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## Pictures at a Global Exhibition

Noah Leavitt

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# PICTURES AT A GLOBAL EXHIBITION

ASHWIN DESAI, *WE ARE THE POORS*. New York: Monthly Review, 2002. vii + 153.

THOMAS GEOGHEGAN, *IN AMERICA'S COURT: HOW A CIVIL LAWYER WHO LIKES TO SETTLE STUMBLED INTO A CRIMINAL TRIAL*. New York: New Press, 2002. xvi + 206.

*Reviewed by Noah Leavitt\**

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We know the feeling. We get home from a long day in front of the computer, settle into a comfortable chair and open the newspaper, only to find a U.S. Supreme Court justice saying, “this court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”<sup>1</sup> Suddenly we feel dizzy. Did we read that correctly?

At such moments, we cannot help but doubt the effectiveness of our work. “Why,” we ask, “have international and foreign law not been more influential in the United States?” “Why aren’t U.S. judges more willing to embrace international legal wisdom, as they are in places as far off as South Africa, let alone in the European Union? What must we do?”

Two recent books, one by an American attorney and the other by a South African professor, demonstrate that such despair may be overwrought and that international law—human rights law in particular—is sinking into the public consciousness in ways that may not be evident from our daily scan of the headlines. The two disagree, however, on how deeply it is sinking. Reading these short works is like looking at snapshots of the incorporation of international law into domestic legal systems, rewarding the reader with two outside perspectives on the growing complexity of the legal protection of human rights.

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1. Linda Greenhouse, *Supreme Court Roundup: Justices Seek Federal Guidance on Jury in Sentencing that Uses Prior Offenses as Factor*, N.Y. TIMES, Oct. 22, 2002, at A23 (quoting Justice Clarence Thomas).

## I. AN AMERICAN LOOKS OUTWARD AND FINDS THE ANSWER

You will not find *In America's Court: How a Civil Lawyer Who Likes to Settle Stumbled into a Criminal Trial* in the international section of your law library.<sup>2</sup> This is unfortunate, for in it author Thomas Geoghegan addresses some of the most important reasons why the United States might look to international norms and precedents to improve on shortcomings in America's domestic legal system. Geoghegan presents a persuasive, albeit not particularly nuanced, argument for a greater infusion of international and foreign legal innovations into U.S. law, to keep it vibrant when it appears in some respects to have stalled.<sup>3</sup> One of the book's heartening lessons is that the work of those who want to integrate these different spheres might actually be getting through to a wider audience, somewhere, somehow.<sup>4</sup>

Geoghegan, a Chicago labor lawyer, is best known for *Which Side Are You On?*, his well-received lament for organized unions in late twentieth-century America.<sup>5</sup> He also wrote *The Secret Lives of Citizens*, a less noticed but equally compelling meditation on how, as an idealistic lawyer, he could make a positive difference in his community.<sup>6</sup>

With this background, Geoghegan would probably be as uncomfortable at a cocktail party filled with international lawyers as he would at one filled with fat-cat corporate managers. Yet, while calling himself "a common type,"<sup>7</sup> Geoghegan has clearly done his homework. Although preoccupied with defending an incarcerated youth in a broken

2. THOMAS GEOGHEGAN, *IN AMERICA'S COURT: HOW A CIVIL LAWYER WHO LIKES TO SETTLE STUMBLED INTO A CRIMINAL TRIAL* (2002).

3. See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 460 (4th Cir. 2003) (holding that a U.S. citizen can be stripped of many constitutional rights if determined to be an "enemy combatant"); NANCY CHANG, *SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES* (2002); DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2002); Anthony D. Romero, *In Defense of Liberty at a Time of National Emergency*, 29 HUM. RTS. 16 (2002).

4. At least one U.S. Supreme Court Justice seems impressed. Justice Sandra Day O'Connor has remarked, "I think domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, *Federalism of Free Nations*, in *INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS* 13, 18 (Thomas Franck & Gregory Fox eds., 1996); see also Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20 [hereinafter O'Connor, *Broadening Our Horizons*].

5. THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK* (1991).

6. THOMAS GEOGHEGAN, *THE SECRET LIVES OF CITIZENS: PURSUING THE PROMISE OF AMERICAN LIFE* (1998).

7. GEOGHEGAN, *supra* note 2, at 205.

down urban penal system, he more than justifies why we should trust him to explain international legal principles. He quotes Kant on a “perfect civil constitution.”<sup>8</sup> He has studied the weighty reports of United Nations (U.N.) special rapporteurs on human rights, read “the long white papers, with forty or so recommendations on race relations, or prisons,” and has familiarized himself with a long list of treaties.<sup>9</sup> He quotes Montesquieu and Maritain, Hobsbawm and Nagel, Franklin Roosevelt and Whitman. We are in good hands.

Before writing this book, Geoghegan was probably no more familiar with international law than the average well-educated newspaper reader (while discussing the U.N., for example, he quips, “Where is the thing, exactly?”<sup>10</sup>). Even now, he may only be a bit more aware than the average practicing civil lawyer. Yet, precisely because of his status as a non-internationalist, he is in an excellent position to take the pulse of new legal developments in America.

On one level, *In America’s Court* is the story of how Geoghegan helped a friend conduct the criminal defense of Rolando, a twenty-two-year-old from the South Side of Chicago. At age fifteen, Rolando was sentenced to forty years for acting as the unarmed lookout in a botched holdup. Geoghegan describes the criminal proceedings and the emotional roller coaster he experienced dealing with a “real” legal case (the vast majority of his civil matters eventually fade into settlement).<sup>11</sup>

While the details of the trial make for compelling reading, the real value of the book comes when Geoghegan ponders the social problems he encounters along the way—and some of their possible solutions, many of which he finds by looking to international law. While defending his young client, Geoghegan gives himself a crash course in treaties, resolutions, regional courts, multinational tribunals, and international organizations, and he clearly enjoys his investigation. A few of his discoveries include:

- Human Rights Watch reports on the United States, which provide the most thorough analyses of the state of America’s incarcerated population;<sup>12</sup>
- The Convention on the Rights of the Child,<sup>13</sup> which “urges every country not to lock up a kid like Rolando with adults,”

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8. *Id.* at 15.

9. *Id.* at 198–99.

10. *Id.* at 198. Bear in mind that the book was written prior to September 11, 2001.

11. *See id.* at 7 (“I’m supposed to be a litigator, though I can’t remember when one of my cases last went to trial.”).

12. *Id.* at 3–4; *see* <http://www.hrw.org/reports/world/usdom-pubs.php>.

13. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989).

and not to execute children<sup>14</sup> (he notes that only Iraq and the United States have refused to sign the agreement outlawing this practice<sup>15</sup>);

- The International Convention on the Elimination of All Forms of Racial Discrimination,<sup>16</sup> which addresses situations like the one he encounters in Chicago, where “everyone in a holding cell is black or brown;”<sup>17</sup>
- The fact that people in many countries can bring their complaints to supranational tribunals, such as the European Court of Human Rights, to receive authoritative and binding legal decisions; and
- The fact that at the beginning of the twentieth century, Jane Addams, founder of Hull House, feminist author, and Nobel Peace Prize laureate, advocated the development of international law and the use of treaty rights at a time when few others could imagine such a system.<sup>18</sup>

Despite its overall strengths, the book has some weak points. After making the above discoveries Geoghegan begins to wonder whether international legal norms are hardwired in us.<sup>19</sup> At one point he muses, “I ‘knew’ that as a species we just don’t put away our young like this, in prisons with adults”—letting his enthusiasm outrun his understanding.<sup>20</sup> Similarly detracting, Geoghegan spends too much time discussing *Bush v. Gore*, the controversial U.S. Supreme Court decision that determined the outcome of the 2002 presidential campaign.<sup>21</sup>

Yet, while most observers would probably not label *Bush v. Gore* a human rights dispute, by belaboring the decision Geoghegan is able to

14. GEOGHEGAN, *supra* note 2, at 15.

15. *Id.* at 15. He also opines that incarcerating juveniles is a “Bangladesh-type thing[.]” *Id.* at 201.

16. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

17. GEOGHEGAN, *supra* note 2, at 66; see DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999).

18. Addams spent nearly her whole life working about three miles from where Geoghegan’s client was imprisoned. “[O]nce in this very neighborhood, she was bigger than Mother Teresa: Right now, I was standing in her Calcutta.” GEOGHEGAN, *supra* note 2, at 67; see JANE ADDAMS, TWENTY YEARS AT HULL HOUSE (1910).

19. He actually describes international law as a type of meme, a contagious idea that replicates like a virus, passed on from mind to mind through communication networks and face-to-face contact between people. GEOGHEGAN, *supra* note 2, at 15. Examples of memes include melodies, icons, fashion statements, and phrases. The word was coined by Oxford zoologist Richard Dawkins in his 1976 book, *The Selfish Gene*.

20. GEOGHEGAN, *supra* note 2, at 15.

21. *Bush v. Gore*, 531 U.S. 88 (2000).

ponder the possibility of international law taking root in the United States. He concludes that *Bush v. Gore* will usher in “a whole new sense of human rights” specifically *because* the courts have demonstrated that they will not use domestic law to solve social problems, even when it is most important for them to do so.<sup>22</sup> In fact, Geoghegan finds the United States’ contemporary legal order in such a state of flux that he exclaims “*this* is the time to be climbing to the golden courts above [the International Court of Justice, the Inter-American Court of Human Rights, the European Court of Human Rights, etc.] and arguing that in America, too, we should have human rights, more rights than we have ever dared to ask for before.”<sup>23</sup> He calls the post-*Bush v. Gore* era “the beginnings of a new beginning.”<sup>24</sup> And, without a trace of irony, he states that with President Bush in the White House, “I’m more interested in treaty law than ever.”<sup>25</sup>

Geoghegan predicts that in the near future, creative attorneys will abandon the U.S. Constitution and instead turn to human rights law to press their claims.<sup>26</sup> He argues that sole reliance on the Constitution is becoming passé and that the most forward-thinking advocates are beginning to quote from treaties, conventions, proclamations, resolutions, and other products of international lawmaking.<sup>27</sup> He admits that while a few lawyers (criminal lawyers in particular<sup>28</sup>) are “sneaking in” human rights

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22. GEOGHEGAN, *supra* note 2, at 196. In this way, Geoghegan’s argument is similar to that of the National Association for the Advancement of Colored Persons (NAACP) in 1947, which filed a petition with the United Nations (U.N.) denouncing race discrimination in the United States because NAACP members were not able to get effective redress in U.S. courts or Congress. See Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988). More recently, the U.N. Economic and Social Council awarded the NAACP non-governmental organization designation with special consultative status. Bob Jackson, *300 Black Men Wanted as Mentors, Presenters*, ROCKY MOUNTAIN NEWS, Mar. 10, 2003, at D14.

23. GEOGHEGAN, *supra* note 2, at 196 (emphasis added).

24. *Id.*

25. *Id.* at 198. Again, it must be pointed out that *In America’s Court* was written *before* September 11, 2001, and thus before the American public had been given extended lessons on the Geneva Conventions, the rights of prisoners of war, the differences between a State actor and a non-State actor, the importance of tracking global cash flows, the rules for intercepting missiles on the high seas, the role of U.N. arms inspectors, and the rules under which the Security Council can authorize the use of force. Since then, unilateralist President Bush may yet enjoy the ironic distinction of having had more impact on the spread of international law, or at least on raising awareness of international law, than dozens of tenured professors in the decades before him.

26. *Id.* at 198–99; see also, e.g., Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15 (1996).

27. GEOGHEGAN, *supra* note 2, at 198–99; see also Richard Dieter, *The Death Penalty and Human Rights: U.S. Death Penalty and International Law* (Death Penalty Info. Ctr., Wash., D.C. 2002).

28. Much has been written, for example, describing international condemnation of the U.S. prison system. See, e.g., Vivien Stern, *The International Impact of U.S. Policies*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 279 (Marc Mauer & Meda Chesney-Lind eds., 2002).

law—"instead of the *Harvard Law Review*, you read the latest report of Human Rights Watch"<sup>29</sup>—this practice is still the cutting edge.

Yet, for Geoghegan, such innovations may not be a choice—soon there may be no alternatives. "In law school I scoffed at human rights law, it isn't 'real,'" he writes. "But after *Bush v. Gore*, would I say the Constitution's real?"<sup>30</sup>

Indeed, since the book was published, Geoghegan seems to have found a new crusade. In a column for *Legal Affairs* magazine, he articulates reasons why the International Criminal Court in the Hague is an appropriate forum for trying terrorists and why, given its preoccupation with a war on terrorism, the United States' hostility to this new institution is misguided.<sup>31</sup> Geoghegan is becoming a homegrown cheerleader for international law.

Although some will undoubtedly criticize him for invading a niche beyond his specialty of labor law, we should be thankful. Geoghegan is doing the difficult work of translating complex legal issues into a vernacular that can be understood and accepted by a broader audience than casebooks and law journals typically reach. The success of incorporating international arguments into the domestic legal order will come partially from the courts. Yet it will also come from an informed electorate, which may approve or quash policies and candidates based on its interest in or hostility to treaties, declarations, and resolutions.

Toward the end of the book, Geoghegan muses that the most important aspect of his learning international law is "how it's changed my sense of what is 'okay' and 'barbaric' in my specialty of labor law."<sup>32</sup> Despite a long career as an attorney and writer on labor issues, his brief lessons in international law opened his eyes to problematic and illegal situations he had simply "gotten used to."<sup>33</sup> One example is when "Walmart brings in Hispanic ladies and screams at them, locked up . . . for an hour, two hours, as to what evils will happen to them if they vote in a union," which Geoghegan learns violates several international labor treaties.<sup>34</sup>

Thus, from his relatively limited international legal exposure, Geoghegan arrives at a broader and more sophisticated understanding of his own field of U.S. law. He wonders how to convey his enthusiasm and

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29. GEOGHEGAN, *supra* note 2, at 198.

30. *Id.* at 197.

31. Tom Geoghegan, *Go Dutch: The Untapped Promise of the International Criminal Court*, *LEGAL AFF.*, Sept.–Oct. 2002, at 16. The Court officially came into being on July 1, 2002.

32. GEOGHEGAN, *supra* note 2, at 199.

33. *Id.*

34. *Id.*; see, e.g., Convention Concerning the Promotion of Collective Bargaining, Aug. 11, 1983, 1331 U.N.T.S. 267.

reinvigoration,<sup>35</sup> noting that if he were teaching law, he would start all the “kids” off with the latest Human Rights Watch reports.<sup>36</sup> No more *Pennoyer v. Neff*.<sup>37</sup> No more *Pierson v. Post*.<sup>38</sup> No more foxes.

Geoghegan concludes that American attorneys—i.e., noninternational attorneys—need an outside perspective in order to become aware of “what the law thinks, from a distance, from far away.”<sup>39</sup> We need to see ourselves as others see us, especially when those “others” are writing human rights reports about our clients.<sup>40</sup> International law helps us achieve that self-awareness and moral grounding, revitalizing our entire legal system, much as it revitalized Geoghegan.<sup>41</sup>

*In America's Court* will fascinate those who spend enough time thinking about international texts and tribunals that we forget we are only a small percentage of the legal and academic communities. The book is a humbling and ultimately optimistic reality check, and will more than repay the couple of hours spent reading it. Geoghegan's style is punchy, thoughtful, a bit wistful, and nearly always engaging. And, although it is easy to argue with some of his source-gathering choices, Geoghegan's work is valuable for its description of a historical moment when domestic lawyers in the United States are beginning to learn about the reach and possible relevance of international law.

So far so good. The remaining question is, “Does infusing domestic systems with international legal principles really work?”

## II. A SOUTH AFRICAN LOOKS INWARD AND FINDS MORE QUESTIONS

Geoghegan describes a country with a severely limited constitution, at one point observing that the Founding Fathers' document does not “have enough words” to adequately address the legal problems now facing our country and our world.<sup>42</sup> At the other end of the spectrum, *We Are*

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35. For another way of rejuvenating one's legal career, see STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999).

36. GEOGHEGAN, *supra* note 2, at 199.

37. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

38. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1875).

39. GEOGHEGAN, *supra* note 2, at 206.

40. Or about our government. See, e.g., ‘War on Terror’ *Infringing Human Rights*, *UNHCR Says*, REUTERS, Dec. 17, 2002 (describing how Sergio Vieira de Mello, U.N. High Commissioner for Human Rights, believes that the Bush Administration's counterterrorism efforts are “hurting human rights and exacerbating prejudices around the world”).

41. See SUSAN BURGERMAN, *MORAL VICTORIES: HOW ACTIVISTS PROVOKE MULTILATERAL ACTION* (2001) (describing ways that U.N. activists have intervened in civil wars and successfully linked international peace and stability with the advancement of universal human rights).

42. GEOGHEGAN, *supra* note 2, at 199.



*the Poors*, by Ashwin Desai, describes a country with a constitution that seems to have *too many* words.<sup>43</sup> Instead of the South Side of Chicago, Desai writes about South Africa. A teacher and activist, he describes the struggles of several marginalized communities near Cape Town, Johannesburg, and Durban.<sup>44</sup>

Desai provides a snapshot of a country where a considerable amount of international and foreign law has been incorporated into the domestic legal system, but where solutions for local human rights problems are not necessarily found in court decisions. His book shows the difficulty of realizing a number of Geoghegan's wishful musings, and serves as a reminder that human rights law alone cannot solve the world's injustices. At the same time, *We Are the Poors* reinforces Geoghegan's ideas about the potential benefits of having a well-developed international framework from which lawyers can draw to build new arguments and advocacy tools in response to a rapidly changing world.<sup>45</sup>

Since the end of apartheid, South Africa has promoted a vision of a more tolerant, equitable, and nonracialized life for its citizens.<sup>46</sup> Yet, the rise of the Black-dominated African National Congress (ANC) government has not necessarily resulted in the hoped-for improvement of living conditions or social interactions.<sup>47</sup> *We Are the Poors* sharply criticizes the current Mbeki administration for abandoning the revolutionary spirit of Nelson Mandela's ANC by becoming simply another uncaring government clamoring for acceptance in the neoliberal global economic order.<sup>48</sup> "I think about the writings evaluating Mbeki's presidency and the new South Africa. Such balanced appraisal, and so clever," Desai writes. "But if he has not unleashed it, then he is presiding over economic genocide."<sup>49</sup> Desai then carefully describes spiraling unemployment, an abysmal lack of health care facilities, and other related ills.

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43. ASHWIN DESAI, *WE ARE THE POORS: COMMUNITY STRUGGLES IN POST-APARTHEID SOUTH AFRICA* (2002).

44. Aryeh Neier, a founding member of Human Rights Watch and the current director of George Soros's Open Society Institute, has spent considerable time in South Africa and describes such struggles as "taking liberties." ARYEH NEIER, *TAKING LIBERTIES: FOUR DECADES IN THE STRUGGLE FOR RIGHTS* (2003).

45. Helpful in this regard is HURST HANNUM, *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* (3d ed. 1999).

46. One of the most hopeful has been Archbishop Desmond Tutu, who was the chairperson and frequently chief apologist for the controversial Truth and Reconciliation Commission. See DESMOND MPILO TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999).

47. See, e.g., Rachel Swarns, *Mingling Despite Mistrust in South Africa*, N.Y. TIMES, Dec. 9, 2002, at A1.

48. See, e.g., Rachel Swarns, *Disillusion Rises Among South Africa's Poor*, N.Y. TIMES, Dec. 31, 2002, at A4.

49. DESAI, *supra* note 43, at 141.

Not surprisingly, there is significant grassroots resistance to Mbeki's policies. It is in this context that Desai locates the "poors,"<sup>50</sup> a new, fluid, anti-ANC affiliation of races and ethnicities—people who want nothing else but for their water to continue without them having to bribe city officials, and for their electricity to be available without any unannounced and irrational rate increases. The poors are, as Desai, states, "happily immune to infection by Robben Islanders, exiles and ethnic entrepreneurs; the ruling post apartheid faction."<sup>51</sup> Desai relates the twenty-year community organizing efforts of this alliance to obtain basic necessities in the face of administrative intransigence.<sup>52</sup>

The book concludes by describing how these many disconnected community justice alliances mobilized under an umbrella coalition called the Durban Social Forum at the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in August 2001.<sup>53</sup> Together they protested Mbeki's neoliberal economic policies and promoted an alternative economic platform to more effectively address the daily needs of the majority of the country's population. Although, for many, "Durban" is synonymous with poisonous anti-Semitic and anti-American rhetoric,<sup>54</sup> Desai argues that the Conference presented an important moment to showcase the poors' burgeoning grassroots movement on the world stage.

Desai provides a compelling story of how historically disempowered groups develop new modalities of social cohesion. He also articulates the tensions in a country with a progressive and generous constitution on paper—one that draws heavily on the authority and interpretative principles of international law—but which is characterized by depressing living conditions for a vast majority of its population. Regardless of one's political leanings, it is difficult to deny that Desai, like Geoghegan,

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50. The name "the poors" came from Girlie Amod, who, on October 23, 1999, uttered the memorable line, "We are not Indians, we are the poors." *Id.* at 41, 44.

51. *Id.* at 7. "Robben Islanders" refers to the group of ANC political prisoners who were housed at the prison on Robben Island, near Cape Town. Nelson Mandela spent eighteen of his twenty-seven years under the apartheid government's watch on Robben Island, helping to organize the prisoners and keep the ANC from withering. See generally NELSON MANDELA, *LONG WALK TO FREEDOM* (1994).

52. Desai pays particular attention throughout the book to struggles with local administrative bodies such as the Durban Metro Council, the Umgeni Water Board, and the Cape Town Unicity Council.

53. Much has been written about this conference and its regional follow-up meetings. For an overview, see Noah Leavitt, Tom Lantos, *Durban—Gone But Not Forgotten: Global Anti-Discrimination Efforts in a Difficult Year*, 10 J. INT'L INST. 1 (2002).

54. Tom Lantos, one of the U.S. delegates who walked out of the Conference, called it an "anti-American, anti-Israeli circus." Tom Lantos, *The Durban Debacle: An Insider's View of the UN World Conference Against Racism*, FLETCHER F. WORLD AFF., Winter-Spring 2002, at 31; see also Anne Bayefsky, *Since Durban: An Entrenchment of Hatred*, JERUSALEM POST, Sept. 13, 2002, at A9.

is well-placed to explain the tensions and predict the challenges facing those supporting greater incorporation of international norms into domestic legal systems.

South Africa has received some of its highest praise for its constitution, which one noted scholar has called “an astonishing success” and “the most admirable constitution in the history of the world.”<sup>55</sup> Another observer familiar with the twists and turns of constitutional development said that it is “regarded by most people as being one of the most libertarian and human-rights-oriented constitutions in the world.”<sup>56</sup>

The contentious yet ultimately successful process behind South Africa’s negotiated transfer of power and the development of this new legal framework has been well documented.<sup>57</sup> One notable feature of this process was its openness, including considerable input by international and foreign lawyers.<sup>58</sup> This participation is evident from the provisions situating international and foreign law at the front and center of the document’s internal interpretative principles.<sup>59</sup>

Indeed, at times it appears as if international human rights lawyers were the sole drafters of the South African Constitution. One of the document’s most radical elements is its guarantee of certain economic rights, including the rights to “an environment that is not harmful to . . .

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55. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS CAN DO* 50, 261 (2001).

56. TUTU, *supra* note 46, at 16.

57. *See, e.g.*, HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION* (2000); ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA’S ROAD TO CHANGE* (1995).

58. “The degree of public exposure to the constitution-drafting process is probably without precedent anywhere in the world. Hundreds of public meetings were held to advertise the drafting of the constitution and to invite public participation in the process.” Heinz Klug, *Historical Background*, in MATTHEW CHASKALSON ET AL., *CONSTITUTIONAL LAW OF SOUTH AFRICA* 2-15, 2-15 n.1 (rev. ed. 1999).

59. For example, the Constitution instructs that to interpret the Bill of Rights, “a court, tribunal or forum . . . *must* consider international law; and *may* consider foreign law.” S. AFR. CONST. §§ 39(1)(b)-(c) (emphasis added). Accordingly, in the South African Constitutional Court’s first decision—the landmark *Makwanyane* case, which abolished capital punishment—the justices thoroughly considered capital punishment in other jurisdictions, including the United States, as well as international and other foreign law. *S. Afr. v. Makwanyane*, 1995 (3) SA 391 (CC). The Court also cited Amnesty International reports on capital punishment, *id.* ¶ 33; *see* <http://web.amnesty.org/rmp/dplibrary.nsf>, as well as the International Covenant on Civil and Political Rights, *Makwanyane*, 1995 (3) SA 391, ¶ 36; *see* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR]. Moreover, the Court interpreted public international law to include “non-binding as well as binding law,” and then listed half a dozen major international and regional tribunals whose decisions it might consider as persuasive. *Makwanyane*, 1995 (3) SA 391, ¶ 35. Contrast this with the U.S. system, where federal law must not be interpreted in such a manner as to violate international law if any other construction is fairly possible—a much more limited approach. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

health or well-being;" "access to adequate housing;" and "access to health care services . . . sufficient food and water [and] social security," among others.<sup>60</sup> This language has created high expectations in a land that takes its constitution seriously, even if its residents do not understand every word of it.<sup>61</sup>

South Africa's Constitutional Court has further extended this progressive framework during the past eight years. For example, in the *Grootboom* decision,<sup>62</sup> the Court established what has been called "a novel and exceedingly promising approach" to the judicial protection of socioeconomic rights by attempting to balance the needs of the State with the needs of individual South Africans.<sup>63</sup> Not surprisingly, *Grootboom* quotes extensively from international law, including the International Covenant on Economic, Social, and Political Rights and related reports by the U.N. Committee on Economic, Social, and Cultural Rights.<sup>64</sup>

But did the outside experts and local constituents (many of them affiliated with international nongovernmental organizations) push the Constitution too far when they filled it with the lofty aspirations of international human rights law? One question is whether this progressive document, with its many guarantees of socioeconomic rights, can be effective in a society with staggering AIDS rates, unemployment, lack of basic infrastructure, and heartbreaking poverty. For scholars (and others, like Geoghegan) interested in the long-term benefits of incorporating idealistic international legal norms into domestic systems, the litmus test may be whether South Africa's Constitution really makes a difference for the poor—the people most in need of constitutional protections. As Desai's book demonstrates, these groups are often unable to secure redress for their problems through local administrative channels and must instead turn to the courts and the Constitution.<sup>65</sup>

To date there is a mixed record, with a few recent developments tipping in favor of calling South Africa's strong rights-protection approach

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60. S. AFR. CONST. §§ 24, 26, 27.

61. Constitutional Court Justice Albie Sachs views the Constitution as "the people's refuge." Emily Bazelon, *After the Revolution*, LEGAL AFF., Jan.-Feb. 2003, at 29.

62. S. Afr. v. *Grootboom*, 2000 (11) BCLR 1169 (CC).

63. SUNSTEIN, *supra* note 55, at 221.

64. *Grootboom*, 2000 (11) BCLR 1169 (CC), ¶¶ 27–31; see International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3. It is not all roses, however. In *Soobramoney*, the Court said that the right to health care was merely "a right not to be refused emergency treatment," *Soobramoney v. Minister of Health*, 1998 (1) SA 765 (CC), ¶ 20, and that courts will be "slow to interfere with rational decisions taken in good faith by the political organs and medical authorities." *Id.* ¶ 29. "Most human rights lawyers," it has been written, "read the majority opinion as a major disappointment." Bazelon, *supra* note 61, at 28.

65. In many ways, Geoghegan's Rolando can be seen as being a member of the United States' "poors."

a success. Notable among these is the *Nevirapine* case, in which the Constitutional Court upheld a claim brought by the Treatment Action Campaign against Mbeki's government, to provide HIV-positive mothers with low-cost medication that may save half the babies born with HIV each year.<sup>66</sup> The case resulted in South Africa's development of the world's largest program to prevent mother-to-child transmission of the virus.<sup>67</sup>

Desai, for one, is dubious about whether the many rights-granting provisions of the Constitution have any real teeth, remarking that because of the Constitution's limitation clause,<sup>68</sup> by which courts will not interfere with policy decisions that are rational and bona fide, "our era of constitutionalism is difficult to distinguish from the apartheid 1950s."<sup>69</sup> For him, the only difference between then and now is that "the parliamentary sovereignty of those days has been replaced by a sort of executive sovereignty . . . and the ideology of apartheid as political determinant [has been] replaced by the ideology of the market."<sup>70</sup> Is the world's most magnificent legal framework simply a throwback to apartheid? Like those of Geoghegan, such rhetorical flourishes may begin to alienate even Desai's most forgiving readers.

Desai also presents a complex perspective on the role of lawsuits that draw on this generous but inaccessible constitutional framework. On the one hand, when the poor get their day in court, they do not expect much to come from it. Desai observes that lawsuits "can often consume energies and deflect from mass mobilization," and that courtroom losses can quell activists' fervor.<sup>71</sup> On the other hand, the community groups described in *We Are the Poors* have repeatedly demonstrated that "legal interventions are crucial defensive weapons that also generate publicity and provide focal points for mobilizations."<sup>72</sup> "The actual benefit[] of litigation," Desai writes, "is less romantic but no less effective" than, say, street-level protests, as litigation rips aside "the mask of political rhetoric" and forces the opposition [ANC] to reveal "in sworn affidavits the brutality of its anti-poor policies."<sup>73</sup> Law becomes as much a tool for

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66. Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC).

67. See Tina Rosenberg, *Editorial Observer: In South Africa, a Hero Measured by the Advance of a Deadly Disease*, N.Y. TIMES, Jan. 13, 2003, at A20.

68. S. AFR. CONST. § 36.

69. DESAI, *supra* note 43, at 72.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 73.

mass mobilization as it is a means of achieving a particular court decision.<sup>74</sup>

Moreover, Desai attributes the limited successes of the poors partially to their relationships with lawyers, academics, human rights activists, and journalists “on the outside”<sup>75</sup>—the very people who helped design the constitution that promises so much but at times seems to deliver so little. And, although he does not reference it, Desai, when writing, must have known about the massive suit currently being litigated by local activists, in conjunction with American lawyers, seeking billions of dollars in redress for human rights violations under apartheid.<sup>76</sup>

Desai’s descriptions of this strange relationship between the “outsiders” who created an attractive yet almost untouchable constitution and the South African human rights activists and community leaders who would themselves benefit from many of these outsiders’ skills perfectly captures the complex South African attitude toward the rest of the world.<sup>77</sup> Desai teaches that having enumerated rights is simply not enough—you must also have activists willing to demand their recognition, a court system willing to give effect to them, and politicians willing to stick up for them.

## CONCLUSION

These are challenging yet hopeful times for international lawyers. Geoghegan and Desai, while writing in widely different regional and

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74. There is an extensive literature on lawyering and organizing. See, e.g., DEREK DENCKLA & MATTHEW DILLER, *COMMUNITY LAWYERING: THEORY AND PRACTICE* (2000); GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LEGAL PRACTICE* (1992); Steve Bachmann, *Lawyers, Law and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984–85); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994); Lucie White, *To Learn and Teach: Lessons from Dreifontein on Lawyering and Power*, 1988 WISC. L. REV. 699 (1988); Richard Klawiter, Note, *¡La Tierra es Nuestra! Campesino Struggle and a Vision of Community-Based Lawyering*, 42 STAN. L. REV. 1625 (1990).

75. DESAI, *supra* note 43, at 142.

76. See Nicol Degli Innocenti, *Apartheid Accused to be Named*, FIN. TIMES, Nov. 12, 2002, at 10; see also *Lawyer Says Files Apartheid Suits Vs Anglo*, REUTERS, Apr. 4, 2003 (describing recent suits filed in U.S. courts by apartheid victims against South African mining companies).

77. South Africa faced massive international boycotts during the apartheid era, only increasing South Africans’ desire to participate in global movements, such as sport and scholarly exchanges. See generally ROBERT ROSS, *A CONCISE HISTORY OF SOUTH AFRICA* (1999).

constitutional settings, capture the increasing interaction between local social justice efforts and international human rights law.

The United States is beginning to see this interaction in the context of capital punishment. In 2001, the United States lost a case before the International Court of Justice (ICJ) addressing the right of German nationals sentenced to death in the United States to be informed of their access to their consulate under the Vienna Convention on Consular Relations.<sup>78</sup> A similar case is now before the Court, as Mexico has filed a complaint on behalf of fifty-four Mexican nationals on death row in ten states.<sup>79</sup>

These international cases are fueling domestic anti-death penalty activity in interesting ways. The same week that Mexico filed its application, outgoing Illinois Governor George Ryan commuted the sentences of more than 160 prisoners on Illinois's death row (some of them Mexican nationals), reducing them to life or less, in part citing international pressure.<sup>80</sup> In a poetic moment linking the United States and South Africa, Governor Ryan described how, on the day before granting these pardons, "I received a call from Nelson Mandela. I was at Manny's [a famous Chicago deli] having a corned beef sandwich, and I talked to Nelson Mandela for about twenty minutes. The message he basically delivered to me was that the United States sets the example for justice and fairness for the rest of the world," but now "we're not in league with Europe, Canada, Mexico, most of South and Central America. These countries rejected the death penalty. We are partners in death with several third world countries."<sup>81</sup> For all Ryan knew, Geoghegan could have been at the next booth, reading his treaties, munching a sandwich, and smiling at this connection.

Recently, Supreme Court Justice Sandra Day O'Connor wrote, "[o]ther legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which

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78. LaGrand Case (Germany v. U.S.), 2001 I.C.J. (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>; see Vienna Convention on Consular Relations, Mar. 19, 1967, 596 U.N.T.S. 261.

79. Avena and Other Mexican Nationals (Mexico v. U.S.), application filed Jan. 9, 2003, <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.

80. See, e.g., Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A1. Steven Hawkins, Executive Director of the National Coalition to Abolish the Death Penalty, said the decision was "a watershed moment, a turning point in the debate over capital punishment in the United States." Press Release, National Coalition to Abolish the Death Penalty, NCADP Welcomes Largest Commutation of Death Sentences in Modern U.S. History (Jan. 11, 2003), available at [http://www.ncadp.org/html/commutations\\_-\\_ryan\\_-\\_jan\\_\\_11.html](http://www.ncadp.org/html/commutations_-_ryan_-_jan__11.html).

81. *Excerpts from Governor's Speech on Commutations*, N.Y. TIMES, Jan. 12, 2003, at A22; see Barry James, *Clearing of Illinois Death Row is Greeted by Cheers Overseas*, N.Y. TIMES, Jan. 14, 2003, at A10.

we can learn and benefit.”<sup>82</sup> *In America's Court* and *We Are the Poors* provide snapshots, respectively, of an American lawyer coming to learn why an openness to these innovations and experiments is important, and of a South African academic awakening to the fact that there is a limit to how much foreign and international law can affect the legal problems of marginalized communities. These realizations are especially appropriate as we are currently involved, at this writing, in at least one significant armed conflict where human rights issues and human rights language are playing a major role in the public debate.<sup>83</sup> Geoghegan and Desai capture a liminal moment as the world reacts to an ever more complex transnational legal regime—each, in his way, concluding that, “perhaps *all* of it is simply human rights law.”<sup>84</sup>

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82. O'Connor, *Broadening Our Horizons*, *supra* note 4.

83. Just prior to the start of the United States military's Operation Iraqi Freedom, Kenneth Roth, Executive Director of Human Rights Watch, noted that the more U.S. government officials cite Saddam Hussein's human rights record as a reason to topple him, the greater their obligation to minimize the potentially serious human rights consequences of an American-led war in Iraq becomes. Press Release, Human Rights Watch, U.S. Human Rights Leadership Faulted (Jan. 14, 2003), available at <http://www.hrw.org/press/2003/01/wr2003.htm>.

84. GEOGHEGAN, *supra* note 2, at 4.