Toward a Unified Theory of Professional Ethics and Human Rights

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Abstract

This article begins with a simple empirical claim – that professionals (doctors, lawyers, and psychologists, among others) may either facilitate or prevent human rights violations. They possess this power by virtue of their expertise, access and social status. Building on this claim, I argue that states are dependent upon the assistance of professionals in order to comply with their international human rights obligations. Compliance with these obligations is an essential condition of the legitimacy of states; non-compliance is a matter of global concern and, if systemic, renders the state liable to interference from external agents in the international community. It follows that states are, in this fundamental respect, dependent upon professionals. But professionals are also dependent upon states; their ability to perform their professional functions in full is contingent upon privileges and protections accorded to them by the state. Given this mutual dependence, I advance a contractarian account of the relationship between professionals and the state – one that gives rise to a duty on the part of professionals to assist the state with the performance of its human rights obligations. The content of that duty varies across professions and among professionals, since it depends upon the nature of the professional's expertise, and the degree of access and social status she possesses. This account offers both theoretical and practical benefits. First, it avoids human rights foundationalism because it ties the ethical obligations of professionals to international legal norms, rather than to human rights conceived as ethical claims. Second, the account offers a further approach for bridging the gap that scholars and advocates have identified between human rights commitments and compliance. The incorporation of human rights norms into domestic law, political institutions and corporate governance may all contribute to this. But the essential role professionals can play in the acculturation of and compliance with human rights has been neglected. The account advanced here has a number of important practical implications – not least, the need for more (and better) human rights education and mentorship for professionals.

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I. Introduction

This article offers a novel account of the relationship between the ethical obligations of professionals and international human rights law and practice. The account is motivated by the role that professionals played in the Bush administration's "war on terror"—in particular, the global detention and interrogation regime that has incarcerated tens of thousands of detainees, in some cases for the better part of a decade. In the most extreme cases, professionals may have committed serious international crimes rendering them liable to criminal prosecution in foreign courts.[1] Serious concerns have also been raised about the ethics of professionals' conduct. Psychologists were the principal architects of the aggressive detention and interrogation regimes operated by both the Defense Department and the Central Intelligence Agency (CIA). These regimes incorporated a variety of coercive techniques including sleep deprivation, exposure to temperature extremes and loud noise, stress positions and—in the case of the CIA—dousing with cold water and waterboarding, the now infamous procedure that induces a desperate feeling of suffocation in those exposed to it.[2]

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[1] For a discussion of universal jurisdiction, its theoretical underpinnings and potential objections to its exercise, *see* Jonathan H. Marks, *Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council*, 42 COLUMBIA J. TRANSNAT'L LAW 445 - 490 (2004).

[2] *See* the Senate Armed Services Committee (SASC) Report of December 2008, available at http://documents.nytimes.com/report-by-the-senate-armed-services-committee-on-detainee-treatment#p=1 (last visited January 21, 2010). See also the CIA Inspector General's Report of May 2004, http://luxmedia.vo.llnwd.net/o10/clients/aclu/IG_Report.pdf (last accessed February 1, 2010).

Government lawyers wrote opinions—documents that David Luban has characterized as "CYA" (cover-your-ass) memoranda[3]—giving the green light to interrogators to use of a variety of aggressive (so-called "enhanced") interrogation techniques including the waterboard. Opinions on the legality of interrogation techniques were not only provided in the abstract, but in relation to the interrogation of variety of specific named detainees.[4] Physicians in the CIA's Office of Medical Services advised that waterboarding was "medically acceptable" provided a physician was present to monitor the application of the technique and that surgical equipment was on hand in case an emergency tracheotomy had to be conducted to enable the detainee to resume breathing.[5] Doctors and psychologists evaluated detainees, advised on individual

[3] See DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007) at 200 – 202. Luban acknowledges that he borrows the term from the argot of practicing lawyers.

[4] The prime example, perhaps the ur-text in this regard, is the August 1, 2002 memorandum signed by Assistant Attorney General Jay Bybee (now a federal judge on the U.S. Court of Appeals for the Ninth Circuit) and addressed to the Acting General Counsel of the CIA, John Rizzo ("the Zubaydah memo"): *see* http://www.justice.gov/olc/docs/memo-bybee2002.pdf (last accessed January 10, 2010). On July 22, 2004, Attorney General John Ashcroft wrote a one paragraph letter confirming that the use of all but one of the interrogation techniques in the Zubaydah memo (the exception being waterboarding) on a detainee [name redacted] held outside the U.S. would not violate the U.S. Constitution, or any statute or treaty obligation of the United States (including the prohibition on cruel, inhuman and degrading treatment in the Torture Convention) "subject to the assumptions and limitations" in the Zubaydah memorandum. Daniel Levin, Acting Assistant Attorney General wrote several letters to John Rizzo, Acting General Counsel of the CIA in August and September 2004 advising that the use of a variety of techniques, including waterboarding and dousing with cold water, in relation to an individual detainee (or detainees) would not violate any US statute (including the Torture State, 18 U.S.C. s.2340A), the U.S. Constitution, or any treaty obligation of the U.S.: *see* http://www.justice.gov/olc/docs/memo-rizzo2004.pdf (last accessed January 21, 2010), http://www.justice.gov/olc/docs/memo-rizzo2004-3.pdf (last accessed January 21, 2010), http://www.justice.gov/olc/docs/memo-rizzo2004-4.pdf (last accessed January 21, 2010) and http://www.justice.gov/olc/docs/memo-rizzo2004-2.pdf (last accessed January 21, 2010).

[5] *See* http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05102005_bradbury46pg.pdf (last accessed January 10, 2010) at page 16. The words "medically acceptable" are apparently taken from the CIA's

interrogation plans, monitored interrogations, and took notes on the effects of the interrogation techniques—also opening them to accusations that they were complicit in unlawful experimentation without the consent of human participants.[6] Recognition of the mutually supportive and enabling roles of this troika of professionals (the lawyers, the doctors and the psychologists) is central to any understanding of systemic detainee abuse in the war on terror.[7] Additional questions have also been raised about the role of anthropologists working in the Defense Department's Human Terrain Program—in particular, whether they are conducting research without consent and whether the results of that research are being used in a manner that is harmful to the research subjects.[8] A further source of concern are the related claims (now being made and acknowledged within the journalism community) that stories of detainee abuse were "buried, played down and ignored" in the U.S. press, even after the Abu Ghraib

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Office of Medical Service (OMS) Guidelines of December 2004, but in all the publicly available versions of those guidelines, the section containing these words appears to have been redacted.

[6] See Physicians for Human Rights, Aiding Torture: Health Professionals' Ethics and Human Rights Violations Demonstrated in the May 2004 CIA Inspector General's Report (2009), available at http://physiciansforhumanrights.org/library/news-2009-08-31.html (last accessed February 1, 2010), and STEVE MILES, OATH BETRAYED: AMERICA'S TORTURE DOCTORS (2009; appendix).

[7] This is explored in more detail in Jonathan H. Marks, *Torture Troika* (draft manuscript on file with author). *See also* David Luban, *Torture and the Professions*, CRIMINAL JUSTICE ETHICS, 2: 58-65 (2007) and Richard Abel, *Professional Integrity* in MICHAEL FREEMAN & DAVID NAPIER, LAW AND ANTHROPOLOGY (2009).

[8] On the continuing use of anthropologists in this program, see Vanessa Gazari, *Rough Terrain*, WASHINGTON POST, August 31, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082101926.html (last accessed January 20, 2010). *See also* David Luban, *supra* note […] and Richard Abel, *supra* note […].

photographs were released in April 2004; that some stories were not diligently followed up; and that others were allowed to become stale before being fully told.[9]

Torture in the "war on terror" is illustrative, perhaps emblematic, of the problematic roles professionals may play in human rights violations. But the scope of the problem is much wider in three senses. First, the complicity of professionals in human rights violations in the United States is not a phenomenon that originates with the war on terror. More than 100 years ago the U.S. used the brutal "water cure," a predecessor to the waterboard, on local "insurgents" in the war in the Philippines who were considered "undeserving" of the protections of the laws of war.[10] Less well-known perhaps, this procedure was carried out under the supervision of a lawyer and with the assistance of a physician.[11] More recently, the Cold War provides further examples of the complicity of health professionals in human rights violations committed in the name of national security.[12] Second, the scope of the problem is broader geographically as well as temporally. There are many examples of the complicity of professionals

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[9] See, for example, Eric Umansky, *Failures of Imagination: American Journalists and the Coverage of American Torture,* COLUMBIA JOURNALISM REVIEW, 45(3): 16 – 31 (2006). For a related critique of U.S. media coverage of the run-up to the invasion of Iraq in 2003, *see* Jonathan H. Marks, *The Fourth Estate and the Case for War in Iraq* in MARK GIBNEY ET AL., THE AGE OF APOLOGY: FACING UP TO THE PAST (2008) 298 – 314.

[10] In the "water cure," water (sometimes salted) was siphoned into the nostrils of prisoners until they provided the name of a village where other "insurgents" were supposedly hiding out. If the siphoning failed to procure a response, soldiers would jump on the victim's stomach to expel the water. The village named by the prisoner would be burnt to the ground, whether or not insurgents were in fact hiding there. This is discussed further in Jonathan H. Marks, *Doctors as Pawns? Law and Medical Ethics at Guantanamo Bay*, 37 SETON HALL LAW REVIEW 711 - 731 (2007) at 728 – 9.

[11] *Id.*

[12] For further reading on this topic, see ALFRED MCCOY, A QUESTION OF TORTURE (2006).

(especially doctors) in torture and detainee abuse—in South Africa, the USSR and Uruguay to name just three.[13] As Elaine Scarry has acutely observed, "it is in the nature of torture that the two ubiquitously present should be medicine and law, health and justice, for they are the institutional elaborations of body and state."[14] Third, there is much more to human rights law than the prohibition of torture. For every detainee waterboarded in the war on terror, many thousands of detainees (in Afghanistan, Iraq, Guantanamo Bay and numerous secret locations elsewhere) were exposed to conditions that violated their human rights in many other ways.[15] Finally, the value of the account I offer is most apparent *in extremis,* for example, in a national security crisis or public health emergency when human rights are particularly vulnerable to abuse, neglect or both. But the relevance and application of the theory is not limited to these cases.

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[13] On South Africa, see for example Derrick Silove, *Doctors and the State: Lessons from the Biko Case*, SOC. SCI. MED., 30(4): 419 – 429. On Uruguay, see M.G. Bloche, *Uruguay's military physicians. Cogs in a system of state terror*, JAMA. 255(20): 2788-93 (1986). On the USSR, see for example DARIUS REJALI, TORTURE AND DEMOCRACY (2007) at 392 – 394.

[14] ELAINE SCARRY, THE BODY IN PAIN (1985) at 42. For a magisterial review of the history of torture, see Darius Rejali, *supra* note […]. Rejali provides a comprehensive account of torture techniques, but does not focus a great deal of attention on the role of health professionals in their design and application.

[15] For an early and articulate indictment of the detention regime at Guantanamo Bay by a senior member of the judiciary in Britain, see Johan Steyn, Guantanamo Bay: The legal black hole, 27th F.A. Mann Lecture: 25 November 2003, available at http://www.statewatch.org/news/2003/nov/guantanamo.pdf (last accessed February 1, 2010). The U.S. Supreme Court has been slower to recognize the fundamental rights of detainees under international law, but Hamdan v. Rumsfeld, 548 U.S. 557 (2006) was a landmark case, recognizing that Al Qaeda suspects are protected by Common Art III of the Geneva Conventions.

II. Locating Professionals and Human Rights

Before proceeding, I will address briefly what I mean by "professionals" and "human rights." There is a rich literature on the criteria for identifying a professional, and for distinguishing a profession from a "mere" occupation. Particular attention is usually paid to the ends of the profession (whether it serves a fundamental social need or provides a public good), the nature of the professional practice (in particular, the expertise, skills and judgment exercised), the degree of autonomy within the practice, the nature and extent of gate-keeping (including the educational and training requirements for admission to the profession and continuation of practice), whether practitioners have a monopoly in relation to some or all of the elements of their practice, the degree of self-regulation and the extent of applicable ethical codes.[16] I do not intend to provide an exhaustive account of prevailing theories; nor will I develop a theory of my own here. In my view, it is unnecessary to do either of these because the theory of professional ethics and human rights I offer provides a workable approach to this issue. For the moment, I invite the reader to focus on paradigm cases, such as the physician and the lawyer, rather than penumbral cases. This is not to suggest that the

[16] I will not attempt provide an exhaustive list of books and articles addressing the definition of professional. However, for a selection of readings addressing definitional issues, *see* for example JOAN CALLAHAN (ED.), ETHICAL ISSUES IN PROFESSIONAL LIFE (1988) (chapter 2) (providing excerpts from the work of Michael Bayles, Everett Hughes and Bernard Barber among others). For another recent distillation of the literature, *compare* Richard Greenstein, *Against Professionalism*, 22 GEO. J. LEGAL ETHICS 327 (2009) at 330, 349 (focusing on three factors: the provision of services is perceived as fundamental to the well-being of the community; the provision of services requires significant skill, including intellectual skill; and the existence of regulation through official state organs or through state proxies).

penumbral cases are unimportant; on the contrary, some may be very important and, increasingly so, as human rights norms and professional practices both evolve.[17]

Except where I indicate expressly to the contrary, human rights here mean those rights in the legal sense, that is, the body of norms constituting international human rights law and its associated global discourse and practice. There are a number of features of this body of law and practice that are relevant to the account offered here, and to the rationale for that account. Some of these will be obvious to readers familiar with human rights law. First, as Charles Beitz reiterates in his recent account of the origins of international human rights law and the nature of the associated practice, the architects of the Universal Declaration of Human Rights (1948) expressly disavowed any single, unifying philosophical foundation for their enterprise.[18] Second, in international law,

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[17] For example, the category of "health professionals" has expanded considerably in recent years. Although many occupations are now regulated as professions, not all these occupations would necessarily be accommodated by traditional accounts of professionalism. In New York State, for example, the health-related professions regulated under Title VIII include physical therapist assistants, massage therapists, and certified dental assistants: see http://www.op.nysed.gov/title8/ (last accessed January 20, 2010). The bill proposed by Richard Gottfried in the NY legislature to address the participation of health care professionals in torture and improper treatment of prisoners covers all health professionals regulated under Title VIII: see http://assembly.state.ny.us/leg/?bn=A06665&sh=t (last accessed January 20, 2010). Similarly, in the United Kingdom, the Health Professions Council currently regulates fourteen occupations defined as "health professions." They are arts therapists, biomedical scientists, chiropodists/podiatrists, clinical scientists, dietitians, occupational therapists, operating department practitioners, orthoptists, paramedics, physiotherapists, practitioner psychologists, prosthetists & orthotists, radiographers, speech & language therapists. See http://www.hpc-uk.org/aboutus/ (last accessed January 20, 2010). The Council's function is to protect the public and, to that end, it keeps a registry of health professionals who meet the Council's "standards for training, professional skills, behaviour and health." (Physicians are regulated by a separate body in the UK, the General Medical Council: see http://www.gmc-uk.org/, last accessed January 20, 2010).

[18] CHARLES BEITZ, THE IDEA OF HUMAN RIGHTS (2009), especially Chapter 2 ("The Practice"). For a book-length account of the drafting of the UDHR, see MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001). As Beitz observes, the challenge

human rights norms vary in nature and kind. It is important to avoid what Beitz calls a "naïve" conception of human rights in which all rights are considered absolute and capable of trumping all other considerations;[19] this is not how human rights function in international law and practice.[20] For example, while some rights under the International Convention on Civil and Political Rights (1966) are *absolute* and *non-derogable,* many rights are *qualified* in that interference with them is justifiable in certain circumstances and, in the most extreme cases, they may also be subject to formal

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was "to frame a public doctrine that was capable of endorsement from a variety of moral and cultural viewpoints" (p.21) and "to preserve the international doctrine from philosophical parochialism that would have limited its appeal and narrowed its normative scope." (p.67) Anticipating a post-colonial critique, one of the drafters, Charles Malik, a Lebanese diplomat and philosopher, noted at the time that the UDHR was constructed on the "firm international basis where no regional philosophy or way of life was permitted to prevail." See Glendon, supra at p.164. This passage is discussed in Mathias Risse, Securing Human Rights Intellectually: Philosophical Inquiries about the Universal Declaration, Harvard Kennedy School Faculty Research Working Paper, RWP09-024 (August 2009), available at http://web.hks.harvard.edu/publications/getFile.aspx?Id=392 (last accessed January 20, 2010).

[19] Beitz, *supra* at 29.

[20] The core structure of international human rights law is to be found in the International Bill of Rights, which comprises the Universal Declaration of Human Rights (G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948); "UDHR") and the two treaties concluded in 1966, the International Covenant on Civil and Political Rights (G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; "ICCPR") and the International Covenant on Economic, Social and Cultural Rights (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, "ICESCR"). (There are many other treaties that build on these foundations. In the interests of time and space, I cannot review them all here.) The bifurcation of human rights into these two categories by the treaties in 1966 (only one of which, the ICCPR, has been ratified by the U.S.) will have some implications for the way in which my theory applies to professionals in the United States: *see* note […] *infra.* The ICCPR provides that each state "undertakes … to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." (Art. 2 ICCPR) By contrast, states' obligation under the ICESCR are "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means." (Art.2 ICESCR) This is sometimes termed an obligation of progressive realization. This distinction indicates that the ICCPR is, in one important sense, more demanding on states than the ICESCR.

derogations.[21] The prohibition of torture, and of cruel, inhuman or degrading treatment or punishment is an example of the former (ICCPR, article 7).[22] By contrast, the right to privacy articulated in article 17 of the ICCPR is qualified; only "arbitrary or unlawful interferences are prohibited." While absolute non-derogable rights leave states no room for maneuver, this is not the case with qualified rights. Notably, the European Court of Human Rights accords a "margin of appreciation" (or sphere of discretion) to states when assessing whether their interference with a qualified right is justifiable in the circumstances.[23] This level of indeterminacy in relation to qualified rights is not an embarrassment to European or international human rights law; it is inherent to both,

[21] Formal derogations require an official proclamation that the life of the nation is threatened, plus notification to the other state parties (via the Secretary-General of the United Nations) of both the fact of derogation and the reasons for it. (Not surprisingly, states are reluctant to do this. However, the United Kingdom tried unsuccessfully to use a similar procedure, and derogate from the prohibition on arbitrary detention under the European Convention on Human Rights in the wake of the attacks of September 11, 2001**:** see Opinion 1/2002 of the Council of Europe Commissioner for Human Rights (Mr Alvaro Gil-Robles), Comm DH (2002) 7, 28 August 2002; see also A v Sec. of State for Home Department [2004] UKHL 56.) Although there is some overlap between qualified rights and non-derogable rights, it is not always the case that a qualified right is derogable. An example of such a right is freedom of thought, conscience and religion under article 18 of the ICCPR. This right is subject to "such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (art. 18(3)). However, article 4 of the ICCPR does not permit a complete derogation from this provision in the face of a public emergency threatening the life of the nation. For an authoritative statement of principles governing justifiable interference with qualified rights and permissible derogations, see the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984) available at http://www.unhcr.org/refworld/docid/4672bc122.html (last accessed January 10, 2010).

[22] See Art 7 of the ICCPR. No interference with this right is permitted in the international human rights regime. Moreover, states may not derogate from that right, even in the event of a "public emergency which threatens the life of the nation" (ICCPR, art. 4).

[23] See Handyside v. UK (1976) ECHR 5, available at http://www.worldlii.org/eu/cases/ECHR/1976/5.html (last accessed, January 10, 2010). The Court adjudicates alleged violations of the European Convention on Human Rights (1950)(the regional treaty that might be considered "the European progeny" of the UDHR) has recognized this. Its jurisprudence

and arguably serves to enhance the democratic legitimacy of human rights law.[24] Third, for the purpose of my account, human rights should be taken to include the body of law known as international humanitarian law or the laws of war.[25] In many cases, the norms of international humanitarian law are very similar to those found in the International Bill of Rights. For example, Common Article III of the Geneva Conventions (which provides the low watermark for the treatment of detainees) requires that detainees be treated humanely, and that they be protected from (inter alia) "cruel treatment and torture," and "outrages upon personal dignity, in particular humiliating and degrading treatment."[26] Fourth, the primary addressees of international human rights norms are states. They are the principal duty-bearers.[27] The

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[24] For a broader discussion of the democratic legitimacy of international human rights law, see Jamie Mayerfeld, *The Democratic Legitimacy of International Human Rights Law*, INDIANA INTERNAT'L AND COMP. L. REV., 19: 49-88 (2009) available at http://faculty.washington.edu/jasonm/Mayerfeld_Democratic_Legitimacy_of_International_Human_Rights_Law.pdf (last accessed January 20, 2010).

[25] The International Court of Justice has expressed the view that human rights norms do not cease to apply in times of war, unless and insofar as there has been a formal derogation. The Court considers international humanitarian law (or a significant part thereof) to be *lex specialis,* that is, a specialized body of law that applies during armed conflict. So in order to determine whether a right under the ICCPR has been violated in time of war, reference must be made to the provisions of international humanitarian law. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) at para 25 (p.240), available at http://www.icj-cij.org/docket/files/95/7495.pdf (last accessed January 10, 2010); see also Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) at para 106, available at http://www.icj-cij.org/docket/files/131/1671.pdf (last accessed January 10, 2010).

[26] Available at http://www.icrc.org/ihl.nsf/WebART/375-590006 (last accessed January 10, 2010). This language precedes and is similar to the language of the ICCPR (1966) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res. 39/46, annex, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (Dec. 10, 1984; "the Torture Convention.")

[27] However, it should be noted (and is often forgotten) that the Preambles to both the ICCPR and the ICESCR recite that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." For the text of the treaties, see http://www2.ohchr.org/english/law/ccpr.htm (ICCPR, last accessed January 20, 2010) and http://www2.ohchr.org/english/law/cescr.htm (ICESCR,

correlative duties on states are three-fold: to respect, protect and to fulfil human rights.[28] (This trichotomy of state duties will become more significant when I articulate corresponding duties of professionals.)

Fifth, international human rights norms are not static; they constitute an evolving body of law and practice. In addition to a plethora of regional and international treaties expanding and elaborating on the protections found in the International Bill of Rights,[29] there has been a proliferation of judicial decisions (by what Anne-Marie Slaughter has termed "the global community of courts")[30] interpreting the scope of human rights obligations and protections. Since human rights law is evolving over time, and the sub-

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accessed January 20, 2010). It is understandable that this sentence in the Preamble is often overlooked, since the remainder of the Treaty and the vast body of human rights law focuses on the obligations of the *state* in relation to individuals over whom they have jurisdiction or control.

[28] The obligation to respect human rights requires states not to violate human rights. The obligation to protect requires them to protect individuals and groups from others who may violate their rights. The obligation to fulfil requires states to take steps to ensure—or, in the case of obligations of progressive realization, to facilitate—the enjoyment of human rights. See, for example, the website of the UN High Commissioner for Human Rights at http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx (last accessed January 10, 2010). For a similar typology, see Charles Beitz, *supra* note […] at 109, drawing on HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY (1996) at 60. (This tripartite articulation of states' obligations will be important when I come to address the corresponding obligations of professionals.)

[29] See, for example, the International Convention on the Rights of the Child (1990), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), and, more recently still, the Convention on the Rights of Persons with Disabilities (2006) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006). All available at http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (last accessed January 10, 2010).

[30] See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARVARD INT'L L.J. 191 (2003). An exemplar in that community is the South African Constitutional Court, whose decisions are heavily informed and enriched by comparative jurisprudence: for a database of the court's decisions, go to http://www.constitutionalcourt.org.za/site/home.htm (last accessed January 10, 2010). By contrast, the U.S. Supreme Court is conspicuously reluctant to participate in Slaughter's global community of courts. The sources of international law discussed in this paragraph are arguably the most significant sources in the current international legal order, but they are—of course—not the only sources of norms.

set of occupations considered professions is also not fixed, the relationship between professionals and human rights cannot be captured by an act of interpretive flash photography. A better metaphor for thinking about human rights norms, the professions, and the relationship between them is slow-motion cinematography.

Finally and most important for the purpose of the account I advance here, the human rights obligations of states are different in kind from other international legal obligations that they may possess. When country A violates the provisions of a bilateral investment treaty with country B, this is a matter of concern for country B, but generally not for other nations. By contrast, violations of international human rights law are matters of global concern.[31] There is much evidence to substantiate this claim in international law and practice. Pursuant to the doctrine of universal jurisdiction, perpetrators of serious international crimes (e.g., torture and crimes against humanity that both reflect the most egregious human rights violations) are, under international law, subject to prosecution by any country, whether or not that country has any connection with the perpetrator, the victim or the crime.[32] The fact that human rights

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[31] Charles Beitz makes a similar claim in Beitz, *supra* note […] at 109.

[32] This phenomenon, known as universal jurisdiction may be explained on a number of grounds, including the "Manichean rationale" and the "common interest rationale." See Jonathan H. Marks, *Mending the Web*, *supra,* note […]. The former rationale refers to an idea that predates but nonetheless survives the UDHR (1948), namely that the perpetrator of a serious international crime is "hostis humanis generis" (that is, an enemy of all mankind). The latter refers to the notion articulated by Kant that similarly survives in modern human rights law—that the "peoples of the earth have … entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere." *See* Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in HANS REISS (ED.), TRANS. H.B. NISBET, KANT'S POLITICAL WRITINGS (1970) at 107 – 8. This view is reflected in the

are matters of global concern is also reflected in the emergent notion of "responsibility to protect."[33] This recasts the so-called "right of humanitarian intervention" as a *responsibility* of the international community particularly in the face of large-scale loss of life or ethnic cleansing (actual or apprehended). It is not the case that any and every interference with a human right calls for intervention, let alone, coercive intervention by the international community.[34] However, responsibility to protect reflects and reinforces the notion that the increasingly serious and systemic human rights violations become within a state, the more compelling will be the case that sovereignty and the principle of non-intervention must yield to concerns for human rights.

More fundamentally, this approach supports the view that the legitimacy of states is dependent on human rights compliance.[35] I recognize, of course, that the concept of

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judgment of the Israeli Supreme Court in the Eichmann case, which noted that "an offence against the laws of war, as a violation of the law of nations, is a matter of general interest and concern" and "can undermine the foundations of the international community as a whole and impair its very stability." 36 I.L.R. 277 (S. Ct.) at 294, 296.

[33] See the INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), *THE RESPONSIBILITY TO PROTECT* (2001), http://www.iciss.ca/report-en.asp (last accessed January 10, 2010). This report has received some endorsement from the UN: see General Ass'y Res. 60/1, 2005 World Summit Outcome, available at http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021752.pdf (last accessed January 10, 2010; see, in particular, paragraphs 138 - 139).

[34] *Id.* The reformulation makes clear (1) that this responsibility is secondary, and comes into play when a state fails to meet its primary obligations in relation to the human rights of those within its borders, (2) that the responsibility should be exercised in a principled manner, (3) that there are many forms of preventive and remedial action, including diplomatic, economic and legal measures, and (4) that military intervention should be a last resort.

[35] In his 1993 Oxford Amnesty Lecture, John Rawls contended that human rights are "*a necessary condition of a regime's legitimacy* and of the decency of its legal order" (emphasis added). See John Rawls, "The Law of Peoples" in S. SHUTE AND S. HURLEY (EDS.), ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES (1993) at 71. In an accompanying footnote (no. 46 on pp.227 – 228), Rawls indicates that he is referring to "human rights proper"—defined to encompass all the rights set out in Articles 3 to 18 of the Universal

legitimacy is complex and contested, and the subject of a vast body of literature with which I cannot fully engage here.[36] However, for the purpose of my account, the concept of legitimacy that I deploy has a few simple features: (1) Legitimacy is a scalar rather than binary proposition. There are degrees of legitimacy. (2) In assessing the legitimacy of states (particularly in the case of global human rights practice, as well as political rhetoric), non-compliance with human rights is an essential factor. (3) The more widespread and systemic a state's failure to comply with human rights obligations, the less legitimate that state will be (and the more its legitimacy will be subject to challenge). (4) In the most extreme cases of widespread and systemic human rights violations, the state forfeits its right to the unimpeded exercise of sovereign power within its territories and jurisdiction.[37]

Declaration of Human Rights (including the right to life, liberty and security of person in article 3 and the prohibition on torture and cruel, inhuman or degrading treatment or punishment in article 5). While Rawls incorporates the vast majority of civil and political rights set out in the declaration (with the notable exceptions of freedom of expression, freedom of assembly and the right to vote), he excludes economic and social rights such as the right to social security (article 22) and the right to equal pay for equal work (article 23) on the grounds that they "presuppose specific kinds of institutions." When Rawls revisited the text, he reformulated the claim quoted above to assert that the fulfillment of human rights is "a necessary condition of the decency of a society's political institutions and of its legal order" (see JOHN RAWLS, THE LAW OF PEOPLES, 1999, at p.80). Despite this reframing, the relation between human rights and legitimacy persists in the *The Law of Peoples:* see Beitz's interpretation of Rawls in Beitz, *supra,* at p.100 ("we might say that human rights function as a standard of international legitimacy).

[36] I draw on the discussion of legitimacy in the work of John Rawls and Charles Beitz cited in this paragraph and the accompanying footnotes.

[37] See also Beitz, *supra,* at pp.122 – 125, for an account of the role of the international community in the event of a state's non-compliance with its human rights obligations. As Charles Beitz noted in his recent critique of the account of human rights that John Rawls offered in *The Law of Peoples*, *supra* note […], "a society whose institutions fail to honor its people's human rights cannot complain if it is condemned by world society and it makes itself vulnerable in extremis to forceful intervention to protect human rights." (p.98)

The erosion of states' legitimacy in the event of serious or systemic non-compliance with human rights is also reflected in the human rights monitoring mechanisms of the international legal community. In addition to various treaty bodies and formal monitoring mechanisms established under the auspices of the United Nations (including, for example, the Human Rights Committee[38] and the Committee against Torture[39]), there are also several non-governmental organizations (such as Human Rights Watch)[40] that produce annual human rights reports. The U.S. State Department's annual human rights report is also premised on the idea that states systemically violating human rights undermine their legitimacy in the international community and jeopardize their entitlement to foreign assistance from the United States.[41]

III. Professional Power and Human Rights

[38] See http://www2.ohchr.org/english/bodies/hrc/index.htm (last accessed January 10, 2010).

[39] See http://www2.ohchr.org/english/bodies/cat/ (last accessed January 10, 2010).

[40] See http://www.hrw.org/en/reports/2010/01/20/world-report-2010 (last accessed January 26, 2010).

[41] The Secretary of State has a statutory mandate to transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate "a full and complete [annual] report regarding the status of internationally recognized human rights" in every country that receives foreign assistance from the United States. See sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (FAA), as amended, and section 504 of the Trade Act of 1974, as amended. For a copy of the reports, see http://www.state.gov/g/drl/rls/hrrpt/index.htm (last accessed January 10, 2010). Several legal memoranda from the Office of Legal Council endorsing aggressive interrogation tactics repeatedly addressed (and dismissed) concerns about these tactics that were based on a critical discussion of other countries' use of similar techniques in the State Department's Country Reports on Human Rights Practices. See Jonathan H. Marks, *Torture Troika, supra* note […].

I will now make several preliminary observations about the relationship between professionals and human rights. I offer them as basic empirical claims. Each claim has three components that are intended to reflect the tripartite nature of states' human rights obligations, that is, the obligations to respect, protect and fulfil human rights. The first claim might be called the *expertise claim*. Put simply, professionals, by virtue of their expertise, may have an impact on the human rights of others. According to this claim, professionals have expertise or skill sets that may be employed to facilitate human rights abuses (*the violative expertise claim)*. Similarly, professionals have expertise or skill sets that enable them to expose, report or otherwise prevent human rights violations (*the preventive expertise claim*). Finally, professionals have expertise or skill sets that may be employed to promote the fulfillment of human rights (*the promotive expertise claim*). Teasing the expertise claim out into these three components is important not only because it reflects the tripartite nature of the human rights obligations of states. Professionals will often have more than one of the three kinds of expertise and the same body of knowledge and practical skill sets will often be implicated by each of them; but neither proposition necessarily applies.

The second claim might be termed the *access claim*. This also has three components. First, professionals have access to information and resources that may be employed to facilitate human rights abuses (*the violative access claim*). Similarly, professionals have access to information and resources that provide them with the opportunity to expose, report or otherwise prevent human rights violations (*the preventive access claim*). Finally,

professionals have access to information and resources that may be employed to promote the fulfillment of human rights (*the promotive access claim*). Once again, while it will frequently be the case that a professional has more than one kind of access, it is not necessarily the case that she will possess all three.

The third claim is the *status claim*. This holds that the social status of professionals may provide license, authority or an imprimatur of decency to human rights violations (*the violative status claim*). Similarly, the social status of professionals enables them to oppose, report or otherwise prevent human rights violations more authoritatively (*the preventive status claim*). Finally, the social status of professionals enables them to promote more authoritatively the fulfillment of human rights (*the promotive status claim*). Again, it will often be the case that all three status claims apply, but it is not necessarily the case. In addition, the extent to which each of the components applies (in any of the three claims, expertise, access or status) will not necessarily be the same.[42]

I will not seek to substantiate these empirical claims in full here, because I do not anticipate that they will be hotly contested. Examples discussed throughout this paper should amply serve to illustrate the claims. The role that professionals played in the architecture and perpetuation of the detention and interrogation regime in the war on

[42] Although none of the claims directly invokes the notion of public trust, it is clearly implicated. For example, the access and social status some professionals possess may well be due to the level of trust that the public (or certain publics) place in those professionals.

terror (discussed in the introduction and, at much greater length, elsewhere)[43] is only the most notable. In addition, my preliminary claims are supported by statements of several professional organizations. For example, resolutions of the American Psychological Association formally acknowledge that the discipline of psychology and its practitioners may contribute to torture and other human rights violations and that, conversely, they may contribute to the fulfillment of human rights.[44] Although the extent of these contributions varies among professionals, the theory can accommodate these variations because it does not offer a binary conception of professionals' human rights obligations. Rather, the content of the obligations will depend upon the circumstances—including the expertise, access and status of each professional.

IV. Professionals & the State: Relationships of Dependence

I will now take a small step beyond the set of simple empirical claims that professionals may—by virtue of their expertise, access and status—facilitate human rights violations,

[43] See, for example, Steve Miles, Oath Betrayed: America's Torture Doctors (2nd ed., 2009); Philippe Sands: Torture Team: Rumsfeld's Memo and the Betrayal of American Values (2008, revised 2009). *See also* Jonathan H. Marks, *Doctors as Pawns? Law and Medical Ethics at Guantanamo Bay*, 37 SETON HALL L. REV. 711 - 731 (2007).

[44] The American Psychological Association's resolution "Opposition to Torture" (1986) acknowledges that "psychological knowledge and techniques may be used to design and carry out torture" and that "torture victims may suffer from long-term, multiple psychological and physical problems." (These provisions echo the language of the 1985 Joint Resolution of the American Psychiatric Association and the American Psychological Association on Torture.) The American Psychological Association's "Human Rights" resolution (1987) also acknowledges that "the discipline of psychology, and the academic and professional activities [of] psychologists, are relevant for securing and maintaining human rights": http://www.apa.org/governance/cpm/chapter14.html#7 (last accessed Dec. 1, 2009).

prevent them, and/or contribute to the fulfillment of those rights. My next claim, which I call the *professional dependence claim*, is that states cannot meet their international human rights obligations without the participation of professionals. Put another way, states need and depend upon professionals for human rights compliance. Although states may be able to satisfy some human rights obligations without the assistance of professionals, there are several core obligations for which professionals' assistance is essential. One obvious example from the laws of war is the obligation to provide medical care for the wounded and sick pursuant to Common Article III of the Geneva Conventions.[45] This obligation clearly cannot be satisfied without the assistance of physicians and other health professionals. Similarly, states cannot ensure that defendants to criminal proceedings or aliens facing deportation have access to appropriate legal representation unless there are lawyers able and willing to provide this service.[46] Beyond the paradigm cases of law and medicine, freedom of expression in article 19 of the ICCPR includes the freedom not only to "impart information and ideas of all kinds" but also freedom to "seek" and "receive" such information and ideas. It has long been recognized that the fulfillment of this right requires a free press,[47] and

[45] See note […] supra.

[46] On the rights of criminal defendants to legal assistance, see ICCPR article 14(3)(d) and General Comment No.32 on the Right to Equality before Courts and Tribunals and the Right to a Fair Trial (2007) at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement (last accessed January 10, 2010) (paras 10, 38; the former noting that the "availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way"). On the rights of aliens facing deportation to representation before a competent authority, see ICCPR article 13.

although the internet has transformed that accessibility of information, journalists are still vital to the fulfillment of that right. More narrowly, states cannot satisfy other more specific obligations without journalists—consider, for example, their obligation under the Torture Convention (1984) to investigate allegations of torture and cruel, inhuman or degrading treatment.[48] The need for investigative journalism is most acute where detainees are held in secret locations or where their detention is concealed from the Red Cross (as in the case of "black sites" and "ghost detainees" in the war on terror).[49]

The professional dependence claim asserts that states depend on professionals in order to comply systematically with their human rights obligations.[50] Since the legitimacy of states depends, in part, on such compliance, this dependence claim may be articulated in an even stronger form: the legitimacy of states depends, in part, on the assistance of professionals in the performance of their human rights obligations. Put simply, the

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[47] See Human Rights Committee, General Comment 10 on Freedom of Expression (1983) available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument (last accessed January 10, 2010).

[48] See note […] *supra;* also available at http://www.un.org/documents/ga/res/39/a39r046.htm (last accessed January 10, 2010). The obligation to proceed with a prompt and impartial investigation in response if there are reasonable grounds is set out in article 12.

[49] *See* Umansky, *supra,* note […].

[50] In my view, the professional dependence claim is—on its own—capable of generating a normative claim about the human rights obligations of the state, whether or not the state is a liberal democracy. Given the dependence of the state on professionals for human rights compliance, the state has an obligation to ensure that the ability of professionals to respect, protect and promote human rights is itself respected, protected and promoted. This obligation has practical implications similar to those I outline in my discussion of the human rights obligations of professionals in Part V below. For example, states should create and maintain whistleblower protections that allow and encourage professionals to act as guardians of human rights. They should also expressly articulate the human rights obligations of professionals as part of licensure. However, the claim does not fully account for the human rights obligations of professionals, absent such an express articulation. This is the work done by the contractarian account of professional human rights obligations that I advance in Part V below.

legitimacy of states depends on professionals. However, the relationship between the state and professionals is not a "one-way street." Professionals are, in turn, dependent upon the state. This leads me to my next claim, the *state dependence claim*. Professionals depend on states, and on the privileges and protections conferred by them, in order to conduct their professional practice. Although every professional need not be dependent upon the state for the exercise of every aspect of her professional practice, the state provides protections and privileges that are vital to the performance of core elements of each of the professions.

If you ask me to write you a prescription for Prozac, I would be forced to decline. I am not a physician. With few exceptions, physicians have a monopoly on prescribing powers.[51] It is a monopoly that states protect, in part, by criminalizing and prosecuting the prescription of pharmaceuticals by anyone who is not a licensed physician. Ask me instead to represent you before the U.K. Supreme Court, the new final court of appeal in the United Kingdom,[52] and I might be able to do so (assuming the case was within my expertise) because I hold a "practising certificate" from the Bar Council of England and Wales. In most jurisdictions in the developed world, only qualified legal professionals

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[51] Psychologists currently have prescribing rights in New Mexico, Louisiana and Guam: see www.apa.org/education/k12/prescriptive.ppt (January 2008; last accessed January 20, 2010) For a critique of psychologists' prescribing rights, see Robiner, W. N. et al., Prescriptive authority for psychologists: A looming health hazard? Clinical Psychology: Science & Practice (2002), 9, 231-248, available at http://www.med.umn.edu/img/assets/6913/Robiner_PrescriptionPriv_HealthHazard.pdf (last accessed January 20, 2010).

[52] See the court's website at http://www.supremecourt.gov.uk/about/index.html (last accessed January 10, 2010).

may represent parties in court proceedings and charge their clients a fee for doing so.[53] Unqualified persons holding themselves out as lawyers are ordinarily liable to prosecution. Moving away from the paradigm cases of law and medicine, journalists are also only able to do their job because of a variety of privileges and protections. Admittedly, some of those privileges are provided by non-state actors (e.g. reduced or no-cost admission to certain events for journalists holding press passes) and some are provided for in international law—most notably, the protections conferred on journalists by the laws of war.[54] However, these latter protections are dependent upon appropriate identity cards being issued by a state.[55] In addition, journalists are afforded many protections and privilege by states during peacetime—for example, press passes issued by police departments, and legal (sometimes constitutional) protections for journalists' sources.[56]

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[53] Some common law countries permit litigants without legal representation to receive "reasonable assistance" from a layperson, sometimes called a "McKenzie friend" (after McKenzie v McKenzie [1970] 3 All ER 1034). For a discussion of what McKenzie friends may or may not do in England and Wales, *see* www.hmcourts-service.gov.uk/cms/files/mckenzie_friends_note.pdf (last accessed February 1, 2011).

[54] There are two categories of protected journalist: (1) war correspondents accredited to the armed forces of a party to the conflict, who are entitled to prisoner of war status under Geneva Convention III (1949), Art. 4A(4), and (2) freelance journalists who are entitled to protection as civilians under Article 79 of the First Additional Protocol to the Geneva Conventions (1977). For a discussion, see the ICRC Commentary to Article 79, available at http://www.icrc.org/ihl.nsf/COM/470-750102?OpenDocument (last accessed January 10, 2010). Although the U.S. has not yet ratified the First Additional Protocol, its practice in recent conflicts respects these provisions, and it has also been argued persuasively that there is a rule of customary international law to similar effect: see JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK CUSTOMARY INTERATIONAL HUMANITARIAN LAW (2005), Vol.1, pp.114 – 116 (rule 34).

[55] See Geneva Convention III (1949), Art 4(4) (requiring war correspondents to possess an identity card issued by the armed forces they accompany). Article 79 of the First Additional Protocol (1977) requires that, in order to receive protected status as civilians, journalists must have an identity card attesting to their status as a journalist that is issued by "the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located."

[56] For a multinational review of source protection laws, see DAVID BANISAR, SILENCING SOURCES:

Just as states depend on professionals for their legitimacy (and, in turn, for the right to the unimpeded exercise of their sovereign powers), so professionals depend upon states for the unimpeded performance of their practice. Of course, a state's legitimacy is not dependent solely upon the assistance of professionals in the performance of their human rights obligations; nor is each and every element of professional practice dependent upon the privileges and protections conferred by the state. But states and their professionals are each dependent on the other in one or more ways that are essential to each of them. This relationship of mutual dependence might also be characterized as a relationship of *reciprocal legitimacy* in which each party relies upon the other in an essential way for its legitimacy as well as its related ability to perform core functions.[57]

V. The Human Rights Obligations of Professionals

(a) The Foundations of the Contract

The mutual dependence of states and professionals leads me to my central claim, the *interdependent contract claim.* The claim is derived from social contract theory. Although

AN INTERNATIONAL SURVEY OF PROTECTIONS AND THREATS TO JOURNALISTS' SOURCES (2007), also at http://www.privacyinternational.org/foi/silencingsources.pdf (last accessed January 26, 2010).

[57] In considering this claim and the discussion in Part V that follows, I invite the reader to focus again on the paradigm case, a liberal democracy where the institutions of government and the professions are not wholly dysfunctional. I will say something more about other cases at page […] *infra.*

the version of the contract I propose here is novel, the use of social contract theory more broadly to justify and elaborate upon the ethical obligations of professionals is not new. Thirty years ago, the medical ethicist, Robert Veatch, articulated an influential triple contract theory of professional ethics that explicitly applies to all professions, not just medicine. In Veatch's model, the first contract is the *basic social contract* whereby "the moral community comes together to articulate the basic ethical system" for a society. In the second contract, the *collective lay-professional contract*, professionals and lay participants within the society define "the basic moral norms of the lay-professional relation." This second contract is constrained by the norms of the first. The third contract is the *individual lay-professional contract* – whether physician-patient, lawyer-client or some other professional relation—in which "within the constraints of these two earlier agreements, the individual professional and lay person would be free to set personal moral limits on their relations."[58] Veatch illustrates the dependent nature of the three contracts in his schema, contending (by way of example) that "if the basic social contract contained a norm that prohibited killing of the innocent, and because of that the second contract prohibited physician killing for mercy, then individual patients and physicians would not be able to agree to a mercy-killing contract."[59]

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[58] See ROBERT VEATCH, THE PATIENT-PHYSICIAN RELATION (1991) at 28 – 32, summarizing the author's articulation of the triple contract theory in ROBERT VEATCH, A THEORY OF MEDICAL ETHICS (1981) at pp.108 - 138.

[59] *Id.* at 31. It is not clear from Veatch's example whether the basic social contract necessarily requires the provision against mercy-killing in the second contract. The basic social contract might be interpreted in such a way as to permit such a constraint in the second contract but not require it (for example, by prohibiting the killing of "the innocent" without their consent).

This complex structure of interrelated contracts should arguably be supplemented by a *fourth* contract that would sit above the basic social contract within a society, and serve to constrain it. That contract would comprise fundamental norms of the international community such as those found in the core protections of human rights law. If certain behaviors are constrained by international law, the basic social contract should similarly not permit them,[60] and they (in turn) should not be permissible in the collective or individual lay-professional contracts. However, given the relationship of mutual dependence and reciprocal legitimacy between professionals and the state, I offer a simpler and more demanding account.[61] In my view, this relationship provides a solid basis for a *single* contract between professionals and the state.[62] The obligations of professionals under this contract may be characterized as follows. In exchange for the state's provision of the privileges and protections necessary for the full performance of the professional's practice, the professional—in return—undertakes to exercise her professional skill and judgment to assist the state with the performance of its human rights obligations. To support this claim, I will draw upon some legal analogies.

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[60] International legal norms are often implemented by and/or reflected in domestic legal norms. For example, the prohibition on torture in article 7 of the ICCPR and in the Torture Convention (1984) is reflected in the criminalization of torture in U.S. law: see 18 U.S.C. 2340A ("the Torture Statute").

[61] Veatch acknowledges that his framework would leave "substantial latitude" to professionals, giving them discretion to act "according to his or her personal beliefs and values." See ROBERT VEATCH, A THEORY OF MEDICAL ETHICS (1981) at 134. The account I offer here would provide greater constraints.

[62] The nature of the state as a party to the contract also differentiates my account from most social contract accounts (including Veatch's) which tend to refer to community or society as an abstraction.

Since the legitimacy of a state is dependent upon the assistance of professionals with the performance of its human rights obligations, the privileges and protections for professional practice must necessarily be granted in exchange for the promise I have articulated—at the very least, in the absence of express provision to the contrary.[63] Readers with some knowledge of Anglo-American principles of contract law will know that terms are often implied into contracts even though neither party has formally articulated them. The criteria that need to be satisfied before courts imply a term into a written agreement have been formulated (and reformulated) in various ways.[64] However, one articulation is that the implied term must be "necessary to give business efficacy to the contract."[65] One might say, in the case of social contract I have articulated, that the "business" of the state is legitimate governance. But it is important not to obsess about the word "business" here; its purpose, in the legal test, is merely to direct the court to consider the practical consequences of the contract with and without the implied term. This approach may provide an analogical tool to support the interdependent contract claim I advance here. In particular, it is inefficacious for the state to grant privileges and protections to professionals without, in return, procuring a commitment on the part of the professionals to assist the state with the performance of human rights obligations that is essential to the legitimacy of the state. The uniform

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[63] I discuss in Part VI below whether such provision might be made and what its implications would be.

[64] For a recent discussion of the various formulations of the test for the implication of a term into a contract at common law, see *Attorney General of Belize v. Belize Telecom Ltd.* [2009] UKPC 10, [2009] 1 WLR 1988 at paras 16 – 27.

[65] *Id.*

incorporation of this obligation into the contract between the state and its professionals is also efficacious from the point of view of the professional because it operates to preserve the legitimacy of the state from which she derives her professional privileges. This benefit may have real and significant practical implications, particularly when the professional seeks to engage with colleagues, clients or funding bodies outside her state.

A second analogy comes not from legal principles of contractual construction, but from the canons of statutory interpretation. When choosing between multiple plausible interpretations, courts tend to construe norm-generating acts of state institutions to be consistent with the international legal commitments of the state. For example, unless a statute is on its face inconsistent with the international legal obligations of the state, the court will construe the provisions of the statute to be consistent with those obligations.[66] The assumption is that the state intends to comply with its international commitments, absent express indication to the contrary. These principles of contractual construction and statutory interpretation should not be applied mechanistically to the social contract

[66] See BENNION ON STATUTORY INTERPRETATION (5th ed., 2008), section 270 ("Municipal law should conform to international law.") For a recent application of this principle, see *Roodal v. State of Trinidad and Tobago* [2003] UKPC 78, [2005] 1 AC 328. In the United States, this canon of construction is known as the *Charming Betsy* doctrine, after the Supreme Court case of the same name (although this was not the first case in which the doctrine was invoked): see Murray v. Schooner Charming Betsy, 6. U.S. (2 Cranch) 64, 118 ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.") See also The Third Restatement of the Foreign Relations Law of the United States: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." (see s.114 (1987)).

between the state and professionals that I advance here.[67] However, they demonstrate that the novelty of this account is found not so much in the contractarian approach,[68] as in the nature and content of the professional obligation derived from the contract.

(b) The Nature of the Duty

To understand the nature and content of the professional obligation entailed by this approach, we must return briefly to my preliminary claims, tying professionals' expertise, access and social status to their ability to violate human rights, prevent human rights violations and promote the fulfillment of human rights. These claims help provide content to the obligation. In return for granting professionals the privileges and protections necessary for them to exercise their professional practice, professionals promise the state they will do what they reasonably can—by virtue of their expertise, access and status—to ensure the state is able to meet its international human rights obligations. What this requires of any professional will depend on the nature of the expertise, access and status that the professional possesses. Expertise, access and status will vary within each profession, as well as between professions.

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[67] Rather, I offer these doctrines, premised on notions of necessity and consistency, by way of analogical support for the interdependent contract claim I make here.

[68] See, for example, David Wilkins, *In Defense of Law* and *Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269 at 291 (1996). In this response to William Simon and David Luban, Wilkins argues that the lawyer's oath to support and defend the law (in order to gain admission to the bar) constitutes a "voluntary agreement with society," but that even without the oath "the regulatory structure that permits lawyers to exercise rights and privileges unavailable to ordinary citizens rests on an implicit commitment to legality emanating from the profession as a whole."

To explore how demanding this duty may be, it is helpful to distinguish it from the duty Amartya Sen articulates in his quest for a general theory of human rights. Sen contends that human rights provide a "*reason* for action to help another person,"[69] but concedes that he would be making a great leap if this reason for action gave rise to "an absolute obligation to undertake that action, no matter what values one has and what other commitments one has reason to consider."[70] As Sen frames it, the duty is "to give reasonable consideration to undertaking such an action."[71] This is, Sen contends, "not an agreement to tie oneself up in hopeless knots,"[72] but rather to "consider seriously what one should do, taking note of the relevant parameters of the cases involved."[73] Sen elaborates on the content of this obligation for those who find themselves bystanders to human rights violations:

> "The recognition of human rights is not an insistence that everyone everywhere rises to help prevent every violation of every human right no matter where it occurs. It is, rather, an acknowledgment that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that. It is still possible that other obligations or non-obligational concerns

[69] Sen, *supra* note […] at 338.

[70] *Id.* at 339.

[71] *Id.* at 338 – 9.

[72] *Id.* at 339.

[73] *Id. at* 340.

> may overwhelm the reason for the particular action in question, but that reason cannot be simply brushed away as being "none of one's business." Loosely specified obligations must not be confused with no obligations at all."[74]

To clarify the nature of this obligation, Sen draws on Kant's distinction between "perfect" and "imperfect" obligations.[75] The would-be torturer and the murderer have perfect obligations; they are, he contends, "obviously quite straightforward, to wit, to refrain and desist."[76] In the case of bystanders, however, the obligation is less fully specified. It is imperfect, and there can be "serious debates," about "(i) the ways in which the attention that is owed to human rights should be best paid, (ii) how the different types of human rights should be weighed against each other and their respective demands integrated together, (iii) how the claims of human rights should be consolidated with other evaluative concerns that may also deserve ethical attention, and so on."[77] Sen contends that this contextual variability is "not an embarrassment" in a

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[74] *Id.* at 340-341. In AMARTYA SEN, THE IDEA OF JUSTICE (2009), Sen phrases the obligation in the following way: "The basic general obligation must be to consider seriously what one can reasonably do to help the realization of another person's freedom, taking note of its importance and influenceability, and of one own's circumstances and likely effectiveness." (372-3) Sen elaborates that "if one is in a position to do something effective in preventing the violation of such a right, then one does have a good reason to do just that – a reason that must be taken into account in deciding what should be done. It is still possible that other obligations, or non-obligational concerns, may overwhelm the reason for the political action in question, but the reason is not brushed away as being 'none of one's business." (373)

[75] See Sen, note […] *supra* at 321, citing KANT'S CRITIQUE OF PRACTICAL REASON *(1788),*. See also SEN, *THE IDEA OF JUSTICE,* note […] *supra* at 374. Compare Michael Perry, *Toward a Theory*, note […] *supra* at 33) who prefers the distintion between "determinate" and "indeterminate" duties.

[76] Sen, *Elements of a Theory,* note […] *supra* at 321. See, similarly, SEN, THE IDEA OF JUSTICE, *supra*, at 376.

[77] *Id.*

discussion of human rights as an ethical claim, and that one can find similar diversity in the articulation and application of other ethical theories.[78]

The first two areas of variability Sen identifies are certainly not an embarrassment for human rights in a legal sense; on the contrary, they are intrinsic to international human rights law and practice.[79] Leaving to one side the case of absolute, non-derogable rights (such as the prohibition on torture), there are rich debates about qualified rights—in particular, the circumstances and manner in which states may interfere with them, and how competing qualified rights should be negotiated. This debate is reflected and embodied in the jurisprudence of courts addressing allegations of human rights violations. As I have already mentioned, the European Court of Human Rights' doctrine includes the concept of "margin of appreciation," giving some deference to states' determinations of how attention should be best paid to qualified human rights and how different and competing rights should be reconciled.[80]

Given the room for maneuver accorded to states in their compliance with human rights obligations, it is logical that my account incorporates a similar sphere of autonomy for the concomitant human rights obligations of professionals. Where international human

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[78] See similarly Sen, *The Idea of Justice* at p.386, where he observes that "discussion, disputation and argument … is indeed the nature of the discipline" of human rights.

[79] See also Beitz at 108.

[80] See note […] above and accompanying text.

rights law imposes a perfect obligation on states not to violate a particular right, my account gives rise to a similar obligation on the part of professionals. Where the human rights obligation on the state is imperfect (or not fully determined), the professional's sphere of autonomy is greater. The professional has some discretion as to how to resolve the first two "debates" Sen identifies—that is, the best ways in which to pay attention to human rights, and how competing rights should be negotiated. But my account is less permissive than Sen's with regard to the third sphere of debate: balancing human rights with competing "evaluative concerns." Under the interdependent contract, professionals have a *prima facie* obligation to give primacy to human rights over other concerns. A *prima facie* obligation is, of course, not absolute, but it creates a presumption that must be rebutted, and that imposes an important cognitive burden. In Sen's weaker formulation, it is extremely doubtful that the obligation would create a sufficiently weighty demand on professionals to ensure that states act in compliance with their human rights obligations—particularly, *in extremis* (for example, in the wake of a mainland terror attack or a public health emergency) when emotions are running high and human rights violations are most likely.[81] In such cases, the stronger obligation I articulate here will be vital.[82]

[81] For a far more detailed discussion of the way in which emotional responses can exacerbate cognitive biases and lead to counterterrorism policies that violate human rights, *see* Jonathan H. Marks, *What Counts,* supra note […].

[82] In addition to improving human rights compliance and preserving the legitimacy of the state, there may be other benefits too, such as (for example) more effective policies to address the threat to national security or public health. For further discussion, *see* Jonathan H. Marks, *What Counts,* supra note […].

(c) Paradigm professions: some examples

Some examples may be instructive in order to demonstrate how the obligation I have articulated might play out in practice. I will take these examples from the real world where I can. In each case, the central question will be: what can the professional reasonably do to ensure the state meets its human rights obligations (obligations to respect, protect and fulfill human rights) taking into account the expertise of the professional, her access to information and resources, and her status? The role of the professional may determine the degree of access to information and resources. For example, a military physician at Abu Ghraib who has observed first-hand evidence of detainee abuse during a clinical examination has a level of access that a family doctor reading about such abuses in the *New York Times* does not have. The content and implications of the relevant ethical obligation of the military physician will therefore be weightier and different in kind than that of the family doctor. We should expect the military physician to report these abuses in both the military and medical chain of command and, if she is rebuffed, we might also expect her to bring her concerns to the attention of relevant external bodies. This is more than we would be entitled to expect from the family doctor reading allegations of abuse in his newspaper. However, we might reasonably expect him to pursue a different course of action—either individually or collectively with others—for example, by writing a letter to his local newspaper or to medical professional associations (even if he is not a member).

Although the professional's role may shape the content of the obligation,[83] the existence of the duty transcends roles. It cannot be excluded by any professional relationship. This is because the duty arises from the relationship between the professional and the state that is constitutive of the professional's status *qua* professional. As a result, any professional role—including one arising from an employer-employee relationship between the state and the professional—is necessarily constrained by this obligation.

A related example should help illustrate this. In the summer of 2003, the conditions at the Abu Ghraib prison were terrible; there was severe overcrowding and a lack of adequate health care. Conditions were so bad that they led the detainees to revolt. Among the many inadequacies at Abu Ghraib was the lack of psychiatric care. By one conservative estimate, at least 5% of the detainee population at Abu Ghraib (which numbered in excess of 7000 in late 2003) was mentally ill.[84] An Army physician and an Army psychologist visited the prison, but they were only able to do so once a week. Moreover, the physician was not a psychiatrist, and he lacked the necessary experience and expertise to prescribe powerful anti-psychotic drugs. During one of his weekly visits, the physician was informed that one of the 350 or so mentally ill detainees (apparently one of the most the seriously ill) kept stripping off his clothes and smashing his head against the wall. Handcuffs and a helmet had failed to stop him, and there

[83] I return to the relevance of role in Part VI below.

[84] This estimate and the related information in this paragraph were provided to me in 2005 during a telephone conversation with a military health professional possessing first-hand knowledge of the conditions at Abu Ghraib at the relevant time.

were no straitjackets. Some soldiers suggested using a leash. Unable to think of another option, the physician agreed to the plan.[85]

In November 2003, a psychiatrist, Scott Uithol, finally arrived at Abu Ghraib. But he was not tasked with ensuring that detainees received the psychiatric care they desperately needed.[86] Instead, he was assigned to the behavioral science consultation team ("BSCT," known colloquially as "Biscuit") and charged with advising interrogators how to *create* psychological stress for detainees. This role was problematic for reasons discussed elsewhere.[87] But whatever Uithol's role, whatever the reason for his assignment to Abu Ghraib (for example, if he had been tasked with providing psychiatric support for soldiers suffering from PTSD, as he may have originally anticipated), he had a professional ethical obligation to address the human rights of the detainees that were being violated. Uithol had *access* to the detainees at Abu Ghraib, and he should have insisted that his primary obligation was to meet their desperate psychiatric needs, since the lack of adequate medical care put the U.S. in breach of its fundamental obligations under human rights law and the laws of war.[88] Alternatively,

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[85] This may have been the inspiration for the iconic image (taken several weeks later) of Lynndie England holding a detainee on a leash: *see* http://www.msnbc.msn.com/id/4964024/ (last accessed December 9, 2010).

[86] M.G. Bloche and J.H. Marks, *Doctor's Orders*, LOS ANGELES TIMES, January 9, 2005.

[87] *See*, e.g., Jonathan H. Marks, *Doctors as Pawns?, supra* note […].

[88] *See* text accompanying notes […] *supra; see also* Principle 24 of the UN's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN GAOR 43/173 (December 9, 1988) (requiring the provision of free medical care and treatment to all detainees).

he should have insisted that the Defense Department immediately provide other psychiatric personnel to address the detainees' urgent mental health needs.

The theory I have proposed here has at least one further implication for BSCT psychiatrists like Scott Uithol—even if they he had not been asked to ramp up interrogation stressors in violation of international human rights law and the laws of war. If they had only been asked to assist in some way with *lawful* rapport-building interrogations, and several other psychiatrists had been tasked with providing (and were capable of providing) adequate psychiatric care to the detainees, the human rights content of Uithol's professional ethical obligations should still have given him pause for thought. If the detention environment was, in other ways systemically violative of international human rights law or the laws of war (as I and others have contended), the psychiatrist would need to consider whether his contribution to the interrogation mission (while seemingly lawful when considered in isolation) was part and parcel of a profoundly violative detention regime. For that reason alone, the psychiatrist could have declined (and, many physicians have since argued, should have declined) to participate even in non-aggressive interrogations.[89] A similar point might also be made regarding psychologists who were similarly tasked as behavioral science consultants.

[89] The position ultimately adopted by the American Psychiatric Association in 2006 and, a few weeks later, by the American Medical Association was that physicians should not participate in interrogations even in lawful detention environments because this also undermines trust public trust in physicians and their role as healers. (This is discussed further in Jonathan H. Marks, Doctors as Pawns?, *supra* note […].) Documents obtained by Gregg Bloche and me under the Freedom of Information Act revealed that, contrary to the policies adopted by these professional associations, the Army continued to train psychologists to serve in these roles in 2006 and 2007: *see* Marks JH, Bloche MG. The Ethics of Interrogation -- The US Military's Ongoing Use of Psychiatrists N. ENGL. J. MED. 359: 1090 - 1092 (2008).

The position recently adopted by the American Psychological Association recognizes that psychologists may (and often do) provide support for non-aggressive rapport-building interrogations (for example, those conducted by the FBI's Behavioral Analysis Unit), but holds that they should not provide this kind of support in locations where human rights norms and constitutional protections are not being respected.[90]

Let us explore another example, this time from law. Consider the lawyers in the Office of Legal Counsel in the Department of Justice (OLC) who drafted the so-called "torture memos." I will not explore these memoranda in detail here, nor exhaustively chart the grounds on which they may be criticized. However, as a number of commentators have argued persuasively, these lawyers should have given impartial advice.[91] Pursuant to the obligation I describe here, this advice should also have included a balanced analysis of whether the detention and interrogation regimes operated individually or jointly by military and the CIA were compliant with the United States' international human rights obligations. Lawyers should not have drafted CYA memos designed to insulate interrogators from legal liability, thereby paving the way for human rights violations. Nor should they have participated in the construction of a legal edifice concealing the ongoing nature of interrogation practices that violated human rights—as they did in

[90] For a copy of the American Psychological Association's Petition Resolution passed in September 2008, see http://www.apa.org/news/press/statements/work-settings.aspx (last accessed January 10, 2010).

[91] For a discussion of the role of government lawyers in approving the Bush administration's detention and interrogation regime, see, for example, DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007), PHILIPPE SANDS, TORTURE TEAM (2008, revised 2009), and David Cole, *The Torture Memos: The Case Against the Lawyers*, THE NEW YORK REVIEW OF BOOKS, October 8, 2009, at 14. This is also addressed in detail in Jonathan H. Marks, *Torture Troika, supra* note […].

2004 – 5 when a publicized memo appearing to indicate the OLC had adopted a more restrictive approach was shortly followed by three secret and more permissive ones.[92]

The account I offer here also has something to say about a lawyer's obligations to those who are not yet her clients.[93] International human rights law provides (among other things) that anyone deprived of his liberty by arrest or detention has the right to challenge the detention in court (ICCPR, article 9), that criminal defendants have rights to legal assistance (ICCPR, article 14) and that the law must protect individuals from unlawful interference with a number of other rights (for example, privacy—see ICCPR article 17). The full realization of these rights requires (either expressly or implicitly) legal representation, or at least the entitlement to legal representation. In countries where such representation is not provided by the state—either adequately or at all—the obligation articulated here would require lawyers with relevant expertise to set aside time from their remunerated practice to provide pro bono legal services to those unable to purchase them.[94] A number of lawyers in the U.S. have clearly done this, by taking

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[92] See David Cole, *supra* note […].

[93] *Compare* Richard Greenstein, Against Professionalism, *supra* note […] at 349 (criticizing legal professional ethics for its "nearly exclusive" focus on the client) and Martha Davis, *Human Rights and the Model Rules of Professional Conduct: Intersections and Integration*, 42 COLUM. HUMAN RIGHTS L. REV. 157 (2010) (arguing that the ABA should incorporate a human rights lens into its ongoing process for reviewing professional ethical standards).

[94] The notion that lawyers should do pro bono work is hardly novel, although in the U.S. it is rarely tied expressly to human rights. For example, the American Bar Association (ABA) Model Rule 6.1 provides that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."See http://www.abanet.org/legalservices/probono/rule61.html (last accessed December 9, 2009). The commentary to rule 6.1 recognizes that law firms have a role to play, and states that they "should act reasonably to enable and encourage all lawyers in the firm to provide pro bono legal services called for by this Rule." The Rule states that every lawyer should "aspire to render at least (50) hours of pro bono

considerable time out of their practice to represent detainees at Guantanamo Bay. The efforts of others who participated in drafting American Bar Association policy documents, and used their legal expertise and skills to critique violations of human rights law and constitutional norms in the detention and interrogation regimes in the "war on terror," also contributed to the satisfaction of the obligation I have articulated.[95]

(d) Penumbral professions: a practical approach

For journalists, the obligation I have articulated would at the very least require that priority be given to stories about violations of human rights. Although limited resources may often constrain investigative journalism (and increasingly so), many important steps can be taken at no or minimal cost—for example, issuing Freedom of Information Act requests. Allegations of human rights violations should be thoroughly investigated, and the resulting story should be given a priority and placement (whether

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publico legal services per year" and should devote a "substantial majority" that time to the provision of legal services without fee or expectation of fee to "persons of limited means or … charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means."

[95] A skeptic might offer as a counterexample that the conduct of a lawyer could potentially contribute to human rights violations. She might have in mind the lawyer who defends an alleged torturer, terrorist or perpetrator of other serious human rights violations. The strongest response to such a contention is, of course, that the right to a fair trial is itself a fundamental human right, and one to which the alleged perpetrator of human rights violations is no less entitled. So the lawyer who zealously defends the alleged perpetrator of human rights violations enables the state to fulfill its human rights obligations in relation to that defendant. However, while the lawyer may zealously defend her client, she should not act in a manner contrary to applicable codes of ethics—a constraint that applies whether the defendant is alleged to have committed a simple misdemeanor or a serious international crime.

in print or broadcast media) that reflects the importance of human rights violations, both in their own right and as corrosive of the legitimacy of states.

Many more examples can be found in other professions too. Since I cannot explore them all here, I will address how, in principle, my account applies outside the paradigm professions. Penumbral cases would include, for example, a massage therapist or certified dental assistant. It is tempting to deal with penumbral professions by asking whether the proposed occupation is truly a profession. This is one possible approach, certainly a logical one, but it would invite a detailed review of the complex literature on professions and professionalism. A simpler approach, however, is to pose as questions the conditions I set out in this paper as providing the foundations for my account.[96]

The first question would be: does the putative professional possess expertise, access and status (by virtue of her training and occupation) that could facilitate the violation, protection or promotion of human rights? The second question would be: if so, is the assistance of that kind of professional necessary for the state to meet its international human rights obligations? The third question would be: does the state grant the putative professional privileges and protections that are necessary for the full exercise of her professional practice? If the answer to these three questions is yes, the conditions

[96] *See* the text accompanying notes […] to […] above.

precedent for the generation of the obligation described here have been satisfied.[97] What an individual member of that profession may be required to do in any particular case will depend, as in the case with the paradigm professions, on the circumstances of the case, and on the expertise, the access and the status that the professional possesses.

(e) Collective Obligations

To recap briefly, the obligation I have articulated applies to professionals whether they are inside or outside government, whatever their role. The obligation also applies both within and outside the clinical paradigm of any profession—so it speaks to what the physician should do both in the consulting room and in the public sphere. Where human rights law yields a perfect obligation not to violate a right, the professional obligation arising in my account is similarly a perfect one: whatever the professional's role, she must similarly not violate that right. Where human rights law yields an imperfect obligation, the professional still has a *prima facie* obligation to give primacy to human rights considerations. Although the obligation is role-transcendent (such that no role excludes the prima facie duty), the role may nonetheless enhance or constrain what the professional may reasonably do to promote and protect human rights.

[97] Once again, just to be clear: if the answer to one or more of the questions I posed was negative, it does not follow that the individual would have no human rights obligations. Such obligations might arise under one or other alternative theories. I discuss this point further at pages [… to …].

The account has implications for collectives that should be considered from the perspectives of both individual professionals and professional organizations. First, the obligation to assist the state is not limited to what the professional may do by herself. The professional should also explore what steps she might take in conjunction with others, either by working with existing formal or informal collectives of professionals, or by seeking to initiate such collectives. This may mean working outside as well as within national borders. Professionals are ordinarily members (informally, if not formally) of global communities of professionals. These global communities offer further opportunities and resources to promote human rights compliance.

Second, the account has implications for existing collectives, in particular professional organizations. These organizations have collective status, expertise, access and resources well beyond those of any individual member. So the obligation on the professional leadership of these organizations is particularly weighty. There are, of course, a number of professional organizations devoted to the advancement of human rights—for example, Physicians for Human Rights,[98] Psychologists for Social Responsibility,[99] and Human Rights First (formerly the Lawyers' Committee for International Human Rights).[100] However, the existence of these organizations does not

[98] http://www.phr.org (last accessed February 1, 2011).

[99] http://www.psysr.org/ (last accessed February 1, 2011).

[100] http://www.humanrightsfirst.org/index.aspx (last accessed February 1, 2011).

absolve other professional organizations with a broader remit, such as the American Medical Association, from their human rights obligations.

My account does not depend upon articulations of professional ethical obligations related to human rights by professional associations. Professional ethics codes are the *children* rather than the parents of the human rights obligation I describe.[101] However, one important implication is that professional associations have an *obligation* to adopt measures—including issuing ethical codes and position statements—that help professionals understand what their human rights obligations require of them and facilitate the performance of those obligations. In some cases, this work has already begun to happen.[102] However, in every case, there is more work to be done.[103]

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[101] I borrow this notion from Sen's discussion and comparison of the views of Jeremy Bentham and H.L.A. Hart regarding the relationship between law and rights. See Sen, *Elements of a Theory*… at 326-327.

[102] For a discussion of some of the codes of conduct in the medical profession, see Jonathan H. Marks, Doctors as Pawns? … *supra* note […].

[103] In my view, there is an obligation to investigate allegations of professional participation in human rights violations. In many developed nations (including the United States and the United Kingdom), the task of licensing and disciplining of professionals falls upon licensing boards (in the United States, state licensing boards), and not professional associations. However, these ordinarily possess powers to expel members, and expulsion from a professional association may have serious consequences. In some cases, expulsion from a professional association may violate a condition of employment or jeopardize professional licensure. Beyond this, I would argue that professional organizations have an obligation to contribute to efforts to amend the regulatory frameworks to articulate more clearly the human rights obligations of professionals and to hold them accountable in extreme cases when they fall short. See, for example, the bill proposed by Richard Gottfried in the NY legislature to address the participation of health care professionals in torture and improper treatment of prisoners, available at http://assembly.state.ny.us/leg/?bn=A06665&sh=t (last accessed January 20, 2010).

VI. Human Rights and Professional Essentialism: The End of Schmoctors?

Robert Nozick posited some time ago that there could be "schmoctors" whose profession is "just like doctoring except that *its* goal is to earn money for the practitioner."[104] Arthur Applbaum has developed this idea more fully, arguing that schmoctors might use the same expertise and skills as doctors but conduct a "different practice with different ends and different role obligations."[105] On this view, it might seem possible that there could be a host of professionals—call them schmoctors, schmawyers, and (somewhat harder on the eye and the mouth!) schmychologists[106]—who practice medicine, law and psychology without the human rights obligation I have articulated here. I will argue briefly why this should not be the case.

If professionals wish to disavow human rights-related obligations, they might seek to do so within an existing professional organization, or try to establish an alternative professional association.[107] Acts of disavowal could potentially put professionals in

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[104] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974) at 234 – 235 (unnumbered footnote).

[105] ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES (1999) at 50.

[106] I refer here to these kinds of professionals collectively as "professionals of the *sch*-variety." I use the phrase for simplicity of expression; it is not intended to concede that such persons would or should necessarily still be considered professionals.

breach of the human rights obligation I have articulated. But let us leave this aside for the moment, and explore what might follow. Although one could conduct a thought experiment in the abstract, it may be helpful to begin the discussion with a real-world example: the recent struggle within the American Psychological Association over the proper role of psychologists in counterterrorism interrogations, and the ethical constraints that govern the activities of psychologists occupying such a role.

The American Psychological Association's 1996 resolution entitled "Opposition to Torture" declares that psychologists "respect the dignity and worth of the individual and strive for the preservation and protection of fundamental human rights" and, by its 1987 resolution entitled "Human Rights," the organization "undertakes to commend the main UN human rights instruments and documents to the attention of its boards, committees, and membership at large."[108] However, in July 2005, the association's Presidential Task Force on Ethics and National Security (PENS Task Force) concluded that psychologists' participation in coercive interrogations was not constrained by reference to international law (in particular, human rights law), but by "applicable" U.S.

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[107] An example of professionals challenging the policy of a major professional association is the Physicians' Working Group. It rejects the position adopted by the American Medical Association on health care reform, and advocates single-payer healthcare in the United States—a position intended, of course, to promote the fulfillment of the right to health. Thousands of practitioners and students have endorsed the Working Group's call. See http://www.pnhp.org/single_payer_resources/physicians_proposal_intro.php (last accessed December 4, 2009).

[108] See http://www.apa.org/governance/cpm/chapter14.html#7 (last accessed December 1, 2009).

rules and regulations as "developed and refined" since 9/11.[109] The Task Force Report stated that members "did not reach consensus on . . . [t]he role of human rights standards in an ethics code."[110] This failure to embrace human rights triggered a grass-roots revolt in the American Psychological Association. The resulting struggle led the APA to pass four successive resolutions over a two-year period (August 2006, August 2007, February 2008 and September 2008) intended to tighten up the Association's position. The final resolution—a grassroots ballot resolution—provides that "psychologists may not work in settings where persons are held outside of, or in violation of, either International Law (e.g., the UN Convention Against Torture and the Geneva Conventions) or the US Constitution (where appropriate), unless they are working directly for the persons being detained or for an independent third party working to protect human rights."[111]

A number of outcomes of this ongoing struggle are possible. Many members have left the APA, and joined Psychologists for Social Responsibility (PSR).[112] If a mass defection

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[109] Available at http://www.apa.org/releases/PENSTaskForceReportFinal.pdf. See also Tara McKelvey, *First Do Some Harm*, AMERICAN PROSPECT, Sept. 1 2005, http://www.prospect.org/web/printfriendly-view.ww?id=10110 (critiquing the task force, many of whose members had military or national security affiliations) and Michael Benjamin, *Psychological Warfare*, SALON.COM, July 26, 2006, http://www.salon.com/news/feature/2006/07/26/interrogation/index.html (last accessed December 1, 2009).

[110] *Id.*

[111] See http://www.apa.org/news/press/statements/work-settings.aspx (last accessed December 1, 2009). The struggle is not over—in particular, debates about accountability of psychologists for human rights violations continue.

were to occur so that more psychologists were members of PSR than of the APA, the significance of the APA might diminish and the professional codes of PSR might be considered better evidence than those of the APA regarding prevailing ethical standards of the profession. But might a more drastic outcome be possible? Could there be a more substantial bifurcation, in which higher ethical standards (incorporating the human rights obligations I advance here) exist for some psychologists but not for others, who might be called schmychologists to distinguish them from their colleagues?

This question raises the specter of a renegotiation of the social contract between the state and psychologists wishing to become schmychologists. Although my account does not categorically exclude this possibility, there are several reasons why it would be very unlikely and highly problematic for both the state and the professionals concerned. From the professionals' point of view, the rejection of human rights norms clearly imperils public trust in the profession and the social status of its professionals. (This was why there was such a powerful grassroots response to the rejection of human rights norms by the APA PENS Task Force in 2005,[113] and—in part—why we have not seen similar efforts to reject human rights norms in other professions.) Moreover, such a

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[112] I have been told that many clinical psychologists often join the APA in order to get a good deal on insurance for professional practice. If PSR is able to offer competitive insurance the defection rate may well increase.

[113] For a discussion of the constellation of factors that led to the APA PENS Task Force Report of 2005, and the grassroots response, see Stephen Soldz, *Closing Eyes to Atrocities: US Psychologists, Detainee Interrogations and the Response of the American Psychological Association* in GOODMAN, R., AND ROSEMAN, M., INTERROGATIONS, FORCED FEEDINGS, AND THE ROLE OF HEALTH PROFESSIONALS: NEW PERSPECTIVES ON INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN LAW, AND ETHICS (2009).

rejection might also jeopardize the objectors' entitlement to some or all of the privileges and protections necessary for their professional practice, and even call into question the status of our putative schmychologists as professionals.

From the state's perspective, the act of creating a cadre of professionals liberated from human rights obligations would potentially put the state in serious violation of its human rights obligations and threaten its legitimacy. It would certainly be a violation of the state's obligation to respect and protect human rights, if it were to endorse a cadre of schmychologists who were given the green light to violate the state's perfect obligations not to interfere with the rights of others (e.g. by torturing them or exposing them to cruel, inhuman and degrading treatment). More broadly, the creation of alternative cadres of professionals of the *sch*-variety would corrode the privileges and protections of their human-rights-obligated professional cousins by (among other things) undermining their monopoly of practice. Worse still, one of the lessons of totalitarianism is that the creation of alternative professional structures (most notably, Nazi professional associations that sapped pre-existing associations of both members and power) can lead in extreme cases to widespread abuse in which professionals are co-opted into systematic human rights violations.[114]

[114] See PAUL WEINDLING, HEALTH, RACE, AND GERMAN POLITICS BETWEEN NATIONAL UNIFICATION AND NAZISM, 1870 - 1945 (1993) at 478 et seq. (discussing the establishment and operation of the *Nationalsozialistischer Deutscher Ärztebund*, the Nazi Doctors League, as part of a Nazi strategy, also evident in law, engineering and architecture.) See also ROBERT PROCTOR, RACIAL HYGIENE, MEDICINE UNDER THE NAZIS (1988) at 65 et seq.

Given the threat to the legitimacy of the state (both real and perceived), this re-negotiation would also be undesirable for the state. It is notable that federal statute and Defense Department regulations ordinarily require military health professionals to be licensed by state boards.[115] The Department needs health professionals who continue to satisfy standards for civilian clinical practice; it should not, and apparently does not, want to become a refuge for practitioners who are sub-standard in either their clinical skills or their ethical norms. In essence, the statute and regulations proclaim: health professionals wanted; schmoctors and schmychologists need not apply![116]

This discussion should raise serious doubts about whether there is any room for professionals of the *sch*-variety in a state concerned to preserve its legitimacy. But whatever view one takes about that question, the state needs—and must therefore provide the requisite privileges and protections for—professionals of the ordinary kind (doctors, lawyers, psychologists, and journalists among others) who are both able and willing to assist the state in the performance of its human rights obligations.[117]

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[115] See 10 U.S.C. 1094; DoD Regulation 6025.13 (2004) at section 5.2.2.2; and DoD Regulation 6025.13-R (2004) at section C4.1.

[116] The U.S. Army's continued efforts to train a small number of physicians to serve as behavioral science consultants to interrogation teams, contrary to the positions of the American Medical Association and American Psychiatric Association (see note […] above), might be viewed, at first glance, as schmoctor-ish! But if interrogators had to choose between a doctor and a schmoctor to monitor interrogations, they would certainly prefer the former so that they could invoke the higher ethical standards of doctors and claim an imprimatur of decency for their practices. *See* Jonathan H. Marks, *Doctors of Interrogation*, HASTINGS CTR REP., 35: 17 – 22 (2005).

[117] Those who advocate a role for the sch-variety of professionals would presumably require that the state take measures (probably by conferring enhanced privileges and/or protections) to ensure that there was

VII. The Professional as Rooted Cosmopolitan

(a) The Professional and the State

It should be apparent that there are two principal beneficiaries (or, more accurately, two categories of beneficiary) of the professional's obligation to assist the state with the performance of its human rights obligations: the state, and individuals whose rights would otherwise be violated. For students of contract law, the notion of multiple beneficiaries of a contractual obligation is, of course, not novel; nor is the idea that some beneficiaries (often called "third parties" or "third party beneficiaries") are not parties to the contract. However, tying professionals' human rights obligations to the state might raise concerns, since the obligation may often require professionals to protect individuals from the state. I will explain briefly why this is less problematic than it appears and why it also demonstrates a material advantage for my account.

First, the basic concern similarly applies to the norms of international human rights law. States are the architects of the international legal order, and of the treaties that establish the structure and core content of human rights law. States are also the principal addressees of these treaties. They are the primary guarantors of human rights within

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a sufficient body of professionals of the ordinary kind who were willing (explicitly or tacitly) and able to ensure that it can meet its human rights obligations.

their borders, and yet they are also the most likely violators of human rights. This is the nature of the global human rights regime.[118] Second, the very purpose of the account offered here is to establish cohorts of individuals—both within and outside the organs of the state—who have clear human rights responsibilities, and act accordingly.

Third, the account allows for a re-framing of questions of so-called "dual loyalties."[119] These arise, for example, in the case of military medical professionals who are often presented with competing obligations arising from the social and therapeutic purposes of medicine or, viewed more narrowly, with military and medical obligations that appear to conflict. These professionals may feel compelled to choose, for example, between their state and a detainee. Since the former has provided them with a career and an identity in which loyalty and service are paramount, and the latter is clearly an object of suspicion (if not worse), it should not be surprising that this conflict is frequently resolved in favor of the state. The account I advance here makes clear, that whatever the instructions of her superiors or the current office-holders of the state, there is a more fundamental obligation owed by the professional to the state, one that also

[118] There are, of course, supra-national bodies charged with monitoring human rights compliance and a court, the ICC, charged with prosecuting the most serious human rights violations in the event that states fail to act. For a review of UN human rights bodies, see JULIE MERTUS, THE UNITED NATIONS AND HUMAN RIGHTS: A GUIDE FOR A NEW ERA (2009). These bodies have been created by the collective acts of states and are often subject to charges that their agendas are shaped by the goals of powerful individual state actors—a charge that is sometimes warranted, and sometimes not.

[119] The question of dual loyalties is discussed more fully in Jonathan H. Marks, *Dual Disloyalties: Law and Medical Ethics at Guantanamo Bay* in F. ALLHOFF (ED.), PHYSICIANS AT WAR: THE DUAL LOYALTIES CHALLENGE (2008) 53 – 73 (arguing that health professionals who rely on their duty to justify their human rights violations exemplify dual *dis*loyalty).

operates to protect the detainee. Admittedly, this is not the way such loyalty is most commonly conceived.[120] But the state is in this vital respect a beneficiary of the duty I have articulated—even when (and, I would argue, especially when) it leads the professional to challenge or confront policymakers.

One important benefit for the state is the preservation of its legitimacy. But it is not the only benefit. As behavioral law and economics has taught us, *in extremis* (for example, in the wake of a terror attack, national security crisis, or public health emergency) there will be a strong temptation to violate human rights (especially those of non-nationals, minorities and anyone perceived as "other.")[121] These violations will often be the result of symbolic measures that do not address the threat to national security or public health, but provide instead some form of reassurance to the public.[122] This reassurance is even more problematic when it mutes calls for more effective measures that would actually address the threat. In such cases, the state's international human rights commitments (irrespective of the reason they were made)[123] can and should serve as a kind of "Ulysses contract," tying the hands of the state when it might otherwise be tempted to leap into perilous waters. One might think of professionals as akin to

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[120] *See also* Physicians for Human Rights, *Dual Loyalty and Human Rights in Health Professional Practice* (2001), available at http://physiciansforhumanrights.org/library/documents/reports/report-2002-duelloyalty.pdf (last accessed February 1, 2010).

[121] See Jonathan H. Marks, *What Counts*, *supra*, note […]

[122] *Id.*

[123] On this issue, see Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?,* JOURNAL OF CONFLICT RESOLUTION, 52: 588 – 621 (2007)

Ulysses' sailors. They could not be tied to the mast like their master, because they had to man the ship. But their ears were plugged so they could not hear the sirens sing. Professionals too must plug their ears against the national security siren song, or at least wear MP3 players to drown it out with human rights talk![124]

At the risk of doing irredeemable violence to the metaphor, sometimes the vessel is a pirate ship with a rogue at the helm. My account is neither an exhaustive nor an exclusive source of the human rights obligations of professionals. It has most to offer in the case of liberal democracies where the institutions of government and the professions are not wholly dysfunctional, and the relationship of mutual dependence and reciprocal legitimacy that I have described generally holds. In repressive regimes, there may well be other accounts of the human rights obligations of individuals (both professionals and non-professionals) that have more to offer.[125] And even in liberal democracies, there may be additional sources of professionals' human rights obligations.[126]

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[124] If human rights talk doesn't sound too enticing, I have no objection to a musical accompaniment (whether Haydn, hip-hop, or perhaps a fusion of the two!).

[125] Some accounts may be derived from general human rights theories that apply to all individuals, whether or not they are professionals (see, for example, Sen's theory at […] above). Others sources may be specific to particular professions, whether derived from social contracts between a category of professionals and their communities or incorporated into theories of professionalism that apply to particular category of professionals. I do not propose to articulate here a theory of civil disobedience for professionals. However, for a discussion of the duties of lawyers operating in unjust regimes, see A. Lahav, *Portraits of Resistance: How Lawyers Respond to Unjust Proceedings*, 57 UCLA L. REV. 725 (2010).

[126] For example, the U.S. is not among the 160 states that have ratified the ICESCR, article 12 of which has been authoritatively interpreted to require states to work toward the realization of health care that is geographically and economically accessible for all. See General Comment No. 14 on the Right to the Highest Attainable Standard of Health (2000), at http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/40d009901358b0e2c1256915005090be?Opendocum

(b) The Global Professional

Human rights obligations are, of course, by their nature owed to all humanity. In that sense, human rights are clearly cosmopolitan.[127] But that cosmopolitanism is rooted in an essential way by global human rights law and practice.[128] A state's primary human rights obligations are limited to those members of humanity who are within the state's own jurisdiction and control—in most cases, those within a state's own borders.[129] States cannot discriminate against those within their borders on the grounds of national origin—as the British government learned in its unsuccessful efforts to defend

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ent (last accessed January 20, 2010). For this reason, another theory might provide a better account of U.S. health professionals' obligations arising from this right. See, e.g., the social contract deployed to argue that health professionals have an ethical obligation to assume "public roles" (including participation in political debate and advocacy) that promote access to health care and address socioeconomic factors that directly affect health such as poor housing conditions that cause disease. Gruen, R.R., Pearson, Brennan, *Physician-Citizens – Public Roles and Professional Obligations,* JAMA (2004); 291(1):94-98. The contract is between professionals and society, the latter not being further defined.

[127] A detailed discussion of cosmopolitanism is beyond the scope of this article. For a taxonomical review, see Pauline Kleingeld and Eric Brown, "Cosmopolitanism," STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/cosmopolitanism/ (last accessed January 1, 2011).

[128] The use of the word "rooted" is inspired by, but not intended to invoke formally the conception of "rooted cosmopolitanism" in KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY (2004) (chapter 6), and Kwame Anthony Appiah, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (2006).

[129] States engaged in the occupation of other territories do, however, have obligations in relation to the inhabitants of those territories under both human rights law and international humanitarian law. But on the limits to the scope of human rights obligations, see the decision of the European Court of Human Rights in Bankovic et al. v. Belgium et al., 41 I.L.M. 517 (2001). For a stinging critique of the Bankovic case, see Erik Roxstrom et al., The Nato Bombing Case and the Limits of Western Human Rights Protection , 23 Boston U. Internat'l L. J. 55 - 136 (2005), http://www.bu.edu/law/central/jd/organizations/journals/international/volume23n1/documents/55-136.pdf (last accessed January 20, 2010). For a similar issue arising from the war in Iraq, see Al Skeini v. Sec. of State for Defence, [2007] UKHL 26, http://www.bailii.org/uk/cases/UKHL/2007/26.html (last accessed Jan. 20, 2010).

legislation permitting the indefinite detention of suspected international terrorists provided they were not British citizens.[130] But under international human rights law and the associated practice, states' obligations in relation to the human rights of those situated outside the territories they control are, for the greater part, secondary.[131] Their obligations kick in when the host state is unwilling or unable to meet its human rights obligations and, even then, those secondary obligations are mediated in prevailing accounts by the demand that action, especially coercive intervention, should ordinarily be taken through the institutions of the United Nations.[132]

The human-rights-oriented account of professional ethical obligations offered here is rooted in similar ways. First, since the obligations are tied directly to international human rights law, they similarly reflect and embody the distinction between primary and secondary responsibilities that I have just described.[133] Second, the account of the professional human rights obligation is derived from the notion of a social contract with

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[130] This law was deemed incompatible with the United Kingdom's human rights' obligations under the Eureopean Convention on Human Rights: see A (and others) v. Secretary of State for the Home Department, [2004] UKHL 56, available at http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf (last accessed January 20, 2010).

[131] This was discussed further above: see notes […] and accompanying text.

[132] See the discussion of the *Responsibility to Protect, supra* at notes [… to …] and the accompanying text.

[133] Although obligations will therefore be more onerous in relation to human rights violations within their own states, professionals may still have obligations arising from human rights violations in other states—for example, to exhort their own government to pursue action through the United Nations in order to stop the violations. But again, the theory I offer here does not exhaust the potential source of the latter obligations. For example, there may be reciprocal obligations on the part of national communities of professionals to assist each other with the performance of the duty articulated here. Such arguments become all the more compelling with the increasing globalization of the professions.

the state, so it is rooted in the duty and loyalty to the state that I describe above. Third, as I have shown, the discharge of that duty clearly operates to the benefit of the state.

The globalization of the professions has the potential to increase the tug of cosmopolitanism. Professionals are increasingly members of global professional communities, engaging with colleagues, clients and funders outside their national borders. This is no threat to the theory proposed here, since the ability to operate globally in this manner is still dependent in part upon the privileges and protections conferred by the professional's home state. On the contrary, the global reach of professionals may speak to the substance of the obligation I have articulated, since international professional relations and collaborations may enhance the opportunities and avenues for professionals to secure greater human rights compliance at home.

Some professional associations have begun to incorporate cosmopolitanism into their notions of professionalism. Most dramatically, the American Medical Association's Declaration of Professional Responsibility (2001) is entitled "Medicine's Social Contract with Humanity," and its preamble contains this simple lofty sentence: "Humanity is our patient." The declaratory section begins: "We, the members of the world community of physicians, solemnly commit ourselves…"[134] In my view, this text clearly

[134] Available at http://www.ama-assn.org/ama/upload/mm/369/decofprofessional.pdf (last accessed January 20, 2010). Although the document does not refer expressly to human rights, its invocation of "dignity" is consonant with the use of the same word in the International Bill of Rights. (Perhaps unsurprisingly, none of these documents defines the word.) The AMA's declaration also addresses serious human rights violations, in particular, crimes against humanity. The commitments include to

has cosmopolitan debts and aspirations, although I leave for now the question of whether the substance of the declared commitments lives up to those aspirations. But, at the very least, physicians from other nations might reasonably expect, given the language of this document, that their U.S. counterparts will respond when they reach out to them in pursuance of the human rights obligations I advance here.

VIII. Human Rights and Professional Ethics: Translational Rewards

There are two distinct rewards that this move toward a unified theory of professional ethics and human rights might offer. The first results from the act of translating the responsibilities of the state into responsibilities of individuals, more particularly, professionals. The second reward results from the manner in which the theory translates human rights obligations in the legal sense back into to human rights obligations in the moral sense, in particular, as professional ethical obligations.

"[r]espect … human life and the dignity of every individual, a commitment to refrain from crimes against humanity, and a condemnation of such acts, the obligation to "treat the sick and injured with competence and compassion and without prejudice," a commitment to "[a]pply our knowledge and skills when needed, though doing so may put us at risk." These obligations are expressly not role-dependent; on the contrary, they are intended to "transcend physician roles and specialties, professional associations, geographic boundaries, and political divides." See also http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/declaration-professional-responsibility.shtml (last accessed December 9, 2009).

In her critique of "rights talk," which she clarifies to mean "our American rights dialect," Mary Ann Glendon lays several charges, among them "its near-aphasia concerning responsibility."[135] As Michael Perry has rightly observed, Glendon's charge was not directed at international human rights law, but instead at the manner in which rights are discussed in contemporary American political discourse.[136] Nonetheless, Perry poses the question in relation to international human rights discourse, and finds the charge wanting.[137] He points to several international human rights treaties that mention responsibilities in relation to human rights—not least, the International Covenant on Civil and Political Rights (1966) which acknowledges in the preamble that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."[138] I would add to Perry's list two notable documents applying specifically to health professionals and lawyers respectively: the UN Principles of Medical Ethics (1982)[139] and the UN Basic Principles on the Role of

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[135] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) at 14.

[136] MICHAEL PERRY, THE IDEA OF HUMAN RIGHTS (1998) at 49 – 50.

[137] *Id.* at pp.50 – 52.

[138] See http://www2.ohchr.org/english/law/ccpr.htm (last accessed January 2, 2010).

[139] See http://www.un.org/documents/ga/res/37/a37r194.htm (last accessed January 2, 2010). These principles, adopted by a resolution of the General Assembly of the United Nations, provide (among other things) that it is a "contravention of medical ethics for health personnel, particularly physicians [to] apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments" (which include the International Covenant on Civil and Political Rights). This is discussed in *Doctors as Pawns, supra* note […].

Lawyers (1990).[140] In general, however, international human rights law is not at its most articulate when it comes to addressing what any one individual owes another in relation to human rights. The account proposed here helps fill that gap by offering a nuanced articulation of the human rights obligations of categories of individuals who possess social status, access and expertise, and whose human rights responsibilities are essential to the legitimacy of states as well as to the international human rights project.

The second reward relates to what Richard Rorty called "human rights foundationalism"[141]—that is, the quest for the moral foundations of human rights. This quest may take a number of forms. The most challenging is the quest for a unified secular (that is, philosophical) justification for human rights as a set of moral claims or some principle (or set of principles) thought to undergird those claims. Avowedly optimistic and pessimistic examples of this kind of endeavor are to be found in the works of Amartya Sen[142] and Michael Perry[143] respectively. I share the sentiment of

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[140] See http://www2.ohchr.org/english/law/lawyers.htm (last accessed February 25, 2010). The Principles articulate the obligations of governments, lawyers and professional associations of lawyers. Principle 14 provides that "[l]awyers, in protecting the rights of their clients and promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law."

[141] Richard Rorty, *Human Rights, Rationality and Sentimentality* in S. SHUTE AND S. HURLEY (EDS.), ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES (1993) at 116. (This project is characterized by Rorty as futile and "outmoded"—a charge Michael Perry disputes in THE IDEA OF HUMAN RIGHTS, *supra* note […] at 37 et seq.).

[142] See, most notably, Amartya Sen, *Elements of a Theory of Human Rights*, PHILOSOPHY AND PUBLIC AFFAIRS, 32(4): 315 – 356 (2004) which builds on Sen's earlier work on capabilities. He also argues here that certain freedoms qualify as human rights because they satisfy the threshold requirements that they possess (i) general importance and (ii) social influenceability.

both Sen and Perry that there is value in this work, but I am grateful the drafters of the Universal Declaration of Human Rights (1948)—who held a wide variety of religious and secular philosophical views—did not await its completion before putting pen to paper. The result may be an incompletely theorized agreement, but it has provided a sufficiently firm foundation on which international human rights law and practice has been built. This brings us to a different kind of foundationalism—one that explores the philosophical foundations for human rights as *legal* claims, either individually or collectively.[144] (This may be a more manageable exercise, particularly if one acknowledges, as Michael Perry does, that there may be sound practical reasons for embodying certain claims as legal rights—even absolute rights—in the absence of a philosophical foundation for similar status as moral rights.[145]) Although this exercise is

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[143] Michael Perry has struggled to find a "non-religious ground" for the morality of human rights: see MICHAEL PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES (1998) at 11 – 41, and MICHAEL PERRY, TOWARD A THEORY OF HUMAN RIGHTS (2007), at pp.14 – 29 (in which he fails to find a satisfactory answer in the work of, among others, Ronald Dworkin, Martha Nussbaum, and claims based on evolutionary biology). Perry's efforts are directed at finding a secular justification for the claim that every human being has inherent dignity and is inviolable (see, for example, *Toward a Theory, supra,* at p.6). In my view, he rightly concedes: "We must be careful not to confuse the question of the ground of morality of human rights… with the different question of the ground or grounds of one or another human-rights-claims. Even if there is no non-religious ground or grounds for the morality of human rights, there are no doubt secular reasons—indeed, self-regarding reasons—for wanting the law, including the international law, to protect some human-rights-claims." (Perry, *Toward a Theory, supra,* at 25).

[144] On this point, I have some sympathy for the view expressed by Beitz, in *The Idea of Human Rights* at 128. He argues that "human rights need not be interpreted as deiving authority from a single, more basic value or interest such as those of human dignity, personhood or membership. The reasons we have to care about them vary with the content of the right in question… Human rights protect a plurality of interests… These rights have a distinct identity as normative standards, but this identity is not to be found in their grounds or in the nature of their requirements for action. We find it, instead, in their special role as norms of global political life."

[145] Michael Perry acknowledges that even if there are, in his view, no moral absolutes (preventing, for example, killing an innocent to save a nation), "it makes very good sense, as a practical matter, that international law establishes some moral rights as unconditional (nonderogable) rights" (*The Idea of Human Rights,* at 105 – 106). In the case of "imaginable-but-extremely-unlikely conditions" ("so unlikely

also of some value, human rights as legal norms do not depend on its completion. Human rights are now, as Rorty observed, "a fact of the world,"[146] and part of the core fabric of the international legal order. As parties to networks of international treaties, states have assumed a variety of legal obligations relating to human rights. Those obligations are binding irrespective of the rationale for their adoption or the philosophical or religious claims that may have motivated those who drafted or endorsed them and, for that matter, irrespective of patchwork enforcement.[147]

When the focus shifts from the legal human rights obligations of states to the ethical obligations of individuals in relation to human rights, the foundationalist concern in the first sense articulated in the preceding paragraph is re-awakened. The theory advanced here avoids this problem by providing a mechanism to link the human rights obligations of professionals directly to the body of international legal norms. In my account, the force of the human rights obligations of professionals is derived from the international legal order—mediated only by the social contract by virtue of which

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as to be negligible") where failure to violate a legal right would cause "the heavens [to] fall," he acknowledges there may still be good reason to insist on an unconditional legal right if conditioning that right would create an "escape clause" for political authorities, leading to many more violations of underlying moral rights by states. When the authorities are, in extremis, "desperately struggling to keep the heavens in place," he doubts they would worry about the international legal sanction.

[146] Rorty, note […] *supra,* at p.134.

[147] Whether and to what extent states could formally revoke these international commitments is beyond the scope of this paper; notably, however, states tend not to attempt this. For example, when the Bush administration was approving the use of so-called "enhanced interrogation techniques," the President was—at the same time—affirming the nation's commitment to the prohibition on torture. (As I have argued elsewhere, the administration was instead endeavoring to define torture out of existence: see, e.g. Jonathan H. Marks, *What Counts…*, *supra* note […].) One reason for this approach, of course, is the political fallout from revocation or these norms and the impact on the state's own perceived legitimacy and on the conduct of and international relations with other states.

professionals operate. These obligations may derive additional support from human rights as ethical claims, but they are not dependent on human rights as ethical claims.

IX. Some Implications of the Account

(a) Human Rights Education and Mentorship

If human rights occupy (and are to be recognized as occupying) a central role in the ethical commitments of professionals as I contend in this article, this will have important implications for the education of professionals (both qualifying and continuing education), and for formal and informal systems of mentorship. The changes that will be required will vary from profession to profession. It might be assumed that medicine is the easiest place to begin. But even here, it is readily apparent that much work needs to be done. More than a decade ago, the World Medical Association passed a resolution declaring that human rights "form an integral part of the work and culture of the medical profession," and "strongly recommend[ing] to Medical Schools world-wide that the teaching of Medical Ethics and Human Rights be included as an obligatory course in their curricula."[148] However, in a recent study of schools of medicine and public health in the U.S., less than a third of medical schools

[148] World Medical Association, Resolution on the Inclusion of Medical Ethics and Human Rights in the Curriculum of Medical Schools World-Wide. Adopted by the 51st World Medical Assembly Tel Aviv, Israel, October 1999. Available at http://www.wma.net/en/30publications/10policies/e8/index.html (last visited December 20, 2009).

reported offering any curriculum related to health and human rights.[149] While most U.S. medical schools are not providing much, if any, human rights education, a recent study of medical students from 46 countries suggests that tomorrow's doctors recognize the importance of human rights (at least while they are still in medical school). More than 85% of respondents demanded training in human rights, and more than half believed this should be compulsory. Almost 85% believed the physician's tasks included "prevent[ing] actively professional practices that violate basic human rights in the health systems" or "develop[ing] and promot[ing] attitudes respectful of human rights in care."[150] Some countries are ahead of others in meeting the WMA's call for the integration of human rights education in medical training—most notably, South Africa, where the complicity of physicians in prisoner abuse in the days of apartheid has focused attention on this issue.[151] The reports of the complicity of health professionals in detainee abuse in the "war on terror" may, in time, have a similar effect on medical education in the U.S.[152]

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[149] L.E. Cotter et al. 2009. *Health and Human Rights Education in U.S. Schools of Medicine and Public Health: Current Status and Future Challenges*. PLoSONE 4(3): e4916-. In most of the institutions where the curriculum was offered, health and human rights was a module of a required or elective course, or part of an elective conference or symposium. In addition, the authors expressed concern that respondents may have over-reported their institution's human rights offerings. They also suggest that social desirability might explain why, despite the limited offerings, more than 70% of medical school deans said it was "important" or "very important" for physicians to understand human rights.

[150] Kabengele M.E, et al. Should medical schools train students in human rights? An exploratory study among medical students in 46 countries. Rev Med Suisse. 2006 Jun 7;2(69):1544-6.

[151] On the role of physicians in the death of Steve Biko (whose death was dramatized in the film "Cry Freedom"), see Derrick Silove, *Doctors and the State: Lessons from the Biko Case*, SOC. SCI. MED., 30(4): 419 – 429 (1990). On recent proposals to integrate human rights education into the medical curriculum in South Africa, see http://www.samj.org.za/index.php/samj/article/viewFile/531/380 (last accessed December 9, 2009).

Medicine is not the only paradigm profession where more and better human rights training is required. Many lawyers across the globe still pass through law school without obtaining any education in human rights law. The exceptions are those who train in countries that have incorporated human rights norms into their domestic law—for example, law students in Britain, where the Human Rights Act 1998 incorporated the European Convention on Human Rights into domestic law—or those fortunate enough to attend one of the few U.S. law schools that have a compulsory international and comparative law component in their curriculum.[153] Lawyers are important not simply because they have the human rights obligations I advance in this article, but also because they can train the trainers in other professions, building an ever-expanding cadre of human-rights-literate professionals. This cadre will be vital to the acculturation of human rights in the professions. As recent empirical work on ethics education in the biomedical sphere has demonstrated, formal education alone is not sufficient.[154] Mentorship is vital for the acculturation of norms, and it must be the right kind of mentorship: subtle cues about the lack of importance of human rights can undermine the effect of formal curriculum.

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[152] Although I have singled out physicians in this paragraph, human rights education for nurses is, of course, also important. For an empirical study of human rights education in nurses' training in the UK, see Mark Chamberlain, *Human Rights Education for Nursing Students*, NURSING ETHICS, 8(3): 211-222 (2001).

[153] *See* Martha Davis, *supra* note […] (footnote 108 and accompanying text) and Jonathan H. Marks, *Britain is no longer an island - international law matters too,* THE TIMES (London), May 18, 2004.

[154] See Anderson, Melissa S. et al., *What Do Mentoring and Training in the Responsible Conduct of Research Have To Do with Scientists' Misbehavior? Findings from a National Survey of NIH-Funded Scientists,* ACADEMIC MEDICINE, 82(9):853-860 (2007).

I do not expect non-legal professionals to acquire a comprehensive knowledge of international human rights jurisprudence to rival that of staff lawyers at Human Rights Watch. Nor do I expect them to anticipate or second-guess complex assessments of when interference with qualified human rights may be justifiable. However, their human rights education should equip them in at least three ways. First, they should have a basic but solid grounding in human rights law. They should be familiar with core human rights treaties, understand the kinds of interests that human rights law protects, and appreciate the nature of states' associated obligations. They should know, for example, that human rights law does not just prohibit torture. It prohibits conduct falling short of torture that constitutes cruel, inhuman or degrading treatment; professionals should also know that there is a positive obligation to treat detainees humanely.[155] They should be familiar with other basic principles of human rights law: for example, they should know that interference with qualified human rights cannot be justified if it is conducted in a manner that violates the prohibition on discrimination. Second, their human rights education should make professionals aware (and prepare them for) the ways in which the exercise of their professional skills may raise human rights issues or create the potential for human rights violations. Third, they should

[155] In this context, it is worth noting (and professionals should be taught to recognize) how professional expertise may also contribute to our understanding of human rights norms and what they require. *See*, e.g., Başoğlu M, Livanou M, Crnobaric C, *Torture versus other cruel, inhuman and degrading treatment: Is the distinction real or apparent?* ARCHIVES OF GENERAL PSYCHIATRY, 64,1-9 (2007) (arguing that psychological manipulations, humiliating treatment, and forced stress positions do not seem to be substantially different from physical torture in terms of the severity of mental suffering they cause, the underlying mechanism of traumatic stress, and their long-term psychological sequelae).

receive training in how they can use their professional expertise, access to resources, and social status to protect and promote human rights. This kind of training should help ensure that professionals are better equipped to satisfy the professional ethical obligation I have advanced in this article.

(b) Human Rights Practice as Professional Practice

Arguments for increased human rights or ethics training in professional curricula are often met with the concerns about finding a place for new modules in a tightly-packed curriculum.[156] These arguments commonly prevail in medical schools, while a place for neuroscience or another developing field is more easily found. In my view, this results from a failure to perceive of ethics and human rights as integral to professional practice. In the case of practice-oriented professions such as law and medicine, it is important to emphasize human rights as a practice (rather than as an abstract theory, a body of often-unenforced international law or a set of lofty aspirations). Although the language of human rights practice is usually applied to state actors, it is only by exploring the synergies between human rights practice and professional practice—and by talking about human rights practice *qua* professional practice—that professions can develop and sustain a membership that is capable of performing the kinds of human rights obligations argued for in this article. Of course, talk is not enough. The recognition of

[156] See Cotter et al., *supra* note […]

human rights practice as an intrinsic part of professional practice should lead to the creation of institutional structures designed to facilitate and promote this practice.[157]

(c) Bridging the Gap between Human Rights Commitments and Compliance

Assessing the impact of human rights norms on behavior—whether the actor of interest is an individual, an institution or a state—is not an easy task.[158] Although some qualitative work (in particular, case studies) has provided cause for optimism,[159] recent quantitative research has attracted much attention, because it suggests that ratification of human rights treaties does not lead to greater human rights compliance.[160] To students of international relations and behavioral psychology, these disappointing results should have not been surprising. There is no reason why the act of signing or ratifying a treaty should necessarily trigger an acculturation of the norms it contains.

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[157] For a discussion of some of these structures in relation to health professionals (including whistleblower protections), see Jonathan H. Marks, *Looking Back, Thinking Ahead*, *supra* note [...].

[158] For a discussion of methodological issues and the divergence between the results provided by qualitative and quantitative research, see Emilie Hafner-Burton and James Ron, *Seeing Double; Human Rights Impact Through Qualitative and Quantitative Eyes,* 61(2) WORLD POLITICS 360 – 401 (2009).

[159] *Id.*

[160] See Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE LJ 1935 (2002); see also Gilligan MJ and Nesbit NH, *Do Norms Reduce Torture* (2009) 38 JOURNAL OF LEGAL STUDIES 445 – 470 (examining the compliance of countries that have signed, ratified or acceded to the Torture Convention).

As one might expect, the effect of ratification appears to depend upon a variety of factors, among them how democratic a country is.[161] However, even in democracies, other factors come into play. During 2003 – 4, the walls of Abu Ghraib prison (in particular, the Joint Interrogation and Debriefing Center) were plastered with posters entitled "Interrogation Rules of Engagement,"[162] purporting to remind U.S. interrogators and military police that the "Geneva Conventions apply," that interrogations must be "humane and lawful" and that "[d]etainees will NEVER be touched in a malicious and unwanted manner." We know how effective that poster was, given the countless documents and images of abuse that have been made public in the last seven years. This is hardly surprising given the host of factors that can contribute to or undermine human rights compliance, above and beyond the state's formal legal commitments.[163]

In Europe, the effects of human rights norms are more easily demonstrable. Parties to the European Convention of Human Rights (which include all members of the European Union) may be sued, and are often successfully sued, in the European Court

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[161] Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?* J. CONFLICT RESOLUTION, 49(6): 1-29 (2005)

[162] A copy of this poster is available at http://www-tc.pbs.org/wgbh/pages/frontline/torture/art/rulesp.jpg (last accessed January 10, 2010).

[163] Official policy endorsing aggressive interrogation was, of course, one reason why this poster was not effective. Building on work in behavioral psychology, I discuss elsewhere how systemic and situational factors may be structured in order to enhance human rights compliance: see Jonathan H. Marks, *Looking Back, Thinking Ahead* […].

of Human Rights if they fail to comply with the provisions of the Convention. It is possible to point to many cases in which successful proceedings before the Court have led European nations to change policies and practices.[164] The effect is more dramatic still in countries, such as the United Kingdom, that have directly incorporated the European Convention into domestic law, thereby giving individuals the right and opportunity to bring proceedings for non-compliance in domestic courts.[165]

Whether or not countries are subject to these kinds of enforcement mechanism, the account I offer here could play an important part in bridging the gap between states' human rights commitments and their human rights compliance. However, it will be especially important in countries that are not subject to these enforcement mechanisms. By facilitating the state's respect, protection and fulfillment of human rights, they will also enhance the prospect of broader acculturation of human rights within their local and national communities.[166] It will always be difficult to provide quantitative

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[164] For a comprehensive analysis of European human rights law, see CLAYTON & TOMLINSON, THE LAW OF HUMAN RIGHTS (2009).

[165] The Human Rights Act 1998, which incorporates the European Convention Human Rights into UK law, does not enable the courts to strike down legislation on the grounds that it is incompatible with the European Convention on Human Rights. However, national courts are empowered to issue a "declaration of incompatibility," and the Human Rights Act provides an expedited procedure to facilitate (but not compel) the passage of legislation intended to address the incompatibility. For more on the Human Rights Act, see CLAYTON AND TOMLINSON, THE LAW OF HUMAN RIGHTS (2009).

[166] Albert Dzur has argued for "democratic professionalism," which he describes as an "inherently collaborative" enterprise that involves "sharing previously professionalized tasks and encouraging lay participation in ways that enhance and enable broader public engagement and deliberation about major social issues inside and outside professional domains." *See* ALBERT W. DZUR, DEMOCRATIC PROFESSIONALISM: CITIZEN PARTICIPATION AND THE RECONSTRUCTION OF PROFESSIONAL ETHICS, IDENTITY AND PRACTICE (2008) at 130. If Dzur's democratic professionals facilitate public engagement and

evidence to demonstrate the human rights efficacy of professionals. In most cases, we will have to make do with case studies, oral histories and other qualitative evidence. But this kind of evidence can still be very persuasive. After all, it took just a few professionals (principally psychologists, physicians and lawyers) to pave the way for the Bush administration's aggressive interrogation and detention regime—the key players could probably all have been seated around a large Thanksgiving dinner table. And, one might reasonably suggest, it would have taken just as many to prevent it.

The UN Global Compact recognizes the vital role that companies, in particular powerful multinational corporations (MNCs), can play in ensuring compliance with human rights—as well as the role they can (and often) play violating them.[167] This article makes a similar claim for the professions. Professionals (and professional organizations for that matter) may not have the financial resources of MNCs, which in some cases have turnovers that rival small nation states. But they do have power by virtue of their social status, access and expertise. And this power can be considerable

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deliberation about human rights (a topic Dzur does not address in this book), they would also further the obligation advanced in this article and contribute to the acculturation of human rights.

[167] See http://www.unglobalcompact.org/ (last accessed February 6, 2011). The compact contains ten principles. The first and second human rights principles provide respectively that businesses should (1) "support and respect the protection of internationally proclaimed human rights" and (2) "make sure that they are not complicit in human rights abuses." In 2008, the UN Secretary General's Special Representative for Business and Human Rights, John Ruggie, also proposed a threefold framework outlining (1) the state duty to protect against human rights abuses by third parties, including business; (2) the corporate responsibility to respect human rights; and (3) greater access by victims to effective remedy, both judicial and non-judicial. For further information about the "Protect, Respect and Remedy" Framework, and the drafting of guidance for its implementation, see http://www.business-humanrights.org/SpecialRepPortal/Home (last accessed, February 6, 2011).

when professionals choose to exercise it collectively. The obligation proposed in this article is intended to complement rather than supplant the human rights obligations of corporations articulated in the UN Global Compact. Moreover, given corporations' interactions with and dependence on a variety of professionals, the professional ethical obligation advanced here should also enhance compliance with the Global Compact.

X. Conclusion

The drafters of the Universal Declaration of Human Rights urged in the preamble that "every individual and every organ of society" should keep the document "constantly in mind."[168] But thinking about these rights is, of course, not enough. The declaration also calls on every individual and organ of society to "strive … to promote respect for these rights and freedoms and … to secure their universal and effective recognition and observance."[169] As I have argued, professionals and professional organizations are, respectively, essential individuals and organs of society as far as the respect, protection and fulfillment of human rights are concerned. Although human rights law and practice has not been at its most articulate when addressing the responsibilities of these individuals and their organizations, I have offered an account here that seeks to provide a principled foundation. It is not, of course, the only scholarly account to speak of the

[168] Available at http://www0.un.org/en/documents/udhr/ (last accessed January 20, 2010).

[169] *Id.*

human rights obligations of professionals. But the novelty is in the endeavor to establish a unified theory—broad enough in scope to apply across all professions, yet sufficiently nuanced to allow for individuation among professions and professionals. Taking human rights seriously means taking seriously the role of professionals as guarantors of those rights. My objective here is to animate that process.

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