

WHY SOUTH AFRICA SHOULD EMBRACE *GIDEON*:
AN ANALYSIS OF THE RIGHT TO COUNSEL
AND WHY IT SHOULD BE EXTENDED
TO ALL DEFENDANTS

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INTRODUCTION

In South Africa, two men, Payise Khanyile and Mkezi Mwanayana were charged with theft and housebreaking with intent to steal.¹ The sole evidence linking them to the crime was a set of fingerprints which were found at the scene a few days after the crime, and which, according to a police officer considered “an expert on such matters,” matched those of the defendants.² A “minimally skilled” attorney would have at least been able to cast doubt on the police officer’s testimony via cross examination.³ But these defendants did not have counsel, and so attempted on their own to question the police officer in efforts described as “perfunctory, superficial and aimless.”⁴ Despite finding them guilty, the trial judge acknowledged “how badly ignorance had handicapped them.”⁵ The appeal noted that “[t]o do battle with an expert witness is seldom easy, even for a skilled litigator. The men were quite at

1. *S v. Khanyile and Another* 1988 (3) SA 795 (N) at 796 (S. Afr.).

2. *Id.* at 797.

3. Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa*, 75 B.U. L. REV. 1, 3 (1995) (“A minimally skilled lawyer would have been able to cross-examine the state’s witnesses on several grounds. A lawyer could have questioned and perhaps raised doubts about the reliability of the fingerprint expert by detailed cross-examination on the process of lifting prints, the production of enlargements, the identification of points of similarity between the lifted prints and those of the defendant, or any points of difference that may have existed. A lawyer also would have been able to challenge the qualifications of the police witnesses and the reliability of the fingerprint field as a whole.”).

4. *Khanyile*, 1988 (3) SA at 797.

5. *Id.* at 798.

sea, the record shows, and far beyond their depth.”⁶ The obvious disadvantage that a layperson faces in representing himself pro se is captured in the United States Supreme Court’s opinion in *Powell v. Alabama*:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.⁷

The understanding that even an educated and capable individual would be severely handicapped if forced to represent himself in an adversarial trial is what led the same court to declare, in its landmark decision *Gideon v. Wainwright*, that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁸ This decision reversed decades of precedent, effectively requiring all courts in the United States to supply counsel for indigent defendants charged with felonies. The Court further expanded the right to counsel in *Argersinger v. Hamlin*, which held “that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial.”⁹

6. *Id.*

7. *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (requiring counsel in all capital cases).

8. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

9. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

In *S v. Khanyile and Another*, then-South African provincial Judge John Didcott¹⁰ sought to apply the U.S. Supreme Court's reasoning to advocate for the right to counsel in his own country.¹¹ After tracing the evolution of U.S. Supreme Court cases from *Powell v. Alabama* to *Betts v. Brady*¹² and finally to *Gideon v. Wainwright*,¹³ Didcott concluded that:

Gideon v. Wainwright would have been the beacon on which my sights were set . . . [t]hat we should head in that direction, intent on remedying the deficiency and arriving there at last, I still believe. For the time being, however, we shall have to manage as best we can with a dimmer light, one resembling rather *Betts v. Brady*.¹⁴

Constrained by the practical difficulties of providing counsel in every trial, Didcott proposed a balancing test by which judges would weigh three factors—the complexity of the case, the capacity of the defendant, and the gravity of the charge¹⁵—to determine whether “their cumulative effect is such that the man would be placed at a disadvantage palpable and gross, that the trial would be palpably and grossly unfair, were it to go ahead without a lawyer for the defense.”¹⁶

Khanyile was overruled two years later by *S v. Rudman and Another; S v Mthwana*, an Appellate Division case in which the court found that there was no principle in South African law that required the state to provide counsel to indigent defendants. Recognizing that the court *could* create such a rule, the Appellate Division declined the opportunity to do so, finding the *Khanyile* standard neither desirable in principle nor practi-

10. When he wrote *Khanyile*, Didcott was a judge, but he became a justice after being appointed to the Constitutional Court in 1995. From now on, I will refer to him as “Justice Didcott.”

11. *Khanyile*, 1988 (3) SA at 814.

12. *Betts v. Brady*, 316 U.S. 455 (1942) (holding that the concept of “due process of law” incorporated in the Fourteenth Amendment does not obligate the states, whatever may be their own views, to furnish counsel in every criminal case in which the accused is unable to obtain counsel).

13. *Khanyile*, 1988 (3) SA at 802–14.

14. *Id.* at 814.

15. *Id.* at 815–16.

16. *Id.* at 816.

cal, given the scarcity of both public funds and advocates in the country.¹⁷

The Interim Constitution of South Africa, enacted in 1993, guaranteed the accused a fair trial, including the right “to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights.”¹⁸ Section 35(2)(c) of the 1996 Constitution preserved this right, stating that anyone who is detained, including the sentenced prisoner, has a right “to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”¹⁹ By affirmatively guaranteeing the right to counsel in its Bill of Rights, the 1996 Constitution effectively overruled *Rudman*²⁰ and “codified” *Khanyile*’s holding that courts must balance feasibility with the principled need to provide representation for indigent defendants.²¹

Because section 35(2)(c) of the Constitution incorporates the balancing test articulated in *Khanyile* which envisioned a dynamic notion of the right to counsel analogous to the idea of due process in the United States, it is time for South Africa to embrace the rule in *Gideon* and guarantee counsel before a defendant could be sentenced to imprisonment.²² Part I of

17. *S v. Rudman and Another; S v. Mthwana* 1992 (1) SA 343 (A) at 371–72 (S. Afr.).

18. S. AFR. (INTERIM) CONST., 1993, § 25(3)(e).

19. S. AFR. CONST., 1996, § 35(2)(c).

20. David McQuoid-Mason, *Legal Representation and the Courts*, 5 S. AFR. HUM. RTS. Y.B. 162, 165 (1994).

21. Ogletree, *supra* note 3, at 23–24.

22. In *Khanyile*, Justice Didcott noted that *Argersinger v. Hamlin* extended the right to counsel to some misdemeanors, as it held that the accused could not be imprisoned unless he was represented by counsel at his trial regardless of whether he was charged with a misdemeanor or a felony. Noting that the distinction between felonies and misdemeanors does not exist in South Africa, Justice Didcott stated that this was a “distinction we have never observed which need not detain us. It had no bearing on the right to counsel, the Supreme Court held.” *S v. Khanyile and Another* 1988 (3) SA 795 (N) at 808 (S. Afr.). Hence even if the distinction between misdemeanors and felonies *did* exist in South Africa, Justice Didcott would have adopted the rule in *Argersinger* rather than *Gideon*, because he agreed with the U.S. Supreme Court that the misdemeanor/felony distinction should *not* dictate whether the accused has a right to counsel.

this Note begins by tracing the similar trajectory of the right to counsel in the two countries. Both countries originally understood the right to counsel to mean that, contrary to the British common law rule,²³ a defendant who hired an attorney should be allowed to be represented by that attorney in court. In *Powell*, the U.S. Supreme Court recognized that in certain “special circumstances,” such as when a defendant is facing the death penalty, he should be provided with counsel at state expense; yet in 1945, the court denied that the right to counsel was a fundamental right required in cases where the accused faced imprisonment as opposed to execution.²⁴ Then, in 1963, the Supreme Court decided *Gideon* against the backdrop of the Civil Rights Movement, as part of a series of court decisions safeguarding the rights of minorities.²⁵ This progression, developed in Part I(A), illustrates that U.S. courts developed a right to counsel based on an evolving understanding of “due process,” which changed according to the norms and social circumstances of the time.

South Africa has similarly undergone an evolution in its understanding of the right to counsel, from the right to be represented by one’s hired counsel, to be represented by counsel at state expense when facing the death penalty, and finally, as envisioned by *Khanyile* and the 1996 Constitution, to be represented by counsel at state expense if “substantial injustice” would otherwise result. Because *Khanyile* envisioned a dynamic notion of the right to counsel that would ultimately move towards the rule in *Gideon*, Part I(B) concludes that South Africa should take the final step in its evolving understanding of the right to counsel and guarantee counsel before a defendant can be sentenced to imprisonment.

23. “Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest.” *Powell v. Alabama*, 287 U.S. 45, 60 (1932).

24. *Betts v. Brady*, 316 U.S. 455, 473 (1942) (“[W]e cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.”).

25. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 5 (1997) (arguing that the constitutionalization of criminal procedure after 1960 was largely motivated by a sense that black suspects and defendants were treated differently by the system than their white counterparts).

Part I concludes by providing three additional arguments in support of South Africa's recognition of the right to counsel. Part I(C) makes a parallel argument to the one made in parts I(A) and I(B) by drawing an analogy between the "special circumstances" test suggested by Justice John M. Harlan II in his *Gideon v. Wainwright* concurrence and the notion of "substantial injustice." While this argument similarly advocates for a dynamic understanding of the right to counsel, it would allow South Africa to discard the "substantial injustice" balancing test while preserving the notion of "substantial injustice" in its Constitution by recognizing that *every* case in which a criminal defendant is tried without counsel constitutes substantial injustice.

Part II argues that now is the time for South Africa to abandon the "substantial injustice" balancing test. Part II(A) begins by illustrating how South African courts have failed to consistently apply the balancing test. Despite the fact that Justice Didcott, who was appointed to the newly created Constitutional Court, clearly re-stated the factors that courts must weigh to determine whether "substantial injustice" would otherwise result, lower courts have disregarded his guidance. The failure of these courts to apply the balancing test suggests that discarding this test in favor of a bright line rule would at least provide more consistency.

Part II(B) lays out two arguments for why a universal guarantee of the right to counsel is more consistent with post-apartheid South Africa's circumstances, resources, and values. First, the Legal Aid Bureau and the legal profession in South Africa have undergone a massive expansion, diminishing the feasibility concerns that limited the scope of *Khanyile's* holding. The drafters of the 1996 Constitution adopted the qualifying language "where substantial injustice would otherwise result," in order to allow courts the flexibility of denying counsel where it would not be feasible.²⁶ Justice Didcott's primary reason for choosing a balancing test, which is more consistent with the holding in *Betts* than the absolute guarantee of coun-

26. See Jennifer L. Huber, Note, *Legal Representation for Indigent Criminal Defendants in South Africa: Possibilities Under the 1994 Constitution*, 5 DUKE J. COMP. & INT'L L. 425, 444 (1995) ("It is conceivable that the more cautious language was used to allow courts, at least in the short-term, to weigh considerations of feasibility.").

sel in *Gideon*, was the recognition of the limited resources in his country.²⁷ Given the recent expansion of South Africa's Legal Aid Board, this concern is less relevant today than it was in 1996, and certainly in 1988. Part II(B)(1) examines the legal resources in South Africa today, arguing that concerns of feasibility and practicality that stymied absolute guarantees of the right to counsel are not sufficient to deny this right any longer.

Secondly, in order for South Africa to truly realize its goal for socio-economic and racial equality, as envisioned by the 1996 Constitution, it must extend the right to counsel for indigent defendants. Part II(B)(2) opens by placing *Gideon* in the context of the U.S. Civil Rights Movement, then examines the disadvantages that black defendants suffered in South Africa both as a result of the apartheid regime and even afterwards, and ultimately concludes that because the 1996 Constitution was meant to confront and correct the injustices of the past, guaranteeing the right to counsel to poor defendants, who are overwhelmingly black, is a necessary step to realizing the ideal of equality.

Part III addresses counterarguments suggesting that the right to counsel may not be appropriate for South Africa, given the differences between that country and the United States. Part III(A) addresses the potential criticism that the right to counsel is less important in South Africa, a jurisdiction where judges, not juries, play the role of fact-finder. Part III(B) surveys international law norms that also recognize the right to counsel, addressing the counterargument that advocating for the right to counsel is solely an American idea. Part III(C) addresses the counterargument that the court should not displace the role of the legislature in deciding that the state should provide counsel, because this would divert funding that could be allocated to other important needs such as food, water, and education. While the right to counsel appears to be a positive right, as it requires the state to expend funds to provide a good, it is actually a negative right that pro-

27. *Khanyile*, 1988 (3) SA at 813–14 (arguing that the country is limited both in its ability to impose higher tax burdens on struggling taxpayers and by the fact that there are too few lawyers to meet the needs of the courts once the funds have been raised).

fects citizens from arbitrary and excessive government power and therefore must be guaranteed by the Constitution.

Courts should interpret the provision in the 1996 Constitution guaranteeing counsel where “substantial injustice would otherwise result” in light of *Khanyile*, which acknowledged that the right to counsel provided at state expense could not be guaranteed as an absolute right because South Africa’s Legal Aid Bureau simply could not provide counsel in all cases. Committed to the principle that a fair trial requires counsel, while recognizing that his country has limited resources, Justice Didcott proposed, for the time being, a balancing test which would provide counsel in the most egregious cases of injustice. It is now time to move beyond this balancing test, because guaranteed representation is increasingly feasible, given South Africa’s much-augmented legal resources. Considering the injustices suffered by blacks in the criminal justice system under apartheid and South Africa’s recent commitment to racial and socio-economic equality, guaranteeing the right to counsel is a crucial step in realizing this ideal.

I. THE ANALOGOUS EVOLUTION OF AMERICAN DUE PROCESS AND THE SOUTH AFRICAN FAIR TRIAL

In *Khanyile*, Justice Didcott made an astute observation: the idea encapsulated in the American notion of “due process,” that is, what standard is necessary to constitute a fair trial, has evolved over time. The American realization that the right to counsel is essential to a fair trial—arrived at after decades of an evolving understanding of “due process”—is applicable to his own country, Didcott observed, because of the shared notion that a verdict arrived at through an unfair process is invalid. And just as the notion of “due process” has evolved in the United States, the South African understanding of the safeguards necessary for a fair trial have similarly changed over time. In a later opinion, Didcott made this idea explicit, stating “[f]or what we tolerate today, . . . we may not tomorrow.”²⁸

Didcott anticipated criticism from his countrymen in attempting to draw a comparison with the United States, a coun-

28. *S v. Davids; S v. Dladla* 1989 (4) SA 172 (N) at 185 (S. Afr.).

try that, unlike his, boasts a Bill of Rights²⁹ guaranteeing certain rights to its citizens, including the Sixth Amendment's right of the accused to be represented by counsel in criminal prosecutions.³⁰ But as Judge D.M. Davis³¹ observed:

[T]he American Constitution does not expressly provide for the right to counsel: that right emerged out of a process of legal interpretation. Thus if the American courts were able to interpret the Sixth and Fourteenth Amendments in order to develop a right to counsel, so could a South African court achieve the same result by a similar process of interpretation.³²

A. *The Evolution of Due Process Standards in the United States*

In South Africa³³ and the United States,³⁴ the right to counsel was originally interpreted as a constraint on state power, that is, as saying that the state cannot prevent someone

29. *Khanyile*, 1988 (3) SA at 808 (“The stock response in legal circles here to any talk of American cases like those I have explored is to remind one that we have no Bill of Rights comparable with theirs, indeed none whatever, and then to dismiss their experience and ideas as intriguing but, when all is said and done, irrelevant.”).

30. U.S. CONST. amend. VI., cl. 3 (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”).

31. D.M. Davis is a judge on the High Court of South Africa, and an honorary professor of law at the Faculty of Law, University of Cape Town, South Africa. Judge Dennis Davis, Univ. of Cape Town, <http://www.commerciallaw.uct.ac.za/staff/academic/ddavis> (last visited Feb. 26, 2012).

32. D.M. Davis, *An Impoverished Jurisprudence: When is a Right Not a Right?*, 8 S. AFR. J. ON HUM. RTS. 90, 92 (1992).

33. In South Africa, the Criminal Procedure and Evidence Act 31 of 1917 states that, “Every person charged with an offense is entitled to make his defense at his trial and to have the witnesses examined or cross-examined by his counsel, if the trial is before a superior court, or by his counsel (if any), or his attorney or law agent, if the trial is before an inferior court.” Huber, *supra* note 26, at 427 (quoting Criminal Procedure and Evidence Act 31 of 1917 § 218 (S. Afr.), *reprinted in* STATUTES OF THE UNION OF SOUTH AFRICA 228, 300 (1917)).

34. Under English common law, prisoners could not be represented by counsel upon the issue of guilt upon an indictment for felony or treason. “In light of this common law practice, it is evident that the constitutional provisions to the effect that a defendant should be ‘allowed’ counsel . . . were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to

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who has hired counsel from being represented by him. Despite an understanding that the Sixth Amendment's provision of the right to counsel only applied to trials in federal court and not to the states,³⁵ the United States came to recognize in 1932 that in certain "special circumstances" the right to counsel can be interpreted as a positive right. The *Powell* court held that in capital cases, the state is required to provide counsel for a defendant when the defendant cannot afford counsel himself.³⁶ In *Betts v. Brady*, the Supreme Court found that the guarantee of the right to counsel found in the Sixth Amendment *could* be held to apply to the states through the Fourteenth Amendment, which says that no person shall be deprived of his liberty without the due process of law.³⁷

Due process is a dynamic concept, one that is determined by the "common and fundamental ideas of fairness and right."³⁸ Surveying the constitutional, legislative, and judicial history of the states, the *Betts* court concluded in 1942 that the majority of the states did not view the right to counsel as a fundamental right essential to a fair trial, but rather one of legislative policy.³⁹ Hence, the court held that "[i]n the light of this evidence, we are unable to say that the concept of due process incorporated in the *Fourteenth Amendment* obligates the States, whatever may be their own views, to furnish counsel in every such case."⁴⁰

Eighteen years later, the Supreme Court reversed *Betts* by deciding *Gideon*, stating that "[w]e think the Court in *Betts* was wrong, however, in concluding that the *Sixth Amendment's* guarantee of counsel is not one of these fundamental rights."⁴¹

compel the State to provide counsel for a defendant." *Betts v. Brady*, 316 U.S. 455, 466 (1942).

35. *Id.* at 461.

36. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

37. *Betts*, 316 U.S. at 461–62 ("The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.")

38. *Id.* at 473.

39. *Id.* at 471.

40. *Id.*

41. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

Pointing out that ten years prior to *Betts*, the Court had held in *Powell v. Alabama* that “the right to the aid of counsel is of this fundamental character,”⁴² the Court decided that the *Betts* ruling was an anomaly, inconsistent with precedent.⁴³ The majority in *Gideon* found its conception of due process not only more consistent with precedent and constitutional principles than the *Betts* conception, but also more reasonable because a competent defense attorney is a necessity for a fair trial.⁴⁴ As Justice Hugo Black explained:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.⁴⁵

Hence the right to counsel in the United States underwent a dramatic evolution in the middle of the twentieth century, based on the Supreme Court’s changing views of the notion of fundamental fairness as required by the Due Process Clause of the Fourteenth Amendment.

B. *The Analogous Evolution of Standards Necessary for a “Fair Trial” in South Africa*

If the U.S. courts were able to develop a right to counsel based on an evolved understanding of the idea of “due process” guaranteed by their Constitution, then South African courts could similarly establish the right because they required the analogous notion of a “fair trial.” As Justice Didcott pointed out, “the standards the [Due Process] [C]ause sets for those occasions in question, the standards it demands be met on each, are simply those ‘fundamental and essential to a

42. *Id.* at 342–43 (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

43. *Id.* at 343–44.

44. *Id.* at 344.

45. *Id.*

fair trial.’ And on the self-same standards our common law insists, doing so no less rigorously or regularly.”⁴⁶ In South Africa, a verdict would be overturned if the proceedings were later found to have been in violation of those standards necessary for a fair trial, so these safeguards played the same role in ensuring the legitimacy of a judicial proceeding that the “due process” standards do in the United States.⁴⁷

Months before *Khanyile* was decided, an appellate court in another jurisdiction held in *S v Radebe; S v Mbonani* that the failure of a judicial officer to inform defendants of their right to legal representation, depending on the “circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice.”⁴⁸ Though *Khanyile* involved a similar omission on the magistrate’s part, Justice Didcott ruled on separate grounds, believing that *Radebe* did not go to the “heart of the matter.”⁴⁹ In *Khanyile*, Justice Didcott went a step further and asserted that the right to be represented by counsel is one of the necessary elements of a fair trial. According to Didcott, a decision rendered without counsel for the defendant in the absence of a waiver was *per se* unfair.⁵⁰

Didcott’s reasoning began with the premise that it is well accepted in South Africa that a person who is able to obtain counsel has the right to be represented by him: “That he should be allowed to exercise the right is vital to the fairness of the proceedings. It is, in other words, ‘fundamental and essential to a fair trial.’ A denial of the right therefore makes the trial *per se* unfair. And any conviction that ensues will inevitably be upset.”⁵¹ To support his contention that the right to counsel is “axiomatic,” the justice cited section 73 of the Criminal Procedure Act 51 of 1977⁵² and a number of cases that

46. *S v. Khanyile and Another* 1988 (3) SA 795 (N) at 809 (S. Afr.).

47. *Id.*

48. *S v. Radebe; S v. Mbonani* 1988 (1) SA 191 (T) at 196 (S. Afr.).

49. *Khanyile*, 1988 (3) SA at 800.

50. *Khanyile*, 1988 (3) SA at 810.

51. *Id.*

52. *Id.* at 809. Section 73 of the Act states:

73. Accused entitled to assistance after arrest and at criminal proceedings. —(1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of

recognized this principle.⁵³ These cases not only demonstrated that South African courts recognized the right to counsel but also illustrated a number of ways in which the right had been considered to be denied; for example, by failing to give the defendant an adequate amount of time to acquire counsel or counsel adequate time to prepare for trial.⁵⁴ “These are, however mere details,” says Didcott. “The various causes matter less than the single effect, the effect of an unfair trial, of a

prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.

(2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings,

if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

(2A) Every accused shall—

(a) at the time of his or her arrest;

(b) when he or she is served with a summons in terms of section 54;

(c) when a written notice is handed to him or her in terms of section 56;

(d) when an indictment is served on him or her in terms of section 144(4)(a);

(e) at his or her first appearance in court,

be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.

[Sub-s. (2A) inserted by s. 2 of Act No. 86 of 1996.]

(2B) Every accused shall be given a reasonable opportunity to obtain legal assistance.

[Sub-s. (2B) inserted by s. 2 of Act No. 86 of 1996.]

(2C) If an accused refuses or fails to appoint a legal adviser of his or her own choice within a reasonable time and his or her failure to do so is due to his or her own fault, the court may, in addition to any order which it may make in terms of section 342A, order that the trial proceed without legal representation unless the court is of the opinion that that would result in substantial injustice, in which even the court may, subject to the Legal Aid Act, 1969 (Act No. 22 of 1969), order that a legal adviser be assigned to the accused at the expense of the State: Provided that the court may order that the costs of such representation be recovered from the accused: Provided further that the accused shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence.

Criminal Procedure Act 51 of 1977 § 73 (S. Afr.).

53. *Khanyile*, 1988 (3) SA at 810.

54. *Id.*

trial rendered unfair by no or insufficient opportunity for the fellow in the dock to make use of a representation that he had or might well have obtained.”⁵⁵

It follows that a trial is similarly considered unfair if the defendant’s inability to procure counsel is due to his poverty. Didcott explained:

And if a lawyer’s participation is deemed essential to the fair trial of somebody who has one either at hand or in mind, why should it be thought inessential to the fair trial of a man with nobody to whom to turn because he cannot afford the expense? The result of no lawyer is the same in both situations, after all, the layman being left to defend himself. And his handicap then is just the same, whether he is a wealthy layman denied an opportunity that he wanted to employ a lawyer whom he could have found or a poor one who never sought the opportunity because it was doomed from the start to prove futile. The answer to each question, I roundly suggest, is that there really is none.⁵⁶

Since the standards for a fair trial include the defendant’s right to be represented by counsel, any violation of that right renders the trial unfair regardless of the cause, including the defendant’s lack of resources. Once the trial is found to be unfair, the conviction cannot stand.

Didcott affirmed and elaborated *Khanyile*’s holding in his subsequent decision, *S v Davids*; *S v Dladla*, in which he held that the absence of counsel could render the trial unfair. However, the opinion was not unanimous. Justice Nienaber dissented because he disagreed with Didcott that the absence of counsel, due to the defendant’s inability to afford one, could in and of itself constitute a “fatal irregularity” that invalidated the entire proceedings.⁵⁷ “For criminal proceedings to be vitiated and a conviction to be quashed there must first be

55. *Id.*

56. *Id.*

57. See *S v Davids*; *S v Dladla* 1989 (4) SA 172 (N) at 199 (S. Afr.) (Nienaber, J. dissenting) (“Never before has it ever been suggested that a miscarriage of justice occurred, so fundamental as to render the proceedings a nullity, as if no trial had taken place, because an accused, due to a lack of means, lacked a lawyer.”).

an irregularity," Nienaber wrote.⁵⁸ "An irregularity will thus be committed if a rule of practice, procedure or evidence, or a precept of natural justice recognized in our law, is disregarded."⁵⁹ In order to overturn a conviction, the irregularity must either result in a "failure of justice," meaning that the defendant is able to prove that he would not have been convicted but for the irregularity, or if "the irregularity impairs a facet of the proceedings which is fundamental to a proper administration of justice."⁶⁰ In such a situation, "the proceedings as a whole are tainted,"⁶¹ and therefore, "it would then be idle to speculate, in addition, on what, but for the irregularity, the fate of the accused would have been."⁶² Rather than assuming that the absence of counsel prejudiced the proceedings, Nienaber would have instead analyzed whether the presence of counsel would have made a difference in the outcome of the trial.⁶³

Justice Nicholas of the Appellate Division employed Nienaber's approach three years later when he decided *S v. Rudman and Another; S v Mthwana*,⁶⁴ a decision that effectively overruled *Khanyile*. Nicholas rejected Didcott's premise that a verdict rendered without the assistance of counsel should be invalidated on the grounds that the trial was unfair.

During the long period in which the [South African legal] system has been in operation, it was never suggested before *S v Khanyile* that accused persons, who were themselves unable to obtain legal representation, were entitled to be provided with it, or that a criminal trial conducted without such representation was irregular or illegal. The silence of numerous Judges over many generations is eloquent testimony that there has never been such a rule.⁶⁵

58. *Id.* at 193.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.* (enumerating a set of considerations to determine whether the irregularity in the proceedings led to a failure of justice).

64. *S v. Rudman and Another; S v. Mthwana* 1992 (1) SA 343 (A) at 390–91 (S. Afr.).

65. *Id.* at 378.

Acknowledging that the court could adopt the *Khanyile* rule,⁶⁶ Nicholas declined to do so on grounds of principle⁶⁷ and feasibility.⁶⁸ For Nicholas, the relevant inquiry was the one conducted by Nienaber: whether there was an irregularity in the trial, and, with the understanding that the absence of counsel may be an irregularity but is not by itself a *fatal* irregularity, whether the irregularity resulted in a failure of justice.⁶⁹

According to South African legal scholars, the 1993 Interim Constitution effectively overruled *Rudman*, a result siding with Didcott in his assertion that a trial in which a defendant is convicted without the aid of counsel is unjust.⁷⁰ The 1993 Constitution guaranteed the accused a fair trial, including the right “to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at State expense, and to be informed of these rights.”⁷¹ The guarantee of counsel provided at “state expense” in cases where substantial injustice would otherwise result supports Didcott’s assertion that a defendant’s poverty is no excuse for denying him counsel. The 1996 Constitution also mandates that in interpreting its provisions, courts “must promote the values that underlie an open and democratic society based on human dig-

66. *Id.* at 384 (“I do not think, therefore, that this Court would be precluded by the present state of the law on the point from adopting the *Khanyile* rule.”).

67. *Id.* at 386 (“As to the question of principle, that part of the rule which has just been referred to would be coercive, if not with intention, then at any rate in effect. Its adoption would constitute notice to the Government that if legal aid on the required scale is not provided, the prospect will have to be faced of numerous criminal trials being delayed and many convictions being upset on appeal because of the failure to provide the accused person with legal representation.”).

68. *Id.* at 388–89 (“The information on which appellants’ counsel based their submission that the *Khanyile* rule would work in practice was partial, fragmentary and quite insufficient to enable a reasoned assessment to be made of its feasibility.”).

69. *See id.* at 390–91 (analyzing whether the irregularity that occurred in the present cases resulted in a failure of justice to the defendant).

70. For example, Professor Etienne Mureinik from Witwatersand University Law School argues that *Khanyile*’s compromise between feasibility and the principled need to provide universal representation for indigent defendants was codified in the “substantial injustice” language of the new constitution. Ogletree, *supra* note 3, at 24.

71. S. AFR. (INTERIM) CONST., 1993 § 25(3)(e).

nity, equality and freedom” and may consider foreign case law, further supporting Didcott’s comparisons with the American court decisions.⁷² Most significantly, the concern about “substantial injustice” suggests that the drafters of the 1993 and 1996 constitutions, like Didcott and the U.S. Supreme Court Justices, were concerned with the *injustice* that would necessarily result from denying the right to counsel.

However, it has been pointed out that given the numerous parallels between the South African Constitution and the U.S. Constitution, the fact that the South African drafters did not adopt the language of the Sixth Amendment suggests that they intended the scope of the right to counsel to be more limited. “It is conceivable that the more cautious language was used in order to allow courts, at least in the short-term, to weigh considerations of feasibility,” pointed out one commentator.⁷³ Indeed, it was this concern for feasibility and an acknowledgement of South Africa’s limited capacity to provide counsel to the poor that forced Didcott to adopt the more limited rule of *Betts*, despite his conviction that the rule in *Gideon* is fundamentally correct.⁷⁴ As he explained in *Davids*:

[*Khanyile*] was not carried, of course, to its logical conclusion. A compromise was deemed necessary, one reached between the principle that the representation of accused persons was vital to the fairness of all trials in which it was wanted, or all of any consequence at least, and the stark reality that our current resources could never cope with the load they would have to bear if the principle were put into immediate and universal practice.⁷⁵

In suggesting a balancing test to determine whether the right to counsel was necessary in a particular case, Didcott was not

72. Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

S. Afr. Const. 1996 § 39.

73. Huber, *supra* note 26, at 444.

74. *S v. Khanyile and Another* 1988 (3) SA 795 (N) at 814 (S. Afr.).

75. *S v. Davids*; *S v. Dladla* 1989 (4) SA 172(N) at 184 (S. Afr.).

submitting that a fair trial could be possible without counsel: “I do not see what choice we have, given a situation that precludes us from proclaiming a coherent rule and compels us to distinguish invidiously between instances of unfairness, finding some more egregious and others less.”⁷⁶ By requiring the provision of counsel at state expense “where substantial injustice would otherwise result” the 1993 and 1996 constitutions embraced Didcott’s reasoning in *Khanyile*⁷⁷: the right to counsel is essential to a fair trial and should only be compromised in cases of lesser, rather than greater, injustice. In doing so, they did not abandon the principle that the right to counsel is essential for a fair trial but rather fashioned a compromise between the principle and the practical limitations of providing counsel.

In *Khanyile*, Didcott adopted the United States’ notion that the standards necessary for a fair trial have changed and can continue to evolve over time. He recognized that in 1988, his country shared the notion that the right to counsel is a fundamental right, because a trial without defense counsel cannot be considered fair. With its qualifying language of “substantial injustice,” the 1993 and 1996 constitutions captured Didcott’s compromise between the ideal of a fair trial, limited by the practical impossibility of providing counsel in every case. But Didcott made clear that “*Gideon v. Wainwright* would have been the beacon on which my sights were set That we should head in its direction . . . I still believe.”⁷⁸ Now, fifteen years after the enactment of the 1996 Constitution, it is time for *Khanyile*, as embodied in provision 35(2)(b), to be taken to its logical conclusion in requiring that counsel be provided in all cases before a defendant can be sentenced to incarceration.

76. *Khanyile*, 1988 (3) SA at 814.

77. McQuoid-Mason, *supra* note 20, at 165 (suggesting that “substantial injustice” should be determined by the *Khanyile* test); John Milton et al., *Procedural Rights*, in *RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER* 401, 414–15 (Dawid Van Wyk et al. eds., 1994) (arguing “substantial injustice” should be interpreted according to *Dauids; Dladla*, the later decision in which Justice Didcott defends his ruling in *Khanyile*).

78. *Khanyile*, 1988 (3) SA at 814.

C. *The Evolving Understanding of "Special Circumstances"*

Just as the standards necessary to uphold "due process" in the United States have evolved over time, the term "substantial injustice" in the South African Constitution is a dynamic one, whose meaning changes according to the social values and practical circumstances of the time. The "substantial injustice" language in section 35(2)(c), which suggests a balancing test, and the need for a bright line rule guaranteeing counsel can also be reconciled by interpreting this clause in the manner that Justice Harlan claimed the U.S. Supreme Court interpreted "special circumstances" in *Gideon*: that it applies to all cases in which a criminal defendant faces a serious criminal charge.⁷⁹

In his concurrence, Justice Harlan asserted that by the time *Gideon* was decided, the Supreme Court had reached an understanding that "the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial."⁸⁰ He traced the evolution of the Supreme Court's "special circumstances" test from *Powell*, where the specific facts of the case⁸¹ were crucial to the Court's holding that counsel was necessary, to *Betts*, which acknowledged that the special circumstances triggering the right to counsel could exist in non-capital cases, "while at the same time insisting that such circumstances be shown in order to establish a denial of due process."⁸² Harlan observed that in the years immediately following *Betts*, the Court had found, often by a sharply divided vote, that the special circumstances were lacking in several cases but that there was no such decision after 1950.⁸³

In other words, the Supreme Court had come to understand over time that when an accused stood before a court facing imprisonment, that was enough to constitute the "special circumstances" in which due process required the appoint-

79. *Gideon v. Wainwright*, 372 U.S. 335, 350 (1963) (Harlan, J., concurring).

80. *Id.* at 351.

81. "[T]he ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . and above all that they stood in deadly peril of their lives." *Id.* at 349 (quoting *Powell v. Alabama*, 287 U.S. 45, 71 (1932)).

82. *Id.* at 350.

83. *Id.* at 350-51.

ment of counsel. *Gideon*'s holding was necessary, according to Harlan, because state courts had not followed the Supreme Court's evolving understanding of the special circumstances rule. "The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence," Harlan concluded.⁸⁴

As described in Part III(B), South Africa's Legal Aid Board has in recent years provided counsel to a much greater proportion of indigent criminal defendants than at the time *Khanyile* was decided. But, Harlan's exhortation is perhaps relevant in South Africa as well: despite the implicit acknowledgement that in many cases the trial of an indigent defendant without counsel constitutes "substantial injustice," courts should formally recognize that now, fifteen years since the enactment of the post-apartheid Constitution, all defendants facing a potential jail sentence ought to be tried with counsel, regardless of their financial situation.

II. WHY SOUTH AFRICA SHOULD DISCARD THE "SUBSTANTIAL INJUSTICE" BALANCING TEST AND ADOPT *Gideon*

A. *South African Courts Have Failed to Apply Consistently the "Substantial Injustice" Balancing Test*

The South African Constitution requires that counsel be provided at state expense where "substantial injustice" would otherwise result, supporting Justice Didcott's maxim that *any* case in which the defendant proceeds to trial without counsel is an instance of injustice, and that counsel should be provided in the cases of "substantial injustice." Sitting on the newly created Constitutional Court in 1995, Justice Didcott clarified that the 1993 Constitution required the *Khanyile* balancing test to be applied by *trial* courts.⁸⁵ In doing so, he not only precluded courts of appeal from making the *ex post facto* determination of whether the defendant was subjected to "substantial injustice" as a result of his lack of counsel, but necessarily precluded courts from using the *Rudman* "irregularity" test. This test,

84. *Id.*

85. See *S v. Vermaas*; *S v. Du Plessis* 1995 (3) SA 292 (CC) at 299 para. 15 (S. Afr.) (stating that trial judges are better positioned to appraise the facts).

premised on the idea that a conviction can only be overturned if the defendant was “prejudiced” by his lack of counsel, invites courts to speculate as to whether the presence of counsel would have made a difference in the outcome of the trial. Despite Didcott’s mandate that trial courts apply the *Khanyile* test and his exhortation that *Khanyile* eventually be taken to its “logical” conclusion so that counsel would be provided in all cases, a number of courts have nevertheless adopted the *Rudman* approach. Not only does the continued use of the *Rudman* test by some courts result in inconsistency, but *Rudman* flouts the principle enshrined in the Constitution: that the right to counsel is a fundamental right that cannot be denied without rendering the trial unjust. The failure of the courts to follow Didcott’s instructions to use the *Khanyile* test for “substantial injustice” instead of the *Rudman* test for “fatal irregularity” suggests that perhaps a balancing approach is unworkable, and weighs in favor of a bright-line rule that counsel must be provided in all cases.

Sitting on the Constitutional Court in 1995, Justice Didcott laid out clear instructions for trial courts to interpret the constitutional provisions on “substantial injustice” in *S v. Vermaas*; *S v. Du Plessis* (1995).⁸⁶ Vermaas faced 140 charges, including theft and fraud.⁸⁷ He was initially represented by various advocates when his trial began in 1991, but they had either withdrawn or had been dismissed due to problems, mainly financial.⁸⁸ When the time came to deliver his closing argument in 1994, Vermaas attempted to proceed on his own, but, finding the task of addressing nearly 40,000 pages of evidence and exhibits to be quite difficult, changed course and asked to be represented by counsel at the expense of the state.⁸⁹ Du Plessis was charged with 62 counts of fraud and one count of corruption.⁹⁰ His trial began in 1993, and, after he ran out of money to pay his various advocates, he requested that the state provide counsel for him.⁹¹ The trial court refused the requests of both defendants on the grounds that their trials had begun prior to April 14, 1994, when the Consti-

86. *Id.*

87. *Id.* at 294 para. 3.

88. *Id.* para. 4.

89. *Id.*

90. *Id.* para. 3.

91. *Id.* para. 5.

tution went into effect, so even if the Constitution guaranteed the right to state-provided counsel, the right did not apply to them.⁹²

Didcott disagreed, declaring that the lower judges “erred in believing the future conduct of their trials to be untouched by section 25(3)(e).”⁹³ However, he refused to rule on whether Vermaas or Du Plessis should have received legal representation at the expense of the state, explaining that the inquiry is heavily dependent on the facts, which the trial judges are better equipped to assess. Didcott wrote:

Such a decision is pre-eminently one for the Judge trying the case, a Judge much better placed than we are by and large to appraise, usually in advance, its ramifications and their complexity and 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 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.’⁹⁴

Despite refusing to apply 25(3)(e) to the cases before him, Didcott provided important guidance to the lower courts by outlining criteria by which to determine whether the denial of counsel would result in “substantial injustice.” The factors he listed are the same that he outlined in *Khanyile*: the complexity of the case, the gravity of conviction, and the ability of the defendant to present his own defense. In subsequent cases, however, courts have not analyzed the question of whether “substantial injustice” would otherwise result to determine if the defendant should have been provided with counsel.

In *Hlantlalala and Others v Dyantyi No and Another*, the defendants argued on appeal that the magistrate had failed to inform them of their constitutional rights to counsel and that they had a right to be provided with one at state expense if

92. *Id.* para. 6.

93. *Id.* at 299 para. 14 (citing the interpretation of section 241(8) given in *S v. Mhlungu and Others* 1995(3) SA 867 (CC) (S. Afr.)).

94. *Id.* para. 15.

necessary.⁹⁵ Conceding that the magistrate's omission constituted an irregularity,⁹⁶ the *Hlantlalala* court stated that the conviction would only be set aside if the irregularity resulted in a "failure of justice," which can occur where there had been "actual and substantial prejudice to the accused."⁹⁷ In other words, "no failure of justice will result if there is no prejudice to an accused, and by the same token, there will be no prejudice if the accused would in any event have been convicted, irrespective of the irregularity."⁹⁸

The appellate court then attempted to analyze whether the appellants would have been convicted if the irregularity had not occurred, that is, if the magistrate had not neglected to inform them of their right to counsel at state expense.⁹⁹ Noting that the appellants did not specifically state in their affidavit that they would have applied for legal aid had they been informed of their right to do so, the court surmised that "it is apparent from other allegations made in the founding affidavit that had they been so informed they probably would have exercised their right to apply for legal aid."¹⁰⁰ The court also concluded that the presence of counsel in this case would have made a difference, based on the appellants' inability to articulate their defense:

From the foregoing it seems to me that the appellants were raising a defence, though not eloquently articulated, that they were entitled to reap from the land, as it was theirs, alternatively that they were *bona fide* of the view that they were acting lawfully and thus not with the intention to steal. In my view, a legal representative would have properly formulated the appellants' defence and would have cross-examined the State witnesses in accordance with such a defence.¹⁰¹

95. *Hlantlalala and Others v. Dyantyi No and Another* 1999 (2) SACR 541 (SCA) (S. Afr.).

96. *Id.* at 545 para. 7.

97. *Id.* para. 9 (citing *S v. Ramalope* 1995 (1) SACR 616 (A) at 621 (S. Afr.)).

98. *Id.* at 545–46 para. 9.

99. *Id.* at 546 para. 9.

100. *Id.* para. 10.

101. *Id.* at 547 para. 13.

Because the court felt that the presence of counsel would have made a difference in this case, the court concluded that the magistrate's failure to inform the appellants of their right to counsel was fatal and set aside the conviction.¹⁰²

There are several problems with the court's approach and reasoning. First, it is antithetical to Justice Didcott's premise in *Khanyile*, which he affirmed in *S v. Vermaas*; *S v. Du Plessis*, that the absence of defense counsel is per se a procedural irregularity that vitiates the fairness of the trial. The proper inquiry is not whether the presence of counsel would have made a difference in the outcome of the trial, but rather, whether this was a case of greater, rather than lesser injustice, based on the three factors to be weighed.

Secondly, contrary to the court's suggestion that the right to be informed of the right to counsel is only significant if the court believes that the appellant would have exercised this right to counsel, the right itself is constitutionally protected. Section 35(2)(c) guarantees the right to "to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and *to be informed of this right* promptly."¹⁰³ Alternatively, even if the right to be informed of the right to counsel is not protected by the Constitution, it is *necessary* in order to ensure that all persons can exercise their right to be represented by counsel. People cannot exercise their rights if they are not aware of them, so the right to be informed of the right to counsel is a prerequisite to exercise the right to counsel (provided at state expense if substantial injustice would otherwise result). In any case, both are guaranteed by the Constitution.

The inappropriateness of this inquiry in the constitutional era is further elucidated by the fact that Justice Nicholas adopted this approach in *Rudman*, a decision that rejects the very idea that there is a principle in South Africa that guarantees the right to counsel and, more broadly, a right to a fair trial. According to Nicholas:

The Court of Appeal does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice' or with 'the ideas underlying . . . the concept of justice which are the basis of all civilized

102. *Id.*

103. S. AFR. CONST. 1996 § 35(2)(c) (emphasis added).

systems of criminal administration.’ The enquiry is whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. It is true that those formalities, rules and principles have been designed to ensure a fair trial, but Didcott J was in error when he said that an irregularity encompassed every flaw in the way a criminal trial is run which renders it truly unfair.¹⁰⁴

In contrast to Didcott, who argued that there were certain elements necessary to ensure a fair trial and that the right to counsel was one of them, Nicholas argued that all that was required was adherence to the rules of procedure. If there was an irregularity or departure from those rules, a conviction would only be found invalid if the irregularity was “prejudicial.” His insistence on analyzing the effect of procedural irregularities on a trial is no longer relevant, as the Constitution is concerned with “substantial injustice” and the notion of a “fair trial,” as guaranteed by section 35. As one post-Constitution decision, *S v Du Toit and Others*, correctly observed, “[T]he right to counsel is enshrined as a fundamental right in the Constitution. It is one of the cornerstones of the right to a fair trial [T]he interference with the right to legal representation is an irregularity so gross as to vitiate the trial *per se*.”¹⁰⁵

Despite the problems with the approach taken in *Hlantlalala*, especially after the passage of the Constitution guaranteeing the right to counsel as a fundamental right, the Supreme Court of Appeal followed the same method six years later in *S v May*. Echoing the reasoning of *Hlantlalala*, the *May* opinion read:

‘What needs to be stressed immediately is that failure by a presiding judicial officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not *per se* result in an unfair trial necessitating the setting aside of the conviction on appeal.’ In addition it must be shown that

104. *S v. Rudman and Another; S v. Mthwana* 1992 (1) SA 343 (A) at 377 (S. Afr.).

105. *S v. Du Toit and Others* (2) 2005 (2) SACR 411 (T) at 426 (S. Afr.).

the conviction has been tainted by the irregularity—that the appellant has been prejudiced.¹⁰⁶

The *May* court found that the accused was not prejudiced by the failure of being informed of his right to representation, because the magistrate did an adequate job of coaching the defendant on presenting his defense:

The magistrate then proceeded to explain other procedures and rules to the appellant before the State called the first witness. The Court below, after examining the record, concluded that the appellant's right to cross-examine had been adequately explained.

I agree. The explanation might have been fuller; the purpose of questioning might have been made clearer; but the appellant was given a full opportunity to indicate whether he understood what was expected of him, and that included his right to contest the evidence of State witnesses, and to put his own version of events to them. Moreover, on repeated occasions the magistrate reminded him of what he should be doing.¹⁰⁷

The *May* court took a slightly different approach than the *Hlantlalala* court did, evaluating the efforts of the magistrate judge to assist the defendant in determining whether he was prejudiced by the lack of a legal representative. However, this method shared the same problem with *Hlantlalala* identified earlier. It assumed that a court of appeal could speculate *ex post facto* whether the outcome would have been different had the accused been provided counsel. It also assumed, perhaps implicitly, that an attentive magistrate could compensate for the lack of counsel. It suggests that the accused could have a fair trial even if he is not provided counsel—an assumption that was rejected first by *Khanyile*, and also by the Constitution.

These cases demonstrate that courts have struggled to realize the constitutional protection for an indigent defendant's right to counsel. Not only have they failed to articulate and consistently follow Justice Didcott's balancing test to determine what circumstances constitute "substantial injustice," but

106. *S v. May* 2005 (2) SACR 331 (SCA) at 335 para. 7 (S. Afr.) (quoting *Hlantlalala and Others v. Dyantyi No and Another* 1999 (2) SACR 541 (SCA) at 545 para. 8 (S. Afr.)).

107. *Id.* at 337 paras. 15–16.

some have adopted Justice Nicholas' test in *Rudman* to determine whether a procedural irregularity was prejudicial. While this inquiry may seem similar to one endeavoring to determine the presence of substantial injustice, it is not. Didcott's *Khanyile* test examines factors such as the gravity and complexity of the case to distinguish the most egregious cases of injustice from the least, acknowledging that any trial without counsel is per se unfair. In contrast, the test adopted in *Hlantlalala* and *May* invites courts to determine whether the outcome would have been different had counsel been provided and will only reverse convictions where, in the appellate judge's opinion, the outcome would have been different. In doing so, they implicitly endorse the idea rejected by the Constitution that a fair trial can occur, or that an accused can be free from prejudice, even if he lacks counsel.

B. *A Universal Guarantee of Counsel Is Now Possible and More Consistent with the Post-Apartheid Era*

Section II(A) described the inability of courts to follow the balancing test articulated in *Khanyile* and to consistently assess whether the lack of counsel constituted "substantial injustice." Section II(B) argues that the balancing test ought to be abandoned altogether for the absolute guarantee of the right to counsel, as articulated in *Gideon*, for two reasons: (i) the Legal Aid Board's increased capacity makes feasibility less of a concern than at the time *Khanyile* was written, and (ii) guaranteeing counsel to indigent defendants furthers the constitutional goal of equality. Given Justice Didcott's exhortation that *Khanyile* eventually be carried to its logical conclusion, it seems that now is the time, given that South Africa has a greater capacity to provide counsel to all indigent defendants and has an increased interest in doing so.

1. *The Increased Capacity of the Legal Aid Board*

The Legal Aid Board, the primary provider of defense counsel, has undergone a massive capacity expansion since *Khanyile* was decided in 1988. While exact figures are difficult to find, one estimate calculates that in 2007, the Legal Aid Board performed approximately seventy percent of criminal

representation in South Africa's courts.¹⁰⁸ The Board is in much better condition today than it was at the time the Constitution came into effect in the mid-1990s, when it was undergoing a managerial and funding crisis that nearly shut it down in 1998–1999.¹⁰⁹ Today, not only does the Board represent a greater proportion of defendants, but it employs nearly 1500 attorneys¹¹⁰ and expects a grant of R230m (roughly \$28 million USD) from the government to provide defense counsel for the poor.¹¹¹ Courts have recognized that, given the expansion of the Legal Aid Board, the feasibility concerns voiced in *Khanyile* are less relevant today and are less valid grounds for upholding a balancing test that would deny counsel to poor persons facing criminal charges. It is time that the courts take a stand, realize the constitutional guarantee of counsel, and interpret “substantial injustice” to result whenever a defendant is to be tried without the assistance of counsel.

In 1988, when *Khanyile* was decided, there were three sources for indigent defendants to obtain counsel. The first was the *pro deo* practice, by which the Supreme Court required that counsel be appointed for all criminal defendants facing a possibility of capital punishment.¹¹² This method of obtaining counsel, however, was only relevant to a very small proportion of criminal defendants. The second method by which defendants could obtain counsel was in the form of *pro amico* services, which were offered by legal practitioners to “deserving” cases, free of charge.¹¹³ Because such services were not required by law or even considered obligatory, *pro amico* was not a reliable source for indigent defendants to obtain counsel, nor did it cover the vast majority of indigent defendants. Of the indi-

108. Tessa Murray, *Leadership Led Transformation but Major Future Challenges Loom*, BUSINESS DAY (Jan. 26, 2009), <http://www.leader.co.za/article.aspx?s=6&f=1&a=1072>.

109. *Id.* By 2007, the Legal Aid Board employed 2000 individuals, 76 percent of whom are attorneys, which amounts to about 1500 attorneys. *Id.*

110. *Id.*

111. Matebello Motloung, *Justice: Looking at Roots of Crime*, FINANCIAL MAIL (Feb. 19, 2010), <http://free.financialmail.co.za/budget2010/spending/dspend.htm>.

112. Albertine Renée van Burren, Note, *Insufficient Legal Representation for the Indigent Defendant in the Criminal Courts of South Africa*, 17 BROOK. J. INT'L L. 381, 396 (1991).

113. *Id.* at 397.

gent defendants who were able to obtain counsel, most were represented by lawyers through the Legal Aid Board.¹¹⁴

The Legal Aid Board was founded in 1971, after the passage of the Legal Aid Act, whose object was to “render or make available legal aid to indigent persons.”¹¹⁵ The Board receives funding from the South African government, but operates based on its own set of rules and is free to receive funding from external sources.¹¹⁶ Applicants could seek representation for either civil or criminal cases, as long as they met certain criteria, including indigence as determined by their monthly income.¹¹⁷ Criminal defendants made up a very small proportion of the applicants, and had to pass rigorous standards in order to be accepted.¹¹⁸

At the time it was founded, the Legal Aid Board referred clients to private attorneys, who were reimbursed by the Board at a fixed rate.¹¹⁹ This referral system, called *Judicare*, was expensive,¹²⁰ and by the early 1990s the cost of providing services outstripped the Legal Aid Budget.¹²¹

At the time *Khanyile* was decided, the Legal Aid Board would have been unable to provide for the representation of all indigent criminal defendants by private counsel. Professor David McQuoid-Mason estimated that there were only 8,784 attorneys and advocates¹²² in South Africa in 1991, of whom

114. *Id.* (explaining that *pro deo* is only available to defendants charged with capital crimes, and the *pro amico* practice is waning because many advocates feel that such representation should be provided by the Legal Aid Board).

115. *Id.* at 394 (quoting Legal Aid Act 22 of 1969 § 3 (S. Afr.)).

116. *Id.*

117. Huber, *supra* note 26, at 445–46.

118. *Id.* at 446 (“For example, applications from criminal defendants are generally not accepted if the accused admits guilt, is unemployed for no good reason, appears to lead a criminal life, or if the Board determines that the case is so simple that the accused should be able to handle it himself.”).

119. *Id.*

120. David McQuoid-Mason estimates that 2.5 times as many defendants could have been defended by public defenders for the sum of R9.6m paid to attorneys for defending the 15,943 criminal cases during 1988–1989. David McQuoid-Mason, Rudman *and the Right to Counsel: Is it Feasible to Implement Khanyile?*, 8 S. AFR. J. ON HUM. RTS. 96, 106 (1992).

121. Murray, *supra* note 108.

122. McQuoid-Mason, *supra* note 120, at 102. South Africa follows the British method of dividing up the legal profession into advocates, who ap-

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878 were doing criminal work.¹²³ Given that there were an estimated 100,000 unrepresented defendants sentenced to imprisonment per year, this would equate to an additional 114 clients per year per advocate or attorney, in addition to the casework that they were already handling.¹²⁴ Even if it could somehow manage to persuade every single practicing lawyer in South Africa to take on 114 additional clients, the Legal Aid Board simply did not have the budget to support such a scheme.

Since then, the Legal Aid Board has experienced a transformation marked by managerial changes, massive funding increases and as a result, vastly expanded capacity to provide counsel. By 1997, it was clear that the Judicare system was no longer sustainable, due to a lack of funding and weak administration as well as corruption within the Legal Aid Board.¹²⁵ Teetering on the brink of closure, the Board received one last chance with an emergency appropriation of R107m from Parliament.¹²⁶ The Board opened its first Justice Centre (JC) staffed by full-time public defenders in 1999, and began envisioning a mixed model in which legal aid would be administered via both Judicare and JCs.¹²⁷ This model was implemented nationwide by 2002, when the Board had developed thirty-three JCs under the direction of four regional offices.¹²⁸ By 2007, the Board had established 58 JCs and 49 satellite offices, and employed 2,000 individuals, seventy-six percent of whom were lawyers.¹²⁹ The Board had moved almost entirely to a public defender system model, as 87% of cases were handled by the JCs and only 11% by Judicare and 2% by cooperation partners.¹³⁰ Most significantly, the Legal Aid Board had increased its capacity by 67.3 percent since 2003, representing 80–90 percent of the matters in the high courts and 60 percent of the trial cases in the lower courts, which equates to

pear in court, and attorneys who solicit clients and do other work. Ogletree, *supra* note 3, at 15.

123. McQuoid-Mason, *supra* note 120, at 102.

124. *Id.* at 103.

125. Murray, *supra* note 108.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

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roughly 70 percent of criminal representation in South Africa.¹³¹

Considering the significant expansion of the Legal Aid Board over the last two decades, providing counsel to all indigent defendants is a much more realistic goal today than it was in 1988. While it is true that many defendants continue to appear in court without counsel, this proportion was arguably far less in 2007¹³² than the eighty percent of defendants who lacked legal representation in 1987.¹³³ As explained above, the Legal Aid Bureau has greatly expanded its capacity, both by moving to a more efficient public defender (as opposed to referral) model and by increasing the number of lawyers specializing in indigent criminal defense. The capacity of the Legal Aid Board is also expected to increase over the next few years, as the government recently pledged to spend R5.4bn to reform the criminal justice system, R230m of which has been allocated to the Legal Aid Board “for the appointment of public defenders, family advocates and court clerks.”¹³⁴ Considering the greater number of attorneys and resources, it is a much less formidable task for South Africa to provide counsel to indigent defendants today than it was in 1988.

The courts have also noted South Africa’s increased capacity to provide representation for indigent defendants in the years since the Constitution was passed. In a case decided soon after the passage of the 1993 Constitution, Justice Didcott noted that:

No counsel on either side could then tell us of any steps taken yet to establish the financial and administrative structures that were necessary to give effect to that part of [section] 25(3)(e) providing for legal representation at the expense of the State. We gained the impression that nothing of much significance had been done in that direction since the Constitution came into force a year ago. The impression,

131. *Id.*

132. Since the Legal Aid Bureau represents 70 percent of criminal matters, *id.*, this suggests that the number of unrepresented defendants is quite low, especially once the number of criminal cases represented by private counsel is added to the 70 percent of cases represented by Legal Aid attorneys.

133. van Burren, *supra* note 112, at 382.

134. Motlounge, *supra* note 111.

if true, is most disturbing. We are mindful of the multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform. But the Constitution does not envisage, and it will surely not brook, an undue delay in the fulfillment of any promise made by it about a fundamental right. One can safely assume that, in spite of [section] 25(3)(e), the situation prevails where during every month countless thousands of South Africans are criminally tried without representation because they are too poor to pay for it. They are presumably informed in the beginning, as the section requires them peremptorily to be, of their right to obtain that free of charge in the circumstances which it defines. Imparting such information becomes an empty gesture and makes a mockery of the Constitution, however, if it is not backed by mechanisms that are adequate for the enforcement of the right.¹³⁵

Noting that the Constitution designated the right to counsel as a “fundamental right,” Justice Didcott expressed disappointment that the right had not been realized for many defendants as a result of the state’s limited resources.

In contrast to the lack of funds and administrative mechanisms to provide counsel described by Justice Didcott in 1995, the account provided by Justice C.J. Claassen in 2001 is striking. In *S v. Thomas*, a decision extending the right to legal representation to aliens accused of crimes, Claassen cited Didcott’s observations and then added his own:

[S]ix years down the line that the Legal Aid Board has become financially and administratively viable. The concern expressed by the Constitutional Court aforesaid is no longer prevalent. The financial and administrative processes are in place.¹³⁶

Claassen’s observations about the enhanced resources of the Legal Aid Board are consistent with the management and funding changes that took place over those six years, and sup-

135. *S v. Vermaas; S v. Du Plessis* 1995 (3) SA 292 (CC) at 299–300 para. 16 (S. Afr.).

136. *S v. Thomas* 2001 (2) SACR 608 (W) at 611 para. 9 (S. Afr.).

port the assertion that the Board had greater capacity to represent indigent defendants in 2001 than it did in 1995.

In 2005, Justice Jordaan of the Transvaal Provincial Division quoted both decisions and suggested that the Legal Aid Board has continued to be well-funded. He wrote:

It is now a further four years down the line since the judgment in *Thomas*.

From experience in this case, wherever disputes arose regarding the legal aid provided from time to time to many of the accused, the Legal Aid Board briefed senior counsel and a senior attorney to appear on their behalf, which illustrates that the Legal Aid Board does not suffer from impecuniousness.¹³⁷

Jordaan's observations also exhibit a marked contrast to those of Didcott writing in 1995.

Given the increased capacity of the Legal Aid Board as demonstrated by the number of attorneys it employs, the percentage of criminal matters in which it provides representation, and the justices' perceptions of its capacity, Justice Didcott's concern about the infeasibility of carrying *Khanyile* to its logical conclusion is less relevant today than in 1988. Thus, there is even less reason for South Africa to settle for the compromise of *Betts*—providing counsel in only the most egregious cases of injustice—and instead it should do so in all cases.

2. *Recognizing the Right to Counsel Is a Step Towards Realizing the Constitution's Ideal of Equality Before the Law*

The social context of the United States was a key factor in the Supreme Court's overruling of *Betts* twenty years later when it decided *Gideon*. While the court did not mention the effect of the Civil Rights Movement, the Movement's cry for equal protection for all citizens contributed to the Warren Court's understanding of the right to counsel as a fundamental right. South Africa similarly underwent dramatic societal change between 1988 and the present by abolishing apartheid and enacting a new constitution that guaranteed racial equality. Just as in the United States, it is important for South Africa's highest court to affirmatively guarantee the right to

137. *S v. Du Toit and Others* (2) 2005 (2) SACR 411 (T) at 427 (S. Afr.).

counsel in recognition of the injustices that blacks have historically suffered. Moreover, it is particularly important that the court guarantee this right post-apartheid, given the disadvantages that black defendants still suffer under the new legal system.

a. *Guaranteeing the Right to Counsel in Recognition of Past Injustice*

When *Betts* was decided in 1942, states in the U.S. South openly practiced segregation. African Americans were considered in many states to be second-class citizens who lacked the same legal rights that white citizens enjoyed. The Civil Rights Movement, marked by successful acts of nonviolent protest and civil disobedience, precipitated groundbreaking political and legal changes.¹³⁸ Against this backdrop of social upheaval, the U.S. Supreme Court ruled in *Brown v. Board of Education of Topeka* that state laws creating separate schools for black children and thereby denying them equal opportunities for education was unconstitutional.¹³⁹ In 1964, Congress demonstrated its commitment to equality under the law by passing the Civil Rights Act, prohibiting state and federal government agencies from discriminating on the basis of race or national origin, followed in 1965 by the Voting Rights Act, which restored African Americans' right to vote by outlawing

138. In arguing that *Brown* was a product, not the cause of the Civil Rights movement, Professor Michael Klarman lists a number of the

momentous civil rights developments of the late 1940s and early 1950s—the landmark report of President Truman's civil rights committee, the executive orders desegregating the federal military and civil service, the integration of major league baseball, the exponential increase in Southern black voter registration, the enactment of a plethora of Northern antidiscrimination laws, the incipient crumbling of Jim Crow's outer facade in many Southern cities (for example, initial steps taken toward the desegregation of Southern police forces, juries, and public accommodations), and the emergence of a general war-related civil rights consciousness among African-Americans.

Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 7–8 (1996).

139. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954).

the discriminatory voting practices that had disenfranchised this group for much of the twentieth century.¹⁴⁰

It was against this backdrop of civil rights activism and a growing recognition by government actors of the injustice of racial discrimination that *Gideon* was decided in 1963. “Many of the accused who were denied appointed counsel were minorities, and the Court’s actions in *Gideon* were another step in ensuring that all racial and ethnic groups were afforded equal justice,” explained one author.¹⁴¹ Under Chief Justice Earl Warren, the Supreme Court began in the 1960s to apply a number of the constitutional guarantees of fair criminal procedure to the states, such as the rule against double jeopardy or the rule against self-incrimination, on the grounds that these were fundamental rights under the Fourteenth Amendment.¹⁴² “Those cases were part of a larger movement to breathe new life into the Constitution, to make meaningful its protections of civil liberties and civil rights. It was in that atmosphere of what I would call ‘constitutional hope’ that the case of *Gideon v. Wainwright* came along,”¹⁴³ remarked Anthony Lewis, a Supreme Court reporter at the time the Court agreed to hear *Gideon*’s case.¹⁴⁴ Professor William J. Stuntz wrote that these decisions “arose, in large part, out of a sense that the system was treating black suspects and defendants worse than white ones. Warren-era constitutional criminal procedure began as a kind of anti-discrimination.”¹⁴⁵ By guaranteeing counsel, *Gideon* was crucial to enabling criminal defendants to assert their constitutionally protected procedural rights.¹⁴⁶ Thus, the unanimous ruling was an affirmation of the country’s new commitment to racial equality.

140. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C. (2006)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in 42 U.S.C. §§ 1971, 1971 nt., 1973-73p (2006)).

141. Jennifer Williams, *The Sixth Amendment Right to Counsel—The Supreme Court Minimizes the Right to Effective Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys*, 28 U. ARK. LITTLE ROCK L. REV. 149, 160-61 (2005).

142. Anthony Lewis, *Speech at the University of Maryland School of Law Symposium, in Gideon—A Generation Later*, 58 MD. L. REV. 1333, 1336-37 (1999).

143. *Id.* at 1337.

144. *Id.*

145. Stuntz, *supra* note 25, at 5.

146. *Id.* at 13.

Like the reforms that the United States undertook during the Civil Rights era, South Africa's 1996 Constitution signified an effort to break with its racist past under the apartheid regime. And just as in the United States, South Africa recognized that indigent defendants' right to counsel is a crucial part of the realization of racial equality. To appreciate this argument, it is first necessary to understand the effect apartheid had on the criminal justice system in South Africa. Harvard Law School Professor Charles Ogletree wrote in 1995:

Without an appreciation of the legacy of apartheid—the manner in which racial separation and subordination permeate every aspect of South African law—one cannot understand the context of change in which South Africa now finds itself, nor can one begin to analyze the reforms necessary to establish a fair, functioning and legitimate criminal justice system.¹⁴⁷

South Africa inherited its government and legal structure from both the Dutch and the British colonizers.¹⁴⁸ According to Ogletree, the political system of parliamentary supremacy, a legacy of the British, was crucial to the development of apartheid.¹⁴⁹ Under this system, Parliament could “‘do everything that is not naturally impossible’ with powers ‘absolute and without control.’”¹⁵⁰ The sweeping powers granted to those who controlled Parliament were a great advantage to the white Nationalist Party when it rose to power in 1950. It was the party's virtually unchecked discretion that began forty years of apartheid rule in which it separated and subordinated blacks from the white minority.¹⁵¹ Under apartheid rule, all South Africans were required to register as a racial group—black, white, colored, or Asian—as different laws applied to each of these racial groups.¹⁵²

In order to maintain power and perpetuate the unjust status quo, the Nationalist Party used the criminal law as an instrument of enforcing apartheid by outlawing any opportunity

147. Ogletree, *supra* note 3, at 10.

148. *Id.*

149. *Id.* at 11.

150. *Id.* (quoting 1 WILLIAM BLACKSTONE *161, *162).

151. *Id.* at 12.

152. van Burren, *supra* note 112, at 381 n.2.

for opposition or protest.¹⁵³ For example, in 1953, Parliament passed the Public Safety Act, which enabled it to declare a state of emergency and allow for arrest and detention without a warrant.¹⁵⁴ The Criminal Procedure Act as amended in 1965, enabled the Attorney General to arrest and detain incommunicado any person “likely to give material evidence for the State in [certain] criminal proceedings.”¹⁵⁵ The Terrorism Act of 1967 extended the power to arrest and indefinitely detain someone because of a suspicion that he or she was a terrorist to all commissioned officers above the rank of lieutenant colonel.¹⁵⁶ Political organizing and protest against the apartheid regime was made virtually impossible, as the party controlling Parliament was able to criminalize “large numbers of activities regarded as basic human rights in most western legal systems,” which resulted in “the unjust detention and imprisonment of thousands of political activists.”¹⁵⁷

Just like the Jim Crow regime, South Africa under apartheid was treating black suspects and defendants worse than white ones. Given the 1996 Constitution’s commitment to breaking with its racist past, it is imperative that South African courts recognize the right to counsel in a country where blacks, just as in the United States, for socio-economic reasons make up a disproportionate number of the indigent defendants who cannot afford counsel.¹⁵⁸

b. *Guaranteeing the Right to Counsel to Address Disadvantages Suffered by Black Defendants Even After Apartheid Was Abolished*

Not only should South Africa recognize the right to counsel in order to correct the injustices of the past, but such a move is crucial in a country where, even after the abolishment of apartheid, black defendants suffer disadvantages under the legal system. According to the sources cited below—published in the mid-1990s, shortly after the abolishment of apartheid—

153. Ogletree, *supra* note 3, at 12–13.

154. *Id.* at 13.

155. *Id.* (quoting the Criminal Procedure Act 96 of 1965 § 7 (S. Afr.)).

156. *Id.*

157. *Id.*

158. According to one estimate, ninety percent of South African criminal defendants in the late 1980’s were black and indigent. N.C. STEYTLER, *THE UNDEFENDED ACCUSED ON TRIAL* 19 (1988).

black defendants faced disadvantages such as lower literacy rates, cultural barriers, and the racial biases of the predominantly white judges. The presence of counsel could counteract these disadvantages; however, due to the overlap of race and poverty, black defendants are often unable to afford counsel. Providing counsel to these defendants would be a step towards mitigating the disadvantages that black defendants face when confronted by the judicial system and further the constitutional objectives of racial and socioeconomic equality.

For various reasons, black defendants were, and arguably still are, at a significant disadvantage in terms of the South African criminal justice system. The first problem is that blacks are largely unaware of their rights under the legal system. This is partly due to high rates of illiteracy and partly due to what Ogletree characterizes as the foreign nature of the colonially-inherited legal system to most black defendants: "Indeed, the most formidable obstacle confronting the unrepresented criminal defendant may be the failure to understand the discourse of the law, a problem greatly exacerbated in South Africa given the culture of the defendant and the culture that spawned South African law."¹⁵⁹

Secondly, the legal profession in South Africa is largely dominated by whites, including judges who, at the height of apartheid, exhibited bias against black defendants. Although there was no law against appointing blacks as judges, the unsurprising reality under apartheid was that an overwhelming number of the judges were white. For example, as of 1990, there were a total of 829 magistrate judges in South Africa.¹⁶⁰ Of these, 811 were white, 2 were "African,"¹⁶¹ 11 were Asian and 5 were "colored."¹⁶² These white judges sometimes exhibited the racist tendencies perpetuated by the apartheid system that effectively legalized racism. "Commentators have reported judges noting differences in race between victim and defendant, judges using tribal custom against blacks, and judges taking judicial notice of the 'facts' that blacks have 'stab lust,' that black women submit to rape without protest, and

159. Ogletree, *supra* note 3, at 17.

160. *Id.* at 17.

161. *Id.* "African" in this context appears to mean "black."

162. *Id.* "Colored" refers to people of mixed racial descent. *Id.* at 9, n.54.

that blacks who provide alibis are liars.”¹⁶³ These disadvantages can be significantly mitigated by providing counsel to black defendants, to help them navigate the justice system.

South Africa officially banned apartheid on February 2, 1990¹⁶⁴ and passed a new constitution that enshrined a commitment to racial equality. The Preamble to the 1996 Constitution acknowledged the injustice suffered by the black population under apartheid, stating that “[w]e, the people of South Africa, [r]ecognise the injustices of our past; [h]onour those who suffered for justice and freedom in our land; [r]espect those who have worked to build and develop our country; and [b]elieve that South Africa belongs to all who live in it, united in our diversity.”¹⁶⁵ Not only diversity, but equal treatment by the law is a key principle for this new constitution. This is articulated later in the preamble: “We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—. . . [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.”¹⁶⁶ In order to realize the promise of racial equality that the Constitution promised, South Africa must provide counsel to indigent defendants regardless of their race or socioeconomic status.

Assuming that one accepts the principle articulated in *Gideon* and *Khanyile* that the accused cannot have a fair trial without being represented by counsel, then equality before the law demands that indigent defendants be provided counsel. The first step in the chain of reasoning is to understand that “equality” must mean that the law treats equally people from different socio-economic classes. South African criminal lawyer A. Chaskalson has argued that “if the concept of equality before the law is to be given any meaningful content, it must mean, at the very least, that a person should not be denied effective access to the courts because of poverty.”¹⁶⁷ If

163. *Id.* at 18.

164. N.C. Steytler, *Equality Before the Law: Being Practical About Principle*, 8 S. AFR. J. ON HUM. RTS 113, 114–15 (1992).

165. S. AFR. CONST., 1996, Pmb1.

166. *Id.*

167. Huber, *supra* note 26, at 428 (quoting *S v. Rudman and Another*; *S v. Mthwana* 1992 (1) SA 343 (A) at 347 (S. Afr.) (A. Chaskalson, Heads of Argument for Appellants)).

the right to counsel is regarded as a fundamental right, and denying it is tantamount to being “denied effective access to the courts” or the right to a fair trial, then counsel must be provided to a defendant regardless of his means to pay for one. Writer Van Zyl Smit observed that, “Equality before the law is so manifestly incompatible with the possibility that an important right may be available only to a wealthy minority (those who can afford counsel).”¹⁶⁸ It follows that “the principle of equality before the law requires that the right to legal assistance be equally accessible to all accused persons. Equal accessibility in turn, requires the appointment of counsel for indigent defendants who otherwise would have no legal assistance.”¹⁶⁹

Given that the 1996 Constitution does not rule out the possibility that “equality” means socio-economic equality, it would be sufficient to stop here in order to establish that to ensure that rich and poor defendants are treated equally under the law, the state must provide representation for indigent defendants who cannot afford on their own to do so. But given South Africa’s history of racial discrimination and injustice, which the Constitution sets out to acknowledge and correct, this proposition is further bolstered by the fact that a disproportionate number of the poor are black; therefore, providing counsel to indigent defendants furthers the cause of racial equality. “With legal representation of the indigent accused, the objectionable discrimination is no longer on the basis of race, but economic class, which in criminal courts most often overlaps with race,” wrote South African law professor N.C. Steytler.¹⁷⁰ The victims of the South African criminal justice system, the defendants who would continue to be convicted without counsel, are poor and black, even after the official abolishment of apartheid. In order to fully realize the promise and honor the commitment of the 1996 Constitution to achieving racial equality, South Africa must provide counsel to these defendants.

168. Dirk van Zyl Smit, *Indigence and the Right to Counsel: S v. Khanyile 1988 (3) SA 795 (N)*, 4 S. AFR. J. ON HUM. RTS. 363, 366 (1988).

169. Huber, *supra* note 26, at 428–29.

170. Steytler, *supra* note 164, at 115.

III. WHY THE RIGHT TO COUNSEL IS APPROPRIATE FOR SOUTH AFRICA

A. *The Importance of Counsel Even in the Absence of Juries*

A possible counter argument to my thesis is that since South Africa does not have juries, there is less of a need for counsel because the judge can take a more active role in protecting the defendant's rights. However, despite the lack of juries, South Africa still runs on an adversarial model. The question of whether or not South Africa should switch to an inquisitorial model is beyond the scope of this paper. What is clear is that in the current South African court system, the judge cannot, in her role as impartial adjudicator, provide the legal assistance that an indigent defendant needs in order to defend himself in an adversarial court. If the judge were to do more to assist the defendant, she would run the risk of betraying her role as an impartial adjudicator.

Justice Didcott illustrated both of these problems in *Khanyile*. He submitted that, "With one exception, . . . the magistrate lent the men all the assistance in the running of their defenses that was required of him once they otherwise had none."¹⁷¹ The magistrate explained to them their procedural rights and clarified and elucidated the expert's testimony "so that they might stand a better chance of following it."¹⁷² Despite the magistrate's well-intentioned and necessary assistance, Didcott maintained that, "It was no substitute, however, for the professional help they missed."¹⁷³ He explained:

It could not guarantee that they got the hang of things; in the first place, even if they thought they did and therefore said so. Nor in the second could it teach them how they might best set about the business still left to them, the tricky business of actually defending themselves. And theirs in the end that job inevitably remained, performable for them by no judicial officer, not even the most conscientious and sympathetic one.¹⁷⁴

171. *S v. Khanyile and Another* 1988 (3) SA 795 (N) at 798 (S. Afr.).

172. *Id.*

173. *Id.*

174. *Id.*

Despite the judge's efforts to assist the undefended accused, there is a limit to the assistance he or she could render within the context of an adversarial system. As Didcott rightly pointed out, the most crucial and yet formidable task for the defendant at trial—of defending himself—must be performed by himself, without the assistance of the judge.

Didcott also pointed out that if the judge was to adequately take on the responsibility of defense counsel, she would betray her role as an impartial adjudicator. After listing the many functions that a defense attorney plays, including building the client's case, advising the client on plea offers, presenting the defense case, and exposing weaknesses in the prosecutor's case, Didcott explained that there is no way that the judge can or should take on any of these responsibilities:

Hardly any of this can effectively or may be properly done for an accused person by the judicial officer trying him, under the system we have at all events, a system in which the judicial officer is no inquisitor conducting his own investigations but an adjudicator who by and large must leave the management of the trials he hears and the combat waged in them to the adversaries thus engaged.¹⁷⁵

In her current capacity as passive umpire, the South African judge cannot do enough to sufficiently assist the undefended accused with his defense. If she does more, she violates her role as impartial adjudicator. Thus, as Didcott concludes, defense counsel is necessary for a fair trial.

B. *The Right to Counsel Is Not Solely an American Idea*

It might also be asserted that the idea of interpreting a South African constitutional provision in light of American jurisprudence is U.S.-centric and appears to be urging the exportation of U.S. practices. However, it was South African legal thinkers that initiated the comparison with the U.S. court cases—not just Justice Didcott, but also South African law professors such as D.M. Davis, David McQuoid-Mason and N.C. Steytler, who cited *Gideon* while arguing that a fair trial cannot be assured unless counsel is provided to the accused.¹⁷⁶

175. *Id.* at 798–99.

176. STEYTLER, *supra* note 158, at 10–11.

As Justice Didcott pointed out, *Gideon* is relevant in South Africa because the case is premised on the idea that counsel on both sides is necessary for a fair trial, a concept that is well-embedded in his country's jurisprudence.¹⁷⁷ Encouraging South Africa to adopt the principle in *Gideon* is not an instance of advocating the exportation of U.S. criminal procedure, but rather a call for South Africa to do what Justice Didcott advocated in 1988—to implement *Khanyile* to its logical conclusion.

Furthermore, as Justice Didcott also pointed out, the idea of a guaranteed right to counsel provided at state expense is a universal concept, enshrined in the International Covenant on Civil and Political Rights (ICCPR).¹⁷⁸ Article 14 of the ICCPR provides “minimum guarantees” to which everyone charged with a crime is said to be entitled, including:

[T]o defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it.¹⁷⁹

Article 6 of the European Convention on Human Rights similarly guarantees the right to counsel “when the interests of justice so require.”¹⁸⁰ Both the ICCPR and the European Convention include the qualifying language, “where the interests of justice so require,” after speaking about the right to be provided with legal assistance, which has also been adopted into the statutes for the International Criminal Tribunal for the Prosecution of Persons Responsible for Violations of the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹⁸¹ However, after a decade of litigation, the ICTY and ICTR have come to envision the right as an

177. See *supra* note 46 and accompanying text.

178. *Khanyile* 1988 (3) SA at 801.

179. International Covenant on Civil and Political Rights, art. 14(3)(d), Dec. 19 1966, 999 U.N.T.S. 171.

180. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(3)(c), Nov. 4, 1950, 213 U.N.T.S. 221.

181. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 21(4)(d), U.N. Doc. S/25704, Annex (May 3, 1993), reprinted in 32 I.L.M. 1163, 1199

automatic one, which is triggered when the accused enters the jurisdiction of the court.¹⁸² Thus despite the presence of the words “when the interests of justice so require” in the statutes creating these tribunals, the ICTR and ICTY have come to understand the right to counsel as an automatic guarantee rather than one subject to a balancing test, which suggests that the guaranteed right to counsel is not just an American idea, but one also accepted in other jurisdictions, including in international forums.

C. *The Right to Counsel Is a Necessary Constitutional Protection*

Finally, there is skepticism as to whether the right to counsel should be constitutionally protected above other important public needs in South Africa, such as food, water, and shelter. Once a right is guaranteed in the Constitution and is understood as an absolute right, it is not subject to control by the legislature. This is, in the view of some people, problematic, because the legislature was democratically elected to decide how funding should be allocated. If courts view the right as an absolute right protected by the Constitution, they prevent the legislature from making the arguably political decision of whether or not to allocate funds to provide counsel in every criminal case concerning an indigent defendant.

While the right to counsel appears to be a positive right, as it requires the state to expend funds to provide a good, it is actually a negative right that protects citizens from arbitrary and excessive power. It is a check on the power of the state, saying in effect that the state cannot incarcerate a defendant unless she is represented by counsel at her trial. Just as the right to counsel appears in the U.S. Constitution alongside the right to a speedy and public trial, the right appears alongside

(1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, Annex, art. 20(4)(d), U.N. Doc. S/RES/955 (Nov. 8, 1994).

182. “[T]he tribunals established the parameters of a model right to counsel: (1) assume that the right to counsel and the right to be informed of this right attaches upon entering the jurisdiction of the court, exclude evidence collected in direct violation of this right, and review the waiver of the right by an objective standard; (2) permit defendants to choose their counsel within limits; (3) provide adequate access to counsel but not equal resources; and (4) permit a qualified right to self-representation.” Katie Kerr, *Fair Trials at International Criminal Tribunals: Examining the Parameters of the International Right to Counsel*, 36 GEO. J. INT’L L. 1227, 1230 (2005).

similar procedural guarantees in the South African Constitution, such as the right to be present at one's trial, to have adequate time to prepare a defense, to remain silent, etc.¹⁸³ This is because, in these countries, incarceration is (aside from execution) the greatest deprivation of liberty that the state can inflict on its citizens. The constitution thus stands as a bulwark against state power, and the right to counsel prevents the state from imposing its most severe punishment without the procedural guarantees of a fair trial.

A related argument is that unlike the right to food or water, the right to counsel is only relevant if the state is already expending money to prosecute a person; it effectively requires the state to spend a little more money in order to ensure that the trial is fair. Therefore, the right to counsel cannot be waived simply because of a lack of public funds; the assumption is that if the state has the resources to prosecute, it must come up with the resources to provide defense counsel. And if the right to counsel is viewed as necessary to a fair trial, then it follows that the state must provide counsel to indigent criminal defendants in order to prevent conviction without a fair trial.

CONCLUSION

As a compromise between his country's limited resources and the principle that a fair trial requires access to counsel, Justice Didcott proposed in 1988 that South African courts adopt a balancing test, which would provide counsel where "substantial injustice would otherwise result." But Didcott envisioned the balancing test as only a temporary solution, one that should be replaced by a rule resembling *Gideon* once it became more feasible to do so. Over twenty years later, it is now time to move beyond this balancing test. Not only have courts failed to consistently apply the balancing test, but an absolute guarantee of counsel is more consistent with a dynamic understanding of the term "substantial injustice." Didcott's primary reason for limiting the provision of counsel—feasibility—is less of a concern today due to the expanded resources of the Legal Aid Bureau. And, in a country where blacks have suffered disadvantages at the hands of the

183. S. AFR. CONST., 1996, § 35(1)(a), (3)(a)–(g).

justice system and make up a majority of the poor, guaranteeing the right to counsel is a crucial step towards realizing the ideals of racial and socioeconomic equality. Therefore all cases in which an indigent defendant is not represented by counsel at trial must be considered “substantial injustice,” and such convictions must be vacated. In order to fulfill the constitutional mandate of guaranteeing a fair trial, South Africa should provide counsel at state expense to all indigent defendants.

