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WEIGHING AND IMPLEMENTING THE RIGHT TO COUNSEL

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In this essay I hope to clarify the meaning of the right to counsel guaranteed by South Africa's Constitution,¹ and to suggest some potential paths for its enforcement to the extent that enforcement is necessary. All of this is certainly part of assessing the new Constitution's impact on access to justice, but access to justice entails much more than access to legal representation, and the new Constitution's impact in this sphere goes well beyond the developments that I will focus on here. Most obviously, the wide range of substantive constitutional rights that South Africans now enjoy all provide a basis for seeking justice. The Constitution's broad standing provisions potentially provide access to justice, via third party representatives, for many people whose valid claims might otherwise go unheard. And each specification of rights before courts or administrative tribunals helps ensure access to justice as well.

Within the sphere of access to counsel, I will look frequently to United States constitutional decisions, which, I believe, offer useful guidance for South Africa. But I do not for a moment suggest that the United States offers South Africa *the model* for the constitutional assurance of access to justice. The truth is that there is no simple formula that determines what access to justice requires. Much of what I will say here seeks to draw on both South African and American constitutional law to clarify two issues that make understanding and enforcing constitutional mandates of access to justice difficult, even perplexing, for both countries. The first is the significance of inevitable limits on state resources in assessing what access to justice our constitutions require. The second is the role of the different branches of government in allocating resources when more access to justice must be achieved.

There are also more concrete reasons for disclaiming the idea that the United States provides the model for South African practice. Our own achievements in this sphere, unfortunately, have been mixed. Moreover, we do not now face the sweeping tasks of transformation that South Africa is facing;

* BA JD (Harvard). This paper has benefited from the comments of participants in the *South African Law Journal 1884 — 2004 Jubilee Conference: The Impact of the Constitution on South African Law: Ten Years On*, in October 2003, and at a subsequent New York Law School faculty workshop, and especially from the insights of Geoff Budlender. I am very grateful also to Theunis Roux for very helpful advice at the start of this project, and to all of the editors of the *South African Law Journal* for all the work they did to make this conference both fascinating and fun. Finally, I thank Parveen Husain for valuable research assistance.

¹ Constitution of the Republic of South Africa, Act 108 of 1996.

if our solutions were more comprehensive in our own country they might still not be transferable to yours. Finally, I do not want to be understood to be criticizing the progress this country has made toward realizing access to justice over the last ten years. On the contrary, my sense is that the Legal Aid Board has not only rectified its own internal problems but also set out aggressively to expand the provision of legal services to South Africans accused of crime and, in some circumstances, to those with civil lawsuits. Indeed, I will suggest, at the end of this essay, that this programmatic success may well justify more judicial deference to the legislative and administrative efforts underway than may now be appropriate in the United States.

Nevertheless, my understanding is also that there is still a lot to be done to achieve full access to justice in South Africa, in particular with respect to the right to legal representation. It is fair to say that South Africa's Constitution does not fully guarantee access to counsel to either criminal or civil litigants. The Constitution does ensure that people in detention or imprisonment and people facing criminal trial have the right to see a lawyer,² but it does not promise anyone a lawyer at state expense unless 'substantial injustice would otherwise result'.³ The leading Constitutional Court case on the meaning of this language strongly implies that, in many criminal cases, the requirement of potential 'substantial injustice' would not be met, and the accused would thus not be entitled to the appointment of counsel paid for by the state.⁴ In civil cases, there is no explicit textual promise of appointed counsel at all, and although *Nkuzi*⁵ nevertheless derived such a right from, presumably, the guarantee of 'a fair public hearing before a court or ... another independent and impartial tribunal or forum',⁶ its reasoning has apparently not yet been extended to other groups of civil litigants besides the labour tenants and occupiers whose situation *Nkuzi* itself addressed.

In practice, the Legal Aid Board offers representation in many cases in which courts have not yet found a right to legal assistance at state expense. Everyone facing more than three months' imprisonment at a criminal trial is considered to face a risk of substantial injustice without the aid of a lawyer.⁷

² Section 35(2)(b) (detainees and people under imprisonment) and s 35(3)(f) (accused persons) of the Constitution. There does not appear to be any explicit guarantee of a right to representation in civil matters generally.

³ Sections 35(2)(c) and 35(3)(g). Children have a similar right to have legal representation at state expense, under s 28(1)(h).

⁴ *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC); 1995 (7) BCLR 851 (CC). The late Didcott J wrote here that the 'substantial injustice' standard, as embodied in s 25(3)(e) of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993), entailed an enquiry into the 'ramifications [of the case] and their complexity or simplicity, the accused person's aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be "substantial injustice"' (at para 15). If every person facing a serious criminal charge was for that reason alone entitled to a lawyer at state expense, most of these questions would never need to be addressed.

⁵ *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC).

⁶ Section 34 of the Constitution.

⁷ Legal Aid Board *Legal Aid Guide* (2001) para 3.1.1. The *Guide* is available at www.pmg.org.za/docs/2002/appendices/020212LegalAid.htm [last accessed 16 April 2004].

Moreover, a considerable range of civil litigants is eligible for Legal Aid, including, but by no means limited to, the people covered by *Nkuzi*.⁸ This is impressively generous, but another constraint (and a perfectly appropriate one) remains: income-eligibility rules. These rules are also quite generous; I was told that by the end of 2003 they would probably allow people to receive legal aid if they have incomes of up to R1 750 per month for a single person, and up to R2 500 per month for a married person.⁹ These limits presumably make a great many South Africans eligible, but the limits still mean that many people are probably neither eligible for Legal Aid nor in a position to hire lawyers, at least not without great difficulty.¹⁰ Ironically, the very generosity of the rules on case types and income limits may create another problem, namely an excessive caseload. I do not have statistics to prove this point, but American experience suggests that in South Africa, as in our country, caseloads for Legal Aid lawyers may be so high that the quality of representation suffers.

At the same time, it is not self-evident that access to justice should be extended further than it has been. No doubt better, and more widely available, legal representation would be a good thing (at least up to a point — the point when matters that might best have been resolved outside of courts become needless litigation). South African litigants could have readier access to state-funded lawyers who would have time to focus on their cases, as well as resources with which to focus effectively, in the form of experience, training, access to support services, access to experts, and similar tools. But this good thing would come at a price. Say that the price is R500 million — approximately a doubling of the current Legal Aid Board budget.¹¹ Is this where South Africa's next R500 million should go? Is it where R500 million currently being spent on something else should now be applied instead? And how should a court answer such questions? I want to explore here this particular instance of the general issue of whether, since all rights have costs, courts must weigh costs in deciding whether to protect rights.

There is a second socio-economic question that immediately follows the first. Suppose that courts do decide to extend the sphere of access to justice. How can they do this? Must courts begin issuing cheques payable at the state treasury, or are there better ways for them to proceed? If courts do try other ways, and they fail, can they issue those cheques payable at the state treasury? On this question, more pragmatic than philosophical, it may surprise South

⁸ These include litigants in labour relations matters (ibid para 3.4), a variety of family law matters (ibid paras 3.3.1.12, 3.3.1.13 and 3.6.2), and asylum cases. The *Legal Aid Guide* identifies three priorities for legal aid: those expressly entitled to representation at state expense under the constitution; 'vulnerable groups, particularly women and children'; and 'the landless' (ibid chap 3, Introduction).

⁹ Personal communication to the author from Peter Brits, Legal Support Services Executive, Legal Aid Board (26 September 2003).

¹⁰ I take it that this is so even though the Legal Aid Board authorizes discretionary exceptions from its income limits for people expressly covered by the Constitution's guarantees of state-provided counsel to avoid substantial injustice (ibid).

¹¹ The annual budget for the last fiscal year is reported as R490 million in Ranjeni Munusamy 'Treason trial finally goes ahead' *Sunday Times* 22 June 2003.

African readers that United States experience offers a number of suggestions — but so I will try to show.

LIMITED RESOURCES, LIMITED JUSTICE

Let us begin with the first question, which might be restated this way: What should courts think about when they consider extending access to justice? More to the point: Should they think about money?

It is clear, of course, that access to counsel is costly, as I have already remarked. Indeed, every right is costly, as Holmes and Sunstein have argued in *The Cost of Rights*.¹² Even the right to be represented by a lawyer at your own expense is costly — to the government, that is, as well as to you — because enforcing it requires an elaborate state structure, the court system itself, which can exist only at considerable state expense.

Holmes and Sunstein argue that society should become more attentive to the cost of rights, and they appear to believe that judges, in particular, should do so as well.¹³ They do not specify, however, just how judges should do this. The most straightforward approach in the context of the right to counsel would presumably be for judges assessing whether to extend this right to ask how much it would cost.

Perhaps they should, and perhaps they inevitably will. But this is not what the South African constitutional text at first blush calls for. There *are* rights in South Africa's Constitution that are guaranteed only in the sense that 'the state must take reasonable legislative and other measures, within its available resources, to achieve [their] progressive realisation' — such socio-economic rights as the right to housing, and to health care, food, water and social security.¹⁴ But the right to have counsel appointed at state expense is not presented in these terms. Instead, in each of the constitutional sections securing this right, we are told that a legal practitioner is to be appointed at state expense 'if substantial injustice would otherwise result'.¹⁵ Clearly, the courts are being told here to measure justice rather than cost.

Now it might be answered that justice includes cost. It is only unjust to send a man to prison without a lawyer, or without a lawyer who has enough time to handle the case with care, if spending money on this is the best use of society's available resources. As a general moral proposition, I accept that what is just depends in part on what is affordable. Even as a matter of morality alone, however, this proposition takes us only so far. What is affordable is not written in stone, but is instead in good measure a product of social choice; a polity that refuses to tax itself will be 'unable' to afford much of what it might want to

¹² Stephen Holmes & Cass R. Sunstein *The Cost of Rights: Why Liberty Depends on Taxes* (1999).

¹³ At 224–9.

¹⁴ Sections 26(2) (housing) and 27(2) (health care, food, water and social security) of the Constitution. Cf ss 24(b) (environmental protection 'through reasonable legislative and other measures') and 29(1)(b) ('further education [i.e. beyond a basic education], 'which the state, through reasonable measures, must make progressively available and accessible').

¹⁵ Sections 28(1)(h), 35(2)(c) and 35(3)(g).

purchase. Even assuming that we have drawn on our resources as much as we should, and that we have allocated what we have to spend in an unimpeachable manner, the remaining unfairnesses may still be deeply troubling. If, say, we believe that convicted criminals should only be sentenced to prison after an impartial investigation of their social background, but we cannot afford to have such investigations done, we may decide that we must imprison people without the very investigation that we consider essential to wise decisions on imprisonment. If so, it seems more candid to describe what we have done as an unavoidable, even tragic, injustice rather than to use its unavoidability as a basis for calling it just.

All that, however, is a matter of moral enquiry. The Constitution does not direct the courts to undertake an open-ended moral enquiry into the appropriateness of providing legal representation at state expense. Instead, it offers a standard — the avoidance of ‘substantial injustice’ — which I suggest is best read as embodying a constitutional resolution of this moral problem. On this reading, the Constitution is not asking courts to factor cost into their assessment of justice; instead, it is asking them to assess justice itself, independent of cost, and to incur the costs necessary to avoid an unacceptable — ‘substantial’ — level of injustice. The Constitution has, in effect, already ‘costed out’ injustice, and decided that it is worth the money to eliminate ‘substantial injustice’. All that is left for the courts is to determine whether the litigants before them do face the prospect of that level of injustice.

To read the Constitution this way may accurately reflect original intent. On this score, Azhar Cachalia and Anton Steenkamp write that the ‘substantial injustice’ standard ‘was clearly motivated by concerns that an unqualified right would place too onerous a burden on state funding, the legal profession and the courts’.¹⁶

Perhaps more importantly, this historical inference coincides with an appropriate assessment of courts’ ability to assess costs, on the one hand, and justice, on the other. If the ‘cost of rights’ question is ‘can we afford to remedy this unfairness?’, courts are not in a good position to answer it. Indeed, in the context where this question is most directly posed by the Constitution — the socio-economic rights which the government is called upon to realize only progressively, within the constraints of available resources — the Constitutional Court has by no means undertaken to offer general answers to questions of what programmes the country can afford, and in what order. In *Grootboom*’s words, ‘[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent’.¹⁷ As

¹⁶ Azhar Cachalia & Anton Steenkamp ‘Detained and arrested persons’ in Dennis Davis, Halton Cheadle & Nicholas Haysom (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 164 at 191.

¹⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 41. See also *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 37. Where the state’s policies accomplish the tragic tasks of allocation in a reasonable manner, *Soobramoney* makes clear that they will be upheld. See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 29.

striking and far-reaching as the court's socio-economic rights jurisprudence is, these decisions have granted relief only on grounds that permit decision *without* answering the global question of 'what can we afford?' The state's policy on anti-retrovirals was concededly not compelled by cost considerations;¹⁸ the flaw in the housing policy at issue in *Grootboom* was not that the state was spending insufficiently, but that it had shaped a policy that was intolerably inattentive to the needs of the most desperately deprived.¹⁹ Though the Constitutional Court has taken the requirement of reasonableness very seriously, it has rightly left a large sphere of choice in the hands of the democratically elected representatives of the people.

In short, where the Constitutional Court has understood the text to place on it a duty to judge, in some measure, what can and must be done within available resources, the court has stopped well short of attempting to answer the global question of what can be afforded. To call on the judiciary to answer this intractable question when the constitutional text does not seem to pose it would be a mistake. In the context of the right to legal representation, focusing on the question of what we can afford would be especially odd because the text does by its terms pose a quite distinct question, and one with which courts are very familiar — namely, whether what is happening before their eyes is or is not a 'substantial injustice'.

But it might be argued, in response, that courts should consider the cost of rights, just not by undertaking a serious enquiry into what society as a whole can afford. Instead, the courts might ask, in an intuitive manner, 'is it worth the money?' If the answer is 'no', then no substantial injustice has been committed. This question is, undeniably, much simpler than the global budgetary assessment we have just been considering. Moreover, attempting to estimate how much money really is at stake does at least give us a sense of the magnitude of the commitment we are contemplating. These estimates may be erroneous — as a general proposition, courts are probably not particularly good at budgetary predictions, and no one is perfect at them — but we might respond to those problems by trying to improve the quality of the predictions rather than by dispensing with them altogether.²⁰

The simplicity of the question 'is it worth the money?' is, however, beguiling. The question seems to have two possible meanings. One is 'Is the right to counsel worth obtaining compared to other goods that society could purchase instead?' Now, it is quite possible that a court could offer fragments of an answer to this question: perhaps the right to counsel is less important, for example, than the right to adequate interpreters who will ensure that the accused knows what is being said in the trial. But this comparison of the value of interpreters and lawyers is not very helpful (even assuming it is right), because the next question has to be, 'can we afford both?' Ultimately this

¹⁸ *Minister of Health v Treatment Action Campaign (No 2)* supra note 17 para 71.

¹⁹ *Grootboom* supra note 17 paras 64–5.

²⁰ So, I take it, Holmes & Sunstein supra note 12 at 255 suggest.

question becomes the one that we have already seen that courts are in no position to answer, namely 'what can we afford overall?'²¹

The alternative is that the question 'is it worth the money?' is somehow *not* a comparative question, and instead means 'is it *intrinsically* worth the money?' Intrinsic worth is not easy to measure, but there are surely occasions when we all believe there are usable answers to this question. In normal life, candy bars are not worth huge sums of money. There may be exceptions even to propositions this plain, but if we can provide answers that cover the normal range of situations that will come before courts, we will have done enough to provide a workable basis for decisions.

The intrinsic value of the right to counsel, however, is far harder to measure, let alone monetize. We know that those who can afford to hire counsel do so very frequently, while those with less money must usually make do without legal representation. But since, by assumption, we have already disclaimed the idea of asking the courts to seriously answer the question 'is it affordable?', I think we must acknowledge that courts will have little *economic* foundation for saying whether spending societal resources on the right to counsel is worth it. This spending might well be 'worth it' if society is rich enough, and not worth it if society is not rich enough, but how rich society is, in this context, is the very question courts cannot answer. Oddly, therefore, giving a figure for the cost of any given implementation of the right to counsel may give us a sense that we have taken the measure of the reform — and yet that sense may be largely illusion.

None of this is quite sufficient to demonstrate that costs should be given no consideration whatsoever. The reality is that courts contemplating potentially costly orders will never be able to shield their eyes from the size of the bill completely as they decide what justice calls for, even if they should. Perhaps it is also fair to say that although no comprehensive, theoretically satisfying answers to the question of 'what is it worth?' are possible, courts may derive some intuitive guidance from reflecting on costs. But this guidance will often be Delphic, resting on uncertain economic estimates and profoundly ambiguous intersections of human value and economic cost. The question of what is just or unjust is undeniably a very hard one, but that is the question

²¹ In *Mathews v. Eldridge* 424 US 319 (1976) at 328, the United States Supreme Court, taking note of what it predicted would be substantial costs from increased due process rights in the administration of the social security disability benefit program, commented that 'the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.' This observation seems less a judgement about what the United States could afford overall than a pragmatic prediction about the likely impact of increasing demands on a particular part of the social service budget. Such predictions are not irrelevant to measuring the cost of rights, and indeed are integral to the deference rightly accorded to legislative efforts to achieve broad socio-economic rights mandates. But these predictions in effect substitute the judgment of the other branches of government about 'what we can afford' for the judiciary's own assessment, and so they seem particularly prone to devaluing the judiciary's own potentially counter-majoritarian assessments of the demands of justice. Of course, these predictions may also be wrong; one scholar called this one 'speculation' (Jerry L. Mashaw 'The Supreme Court's due process calculus for administrative adjudication in *Mathews v. Eldridge*: Three factors in search of a theory of value' (1976) 44 *Univ of Chicago LR* 28 at 46).

South African courts have been asked to focus on, and costs will not provide a firm basis for its answer. The real content of the question of 'is it worth it?' in the context of the constitutional standard of 'substantial injustice' should in the end be seen as primarily non-economic — not, 'how much does this cost?' but, rather, 'how much does this help?'

It is a different question whether courts should focus on costs under s 36 of the Constitution as a ground for limitation of rights. If, as Geoff Budlender plausibly suggests,²² the current limitations on access to counsel have been effected by a 'law of general application', as the opening words of s 36 require, the question is whether the limits created by that law can be justified by cost considerations.

In principle, the answer might be 'yes'. When we address limitations on rights, we are no longer denying that rights have been limited, and so the arguments I have made for excluding costs from the assessment of substantial injustice are no longer in play. The limitations question is, precisely, whether an acknowledged substantial injustice can be tolerated because it is 'reasonable and justifiable in an open and democratic society'.²³ There is no point in denying the undeniable: rights do cost money, and they cannot all be fully honoured. Resources are not infinite anywhere, but in South Africa the problem of scarcity is acute. Given that, saving money for other vital rights and needs should be a justification for limiting rights. To pay for Nevirapine might well be more important, for example, than avoiding unjust convictions leading to short terms of imprisonment.

But should costs be given the same consideration in this context as they would in a case dealing with, say, the right of access to health care? If all rights have costs, then in a sense all rights are socio-economic, but it seems to me that in the South African Constitution, some rights are more socio-economic than others.

To quote again from the constitutional text, what the state is required to do, for housing, health care, food, water and social security (and somewhat similarly for the environment and for education beyond the 'basic' level), is to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.²⁴ This language reflects a recognition that full realization of the right is currently completely infeasible, and implicitly points to a willingness to tolerate prolonged deprivations of housing, health care and so on, as long as the state is moving toward their realization. As the Constitutional Court recently emphasized, '[i]t is impossible to give everyone access even to a 'core' service [in the area of socio-economic rights] immediately'.²⁵ Moreover, 'the courts are not institutionally equipped to make the wide-ranging factual and political

²² Geoff Budlender 'Access to justice' (2004) 121 *SALJ* 339 at 347.

²³ Section 36(1) of the Constitution.

²⁴ Sections 26(2) and 27(2). Cf ss 24(b) and 29(1)(b).

²⁵ *Minister of Health v Treatment Action Campaign (No 2)* supra note 17 para 35.

enquiries necessary for determining what the minimum core standards . . . should be'.²⁶

There is no such sweeping language of limitation attached to the right to counsel in the constitutional text, or to any of the other civil and political rights the Constitution guarantees. I take this to mean that the Constitution does not, in fact, simply accept the continued existence of substantial injustice in criminal cases for a prolonged period. Similarly, I take it that the Constitution demands more than mere progress toward the elimination of denials of the right to legal representation at state expense that work 'substantial injustice'.

Cost may still justify failure to achieve substantial justice, but not readily and not well. To put this more concretely: so far as the constitutional text indicates, cost is no better a justification for substantial injustice than it is for, say, a denial of the right to vote. Mounting elections costs money, and there may be monetary justifications for some limits on the right to vote — but not many. The same is true, it seems, for limits on the right to legal representation.²⁷

Even this may yield too much ground. Consider, for example, the right to be free from torture.²⁸ Suppose that a prison guard employed by the state actually tortures a prisoner. The prisoner sues the state, and the state defends by saying that it had carefully trained and supervised the prison employees, and that it could not have prevented this unfortunate event except by vastly more elaborate surveillance of the staff, at a prohibitive expense. That may be a good reason why the state should not be ordered to improve its surveillance systems, but it does not seem like a good reason to deny the tortured prisoner damages for the constitutional wrong he has suffered. To put the point more generally: even though no right can be perfectly secured except at infinite cost, individual violations of some rights may always demand remedy.

It is quite plausible to say the imposition of 'substantial injustice' is such a right. 'Substantial injustice', to be sure, is not a self-defining term; but choose whatever definition makes most sense to you and ask whether, if the events that satisfy that definition take place, they should go unremedied. Say, for example, that you define substantial injustice as 'trial errors that make it more likely than not that an innocent person has been convicted', or errors that create 'a reasonable probability . . . that the result of the proceeding would have been different'.²⁹ Could one say to that individual, 'Sorry, but you'll just have to serve out your sentence'?

²⁶ Paragraph 37.

²⁷ This argument holds even if cost is properly factored into the assessment of 'substantial injustice', contrary to what I have argued above. Once 'substantial injustice' is found, with or without use of costs as a consideration, the text suggests no further role for costs as a basis for limiting this right than for limiting the right to vote or a host of other rights that all, inevitably, cost money to honour.

²⁸ Section s 12(1)(d) of the Constitution.

²⁹ The latter standard is drawn from *Strickland v Washington* 466 US 668 (1984) at 694, where it is the standard for granting relief based on the 'ineffective assistance of counsel'.

Does this hold true even with a weaker definition of 'substantial injustice'? Not if the definition is weak enough. If we defined 'substantial injustice' as 'any increment in the chance of conviction' then we might well say that some increments were too small to merit freeing the convicted prisoner — but really that would be because, after all, we do not view *every* such increment as a substantial injustice. Where the injustice really is substantial, it may well be simply unacceptable. In the words of one court, the state is 'irrefutably presumed to be capable of providing such legal representation in cases where a substantial injustice would otherwise occur'.³⁰

In this regard, it is worth pausing for a moment over the phrase 'substantial injustice'. It would be tempting to read these words as, essentially, a redundancy: what is prohibited is all injustice, because any injustice is substantial. But this is not what the text says. It seems to tell us that in South Africa there is such a thing as 'a little injustice', and that a little injustice is constitutionally acceptable.³¹ That statement is stark, but also quite realistic, and not only in South Africa. If 'a little injustice' is acceptable, however, something more — 'substantial injustice' — perhaps should not be, whatever the proffered excuse for it.

This is especially the case because in a real sense the court is itself the author of the injustice. It is the court that finds guilt and imposes sentence, or finds liability and imposes a judgment, based on the events that amount to a substantial injustice. Although all action may be state action in the sense that it has some licence or support from the state, the South African Constitution clearly embodies the view that some action belongs more to the state than other action.³² Some state action, similarly, belongs specially to courts and so, I think, should be especially hard for courts to allow if it works 'substantial injustice'.

In short, it seems to me that the Constitution tells South African courts to pay only limited attention to cost in measuring whether a substantial injustice exists in terms of s 35, or whether, if it exists, it is justified under s 36. This does not mean that cost is irrelevant. Rights do cost money. Rather, what it says is that the way for courts to honour the relevance of money to this right is to apply the constitutional standard — substantial injustice — and with little qualification. In effect, the Constitution, as I am reading it, has already determined what the right to legal representation is worth, and has concluded that it is worth the price required to prevent 'substantial injustice'. The best way for courts to honour this judgement about the significance of costs is, at least to a large extent, to not think about costs.

³⁰ *B v S* 2003 (9) BCLR 955 (E) at 961H–I.

³¹ Perhaps, however, the opposite of 'substantial' is not 'a little' but 'insubstantial' in the sense of 'without substance' or 'imaginary'. The strongest argument for my reading in text is not lexical but practical.

³² The Bill of Rights unambiguously binds the three branches of the government 'and all organs of state' (s 8(1) of the Constitution and s 239 (defining 'organ of state')). Private actors are bound by the Bill of Rights only 'if, and to the extent that, it is applicable' (s 8(2)). If private actors were indistinguishable from state actors, these different provisions would reduce to the same thing. Cf Stephen Ellmann 'A constitutional confluence: American "state action" law and the application of South Africa's socio-economic rights guarantees to private actors' in Penelope Andrews & Stephen Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444.

Much of this logic applies, I believe, not just in South Africa but also in the United States. American courts are no more suited than their South African counterparts to measure justice by what the nation can afford, and they are just as suited as their South African counterparts to undertake, directly, an assessment of what justice calls for in the cases that come before them. More generally, it seems to me that the cogent demonstration by Holmes and Sunstein that all rights have costs does not readily lead to the conclusion that judges, as they adjudicate rights, should measure the dimensions of those rights in light of their costs.

It is quite common, I suspect, that we carve complicated problems into somewhat smaller or simplified parts, and ask decision-makers to address only the sub-questions even though we are ultimately still interested in deciding the full question at issue. In criminal cases, for example, we are ultimately concerned to decide what to do with a particular accused — whether to free him or to punish him, and, if punishment is what is called for, what punishment to impose. This is the full problem a criminal court must resolve. But American courts routinely (and of course rightly) break this problem apart, and begin by deciding whether the accused is guilty. At that stage, quite a lot of information about the accused's past behaviour and character will be kept out of consideration because it might prejudice the decision on guilt. But that same information will be entirely appropriate for consideration after conviction, at the sentencing stage. So, too, rights adjudications may often work best if considerations of cost are excluded, even though those considerations are, in the end, always relevant.

Let me acknowledge two significant qualifications on this 'no-cost' reading of the right to legal representation at state expense. First, to say that 'substantial injustices' demand remedy, presses for a quite strict definition of substantial injustice. In effect, the underlying constraint of costs 'leaks' into the definition of substantial injustice. I accept this. It seems to me that the Constitution calls on courts to think hard about justice, and that they are well equipped to do this. Better for them to think seriously about what injustice is just 'a little' and what is 'substantial', than to try to focus on the question of whether injustice that is substantial is justified by costs.

Secondly, this logic may not apply so fully to civil cases. If the several provisions of the South African Constitution that explicitly promise access to legal representation at state expense to avoid substantial injustice do 'cost out' this right, as I have argued, there is no comparably explicit provision governing civil cases. The provisions dealing with access to legal representation provide both a specification of the right and a standard for determining when it applies. In contrast, although the right to counsel can readily be seen as implicit in s 34's guarantee of access to courts,³³ it is not spelled out there. What is there is only a guarantee of a 'fair public hearing'. This is an important guarantee, undoubtedly, and it can certainly be argued

³³ *Nkuzi* supra note 5 presumably rests in part on s 34, although the judgment does not explicitly say so.

that 'fair' is, essentially, a synonym for 'just' and that therefore the standards for the provision of counsel in civil and criminal cases should be essentially the same. But 'fair' remains a vague term, and its very lack of precision makes it seem a less definitive statement of the constitutional mandate than the prohibition on 'substantial injustice'. It would be reasonable to infer that as a result the courts retain more discretion to take costs into account in the broad range of civil matters than in the criminal and children's cases where the right to legal representation at state expense is explicit.

We can find some guidance about what courts might do with this discretion in American case law. It must be said at once that United States cases do not offer a single, consistent approach to the relevance of costs to the determination of the extent of a constitutional right to legal representation at state expense. In part, this is surely a function of the difference between our constitutional text and South Africa's. The United States Constitution nowhere explicitly guarantees a right to legal representation at state expense. In addition, American constitutional rights are not, in general, explicitly subject to limitation in the way that South African rights are by virtue of s 36. As a result, not only must much more of the content of American rights be inferred than would be necessary in South Africa, but the limitations on those rights are generally made a part of the inferred content of the rights themselves. There is, in short, more room in the United States constitutional text for courts to factor costs into all of their decisions about the right to counsel than I have found in the South African text.

That said, it also seems fair to say that the United States Supreme Court has on occasion been prepared to recognize rights to representation at state expense in criminal cases without much explicit reference to costs.³⁴ In criminal cases, it is now settled in the United States that no one can be sentenced to imprisonment, for any length of time, if he or she could not afford counsel and was not offered counsel at state expense.³⁵ There is a modicum of textual basis for this, because the right 'to have the Assistance of Counsel' is explicitly guaranteed in the Sixth Amendment.³⁶

³⁴ See, for example, *Gideon v Wainwright* 372 US 335 (1963) (applying the right to appointed counsel to the states, with no explicit consideration of costs, although issues of cost were briefed, see Brief of the American Civil Liberties Union and the Florida Civil Liberties Union, Amici Curiae at 33–7, *Gideon v Cochran* decided sub nomine *Gideon v Wainwright* 372 US 335 (1963) (No 155)); *Ross v Moffitt* 417 US 600 (1974) (refusing to extend the right to appointed counsel beyond the first appeal (as of right) from conviction, and basing this on an assessment of fairness to the accused, with only glancing reference to 'other claims for public funds'). But see *Scott v Illinois* 440 US 367 (1979) at 374 (refusing to extend right to appointed counsel to misdemeanour trials not resulting in imprisonment, in part because 'any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States').

³⁵ *Argersinger v Hamlin* 407 US 25 (1972). In *Scott v Illinois* supra note 34 at 373 the Supreme Court characterized *Argersinger* as reaching its conclusion 'regardless of the cost to the States implicit in such a rule'. Justice Powell's opinion in *Argersinger* (at 55–62), concurring in the result but not the opinion of the Court, is much more concerned with the potential impact on the States.

³⁶ This is not more than a 'modicum' of textual basis, however, for two reasons. First, the Sixth Amendment does not explicitly refer to any right to counsel paid for by the state. Secondly, this amendment as originally understood applied only to criminal prosecutions by the federal government; its application to prosecutions by state governments — the vast bulk of all prosecutions that take place — came about through the 'incorporation' of this amendment's requirements under the rubric of the post-Civil War Fourteenth Amendment's imposition of the requirement of due process on the states. Due process, however, does not self-evidently embrace specific rules such as the right to counsel.

In civil cases, on the other hand, all that is explicitly guaranteed is the Fifth and Fourteenth Amendment right to 'due process of law'. The dimensions of due process, in turn, are measured in these cases using a test that explicitly takes into account the private interest at stake, the value of additional procedural protections for the accuracy of the result in the matter, and the government interests involved. Among those government interests are 'the fiscal and administrative burdens that the additional or substitute procedural requirement would entail'.³⁷

It seems to me that this test does not escape the problems with judicial assessment of costs that I described earlier in this essay.³⁸ Our courts, in applying this test, cannot judge whether, globally, we can afford any given protection. Nor does a measure for how much a protection will cost readily convert to a measure of how much it is worth. For the reasons I have already offered, I suggest that where the South African Constitution specifies a standard of 'substantial injustice', the courts should not make cost considerations a central part of their analysis. Nevertheless, where the Constitution does not provide such relative clarity, it may be incumbent on courts to take a more direct role in assessing the significance of the costs of rights. When that is so, the *Mathews v Eldridge*³⁹ schema offers a framework for analysis.

MORE RESOURCES FOR MORE JUSTICE

Let me turn now to the second question: What should courts do about failures to provide state-funded legal representation when those failures do breach the Constitution?

South Africa already has certain doctrinal responses in place. It has a rule, or at least a developing principle, that in the absence of counsel, the court is obliged to assist the unrepresented litigant.⁴⁰ Clearly this is an effort to prevent substantial injustice in such cases.⁴¹ I have to admit that, starting from the American presumption in favour of counsel whenever an accused faces a sentence of imprisonment, I am skeptical about the efficacy of such judicial efforts. I am particularly uneasy because a focus on the judicial duty to assist

³⁷ *Mathews v Eldridge* supra note 21 at 335. For an application of these factors to the question of appointment of counsel at state expense, see *Lassiter v Department of Social Services* 452 US 18 (1981) at 28, 31-2 (deciding that parents facing termination of parental rights do not have an automatic right to representation at state expense, though such representation may be required in individual cases — even though the expense of providing such representation was 'admittedly *de minimis* compared to the costs in all criminal actions').

³⁸ For trenchant criticism of the case, urging attention to 'systematic concern with [due process] value' in place of 'the intuitive functionalism of the *Eldridge* opinion', see Mashaw supra note 21 at 30 and passim.

³⁹ Supra note 37.

⁴⁰ Frank Snyckers 'Criminal procedure' in Matthew Chaskalson et al *Constitutional Law of South Africa* (Revision Service 5, 1999) 27-60E.

⁴¹ American constitutional law too has sought to provide assistance to those not entitled to counsel. See *Bounds v Smith* 430 US 817 (1977) at 828 (duty of prison authorities to provide inmates with 'adequate law libraries or adequate assistance from persons trained in the law'). Efforts to engage candidate lawyers or even law students in providing a measure of legal advice to people who would otherwise be entirely without representation fill a similar function.

the litigant tends to mean that the judge cannot find substantial injustice unless he finds his or her own efforts at assistance inadequate — and this judges may be unhappy to do. But I do not have the first-hand knowledge to assess how this rule works in practice.

When lawyers are supplied at state expense, however, the next question is whether courts can ensure the adequacy of the representation they actually offer. Again, I do not have first-hand knowledge of the quality of these South African lawyers' work. I also mean no criticism whatsoever of their dedication and effort. But it is my impression that they are often seriously overburdened, and if this is so then it seems inevitable that the quality of their representation of individual clients sometimes, or regularly, suffers. So what can courts do about this?

The most obvious step is at once an identification of these cases and a response to them. This is to adopt a doctrine of ineffective assistance of counsel. In the United States, it is well settled that when a lawyer — state-paid or privately retained⁴² — renders constitutionally inadequate service that prejudices the client's trial, the client's conviction must be overturned.⁴³

South Africa does not have an articulated ineffective-assistance-of-counsel doctrine. But such a doctrine does seem to be coming into being. In the case of *Charles v S*,⁴⁴ the Eastern Cape High Court ruled in 2002 that to comply with the Constitution's provision for state-funded counsel in s 35(3)(g), 'legal assistance to an accused person must be real, proper and designed to protect the interests of the person so represented'. The only authority the court cited was a decision finding a denial of a fair trial where the state-funded lawyer could not speak the accused's language well enough to communicate with him,⁴⁵ but the court said, essentially, that the failure to consult adequately with the accused was an even worse problem, and set aside his conviction and sentence on appeal.

This is an ineffective-assistance-of-counsel case in all but name, and it has already been followed.⁴⁶ If this case helps to foster a body of South African case law identifying, or at least sketching, the elements of effective representation and assessing the significance of their absence, then over time the courts will provide the country with an appraisal of the state of representation by counsel. This appraisal may produce critical assessments of the Legal Aid Board's lawyers; it may also produce critical assessments of some privately retained counsel, and it may shed light on the implicit standards by

⁴² See *Cuyler v Sullivan* 446 US 335 (1980) at 342–5.

⁴³ *Strickland v Washington* 466 US 668 (1984).

⁴⁴ [2002] 3 All SA 471 (E) at 475f–g.

⁴⁵ *S v Pienaar* 2000 (2) SACR 143 (NC); 2000 (7) BCLR 800 (NC) (decision in Afrikaans). The Editor's Summary, on which I must rely, reports that in this case the failure to advise the accused of his right to a lawyer with whom he could communicate, and his subsequent decision to conduct his own defence, 'amounted to a denial of the accused's right to legal representation'.

⁴⁶ See *B v S* 2003 (9) BCLR 955 (E) at 963. This case too sets aside a conviction because of ineffective assistance of counsel, and invokes the *Charles* judgment (supra note 44) as amply illustrating the courts' concern 'not only . . . with the fact of legal representation, but also by the adequacy thereof' (emphasis in original).

which judges assess the fairness of cases in which they seek to assist unrepresented accused people to defend themselves. In addition, a remedy will be available in each case in which substantial injustice is found, taking the form of the setting aside of the convictions, or civil judgments, that resulted. I think it is important for South Africa's courts to move in this direction; indeed, I do not see how else cases can be assessed, and if need be remedied, under the 'substantial injustice' standard.

In the United States, however, this remedy does not seem to have been enough. In part this may be because it is not a simple task to establish standards that can readily be applied to assess the adequacy of counsel's performance; these assessments are often, inescapably, contextual.⁴⁷ No doubt it is also true, in the United States as well as South Africa, that it is hard for judges to release people they believe to be guilty.⁴⁸ There is also room for concern, which the Supreme Court has expressed, that the tasks of representing criminal defendants not be made too perilous for the lawyers who undertake them.⁴⁹

In any event, the Supreme Court's *Strickland v Washington* standard for ineffective assistance of counsel is intentionally deferential. This test establishes 'a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance'.⁵⁰ Even where that presumption is overcome, the defendant challenging counsel's performance must also show prejudice, or harm, to his case: 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'.⁵¹ These standards have been repeatedly attacked as much too indulgent of lawyers' incompetence. In the words of one critic, under this standard 'a lawyer need not be awake, sober, prepared, knowledgeable, or sensible, at least in the large number of cases where courts find no prejudice'.⁵² At the same time, there is, unfortunately, considerable reason to believe that state-funded criminal defence lawyers in the United States are, as their South African counterparts may be, so overburdened that they are liable to render ineffective assistance to their clients.⁵³

What then can be done? Contrary to popular belief, American courts in some contexts are by no means hostile to socio-economic rights claims, and the decisions of several state courts in the United States offer signposts that

⁴⁷ See Adele Bernhard 'Take courage: What the courts can do to improve the delivery of criminal defense services' (2002) 63 *Univ of Pittsburgh LR* 293 at 336–8; William J Stuntz 'The uneasy relationship between criminal procedure and criminal justice' (1997) 107 *Yale LJ* 1 at 70.

⁴⁸ See Bernhard *op cit* note 47 at 311 (discussing the 'unacknowledged but pervasive belief [among judges, lawyers and others in the criminal justice system] that anyone who has been arrested is guilty').

⁴⁹ See *Strickland v Washington* *supra* note 43 at 697. This concern for the burdens on counsel is forceful if counsel's shortcomings are the result of systemic problems, such as overwhelming caseloads, for which individual lawyers are not responsible. It is less cogent where what is at issue is avoidable misconduct.

⁵⁰ At 689.

⁵¹ At 694.

⁵² Marc L Miller 'Book review: Wise masters' (1999) 51 *Stanford LR* 1751 at 1786–7 (footnotes omitted).

⁵³ See Stuntz *op cit* note 48 at 76 (commenting that making the right to state-funded counsel 'a formal right only, without any ancillary funding requirements, has produced a criminal process that is, for poor defendants, a scandal').

South African courts — commonly seen as less hesitant about socio-economic rights in general — might ultimately need to follow in order to ensure that the true costs of honouring the right to legal representation at state expense are met.⁵⁴

Consider, for example, the case of *State v Leonard Peart*,⁵⁵ a decision of the Supreme Court of Louisiana. The trial court in *Peart* had held a hearing based on a motion by Peart's lawyer, a man named Rick Teissier. The court found the following:

'At the time of his appointment, Teissier was handling 70 active felony cases. His clients are routinely incarcerated 30 to 70 days before he meets with them. In the period between January 1 and August 1, 1991, Teissier represented 418 defendants. Of these, he entered 130 guilty pleas at arraignment. He had at least one serious case ... set for trial for every trial date during that period. OI DP [Teissier's employer] has only enough funds to hire three investigators. They are responsible for rendering assistance in more than 7,000 cases per year in the ten sections of Criminal District Court, plus cases in Juvenile Court, Traffic Court, and Magistrates' Court. In a routine case Teissier receives no investigative support at all. There are no funds for expert witnesses. OI DP's library is inadequate.'⁵⁶

On the basis of this evidence, the trial court found the entire system of providing counsel for indigent defendants in New Orleans unconstitutional. The Louisiana Supreme Court did not go so far. In a judgment with a notably political flavor, the court found the appointed counsel system only 'generally' unconstitutional, and only in the particular court ('Section E' of New Orleans' Criminal District Court) where Peart's case had been brought.⁵⁷ Then it imposed 'a rebuttable presumption' that, in the absence of changes in this system, future defendants in this court 'are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards'.⁵⁸ What that meant was that the trial court would have to hold individual hearings on the motion of any such defendant, and '[i]f the court, applying this presumption and weighing all evidence presented, finds that Leonard Peart or any other defendant in Section E is not receiving the reasonably effective assistance of counsel the constitution requires, and the court finds itself unable to order any other relief which would remedy the situation, then the court shall not permit the prosecution to go forward until the defendant is provided with reasonably effective assistance of counsel'.⁵⁹

⁵⁴ I focus here on the role of the courts. In daily practice, the role of lawyers is at least as important, for they will inevitably find themselves giving effect, in individual cases, to the overall societal level of support for their function, whether that support is adequate or parched. Well-trained and well-supervised lawyers can handle their demanding roles better than novices practising with little oversight. But how shall these lawyers practise? If they do not have time to do all that they should, they must decide what to forgo; seriously assessing what choices must be made is essential, at the same time that it runs the risk of deteriorating into a form of acquiescence in an unacceptable state of affairs. For thoughtful exploration of these issues, see Darryl K Brown 'Rationing criminal defense entitlements: An argument from institutional design' (2004) 104 *Columbia LR* 801 at 816–28.

⁵⁵ 621 So 2d 780 (La 1993).

⁵⁶ At 784.

⁵⁷ At 790.

⁵⁸ At 791.

⁵⁹ At 791–2. For another case similarly establishing 'an inference that the adequacy of representation is adversely affected' as long as the defender system is not reformed, see *State v Smith* 681 P2d 1374 (Az 1984) at 1381. Florida's Supreme Court threatened an even more drastic step — prisoner release. It decided, in a case finding unconstitutional shortfalls in the funding of indigent criminal appeals, that: 'although this Court may

The Louisiana court's approach stays close to the courts' central area of expertise and of responsibility — the assurance that individual cases do not result in substantial injustice. It would seem to be doctrinally within the reach of a court applying ineffective-assistance-of-counsel principles. But it is reasonably clear that what the court was doing was using its presumption of unconstitutionality, and threat to stay pending cases, as a bludgeon, or a symbol, to pressure the state legislature to act.⁶⁰ I do not know whether, or for how long, any cases were actually stayed, but in the following years Louisiana restructured its indigent counsel programme and increased its funding.⁶¹

Another approach, however, moves explicitly into the realm of money. Consider the response of the state courts of New York to what they saw as a crisis in indigent representation, brought on by rates of compensation for appointed counsel so low that (the courts felt) the rates discouraged counsel from accepting appointments and from working hard on the appointments they did take. The limits may sound high to a South African ear: \$40 per hour for in-court work, and \$25 per hour for out-of-court work, with a cap of \$1 200 in felony cases absent 'extraordinary circumstances'.⁶² But the courts' concern was, I think, entirely plausible, in light of evidence about the rates' actual impact on counsel's availability and performance; in view of the sheer mathematics, which indicated that the statutory cap would be reached anytime a lawyer worked for 16 hours out of court, and 20 hours in court; and in consideration of financial evidence that overhead expenses for a solo attorney in New York might be \$60 000 per year.⁶³ As a result, courts in the state apparently began 'routinely ignor[ing] the cap'; that is, they compensated lawyers for the time actually spent, despite the statutory cap.⁶⁴ A number of judges concluded that the funding crisis put so much pressure on the adequacy of representation that *every* case would count as extraordinary.⁶⁵

Finally, early in 2003, a New York State trial court concluded explicitly that the low rates 'result[ed] in denial of counsel, delay in proceedings, excessive caseloads, and inordinate intake and arraignment shifts; further resulting in rendering less than meaningful and effective assistance of counsel, and impairment of the judiciary's ability to function'.⁶⁶ The State and City

not be able to order the legislature to appropriate those [needed] funds, we must advise the legislature that if sufficient funds are not appropriated within sixty days from the filing of this opinion, and counsel hired and appearances filed within 120 days from the filing of this opinion, the courts of this state will entertain motions for writs of habeas corpus from those indigent appellants whose appellate briefs are delinquent sixty days or more, and upon finding merit to those petitions, will order the immediate release pending appeal of indigent convicted felons who are otherwise bondable.' *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender* 561 So 2d 1130 (Fla 1990) at 1139.

⁶⁰ The dissenting justice wrote that '[e]vidently, my colleagues intend to offer up Section E as a lamb for burnt offering, hoping that an all-knowing, benevolent deity will miraculously cure the ills of the indigent defense system in that section and perhaps elsewhere' (621 So 2d 780 at 792 (Dennis J, dissenting)).

⁶¹ Miller op cit note 52 at 1795.

⁶² NY County Law s 722-b (McKinney 1991); NY Fam Ct Act s 245 (McKinney 1999); NY Jud Law s 35 (McKinney 2002).

⁶³ *New York County Lawyers' Association v New York* 793 NYS 2d 397 (Sup Ct, NY Cty, 2003) at 416–17, appeal withdrawn 767 NYS 2d 603 (App Div 1st Dept 2003).

⁶⁴ *State v Bernard Thompson* 2003 NY Misc LEXIS 11 at *4 (Sup Ct, Bronx Cty, 2003).

⁶⁵ *People v Branch* 2001 NY Misc LEXIS 507 at *6–7 (Sup Ct, Queens Cty, 2001).

⁶⁶ *New York County Lawyers' Association* 793 NYS 2d at 400.

argued 'that injunctive relief should not issue until the Legislature has been given an opportunity to act'.⁶⁷ The court, however, was convinced that the legislature had already been given more than enough time — this issue having been a subject of prolonged, ineffectual political effort in the state. Therefore, the court 'issue[d] a mandatory injunction raising the rates to \$90 an hour, without distinction between in and out-of-court work, and without ceilings on total per case compensation, until the Legislature addresses the issue'.⁶⁸ All of this was quite striking, but not unique, for other states have also directly regulated the levels of compensation for assigned counsel.⁶⁹

Could a South African court issue orders of these sorts — staying all pending cases in a particular court, for example, pending legislative reform of the system of provision of counsel to indigents, or simply ordering the State to pay to the Legal Aid Board an additional R500 million, to be used for hiring, training and providing support services to additional lawyers for indigent South Africans? In principle, it seems to me that the answer should be 'yes'. There is no doubt, I take it, that South African courts can issue monetary judgments against the state, for damages and for costs. Equally there is no doubt that the courts can order the government to undertake programmes that will cost money and that may well divert money from other potential programmes, as in, for example, *Grootboom*. Because orders of the kind I am describing would deal, in a sense, with the courts' own operations, they would rest not only on the courts' general remedial powers but also in part on the courts' authority 'to protect and regulate their own process'.⁷⁰ The courts could also invoke the constitutional duties of all other organs of state to avoid interfering with the courts⁷¹ and to 'assist and protect the courts to ensure [their] independence, impartiality, dignity, accessibility and effectiveness'.⁷² In

⁶⁷ At 418.

⁶⁸ At 419. A federal court had also ruled, in 2002, that mothers facing removal of their children were entitled to appointed counsel, compensated at \$90 per hour up to a maximum, ordinarily, of \$1 500 per case (*In re Shanvline Nicholson* 181 F Supp 2d 182 (EDNY 2002) at 192). The Second Circuit United States Court of Appeals recently postponed assessment of the correctness of this decision pending guidance on issues of state law from the New York Court of Appeals (*Nicholson v Scopetta* 344 F 3d 154 (2d Cir 2003) at 158n1). Some months after the *New York County Lawyers' Association* decision the New York state legislature did address the issue, setting somewhat lower rates than the court had ordered; the parties to the lawsuit agreed to a settlement incorporating the legislature's chosen rates. Daniel Wise 'Assigned counsel fee litigation is settled: County lawyers agrees to lower hourly rate set by legislature; benefits of previous rulings preserved' *New York LJ* (13 November 2003) 1. The debate over the state of New York's indigent representation system continues. See John Caher 'Defenders' group documents 18-B from poor defendants' point of view' *New York LJ* (14 October 2003) 1.

⁶⁹ See *State v Lynch* 796 P2d 1150 (Ok 1990) (finding Oklahoma rates of compensation for appointed counsel so low as to be an unconstitutional taking of the attorneys' property; for the subsequent reforms enacted by the Oklahoma legislature, see Miller op cit note 52 at 1801). See also *In the Matter of the Recorder's Court Bar Association et al v Wayne Circuit Court et al* 503 NW 2d 885 (Mich 1993) (Michigan State Supreme Court finding that a local compensation system set by a lower court violated a state statutory requirement of 'reasonable compensation').

⁷⁰ Section 173 of the Constitution.

⁷¹ Section 165(3). See also s 165(1), which provides that '[t]he judicial authority of the Republic is vested in the courts'.

⁷² Section 165(4). Some American courts, similarly, have invoked their general power to supervise the legal profession and legal proceedings as a basis for their orders. *Lynch* supra note 69 at 1162; cf *Recorders' Court Bar Association* 503 NW 2d at 897 ('Court's extraordinary power of superintending control' over lower court).

short, the orders I have reported from American state courts do not seem, in principle, to rest on forms of judicial authority unavailable to South Africa's courts. Nor do they emerge from courts indifferent to the sensitivity of such judicial demands upon the political branches — for American courts if anything may sometimes be more hesitant on this score than South African courts are.

At the same time, these are very drastic steps to take. Even if I am right that courts should assess the presence of 'substantial injustice' largely without attention to the question of what justice might cost, they clearly could not issue orders like these without directly addressing the issues of costs and, correspondingly, of spending priorities. They are not well positioned to do so. This obvious reality suggests that two other courses of action will make better sense.

First, here as in other areas where courts may need to intrude into executive and legislative decision-making to vindicate constitutional rights, they should first intrude as little as possible. Faced with a court system in which inadequate representation was endemic, the first step might be just to say so, to urge the government to address the problem (perhaps simply as a matter of wise policy rather than explicitly announced legal duty) and then to await government steps to remedy the problem.⁷³ The next step might be to require the government to offer a remedy, and then to monitor its implementation. Another step of this sort might be to require the government and the litigants challenging it to try to agree on a remedy, and order their agreement into effect. Even when courts take the further step of ordering a plan into effect based on the outcome of an adversary hearing rather than of negotiation, they may do so without directly ordering particular levels of funding. Steps such as these limit the extent of the courts' intrusion into political decision-making, and can also provide the basis for more drastic intervention if it is necessary.

It must also be said, however, that orders like these can be sharp, and long-term, constraints on the political branches. That may be just what is needed, where the government is resisting compliance with its obligations. Yet it may also turn out that reforms ordered at one stage, perhaps even on the basis of consent by all parties, ultimately become unreasonable constraints on future, needed change. Suppose, for example, that the court orders a particular system of supplying appointed counsel, and some years later the government comes to believe that another system would do the same job equally well, but more cheaply. American courts have wrestled with the questions of when

⁷³ *Nkuzi* supra note 5 para 12 adopts essentially this stance, ordering that legal representation be made available but not specifying the programmatic steps that would have to be taken to accomplish this (declaring that '[t]he State is under a duty to provide such legal representation or legal aid through mechanisms selected by it'). For an example of a court urging steps as a matter of policy rather than law, see *Lassiter* supra note 37 at 33–4, in which the Supreme Court, while deciding that the Constitution did not automatically guarantee a right to counsel at state expense to parents facing termination of their parental rights, at the same time made clear its view that 'wise public policy' would provide counsel not only in these cases but in other related proceedings as well.

courts' 'structural' interventions into governmental operations can be reconsidered, and on what showing, and these issues may need to be addressed in South Africa as well.⁷⁴

Secondly, it may be that courts should not now initiate this series of interventions and perhaps then of reconsiderations. This is, in one sense, a startling suggestion. United States courts oversee a vastly more expensive effort to implement the right to appointed counsel than South Africa has yet undertaken, and yet a number of those courts have found the expensive systems in place constitutionally unacceptable and have intervened quite forcefully. Yet I am suggesting that in South Africa the time is not yet ripe for such intervention. This is so for several reasons. For one thing, the groundwork has not yet been laid, in the form of an accumulation of court decisions defining effective assistance of counsel and acknowledging its absence (if indeed it is absent). Sweeping judicial intervention is a drastic step, and certainly not the first one to take. In addition, the choices that must be made about spending priorities are, I think, much harder in South Africa than in the United States; needs are greater in South Africa and resources are less. Choosing what to do in such painful circumstances is a quintessentially democratic, rather than judicial, task — to be sure, within the boundaries set by the Constitution.

Perhaps most important is the fact that the political process *has* responded quite vigorously to the problems of lack of representation in South Africa's courts. In the United States, representation of indigent criminal defendants may seem like the last thing that most elected officials would make a priority.⁷⁵ Whether politicians' priorities are different in South Africa, or whether this issue has (happily) escaped from the focus of politicians whose priorities are elsewhere, the Legal Aid Board has, in recent years, rescued itself from financial disarray and dramatically restructured its method of providing legal services, abandoning a system of case-by-case appointment of counsel in favour of preferred use of lawyers from justice centres established around the country.⁷⁶ It has also adopted regulations that in effect give 'substantial injustice' a very wide definition, embracing *all* criminal cases where a sentence of three months is probable⁷⁷ — a definition much more inclusive than any court, as far as I know, has adopted so far. Legal Aid services are also available to clients in a wide range of civil matters, again well beyond what the

⁷⁴ My colleagues Ross Sandler and David Schoenbrod have thoughtfully explored these problems, though I am less wary of judicial power than they are. See Ross Sandler & David Schoenbrod *Democracy By Decree: What Happens When Courts Run Government* (2003).

⁷⁵ One possible response to such political realities is to confer funding authority on the courts. For an illustration of a statutory system in New Jersey that gives the courts authority to increase appropriations for prosecutors despite the decision of the relevant local government to appropriate less, see *In the Matter of the Application of A Donald Bigley, Camden County Prosecutor, for the Appointment of Additional Assistant Prosecutors and the Incurring of Other Expenses* 259 A 2d 213 (NJ 1969). It would of course be open to South Africa to vest similar authority, for prosecution or defence funding, in its courts or in some other agency removed from direct political pressures.

⁷⁶ See, for example, South African Press Association 'Govt-funded justice centre to serve poverty-stricken people' 7 February 2001 (available on LEXIS).

⁷⁷ *Legal Aid Guide* op cit note 7 para 3.1.1.

Constitution's text specifically calls for.⁷⁸ My understanding is that the Board is now moving to implement training programmes for its lawyers, certainly another needed step.⁷⁹ There is a lot to be done, but also reason to believe the Board is doing it.

Is there a doctrinal basis on which South African courts could refrain from intervening systemically even if they come to see that the provision of counsel has systemic problems? Section 172(1)(a) of the Constitution would seem to say that courts cannot refrain from calling 'any law or conduct' unconstitutional if it is so. But s 172(1)(b)(ii) allows the courts to 'make any order that is just and equitable, including ... an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect'. It may be that, in dealing with the adequacy of representation and perhaps a number of other painful problems South Africa faces, the courts will need to rely on this power. Thus, the ultimate judicial response to this aspect of the task of ensuring access to justice may turn out to be vigilant case-by-case adjudication, combined with reliance on other government actors for systemic improvements. One reason that approach may work, finally, is that all parties will no doubt be aware that courts have much more incisive remedies available to them if co-operative responses fail.

⁷⁸ See note 8 above.

⁷⁹ *Brits* op cit note 9.