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Katharine Young

Jeremy Perelman

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Rights as Footprints: A New Metaphor for Contemporary Human Rights Practice

Jeremy Perelman and Katharine G. Young*

So the Zakari case has been one of the biggest achievements of what legal aid has done in this community. And because everyone, almost all the community members were involved, it became like a footprint in everybody's mind: anybody you ask around knows the story.

- Nihad Swallah, Community Organizer, Legal Resources Center, Ghana

… "[C]ustomary rules" preserved by the group memory are themselves the product of a small batch of schemes enabling agents to generate an infinity of practices adapted to endlessly changing situations.

- Pierre Bourdieu, Outline of a Theory of Practice (1972)

I. INTRODUCTION

¶1 Metaphors can help advocates and scholars to understand the complicated practice of claiming human rights. So far, drawing on studies from related literatures – from critical rights scholarship, critical race theory and the socio-legal study of public interest lawyering – metaphors have helped to describe and celebrate human rights advocacy. They have also provided a trenchant critique. The "rights as myths" metaphor endures for its shorthand description of how rights beguile socially disadvantaged groups with the false promise of a legal remedy for their grievances, if only they articulate them as rights.[1] The "double-edgedness" and "dark sides" of rights are also metaphors, which

* Jeremy Perelman is a Visiting Professor at the University of Connecticut School of Law, Lecturer-in Law at Columbia Law School and S.J.D. candidate at Harvard Law School. Katharine G. Young is a Senior Lecturer at the Australian National University College of Law and a Visiting Fellow at the Centre for International Governance & Justice at the Regulatory Institutions Network of the Australian National University. We would like to thank Professor Lucie White, the staff at the Legal Resources Center in Accra, Ghana and the people of Nima and Mamobi for their various powerful insights that led to the completion of this Article. The Article has benefited from presentations at the Joint Scholar/Activist Team Workshop to Challenge Global Poverty, Rockefeller Bellagio Center, Italy, December 2006, the Panel on Public Interest Law in a Global Context, Joint Annual Meeting of the Law & Society Association and the Research Committee on Sociology of Law, Humboldt University, Berlin, July 2007, and the Harvard Law School, May 2008. In addition, we would like to thank Raymond Ataguba, Mahama Ayariga, William Forbath, Tom Hilbink, Peter Houtzager, Duncan Kennedy, Kerry Rittich, Bill Simon, Susan Sturm, Nihad Swallah, Louise Trubek and Peter Uvin, for their valuable comments.

[1] For seminal treatment, *see* STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5 (1974) ("The myth of rights is, in other words, premised on a direct linking of litigation, rights, and remedies with social change"). Assessment of rights-based advocacy in the U.S. has produced counter-metaphors of "rights without illusions," which retains them instrumentally, and "rights at work," which concedes their value in the process of cultural construction and social movement struggle.

highlight the ability of rights claims to be pursued by many different and opposing interests. The dark side of rights results in the demobilization of some groups, and the crowding out of the perspective of others.[2] Finally, the compound-metaphor of the "savage/victim/savior" highlights the Western origins and colonial heritage of human rights.[3] These critical metaphors help us to predict the missteps and errors of human rights advocacy, in the United States and elsewhere.[4]

¶2 Accompanying such metaphors is often a prescription, not to reject human rights, but to weigh the costs and benefits of rights practice in consequentialist terms.[5] Yet, such an assessment relies on notions of agency that have been insufficiently developed. In this Article, we introduce the new metaphor of rights as "footprints". We suggest that this image helps us to locate the experience and accomplishments of contemporary human rights practice. Rather than emphasizing the capacity of individuals to act independently in weighing the costs and benefits of human rights (and therefore suggesting an unconstrained agency in constructing their social world), or detailing the patterned arrangements which limit and determine their choices, we point to a complementary relationship of the two.[6] Moreover, the metaphor of "footprints" captures the peculiar capacity of human rights to support a variety of claimants and advocates, who are otherwise separated by geography, culture, class and time.

¶3 This metaphor is not our own. We take our cue from the term used by Nihad Swallah, a human rights activist and community organizer working in an impoverished community of Accra, Ghana. Against the backdrop of a strikingly resonant human rights campaign first pursued in this community in January 2003, and retold repeatedly in different times and places in the intervening seven years, we use the footprints metaphor

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See Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J. L. & SOC. 309, 326 (1990); MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 278 (1994).

[2] DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 318-19 (1997); David Kennedy, *The International Human Rights Movement: Part of the Problem?,* 15 HARV. HUM. RTS. J. 101, 119-124 (2002).

[3] Makau W. Mutua, *Savages, Victims, and Saviors: the Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 201-205 (2001).

[4] For a prominent comment on the genealogical connections between international rights and U.S. constitutional rights, *see* LOUIS HENKIN, THE AGE OF RIGHTS (1990). For a present study of the return interlinkage of U.S.-based rights and international human rights advocacy, *see, e.g.*, BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES (Catherine Albisa, Martha F. Davis & Cynthia Soohoo eds., 2007).

[5] Duncan Kennedy, *supra* note 2, at 334; David Kennedy, *supra* note 2, at 102-103; Makau W. Mutua, *Human Rights and Powerlessness: Pathologies of Choice and Substance*, 56 BUFF. L. REV. 1027, 1034 (2008).

[6] *See* A. SARAT & S. SCHEINGOLD, THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 4 (2005) (analyzing the practice of cause lawyering as a "form of human action in a field of institutional possibilities" and situating it within the structure-agency problematic explored, among others, by Pierre Bourdieu. *See* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (1977)). Sarat and Scheingold emphasize non-binary positions that transcend the structuralist versus agency/methodological individualist dichotomy, such as A. Giddens' "structuration theory" (*see* ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (1984)) and the work of Ewick and Silbey (*see* PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 39 (1998)). In that work, Ewick and Silbey argue that "the individual and social structure … (are) mutually defining (…) consciousness is understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaning making."

to focus on the aspects of human rights practice that explain the resonance and longevity of human rights claims. In particular, we suggest that this metaphor allows us to emphasize the way in which human rights are intrinsically constructed within collective memory.

¶4 Part II of this Article describes how these aspects depart from current thinking about human rights. First, we show how the footprints metaphor allows us to focus on changes in expectations and understandings of rights diachronically, with particular political moments taking on a heightened significance.[7] Attention to the expressive function of rights is not new – scholars concerned with legal consciousness and rights consciousness have long emphasized the symbolic work done by legal norms outside the strict understanding of positivist rules and norms.[8] In adopting this evolving, pluralistic, and relational view of rights, we contrast our metaphor with the formal legal understanding of rights. In particular, we contrast this metaphor with the understanding of rights as legal precedents, on the one hand, or as human rights covenants, on the other.

¶5 Secondly, we argue that the footprints metaphor allows us to emphasize the dynamism, impermanence, and particularized aspects of human rights practice. Although "rights" by definition relate to a universalized plane of rhetoric, the footprints metaphor emphasizes the tension between the universality and particularity of human rights values. Thus, the footprints metaphor invokes the way in which rights language makes meaning in multiple and local ways. At the same time, rights stories like the one we recount appear to have a common narrative structure. They are not merely anecdotes. Instead, the retellings replay more or less constant features of the rights they represent.

¶6 Thirdly, we argue that the footprints metaphor allows us to emphasize more creative understandings of law, law reform, and lawyering as it relates to human rights practice, especially in relation to the belated embrace (coming particularly late to the Western human rights community) of economic and social rights as a critical part of that practice.[9] Here, the rights footprint produces a different understanding of institutional advocacy, which might inspire more contextual and responsive reform. In this aspect, we contrast an idea of rights as a formula for institutional success (the blueprints image) with a less rigid, more open idea of localized innovation and experiment. Such innovation may prove particularly important for addressing the challenges of poverty and maldistribution, which often underlie the claims of economic and social rights.

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[7] We find it helpful to adopt the "dynamic longitudinal perspective" suggested by McCann in his evaluation of rights. *See* MCCANN, *supra* note 1, at 288; *see also* Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 L. & SOC. REV. 237 (1992) (demonstrating the enduring effect of class action lawsuits).

[8] Legal consciousness literature has flourished since the mid-1980s, particularly in the area of poverty and welfare rights studies. *See, e.g.* Austin Sarat, *"The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J. L. & HUM. 343 (1990) (exploring how the welfare poor's identity and consciousness is partly constructed through their interaction with the welfare system, and emerges as a legal consciousness of power and domination, as well as one of resistance).

[9] For evidence of this late entrance, by international human rights organizations based in the United States, see Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63 (2004); Mary Robinson, *Advancing Economic, Social, and Cultural Rights: The Way Forward*, 26 HUM. RTS. Q. 866 (2004); Leonard S. Rubenstein, *Response by Leonard S. Rubenstein*, 26 HUM. RTS. Q. 879 (2004). Most recently, a number of prominent international human rights organizations have adopted a socio-economic rights agenda: *see, e.g.*, AMNESTY INTERNATIONAL, Demand Dignity, http://www.amnesty.org/en/demand-dignity (last visited March 8, 2010).

¶7 After we contrast our metaphor with the current theoretical portrayals of rights in Part II, we present a case study of a human rights campaign. This case study exemplifies the memory-building, contextual, and responsive features of contemporary human rights practice. Part III therefore traces a "right to health" claim by the Legal Resources Center, a Ghanaian grassroots human rights organization, its visiting student interns from various American law schools, and members of the Nima/Mamobi community of Accra in Ghana. The claim began in 2003, and was focused on ending the human rights infringements that were indirectly produced as a result of financing health care through user fees.[10] These infringements occurred when public hospitals sought to detain patients, after their discharge, until they had paid their medical expenses. This occurrence, spectacular in its assault on liberty, is increasingly and banally practiced in the cash-strapped hospitals of developing countries.[11]

¶8 The claim called for the release of Mohammed Zakari, an elderly subsistence farmer detained in a public hospital, for failure to pay for the medical treatment he received some months earlier. Detention in a hospital clearly contravened the rights protected by the Ghanaian Constitution, which prohibits arbitrary detention and contains fundamental habeas corpus protections.[12] Moreover, the detention also implicated the right to health in the Ghanaian Constitution, which is recognized as a directive principle of policy.[13] The detention also contravened the international human rights conventions to which Ghana was party.[14] Moreover, it was illegal according to local (and World Bank-sponsored) health laws, which formally exempt indigent people from user-fees.[15] The human rights infringements at the heart of the case therefore combined legal and moral arguments drawn from civil and political rights and economic and social rights.

¶9 In pointing to these contraventions, the claim relied on tactics of litigation, petition-signing, mass meetings and media speeches. The claim catalyzed a community and instigated Mohammed Zakari's release from his hospital detention as well as a surge in media attention about the enforcement and financing of Ghana's legal protections of health. For many, it became a shorthand story of the community's success-against-the-odds, which would continue to galvanize both community members and the Legal Resources Center in the months and years to come. The *Zakari* case also stimulated and

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[10] User fees are a method to recover the costs of health care directly from users, as an alternative to tax-based financing. Since the 1980s, they have been highly prevalent in Africa. *See* Bamako Initiative 1987 (the pan-African agreement to entrench user fees for public facilities).

[11] The practice of "hospital detentions" is disturbingly widespread, and has been reported in African hospitals in Burundi, Kenya, Ghana, the Democratic Republic of Congo and Zimbabwe, and in Colombia, Haiti, Mexico, the Philippines and Venezuela: *see* Arachu Castro, *In and Out: User Fees and Other Unfortunate Events during Hospital Admission and Discharge*, 24 CADERNOS DE SAUDE PUBLICA 1174 (2008) (collecting data from the United Nations Children's Fund, Médecins Sans Frontières, Human Rights Watch, Physicians for Human Rights, and the Pan American Health Organization).

[12] CONSTITUTION OF THE REPUBLIC OF GHANA 1992, art. 14, §33 (right to be free from unlawful detention and restriction); *see also id.* art. 23 (right to administrative justice).

[13] *Id.* at art. 34(2) (establishing the right to good health care as a directive principle of state policy); *see also id.* at art. 17(2) (right to be free of discrimination on the grounds of social and economic status).

[14] INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, opened for signature Dec. 16, 1966, art. 9, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, opened for signature Dec. 16, 1966, art. 12, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

[15] HOSPITAL FEES ACT, 1971 (Ghana), §§ 2, 4. *See, infra*, text accompanying note 73.

sustained an ongoing cycle of interest by scholars and law students based in the United States.

¶10 After presenting this case study, Part IV of this Article returns to the footprints metaphor. We highlight the impact of memory and agency in the rights campaign. Moreover, we explore whether giving attention to these functions can complicate the pragmatic assessment of the costs and benefits of "rights talk," which has become an influential prescription for contemporary human rights practice.[16] The rights practice that we describe is both expressive and constitutive, and does not produce clear winners and losers. Acknowledging the local, national, transnational, and international dimensions of practice further highlights the complexity of this assessment. Rather than attempting to resolve this conundrum, we suggest that different phases and forums in the use of rights must be acknowledged, an approach which is captured by the footprints metaphor. It is to this metaphor we now turn.

II. THE FOOTPRINTS METAPHOR

¶11 Metaphors are cognitive and rhetorical tools, which operate to expand – and to constrain – thought. Just as metaphors help us to understand law,[17] they also help us to understand law's practices.[18] This latter focus engages the actions, and social relations, that configure contemporary human rights law. The metaphor of the footprint is especially resourceful in capturing the dynamism and incompleteness of this practice, in which politics is understood as law.[19] The metaphor is also useful for other fields in which law is viewed as both the terrain of the struggle and the mode of institutionalizing political victories.

¶12 The metaphor of footprints is apt for the human rights field, but this field is not self-contained. Indeed, the human rights field increasingly overlaps with the professional mandates of two other scholarly and practical enterprises – those of "public interest lawyering" and "development."[20] All three fields diagnose particular problems and envisage particular action when recognizing material disadvantage in the modern world. Though we should be cautious about the convergence of these professional fields, especially in light of glaring blind spots and biases in each,[21] we might nevertheless find

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[16] *See e.g.*, David Kennedy, *supra* note 2. On the practice of "rights talk", *see* Sally Engle Merry, *Rights Talk and the Experiences of Law: Implementing Women's Human Rights to Protection from Violence*, 25 HUM. RTS. Q. 343 (2003).

[17] We heed the famous warning of Justice Benjamin Cardozo, who suggested that "[S]tarting as devices to liberate thought, [metaphors] end often by enslaving it." Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926). Nonetheless, we use metaphors in order to highlight the "social forces which mold the law," rather than to obscure them: *see* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 834 (1935).

[18] *See, e.g.*, Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004).

[19] Human rights practice can therefore parallel 'cause lawyering,' *see* SARAT & SCHEINGOLD, supra note 6, at 6 (drawing on the connections between lawyering and political action, and the "reciprocal[…] recoding [of] politics as law").

[20] For a case study at the intersection of these three fields, *see* Jeremy Perelman, *The Way Ahead? Access to Justice, Public Interest Lawyering, and the Right to Legal Aid in South Africa: The* NKuzi *Case*, 41 STAN. J. INT'L L. 357 (2005).

[21] PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT (2004) (referring to development dangers in Rwanda); *see also* Philip Alston & Mary Robinson, *The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours, in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 1 (Philip Alston & Mary Robinson eds., 2005); Philip Alston, *Ships Passing in the Night: The Current State*

practical innovations, borrowed tactics and information resources in the spaces in which they overlap. Indeed, it is this practical space in which the "rights-as-footprints" metaphor is sourced.[22]

¶13 Thus, while "human rights activism" has been traditionally described as a methodology of naming and shaming,[23] and "public interest lawyering" (at least in the United States) as one of court-centric impact litigation and structural reform,[24] we can recognize a more common tactical pathway as human rights lawyers have become less skeptical of the tools of litigation when combined with other forms of advocacy, and public interest lawyers have become more skilled at detecting the limits of courts and legal expertise.[25] Moreover, the globalization of lawyering—meaning the diffusion of particular American models of lawyering, as well as a more general movement between legal participants, ideas and legal cultures[26]—has impacted these fields of practice.[27] Added to this is the growing perception that economic development strategies contain different emphases and different implications for rights, and that trade-offs between

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of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals, 27 HUM. RTS. Q. 755 (2005).

[22] The footprint metaphor has also been used in both public and academic discourses in the environmental field, as a marker of the ecological "impact" of human activity, particularly in the emission of greenhouse gases such as carbon. *See, e.g.*, Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675, 724-26 (2003) (noting the ecological impact of different nations); and, as early as 1992, *see* William Rees, *Ecological Footprints and Appropriated Carrying Capacity: What Urban Economics Leaves Out*, 4 ENV'T & URBANIZATION 121 (1992). This characterization of the metaphor, which captures the "impact" of particular human activities, has also been employed in relation to the societal impact of corporations' activities. *See* Margo T. Drakos et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L. J. 135, 167 (2007) (noting a "human rights footprint" as a substantive element of corporate social responsibility); *see also* Janet E. Kerr, *A New Era of Responsibility: A Modern American Mandate for Corporate Social Responsibility*, 78 UMKC L. REV. 327, 333 (2009) (pointing to the notion of corporations' "social footprint"). The footprints metaphor used in this article incorporates the notion of impact, but relates this to consequences brought about by the use of rights. For a similar use, which reflects on the human rights movement's "footprint" on the normative and institutional international landscape of the early 21st century, *see* Henry J. Steiner, *Human Rights: The Deepening Footprint*, 20 HARV. HUM. RTS. J. 7, 12 (2007).

[23] *See, e.g.*, Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 HARV. HUM. RTS. J. 301, 310 (2002); for an early social-legal analysis of municipal techniques, see William Felstiner, Richard Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…*, 15 L. & SOC. REV. 631 (1981). For a microanalysis of the role of persuasion and acculturation in international human rights, which focuses on state behavior, *see* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621 (2004).

[24] For a classic description of the U.S. context, *see* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); *see also* Owen M. Fiss, *The Supreme Court 1978 Term -- Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

[25] Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law,"* 2005 WIS. L. REV. 455 (2005) (noting pressures from the restricted access to courts, as well as legislative gridlock, increased privatization, and globalization). The integration of transactional lawyering and community economic development has revised the public interest law field, and made it more relevant to human rights advocacy, particularly in relation to economic and social rights.

[26] Scott Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 1 (2008); *see also* Jeremy Perelman, Book Review, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, 47 HARV. INT'L L. J. 531 (2006) (reviewing a comparative collection of rule of law strategies to address development, global poverty and inequality).

[27] YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002); Scott Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L. J. 891 (2008).

human rights and development may be avoided by engaging in a "rights-based" approach to development.[28]

¶14 We use the junction between these fields to locate the rights-as-footprints practice. We define this practice by adopting a series of contrasts.[29] In this section, we show how the metaphor allows us to highlight and at the same time connect four previously underemphasized effects of human rights practice. We introduce the way in which the footprints metaphor helps draw our attention to how human rights practitioners can (1) recast the meaning of rights claims for communities themselves rather than for lawyers and courts; (2) emphasize the particularist and episodic nature of rights articulation over the universalized narrative; (3) conversely reach away from an individualist, anecdotal focus on rights to locate its presence as collective memory; and (4) mark new institutional trajectories, which are left open, plural, and contestable, rather than formularized. We discuss each of these aspects in turn, before describing them within the context of the *Zakari* story.

A. Footprints Not Precedents

¶15 The metaphor of rights-as-footprints may be contrasted with the legalist understanding of "rights-as-precedent." The latter image evokes the advocate's preference for institutionalizing victories in court. In contrast, the metaphor of footprints enables us to envision rights as decentralized and democratized. It highlights the way in which rights enact meaning outside of legislation, regulations, and adjudication. This contrast is one of emphasis rather than dichotomy, because the human rights practice we describe may take place against the backdrop of the conventional forums of positivist law – courts, legislators, agencies – and its conventional texts – human rights instruments, constitutions, and legislation. Nonetheless, the primary characteristic of rights-as-footprints is that communities themselves define their rights.

¶16 Legal precedent is usually embedded in a judicial decision operating as a source of law for subsequent cases of a similar kind. In generating precedent, lawyers often strive to create favorable legal terms for their clients. At the same time, lawyers are able to use litigation victories to avert future rights-infringements.[30] In this way, new norms, or different areas of law can be drawn into legal claims, pushing settled areas of law in new directions. Much of the current scholarship on rights operates precisely at this juncture – where lawyers call on the protections afforded by human rights to challenge legislation or executive power in the courts. Domestic – or sometimes transnational – courts are the locus of this lawyering, especially in relation to civil and political rights.[31]

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[28] On the rights-based approach to development, *see* UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2000 ch. 1; *see also* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); Mary Robinson, *What Rights Can Add to Good Development Practice, in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 25 (Philip Alston & Mary Robinson eds., 2005); *see also* DAVID KINLEY, CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY (2009).

[29] Upendra Baxi offers a different series of images in analyzing the politics of human rights: UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2002).

[30] This receives emphasis in "cause lawyering" practices: *see* Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction, in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 3-4 (Austin Sarat & Stuart Scheingold eds., 1998).

[31] This emphasis is common to traditional civil rights litigation in the U.S., and to civil and political rights practice abroad. *See, e.g.*, SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, THE INTERNATIONAL

This focus on developing favorable precedent is also taking root in the contemporary practice around economic and social rights, despite the challenges of justiciability that are often raised.[32] We suggest, however, that while this attention to precedent is critical, it is part of a much broader picture of human rights practice. We therefore focus on the features of law-making and meaning-making outside of courts.

¶17 This is not to suggest that the metaphor of footprints and the focus on precedent are not related. Both admit a diachronic pathway for law, allowing for present-day activities to shape the future. Both involve elements of narrative and retelling, and selectivity and change. Both rely on certain rules to persuade and operate through time. This is probably more the case for common law countries than for civil law countries, as the former requires development to occur through individuated stories and the juristic interpretation of such stories.

¶18 Precedents and footprints may therefore mirror or even constitute the other.[33] Nonetheless, while precedent requires the imprimatur of the court for its existence, and indeed draws on the power to coerce just as it draws on the power to persuade,[34] the rights footprint depends on a more spontaneous and relatively less ordered community of voices to remember, listen to and retell the tale. Indeed, in relying on this community, the footprint also creates it by virtue of its capacity to connect groups of people who may experience very different understandings of human rights and remember different versions of events. The contour of the right and its very longevity is filtered, not through courts, but through the social relations that bind communities. We suggest that the rights footprint operates to "create social spaces within which communities take shape."[35] These social spaces are not without their own subtle ordering and constraints.[36] Yet, these dynamics play out in less predictable, and more changeable, ways.

¶19 An analogous distinction exists between formal law and "legal consciousness." Studies of legal consciousness have long located the effectiveness of rights and law in bringing about social change within social relations and structures of action.[37] This focus allows us to recast our understanding of the meaning of rights and

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COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY (2d ed. 2004).

[32] CENTRE ON HOUSING RTS. & EVICTIONS, LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ACHIEVEMENTS, CHALLENGES & STRATEGIES (2003), available at http://www.cohre.org/sites/default/files/litigating_esc_rights_-_achievement_challenges_and_strategies_2003.pdf; *see also* EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE (Daphne Barak-Erez & Aeyal M. Gross eds., 2007). For the supranational context, *see* James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L. J. 217 (2004); Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171 (2006) (despite disagreement as to strategy, accepting the role of litigation).

[33] For a view of "socio-legal positivism" that challenges the idea that formal law mirrors society, *see* BRIAN TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001) (emphasizing the particular difficulties of mirroring in formerly colonized nations); *compare with* H.L.A. HART, THE CONCEPT OF LAW, Rev. ed. (1994).

[34] Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 187, 187 (Peter Brooks & Paul Gewirtz eds., 1996).

[35] Lucie E. White, *Ordering Voice: Rhetoric and Democracy in Project Head Start*, *in* THE RHETORIC OF LAW 1865 (Austin Sarat & Thomas R. Kearns eds., 1994).

[36] *Id.*

[37] Sarat & Scheingold, *supra* note 6; *see also* Ewick & Silbey, *supra* note 6 (noting the opportunities for "thought and action" in which social difference and temporality matter in shaping the kinds of opportunities that will be available for individuals).

legal language outside of the field of the legal profession and the professional human rights community and into the common expectations and languages of "ordinary people" in everyday life.[38] Nonetheless, as the concept of "legal consciousness" has traveled in new theoretical and empirical literatures, it has been utilized—and perhaps even domesticated—in order to describe a much wider range of phenomena.[39] Our use of the footprints metaphor is prompted by the effort not only to expose and critique the way in which legal consciousness sustains particular structures of power and inequality, but also to explore how such consciousness may work to disrupt those very structures.[40]

B. Footprints Not Covenants

¶20 The rights-as-footprints metaphor may also be contrasted with another legalist image: that of covenants. Human rights declarations and instruments, as well as underenforced constitutional text, often enjoy a status as "soft" law in contradistinction to the "hardness" of legal precedent.[41] They may harden over time, or have elements of justiciability that provide a particular legal enforceability akin to precedent. They also generate a range of declaratory normative texts upon which practice can rely. Like precedent, then, non-actionable covenants are not discounted by the footprints metaphor. Nonetheless, the emphasis of the footprints image is different. Instead of seeking to generate additional covenants, or normative development of existing covenants, in the way that often characterizes international human rights practice,[42] the footprints metaphor connotes smaller scale ambitions, focusing foremost on the generative engagement of the community.

¶21 Located in the community, the footprints metaphor must contend with a "community's" open-ended characteristics. While human rights practice is often focused on the physical locality of a human rights claim and/or abuse, many factors outside of the

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[38] *See, e.g.,* Ewick & Silbey, *supra* note 6; Sarat, *supra* note 8; Merry, *supra* note 16, L.B. Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment*, 34 LAW. & SOC'Y. REV. 1055 (2000).

[39] Susan Silbey, *After Legal Consciousness*, 1 ANNU. REV. L. SOC. SCI. 323, 323 (2005) (suggesting that "[l]egal consciousness is an important, conceptually tortured, and ultimately … compromised concept in law and society scholarship").

[40] White, *supra* note 35. For a useful distinction between two different conceptions of legal consciousness, *see* Orly Lobel, *The Paradox of Extra-legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

[41] The concept of "soft law" has been influential in coming to terms with the impact of international law: *see, e.g., Panel Discussion, A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988). This is a useful precursor to the analysis of social constructivism in present international law and international relations theory: *see, e.g.*, Goodman & Jinks, *supra* note 23. The concept of judicial underenforcement has been influential in U.S. constitutional scholarship: Lawrence G. Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); for comparison of international, constitutional and judicial approaches, *see* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008).

[42] An example of this type of international human rights activism is the recent work around the emergence of the 2006 United Nations Convention on the Right of Person with Disabilities: *see* Michael Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007); Michael Stein & Janet Lord, *The Committee on the Rights of Persons with Disabilities, in* THE UNITED NATIONAL AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston & Frédéric Mégret, eds., 2009). For a similar, post-colonial, perspective which seeks a cross-cultural legitimation of human rights universalism, *see* Abdullahi Ahmed An-Na'im , CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA (Abdullahi Ahmed An-Na'im, ed. 2002).

community's geographic location affects human rights practice there.[43] We use community here to refer to both the community of Nima—individuals linked by ethnicity, kinship, religion and of course locality—and to the community of human rights advocates, the student interns and others who travelled to Nima with a commitment towards human rights. The commonality between these groups was their commitment to human rights. Yet this commitment was only vaguely and abstractly understood. This commitment extended over the community's tensions, conflicts, and hierarchies.[44]

¶22 In this sense, the footprints metaphor is "glocalized" rather than "globalized", retaining a strong local character.[45] Admittedly, there is a tension here because the language of rights already suggests a universal aspiration. Nonetheless, the footprints metaphor explicitly locates this universalization in local places, allowing the interpretation of rights to settle and resettle.[46] Moreover, the language of rights enables the community to enact its normative vision in open terms, rather than sealing itself off from national and international human rights norms and their different translations.[47] Unlike covenants, which incorporate general statements about rights that are intended to resist political change, the footprint may fade over time, thus requiring social action to keep it meaningful. Through story telling, the footprint connects with different contributors, audiences, and contexts. In short, the practice generates, rather than assumes, an agreement.

¶23 Moreover, the rights-as-footprints metaphor is different from any nationalistic narrative of rights. Rather than indicating a national sense of memory and culture, served by the material imagery of statues, museums, or the symbolic imagery of Truth and Reconciliation Commissions, the rights are particularized in many local venues. They seek to counter hegemonic interpretations. Although the two interpretations

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[43] *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 8 (1998) (describing the "'fluid and open relations among committed and knowledgeable actors working in specialized issue areas"' to emphasize the transnational basis of human rights advocacy networks).

[44] Irene Guijt & Meera Kaul Shah, *Waking Up to Power, Conflict and Process, in* THE MYTH OF COMMUNITY: GENDER ISSUES IN PARTICIPATORY DEVELOPMENT (Irene Guijt and Meera Kaul Shah eds., 1998), (problematizing the neutralizing effect of the concept of "community").

[45] THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE 295 (2000) (promoting the glocalization of certain cultures, which he defines as "the ability of a culture, when it encounters other strong cultures, to absorb influences that naturally fit into and can enrich that culture, to resist those things that are truly alien and to compartmentalize those things that, while different, can nevertheless be enjoyed and celebrated as different.").

[46] *See, e.g.*, LAW'S STORIES, *supra* note 34, at 2, 5-6 (raising the question as to whether "telling stories…has a distinctive power to challenge and unsettle the legal status quo, because stories give uniquely vivid representation to particular voices, perspectives and experiences of victimization traditionally let out of legal scholarship and ignored when shaping legal rules"). The early U.S. writing on legal storytelling focused on the trial or on judgment production – and not the wider cultural processes that we document in our human rights case study.

[47] This is related to ethnographic work which uses the concept of "translation" to explore the nuance of local human rights practice in the settings of developing countries, shuttling back and forth between local norms, formal juridical forums and transnational human rights discourse: *see* THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL (Mark Goodale & Sally Engle Merry, eds., 2007); *see also* Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38 (2006) (offering a theoretical framework that captures the various ways transnational human rights discourse is translated and becomes meaningful in local context).

of rights are related, and may at times overlap, the local interpretations depart from nationally fostered and approved policies.

C. Footprints Not Anecdotes

¶24 The particularist image may go too far. Just as it is wary to adopt too globalist and general an articulation of rights, the rights-as-footprints practice seeks more than an anecdotal understanding of particular losses, traumas or triumphs in social histories and actions.[48] It is pluralist, allowing us to explore the way that alternative conceptions of rights and law take shape in different communities through time.[49] Hence, the metaphor of footprints suggests how collective memories of political mobilization, repeated and retold through shared but shifting frames, generate multiple pathways towards a "realization" of human rights.[50]

¶25 Such stories may be the most important for the marginalized groups themselves, expressive of important "truths" about their historical experiences and their current social relations.[51] As oral historians have noted, "the strongest communal memories are those of beleaguered out-groups."[52] These expressions of rights – existing beyond "law stories"[53] into the realm of a group's identity and its oral history – reach outsiders as well. For outsiders, they may make new groups of people visible.

¶26 Such effects do not operate in a singular, triumphalist course, but subsist in expressive spirals, which are transmitted in different times and places by different actors, often undergoing a change in meaning according to the forum and the community. The progression of a rights story therefore has its own phases. A long-standing approach in psychology separates three mental processes common to memory retention that may transform a story or rumor into a briefer, more transmittable version over time.[54] The first, which is termed "leveling," follows the sharp decline in the number of details in a story until its stabilization in a short report. At the same time, the process of "sharpening" prepares for the "selective perception, retention and reporting of a limited number of details from a larger context."[55] Moreover, "what is sharpened in one protocol may be

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[48] *Cf.* SPENCIE LOVE, ONE BLOOD: THE DEATH AND RESURRECTION OF CHARLES R. DREW (1996) (exploring a story of trauma in African-American folklore, which channeled black anger, outrage and despair).

[49] *E.g.*, WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); Hendrik Hartog, *Pigs and Positivism*, 1985 WISC. L. REV. 899 (1985).

[50] For a similar documenting of community rights-contestation, involving South Africa's constitutional right to health care, *see* William E. Forbath, *Realizing a Constitutional Social Right--Cultural Transformation, Deep Institutional Reform, and the Roles of Advocacy and Adjudication*, *in* STONES OF HOPE: HOW AFRICAN LAWYERS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie White & Jeremy Perelman eds., forthcoming 2010).

[51] We use "truths" advisedly. As Spencie Love puts it, "a group's shared memories, frequently expressed in the form of historical legends, may often be inaccurate as to surface details, but within them are important truths about that group's historical experiences": *see* LOVE, *supra* note 48, at 5.

[52] PAUL R. THOMPSON, THE VOICE OF THE PAST: ORAL HISTORY 30 (3d ed., 2000); *see also id.* at 166 (noting the special dependence on oral sources for anthropologists and historians of Africa).

[53] *See, e.g.*, LAW STORIES (Gary Bellow & Martha Minow eds., 1996) (challenging the "war stories" notion in legal commentary).

[54] GORDON W. ALLPORT & LEO POSTMAN, THE PSYCHOLOGY OF RUMOR, at 75, 100 (1947) (applying this to changes in both individual and social memory, which become "shorter, more concise, more easily grasped and told").

[55] *Id.*

leveled in another," thus resulting in multiple versions of the "truth."[56] Finally, "assimilation" describes the listener's own attraction to the story through their own intellectual and emotional context.[57] In our account, the framework and language of rights provides a crucial backdrop and context for the story to be shaped and to hold.

D. Footprints Not Blueprints

¶27 As well as supplying a language of "claiming" in which new frames of meaning can be generated and new group memories formed, the rights-as-footprints metaphor makes visible an institutionally open practice. Finally, we contrast the footprints metaphor with that of blueprints. Footprints are distinct from blueprints not only in the way rights change legal consciousness, as our previous distinctions have emphasized, but also in the way the change in legal consciousness itself is embedded in the demand for a change in institutional practices.

¶28 In other words, the contrast between footprints and blueprints establishes the metaphor in its institutional setting. It does not suggest that this setting can be fixed by a formula of either litigation or of institutional reform. The image of the footprint retains the potential of rights to be disruptive, creative, and locally responsive. It connotes an open-ended process of communities' engagement with other relevant actors in changing present institutions.

¶29 The blueprint image is familiar in human rights and development commentary. In these fields, the blueprint offers a standard means of planning a set of institutional reforms from previous practices that suggest a plausible assertion of success.[58] For development economists, a current example of an institutional blueprint is the Poverty Reduction Strategy Papers (PRSP) framework, in which low-income countries are required to develop their own plans for reducing poverty.[59] For lawyers in the field of human rights, an analogous example lies in efforts to develop a "minimum core" of economic and social rights.[60]

¶30 The World Bank's current poverty reduction approach offers a "chastened" blueprint for development—chastened, in that it recognizes the value of participation and

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[56] *Id.* at 86. Indeed, Love explains the multiple versions of the legend of Charles Drew with an account of this psychology"; *see* LOVE, *supra* note 48, at 33.

[57] *Id.* at 140. The availability of a verbal label provides an anchorage effect on the form of the retention and report. The implications are analogous to the availability heuristic, which has been adapted to current behavioral law and economics literature: *e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS (2009).

[58] The blueprint is a long-standing planning idea in the field of development: *see, e.g.*, Emery M. Roe, *Development Narratives, Or Making the Best of Blueprint Development*, 19 WORLD DEV. 287, 287 (1991) (seeking to address the criticisms of what is "stenciled whole-cloth from pre-made plans and blueprints").

[59] THE WORLD BANK, WORLD BANK PARTICIPATION SOURCEBOOK (1996), *available at* http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000009265_3961214175537; *see also* THE INTERNATIONAL MONETARY FUND, POVERTY REDUCTION STRATEGY PAPERS: A FACTSHEET (2009), *available at* http://www.imf.org/external/np/exr/facts/prsp.htm (last visited on Mar. 3, 2010).

[60] *See* U.N. Committee on Econ., Soc. and Cultural Rts., General Comment No. 3: *The Nature of States Parties Obligations*, (art. 2, ¶ 10) U.N. Doc. E/1991/23 (1990)), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument. For commentary on the different legal and monitoring approaches to which this concept has been put: *see* Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L. L. 113 (2008).

national-ownership, as opposed to the "top down" version of previous best practices.[61] Thus, the approach sets out a blueprint for reducing poverty, which invites civil society and the private sector to participate in the development of an appropriate national strategy. Strategies from differently situated countries are then compiled and compared. Nonetheless, evidence on this poverty reduction approach suggests that it is, in reality, non-participatory for certain groups, such as local parliamentarians, trade unions, women and the marginalized groups who actually represent the poor.[62] In content, the poverty reduction strategy papers have curiously replicated earlier structural reform programs, endorsing financial and trade liberalization, privatization and, in the case of curative health care, cost recovery mechanisms. Some commentators have suggested that the fact that engaging with this process is compulsory for countries seeking to qualify for debt relief, which must be developed quickly, limit the opportunity for local participation.[63] They argue that the poverty reduction strategy papers have taken on a "one size fits all" shape, which fails to resonate locally.

¶31 The footprints image departs from this formula by engaging with the more open-ended processes of negotiation, or by leveraging mobilized community power to uproot previously immune public institutions. Because the footprint takes its shape locally, it is connected to the specific ways in which the community articulates its interests. Thus, the footprint does not commend the authorized content of a poverty reduction strategy, but neither is it normatively or institutionally empty. By responding to the memory of injustice embodied within the right, the rights-as-footprints practice introduces a particular direction to the outcome, on which future changes will be dependent.

III. A CASE STUDY OF CONTEMPORARY HUMAN RIGHTS PRACTICE

¶32 We have detailed, in rather abstract terms, the contemporary dimensions of human rights practice that are captured by the new and distinct metaphor of footprints. We now turn to illustrate that practice as a direct and evocative example of human rights in practice in Ghana.[64] Indeed, it is from this human rights campaign that the metaphor was first related to us, as Westerners invited in to participate in, and observe, the local campaign. In describing the effect of this campaign several years afterwards, participant Nihad Swallah reported that the rights campaign had become "like a footprint in everyone's mind."[65]

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[61] We liken this to the "chastened neoliberalism" of the post-Washington Consensus. For an expression of the now-mediated relationship between blueprints and local knowledge, *see* DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH, at 155, 164-5 (2007).

[62] Frances Stewart & Michael Wang, *Poverty Reduction Strategy Papers within the Human Rights: Perspective, in* HUMAN RIGHTS AND DEVELOPMENT, at 447, 456-457, 466.

[63] The Highly-Indebted Poor Country Initiative ("HIPC") makes the production of PRSPs conditional on relief. Ghana is a HIPC member.

[64] This case study is adapted from Jeremy Perelman & Katharine Young, *Freeing Mohammed Zakari, in* STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY, *supra* note 50.

[65] Interview by Jeremy Perelman with Nihad Swallah, Community Organizer, Legal Resources Center, in Accra, Ghana (Jan. 13, 2005).

¶33 The campaign itself involved action around one man's release from detention in a public hospital, and with it, one community's battle for their right to access health care in Ghana. This example demonstrates how multiple communities assimilate and incorporate ideas of "rights" and how this assimilation works over time. Our case study draws on the encounter between several legal norms, encapsulating the internationally and domestically recognized right to be free from arbitrary detention,[66] the right to habeas corpus,[67] the right to "the highest attainable standard of physical and mental health,"[68] and the constitutionally endorsed "right to good health care."[69] It also involves an encounter between these norms and the social norms that belonged to the community in Nima, Ghana.

¶34 The *Zakari* case began and ended formally in one month, but its significance lies in the pursuit of human rights that is still underway. Mohammed Zakari, an elderly subsistence farmer, was detained in a public hospital in Accra for failure to pay his medical expenses. His case was brought by the Legal Resources Center of Ghana. In this section, after introducing the community and the human rights professionals who were involved in the case, we retell the case through seven significant moments. Each of these represents the choices and turning points of advocacy and mobilization.

¶35 The Legal Resources Center is a Ghanaian human rights organization based in Nima, a small crowded community wedged in Accra, the capital of Ghana. The community of Nima encompasses 150,000 people who reside in a crammed urban location in central Accra, which has a population of some 2.4 million. Many of Nima's residents are migrants from other parts of Ghana, mostly from the impoverished North. The majority of Nima's population belongs to a Ghanaian minority: it is Muslim and speaks Hausa. Nima is known as one of Accra's poorer districts: it provides the domestic labor for the rich communities that reside in lower-density, leafier parts of Accra, the informal labor for the administrative and business districts that encircle it, and the unskilled labor needs of local industries.

¶36 Crowded arterial roads delineate Nima, and few non-Nima residents seem to venture in. Yet the main street is often teeming with people, serving as the entry to Nima's market, where cheap Chinese gadgets are sold, along with oil, flour, vegetables and meats. Petty traders, tailors and artisans attempt to make a living in the middle of the crowds and among the dense array of advertisements for beauty products, American sodas, or Ghanaian political candidates. In these six square kilometers, development concepts like "rationing," "planning" and "provision" reveal their foreignness at once. So did the concept through which the *Zakari* case was framed – the concept of "human rights." This foreignness arguably remained until the community itself was able to contribute its own conception of rights.

¶37 Established by two law students at the University of Ghana, Raymond Ataguba and Mahama Ayariga,[70] the Legal Resources Center draws on a model of legal

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[66] ICCPR, *supra* note 14, at art 9(1); CONSTITUTION OF THE REPUBLIC OF GHANA 1992, *supra* note 12, at arts 14, 33.

[67] *Id*.

[68] ICESCR, *supra* note 14, at art. 12(1). (Ghana ratified the ICESCR, without reservations, along with the ICCPR, on September 7, 2000).

[69] CONSTITUTION OF THE REPUBLIC OF GHANA 1992, *supra* note 12, at art. 34, § 2 (establishing the right to good health care as a directive principle of state policy).

[70] Mahama Ayariga, one of the Legal Resources Center's founder and its original Executive Director, was

services, which is informed by comparative examples, especially across Africa and the Americas. Indeed, the Legal Resources Center borrows its name from the famous public interest law organization in South Africa, which has evolved from anti-apartheid advocacy to constitutional rights litigation.[71] Mahama Ayariga interned at the South African Legal Resources Center, and both Mahama Ayariga and Raymond Ataguba earned graduate degrees from Harvard Law School and maintained contact with its faculty and students.

¶38 The Legal Resources Center employs expansive definitions of "legal resources" and "human rights," which include the provision of conventional legal aid, dispute resolution, and importantly, the use of its office space for local groups to meet. During these meetings, community groups trade local gossip, advice, warnings and complaints—and sometimes all of the above—under the heading of "human rights education." With this format, the mothers of Nima, with the help of the Legal Resources Center, have managed to draw attention to the lack of street lighting in Nima, the pitfalls of the open drain which snakes its way between their homes, and the refusal of the public works to remove rubbish from the Nima streets. Their rights-claims are distinctively "economic and social" in character. By 2003, a "right to health campaign" had been underway for several years.

A. The First Meeting

¶39 Our case study begins in January 2003, at one of the community meetings. Two lawyers from the Legal Resources Centre, the Mother's Club of Nima, and several student interns from Harvard Law School and their professor all met to discuss the future steps in the right to health campaign.[72] The meeting was coordinated by a knowledgeable member of the Mother's Club, Auntie Rahina, who wore didactic Oxfam T-shirts over her elaborate African dress. Nihad Swallah, the young community organizer, also facilitated the meeting.

¶40 Before coming to Ghana, the student interns had studied Ghana's "user fee" system of health care, which they expected would be the central legal and institutional backdrop for claiming a right to health in Ghana. As mentioned earlier, this "user fee" system required patients to pay for their treatment before it could be administered by doctors or nurses. The institutionalization of this system followed a common trajectory in public health financing in Africa. Ghana, the first African country to gain independence, inherited the hospitals and clinics of the British-colonized Gold Coast, and had declared, at independence in 1957, a free public health care system.[73] However, Ghana institutionalized fees for services in 1971.[74] In 1985, the service schedule became the

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pursuing a Masters of Law at Harvard Law School at that time.

[71] For a description of the South African model, *see* Perelman, *supra* note 20.

[72] We were part of this campaign, which was informed by the direct participation, as well as scholarly approach, of Professor Lucie White. For an example of this approach, *see* White, *supra* note 35; *see also* Lucie White, *'If You Don't Pay, You Die': Death and Desire in the Postcolony*, *in* EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 57 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

[73] For a description of the colonial origins of this facility and its current segregation along socio-economic lines and with a bias towards civil servants, *see* RANDOLPH QUAYE, UNDERDEVELOPMENT AND HEALTH CARE IN AFRICA: THE GHANAIAN EXPERIENCE 112 (1996).

[74] Delali Margaret Badasu, *Implementation of Ghana's Health User Fee Policy and the Exemption of the Poor: Problems and Prospect*, *in* AFRICAN POPULATION STUDIES SUPPLEMENT A TO VOL. 19, 290 (2004)

"cash and carry" healthcare scheme, which was instituted as part of a "cost recovery" policy in the health sector. This healthcare scheme is connected with a raft of structural adjustment policies promoted by the World Bank. These policies were developed in order to finance and contain the rising costs of publicly provided health service in developing countries .[75]

¶41 Ghana's legislative text included a system of "exemptions" from health care payments. These exemptions purported to make "user fees" less discriminatory and regressive. With an exemptions system in operation, user fees would be waived for particular classes of people – for public servants, for instance, and also for the elderly, children, and pregnant women in need of health care. In setting out "general exemptions from hospital fees," the legislation also established that:

> No fees shall be paid in respect of services rendered in a hospital to—
> (a) any person certified in writing by a medical officer to be unable to pay those fees on the ground of poverty. . . . [76]

However, the exemptions from the user fees were rarely enforced for the category of those "unable to pay." In fact, only public servants were in a position to demand their exemptions in the clinics that treated them. Other users either did not know of them, or did not have the clout to request free care. The process for determining eligibility for the user fees exemption, located in the clause that Legal Resources Center lawyers called the "pauper exemption," contained no regulatory definition.

¶42 Until 2003, the Legal Resources Center's right to health campaign had involved an exemptions education campaign, which aimed to inform community members of their rights, in the hope of ensuring that their demands for exemptions would be made and met. Student interns in prior years helped put up posters in the local clinics and held meetings with pregnant women advising them of their rights in childbirth and in post-natal care. The student interns had gathered affidavits from community members who had been patients in local clinics and from the nurses who had treated them. The interns also asked local chiefs, *imams,* and others about their experience under the user fees regime.[77]

¶43 Despite these efforts, educative strategies failed to resolve the basic structural problem of health care. Even when patients knew to demand their exemptions, local clinics and even hospitals did not have the resources to grant them. Because there was no framework in place to seek their reimbursement, granting the exemptions would simply

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(describing the progressive introduction of user fees in the Ghanaian health care system, pointing to the introduction of a system of exemptions in 1992, with input from international donors).

[75] For a discussion of the 1987 pan-African Bamako Initiative, which set out the principles of entrenched user fees for public facilities across Africa, *see* GAY HUTTON, DEPARTMENT FOR INTERNATIONAL DEVELOPMENT HEALTH SYSTEMS RESOURCE CENTER, CHARTING THE PATH TO THE WORLD BANK'S "NO BLANKET POLICY ON USER FEES" (2004), *available at* http://www.dfidhealthrc.org/publications/health_sector_financing/04Hut01.pdf .

[76] Hospital Fees Act, §§ 2, 4, (1971) (Ghana).

[77] The right to health campaign in Nima had also previously involved a public hearing featuring community members, health care providers, and local officials, as well as a correspondence with the local World Bank office around the issue of exemptions. *See* LEGAL RESOURCES CENTER, *Right to Health Campaign Internship Report* (2002) (on file with authors).

deplete these public facilities of their drugs, dressings, and physicians' time. The educational focus of the right to health campaign had reached a stalemate.

¶44 At the same time, the Legal Resources Center took part in public consultations about the user fees system, and sought to canvas the potential for alternative financing models, such as a national health insurance system. Studies of the negative impact of user fees had long been circulated in academic and donor communities and yet, decision-makers at the national level had not acted. Action from such decision makers was recognized as critical to ending the user fees system.[78] The Legal Resources Center had therefore been involved in assessing pilot community health insurance schemes, in the hope that its findings would be relevant to national decisions.

¶45 A very different campaign began in January 2003. At the Mothers' Club meeting, attended by some 20 women and student interns, the students began a small presentation of their research on health. They had listed eight "strategies for action" for health in Nima, and planned to rank them after the mothers' input. After the strategies were listed and before the priority-setting had begun, each woman was invited to describe her experiences with the health system. The mothers first seemed surprised at this shift in gear, but the question ignited a small cluster of women sitting at the back of the room, one of whom could hardly hide her impatience. When her turn finally came (her name was Salima), she was quick and concise. Her cousin, Mohammed Zakari, was at the Ridge Hospital. She needed to raise money for him. The money was not meant for her cousin's treatment, it was meant for his release from the hospital. Hospital administrators detained him there because of his inability to pay for treatment he had received, and would detain him until his hospital bill was paid.

¶46 The Legal Resources Center lawyers instantly saw potential legal claims, combining basic habeas corpus rights with other rights denied by the health system. As the interns' enthusiasm about the legal potential of the case grew, so too did the women's indignation at Mohammed Zakari's treatment. Indignation fueled enthusiasm, and vice versa. The footprint was taking shape. The lawyers decided to take on the case.

B. The Affidavit

¶47 The next pivotal scene in our case study occurred 10 days later, when two student interns visited the Ridge Hospital where Mohammed Zakari was detained. Prior to the interview, the students researched Ghana's habeas corpus laws and other human rights provisions and talked at length with the Legal Resources Center's attorneys. The interview occurred in the cramped interior of a Ghanaian taxi, parked on the hospital grounds. A translator assisted with gathering the affidavit for Mohammed Zakari's claim. The affidavit served the formal legal purpose of orienting the legal claim that would follow. It also allowed Mohammed Zakari to articulate, in his own words, his experience with the health system, within the constraints of the legal action.[79]

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[78] Hutton, *supra* note 75, at 1.1 (predicting that user fees would cease as a viable national financing instrument "not so much through further presentations of the negative impact of user fees (which are mainly circulated amongst academicians and donor agencies), but instead through dialogue at the highest political level with players the government can trust.").

[79] The questions posed to Mohammed Zakari were configured by the requirements of the legal action. However, the narrative of "rights" opened the way to a broader set of questions, which were focused on his own evaluation of his experience. We suggest that, although constrained by the structure of legal action, this effort is more congruent with an attempt to give voice to the marginalized than larger scale approaches.

¶48 The affidavit indicated that Mohammed Zakari was 62 years-old, and was a subsistence farmer in Ghana's impoverished North.[80] From Mr. Zakari's cassava and maize sales, he made about five hundred thousand cedis per year (or about 20 U.S. cents per day),[81] which was below Ghana's national poverty line, and one third of the national average of about 60 U.S. cents per day.[82] On this income, Mr. Zakari supported his wife and three school-age children.[83] Despite these hardships, Mohammed Zakari did have one thing in his favor: he had a cousin in Accra.

¶49 On a Friday in November 2002, just before afternoon prayer time, Mohamed Zakari felt a sharp pain in his abdomen and asked that a call be made to his cousin. Mr. Zakari's sister took him directly to his cousin's home in Nima. The day after Mr. Zakari's arrival, he was taken to the Ridge Hospital, the closest public hospital, and his cousin registered him there. At the hospital Mr. Zakari underwent emergency hernia surgery, which was followed by a second operation three weeks later. After Mr. Zakari recovered, he was discharged and handed a bill that included the costs of his dressing, injections, laboratory, theatre, sanitation, and accommodation. The hospital bill totaled two million-three hundred and ninety six thousand cedis (about U.S. $ 240).

¶50 The hospital bill amount was more than three times Mohammed Zakari's yearly income. After telling the hospital's administrative staff that he could not afford to pay this bill, he was told he could not leave the hospital unless it was settled. For the next six weeks, Mr. Zakari was detained within the boundaries of Ridge Hospital—a boundary guarded by private security and a high fence. During this period of detention, Mohammed Zakari was only allowed outside the fence under the supervision of hospital staff, and in this case, only to buy plantains to eat. He paid for these with donations from the Nima community, since the hospital refused to provide regular meals after his official discharge. Besides these rare ventures and the leftovers that the hospital handed out sporadically, Mr. Zakari's only source of food came from his wife, who had to leave their children in the care of relatives, which she could only occasionally do. During this time, Mr. Zakari slept on a bed in the porch of the hospital ward and was charged a daily fee of fifteen thousand cedis (about U.S. $1.50) to do so.

¶51 During this time, Mohammed Zakari was not aware of the exemptions formally provided for indigent people within the Ghanaian health system. Neither the hospital's administrative staff, nor any other nurse or doctor with whom he came into contact, informed him of the potential for people living in extreme poverty to be exempted from this financial burden, as provided by the letter of the law. With no means to challenge this situation, Mr. Zakari was left to wait for outside assistance. Mr. Zakari's relatives in Nima were the only plausible source.

See, e.g., WORLD BANK, VOICES OF THE POOR (1999) (a widely publicized World Bank study undertaken to collect the voiced of "60,000 poor women and men from 60 countries, in an unprecedented effort to understand poverty from the perspective of the poor themselves.").

[80] Mohammed Zakari Aff., Jan. 21, 2003 (on file with the authors).

[81] *Id.*

[82] The average daily income in Ghana at the time of the Zakari case was estimated at $US 0.60 per day. *See* GLOBAL POLICY NETWORK, INCOMES IN GHANA (May 2004), *available at* http://www.gpn.org/data/ghana/ghana-analysis.doc at 3.). According to the World Bank, 59% of food crop farmers live below Ghana's national poverty line. *See id*. at 5. The average per capita income in northern Ghana was 2-4 times lower than that of the southern regions in the late 1990s. WORLD BANK, *Bridging the North South divide in Ghana?* in BACKGROUND PAPER FOR THE 2006 WORLD DEVELOPMENT REPORT.

[83] *See* Zakari Aff., *supra* note 80.

¶52 Coincidentally, on the day Mr. Zakari's affidavit was completed, oil prices in Ghana were raised by 80 percent.. The gas crisis would impact all sectors of the economy. It would also impact the mobilization strategies in Mr. Zakari's case.

C. The Litigation

¶53 Because of Mohammed Zakari's detention, the strategy of aggressive litigation was a promising one. The lawyers at the Legal Resources Center could seek a writ of habeas corpus on the ground that the state's detention of Mohammed Zakari, without first charging him with a crime, was patently illegal. Stripped away from the hospital context, the state would have to show due cause for the deprivation of liberty. A letter of demand to the state probably would have sufficed to release Mohammed Zakari. Thus, filing a lawsuit before taking this less adversarial step would seem, to the experienced lawyer, a misuse of resources. Nonetheless, the lawyers decided to join the habeas corpus claim with a human rights claim that challenged the illegality and inequity of the system of health financing in Ghana. The lawyers therefore used the complaint as a vehicle for drawing attention to norms protecting health, in both Ghana's Constitution and international human rights instruments.[84] The lawyers supplemented this study with comparative interpretations of similar constitutional protections elsewhere.[85] These examples indicated the ways in which a constitutional right to health, even if recognized only as a "directive principle of state policy" rather than a "justiciable right,"[86] could inform the interpretation of constitutional rights and of the remedies that would follow.

¶54 The remedies that were sought were expansive, extending beyond Mohammed Zakari's complaint. Indeed, the lawyers crafted the lawsuit as a challenge to the entire structure of Ghana's health care cost recovery system, on the basis of how that system impacted the poor. The complaint, lodged in Ghana's High Court, stated four claims, each with its own remedy, and listed the Attorney-General as the defendant, on behalf of the Ministry of Health. Taken together, these four remedies combined traditional relief for the habeas corpus violation with more far-reaching efforts to coax the Ghanaian judges to deliver more structural remedies that would address the inequities of the health care system and prevent the reoccurrence of hospital detentions.

¶55 The first remedy sought was an order of "mandamus," that would require the Ministry of Health to set up and implement a procedure for distinguishing "paupers" from patients who could pay, at the time of treatment.[87] It demanded that other actors be

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[84] CONSTITUTION OF THE REPUBLIC OF GHANA 1992, *supra* note 12, at art. 34(2); *see also* ICESCR, *supra* note 14, at art. 12.

[85] The two most relevant jurisdictions cited in the claim were India and South Africa. *See* INDIAN CONSTITUTION, arts. 39, 47; SOUTH AFRICAN CONSTITUTION, art. 27.

[86] Lawyers relied on the example of the Indian Supreme Court, which had interpreted the directive principles of state policy relating to health as informing the constitutional right to life, leading to a constitutional duty to provide emergency medical treatment. Samity v. State of W.B., (1996) 4 S.C.C. 37 (Sup. Ct. India). They also relied on the South African Constitutional Court's assessment of the duty on the government to make reasonable efforts to provide health care. Soobramoney v Minister of Health, Kwazulu-Natal, (1998) (1) SA 765 (CC) (S. Afr.); *see also* Minister of Health v Treatment Action Campaign, (2002) (5) SA 721 (CC) (S. Afr.).

[87] More specifically, the remedy demanded that regulations be promulgated under the Hospital Fees Act 1971. It sought:

1. An order for mandamus compelling the Ministry of Health to:
   (a) make regulations that establish criteria and procedures for defining at the time of initial

consulted by the Ministry in establishing this procedure. The targeting of the Ministry of Health, rather than the Ridge Hospital, was deliberate. It constituted a departure from the individual focus of common law remedies by compelling the Ministry of Health to establish an administrative process that would finally define and implement the pauper exemption at the national level. Furthermore, the remedies requested that the judge require the Ministry of Health to structure that process in a consultative way. If the proposed remedy were granted, the Ministry of Health would be required by the High Court to include specific groups in that consultative process, including people like Mr. Zakari.

¶56 This idea of "stakeholder consultation" borrowed heavily on U.S. legal literature on regulatory negotiation.[88] Drawing on participation, the practice of regulatory negotiation convenes together interest groups that have been sharply divided about what they want the regulations to accomplish. Regulatory negotiation also enlists private actors to work with the State in the administrative realm. Finally, regulatory negotiation sets in motion a learning process for all participants. Transplanted into the Zakari remedy,[89] a court order requiring regulatory negotiation could launch a new process for reforming Ghana's health care system.

¶57 As a second remedy, Mr. Zakari demanded an order requiring "the authorities of the Ridge Hospital to exempt Mohammed Zakari from payment of his medical costs on the grounds of poverty" under the Hospital Fees Act 1971.[90] The third remedy sought was a declaration by the court that the hospital's refusal to release Mohammed Zakari violated his constitutional right "to be free from unlawful detention" under articles 14 and 33. And finally, the fourth remedy demanded was a declaration by the court that the hospital's failure to define the pauper exemption and then grant it to Mohammed Zakari was a "simple and egregious violation of his right to health" under articles 33 and 34 of the Constitution, as well as a violation of his right to be free from discrimination on the grounds of poverty under article 17(2), and of his right to administrative justice under article 23.[91]

> registration whether a prospective patient is 'unable to pay ... fees on the ground of poverty' and, as such, entitled to the exemption under §§ 2(a) and 4(2) of the Hospital Fees Act 1971, after consulting with Members of the Parliament, the Ministry of Health, the Ministry of Finance, health system and finance experts, health care providers and low income health consumer groups; (b) implement the exemption scheme in Ridge Hospital and all other public health facilities covered under the Hospital Fees Act 1971.

[88] *E.g.*, Jody Freeman & Laura Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L. J. 60 (2001) (reporting evidence that agency negotiation of rules generates more learning, better quality rules, compared to conventional rulemaking for environmental protection); *see also* Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 3 UTAH L. REV. 797 (2009) (exploring models of adjudication and alternative dispute resolution in South Africa).

[89] Ghana's common law system, its adversarial court processes and independent judiciary make this process of "borrowing" a broadly feasible one, with the knowledge that local institutions would take up these ideas in new—and sometimes unpredictable—ways.

[90] HOSPITAL FEES ACT, 1971 (Ghana), §§ 2, 4.

[91] CONSTITUTION OF THE REPUBLIC OF GHANA 1992, *supra* note 12.

D. The Petition

¶58 In addition to the litigation, the lawyers and student interns worked together in drafting a petition for the community to sign. The "Petition for the Right to Health" would be presented to the Ghanaian Ministries of Health and Finance, the Commission for Human Rights and Justice (CHRAJ) and the Health Committee of Parliament. The signatures for the petition were collected by student interns and by members of Nima's Youth Group, which, like the Mother's Club, is a community group that collaborates with the Legal Resources Center.

¶59 In collecting these signatures, volunteers asked community residents a series of questions about their experience with the exemptions from user fees. The volunteers informed residents of the exemption policy and the plight of Mohammed Zakari, and of plans to march to Parliament to deliver the Petition. The volunteers then invited residents to sign their name at the end of this statement:

> We, the people of the Nima, Mamobi, and Newtown communities, believe that our right to health is being neglected. We know that paupers, pregnant women, the elderly over 70 years old, and children under 5 are legally exempt from medical fees. However, this exemption policy is not enforced. We often do not go to the hospital when sick or injured because we know that we will not be able to afford medical care there. In emergencies, we should always receive medical care even before we are asked to pay. Finally, like Mohammed Zakari, we should never be detained in the hospital because we cannot pay.

The petition was met with a significant community response. The circulation of the petition triggered many conversations between interns, youth group members and other members of the Nima community.[92] 1500 people signed the petition between January 13 and January 21, 2003. In addition to circulating the petition, the teams also prepared a press statement and invitations to the press officers of Ghana's main TV and newspapers. One team designed a banner with the slogan "Health Regardless of Wealth."

¶60 This petition presented a different form of politics to the people of Nima. Of course, politics was ever-present in the community. Political advertisements and billboards lined the streets, and political announcements streamed constantly on the radio. Indeed, even during the interns' visit, there was a National Reconciliation Commission event, meant to apply the balm of "transitional justice" to the wounds of Ghana's former military rule, which took up much of the radio air. Many of these attempts, however, generated cynicism and inertia in Nima itself. Attempts to draw members of the Youth Group or Mother's Group into consideration of these issues were met with silence or amusement. The petition seemed to have the opposite effect. By commandeering a face-to-face, interactive, and inclusive process of politics—at least, as much was possible on the streets and in the households of Nima—the petition-gathering invited residents to form an opinion, discuss that opinion, and register it in a quasi-official notice.

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[92] Interview with Jennifer Pendleton, Student Intern (Feb. 28, 2008) (on file with authors).

E. The March

¶61 After five days of signature gathering, there was a noticeable air of expectation in the Legal Resources Center conference room when interns, youth group members, mothers and lawyers met together. All who were present seemed invested in the next steps. The Ghanaian attendees seemed more alert to what the interpreter was saying, and fired a number of questions at him. Hands were repeatedly raised, and opinions given in relation to strategic steps. This reaction contrasted with that during meetings held during other parts of the campaign. For instance, when the progress of the litigation was reported to the community, it evoked only patient passivity.

¶62 On January 18, the question for the meeting was whether to march on Parliament on the day of filing the suit in court and the petition in Parliament. The march was consistent with the overall right to health strategy, which was to make the community's outrage about the health system as loud as it could be. Nonetheless, the group faced two problems: first, the Legal Resources Center had not informed the police about the demonstration in due time, which meant that the demonstration would be illegal; second, they recognized that the march might be joined by people violently protesting things other than health. Other groups, especially those angry about the staggering hike in gas prices, might join the march and distort or co-opt its health-rights message. Worse yet, the march might trigger chaotic unrest.

¶63 Attendees voted on whether to march. Members of the Youth Group, buoyed by their work in collecting signatures and educating interns, intended to march. However, the mothers were worried about the consequences of violence, and some of the lawyers were worried about the fine line between democratic self-expression and violence.[93] Mahama Ayariga wished to picket Parliament, and gave an impassioned speech invoking "courage" and "justified, non-violent illegality." Nonetheless, with the exception of Mahama Ayariga and one of the students, the participants at the meeting voted to cancel the march. Instead, the majority decided to conduct a press conference in front of the Legal Resources Center offices in Nima, followed by a bus ride to Parliament to present the petitions.

F. The Release

¶64 A key part of the Zakari case was then to allow the three "rights" strategies—the litigation, the press conference, and the petition to Parliament—to occur on one day. This order and quick succession of events was meant to enhance their respective significance. The campaign was conceived as a way to shame or force the government to grant Mr. Zakari's public release, and to answer the claims about the dysfunction of the user fees system and its impact on human rights.

¶65 However, in the early hours of January 22, Mr. Zakari was allowed to leave the hospital premises. Mr. Zakari's bill did not indicate whether anyone had settled it. The lawyers speculated that the government had intervened to undercut the momentum generated by the Legal Resources Center around Mr. Zakari's detention. It seemed that the release would adversely affect the mobilization behind the *Zakari* case, by rendering

[93] Interview with Raymond Ataguba, Co-founder of the Legal Resources Center, in Berlin, F.R.G. (July, 2007).

the habeas corpus claim moot. The students feared that the opportunity to expose the illegality of user fees and to develop precedent was lost.

¶66 In fact, the momentum built up around the right to health campaign could not be so easily quelled. The lawyers of the Legal Resources Center—and Mahama Ayariga in particular—immediately recognized the potential of bringing Mohammed Zakari himself to the press conference and having him speak in front of the community about what had happened to him. Just as the script of the press conference had to be improvised, so too did the legal claim: it no longer demanded the release of Mohammed Zakari through a habeas corpus action, but instead sought damages for wrongful imprisonment.

¶67 Approximately 100 people attended the press conference. Members of the press had been invited, and members of the community were attracted by the loud blaring "high life" music, sodas and plastic chairs. Undoubtedly one of the best attractions was the coterie of white faces and bland dress of the student interns, as foreign as the Chinese gadgets on sale in the road. Auntie Rahina arrived with Mohammed Zakari. The big conference table was taken from the Legal Resources Center offices and set up in front of the audience. A few chairs were arranged behind the table where Mahama Ayariga and Nihad Swallah sat, as well as a Muslim cleric and a couple of interns, all flanking Mohammed Zakari. Behind them was propped a 6 by 4 foot sign reading "Health Regardless of Wealth."

¶68 Nihad Swallah began by reading aloud an official statement describing the Legal Resources Center's litigation and petitions. The words of this young, articulate, Muslim woman became a singular memory in the *Zakari* case – at least, for the student interns, and for the lawyers of the Legal Resources Center.[94] Indeed, Nihad Swallah's speech became central in reports of the local press about the health financing situation and the public protest.[95] She described the ways in which Ghana's public hospitals rarely implemented pauper exemptions, such that Mohammed Zakari's predicament was not exceptional. In the spirit of the consultative process pushed by the lawyers and organizers involved in the action, she avoided using an accusatory tone towards the Ministry of Health by pointing out that providing exemptions more regularly would strain the Ministry financially.

¶69 Mohammed Zakari was then asked to tell his story, and as he called on the audience to pray, he struggled to remain composed, which elicited prayers and tears from the crowd. At then end of Mr. Zakari's account, when he stated that he was "now a free man,"[96] the community rose to its feet clapping and calling out prayers and words of support in jubilation.

¶70 The members of the press were curious about the way the press conference was unfolding, and were surprised at the pamphlets the students had been handing out. Many of the press' questions were directed at the origins of the protest, rather than its

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[94] See *e.g.*, Interview with Abdullah Baasit, Legal Resource Center Lawyer (Apr. 2, 2008) (on file with authors); Interview with Jennifer Pendleton, Student Intern (Feb. 28, 2009) (on file with authors).

[95] *Government Sued over Hospital Fees Act*, The Ghanaian Times, Jan. 23, 2003, at 1.

[96] Unlike Mohammed Zakari's report during the collection of the affidavit, at this time he was able to relate his experience in his own words. This is closer to the subtle efforts of ethnographers featured in PIERRE BOURDIEU, THE WEIGHT OF THE WORLD: SOCIAL SUFFERING IN CONTEMPORARY SOCIETY (Priscilla Parkhurst Ferguson et al., trans.) (1999); *compare with* VOICES OF THE POOR, *supra* note 79.

substance.[97] During the question period, several journalists asked why community members hadn't engaged in a protest and marched to Parliament. The journalists tried to get the students' inside story: hadn't they brought all of this strange "legalese" straight from their foreign law school? In contrast to the rest of the crowd, whose emotional responses reflected a commitment to the authenticity of the occasion, the press did not seem to trust what was going on. As Ghanaian professionals, and as an educated elite, they were distinct from members of the Nima community and had a different response to the organization of events under the banner of Human Rights. They were clearly more interested in the intentions of the foreign students than those of the community members, and directed their questions to the former group and the lawyers of the Legal Resources Centre.

¶71 Six days later, the following appeared in a prominent Ghanaian newspaper:

> Three billion cedis will be disbursed this year to the country's hospitals to settle bills of the needy and vulnerable under the exemption policy of the Ministry of Health. The amount represents a 100 per cent rise over last year's figure of two billion and forms part of the government's plan to increase the funds to cover all beneficiaries under the scheme. The Deputy Ministry of Health (…) made that known in Accra yesterday at a meeting with community leaders from Nima and Mamobi to dialogue on how best to operate the exemption policy in the two communities. The people had earlier in a petition appealed to the ministry to put in place workable mechanisms to ensure the effective operation of the system in the hospital and clinics in the two areas. The Deputy Minister said apart from the delays, the funds made available are inadequate to cater for all the beneficiaries and most health institutions are not reimbursed for the treatment of beneficiaries of the scheme.[98]

G. The Present Institutional Settlement

¶72 Seven years after this intensive month of Human Rights advocacy, the campaign has affected change for Mohammed Zakari, for the Legal Resources Center, for the student interns and for Nima's community. The campaign has also lent influence to efforts to eliminate user fees in Ghana, and importantly, to ensure that alternative health financing models respect the human rights of those who cannot afford to pay for care.[99] Mohammed Zakari was released and returned to his Northern village. We are unaware of Mr. Zakari's whereabouts and unfortunately have not been able to interview him about these events.

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[97] Interview with Jeremy Perelman (Jan., 2003) (detailing questions that journalists asked him after the press conference) (copy on file with authors).

[98] *3 Billion Cedis Voted for Medical Bills*, DAILY GRAPHIC, Jan. 29, 2003, at 3.

[99] For an overview and human rights critique of user fee-based health financing in developing countries, *see* Margaux J. Hall, Aziza Ahmed & Stephanie E. Swanson, *Answering the Millennium Call for the Right to Maternal Health: The Need to Eliminate User Fees*, 12 YALE HUM. RTS. & DEV. L. J. 62 (2009).

¶73 The Zakari campaign was one of many activities that catapulted the Legal Resources Center into a more prominent public role. At the time of the *Zakari* case, the organization had been taking part in consultations about transitioning from user fees, and exploring alternatives in health insurance.[100] The *Zakari* campaign became a key step in pointing to the practices of detention and the hospitals' and the Ministry of Health's failure to implement exemptions for paupers under the user fee system.[101] The Legal Resources Center also conceived the campaign to push authorities to act and to influence the designing process and content of the user fee alternatives. The organization suspended the wrongful imprisonment claim on the part of Mohammed Zakari, in order to join, in a less adversarial role, the negotiations about the new insurance system.

¶74 During negotiations over this health financing alternative, the Legal Resources Center sought to represent how the interests of the poor would be impacted by the national health insurance system, which was publicized as one which would bring "equity, risk equalization, solidarity, cross-subsidization, quality, efficiency, community ownership, and sustainability in health care."[102] Central to this scheme is a system of decentralized insurance, which is financed partly through public national cross-subsidization and partly through locally designed contribution and membership schemes.

¶75 Lawyers at the Legal Resources Center played a role in the design stage for both the legislation – which became the *National Health Insurance Act* (2003), and the regulations.[103] They made representations as to how such decentralization could have a positive impact on human rights, on the basis of the Legal Resources Center's work in Nima, and in poor communities in the rural North.[104] Decentralized insurance schemes instituted under the new system have attempted to democratize the process of defining the categories of people exempted from premium payment, while opening up the regulatory framework to local institutional and financing solutions.[105] New generations of student interns from American law schools, many of whom learned of the Legal Resources Center because of the *Zakari* case, have been engaged in the necessary fieldwork and desk-study research for these issues. Though the Legal Resources Center exerted limited influence on the national regulations,[106] it helped determine the criteria

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[100] In Ghana, the transition from user fee to a national health insurance financing scheme was outlined under the Poverty Reduction Strategy framework, framework *see* GHANA POVERTY REDUCTION STRATEGY, AN AGENDA FOR GROWTH AND PROSPERITY 111 (2003) (available at http://planipolis.iiep.unesco.org/upload/Ghana/PRSP/Ghana%20PRSP%202003%20Vol%201.pdf (last visited March 10, 2010), and reflected the falling out of favor of user fees at the donor level. A key requirement, however, was national support for change. *See* Hutton, *supra* note 75. Indeed, the shift to health insurance was a central element in the successful electoral platform of the centre-right New Patriotic Party's candidate for the 2000 presidential elections, John A. Kufuor.

[101] The Ministry of Health was responsible for implementing the exemptions. Under the current National Health Insurance Act 2003, a National Health Insurance Authority has been created to oversee health insurance. This authority is nevertheless still responsible to the Ministry of Health.

[102] NATIONAL HEALTH INSURANCE POLICY FRAMEWORK FOR GHANA (2004) (on file with the authors).

[103] NATIONAL HEALTH INSURANCE ACT (Act 650) (2003) [hereinafter "NHIA"]; NATIONAL HEALTH INSURANCE REGULATIONS (L.I. 1809) (2004).

[104] Since 2004, as part of a United Nations Development Programme-funded "human rights cities" program, the Legal Resources Center has taken a leading role in facilitating the participatory design of District Mutual Health Insurance Schemes [hereinafter "DMHIS"] which are "human rights positive."

[105] LEGAL RESOURCES CENTER, HUMAN RIGHTS CITIES REPORT (2005, 2006) (on file with authors).

[106] NATIONAL HEALTH INSURANCE REGULATIONS, *supra* note 103, at L.I. 809, § 58 (listing four cumulative conditions that may be exempted from premium payment under the category of "indigent").

for individuals who would be exempt from the premium payment in national health insurance under the 2003 law.[107]

¶76 Other implementation problems have emerged.[108] Indeed, a new version of national health insurance is now being considered.[109] A central concern remains: despite the advocacy efforts by the Legal Resources Center and others and the system's claimed intentions, replacing user fees with national health insurance has not put an end to hospital detentions. The Legal Resources Center's ongoing surveys reveal that, in fact, hospitals still use this practice to raise revenue, particularly in rural areas of Ghana.[110] Insurance premiums have not resolved the financial shortcomings in the system. In other words, the *Zakari* case did not secure a right to health in Ghana, though it made significant strides toward that goal.

¶77 Perhaps the greatest effect of the rights campaign has been on the community itself. The Mothers Club and Youth Group continue to mobilize around the levels of socio-economic provision within the Nima community. The community's efforts are buttressed by the success-against-the-odds story of one of their kin. Nima itself has been studied qualitatively in investigating the national health insurance scheme. Ironically, however, the *Zakari* case has diminished the community's own access to the Legal Resources Center. The latter organization's new status as a leading national human rights organization and a partner to legislation drafting has limited its ability to engage in litigation and community petitions. The Legal Resources Center's new, expanded, main office is now located in a more leafy part of Accra, away from Nima.

IV. THE FOOTPRINTS METAPHOR IN ACTION

¶78 Since the *Zakari* case took place, it has been retold to the Nima community, to Ghanaian communities outside of Nima, and to audiences outside of Ghana. By

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[107] NHIA, §81(2)(d) states that "no person is excluded from enrollment from the scheme because of physical disability, social, economic or health status"; §81(2)(a) states that discrimination in DMHIS is prohibited if it is based on "disability, social, economic or health status." NHIA, *supra* note 103, at §§81(2)(d), 81(2)(a).

[108] Among the various problems documented since 2005 are the lack of adequate and sustainable financing of the system to support the increase of newly registered patients under the DMHIS, the lack of systematized cross-subsidization between richer and poorer districts, and the economic inability of high poverty groups to pay the insurance premiums: *see* LEGAL RESOURCES CENTER, REPORT ON HEALTHCARE ACCESS IN THE BONGO AND WEST MAMPRUSI DISTRICTS OF GHANA (2008, 2009) (on file with authors).

[109] The Legal Resources Center is currently involved in negotiating the drafting of a new Bill to replace the NHIA, which would place institutional streamlining, financial sustainability and access at the core of the system through (1) a re-centralized institutional design (replacement of the DMHIS schemes by a single National Health Insurance Scheme, managed by a National Health Insurance Commission with expanded membership including "two persons representing organized labor, one of whom shall be a woman" and "two persons representing beneficiaries one of whom shall be a woman") and (2) a revamped financing system (which would create a National Health Insurance Fund, financed notably by new sources such as an export tax on Ghana's newfound oil and gas reserves). Proposed revisions include an expansion of the exempted categories, including the category of indigents. *See* DRAFT NATIONAL HEALTH INSURANCE BILL (2009) (on file with the authors). Importantly, national health insurance reform was a campaign promise of the center-left National Democratic Party, which regained power with the 2008 election of President John Atta-Mills. Mahama Ayariga, past director of the Legal Resources Center, was heavily involved in this campaign, and himself had run for Parliament after the *Zakari* case. A full discussion of the impact of rights—campaigning on professional politics in Africa – both for individual political careers and for political parties—is beyond the scope of this Article.

[110] *See* LEGAL RESOURCES CENTER, *supra* note 108.

retelling the story yet again in this Article, we seek to convey how it lodged itself in the community's collective memory and gave shape to an emerging social justice movement. As participants in the story, we witnessed the power of human rights to move people in multiple ways. Of course, as Westerners and scholars, our perception of the values motivating the community is distorted, yet we are able to perceive the reinforcing role that the human rights practice offered. The metaphor of "footprints" helps explain how.

A. Highlighting Memory and Agency

¶79 As described above, Nihad Swallah introduced the metaphor when she described how the case had become "one of the biggest achievements of what legal aid has done in this community."[111] Three years after the case, she attributed this achievement to the fact that "everyone, almost all the community members were involved."[112] It had thus become "like a footprint in everybody's mind: anybody you ask around knows the story."[113] Importantly, Nihad Swallah did not see Mohammed Zakari's situation as atypical; rather, she attributed the power of the case to the uncommon way in which the activists and community members responded to it. In her words:

> It is not that we went for this case and wanted to use it and for it to become a hit and everyone wanted to talk about this case, no. This case came up and we think that the way we dealt with it and type of community lawyering that we did around it was special and uncommon and captured the attention of all therefore we tell the story. Otherwise we don't see it as so unique.[114]

¶80 In seeking to uncover the meanings of these "footprints," we consider the ways in which the footprints metaphor expands our ability to understand contemporary human rights practice. Above, we contrasted the images of the footprints with the conventional wisdom of human rights, understood as precedents, covenants, anecdotes, and blueprints. We conclude, in this Part, by showing how features of the footprints metaphor were enacted in the moments—or retellings—of the Mohammed Zakari story. Such features reveal the prescriptive work done by the metaphor.

¶81 First, the locus of action remained within the community of Nima. Nihad Swallah, remembering Mohammed Zakari's story, starts by articulating it as a legal construct—a "case" of "legal aid." Even while implying that Mohammed Zakari's story created a favorable legal precedent, she interpreted and expressed the event through the question of "what [it] has *done for the community*." For her, the case was a moment of meaning-creation that was grounded in community norms. Further in the interview, she added: "For me, this is one of the cases the Legal Resources Center has dealt with and people talk about it because they were directly involved—it is in their memory and they want to talk about it every now and then."[115]

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[111] Interview by Jeremy Perelman with Nihad Swallah, Community Organizer, Legal Resources Center, in Accra, Ghana (Jan. 13, 2005).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*

¶82 Although the *Zakari* case involved lawyers, courts, and remedies, its locus remained with the community of Nima. Its central physical location was not a courtroom, but a crowded conference room; its central players were mothers, young men, student interns, organizers—as well as lawyers. The story was also enacted in a taxi, on a makeshift podium, and in the streets of Nima. Although it was a case, which was strengthened by the presence of formal law—habeas corpus, statutory entitlements, and multiple constitutional provisions, the norms that lodged in the community's own expression of the case were not restricted to law. At the moments when formal law was discussed, the community members were at their most passive; at the moments when Mohammed Zakari's rights were expressed as instances of justice, they were at their most engaged.

¶83 For example, in the first meeting with the Mothers' Club, a key moment occurred when the pre-established human rights script of "participation" was disrupted and the women were invited to speak out. This moment can be interpreted as a break from the subtle ordering and distribution of roles embedded in "progressive" programs framed in public law terms,[116] such as human rights education. The narrative space, unexpectedly opened up to express individual grievances, operated as a space in which a politics of justice was able to develop.[117]

¶84 The impatient, emotional story-telling by Mohammed Zakari's cousin, the excited looks among the lawyers, the mounting rumble in the back of the room—all transpired to produce a collective indignation. The rights footprint took place not only outside a courtroom, but also, crucially, inside the minds of those present. Moreover, the language of rights allowed different perspectives to develop in each participant – and, it should be emphasized, the presences of the interns meant that the perspectives were extraordinarily different—and created an altogether new horizon of action.[118] In a fluid back-and-forth effect, rights talk interacted with pre-existing social meanings (grief, suffering, law, action) to generate this politics of justice. The narrative became a medium, not to complain about suffering, but to denounce its inequity.[119] This went beyond giving people a sense that they should be aggrieved—most often they already know this.[120]

¶85 This practice may not be the same for all human rights. The assimilation of the right to health with community notions of justice succeeded in part because of the intellectual and emotional context linking modernity, colonialism, and development. That is, the right to health seemed to challenge market efficiency and commoditization as a prerequisite of development and a return to different considerations of how health care should be provided. This vision was more accommodating to status-based views of

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[116] For an ethnographic study of a public law-engineered program in the U.S., *see* White, *supra* note 35.
[117] For the distinction between the politics of justice and the politics of pity, *see* LUC BOLTANSKI, DISTANT SUFFERING: MORALITY, MEDIA, AND POLITICS (Graham Burchell, trans.) (1999) (suggesting that the international humanitarian movement is mobilized by the latter, rather than the former). The notions of justice and injustice that accompanied our experience suggest that the politics of justice can play an important role in the response to suffering – responses established from positions of closeness and distance.
[118] On the importance of individual life trajectories in the formation of identity, legal consciousness, and the "activation" or inactivation of rights, *see* DAVID ENGEL & FRANK MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICAN WITH DISABILITIES (2003).
[119] A seminal work, on the translation of the perception of misfortune into injustice is JUDITH N. SHKLAR, THE FACES OF INJUSTICE (1992).
[120] *Cf.* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: the Case of the New Departure*, 2739 SUFFOLK L. REV. 27 (2005).

justice.[121] It remains to be examined how successful such assimilation of rights discourse would be for a different set of rights, such as gender rights. This point highlights the contingency of the human rights footprint, and suggests that distributive justice conceptions raised by economic and social rights perhaps enjoy a greater prospect of success than mobilizing community conceptions of other human rights, such as rights to be free of discrimination on arbitrary grounds. Gender discrimination, for example, may be rationalized within customary norms of justice in particular communities, and be less open to translation in different cultural contexts.

¶86 With this caveat in mind, we suggest that the footprints metaphor has important implications for cross-cultural rights practice. The memory allowed the community to coalesce and sustain a localized movement. Yet this memory did not only reside in the geographic community of Nima. It carried significant meaning for other participants in the human rights campaign, who were mobilized outside of Ghana. For instance, a participant in the campaign retold the story at Stanford Law School, in 2005. The *Zakari* case was a central part of a presentation to law students about human rights in Africa, prompting many to sign up for further work in Ghana.[122] What was retained by the students was not identical, of course, to what was remembered by the community; and yet the rights idea was a mobilizing one. For example, the talk to students emphasized the moral dimensions of the case:

> The work we did around the case of Mohammed Zakari … led to the first ever right to health case ever started in a Ghanaian court. It was about the international and constitutional legal standard that says that everyone – no matter how poor – has a universal right to access the best possible health care. It was about the idea that you should not *die*, you should not be left untreated, you should not be deprived from your liberty – because you are too poor to pay a medical bill. For Mohammed Zakari, that humble, religious, dignified man had been locked up – and I mean *LOCKED UP*, with guards in arms at the door and a high metallic fence! – in a public hospital simply because … he couldn't afford his bill. He was locked up, *for simply being too poor*.[123]

¶87 Yet the moral idea was not the only animating one. The spontaneity and intrigue within the story probably also appealed to the American students' desire for adventure:

> Because of the mobilization and the "hype" in the community around his case, and although Mohammed Zakari's bill was mysteriously paid (by a

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[121] *See* A.J. van der Walt, *Modernity, Normality, and Meaning: The Struggle Between Progress and Stability and the Politics of Interpretation: Part 2*, 11 STELLENBOSCH L. REV. 226, 227-230 (2000); *see also* Katharine G. Young, *Securing Health through Rights*, *in* INCENTIVES FOR GLOBAL PUBLIC HEALTH 357 (Thomas Pogge, Matthew Rimmer & Kim Rubenstein, eds., Cambridge University Press, 2010).

[122] For commentary on the increasing dimension of transnational human rights work in U.S. clinical legal education, *see* Arturo J. Carillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527 (2004).

[123] Jeremy Perelman, Preparatory written notes for a recruitment talk for the "Making Rights Real: the Ghana Project" to students, Stanford Law School (2005) (on file with the authors).

> government agent) in the middle of the night – like in your best Hollywood movie … our action helped start negotiations with the government to have the community *itself* involved in shaping [health care financing in Ghana] and make it more accessible to the poor.[124]

Of course, the community of Nima experienced the memory differently. Theirs was an "eye-witness" account of an action against the health care system under which they lived. The students, on the other hand, received a different "word-of-mouth" version of the events. More importantly, the community of Nima experienced Mohammed Zakari's injury first-hand and would live with the ongoing experience of exclusion and hardship if the health care system remained without exemptions for the poor. For the American students, the adventure could end when they desired it to end. Nonetheless, the currency of Mohammed Zakari's story for remote audiences is another vital part of the footprints effect.

¶88 Finally, the practice created a strategy that was constitutive of, rather than formally reliant on, community participation and responsive to local agency, creativity, and uncertainty. The example of the press conference is one in which a highly disruptive practice emerged from a seemingly conventional human rights medium. This event, in which members of the community were invited to participate and in which their own members spoke from the podium, was crucial in formulating the rights footprint. In contrast to the blueprints of rights and development, in which formal authorities are engaged, the press conference represented the community's ability to voice their claim, in the terms of their own choosing.

¶89 This strategy supported the remedial claim for inclusion and voice in the lawsuit itself. As discussed, lawyers of the Legal Resources Center sought creative remedies to end Mohammed Zakari's detention, pressing the Ghanaian courts to promote a more structural solution to the structural problem of health care financing that had led to the habeas remedy. The remedies asked the Ghanaian High Court to devise a process by which the Ministry of Health, the Ministry of Finance, and health consumer groups could negotiate a solution to the punitive effects of user fees. This tactic responded to the inertia of public institutions to the problems of health financing. It was a strategy that relied on litigation to dislodge the entrenched position of the Ministries in deciding on the distribution of health care for Ghanaians.[125] By accentuating the agency of members of the Nima community, the remedies were crafted as a means to include their ongoing participation. The litigation therefore attempted to draw on the power of the courts to ensure further community involvement in the design of the future health care financing scheme. If implemented, the model of inclusion required by the Court would be unlike other reform efforts in Ghana, such as the poverty reduction strategies supported by the World Bank, which represented only superficial support for community consultation.[126]

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[124] *Id.*

[125] *See* Freeman & Langbein, *supra* note 88; *see also* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV 1016 (2004) (presenting a vision of programmatic reform via litigation focused on the disentrenchment of public institutions in the U.S.).

[126] Tony Killick & Charles Abugre, *Chapter 3: Institutionalizing the PRSP Approach in Ghana*, *in* REPORT SUBMITTED TO THE STRATEGIC PARTNERSHIP WITH AFRICA (2001), cited in Stewart & Wang, *supra* note 62, at 464-465.

B. Challenging Costs and Benefits

¶90 Finally, the metaphor of rights as footprints invites a reassessment of the pragmatist critique of contemporary human rights practice. One influential comment suggests that human rights practitioners may be part of the problem of, rather than the solution for, achieving the broad goals of human rights.[127] The list of failings includes the way in which human rights may crowd out other social justice strategies, produce ineffective lawyering models, undermine social movements, and prevent more effective redistributive strategies. These failures are exacerbated when expert-lawyers take charge in moments of rights-claiming litigation, using their professional expertise to override local expressions of rights and local knowledge of remedies. Such a tendency is particularly distorting when the same lawyers are "outsiders" by race, nationality, or class, as is common in international human rights practice.[128]

¶91 This critique of human rights joins a long tradition of rights skepticism, which points to the tendency of rights to legitimate and reify the status quo, to atomize claimants in individualist narratives, and to perpetuate ill-fitting remedies for distinctive problems. Drawn from critical legal studies, these criticisms were often sympathetic to the interests of vulnerable or marginalized groups, and yet critical of the capacity of rights to provide appropriate redress.[129] Yet the prescriptions that attended such critiques—to disavow rights and to avoid rights talk—were challenged by a range of empirical and historical studies drawn from critical race theory and feminism.[130]

¶92 Partly drawing on these objections, the contemporary pragmatist critique of human rights suggests not to reject the human rights paradigm wholesale but rather to assess the potential of human rights, specifically and generally, in relation to each discrete political activity.[131] If we were to assess the right to health campaign in Ghana in these terms, we might emphasize the way in which Mohammed Zakari's experience was translated into an actionable claim which ultimately resulted in his release, and how human rights talk was able to mobilize a previously disempowered community to protest against his treatment, and against their own. These benefits would perhaps outweigh the costs of introducing a lawyer-run strategy and a Western discourse to Nima's residents.

¶93 Yet this pragmatic assessment would be incomplete. This is because there are general and longer-term forms of "success" in rights-claiming, which remain radically uncertain. Operating diachronically, the footprints metaphor admits change in the expectations and understandings of rights through time and space. We emphasize the relative permanence or tangibility of the symbolic aspects of human rights practice, to show how the significance of particular political moments may continue through time, albeit in a changed form.[132]

¶94 We suggest that the footprints metaphor does not help in assessing the success or failure of a particular human rights practice. The footprint may fade, and

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[127] David Kennedy, *supra* note 2.
[128] Mutua, *supra* note 3.
[129] *See* Duncan Kennedy, *supra* note 2, at 315-338; Scheingold, *supra* note 1.
[130] *See, e.g.*, Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).
[131] David Kennedy, *supra* note 2.
[132] Garth, *supra* note 7.

therefore present a less reliable vision of the positive and negative effects of rights practice. Or the footprint may bring together new communities of claimants. And that is where the value of the metaphor lies. The footprint cannot be instrumentalized in the assessment of human rights practice. Rather, it problematizes that assessment.

¶95 For example, the *Zakari* story interrogates the blind spots behind the failure/success, cost/benefit, negative/positive ledger. First, it demonstrates the way in which the advantages and disadvantages of rights talk are unavoidably interlinked. Secondly, it disaggregates the "legacy" of rights across different times and places.

¶96 A long-expressed criticism of the deradicalization of law has targeted "rights-talk" for delimiting the political imagination. The language of human rights is said to constrain attempts at transforming power relations by implicitly controlling the terms within which subordinate groups experience the world and articulate their aspirations.[133] And yet the very open-endedness of legal discourse prevents this easy conclusion. The languages of the social world, including legally endorsed language, change meaning over time.[134] The footprints metaphor is able to capture the difficulties in categorizing, balancing, and evaluating the costs and benefits of human rights practice.

V. CONCLUSION

¶97 This Article has introduced the metaphor of footprints to describe the potential of human rights practice to build towards political action and institutional change. It is a metaphor that departs from understandings of rights in terms of precedent, covenants, anecdotes, or blueprints. We have indicated the way in which a community action around health care in Ghana was focused on both formal law and informal norms, linked universal and particular understandings of rights and justice, constituted an ongoing memory of action for different communities, and opened up new avenues for institutional change.

¶98 The details of this action reveal the workings of the rights "footprint." We have described the key moments of the health care campaign, including the first meeting within the Legal Resources Center to Mohammed Zakari's final release from his hospital detention. Through a series of tactical moves by the Legal Resources Center leadership and its community members, and by U.S. visitors, the *Zakari* case captured a moment – which could later be replayed – of extraordinary vigor and emotion.

¶99 Finally, this Article has described the ways in which our metaphor points to the importance of memory and agency in human rights practice and can transcend a pragmatic assessment of the costs and benefits of human rights as a social justice practice. The forward-looking progression of human rights advocacy can be intimately related to the experience of looking back. Collective memory plays a powerful role in a dynamic, community-focused, and community-reinforced story of hope. It involves telling and retelling and forgetting and selecting and remembering. It also involves critique, and the outline of a contemporary human rights practice.

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[133] For a critique of the hegemonic features of human rights discourse in the developing world and a legal pluralist perspective on subaltern legality, *see* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003); *see also* LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito eds., 2005).

[134] *See* Forbath, *supra* note 49, at 171-172.