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From moral rights to legal rights? Lessons from healthcare contexts

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Abstract

Many believe the existence of a moral right to some good should lead to recognition of a corresponding legal right to that good. If, for instance, there is a moral right to healthcare, it is natural to believe countries should recognize a legal right to healthcare. This article demonstrates that justifying legal rights to healthcare is more difficult than many assume. The existence of a moral right is insufficient to justify recognition of a corresponding justiciable constitutional right. Further conditions on when it is appropriate to recognize constitutional rights are rarely satisfied in the healthcare case. And focusing on aspirational or statutory rights presents costs for those seeking to justify legal rights on the basis of corresponding moral ones while maintaining empirical challenges for justifying constitutional rights. This suggests movement from a moral right to a corresponding legal one is far from straightforward and justifies examining alternative means of realizing moral socio-economic rights such as the proposed moral right to healthcare.

KEYWORDS
bioethics, developing world bioethics, rights

1 | INTRODUCTION

Claiming a moral right to a good suggests others wrong you if they fail to secure access to it (without good reason for doing so). But when should one recognize a *legal* right to provision of a good? The present work analyses this issue by focusing on the right to healthcare. If there is a moral right to healthcare, it is natural to believe countries should recognize a corresponding legal right. Many countries recognize specifically constitutional rights to healthcare, over 40% of which are justiciable rights one can directly bring in court.[1] Knowing whether and when countries should recognize legal rights corresponding to moral rights is important for understanding whether and how such rights are justified, the nature of any state duties to provide healthcare, and the relationship(s) between moral and domestic legal rights.

This work assumes a moral right to healthcare exists to examine whether and when domestic governments should recognize legal rights corresponding (in the sense defined below) to moral ones. It finds that justifying legal rights to healthcare is more difficult than many assume. Recognition of a moral right cannot justify recognition of a corresponding justiciable constitutional right. Further conditions on when it is appropriate to recognize constitutional rights are, in turn, rarely satisfied in the healthcare case. Domestic 'aspirational' or statutory rights to healthcare (also defined below) may further corresponding moral rights but those legal rights prove unnecessary

[1]Rosevear E., Hirschl, R., & Jung, C. (2019). Justiciable and Aspirational Economic and Social Rights in National Constitutions. In K.G. Young (Ed.), The Future of Economic and Social Rights (37–65). Cambridge University Press.

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and often insufficient for the task. Focusing on aspirational or statutory legal rights also presents costs for those who seek to justify legal rights on the basis of corresponding moral ones and maintains empirical worries. This justifies examining alternative means of realizing moral socio-economic rights such as the proposed moral right to healthcare.

The argument below primarily concerns the relationship between moral and legal rights. While some view international human rights as reflecting moral rights,[2] this argument views international human rights law as a predominantly legal domain establishing international rights. Questions concerning whether and when domestic legal rights further international legal rights are accordingly less central here than in other parts of the health and human rights scholarship. Many health rights theorists seek to justify the international right to health and take its contours as indicative of the general structure that a moral right should encompass. And work on how states attempt to fulfill the international right to health provides evidence for claims about how domestic modes of implementation function in practice.[3] I thus appeal to international law throughout the analysis below. However, the relationship between any moral health rights and domestic legal health rights also raises questions that need not be directly mediated by appeals to international human rights law. I take these as central here. While international law does not, in turn, explicitly require recognition of domestic 'rights' to health or healthcare of the kind detailed below,[4] that is non-dispositive of whether the domestic rights are justified or required where a moral right to health, healthcare, or public health obtains. I accept for argument's sake that morality could require more or less than international human right law.

2 | WORKING DEFINITIONS

Working definitions further clarify the scope of my inquiry and nature of my argument. The 'moral rights' at issue here confer a rights-holder with a particular form of moral standing vis-à-vis a duty-bearer. More specifically, they provide the rights-holder with the standing to make claims on duty-bearers regarding the content of the right. While such 'claim-rights' are only one kind of right, they are paradigmatic ones, both generally and in the specific debates about health rights in which I develop the present argument.[5] Rights-based claims for some action (or inaction) then trigger specific grounds for complaint when that duty-bearer fails to perform the action/inaction. The duty-bearer must minimally explain why they did not do so and must at least sometimes compensate the right-holder.[6] Claiming a moral right to healthcare, for example, aims to establish an entitlement to access to basic healthcare and that others wrong you when failing to secure access and accordingly must explain such failures and, perhaps, provide some alternative goods.[7] The rights at issue are 'moral' in the sense that they can exist absent legal recognition.

This definition is bound to be controversial but fits the basic structure of rights in debates about claimed socio-economic rights.[8] I further understand a moral right *to healthcare* as minimally providing a valid claim to some specifiable set of healthcare goods.[9] I take a modest view of the goods required to fulfill the right, assuming it refers to goods uncontroversially required to secure basic health, dignity, or a minimally good life. Primary healthcare, World Health Organization-recognized essential medicines, and basic immunizations exemplify the kinds of goods likely to fall under any minimalist specification of its content.[10] This covers most existing claims while fitting the basic structure of the international legal right many theorists seek to justify.[11] It also limits the right's scope, helping to ensure it is distinct and not unduly expansive.[12]

I remain initially agnostic as to the proper moral justification for human rights as a class or the right to healthcare particularly as many points below generalize and proponents of a right to healthcare should retain as many possible argumentative strategies as

[2]E.g., Kahn, E. (2021). Beyond Claim-Rights: Social Structure, Collectivization, and Human Rights. Journal of Social Philosophy. 52(2):162-184.

[3]See Simmons, B.A. (2009). Mobilizing for Human Rights: International Law in Domestic Politics. Cambridge University Press (on human rights generally); Perehudoff, S.K., Alexandrov, N.V., & Hogerzeil, H.V. (2019). Access to Essential Medicines in 195 Countries: A Human Rights Approach to Sustainable Development. Global Public Health 14(3):431-444; Perehudoff, S.K., Alexandrov, N.V., & Hogerzeil, H.V. (2019). The Right to Health as the Basis for Universal Health Coverage: A Cross-National Analysis of National Medicine Policies of 71 Countries. PLoS ONE 14(6):e0215577; and Yamin, A.E., Bottini Filho, L., & Malca, C.G. (2023). Advancing the Right to Health: From Exhortation to Action: The WHO Council on the Economics of Health for All (Council Brief No. 5). World Health Organization (on health rights).

[4]The international right admits options for realization. See my Da Silva, M. (2018). The International Right to Health Care: A Legal and Moral Defense. Michigan Journal of International Law. 39(3):343-384. See also, e.g., Tobin, J. (2012). The Right to Health in International Law. Oxford University Press.

[5]Claim-rights are only one of four categories in Hohfeld 1913's famous taxonomy of rights. See Hohfeld, W.N. (1913). Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. Yale Law Journal. 23(1):16-59. While Hohfeld's analysis is primarily legal, he is used in moral discourse too. On claim-rights' general prominence, see Valentini, L. (2023). Rethinking Moral Claim Rights. Journal of Political Philosophy. 31(4):433-451 (though Valentini, like Kahn, op. cit. note 2, criticizes this focus). On the basic structure of health rights claims, see philosophical accounts like Rumbold, B.E. (2017). The Moral Right to Health: A Survey of Available Conceptions. Critical Review of International Social and Political Philosophy. 20(4):508-528, and comparative work like Flood C.M. & A. Gross (Eds.). (2014). The Right to Health at the Public-Private Divide: A Global Comparative Study (pp. 288-317). Cambridge University Press; or Yamin A.E. & S. Gloppen (Eds.). (2011). Litigating Health Rights: Can Courts Bring More Justice to Health? Harvard University Press.

[6]The second-order duties are not strictly Hohfeldian. *Cf*. Hohfeld, op. cit. note 5(i), and Da Silva, M. (2020). Correlativity and the Case Against a Common Presumption About the Structure of Rights. Journal of Value Inquiry. 54:289-307.

[7]For a useful introduction to rights theory, see Wenar, L. (2020). Rights. Stanford Encyclopedia of Philosophy. Retrieved January 20, 2024, from plato.stanford.edu/entries/rights/. On moral and legal rights, see also, e.g., Etinson, A. (Ed.). (2018). Human Rights: Moral or Political? Oxford University Press.

[8]*Ibid*. On legal socio-economic rights claims, see also, e.g., Young, K.G. (Ed.). (2019). The Future of Economic and Social Rights. Cambridge University Press.

[9]It may also include procedural fairness in health decision-making and governance structures necessary to secure them. I argue for that in Da Silva, M. (2021). The Pluralist Right to Healthcare: A Framework and Case Study. University of Toronto Press but am agnostic on that issue here. An entitlement to some specific goods remains a necessary condition for a distinct right to healthcare, rather than to just decision-making in care settings.

[10]For other minimalist accounts of the content of the right, see, e.g., Hassoun, N. (2020). Global Health Impact: Extending Access to Essential Medicines. Oxford University Press; and Da Silva, op. cit. note 9.

[11]On the international right, see, e.g., Tobin, op. cit. note 4(ii); and Da Silva, op. cit. note 4(i).

[12]See Da Silva, op. cit. note 4(i); Da Silva, op. cit. note 9.

practicable. This appears acceptable where justifications for a right to healthcare also minimally overlap in their guarantee of basic healthcare goods like primary healthcare, essential medicines, and basic vaccinations.[13] However, I do raise distinctions where they are relevant to particular arguments/claims below.

'Legal rights' then refers here to specific entitlements to healthcare goods within a legal system. They take many forms. One could, for example, have a direct legal right to healthcare that triggers a governmental duty to provide insulin and permits one to bring the government to court to get it. Or one could have an 'aspirational' right that does not directly trigger such responsibilities but requires reading a right to life as entailing healthcare provision requirements that could even include public funding for insulin.[14] One could then possess a constitutional right that is hierarchically superior to other legal claims and triggers special protections from regular forms of limitation or amendment. Or one could have a statutory right that provides a claim that a legislature can easily remove; Canada's guarantees of universal access to insured healthcare goods in the *Canada Health Act* can, for example, be formally removed via simple amendment.[15]

I take justiciable constitutional rights with a hierarchical status in a country's legal order and more challenging amendment procedures as my primary case below. Right to healthcare claimants seek secure entitlements that cannot be easily overridden or removed through regular amendment procedures and want to be able to bring governments to court to secure access to their goods.[16] Constitutional rights alone reflect their claims' desired special status (though I will briefly analyze aspirational and statutory rights to healthcare after addressing this primary focus).

'Corresponding rights' denote legal rights to Φ conditional on moral rights to Φ. This follows use in debates about whether legal rights require corresponding moral ones.[17] While few hold a strong 'Mirroring View'[18] of human rights whereby a legal right is justified if and only if it directly corresponds to a moral one, several adopt the related, intuitively plausible position that one should, or even must, recognize legal rights to further corresponding moral rights.[19] I now turn to further explicate these and related arguments for legal rights to healthcare.

3 | CONDITIONS ON RIGHTS RECOGNITION

A 'right' must fulfill several conditions. For simplicity's sake, the following adopts conditions I defend elsewhere[20] whereby 'rights' properly-so-called should be correlative, determinate, justifiable, and practically realizable. These conditions too are likely controversial but common to many accounts and reflect rights' purported distinctive features and contributions to moral ontology. They thus provide useful guidelines for evaluating legal rights recognition. Analysis below examines whether and when a moral right fulfilling the conditions should be legally recognized and, relatedly, if corresponding legal rights are likely to fulfill moral ones.

The first condition is that rights are *correlative*. This point is analytic: rights here are defined in terms of a rights-holder-duty-bearer relationship.[21] There must be some reason for this relationship to exist for the right to obtain. Someone must plausibly be duty-bound to act for another and that person must have specific grounds for complaint when that duty is unfulfilled.

This formal relationship then requires elaboration if it is to have moral implications. A second condition thus requires the content of the right and corresponding duties be sufficiently *determinate* to guide action. A rights-holder, A, and a duty-bearer, B, must know enough about the content of the right, X, and corresponding duty, Y, to know what is expected of them qua rights-holder and duty-bearer. I do not assume there is only one possible duty-bearer or way of fulfilling that duty.[22] That makes it too easy to reject socio-economic rights claims, which is uncharitable here. However, a plausible, action-guiding rights claim must at least identify a reasonable class of duty-bearers and actions that they must perform (or refrain from performing).

To change moral powers, a third condition is that rights are *morally justified*. There should be a set of strong moral reasons that cannot be reasonably rejected and explain why A has a claim to Y from B and why B wrongs A when failing to do Y. While rights theory admits many nuances, a simple account of the two most prominent accounts explains the relationships in terms of individual interests and will.[23] On the 'interest' theory, all rights are justified by their ability to protect individual interests. Some of A's interests are strong enough to trigger B's duties to help further them in some determinative way. On the 'will' theory, all rights reflect powers to exercise one's inherent freedom, which itself entails a power to

[13]Recall, e.g., sources in Kahn, op. cit. note 2.

[14]Distinctions here follow those in, e.g., King, J. (2012). Judging Social Rights. Cambridge University Press, and Rosevear, et al., op. cit. note 1.

[15]I bracket here questions as to the political costs of eliminating these entitlements as the formal distinction is key.

[16]See comparative law sources below and the nature of the claims therein.

[17]Etinson provides a useful overview of that debate (see Etinson, op. cit. note 7(ii)).

[18]Buchanan, A. (2013). The Heart of Human Rights. Oxford University Press.

[19]Tomalty hints at the small number of Mirroring View proponents (see Tomalty, J. (2016). Justifying International Legal Human Rights. Ethics & International Affairs. 30(4):483-490). Tomalty herself takes the majority view that the Mirroring View is false but contends that moral rights have an important role to play in justifying legal ones. For more discussion of legal human rights furthering moral rights, *cf*., e.g., Tasioulas, J. (2017). Exiting the Hall of Mirrors: Morality and Law in Human Rights. In T. Campbell & K. Bourne (Eds.), Political and Legal Approaches to Human Rights (pp. 73-89). Routledge; Tasioulas, J. (2019). Saving Human Rights from Human Rights Law. Vanderbilt Journal of Transnational Law. 52: 1167-1207; Sreenivasan, G. (2021). Whither and Whether with the Formative Aim Thesis. Vanderbilt Law Review. 52:1331-1357.

[20]Da Silva, M. (2023). Health, Healthcare, and Public Health as Objects of Human Rights. In S. Venkatapuram & A. Broadbent (Eds.), The Routledge Handbook of Philosophy of Public Health (pp. 347-361). Routledge.

[21]This understanding is, again, commonly attributed to Hohfeld: see Hohfeld, op. cit. note 5(i). *Cf*. Kahn, op. cit. note 2; Valentini, op. cit. note 5(ii).

[22]The weaker correlativity in Da Silva, op cit. note 9 is notable in this respect.

[23]Wenar is, again, a useful introduction (see Wenar, op. cit. note 7(i)). The volume including Kramer has excellent papers detailing competing accounts (see the broader volume including Kramer, M.H. (1998). Rights Without Trimmings. In M.H. Kramer, N. E. Simmonds, & H. Steiner (Eds.), A Debate Over Rights: Philosophical Enquiries (pp. 7-112). Clarendon Press). A festschrift for Kramer has an up-to-date account of competing views (see McBride, M. & Kurki, V.A.J. (2022). Without Trimmings: The Legal, Moral, and Political Philosophy of Matthew Kramer. Oxford University Press).

change their normative powers. Accounts of the right to healthcare often build on interest theories: health or another level of well-being is said to be a fundamental interest of sufficient strength to trigger duties to protect it, including duties to provide necessary healthcare.[24] Even this leaves open questions regarding how to determine the scope and content of relevant rights and duties, what justifies protecting particular interests, and the priority of interests in, e.g., capabilities or dignity, which can pick out different goods as necessary content of a right.[25] A will-based account must then explain how people can change each other's normative powers. It suffices here to highlight that some moral value– be it fundamental interests or freedom, capabilities or dignity –must justify a right.

Rights should, finally, be *practically realizable* in the real world (or at least nearby ones). Fulfilling a health-specific version of Y must further health-related moral values without substantially undermining B's ability to further other moral values/rights/social goals. One should not recognize a 'right' to healthcare expansive enough to make properly funding education impossible. Even an expansive non-enforceable moral right to healthcare might lead to distortions in funding if, for instance, it leads decision-makers to believe they must prioritize the provision of expensive cancer medications with questionable efficacy over funding low-cost water access programs. Indeed, the very values that would justify a right to healthcare seem to favour the latter: water is more fundamental to basic human health than most cancer treatments.[26] However, this practicality concern is arguably even more acute with respect to legal rights with direct practical consequences – and especially so with respect to constitutional rights with hierarchical status in a legal system. I further discuss these and related challenges below.

4 | REASONS TO RECOGNIZE A *LEGAL* RIGHT TO HEALTHCARE

There are several reasons to recognize a constitutional or other legal right to healthcare, but each faces challenges. I now outline some compelling possibilities before exploring their limitations.

One may, for instance, think legal rights should correspond to moral ones. Human rights theorists have discussed whether the existence of a moral right to Φ is necessary for justified recognition of a legal right to Φ at length.[27] The related claim that the existence of a moral right to Φ necessarily requires recognition of a legal right to Φ receives comparatively little scrutiny; however, prominent philosophers appear to assume that this justificatory entailment holds.[28] While I challenge that assumption below, the underlying ideas are facially compelling. Claiming 'I have a right to Insulin' without attending to institutions necessary to establish a system in which you would receive it and the costs thereof appears unwise. Moral rights then become mere abstractions. Legal rights can be necessary to concretize their implications. Indeed, relatedly, many moral rights may not be realizable absent a functioning legal system protecting against their violation. It is thus unsurprising that the *Universal Declaration of Human Rights*[29] states that the human rights therein must be secured by the "rule of law." If the *Declaration* codifies universal moral human rights, as some scholars suggest,[30] that arguably provides still further reason for countries to recognize corresponding domestic rights. Realizing some moral rights can, in short, be furthered by and may require corresponding legal rights.

One may also recognize legal rights to healthcare to further other, non-healthcare-specific moral rights or even other values. Health and human rights scholars note the interdependence of that field's constituent parts: good health is prerequisite to the enjoyment of human rights while human rights protections help safeguard basic human health.[31] International legal rights are also supposed to be 'indivisible'.[32] If, again, they reflect moral rights, protection of any right may require protecting the healthcare-specific one. While one may question either claim, the idea that strong protections for healthcare can further other moral rights has plausibility. Protecting access to necessary insulin injections may not only protect and further a health-specific moral right but a broader range of moral rights. At the risk of being glib, the dead simply cannot enjoy a right to free speech: health is prerequisite to enjoying that less controversial right.

Indeed, recognition of a legal right to healthcare could additionally or alternatively further non-rights-based ends. Access to minimally adequate healthcare also seems prerequisite to the enjoyment of other values that might justify a moral right to healthcare, like basic health or dignity.[33] A legal right could secure entitlements thereto and thereby promote the values. Such a right might also further other substantive goods. Domestic constitutional rights to healthcare often appear in countries with lower-performing healthcare systems and health inequities; such rights could be justified attempts to require states improve systems performance and equity.[34]

A legal right to healthcare could also bring about positive ends in other ways. Legal rights to healthcare may not need to secure better access to, e.g., essential medicines to be justified. They could, for instance, be justified by the way that they provide means of critiquing state action and holding state actors to account. International law, for example, triggers duties for states to explain what they are doing to

[24]See, e.g., Hassoun, op. cit. note 10.
[25]Rumbold canvasses justificatory options (see Rumbold, op. cit. note 5(iii)). See also Prah Ruger, J. (2006). Toward a Theory of a Right to Health. Yale Journal of Law & the Humanities. 18(2):273-326 (on capabilities), and Da Silva, op. cit. note 9 (on dignity).
[26]I discuss this concern elsewhere (see Da Silva, op. cit. note 4(i)).
[27]This is the crux of the debate in Etinson, op. cit. note 7(ii).
[28]Hassoun is notable in this respect (see Hassoun, op. cit. note 10).
[29]United Nations. (1945). Universal Declaration of Human Rights. Retrieved January 20, 2024, from https://research.un.org/en/docs/humanrights/undhr.
[30]Kahn is representative here (see Kahn, op. cit. note 2). This is, again, non-obvious but I raise the point for charity's sake.
[31]See, e.g., Mann, J.M., Gostin, L., Gruskin, S., Brennan, T., Lazzarini, Z., & Fineberg, H.V. (1994). Health and Human Rights. Health and Human Rights. 1(1):6-23 (also presenting a third posit that largely amounts to the conjunct of the two here).
[32]Whelan, D.J. (2010). Indivisible Human Rights: A History. University of Pennsylvania Press.
[33]On basic health, see, e.g., Daniels, N. (1985). Just Health Care. Cambridge University Press.
[34]See Flood & Gross, op. cit. note 5(iv).

fulfill the rights and why they are not meeting their commitments (e.g., UN General Comment 14).[35] An analogous domestic mechanism can provide public accountability and could produce pressure to improve outcomes. Even aspirational rights can indirectly safeguard existing entitlements against other 'rights' claims. A right to healthcare could, for instance, protect against attempts to use a right to life framework to undermine single-payer healthcare systems that improve access to basic healthcare goods within a state.[36] If debates about such systems involve conflicts of rights, those seeking to undermine the public system do not 'win' simply because their claim is rights-based. One must instead address the substantive interests at stake as part of a conflict of rights analysis. Less directly still, legal rights may provide inspiration and pressure for myriad valuable actions, which further both moral rights and other moral values. Understanding healthcare through a rights framework could highlight the need to address access to healthcare-related concerns and inspire political action necessary to bring about necessary ends. Hassoun,[37] for example, suggests a legal right to healthcare will foster "creative resolve," understood as a disposition to "think creatively about how to overcome obstacles to fulfilling significant moral requirements" and attempt to fulfill them where possible/permissible.[38] Fostering such resolve could help fulfill a moral right to care and may prove desirable even absent a moral right where it produces other good health outcomes.

5 | REASONS TO QUESTION CONSTITUTIONAL RIGHTS TO HEALTHCARE

There are, then, several reasons why a legal right to healthcare corresponding to a moral one appears compelling. However, the remainder of this text highlights difficulties with moving from a moral right to recognition of a corresponding legal one. The need for a legal right of any kind to fulfill moral rights does not follow analytically from the nature of rights, moral, legal, or otherwise. Constitutional right to healthcare claims struggle to meet the criteria for rights recognition and the empirical record does not support constitutional rights recognition as even one of a set of most promising tools for furthering ends discussed in the previous section. Statutory or aspirational rights are desirable in some circumstances. However, appealing to statutory or aspirational legal rights as 'corresponding' to moral ones raises its own issues.

Moral rights do not analytically entail corresponding legal rights absent strong and controversial posits on the relationship between moral and legal rights that one can reasonably reject. If one seeks to justify legal rights on the basis of moral rights, the moral rights themselves require some justification. Attending to those justifications raises questions about whether legal rights are necessary. The move from the existence of some morally valuable end to that of a moral right is non-automatic. Even interest theory proponents grant that rights only protect certain kinds of interests. Healthcare access is, for instance, weighty enough due to its connection to the protection of basic health, capabilities, dignity, or some other good. Yet not all interests become subjects of moral rights (as the preeminent interest theorist, Kramer,[39] makes clear). There is little reason to believe that the mechanism that converts interests into valid rights claims necessarily provides justification for, let alone requires, corresponding legal rights. The possibility that non-legal conventional norms could equally fulfill a particular moral right remains. One must thus not only explain why some interests or other ends ground a moral right but also why legal recognition is needed. Positing a necessary relationship to justify legal rights risks begging the question. Claimants owe further explanation of whether, why, and when recognition of *legal* rights is at least justified. This could connect to the need to protect moral rights, the system's internal norms, or another value. But further justification remains necessary.

One may, of course, adopt a strong version of the interest theory whereby calling something a 'right' simply denotes its being an interest of the kind and force required to trigger a need for legal protection. The move from moral to legal rights would become analytic. However, that move would come at the cost of 'moral rights' as a distinct category. And even it may create higher burdens for establishing *justified* legal health rights than many assume: Plausible accounts of why specific legal protections are required will likely face each challenge identified below.

If the relationship between moral and legal rights is non-analytic, it is better understood as an empirical prediction about the value of legal rights for protecting or furthering moral ends. Unfortunately, the empirical case on many constitutional rights is weaker than necessary to vindicate the arguments above. The practicality condition for justified rights recognition highlights one of the most pressing challenges for moving from a moral right to a legal right. The empirical record on the right to healthcare in particular at best does not support and may even undermine arguments that recognizing a constitutional right will further a corresponding moral one. Cases where it will do so without violating the practicality condition on recognition are likely minimal. Justifying recognition of constitutional right to set goods, in this case healthcare, to further a corresponding moral right to the goods is accordingly more difficult than many think.

Constitutional rights to healthcare do not consistently secure access to the content of even minimalist healthcare rights necessary to secure basic health, dignity, etc. Recent literature reviews found no positive correlations between constitutional recognition of social rights and respect for such rights.[40] The right to healthcare was a

[35]General comment no. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). UN Committee on Economic, Social and Cultural Rights (22nd sess.: 2000: Geneva). https://digitallibrary.un.org/record/425041

[36]Da Silva, op. cit. note 9.

[37]Hassoun, op. cit. note 10, p. 39.

[38]Perehudoff et al. provide further representative accounts of other roles health rights may play (see Perehudoff, et al., op. cit. note 3(ii), and Perehudoff, et al., op. cit. note 3(iii)).

[39]Kramer, op. cit. note 23, p. 62.

[40]Law, D.S., & Versteeg, M. (2013). Sham Constitutions. California Law Review. 101: 863-952; Chilton, A., & Versteeg, M. (2022). How Constitutional Rights Matter. Oxford University Press; Chilton, A., Eyzaguirre, C., & Versteeg, M. (2023). Social Rights Scapegoating. Global Constitutionalism. 1-8.

primary case study in analyses demonstrating no positive relationship between constitutional rights recognition and improved social outcomes.[41] This record is partly a function of whether legal rights are enforced, and enforcement admittedly varies across countries.[42] Yet the lack of a positive correlation generalizes in ways that suggest non-enforcement does not exhaust the problem(s).

Particular constitutional rights to healthcare can help fulfill elements of a plausible moral right in particular settings or realize other important ends. One accordingly should not assume all constitutional rights to healthcare are problematic, let alone illegitimate. Constitutional healthcare rights were instrumentally valuable for bolstering support for necessary healthcare system reforms in specific countries. In *Minister of Health and Another v Treatment Action Campaign and Others*, 2002 (5) SA 721 (CC),[43] for example, the Constitutional Court of South Africa famously required that the government in that state cease policies limiting the availability of nevirapine to reduce mother-to-infant HIV transmission and adopt policies to secure better access thereto. Affecting that judgment helped fulfill many plausible articulation of a moral right to healthcare concerned with basic health, dignity, capabilities, or other basic goods. Litigation under Brazil's constitutional right to health in the 1990s, in turn, increased access to then-new treatments for HIV/AIDs patients.[44] Brazil was subsequently recognized as an early leader in HIV/AIDs policy.[45] Health rights champions likewise suggest constitutional rights in Kenya, Colombia, and Thailand, for three examples, helped secure access to particular essential goods in each.[46]

Particular success stories cannot, however, establish a general case for constitutional rights to healthcare and there is reason to question whether constitutional health rights will consistently further corresponding moral rights. No single success can demonstrate that constitutional rights are generally advisable. And purported success stories raise their own issues. Stating that most proffered cases of 'successful' constitutional rights arise in states whose systems are unlikely models for healthcare system performance may seem orthogonal to core questions in 'developing world bioethics' but should provide pause as to whether constitutional health rights are generally desirable.[47] If the case for constitutional rights only applies in 'developing' states, it is unlikely to follow from the existence of a corresponding moral right alone. There is also reason to question whether success can generalize even in 'developing' states. The major successes in South Africa and Brazil notably each focused on HIV/AIDs. Each additionally followed sustained public advocacy campaigns that may have played as strong a role in creating conditions improving access. *Treatment Action Campaign* itself may be an outlier in its own jurisdiction.[48] And while the Brazilian right has also been used to secure important health goods outside the HIV/AIDs context,[49] Brazil and Colombia are at best highly controversial 'success' stories given widespread concerns about litigation in those states discussed below. Identifying uncontroversial 'success' stories is much more difficult than one may assume.

Even more positive accounts of constitutional health rights suggest they can only further health justice of any stripe under certain conditions. For example, a recent report to the World Health Organization accepts that legal health rights have an important role to play in furthering the international right to health but highlights many ways in which legal health rights– constitutional or otherwise –may fail to further that right and ultimately holds that any such influence relies on various institutional factors.[50] For another example, Kavanagh argues that a legal "right to health is a broadly beneficial institution for population health"[51] and further contends that "countries with a constitutional right to health deliver more and better health services to their populations—just one part of improving health, but an important one"[52] but attributes this to the way in which a right will "mobilizes actors and ideas and shapes the 'rules of the game' of both the health and governance systems in both large and small ways".[53] Even if Kavanagh's well-evidenced general empirical story succeeds, the case for constitutional rights still will not easily follow from the existence of moral rights alone. They will stem from features of political economy. (And Kavanagh's use of what we will below learn are controversial cases, particularly Colombia and Brazil, as core examples of his theory working in practice further suggests there is no easy path from a moral right to the need for a legal right).

Indeed, Kavanagh more broadly points toward how the most persuasive arguments for constitutional health rights speak to their indirect effects, which likely do not suffice to establish a general argument that moral rights are best protected through constitutional recognition of same. Health and human rights scholars have long recognized that success in litigation and success in achieving one's social aims need not co-extend.[54] Some health rights scholars argue that this can support constitutional health rights even where successful litigation to ensure better access to medicines, for example, is rare. Health rights, like other human rights, can place

[41]Chilton, A., & Versteeg, M. (2018). Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending. Journal of Law and Economics. 60:713-748; Chilton, et al., op. cit, note 40(iii).

[42]Langford, M., C. Rodríguez-Garavito, & J. Rossiet (Eds.). (2017). Social Rights Judgments and the Politics of Compliance: Making it Stick. Cambridge University Press.

[43]The Constitutional Court of South Africa. (2002). Minister of Health and Another v Treatment Action Campaign and Others. Retrieved January 20, 2024, from https://collections.concourt.org.za/handle/20.500.12144/2151

[44]Ferraz, O.L.M. (2009). The Right to Health in the Courts of Brazil: Worsening Health Inequities? Health and Human Rights 11(2):33-45; Ferraz, O.L.M. (2020). Health as a Human Right: The Politics and Judicialisation of Health in Brazil. Cambridge University Press.

[45]E.g., Nunn A.S., Massard da Fonseca, E., Bastos, F.I., & Gruskin, S. (2009). AIDS Treatment in Brazil: Impacts and Challenges. Health Affairs. 28(4):1103-1113.

[46]E.g., Kavanagh, M.M. (2016). The Right to Health: Institutional Effects of Constitutional Provisions on Health Outcomes. Studies in Comparative International Development. 51:328-364; Yamin, et al., op. cit. note 3(iv). Comparative collections like Flood & Gross and Gauri & Brinks contain positive and negative cases. See Flood & Gross, op. cit. note 5(iv); and Gauri, V., & D.M. Brinks (Eds.). (2010). Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World. Cambridge University Press.

[47]E.g., Perehudoff et al. model cases of South Africa, Indonesia, South Sudan, Philippines, Malaysia, Somalia, Afghanistan, and Uganda are non-obvious comparators for Canada, Switzerland. See Perehudoff, et al., op. cit. note 3(iii).

[48]*Ibid*.

[49]Yamin, et al., op. cit. note 3(iii), p.18.

[50]Ibid.

[51]Kavanaugh, op. cit. note 46, p. 345.

[52]Ibid: 346.

[53]Ibid: 354.

[54]Gloppen, S. (2008). Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health. Health and Human Rights. 10(2):21-36; Ferraz, op. cit. note 44(i); Ferraz, op. cit. note 44(ii).

constraints on political action or be useful tools for social advocacy mobilization to improve health outcomes.[55] Fair enough. However, constitutional health rights appear to be neither necessary nor sufficient for creating these political circumstances. Mobilization can and does occur absent constitutional rights, including constitutional rights to healthcare or health. And the empirical record on whether constitutional rights even indirectly produce better outcomes remains debatable. The extent to which rights improve access to essential medicines is contestable despite Kavanagh's insights. It is, for example, notable that the limited empirical record on essential medicines access does not identify a correlation between increased health rights recognition and increased access to such goods.[56]

Constitutional rights to healthcare can, in fact, undermine realization of plausible articulations of any moral right to healthcare. Consider Brazil again. Ferraz[57] details several ways in which litigation under its constitutional right to healthcare produced retrogressive effects. One notable issue Ferraz identifies is middle-class capture such that constitutional rights to healthcare favour access to more expensive goods. Brazilian litigation does not result in all persons having better access to the basic goods discussed above but to wealthy individuals securing access to goods outside the boundaries of a plausible moral right fulfilling the conditions above. Spending on these healthcare goods comes to the detriment of other goods, like education. This too violates our practicality constraint. If these are social determinants of health, as many claim, this will undermine realization of even health-related goods. Another issue is over-litigation: claimants in Brazil need to frequently go to court to gain access to any goods. A single victory in court is insufficient to secure society-wide access to the good in question absent binding precedent.

These results are not, moreover, unique to Brazil. Similar problems arose in Colombia and Chile.[58] One recent survey of the Latin American experience with social rights suggests the problems above generalize across that domain, crossing numerous divides, including among linguistic and cultural majorities and legal system type.[59] Still other case studies further suggest the problems are not due to Latin America-specific features. Indeed, some scholars suggest they arise even in states that are often considered exemplary of positive experiences with constitutional rights, like South Africa.[60]

Some issues with constitutional rights recognition above are likely superable. A narrow, defeasible right only covering essential medicines and some other basic goods is less likely to expand into a right to expensive goods for the middle class or to put an undue drain on resources than the Brazilian right. A policy of 'stare decisis' in which one person securing a constitutional entitlement to a good establishes a constitutional entitlement thereto for all persons requiring it would, for instance, likely address over-litigation concerns (though securing the formal entitlements could itself require more litigation).[61] These are important lessons for those who choose to recognize constitutional rights to healthcare. But they do not eliminate all risks above or establish that constitutional rights further relevant ends better than alternatives.

Stare decisis, in fact, highlights a further burden of *fit* for legal rights claims a plausible right to healthcare will not always meet. If, for example, a legal right to healthcare is to affect change within a legal system, it should reflect the basic structure of rights therein and be consistent with the existing rules of the system.[62] This is clearest for rights that claim to gain their justification from their role in a justified system but the point generalizes: A right is unlikely to fulfill proper moral ends if it cannot properly operate in a system. It is instead likely to cause instability. Yet neither stare decision nor limitation clauses are possible in all countries and new recognition of either would have wide-ranging institutional implications, which may themselves cause issues.[63]

Related concerns that a right may have unexpected consequences in new settings cannot be easily dismissed. One cannot know how its interpreters will resolve any conflicts, raising undue risks of poor outcomes, if not outright systems instability. Improperly tailored positive rights to healthcare or those that fit poorly in a system can be used to undermine a country's functioning healthcare system. Litigants recently tried to use right to healthcare-like claims to dismantle Canada's public healthcare system in the name of 'access'.[64] While courts there ultimately sustained the system, this possibility is notable, particularly where there is little evidence that constitutional health rights will better secure necessary healthcare in countries like Canada.[65]

Even if constitutional rights recognition could provide more indirect means of fulfilling corresponding moral rights, this would only provide a modest defense of constitutionalization in limited cases and requires further analysis of whether constitutionalization is

[55]Recall Hassoun, op. cit. note 10; note 37; etc. See also, e.g., Langford, et al., op. cit. note 41 on the interplay of law and politics.

[56]See Perehudoff, et al., op. cit. note 3(ii). Recall also work by Law, Versteeg, and Chilton on socio-economic rights more broadly.

[57]Ferraz, op. cit. note 43(ii).

[58]E.g., Yamin, A.E. (2019). The Right to Health in Latin America: The Challenges of Constructing Fair Limits. University of Pennsylvania Journal of International Law. 40(3):695-734; Chilton, et al., op. cit. note 39(iii). See also the country-specific chapters in the essay collections above/below.

[59]Ibid. See also Yamin & Gloppen, op. cit. note 5(v); Flood & Gross, op. cit. note 5(iv); Young, op. cit. note 8; and other works by authors in each collection.

[60]Even right to health proponents, like Forman, have since recognized that the South African jurisprudence at best offers a mixed record of improving access to care (e.g., Forman, L. (2008). Justice and Justiciability: Evaluating Right to Health Jurisprudence in South Africa. Journal of Medicine and Law. 27:661-683; Forman, L. & Singh, J.A. (2014). The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa. In C.M. Flood & A. Gross (Eds.), The Right to Health at the Public-Private Divide: A Global Comparative Study (288-317). Cambridge University Press.). Indeed, Heywood states that South African presents an "ideal" legal infrastructure for recognizing healthcare entitlements yet claims TAC's victory stemmed political advocacy (see Heywood, M. (2009). South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health. Journal of Human Rights Practice 1(1):14-26). Other forms of advocacy can be less successful.

[61]Da Silva, op. cit. note 9.

[62]These appear to be basic components of any 'political' approach in Etinson, op. cit. note 7(ii). See also e.g., Buchanan, op. cit. note 18.

[63]This explains some outcomes in the Latin American cases discussed above (with citations in previous notes).

[64]See *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2022 BCCA 245. Available at https://uploads-ssl.webflow.com/5e94a102877c872e8710b7a1/5f5a83f87197efb201f58245_Judge%20Steeves,%20re%20Cambie%20Surgeries%20Corporation%20v.%20British%20Columbia%20%28Attorney%20General%29,%2009-10.pdf

[65]Recall Perehudoof. et al., op. cit. note 47, surrounding.

preferable to other means of fulfilling moral rights. The empirical evidence above does not determinatively establish that constitutional rights to healthcare cannot further moral rights. Even Ferraz,[66] for example, also finds evidence that the Brazilian constitutional right to healthcare did lead executive and legislative decision-makers to pass policies that improved health justice in Brazil, "either out of a sense of constitutional duty or through pressure from civil society." However, constitutional rights to healthcare are not clearly necessary or desirable even where they have such positive indirect effects. They are clearly insufficient for fulfilling the moral right to healthcare wherever direct litigation is retrogressive and positive action requires further government developments. Moving from a moral right to a constitutional one at best requires one determine whether a constitutional right is likely to have this direct aid. Such analysis will likely require more comparative analysis with alternative means of fulfilling moral rights. If so, moving from moral rights to justified constitutional rights is again more difficult than some imagine.

If the positive measures rely on alternative means of fulfilling the rights that could exist absent a constitutional right, the case for constitutionalization is weaker still. If the executive and legislature in Brazil could have been pressured to act absent a constitutional right, that may have proved more desirable given some of the unintended issues with the Brazilian rights. One may think that constitutional rights could be a useful tool for inspiring necessary action in many cases. However, constitutional rights recognition then appears to be 'justified' as a political gambit, rather than a consequence of moral rights recognition as such. That result would vindicate my basic position. But one cannot assume any such political gambit will pay off.

Appeals to other indirect effects that constitutionalization may inspire do not eliminate the concerns above and again suggest that moving from a moral to a justified constitutional right requires work. The empirical record on these rights is, again, hardly encouraging. Those who are more sanguine about that record face further challenges. One risk of appeals to other moral ends is that nearly any law or policy is likely to further some substantive end. Even suggestions that a given class of rights are justified to 'give effect' to moral rights are uncomfortably vague and potentially justify all but the most problematic policies.[67] Appeals to other moral rights, let alone other moral values, risk justifying too much. However, specifications of a discrete set of justificatory ends cannot accrue the justificatory force for constitutional rights to healthcare that proponents desire. Other means may further them equally well as, or even better than, alternatives.

Hassoun's appeal to the intriguing concept of creative resolve clarifies issues here. Hassoun suggests a moral right to healthcare should entail a corresponding legal right but identifies alternatives that could better fulfill those rights. Hassoun notes consistent governmental reluctance to fulfill rights to health or healthcare and suggests private entities might provide a second-best means of fulfilling them. Private entities who exercise control over conditions necessary for health then owe secondary duties to fulfill a right to health absent governmental action. This should lead major corporations, for example, to seek means of securing wide access to essential medicines. Corporations might be more easily incentivized to take necessary action using market forces. Hassoun proposes a Global Health Impact [GHI] project, which would see private entities provide low-cost access to high-impact goods in exchange for labelling all the company's products as a product of a 'high impact' company. Hassoun suggests that project could produce necessary incentives to fulfill a plausible understanding of the right to healthcare.

While one may quibble with the details of Hassoun's proposal, the basic idea is compelling. Some corporations could and perhaps do possess and exercise more control over individuals' health than domestic governments in an increasingly globalized world, positioning them better to address relevant threats to health. They may also be more easily incentivized to bring about valuable ends. However, Hassoun's positioning of corporate agents also raises questions as to whether direct legal rights to healthcare are necessary to fulfill a plausible moral right. The GHI proposal does not require constitutional rights. Indeed, it appears preferable to constitutionalization across several dimensions. Corporate incentive structures can, e.g., be calibrated in real time; attending to issues that arise is easier than in cases where constitutional rights have entrenched particular understandings of rights with problematic implications that can only be 'corrected' through new litigation – or even long constitutional amendment processes.[68] There is, moreover, another question as to whether any legal right *to healthcare* is necessary to properly calibrate corporate incentives or foster creative resolve among public or private actors.

Hassoun would likely respond that programs like the GHI will only work where governments recognize a right to healthcare. Hassoun, again, contends that legal healthcare rights held against government should be primary and corporate duties secondary. Yet it is unclear why one should take this tack if corporations also control health outcomes, are truly best-positioned to address them, and corporate responsibility is more likely to bring about those ends. And even the necessity of incentivizing private actors or fostering resolve need not entail the creation of legal entitlements to particular healthcare goods. Any primary governmental right plausibly admits options for how to realize it. While one may then contend that *some* government action including an allocation of 'rights' is required to fulfill the moral right to healthcare, whether directly or indirectly, it is not clear that a legal right corresponding to the moral one or otherwise fitting under a plausible description of 'the right to healthcare' is required. The intellectual property and labelling rights allocated under the GHI are not, for instance, clearly 'rights to the healthcare.' But they may prove all that is required to fulfill the moral right and other valuable moral ends.

A constitutional right to healthcare also does not appear necessary for several other candidate moral ends. States could, for example sign an international covenant to express commitments to healthcare access

[66]Ferraz, op. cit. note 44(ii). p.2.

[67]See Sreenivasan, op. cit. note 19(iv). The point is more directly made in a forthcoming chapter in the *Routledge Handbook for the Philosophy of Human Rights*.

[68]Some issues are addressed over time. Sources on Latin America above note that Colombia changed the remedies available under their right to health to address capture and over-litigation concerns. Change remains difficult.

without recognizing equivalent domestic rights.[69] This could inspire actors to produce innovative programs to realize that right and would provide citizens of states with a means of critiquing state failure to fulfill the right. This is arguably how the international right to health already operates: International law requires states explain how they are fulfilling the right in periodic reports and offers a framework for critiquing state failures to realize it. However, corporations and NGOs do not obviously need a domestic constitutional right to healthcare to inspire them to develop innovative programs like the GHI. Domestic constitutional rights may produce more pressure to act, but this is non-obvious and they still present the challenges above.

Arguments for legal healthcare rights more broadly appear to provide justifications for using 'soft' power for certain moral ends that can be fulfilled absent legal healthcare rights. The question then becomes whether legal healthcare rights can better fulfill relevant moral ends. My prior examination of constitutional law, human rights law, and administrative law's ability to further Canadian realization of his interpretation of a moral right to healthcare concluded that use of 'soft' law tools, such as ombudspersons reports or model health legislation, offer better prospects of fulfilling the right in Canada.[70] While these bodies are often products of legislation, they do not rely on and are not obviously best secured through 'healthcare rights,' enforceable or otherwise. If these alternatives independently prove more effective, legal recognition of a right to healthcare is just one of many potentially problematic public tools for those who seek to fulfill the best version of a moral right to healthcare in states with developed healthcare systems. One may, of course, challenge my version of the right. And one cannot draw strong conclusions from one case study. But above-mentioned issues in Latin America, for example, are again notable. Given the (at best) mixed empirical record, one should at least explore alternatives before recognizing legal healthcare rights. Even if, for instance, one takes a more sanguine view of constitutional social rights' impact[71] or contends legal rights fare comparatively better on a relevant metric, one is unlikely to establish constitutional rights are uniquely capable of fulfilling said ends and mitigating corresponding risks.

Moral rights, then, need not entail legal rights recognition and constitutional rights recognition can actually undermine, rather than fulfill, apparently corresponding moral rights. Attempts to avoid these concerns can raise challenges for other conditions for justified rights recognition, like concerns with fit. Where even our best-case scenarios for the right to healthcare requires features of legal and healthcare systems that may not fit in many countries, the arguments for not to jumping quickly from recognition of a moral right to recognition of a corresponding legal right are strong. Constitutional healthcare rights may still be justified in some cases. They might, for instance, 'kickstart' broader access to relevant healthcare goods in a state or promote greater health equity. However, other endeavors, such as the GHI or soft law, may produce better outcomes. If they will most effectively fulfill the ends above, the case for legal rights against governments requires further elaboration. One must at least explain why governmental moral duties are primary beyond a mere appeal to a duty to fulfill interests and why primary legal duties should rest with governments. This should lead us to develop a more sophisticated account of moral rights than one appealing to broad interest protection alone and to explore its institutional implications in real settings. Doing so is unlikely to vindicate constitutional rights to healthcare. And arguments for *some* government action do not require direct legal healthcare entitlements. Appeals to the need for some legal rights here do not establish the need for a legal right *to healthcare* particularly, let alone one that broadly corresponds to a moral right to care.

6 | CHALLENGES FOR APPEALS TO OTHER DOMESTIC 'RIGHTS'

One may suggest that moral rights recognition nonetheless entails recognition of another kind of legal right– this, again, appears to be Hassoun (2020)'s settled position –but that facially compelling maneuver produces its own challenges. In the space remaining, I present some challenges for justifying statutory or aspirational rights to care. I primarily understand this in terms of public law rights held primarily against one's government as this appears to be how health rights advocates understand 'the right to healthcare' and fits common legal practice wherein most advocates bring their primary claims against governments.[72] Several points may apply to private laws, but fulsome discussion of if and how they do so is outside of scope here.

The first cost of this position is explanatory. Appeals to a statutory or aspirational right do not clearly reflect the meaning of a 'right to healthcare' intended by those who claim it. Most health rights advocates claim there is something distinct about healthcare that should ground special entitlements and/or priority for healthcare-related claims over (at least many) other goods; many seek means of ensuring governments provide same. Entitlements that are non-enforceable, on par with others, or easily removed do not reflect what they mean by 'rights' to healthcare. They are genuine (legal) rights of a kind but not of the kind intended by those claiming entitlements.

The second, related cost of this position concerns an asymmetry between the kinds of 'rights' at issue. The relatively easy movement from a moral right to a legal one requires that one accept that the legal 'right' lacks core features of the moral one. Aspirational rights at best significantly weaken, if not eliminate, basic correlativity. They do not create direct entitlements for rights-bearers or provide direct duties to act in any way. Statutory 'rights,' in turn, have no special status vis-à-vis other legal entitlements. This gives up on the priority of at least healthcare entitlements that is meant to characterize most accounts of the moral right to healthcare. Such an asymmetry may be acceptable all-things-considered. Moral rights could admit options for realization

[69] I suggest an *international* right may be partly justified for expressive purposes in Da Silva, op. cit. note 4(i).
[70] Da Silva, op. cit. note 9.
[71] For example, Gauri & Brinks, op. cit. note 46(ii).
[72] Recall philosophical and comparative law sources above.

that may include aspirational or statutory rights and legal rights of this kind could, in turn, be justified even if moral rights are justified. However, positing an asymmetry is a genuine cost for those who seek to justify legal rights corresponding to moral ones. One can no longer easily move from recognition of a moral right to recognition of a directly corresponding legal one. Rather, a moral right entails legal protections *of some kind*. This, in turn, requires either that one identify a particular legal right that will best fulfill the moral one or admit moral options.

This leads to the final cost of focusing on statutory or aspirational rights, namely a burden for explaining how the legal right in question will meet the above conditions on recognition. Most legal entitlements are likely to raise at least some challenges facing constitutional rights claims. Empirical data suggesting statutory or aspirational fulfill the basic core of a moral right to healthcare is also lacking. Stating that these non-constitutional legal protections are necessary for the other rights or values is an empirical claim or, at best, prediction. Assessing this claim requires an independent evaluative standard and establishes a burden of justification for legal rights that has not yet been met. Stating that a statutory or aspirational right is justified to 'further other moral rights or values' then raises questions of which are relevant what it would mean to 'further' them. Specifying a narrow class of moral rights or values raises empirical challenges that legal health rights advocates may not be able to meet. Statutory or aspirational rights to healthcare do not obviously best secure entitlements to related goods (e.g., the right to housing, freedom from torture, basic capabilities) or best foster desirable values (e.g., solidarity).

Even a successful version of this argument again cannot move easily, let alone directly, from the existence of a moral right to the justification of a corresponding legal one. Rather, it identifies other reasons to recognize legal rights that may not generally, let alone always, obtain. More capacious evaluative standards stating that rights are justified when they further a broader range of values may then offer easier means of justifying non-constitutional healthcare-related legal rights of some kind. Yet many beg the question by providing standards the rights further by definition or provide no evaluative standard by setting a threshold of justification any standard could meet. Seemingly any legal entitlement will further *some* right or value. Justification is then trivial – and here too another right/value, rather than the moral right, does the justificatory work.

7 | CONCLUSION

Plausible normative bases for assessing healthcare rights claims bar direct movement from the existence of a moral right to the justification of a corresponding legal one. This does not mean legal recognition of healthcare rights is always problematic. However, the empirical record on legal rights *to healthcare* queries whether such enforceable legal rights are desirable even on the grounds most likely to justify them. The conditions under which the legal rights will be justified are, it seems, less common than many proponents assume. There is accordingly reason to explore alternative means of realizing relevant moral ends before recognizing legal rights to healthcare.

This result clarifies aspects of the nature of and relationships between moral and legal rights. At least some moral rights can now be fulfilled without corresponding legal rights. However legal rights may be justified by considerations other than an ability to fulfill moral rights. These findings are consistent with views in aforementioned debates about legal rights justification and conform to the practice of human rights law. They are unproblematic where moral and legal rights share basic features, like correlativity, and one can maintain a generic concept of 'rights' encompassing both.[73] Results above also clarify state duties to provide healthcare: where states have moral duties to provide care, rights-based versions can be discharged without specific forms of legal entitlements to particular goods. Operative state duties instead require decision-makers survey options for how best to fulfill moral rights to healthcare, recognizing that constitutionalization is no easy solution and alternatives are often required to fulfill moral rights.

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CONFLICTS OF INTEREST STATEMENT

The author declares no competing or conflicting interests.

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[73]Compare Da Silva, op. cit. note 6(ii).