (Md. 1899).

435. *Id.* at 912 (citing MD. CODE PUB. GEN. LAWS art. 77, § 22 (1888)). The statute the court cited was the most recent version of the one described *supra* text accompanying note 294.

had no authority to set or even challenge those bills.[436] The court concluded that the commissioners did not have authority to challenge the counsel fee set by the court "any more than they possess authority to revise a demand of the school commissioners."[437]

In 1971, the legislature enacted Maryland's first public defender law, establishing the state-financed system that remains largely in place today.[438] According to the then-city solicitor of Baltimore, chair of a committee studying the new law for the Bar Association of Baltimore City, the State "[b]ow[ed] to successive court decisions requiring counsel at practically all stages of criminal proceedings."[439] The first of these decisions, of course, was *Gideon v. Wainwright*, which established a federal constitutional right to appointed trial counsel for indigent felony defendants in state court.[440] *Gideon* invalidated a series of Maryland cases holding that defendants could challenge uncounseled convictions only if they demonstrated that the absence of counsel led to some specific unfairness in the proceedings.[441] In another case decided six weeks after *Gideon*, the Court reversed the Court of Appeals of Maryland. In that case, *White v. Maryland*, the defendant had pleaded guilty during a preliminary hearing at which he was not afforded a lawyer.[442] A lawyer was later appointed for him, and he changed his plea to not guilty.[443] At trial, the prosecution introduced the fact that the defendant had initially pled guilty, and he was convicted.[444] The Maryland Court of Appeals affirmed this conviction, and the Supreme Court reversed with little explanation.[445] It was not until six years later, however, when the Court granted the right to appointed counsel to defendants at all "critical stages" of a proceeding in *Coleman v. Alabama*, that Maryland's governor was spurred to action.[446]

Just one week after *Coleman* was announced, Governor Marvin Mandel established a commission to investigate the need for a statewide public defender

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436. *Id.*

437. *Id.*

438. 1971 Md. Laws 209 (codified as amended at MD. ANN. CODE art. 27A, §§ 1–14 (2003)).

439. George L. Russell Jr., *Statewide Public Defender System Adopted by Maryland Legislature*, MD. B.J., July 1971, at 20. *See also* George M. Lipman, *Conscripting the Private Bar*, MD. B.J., Nov./Dec. 1991, at 15 (noting that Maryland's statewide public defender office was created in response to *Gideon* and subsequent decisions).

440. 372 U.S. 335, 338–39 (1963).

441. *Id.* at 338. *Gideon* invalidated Shaffer v. Warden of Md. House of Corr., 126 A.2d 573, 573–74 (Md. 1956), *cited in Gideon*, 372 U.S. at 338 n.2; Selby v. Warden of Md. House of Corr., 92 A.2d 756, 756 (Md. 1952); Williams. v. Warden, Md. Penitentiary, 89 A.2d 228, 228 (Md. 1952).

442. 373 U.S. 59, 59 (1963) (per curiam).

443. *Id.* at 60.

444. *Id.*

445. *Id.*

446. REPORT OF JOINT GOVERNOR'S COMMISSION AND BALTIMORE CITY BAR ASSOCIATION'S COMMITTEE FOR THE STUDY OF PUBLIC DEFENDER SYSTEM FOR THE STATE OF MARYLAND 1 (1970) [hereinafter MD. PUB. DEFENDER STUDY]; Coleman v. Alabama, 399 U.S. 1, 8–10 (1969).

system and for a uniform procedure for preliminary hearings, the "critical stage" at issue in *Coleman*.[447] The governor appointed the state's top prosecutor, the attorney general, to chair the commission.[448] Though the governor had asked the commission to investigate "the need" for a statewide public defender system, all of the members agreed from the start of the very first meeting that such a system was necessary to comply with *Coleman*. The only question was what form it would take.[449] Commission members considered three options: a fully centralized system with a state budget, fully autonomous regional systems, and a centralized system that allowed individual regions to opt out.[450] The commissioners quickly concluded that a fully centralized system would best "promote uniformity and the availability of State funding."[451] At the same time, however, they noted that any such system would need to remain flexible to meet local needs. In the end, the commission proposed that the state Public Defender oversee twelve regional offices, each matching the boundaries of the recently established district courts.[452]

The commissioners also considered whether the Public Defender should employ a staff of full-time lawyers or simply manage assignments to the private bar; one of the three Maryland counties that had already established public defender offices had chosen the latter approach.[453] This question proved contentious, and one commissioner ultimately opposed the commission's proposal because of his belief that defendants should be able to choose their own counsel.[454] Excepting that one member, the commission eventually recommended a system of full-time defenders, in part because a full-time office would be best able to handle the enormous indigent defense needs of Baltimore City.[455] In fiscal year 1970, indigent defense in the city had cost $358,628, more than twice the cost in any other county and more than 100 times the cost in several.[456] The commission recommended a $4.2-million budget for the new system, basing the figure in part on the number of prosecutors employed by the state.[457] The newly elected prosecutor of Baltimore City—Milton B. Allen, the first black lawyer to be elected a big-city prosecutor anywhere in the United States[458]—had recommended tying the defender's budget to the prosecutor's.[459]

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447. MD. PUB. DEFENDER STUDY, *supra* note 446, at 1.

448. *Id.*

449. *Id.* at 1–2.

450. *Id.* at 102.

451. *Id.*

452. *Id.* at 9, 102. The District Courts were established by 1969 Md. Laws 789 (ratified Nov. 3, 1970 as MD. CONST. art. IV, § 41A–41I).

453. MD. PUB. DEFENDER STUDY, *supra* note 446, at 10.

454. *Id.* at 15, 103–04.

455. *Id.* at 9, 104.

456. *Id.* at 62.

457. *Id.* at 12.

458. David Michael Ettlin, *Milton Allen, City State's Attorney, Dies at 85*, BALT. SUN, Feb. 13, 2003, at 1B.

The commission members went further, concluding that the defender should have up to twenty percent more personnel than the prosecutors' offices.[460]

Maryland's 1971 public defender law, based on the commission's recommendations, announced that it would thereafter be state policy "to provide for the realization of the constitutional guarantees of counsel in the representation of indigents . . . and to assure effective assistance and continuity of counsel" through the Office of Public Defender.[461] The law, then and now, applied to indigents charged with a "serious crime," including all felonies, all misdemeanors or other offenses with penalties of more than three months' imprisonment or a fine of more than $500, any offense for which the judge deems counsel necessary, and any offense that would fit one of the foregoing categories if not for the age of the accused.[462] Since its inception, the law has also maintained consistent policies regarding panel attorneys, including the Office's responsibility for setting their rates.[463]

Following the commission's advice, the new law required the state public defender to appoint one district public defender to manage the office in each district.[464] These district public defenders, according to the Office's first annual report, received "almost complete autonomy" to address local issues, even as they maintained statewide standards.[465] The law also established five-member volunteer advisory boards in each district to "study and observe" the operation of the district offices and advise both the district public defender and the state public defender.[466] Twenty-five years later, the legislature consolidated these boards into four regional advisory boards, each still consisting of five volunteer members.[467]

Under the original law, the Public Defender was to receive whatever salary was provided in the budget, but the legislature eventually mandated that the Public Defender's salary match that of associate judges of circuit courts.[468] The original law required, as it does today, that the state budget provide funds to effect it.[469]

The new law gave counties choosing to remain outside the state system four months to create independent systems to provide indigent defense at county

459. MD. PUB. DEFENDER STUDY, *supra* note 446, at 106.

460. *Id.*

461. 1971 Md. Laws 209 (codified at MD. ANN. CODE art. 27A, § 1 (2003)).

462. *Id.* (codified at MD. ANN. CODE art. 27A, § 2(h) (2003)).

463. *Id.* (codified at MD. ANN. CODE art. 27A, §§ 5, 6 (2003)).

464. *Id.* (codified at MD. ANN. CODE art. 27A, § 3(b) (2003)).

465. 1 MD. OFF. PUB. DEFENDER ANN. REP. 1 (1972).

466. 1971 Md. Laws 209 (codified as amended at MD. ANN. CODE art. 27A, § 10 (2003)).

467. 1996 Md. Laws 341 (codified at MD. ANN. CODE art. 27A, § 10 (2003)).

468. 1971 Md. Laws 209 (codified as amended at MD. ANN. CODE art. 27A, § 3(a) (2003)); 1998 Md. Laws 169 (codified at MD. ANN. CODE art. 27A, § 3(a) (2003)).

469. 1971 Md. Laws 209 (codified at MD. ANN. CODE art. 27A, § 13 (2003)).

expense.[470] Any county taking advantage of this provision would be allowed to dissolve that system later and obtain the services of the Office of Public Defender, but only if the state public defender determined that providing such services was "feasible."[471] Although one county initially announced that it would create its own system, it quickly reversed course and joined the rest of the state.[472]

A statewide budget crisis in 1991 threatened to return public defender financing to the counties. Facing a more than $200-million deficit,[473] the governor cut $1 million from the Office's budget.[474] Eventually, the Office ran out of money to hire panel attorneys, creating an ethical dilemma in cases involving multiple defendants.[475] Under ethical rules, the Office's full-time lawyers could not represent codefendants because their interests would likely conflict.[476] At the same time, the public defender law allowed the Office to hire panel attorneys only to the extent that the state provided money to do so.[477] When the public defender asked the state attorney general for an advisory opinion on how to handle the situation—a procedure that itself should perhaps have raised ethical concerns—the attorney general pointed to a provision of the public defender law that maintained a vestige of the pre-public defender system.[478] The statute specifically mandated that it should not be construed to deprive courts of their authority to appoint counsel to represent indigents when the Office of Public Defender failed to do so.[479] In fact, the law listed cases involving codefendants as such a situation.[480] That authority to appoint counsel derived from another statute, which also specified how such counsel should be paid: either by including the fee among other court costs or by charging the county.[481] Because an indigent defendant will not pay costs, the provision effectively meant that the counsel fee would be borne by the county in which the prosecution took place.[482] The attorney general, however, noted that the statute and the case law were silent as to what would happen "in the absence of local appropriations" to cover the fee,[483] suggesting that, at least in his opinion, the

470. *Id.* (codified at MD. ANN. CODE art. 27A, § 14 (2003)).

471. *Id.*

472. 1 MD. OFF. PUB. DEFENDER ANN. REP. 8 (1972).

473. Thomas W. Waldron & Laura Lippman, *State Employees Wary of Layoff Roller Coaster*, BALT. SUN, Dec. 17, 1990, at 1A.

474. Maria Archangelo, *Crisis Averted as Public Defenders Survive Budget Slash*, BALT. SUN, Feb. 13, 1991, at 5.

475. 76 Op. Att'y Gen. 341 (1991).

476. *Id.*

477. *Id.* at 342 (citing MD. ANN. CODE art. 27A, § 6(d) (1997)).

478. *Id.* at 343 (citing MD. ANN. CODE art. 27A, § 6(f) (1997)).

479. MD. ANN. CODE art. 27A, § 6(f) (2003).

480. *Id.*

481. MD. CODE ANN., CTS. & JUD. PROC. § 2-102(a), (c) (2002).

482. 76 Op. Att'y Gen. at 344.

483. *Id.*

counties would likely be either unwilling or unable to pay for indigent defense counsel. Indeed, one commentator described most counties and the city of Baltimore as "more destitute than the state."[484] The attorney general concluded that appointed counsel might be forced to work without pay.[485] Luckily, the state found money to cover the shortfall before this possibility became a reality.[486]

## VII.
## NEVADA PUBLIC SCHOOLS: LOCAL SCHOOLS

During the 2000–01 school year, local sources accounted for 66.33% of public school financing in Nevada, a higher share than in any other state.[487] The crucial step in determining state aid to education in Nevada is the setting of "basic support guarantees" per student both for the state as a whole and for each school district. The legislature sets these figures each year, but the state's education statute does not establish how it should do so.[488] According to a 1990 study conducted on behalf of the state legislature, the per-student statewide guarantee is based on estimated total enrollment and the revenue available in the state's education fund.[489] The per-student guarantee for each school district, according to the study, is set by multiplying the statewide guarantee by a factor, different for each district, intended to account for whether the average cost of educating a student in that district is higher or lower than the statewide average.[490] For example, the per-student cost might be above average in an especially small district because unavoidable overhead costs, such as a principal's salary, are spread over a smaller number of students.[491] Then, the formula factors in transportation costs for the district and the district's relative wealth.[492] State aid to the district will be the amount needed to reach that basic support level if the district imposed a property tax of twenty-five cents per $100 of valuation and a variety of other taxes mandated by state law.[493] The state also requires that each county impose a tax of seventy-five cents per $100 of assessed

484. Lipman, *supra* note 439, at 15.

485. 76 Op. Att'y Gen. at 344.

486. Patty Reinert, *Bill Would Restore $1.4M to Public Defenders' Budget*, DAILY REC. (Balt.), Oct. 17, 1991, at 1.

487. *See* Department of Education, *supra* note 10. That year no other public education system relied on local sources for as much as 60% of financing.

488. NEV. REV. STAT. 387.122 (2003). The figures for the 2003–04 school year, and the tentative figures for the 2004–05 school year, were both set in 20th Spec. Sess., 2003 Nev. Stat. 5, § 189.22.

489. A FISCAL AGENDA FOR NEVADA: REVENUE OPTIONS FOR STATE AND LOCAL GOVERNMENTS IN THE 1990S 330 (Robert D. Ebel ed., 1990) [hereinafter AGENDA FOR NEVADA].

490. *Id.* at 329.

491. *Id.*

492. NEV. REV. STAT. 387.1233 (2003). AGENDA FOR NEVADA, *supra* note 489, at 331.

493. *Id.* 387.1235.1, 387.124.

property value for the support of local schools.[494]

In 1963, the state assembly assigned a commission to study the problem of inequity in education.[495] At the time, state aid to education consisted of identical grants to each district, regardless of local tax base, based on average costs as measured nearly a decade before.[496] The basic structure of Nevada's current school finance system was put in place in 1967 in response to that study, and it has been adjusted periodically since then.[497] According to the state aid statute, the purpose of state aid is to ensure "a reasonably equal educational opportunity" for each child.[498] The aid system includes protections to prevent sudden and temporary drops in enrollment from dramatically reducing state aid and a separate calculation for special education aid.[499] Beginning with the 2004–05 school year, state officials set a minimum amount that each district must spend on textbooks and other supplies;[500] the new rule is an expansion of a 1999 provision allowing state officials to set minimum annual spending levels for library books and computer software.[501]

## VIII.
## NEVADA INDIGENT DEFENSE: LOCAL COUNSEL

In fiscal year 2002, 97.4% of Nevada's indigent defense financing was derived from local sources, a higher share than in any other state outside the four in which indigent defense is fully locally financed, including Michigan. Nevada law requires counties with a population of 100,000 or more to establish county public defender offices.[502] There are two such counties, those that include Las Vegas and Reno.[503] The remaining fifteen counties may create their own public defender offices, retain the services of the state public defender's office, or contract with the private bar to provide defense services.[504] One of the fifteen has created its own public defender office and seven retain the state office.[505] The counties that retain the state public defender office pay the office for its

494. *Id.* 387.195.1.

495. LEGISLATIVE COMM'N OF THE LEGISLATIVE COUNSEL BUREAU, STATE OF NEVADA, STATE FINANCIAL SUPPORT FOR PUBLIC SCHOOLS iii (1967) (citing Assemb. Con. Res. 25, 52d Sess. Leg. (Nev. 1963)).

496. *Id.*

497. AGENDA FOR NEVADA, *supra* note 489, at 328.

498. NEV. REV. STAT. 387.121 (2003).

499. *Id.* 387.047, 387.1221, 387.1233.2.

500. *Id.* 387.206.

501. 1999 Nev. Stat. 1357 (codified as amended at NEV. REV. STAT. 387.207 (2003)).

502. NEV. REV. STAT. 260.010.1 (2003).

503. SPANGENBERG GROUP, *supra* note 11, at 17–18.

504. NEV. REV. STAT. 180.090, 260.010.2 (2003); SPANGENBERG GROUP, *supra* note 11, at 18.

505. SPANGENBERG GROUP, *supra* note 11, at 18; 2003 Nev. Stat. 328, § 11.

services in advance, based on caseload projections,[506] and are liable to the office for any unexpected expenses.[507] The state public defender office also provides counsel in all counties in post-conviction proceedings and direct appeals that reach the state supreme court;[508] in post-conviction petitions for habeas corpus the state pays counsel fees.[509]

In 1965, two years after *Gideon*, the State of Nevada empowered counties to create their own public defender offices.[510] Clark County, which contains Las Vegas, did so the following year,[511] and the year after that the state mandated that all counties with populations of 100,000 or more do the same.[512] In 1971, the legislature created the state Public Defender Office, which was initially state-financed.[513] In 1973, however, the legislature revised the statute to allow the Office to collect fees from the counties.[514]

By 1979, the counties participating in the state system were supplying slightly more than 75% of the state office's budget, and one of the counties complained that the state should absorb the costs of indigent defense.[515] (This was the same county, Elko, that is the only one that voluntarily runs its own public defender office today.)[516] The state public defender brought the question to the attorney general, who concluded that the state was within its authority to require the counties to pay for indigent defense.[517] The attorney general noted that *Gideon* and its progeny did not address which government entity was responsible for the costs of indigent defense.[518] He also observed that Nevada law assigned the costs of much of the criminal justice system to the counties.[519] The costs of maintaining courtrooms and other judges' facilities, bailiffs' salaries, court reporters' fees, salaries of justices of the peace, the fees and

506. NEV. REV. STAT. 180.080.1(b), 180.110 (2003).

507. 1998 Op. Att'y Gen. 258, 1998 WL 892989, at *3 (1998).

508. NEV. REV. STAT. 180.060.4 (2003). In counties with a county public defender office, that office remains in a co-counsel role. *Id.*

509. *Id.* 7.155.

510. 1979 Op. Att'y Gen. 65, 1979 WL 34690, at *2 (1979) (citing 1965 Nev. Stat. 279 (codified as amended at NEV. REV. STAT. 260 (2003))).

511. *See generally* Jeanette McPherson & Marla Hockfeld, *The Public Defender's Office: Created to Provide Adequate Justice*, NEV. LAW., Dec. 2001, at 10–11 (describing the creation of the Clark County Public Defender's Office).

512. 1979 Op. Att'y Gen. 65, 1979 WL 34690, at *2 (citing 1967 Nev. Stat. 674, 678 (codified as amended at NEV. REV. STAT. 260.010 (2003))).

513. *Id.* (citing 1971 Nev. Stat. 622 (codified as amended at NEV. REV. STAT. 180 (2003))).

514. *Id.* (citing 1973 Nev. Stat. 486 (codified as amended at NEV. REV. STAT. 180.110 (2003))).

515. *Id.* at *1.

516. *Id.*; SPANGENBERG GROUP, *supra* note 11, at 18.

517. 1979 Op. Att'y Gen. 65, 1979 WL 34690, at *1, *4.

518. *Id.* at *2 (citing Scott v. Illinois, 440 U.S. 367 (1979); Berry v. Cincinnati, 414 U.S. 29 (1973); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

519. 1979 Op. Att'y Gen. 65, 1979 WL 34690, at *3.

expenses of grand and petit jurors, private indigent defense counsel (appointed when public defenders face conflicts of interest), prosecutors' salaries, and sheriffs' salaries were all paid by counties.[520] Most importantly, the counties were creatures of the state, fully responsible for any duties the state assigned them.[521]

## IX.
## NEW MEXICO PUBLIC SCHOOLS: STATE SCHOOLS

During the 2000–01 school year, local sources accounted for 14.96% of school financing in New Mexico, a lower percentage than in any other state.[522] State grants to New Mexico school districts are determined according to a principle similar to that used in Maryland: the theoretical cost of the educational program in each district is determined by using a formula that assumes that educating some types of students will cost a preset multiple of the cost of educating other students.[523] For example, certain special education students are assumed to cost twice as much to educate as "basic education" students.[524] New Mexico also provides extra financing to schools that are unusually small or unusually large,[525] and to schools where the student body, after weighting, increases by more than 1% from one year to the next.[526] All of these costs combined are a district's theoretical "program cost."[527] Local revenue is assumed to be 75% of the revenues that would be generated by a local property tax of just fifty cents per $1000 of valuation, plus certain other local revenues.[528] Each district's theoretical local revenue, actual federal revenue, and revenue from another state program are subtracted from its program cost, and the state provides a grant to cover the remainder.[529] For the most part, even though state grants are calculated assuming that certain types of students will cost certain amounts to educate, school districts are free to spend their state grant however they like; they are not required, for example, to spend twice as much per student on one category of special education students as they do on other students.[530] One near-exception to this principle governs the extra financing provided for "at-risk" students; districts are eligible for that financing only if

520. *Id.*
521. *Id.*
522. *See* Department of Education, *supra* note 10.
523. *Compare supra* text accompanying notes 257–259 *with* N.M. STAT. ANN. §§ 22-8-18–22-8-22 (Michie 2003).
524. N.M. STAT. ANN. §§ 22-8-18(a) (3), 22-8-21(c) (3) (Michie 2003).
525. *Id.* §§ 22-8-18(a) (6), 22-8-23.
526. *Id.* §§ 22-8-18(a) (8), 22-8-23.1.
527. *Id.* § 22-8-18.
528. *Id.* § 22-8-25(b).
529. *Id.* §§ 22-8-25(d) (5)–22-8-25(d) (7), 22-8-25(e).
530. *Id.* § 22-8-18(b).

they actually create a state-approved program for such students.[531]

This equitable distribution formula did not always exist. When New Mexico became a state in 1912,[532] it continued the practice it had observed as a territory of financing schools with property taxes.[533] When property values fell during the Depression, this method proved insufficient, and the state temporarily enacted other taxes to pay for schools.[534] The next significant change took place in 1969. With lawsuits across the country challenging school financing systems based on local property taxes, New Mexico established an early version of the system now in place.[535] Though four years later the *Rodriguez* Court effectively announced that such a dramatic restructuring was unnecessary, New Mexico never reverted to its former, locally financed approach.

## X.
## NEW MEXICO INDIGENT DEFENSE: STATE COUNSEL

Indigent defense in New Mexico is fully funded by the state at both the trial and the appellate level.[536] The state's Public Defender Department provides trial counsel to indigents in approximately half of the state's counties through district defender offices composed of full-time public defenders.[537] In the remaining counties, the Department pays private defense counsel at rates set by the state's Chief Public Defender.[538] The Department provides appellate representation through a centralized division that handles all indigent appellate defense, regardless of whether the Department provided trial representation through its own lawyers or by paying private counsel.[539]

New Mexico's indigent defense system developed in two stages. In 1968, the state enacted the Indigent Defense Act, which provided that courts must determine whether defendants are indigent and appoint counsel for those who

531. *Id.* § 22-8-23.3(a). In this scheme, at-risk students are those who are eligible for federal financing under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301–6578 (2000), who are classified as English-language learners by federal standards, or who move frequently. N.M. STAT. ANN. § 22-8-23.3(b) (Michie 2003). The at-risk program is only a "near-exception" to the principle of local control over spending because, though the statute requires that an at-risk program exist, it does not require that the district spend all of its at-risk money on that program. *Id.* § 22-8-23.3(a).

532. William H. Taft, Presidential Proclamation, *in* 37 Stat. 1723 (1912).

533. Robert J. Desiderio, James La Fata & Maria Siemel McCulley, *New Mexico Taxes: Taking Another Look*, 32 N.M. L. REV. 351, 363–64 (2002).

534. *Id.* at 364.

535. 1969 N.M. Laws 180.

536. N.M. STAT. ANN. §§ 31-15-5, 31-15-8, 31-15-10 (Michie 2000 and Supp. 2002).

537. SPANGENBERG GROUP, *supra* note 11, at 19; N.M. STAT. ANN. §§ 31-15-9–31-15-11 (Michie 2000 and Supp. 2002).

538. SPANGENBERG GROUP, *supra* note 11, at 19; N.M. STAT. ANN. § 31-15-7(b) (11) (Michie Supp. 2002).

539. N.M. STAT. ANN. § 31-15-8 (Michie 2000).

are.[540] The Act also provided that the state would pay appointed counsel—including costs and expenses—and established rates at which to do so.[541]

In June 1972, the Supreme Court held in *Argersinger v. Hamlin* that convicted defendants could not be incarcerated, even for misdemeanors, if they had not been represented at trial, unless they had waived representation.[542] The decision—two years after the *Coleman* decision had spurred Maryland to reexamine its indigent defense system[543]—prompted New Mexico officials to consider shifting from appointed counsel to a public defender model.[544] In the same year, NLADA studied indigent defense in the state and concluded that appointed counsel were so poorly paid that the quality of their representation suffered.[545] The only way to ensure adequate counsel for the indigent, according to NLADA, would be at least to double the fees paid to appointed counsel.[546] More significantly, in light of *Argersinger*, the group determined that even if pay were increased, the unappealing substance of the work would deter so many attorneys from taking it on that there would be virtually no way to ensure adequate representation.[547] The group recommended that New Mexico adopt a statewide public defender system as the only way to handle the increased caseload.[548]

In 1973, without revising the Indigent Defense Act, the state enacted the Public Defender Act, which established the Public Defender Department described above and provided that it too would be financed by the state.[549] The new Act mentioned the earlier law only once, when it noted that the new department's appellate division would represent the trial clients both of full-time public defenders and of private counsel appointed under the Indigent Defense Act.[550] The Supreme Court of New Mexico has reconciled the statutes by describing the Public Defender Act as creating an agency to represent defendants who are indigent according to the Indigent Defense Act.[551]

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540. 1968 N.M. Laws 69, §§ 60–62 (codified at N.M. STAT. ANN. §§ 31-16-3–31-16-5 (Michie 2000 and Supp. 2002)).

541. *Id.* § 65 (codified at N.M. STAT. ANN. § 31-16-8 (Michie 2000)).

542. 407 U.S. 25, 37 (1972).

543. *See supra* text accompanying notes 446–447.

544. NAT'L LEGAL AID & DEFENDER ASS'N, COMPREHENSIVE PLAN FOR PROVISION OF DEFENSE COUNSEL FOR INDIGENT ACCUSED IN THE STATE OF NEW MEXICO 1 (1972).

545. *Id.* at 8–9.

546. *Id.* at 10.

547. *Id.* at 14.

548. *Id.* at 32.

549. 1973 N.M. Laws 156, § 5 (codified as amended at N.M. STAT. ANN. § 31-15-5 (Michie Supp. 2002)).

550. *Id.* § 8(c) (codified at N.M. STAT. ANN. § 31-15-8 (Michie 2000)).

551. State *ex rel.* Quintana v. Schnedar, 855 P.2d 562, 565 (N.M. 1993).

## XI.
## LESSONS

### *A. State Schools, Local Counsel*

In Michigan and five other states, public education is mostly state-financed, but indigent defense counsel is more than 90% locally financed. What can advocates of state financing for indigent defense in these states—and perhaps in others with local financing—learn from their more successful counterparts in the field of education?[552] Emel Gökyigit Wadhwani has argued that school finance litigation suggests arguments that can be applied more broadly to many other traditional municipal functions.[553] Wadhwani contends that—at least with respect to municipal functions as a group—these arguments may be more successful in the political than in the legal arena.[554] But when applied specifically to indigent defense, one of the legal arguments that succeeded in education should be more directly transferable than she supposed.

As noted above, education finance litigation has been described as progressing in three waves: advocates first raised federal equal protection claims, then state equal protection claims, and finally state adequacy claims.[555] The second wave, based on state constitutions' equal protection clauses, presents the best hope for a challenge to locally financed indigent defense. Claims based on state equal protection clauses proved successful in education litigation in some states in which claims based on the federal constitution had failed, including, briefly, Michigan.[556] If states that pay most of the cost of public education do so because their courts concluded that education was a fundamental right under the state constitution,[557] advocates should be able to argue that the right to appointed counsel must be fundamental as well, because it has existed in

552. Michigan's school finance reforms of the early 1990s succeeded in shifting the burden from local to state sources, and progress toward that goal is the focus of this article. Whether the state distributes money equitably and whether the reforms produced better educational results is subject to debate. *See, e.g.*, Brad Heath, *Michigan Still Shortchanges Poor Schools*, DETROIT NEWS, May 25, 2003, at A1. *See generally* James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 203–04 (2003) (contending that apparently successful school finance equity litigation often leads to stagnation or decline in overall expenditures on education); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 256 (1999) ("[S]chool finance reform has done little to improve the academic performance of students in predominantly minority districts . . . [and] it may be a costly distraction from the more productive policy of racial and socioeconomic integration.").

553. *See generally* Emel Gökyigit Wadhwani, *Achieving Greater Inter-Local Equity in Financing Municipal Services: What We Can Learn from School Finance Litigation*, 7 TEX. F. ON C.L. & C.R. 91 (2002).

554. *Id.* at 120–25.

555. *See* Thro, *supra* note 333, at 222–38.

556. *See supra* text accompanying notes 134–155, 164–168.

557. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1977).

some form in every state for more than seventy years.[558] Even better, if those state courts held that wealth is a suspect classification,[559] that holding should apply directly to a challenge to indigent defense financing. Either the fundamental right argument or the suspect classification argument, if successful, would trigger strict scrutiny of locally based indigent defense financing systems. Such scrutiny, of course, is nearly always fatal.[560]

It is important to note, however, that the suspect classification argument is not nearly as strong as the fundamental right argument. Any court that viewed school financing based on geography as implementing a wealth-based classification would likely view indigent defense financing based on geography in the same way. But courts that were swayed by the sympathetic class of plaintiffs in school finance cases—schoolchildren living in poor districts, the parents of those children, taxpayers in poor districts, or government officials in those districts[561]—might see few parallels in the class of accused criminals who would be plaintiffs in indigent defense financing cases.[562] Advocates could attempt to avoid this problem by focusing on another, more sympathetic, class that might exist. If the indigent defense system is so skewed against poor counties that appointed counsel there are demonstrably incompetent, and defendants in those counties can therefore overturn their convictions because they were provided ineffective assistance of counsel,[563] the system could be said—ironically perhaps—to discriminate against both those defendants and the victims of their crimes, whose victimizers escape justice. Crime victims, of course, make more sympathetic plaintiffs than accused criminals. Nonetheless, this class is probably more theoretical than real, and advocates modeling indigent defense advocacy on education advocacy should therefore focus courts' attention on the suspect classification rather than on the suspect class.

The suspect classification argument also suffers when viewed in light of the

558. *See* Powell v. Alabama, 287 U.S. 45, 73 (1932) ("The United States by statute and every state in the Union by express provision of law, or by determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases.").

559. *See, e.g., id.*

560. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (characterizing strict scrutiny as "'strict' in theory and fatal in fact"). *But see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 361–62 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (discounting Gunther's view).

561. *See, e.g.*, Hornbeck v. Somerset County Bd. Of Educ., 458 A.2d 758, 764 (Md. 1983).

562. The accused themselves must be the plaintiffs; the Supreme Court recently held that defense counsel did not have standing to challenge appointment procedures on behalf of "hypothetical indigents." *Kowalski v. Tesmer*, 125 S. Ct. 564, 566 (2004).

563. As explained *infra* text accompanying notes 582–584, defendants are not usually able to raise successful ineffective assistance claims based solely on the lack of resources the government provides their counsel. The scenario described in the text assumes that that poor financing leads to poor defense work that itself can be challenged as ineffective.

origins of strict scrutiny in *United States v. Carolene Products Co.*[564] There, the Court first articulated a key reason for the judicial branch to apply a more exacting standard of review to statutes that have a special impact on minorities: the possibility that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[565] Strict scrutiny thus provides judicial protection to people victimized by the political decisions of the legislative and executive branches.[566] Unfortunately, the potential plaintiffs with the strongest claim of political powerlessness are unlikely to support reform of local financing systems. Where indigent defense is financed locally, only local residents with voting rights have any influence over the level of financing. Indigent defendants in poor counties may or may not reside in the counties in which they are charged, but it is likely that indigents in wealthy counties, simply by virtue of being indigent, are probably less often residents of the wealthy counties in which they are charged.[567] Indigent defendants charged in wealthy counties therefore have a stronger claim that they are politically powerless as a group, and thus that they merit the protection of strict scrutiny under the principles of *Carolene Products*. Political powerlessness was, after all, a trait that the Supreme Court in *Rodriguez* noted was absent in those disadvantaged by Texas's school finance system; this was one reason it held that the plaintiffs were not a suspect class.[568] But the premise of the push for centralized financing is that in a system of local financing, counsel for defendants in poor counties have fewer resources, and therefore provide lower quality representation, than counsel for defendants in wealthy counties.[569] By comparison, indigent defendants in wealthy communities benefit from a locally financed indigent defense model. They would never challenge such a system.

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564. 304 U.S. 144 (1938).

565. *Id.* at 152 n.4.

566. *See, e.g.*, Watkins v. United States Army, 875 F.2d 699, 726–28 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment) (concluding that homosexuals' political powerlessness favors treating them as suspect class protected by strict scrutiny); Lopez Lopez v. Aran, 844 F.2d 898, 913 (1st Cir. 1988) (Torruella, J., concurring in part and dissenting in part) (concluding that Puerto Ricans' political powerlessness favors granting them protection of strict scrutiny); Medley v. Ginsberg, 492 F. Supp. 1294, 1301–02 (S.D. W. Va. 1980) (suggesting that political powerlessness of mentally retarded might warrant granting them greater protection under equal protection clause); Doe v. Colautti, 454 F. Supp. 621, 632 (E.D. Pa. 1978) (suggesting that political powerlessness of "the mentally ill" might warrant granting them greater protection under equal protection clause), *aff'd*, 592 F.2d 704 (3d Cir. 1979); Dean v. District of Columbia, 653 A.2d 307, 349–51 (D.C. Ct. App. 1995) (per curiam) (Ferren, J., concurring in part and dissenting in part) (concluding that homosexuals' political powerlessness favors treating them as a suspect class protected by strict scrutiny).

567. From this perspective, indigent defense is one of the few government services that is "ageographical": residency does not determine who may use the service. *See* Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 324–25 (1993).

568. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

569. 1976 NLADA GUIDELINES, *supra* note 63, at 242, 247–48.

The second wave of school finance litigation thus provides advocates with a useful strategy for attempting to secure state financing of indigent defense. It is especially—and perhaps only—a useful strategy if plaintiffs depend upon the fundamental right theory to obtain strict scrutiny. Both the first and third waves present less helpful examples for indigent defense advocates.

The first wave of school finance litigation was based on the Equal Protection Clause of the federal constitution.[570] This approach proved unsuccessful for school finance reformers, and it would likely fail for indigent defense reformers as well, but it would fail in the indigent defense context for different reasons. *Rodriguez* foreclosed this approach in the educational context by holding that wealth was not a suspect classification and that education was not a fundamental right.[571] The criminal defendant's right to counsel, however, unlike the right to education (and the "rights" to police and fire protection[572]) is a fundamental right under the federal constitution.[573] A financing scheme that distributes the right to counsel unequally should therefore be subject to strict scrutiny. As noted above, NLADA, relying on *Rodriguez*, considered and rejected this argument nearly three decades ago. The organization did so because the right to counsel is not completely denied to indigent criminal defendants charged in underfunded counties[574]—and the *Rodriguez* Court resisted the equal protection challenge because the schoolchildren had not been subjected to a total deprivation of their rights.[575]

Today, there is another reason that a federal equal protection claim would probably fail. While Texas "virtually" conceded in *Rodriguez* that its system would not survive strict scrutiny,[576] a state defending a county-financed indigent defense system would not need to do so under current federal law. Three years after *Rodriguez*, the Court required in *Washington v. Davis* that a party raising an equal protection claim show discriminatory intent, not merely disparate impact.[577] Some state courts, including Maryland's Court of Appeals, have pointed to *Davis* and its progeny as an additional reason to reject federal equal protection challenges to local school financing.[578] They would likely do the same in the face of a challenge to local indigent defense financing. The first wave of school finance litigation, then, presents no helpful model for indigent defense advocates.

The third wave of education finance litigation was the adequacy movement,

570. *See* Thro, *supra* note 333, at 222–25.
571. *Rodriguez*, 411 U.S. at 18–29, 35.
572. *Id.* at 54.
573. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
574. 1976 NLADA GUIDELINES, *supra* note 63, at 249.
575. *Rodriguez*, 411 U.S. at 20–25.
576. *Id.* at 16–17.
577. 426 U.S. 229, 239–41 (1976).
578. *See supra* text accompanying notes 353–354.

based on state constitutions.[579] This wave, like the first, will not be useful to challengers of locally financed indigent defense systems. Plaintiffs in these cases argued that state constitutional guarantees of education either explicitly or implicitly guaranteed education of a certain quality, usually referred to as an "adequate" education.[580] Wadhwani argues that this type of claim might usefully be adapted to municipal services generally, even though many municipal services are not explicitly mentioned in many state constitutions and the claims would not often be obvious winners.[581] At first blush, underfunded indigent defense services appear to be a perfect target for adequacy arguments because the right to appointed counsel is protected by state constitutions. In fact, a doctrine analogous to adequacy—ineffective assistance of counsel—already exists in the context of criminal defense. Nevertheless, reliance on this Sixth Amendment doctrine has failed to lead to financing reform. To bring a claim based on ineffective assistance of counsel, a defendant challenging a conviction or sentence first must show that defense counsel's representation was objectively unreasonable and next must show that there is a reasonable probability that, absent counsel's errors, the result of the proceeding against the defendant would have been different.[582] Convicts claiming ineffective assistance of counsel who cite the underfunding of their counsel have almost always lost,[583] because the doctrine requires defendants to identify a specific error made by counsel. If such an error cannot be shown, underfunding alone does not make out a claim, and if such an error can be shown, underfunding is irrelevant.[584] The adequacy approach, as a result, is not transferable from school finance litigation to indigent defense reform.

Finally, some commentators have proposed applying what amounts to a combination of the first and third waves of school finance litigation to indigent defense litigation. Though its members could not have known it at the time, NLADA took this approach when it suggested that equal protection claimants argue that underfunding constitutes a complete denial of their right to counsel, as a way to meet *Rodriguez*'s strict requirements in this regard.[585] Such an

579. *See* Thro, *supra* note 333, at 233–38.

580. *Id.*

581. Wadhwani, *supra* note 553, at 102–06.

582. Williams v. Taylor, 529 U.S. 362, 390–91 (2000) (citing Strickland v. Washington, 466 U.S. 668, 687,688, 694 (1984)).

583. *See, e.g.*, Ex parte Smith, 698 So.2d 219, 223–25 (Ala. 1997); Bui v. State, 717 So.2d 6, 15–16 (Ala. Crim. App. 1997); People v. Dist. Court of El Paso County, 761 P.2d 206, 208 (Colo. 1988) (en banc); Johnson v. State, 693 N.E.2d 941, 952–53 (Ind. 1998); Games v. State, 684 N.E.2d 466, 481 (Ind. 1997); Hodges v. State, No. M1999-00516-CCA-R3-PD, 2000 WL 1562865, at *20–*22 (Tenn. Crim. App. 2000); Webb v. Commonwealth, 528 S.E.2d 138, 144–45 (Va. Ct. App. 2000). *But see* State v. Peart, 621 So.2d 780, 791 (La. 1993).

584. I thank Professor William Stuntz for this point. A similar argument appeared in Rodger Citron, Note, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 486–87 (1991).

585. 1976 NLADA GUIDELINES, *supra* note 63, at 249.

argument would combine the federal equal protection claim of the first wave of education finance litigation with the state adequacy claim of the third wave. It might arise slightly differently from a traditional ineffectiveness claim; for example, a defendant, prior to conviction, might file suit as a plaintiff against the state, claiming a violation of equal protection. But such a defendant would likely have no more success than those defendants who have cited underfunding in ordinary ineffectiveness challenges.[586] This is because ineffective assistance of counsel is a backward-looking doctrine, designed to compensate for errors made by counsel that led to conviction. The doctrine simply does not apply before conviction, because defendants can point neither to unreasonable performance by counsel nor to resulting prejudice, and, thus, can meet neither prong of the ineffectiveness test.[587] Advocates of indigent defense finance reform will therefore be unable to use this combination of the first and third waves of school finance litigation.

### *B. Local Schools, State Counsel*

In Maryland and seven other states, schools are mostly locally financed and indigent defense systems are more than 90% state-financed. What can advocates of state financing for public schools learn from their more successful counterparts in indigent defense?

Based on the states surveyed here, education advocates in Maryland and similar states should take two lessons from indigent defense reform. The first is that reform may come more easily in the state house than in the courthouse, because the shift from local to state financing in indigent defense came through legislation, not litigation, in both Maryland and New Mexico.[588] The legislation in both states, to be sure, was spurred by Supreme Court decisions—*Coleman v. Alabama* and *Argersinger v. Hamlin*, respectively[589]—but neither the parties nor the Court in those cases raised issues of financing. Advocates in Maryland and New Mexico could have used those decisions as foundations for finance litigation, but they did not. Instead, legislators decided that centralizing financing would be the most effective way to meet the procedural requirements the Court had set out. At the least, these stories suggest that reformers should not be so committed to achieving change through the courts that they cannot take up legislation when litigation fails. To draw this conclusion is not to choose sides in the debate over whether school finance reform is, as a general matter, an

586. *See, e.g.*, Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn. 1996) (holding that public defender plaintiff alleging, under Minnesota law, that inadequate indigent defense financing denies his clients effective assistance of counsel does not present a valid claim).

587. *But see* Note, *supra* note 4, at 2070–72 (advocating a "prospective Sixth Amendment claim").

588. *See supra* text accompanying notes 438–472, 544–551.

589. *See supra* text accompanying notes 446–447, 542–544.

appropriate subject for public law litigation.[590] It is, instead, to join scholars who have concluded that litigation, at least in certain circumstances, is simply not an effective tool in reforming the financial structure of public education,[591] or is effective only in combination with legislative efforts.[592] Indeed, even advocates and practitioners of public law litigation often view the approach as an alternative to be employed when more democratic means of reform fail.[593]

The second lesson may be more important, though more mundane: legislation intended to shift an enormous financial burden from localities to the state has the best chance of success if the governor drives it. The mere support of the governor may not be enough. In Maryland and Michigan (to the degree it has happened in Michigan at all), indigent defense reform has been driven by governors. In Maryland, Governor Marvin Mandel established a committee to evaluate the impact of *Coleman* one week after the case was decided, and it is probably not a coincidence that the question ostensibly before the group—whether to establish a statewide system—was a foregone conclusion at the very first meeting.[594] In Michigan, the original impetus to create the State Appellate Defender Office came from a state commission on which the governor served as chair.[595] Broader reform efforts in Michigan have come more recently from the ABA task force, which appears to include not a single representative of the

590. *See supra* text accompanying notes 76–80.

591. *See, e.g.*, Tomiko Brown-Nagin, *"Broad Ownership" of the Public Schools: An Analysis of the "T-Formation" Process Model for Achieving Educational Adequacy and Its Implications for Contemporary School Reform Efforts*, 27 J.L. & EDUC. 343, 345–47, 399–400 (1998); Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CIN. L. REV. 1735, 1764 (1995); Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391, 395–403 (2003); Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 111–13, 157–58 (1996). Admittedly, some of these scholars oppose legislative solutions as well. *See* O'Brien, *supra*, at 403–05; Rebell & Hughes, *supra*, at 159.

592. *See, e.g.*, Liebman & Sabel, *supra* note 552, at 279. *But see* Helen Hershkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel's Approach to Reform of Public Education*, 28 N.Y.U. REV. L. & SOC. CHANGE 319, 321–22 (2003) (arguing that legislatures are responsible for "the crisis of education").

593. *See, e.g.*, Chayes, *supra* note 76, at 1315 ("[O]ne may ask whether democratic theory really requires deference to majoritarian outcomes whose victims are prisoners, inmates of mental institutions, and ghetto dwellers. Unlike the numerical minorities that the courts protected under the banner of economic due process, these have no alternative access to the levers of power in the system."); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1062 (2004) ("A public law destabilization right is a right to disentrench or unsettle a public institution when, first, it is failing to satisfy minimum standards of adequate performance and, second, it is substantially immune from conventional political mechanisms of correction."); Southworth, *supra* note 79, at 473, 478–83 (describing survey of "cause lawyers" revealing that "[l]obbying was the most prominent of the non-litigation tasks that lawyers reported pursuing in conjunction with litigation"). *But see* Fiss, *supra* note 77, at 5–17 (arguing that legislative failure is not necessary to justify structural reform litigation).

594. MD. PUB. DEFENDER STUDY, *supra* note 446, at 1–2.

595. FIRST PLAN FOR MICH., *supra* note 239, at v.

governor's office, and have had little success.[596] The task force itself notes that two previous reform efforts, one led by the chief justice and one led by the state bar, also failed.[597]

Michigan demonstrates that governors can indeed force successful school finance legislation. The first Michigan governor to attempt reform was William Milliken.[598] Impatient with the legislature, he tried a lawsuit.[599] The suit itself failed,[600] and even the legislative reform that grew out of it eventually failed.[601] Governor John Engler, in contrast, fought the legislature for two years and eventually won over both its objections and those of the state's voters.[602]

Maryland may yet prove that legislation on this scale can work without the strong influence of a governor. The state recently enacted legislation dramatically altering the distribution of—and, in theory, dramatically increasing—state education aid.[603] The legislation was driven not by the governor but by a lawsuit and a state legislator.[604] In the end, however, the statute that was enacted lacked any system to pay for the increased aid after the first year. Though the state's General Fund covered the costs of the new system in its second and third years, the legislature and the governor have battled each year over creating a dedicated funding stream, and have not done so yet.[605]

### *C. Local Schools, Local Counsel*

In Nevada and just two other states (Nebraska and Pennsylvania), schools are more than half locally financed and indigent defense systems are more than 90% locally financed. What can advocates for state financing in both fields in these states learn from the rest of the country?

These advocates may be uniquely positioned to borrow a theory that has appeared occasionally in school finance litigation: municipal overburden. According to some plaintiffs, like the Baltimore City plaintiffs in *Hornbeck*, large cities are burdened with unique costs for police protection, fire protection, and other services that limit the percentage of spending they can devote to education.[606] Though it did not base its constitutional holding on municipal overburden, the trial court in *Hornbeck* found that municipal overburden did

596. MODEL PLAN, *supra* note 182, at 2 (listing the task force's members and affiliations).

597. *Id.* at 5.

598. Hain, *supra* note 113, at 351.

599. *Id.*

600. Milliken v. Green, 212 N.W.2d 711, 711 (Mich. 1973) (*Milliken II*).

601. *See supra* text accompanying notes 169–171.

602. Mary Jordan, *Michigan School Taxes Herald National Change*, WASH. POST, Mar. 17, 1994, at A1; Suris & McGinley, *supra* note 173, at A3C.

603. 2002 Md. Laws 288.

604. SCHRAG, *supra* note 409, at 169–74.

605. David Nitkin, *City, Counties Brace for Deep Budget Cuts: Potential $400 Million Loss in State Aid Could Force Local Tax Increases, Layoffs*, BALT. SUN, Apr. 14, 2004, at 1A.

606. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 765 (Md. 1983).

exist and that it limited Baltimore City's ability to support education.[607] The city, the court found, spent 69.5% of its per capita revenue on non-education expenditures, while its less urban neighbor, Baltimore County, spent only 47% of its per capita revenue outside of education.[608] The difficulty with this argument, at least as it is traditionally used, is that economists agree that municipal overburden does not exist.[609] The fact that a city is a city does not require that it spend a large share of its budget outside of education, and whatever it does spend outside of education does not limit what it spends on education.[610] Nonetheless, advocates in Nevada, Nebraska, and Pennsylvania can make a different type of municipal overburden argument that has emotional appeal, which is useful politically if not always legally: public education and indigent defense are expensive services, and no jurisdiction, urban or rural, should be forced to support both with little or no help from the state. Indeed, the fact that only three states in the country require local jurisdictions to do so suggests that lawmakers elsewhere, whether in legislatures or courtrooms, may have already acted on this intuition.

## XII.
## CONCLUSION

Comparing the evolution, or lack thereof, of financing systems for public education and indigent defense suggests ways that advocates in each field can learn from developments in the other. Indigent defense reformers can look to their counterparts' efforts to use state constitutions' equal protection clauses to improve education funding. School reformers have had mixed success with the approach, but indigent defense advocates should have a stronger case. Education finance advocates, in turn, can borrow indigent defense advocates' use of the legislative process, and history suggests that they should focus their efforts on winning the vocal support of a governor rather than on rounding up votes in a state house. Reformers in those few states where both services remain locally financed can try to modify the municipal overburden argument that once gained some traction for school finance activists.

The stories described here, however, do not bring only good news. The timing of most of the significant changes suggests that effecting reform of this magnitude may be beyond the power of in-state activists alone. United States Supreme Court decisions spurred successful reform of indigent defense in both Maryland and New Mexico. National lawsuits also drove successful reform of school finance in New Mexico, though officials took action before the cases were resolved. The only example of a purely in-state reform among the

607. *Id.* at 767, 769.

608. *Id.* at 767.

609. Harvey E. Brazer & Therese A. McCarty, *Municipal Overburden: A Fact in School Finance Litigation?*, 18 J.L. & EDUC. 547, 557–65 (1989) (surveying the literature).

610. *Id.* at 561.

undeniably successful reforms was Michigan's shift to state financing of public education, and that required a highly motivated governor and the state legislature's dramatic gesture of eliminating the previous finance system, forcing voters to accept a change. Maryland's move to state financing for education is the only reform in any of these states that might have been driven by grassroots efforts: a local lawsuit, the legislature's creation of a commission to study school finance, and the dedication of one legislator and a host of local activist organizations came together in the form of a massive reform bill. A critical failure of this effort, however, was that the bill lacked dedicated financing. Two years after its enactment, state officials still have not found a reliable way to pay for their ambitious plan. Looking at the circumstances surrounding each of these reforms suggests—not surprisingly, but nevertheless starkly—that only a powerful influence can spur states to take on the financial and organizational challenge of absorbing public services long delivered at the local level.