As part of my law school faculty duties, I teach classes in human rights law. If I wanted to do so—and if my students would put up with it—we could spend several weeks of class just describing the many sources of law that establish a human right to health, including the right to essential medicines.

We would start by recognizing that the idea that individuals possess human rights is one that existed long before there were international treaties and institutions designed to define and protect those rights. Those international treaties are relatively new, with most dating back only to the mid-twentieth century. But there is a long history of human rights, including the human right to health, being well respected stretching back for generations before these formal treaties ever existed.

All major religious traditions, and virtually all philosophical approaches, which have long had an enormous impact on the law, set out a clear mandate to provide for the needs of the poor and sick. Most have done so using language that invokes justice and rights, not merely charity. Old
Testament prophets and Jesus Christ spoke in terms of justice, often in the context of addressing the needs of the sick. The Qur’an speaks passionately of justice, and Confucian principles embrace a community-wide obligation to provide for the needs of all. St. Augustine said that charity cannot make up for justice withheld.

Following in those religious and moral traditions, many individual governments in Europe and the United States have long embraced a responsibility to provide for health care and what are known as the “social determinants of health,” which include universal subsistence needs such as food and water and shelter. In the early twentieth century, the constitutions of Mexico, the Soviet Union, and the Weimar Republic all articulated a governmental obligation to address economic and social needs. On the international level, the Treaty of Versailles in 1919 created the International Labour Organization, which eventually adopted standards that included insurance in the event of injury, illness, and old age.

In the United States, some state constitutions adopted in the nineteenth and twentieth centuries articulated rights to health and general welfare. Beginning in the nineteenth century, states implemented government poor relief programs. And in the 1930s, New Deal legislation created ambitious and successful federal programs designed to address the social determinants of health, including social security to meet the needs of the sick and disabled.

In President Franklin Roosevelt’s 1944 State of the Union address, he sought to build on the success of that New Deal legislation and the impending end of World War II by laying out an agenda he called a Second Bill of Rights. Prominent among those rights was “The right to adequate medical care and the opportunity to achieve and enjoy good health.” Roosevelt’s Second Bill of Rights followed his 1941 State of the Union address outlining the Four Freedoms: freedom of speech, freedom of worship, freedom from want, and freedom from fear.

These Roosevelt speeches animated the deliberations of the new United Nations when it created the Constitution of the World Health Organization in 1946 and the Universal Declaration of Human Rights in 1948. Both these documents made clear that all individuals in the world possess the fundamental right to the highest attainable standard of health. The qualifier *highest attainable standard* reflects the fact that it is impossible for a government to guarantee good health. Although health is largely
determined by social determinants such as food, water, and safety, along with access to care and medicines in a time of need, some health issues, attributable to genetics or personal choice, are outside the control of a government.

But access to medicines is most definitely something a government can influence. So, in 1978, the world’s nations adopted the Declaration of Alma-Ata on Primary Health Care, which listed essential drugs as one of the components of primary health care, identified by the representatives of 134 nations as “a most important world-wide social goal.” The International Covenant on Economic, Social and Cultural Rights (ICESCR) builds on the nonbinding Universal Declaration of Human Rights by imposing in its Article 12 the obligation for state parties to take steps to achieve the full realization of the right to health.

The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has the task of explaining in more detail what governments are obligated to do to fulfill this right. Chiefly through the 2000 document General Comment No. 14, the committee made it clear that one core and immediate obligation is ensuring the availability, accessibility, and good quality of essential medicines. The ICESCR is an all-but-universal treaty, with 164 countries having signed on. Unfortunately, the United States is one of just a handful of countries that has not yet ratified the ICESCR. But the United States is a party to the Universal Declaration of Human Rights, the Constitution of the World Health Organization, and other international agreements and declarations that establish a clear right to health.

Whenever that right to health is described by major human rights organizations, access to essential medicines is front and center. The UN high commissioner for human rights includes access to essential medicines as one of five indicators of the fulfillment by a country of the right to health and has urged states to pursue policies that facilitate the purchase of low-cost generic medicines. The World Health Organization has created a Department of Essential Medicines and Pharmaceutical Policies, and it has firmly stated that the right to access essential medicines is well-founded in international law. The Human Rights Council, which is composed of UN member countries elected by the UN General Assembly, has confirmed that the right to health includes access to medicines and that such rights supersede interests in international trade, investment, and intellectual property. That position was unequivocally repeated in 2016
by the UN High-Level Panel on Access to Medicines, which stated in its final report, “Human rights are fundamental, universal entitlements that people inherently acquire by virtue of their birth. In comparison, intellectual property rights . . . are temporary, revocable, transferrable privileges granted by states and can be suspended or revoked.”

At a national level, most countries have explicitly recognized the human right to the highest attainable standard of health within their own borders, whether by signing international and regional treaties or by laying out the right to health in their national constitutions—or, in many cases, both. These are not just empty promises. Many courts across the globe have issued rulings recognizing the right to health, including the right to access to medicine, and ordering that the right be fulfilled by governments.

We know from chapter 18 that trade agreements usually work to protect medicine monopolies and against access to affordable medicines. So, it is important to realize that, as a matter of human rights law, those trade deals do not stand on equal footing with the human rights obligations of any country. Although the Universal Declaration and the ICESCR include the right to protection of an inventor’s “moral and material interests” in a scientific, literary, or artistic product, the ICESCR also guarantees a human right to “enjoy the benefits of a scientific program and its applications.”

In 2006, the ESCR Committee cleared up any potential conflict between intellectual property rights and human rights, stating that it is important not to equate the two. Expressly citing the human right to essential medicine and specifically calling out the patent regime, the committee said, “States parties should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights.”

This do-no-harm requirement for countries includes the duty to actively prevent third parties—such as pharmaceutical companies—from taking actions that would have a negative effect on human rights, such as access to medicines. This commitment is binding on governments even when that harm would be felt in other countries, which is clearly the case whenever the United States pushes trade agreement terms that increase patent rights
and reduce access to medicine.\textsuperscript{26} The bottom line is this: in the eyes of the law, when the human right to health clashes with intellectual property rights, the human right to health wins.

Of course, it is no secret that TRIPS-Plus trade agreements (chapter 18) set the stage for violations of the human right to essential medicine. That problem was specifically addressed by the ESCR Committee in 1999, when it reminded the World Trade Organization that trade liberalization should serve the goals of international human rights instruments.\textsuperscript{27} In 2009, the UN special rapporteur on the right to health strongly criticized the TRIPS-Plus agreements for undermining the right to access essential medicines.\textsuperscript{28}

More recently, a group of UN experts issued a 2015 statement that addressed access to medicines and TPP and TTIP. “Observers are concerned that these treaties and agreements are likely to have a number of retrogressive effects on the protection and promotion of human rights, including . . . by catering to the business interests of pharmaceutical monopolies and extending intellectual property protection.”\textsuperscript{29}

Although human rights documents chiefly impose obligations on governments, pharmaceutical corporations have human rights responsibilities as well. The ESCR Committee 2000 General Comment No. 14 lays out corporate obligations, as do the UN Guiding Principles on Business and Human Rights. Both explicitly admonish businesses to avoid actions that would cause adverse human rights impacts.\textsuperscript{30}

Yet, as we know, the pharmaceutical corporations have ignored these mandates. The UN special rapporteur on the right to the highest attainable standard of health also knows that, so in 2008 he issued a very specific report on this issue, entitled “Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines.”\textsuperscript{31} Stating that enhancing access to medicines has “the central place in the societal mission of pharmaceutical companies,” and noting the benefits the industry receives from government-paid research and government-provided patent protections, the special rapporteur outlined recommendations that corporations contribute to the research and development for neglected diseases, and refrain from efforts to block access to essential medicines.

The special rapporteur’s guidelines include cooperating with countries that seek to provide their populations with the benefits of patented medicines through compulsory licensing and importation of affordable generic
medicines. The special rapporteur also discouraged pharmaceutical corporations from lobbying for increased protection of their intellectual property interests when that protection would negatively affect access to essential medicines. The special rapporteur recognized that this negative impact occurs as a result of patent-elongating schemes such as data exclusivity and evergreening.32

In sum, the human right to health, including the human right to essential medicines, is unequivocal and well established. Yet this human right has proven to be very difficult to enforce. Well-funded powerful corporations and governments have put up roadblock after roadblock on the path to universal access to affordable medicines.

But that this human right to essential medicines is not yet being well enforced does not change the fact that it exists, anymore than the continued existence of slavery in the world calls into question the human right to freedom. In the conclusion of this book I focus on how the human right to essential medicines can be made a reality in the lives of all people.