Ethic Theory Moral Prac (2012) 15:309–322
DOI 10.1007/s10677-012-9345-8

Evaluating 'Bioethical Approaches' to Human Rights

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Accepted: 1 February 2012 / Published online: 22 February 2012

Abstract In recent years there has been growing scholarly interest in the relationship between bioethics and human rights. The majority of this work has proposed that the normative and institutional frameworks of human rights can usefully be employed to address those bioethical controversies that have a global reach: in particular, to the genetic modification of human beings, and to the issue of access to healthcare. In response, a number of critics have urged for a degree of caution about applying human rights to such controversies. In particular, they have claimed that human rights have unresolved distributive and foundational problems. Interestingly, however, some of these critics have gone on to suggest that it might be possible to draw on certain bioethical insights to remedy these problems with human rights. This paper evaluates these recent attempts to apply insights from bioethics to the theory and practice of human rights. It argues that while these insights do not constitute an entirely new and original contribution to human rights thinking, they do force human rights scholars and campaigners to reflect on some key issues. First of all, they force us to question the prevalent idea that human rights are always 'inviolable trumps'. Secondly, they demand that we pay close attention to the 'fairness' of the institutions we charge with determining our concrete rights. And finally, and perhaps most radically, these insights challenge the notion that human rights are held exclusively by members of the human species.

Keywords Human rights · Bioethics · Human dignity · Genetic enhancement · Health

In recent years there has been growing scholarly interest in the relationship between bioethics and human rights. The majority of this work has focused on whether the normative and institutional frameworks of human rights can usefully be employed to address those bioethical controversies that have a global reach. In particular, this work has proposed that human rights can and ought to be used to regulate and constrain certain advances in

I would like to thank two anonymous reviewers and participants of the BIOS seminar at the London School of Economics, for helpful comments on earlier versions of this paper.

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biotechnology, and to promote access to healthcare. Taking biotechnology first then, scholars such as George Annas and Francis Fukuyama have argued that the threats posed by human cloning and other forms of genetic engineering are so profound that we need to employ the absolute prohibitions of human rights in order to curtail them. Moreover, if we do not curtail them, and allow these technologies to proceed, then these thinkers suggest that we face the possibility of massive human rights violations in the future (Annas et al. 2002; Fukuyama 2002). At the same time, there has also been a growing movement calling for the application of human rights norms to the issue of global health. Indeed, several thinkers and campaigners, such as George Annas, Paul Hunt, Audrey Chapman, and others, have claimed that a human rights-based approach offers unique advantages in tackling access to healthcare on a global scale (Annas 2004; Hunt 2006; Chapman 2009).

Inevitably, the idea of applying human rights to bioethical issues such as these has not been without its critics. Recently, a number of authors have urged for a degree of caution about the application of human rights to controversies in bioethics (Fenton 2008; Arras and Fenton 2009; Fenton and Arras 2010a, b). In particular, they have pointed to two important limitations of a human rights-based approach. First of all, they argue that human rights have difficulty in resolving distributive issues when rights claims conflict (Arras and Fenton 2009; Daniels 2008: 313). Secondly, they argue that human rights face unresolved foundational issues about the very idea of a set of basic entitlements grounded in our biological humanity (Fenton 2008: 4; Harris 2011).

Importantly, however, these critics do not seek to completely undermine the idea of human rights, or their application to controversies in bioethics. Instead, these authors have suggested ways in which human rights might themselves be modified to tackle these limitations. Crucially, they have also suggested ways in which the insights and debates *within bioethics* can be used to modify our understanding of human rights. For example, in response to the critique that human rights fail to offer the means by which to resolve distributive issues when rights conflict, John Arras and Elizabeth Fenton have proposed a so-called 'institutional' approach to human rights (2009). This institutional approach draws on work in bioethics around the distribution of scarce medical resources, and argues that rights ought to be allocated and fulfilled in a resource-sensitive way, and through fair institutional procedures. Furthermore, in response to the critique that our bare humanity provides an implausible foundation for human rights, both John Harris (2011) and Elizabeth Fenton (2008) have proposed that we move away from using simple biological traits in order to establish our basic universal entitlements, and towards morally relevant capacities. Once again, bioethical insights can be of use to human rights thinking in this regard, because the field has a rich tradition of debating the moral importance of such capacities as potentiality, life, sentience, consciousness, self-consciousness, moral autonomy, and so on.

In light of these contributions, the purpose of this paper is to ask whether these authors have actually begun to shape a distinctive approach to human rights, informed by the insights of bioethics. Have Fenton, Arras and Harris developed what might be deemed a new and distinctive 'bioethical approach' to human rights? This paper asks this question over four sections. The first and second sections explain Arras and Fenton's two-tiered 'institutional' understanding of human rights in more detail, before evaluating whether this understanding can be thought of as a new and distinctive 'bioethical approach' to human rights. The third and fourth sections explore John Harris and Elizabeth Fenton's insights with regards to the foundations of human rights, before assessing whether they constitute a new approach to human rights theory and practice. The paper concludes that while these insights from bioethical enquiry cannot be considered to provide a totally novel and original approach to human rights, they do force scholars and campaigners to reflect on some key

assumptions concerning human rights. First of all, they raise considerable doubts about the idea that human rights are 'inviolable trumps'. Secondly, they demand that we pay close attention to the 'fairness' of the institutions we charge with determining our concrete rights. And finally, and perhaps most radically, these insights challenge the notion that human rights are held exclusively by members of the human species.

1 The Institutional Understanding of Human Rights

The first area where scholars have offered 'bioethical insights' into the theory and practice of human rights has been with regards to the problem of 'indeterminacy'. John Arras and Elizabeth Fenton have proposed a 'two-tiered' 'institutional' understanding of human rights in order to try and resolve the distributive problems faced by human rights-based approaches—thus attempting to make them more determinate (2009). This section explains their institutional understanding of human rights in more detail, and the subsequent section examines whether it can be said to offer a new and distinctive approach to human rights.

In order to understand the institutional approach to human rights advocated by Arras and Fenton, it is useful to think of it as essentially *remedial*. That is to say, it is proposed as a solution to the distributive problem faced by a human rights-based approach to health. To explain, it has been pointed out that the idea of a human right to health faces the problem of *indeterminacy*. That is to say, when it is said that an individual has a human right to health, it is uncertain precisely *what* that individual is owed. Take, for example, Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) which grants human beings the right to the 'highest attainable standard of physical and mental health.' Clearly, the term 'highest attainable' is somewhat demanding, and given that resources are scarce, it cannot mean that an individual is owed *all and any* goods that would promote his or her health. To deal with such scarcity problems, the Covenant famously acknowledges that the duties the right imposes upon states are aspirational. Hence it asks states to 'progressively realise' the right, 'to the maximum availability of its resources.' But while such statements are useful and plausible, they still do not make the right determinate. After all, what precisely constitutes progressive realisation? How much progress is sufficient progress? In response to such questions, the Committee on Economic, Social and Cultural Rights has developed the notion of 'minimum essential levels' to outline basic core obligations that all states must provide in respect of economic, social and cultural rights (CESCR, General Comment 3 1990). Furthermore, the Committee has outlined what core obligations are entailed by the right to health in Comment 14 (CESCR, General Comment 14 2000). But still, while we know that states have mandatory obligations to ensure that access to health services is non-discriminatory, that everyone has access to essential food, shelter, drugs, and so on, the fundamental problem of indeterminacy still remains. For over and above this minimum content, who is entitled to precisely what under the right to health? And furthermore, if specific circumstances mean that not all claims to this minimum content can be fulfilled, how are we to decide whose rights ought to be prioritised? While human rights may offer some advantages in tackling global health—and there are plenty of scholars and campaigners currently claiming that they do—it cannot be denied that a human right-based approach also brings the significant disadvantage of indeterminacy.

Furthermore, the indeterminacy of human rights may not be unique to the issue of health. In fact, it might be argued that human rights face a fundamental difficulty when it comes to resolving *any* situation where the distribution of scarce resources is involved. As Fenton and Arras argue:

> (Human rights) … are of limited use in determining exactly who should get exactly what in very different contexts circumscribed by varying degrees of resource scarcity, and reliance on the human rights framework may even *preclude* consideration of better methods for making difficult allocative decisions (Arras and Fenton 2009: 28).

The reason that Arras and Fenton believe that a human rights approach might actually stand in the way of using better methods to make allocation decisions comes down to the special normative force that rights are often thought to hold. For instance, it is often held that rights are quite unlike other moral concepts and goods in that they are 'peremptory', 'inviolable', 'firewalls', 'side-constraints' and act as 'trumps' on competing considerations (Raz 1988: 192; Habermas 1996: 258–259; Nozick 1974: 28–29; Dworkin 1984). On this view, when a *right* to some good is invoked, that invocation is meant to *end* normative deliberation and to determine what finally ought to be done. What Arras and Fenton are suggesting then, is that the use of a human rights framework in relation to healthcare can be problematic, because it can be used to evade the crucial and complex business of determining who should get what, in favour of stipulating vague inviolable trumps.

For a human rights-based approach to healthcare to have any plausibility, some means of determining who should get what needs to be built into the approach. Given practical realities, we cannot just have an approach that stipulates a general right to health, for we urgently require a means by which competing claims to the right to health can be judged and resolved. Crucially, it is here that bioethics has been argued to be of real use. After all, the field of bioethics has a well-established and sophisticated debate with regards to the allocation of scarce medical resources. Indeed, a number of substantive principles that a just distribution of access to healthcare should conform to have been proposed and debated within bioethics. For example, principles whereby health-related goods are distributed so that they maximise overall welfare, prioritise the worst-off, prioritise the most deserving, conform to our market choices, and so on, have all been advanced and evaluated within the bioethics literature (Maclean 2007). And yet, some bioethicists have argued that in practice these debates are intractable: when formulating policy, different people will always have different ideas as to the basis for distributing health resources, and may in fact want to employ different principles for different types of resources. Because of the impossibility of attaining a consensus on a substantive principle with which to distribute health-related goods, the bioethicist Norman Daniels has famously suggested that we ought to abandon attempts to link policy to such a principle, and has instead proposed that our aim should be to ensure that the policy is the outcome of a fair procedural process. Daniels calls his proposed fair procedural standards, 'accountability for reasonableness' (Daniels 2008). The idea then is that a legitimate distribution of health resources is not one which conforms to principle X, or which seeks to maximise overall levels of Y, but is one which has been made through institutional decision-making processes that are transparent, that appeal to rationales that can be accepted as relevant, and which are open to contestation (Daniels and Sabin 1997).

Importantly for our purposes, Arras and Fenton have developed a human rights-based approach to healthcare that also relies on fair institutional procedures. Their proposal aims to work within the human rights framework, but also to tackle the problems of distribution described above. Arras and Fenton argue that we ought to adopt a 'two-tiered' approach to human rights. This two-tiered approach encompasses two different but complementary conceptions of human rights. The 'ideal' conception of human rights identifies the basic conditions that all human beings require in order to lead minimally decent lives. Under this ideal conception, it must be possible, if only theoretically, to assign specific duties to fulfil these abstract rights (Arras and Fenton 2009: 31). Recognising that human rights have this

'ideal' component grounded in the basic interests that all humans share underpins the approach in a universal morality. However, on its own the ideal conception faces the distributive problem outlined above: it does not assign in detail the specific content of any particular claim, or the specific duties entailed by that claim. As such, the two-tiered approach also recognises a second conception of human rights, the 'institutional' conception, which provides the detail and specificity that the ideal conception lacks. For institutional rights are those concrete rights that *emerge out of* fair institutional decision procedures. Institutional rights tackle allocation decisions by specifying in detail who gets what from any right claim, and who has to provide it (Arras and Fenton 2009: 35). Crucially, of course, this makes institutional human rights contingent on context: contingent on the deliberations of particular institutional bodies, and contingent on the resources available to those bodies. As such, we cannot know in advance what any particular individual's human right to health entails; rather, we have to rely on the deliberative process of specific institutional bodies:

> Concrete or 'effective' rights to health-related goods will thus depend on particular institutions within particular sociocultural contexts, and will have to be responsive to varying degrees of scarcity and different health-related priorities in different states (Arras and Fenton 2009: 35).

What is valuable about the approach suggested by Arras and Fenton is the way in which it uses bioethical insights to make the human right to healthcare more determinate. Under this two-tiered approach, the right to health retains its universality, grounded as it is in our shared basic interests; however, the right also has substantive meaning for individuals through being given specific content by the deliberative processes of fair institutions.

Crucially, however, this approach can be applied beyond the issue of the right to health. For one, this approach is certainly applicable to other socio-economic rights that must deal with the practical problem of scarce resources and prioritisation. For example, fair institutional procedures working within and facing the realities of specific contexts seem absolutely crucial to making such human rights as the right to work, to social security, to housing, to education and so on, meaningful and determinate. Furthermore, this institutional approach need not be limited to socio-economic rights. After all, fair institutional procedures are also needed to make effective and concrete civil and political rights. Human rights to liberty and security of the person, to freedom of movement, to freedom of association, to free speech, and so on simply have to be deliberated upon in fair institutions in specific contexts in order to make them determinate. After all, the bald statements of such rights in international treaties, domestic constitutions, or philosophical tracts do not tell us what any particular individual's right in any particular context actually amounts to. Decisions need to be made about which claimant ought to win out when clashes of the same right occur—as can often occur with the right to freedom of association. Decisions also need to be made when different types of right clash—as the right to freedom of speech often does with the right to privacy. Furthermore, rights can also clash with other interests and values—such as security—and we need procedures to decide what should win out in these cases too. And even with those rights that are sometimes regarded as 'absolute', such as the right not to be tortured and the right not to be enslaved, we still need processes to determine the *meaning* and hence the *content* of those rights in specific situations. In other words then, a two-tiered approach that incorporates the institutional delivery of human rights as well as their status as ideal claims seems crucial for *all* human rights, and not just those related to the distribution of scarce resources.

2 The Distinctiveness and Importance of the Institutional Understanding of Human Rights

Can we then conclude that this two-tiered institutional understanding offers a new and distinctive 'bioethical approach' to human rights? Not quite. I believe that Arras and Fenton's analysis is invaluable to our understanding of human rights for two main reasons: firstly, because it forces us to question the common assumption that human rights are simple 'inviolable trumps'; and secondly, because it makes us evaluate the fairness of the institutions which are charged with securing our human rights. However, while such insights are important, they are by no means alien to current human rights thinking and practice. Arras and Fenton's two-tiered model of human rights may be extremely worthwhile, but it does not constitute a totally original and distinctive approach to the topic.[1]

For example, the two-tiered approach to human rights corresponds closely with the familiar distinction within rights discourse between 'prima facie' rights and 'concrete' rights (Vlastos 1962; Dworkin 1977). Prima facie rights identify at a very general level the entitlement to some good, as is done in the texts of international human rights treaties, or domestic bills of rights. For example, these documents often list prima facie rights at a very abstract level: the right to privacy, to free speech, and so on. As with Arras and Fenton's notion of 'ideal rights', prima facie rights do not specify the content of any particular individual's entitlement. Concrete rights, on the other hand, are those rights that specify an individual's particular entitlements after all relevant considerations have been taken into account. For example, the fact that all individuals possess a prima facie human right to privacy is widely accepted. However, what our concrete right to privacy amounts to in any particular situation—whether, for example, it entitles individuals to an undisturbed night's sleep—needs to be determined after consideration of all relevant information. Concrete rights correspond to the institutional rights of Arras and Fenton's two-tiered approach, for they provide specificity with regards to what any particular individual's entitlement amounts to.

The distinction between prima facie and concrete rights is thus equivalent to Arras and Fenton's two-tiered approach to human rights. Both understandings ascribe to what Jack Donnelly has named 'the relative universality of human rights' (Donnelly 2007). That is, they endorse the position that human rights exist as a set of shared entitlements grounded in universal interests, but they also recognise that the delivery of these rights for real individuals will be different relative to context.

Importantly, however, this two-tiered approach to human rights is not just prevalent within human rights theory, but also very much exists within human rights practice. Much of the work of human rights courts and institutions is about translating the abstract ('ideal' or 'prima facie' rights) norms of legal treaties into the specific entitlements ('institutional' or 'concrete' rights) of real individuals in particular societies. For example, the implementation of human rights by most constitutional courts provides an excellent example of a 'two-tiered' model of human rights: where abstract ideal norms are translated into specific entitlements for individuals. To explain, the form of legal reasoning employed in rights courts across the globe, including the European Court of Human Rights, is something called 'proportionality analysis'. Robert Alexy has argued that courts employing this method understand the human rights they protect not as inviolable absolutes, but as 'optimisation requirements' (Alexy 2002: 47). In other words, they are principles to be fulfilled *as far as possible*, given countervailing considerations (Alexy 2003: 135; Kumm 2007: 136–137; Moller 2007: 459). 'Proportionality' is the

[1] Arras and Fenton themselves acknowledge that their approach draws on existing human rights scholarship (2009: 29).

means by which courts balance these ideal principles against the countervailing considerations. As such, it is through undertaking this balancing that courts translate our general and ideal prima facie rights into our real and concrete institutional rights.

Returning to my example of the right to privacy then, while individuals in the UK might enjoy the human right to privacy at an ideal level, what that right means in concrete terms for specific individuals has to be determined by the proportionality analysis of the judges in Strasbourg. Indeed, in a famous judgement from 2003, the judges determined that the right to privacy does not mean that individuals living beneath Heathrow are entitled not to be disturbed by night flights (Hatton v UK, ECHR 2003). They reached such a judgement through balancing the competing interests at stake: the interest of the residents in sleeping well, versus the economic interests of the country. Importantly, the process of balancing under proportionality analysis is not done at a high level of abstraction, but depends on the particular circumstances of the situation. In other words, the outcome of the balancing cannot be predetermined, and is contingent upon and relative to the context of the case. So while residents living under Heathrow and residents living under, say, Frankfurt airport both share a human right to privacy, given all relevant considerations, their concrete rights might in fact look rather different.

Now it might be objected at this stage that the current institutional practices described above are not so similar to Arras and Fenton's two-tiered model of human rights. After all, you will recall that Arras and Fenton's approach, influenced as it is by the work of Norman Daniels, demands *fair* institutional procedures in order to determine the scope of our concrete rights. Is the kind of proportionality analysis carried out by the ECHR and constitutional courts fair in those terms? We certainly have reason to question whether it is. Indeed, some might claim that courts are necessarily an unfair forum in which to undertake these important decisions over rights, quite simply because of the fact that they are unrepresentative and unaccountable. Indeed, some legal scholars, such as Jeremy Waldron, have argued that given that the meaning, content and priority of rights is always contestable, it is better that these rights decisions are deliberated and decided upon in *legislatures*, as opposed to courts (Waldron 2006). After all, not only do legislatures have the competence to make these kinds of complex policy decisions, but they hopefully also provide a forum for deliberation and decision-making that is representative and accountable.

It is certainly true that courts are not the only arena in which our concrete rights can and ought to be realised. It is always worth reminding ourselves that rights are also delivered by ordinary policy decisions taken by legislatures. Given that prima facie rights are not inviolable trumps, and that their meaning and priority needs to be decided upon, we have good reason to welcome the fact that rights are often determined in representative and accountable institutions such as legislatures. The question remains, however, as to whether legislatures are the *only* legitimate institution to deliver our concrete rights. Is the inevitable consequence of Arras and Fenton's two-tiered approach, demanding as it does fair institutional procedures, that the delivery of our rights has to take place *only* within representative and accountable bodies like legislatures? Not necessarily. For while the bulk of rights work is and ought to be done in the legislature, fairness may actually demand some degree of scrutiny over their deliberations and decisions. For example, it has been argued by thinkers such as Dworkin that fairness in a democracy cannot be equated with simple majoritarianism (Dworkin 1996: 15–35). So while one element of fairness involves allowing every citizen an equal vote to elect representatives who decide upon policy, fairness may also involve allowing individuals to challenge those policies if they feel them to be unreasonable. In particular, fairness may demand that citizens be allowed to challenge policies that they believe violate their own rights (Kumm 2010: 163–168).

Interestingly, the understanding of fairness developed by thinkers such as Mattias Kumm who defend proportionality analysis is extremely close to the understanding of fairness which Norman Daniels proposes to work out the allocation of scarce medical resources. For you will recall that Daniels's notion of 'accountability for reasonableness' demands that these allocation decisions are not made by reference to some substantive principle. Instead, Daniels claims that fairness demands that these decisions are made through processes that are transparent, that appeal to rationales that can be accepted as relevant, and which are open to appeal (Daniels and Sabin 1997). Proportionality analysis bears close resemblance to this understanding of fairness; for the test of proportionality is applied by courts to answer appeals from individuals that a policy unreasonably interferes with their rights. Moreover, proportionality analysis requires that courts make that decision using rationales that are publicly justifiable. As Kumm states:

> When courts apply the proportionality test, they are in fact assessing whether or not legislation can be justified in terms of public reasons, reasons of the kind that every citizen might reasonably accept, even if actually they don't (Kumm 2010: 168).

In sum then, it is at least plausible to maintain that the institutional fairness demanded by Arras and Fenton's two-tiered understanding of human rights can be met by institutional procedures that include proportionality analysis conducted by courts.

Of course, the point of this discussion is not to finally resolve the debate about what constitutes a fair institutional procedure for determining our concrete rights. That question is too big to be resolved here. Rather, the aim has been to show how Arras and Fenton's two-tiered approach makes us understand the importance of that debate. If prima facie human rights, as written down in legal treaties and bills, are not clear and absolute rules that determine what finally ought to be done, but are instead principles that have to be given meaning within different contexts, then it is of course vital that the institutions we have to determine those concrete rights are fair and legitimate. While such a claim may not be entirely novel to human rights thinking and practice, Arras and Fenton do us a great service by forcing us to engage with it.

3 Scepticism Over Grounding Human Rights in Biological Humanity

The second context in which scholars have offered 'bioethical insights' into human rights has been in respect of their foundations. Both Elizabeth Fenton and John Harris have questioned attempts to use human rights in order to curtail technologies that genetically modify human beings. In so doing, they have challenged the idea that human rights can be established by our biological humanity, and instead have urged that we ground them in certain 'morally relevant' capacities (Fenton 2008: 4; Harris 2011: 18). This section explains the arguments of Harris and Fenton in more detail, while the next section asks whether their approach offers anything distinctive to the theory and practice of human rights.

To understand the claims of Fenton and Harris with regards to the foundations of human rights, it is necessary to put them in their proper context. Their calls to avoid grounding human rights in biological humanity emerges as a rejoinder to bioethicists who have employed human rights as a means to argue against the genetic modification of human beings. Fenton's paper, for example, is a response to the work of bioethicist George Annas (Fenton 2008). Annas has written a number of articles and books endorsing the idea that human rights treaties should prohibit technological innovations aimed at the genetic engineering of human beings (Annas et al. 2002; Annas 2010). In his work, Annas claims that

such techniques are inimical to and threaten human rights at a fundamental level. Annas's objections to such alterations are fourfold: firstly, the techniques would require massive and unethical human experimentation; second, they would restrict the altered humans' right to an open future; thirdly, they would lead to a new eugenics of manufactured children; and finally, they would lead to new species of human and raise the spectre of war between the 'posthumans' and the 'normals' (Annas et al. 2002: 161).

Without doubt each of these claims is controversial. For example, in relation to Annas's first claim, it is certainly not obvious that the development of such modification techniques *necessitates* massive and unethical experimentation. Piecemeal and well-regulated research that takes place using only cells and early stage embryos may not raise the kinds of problems Annas envisages. As for an individual's right to an 'open future', it is not entirely clear what that means. If it means that individuals should be able to frame and pursue their own goals and life-plans, and not those set by someone else, it is hard to see why genetic alterations necessarily prevent this. Annas's claim that genetic alterations would lead to a new eugenics of manufactured children is also questionable. After all, most societies already allow parents to make choices that affect their children in profound ways—such as instructing them in a particular religion, educating them with a certain skill and knowledge set, and encouraging them to take up particular hobbies. As such, it needs to be shown why the selection of genetic traits is somehow more problematic than any of these interventions.

But the most interesting and important of Annas's claims relates to the idea that these interventions will lead to a division within the species—'posthumans' and 'normals'—and the prospect of gross human rights violations perpetrated and suffered by both:

> The new species, or 'posthuman', will likely view the old 'normal' humans as inferior, even savages, and fit for slavery or slaughter. The normals, on the other hand, may see the posthumans as a threat and if they can, may engage in a preemptive strike by killing the posthumans before they themselves are killed or enslaved by them (Annas et al. 2002: 162).

Annas's claim then is that these kinds of genetic interventions have the potential to divide the human species—which in turn has the potential to lead to resentment between the groups, and ultimately to war and enslavement. But there is something strange about this analysis. After all, human beings are already divided in certain crucial respects, whether it be in terms of gender, race, nationality, religion, and so on. It is true that these divisions can be a reason for conflict in the world. However, Annas seems to think that divisions as result of genetic interventions will create far more profound and catastrophic conflicts. Why is that?

Ultimately Annas believes that the divisions caused by genetic alteration will be so profound that they will result in us failing to see certain others, such as posthumans, as fellow humans. Because we will not see these others as fellow humans, we will not regard them as legitimate bearers of human rights, and so prohibitions against enslaving and slaughtering these others will not apply. As such, Annas believes that these interventions fundamentally threaten the *very idea* of human rights, because they will alter human nature, which forms the *foundation* of human rights (2002: 153). Such an argument bears close relation to that put forward by Francis Fukuyama, who also uses human rights to oppose biotechnology: "We do not want to disrupt either the unity or the continuity of human nature, and thereby the human rights that are based on it" (Fukuyama 2002: 172). For both Fukuyama and Annas then, we need to utilise the constraining power of human rights today in order to save human rights for tomorrow.

Fenton and Harris, however, find this analysis of human rights quite implausible. In particular, both claim that it rests on a faulty understanding of the foundations of human

rights. For example, Fenton points out that Annas seems to be reducing human nature to a set of fixed biological traits, and in particular, a set of fixed genes. After all, once these genes are altered, Annas claims that humanity is altered and human rights undermined. However, there are several problems with this argument. In the first place, and as Fenton points out, genes and other biological traits in themselves have no *moral relevance*. A trait may of course correspond to further characteristics that are morally relevant—as the nervous system corresponds to sentience, or cognitive capacities to self-consciousness—but bare biological facts are not of moral significance in and of themselves (Fenton 2008: 4). So while it may be true that humans possess certain genes, it is unclear how and why those genes establish a set of shared basic entitlements. Furthermore, Fenton goes on to claim that while posthumans may well have a different biological make-up to normals, they are still likely to possess human rights. After all, current humans have quite different biological make-ups, and yet are still held to be moral equals. As Fenton states, "Such differences are the *raison d'etre of human rights*, whose very point is to equalize across differences" (2008: 6). The point Fenton is making is that it is perfectly plausible for posthumans to be genetically different from us, and yet still share the same basic rights as us.

Harris also takes issue with the idea that our bare humanity grounds human rights. For he correctly points out that our 'humanity' is highly contingent: humans do not have fixed and hermetically sealed genetic identities. For one, evolution obviously undermines the notion that species are forever comprised of fixed genetic identities (Harris 2011: 13). Moreover, it is clear that humans have been exchanging bits of biological material with non-humans in various ways since both have existed (2011: 12). Harris thus points out that while biotechnology does offer the means of creating creatures with new genetic identities, and that this does trouble the category of 'humanity', that category has always been rather blurred anyway (2011: 15). As such, there is no reason to regard such technologies as posing a basic threat to human rights.

When Harris calls on us to 'take the 'human' out of human rights' he is essentially making the same claim as Fenton. Both argue that we need to move away from the common assumption that human rights are grounded in our bare humanity. For Harris, the biological category of 'humanity' is too blurred to be of much use in establishing our universal entitlements, and for Fenton it lacks moral relevance in and of itself. Both are open to the idea that posthumans can and will possess human rights—thus mitigating the catastrophic results envisaged by Annas—quite simply because they may possess those 'morally relevant capacities' that ground them. While neither spends much time elaborating on precisely what those relevant capacities actually are, the kinds of options open to us are clear enough. And it is when deliberating upon these options that bioethical insights can be extremely useful. After all, bioethics has long-standing and sophisticated debates regarding what constitutes the relevant characteristics for moral status, intrinsic value and even the possession of rights. Bioethical deliberation over the importance of potentiality, life, sentience, consciousness, self-consciousness, moral autonomy, and so on, can thus enrich enquiries concerning the foundation of human rights. Ultimately, however, the most important bioethical insight offered by Harris and Fenton is simply that human rights cannot plausibly be grounded in our bare humanity.

4 The Distinctiveness and Importance of Such Scepticism

The question that needs to be asked next then, is whether these insights from Harris and Fenton can be claimed to offer a new and distinctive 'bioethical approach' to human rights. In this case, I think the answer must be 'no' and 'yes'.

To begin then, it is worth reemphasising that debates around moral status and the like within bioethics can make a significant contribution to human rights theory and practice. After all, it is frequently stated within human rights discourse that human rights are those rights that all humans possess simply in virtue of their humanity. However, consideration of what humanity consists of, when it begins and end, as well as whether it is a discernible or plausible moral category, is not reflected upon enough. Given that these questions are the 'bread and butter' of bioethical enquiry, it is clear how these insights can be of real use to human rights thinking (Ashcroft 2008: 39).

However, none of this should be taken to imply that all human rights scholarship is wedded to biological humanity as a foundation for human rights. For in actual fact, a good many human rights theorists would consider Harris and Fenton's analysis to be completely uncontroversial, and find it unquestionable that morally relevant capacities, as opposed to biological humanity, provide the proper basis for human rights. Indeed, the debates within human rights scholarship over which moral characteristics provide the foundations of human rights are complex and sophisticated. For example, a number of scholars maintain that human rights are grounded in the capacities for rational and moral agency (Griffin 2008; Gewirth 1982). For others, they are established by virtue of our shared vulnerability (Turner 1993). For still others, human rights are grounded in our key capabilities (Nussbaum 1998). And still for others, human rights derive from a set of shared basic interests (Tasioulas 2002; Caney 2007).[2] In none of these cases do the theorists make an appeal to 'bare humanity' to ground human rights; instead, the appeal is to morally relevant capacities that humans possess.

Crucially, however, these debates within human rights scholarship usually overlook an important implication of their analysis—and it is an implication that Harris and Fenton are prepared to confront. For once we move away from species membership and towards morally relevant characteristics as our foundation for human rights, the exclusivity of human rights to human beings begins to break down. After all, if it is morally relevant characteristics and not species membership that matters for the establishment of basic rights, then it is surely only proper to acknowledge that any individual who possesses those relevant characteristics also holds those basic rights. This, of course, is why Harris and Fenton are prepared to see posthumans as the legitimate holders of human rights. For while posthumans may be genetically different to other humans, that difference does not undermine their claim to basic rights—assuming that is, that they possess consciousness, self-consciousness, moral autonomy, or whatever we take the relevant capacity for human rights to be. But of course once we are open to the idea that human rights can be possessed by individuals other than 'normal' humans, not only might *posthumans* possess human rights, but so too might *nonhumans*. For example, it is at least possible that advances in artificial intelligence may one day lead to the creation of robots or other machines who have the capacities for consciousness or even moral autonomy. And if they possess the morally relevant characteristics, it is hard to see why these robots ought to be denied human rights. Moreover, genetic interventions on non-human animals could also eventually lead to a range of creatures—'postanimals'—with capacities far in advance of those they currently possess (Chan 2009). Once again, if these postanimals were to possess the relevant characteristics, they would surely

[2] Of course, there are other 'pragmatic' and 'postmodern' philosophers who think the search for a rational foundation to human rights to be impossible, unnecessary and even dangerous. The most famous example of this type of argument is provided by Rorty (1993). There is not room here to do justice to this complex debate. Nevertheless, without foundations it is difficult to see how debates about the proper content of human rights can be resolved, how human rights sceptics can be persuaded of their normative force, and how we can legitimately compel others to live up to their standards. For such arguments, see Schaefer (2005).

also be legitimate holders of human rights. However, not all of the challenges to the exclusivity of human rights rest on these kinds of speculative projections about the future. After all, it is extremely probable that the set of characteristics that one considers to be the basis for human rights—whether it be sentience, moral agency, vulnerability, the possession of basic interests, and so on—is *already* possessed by certain members of non-human species (Cavalieri 2001). Indeed, the Great Ape Project currently campaigns for the recognition of basic legal rights for great apes on the grounds that these animals possess self-consciousness and rationality (Cavalieri and Singer 1993).

What I am suggesting here then is that the bioethical insights offered by Harris and Fenton have a rather profound implication for human rights: that is, they force us to question the species exclusivity of human rights. Of course, what these human rights for non-humans would amount to in terms of both content and institutional protection is unclear, and requires much more work than there is room for in this paper. Nonetheless, the very idea of assigning human rights beyond humanity is sufficiently challenging in its own right.

At this stage, however, some might object that all of this amounts to rather more than an 'implication' for human rights. Indeed, it might be said that these bioethical insights *undermine* the very idea of human rights. After all, this analysis challenges the notion of a discrete category of exclusively *human* rights—and so may even demand the adoption of some other new label for these basic rights. Perhaps then these insights actually signal the end for human rights!

But while I accept that these bioethical insights are both radical and profound, I do not see that they necessarily deliver a fatal blow to the very idea of human rights. For one, it is plausible to argue that this more inclusive understanding of basic rights would still serve the same *function* as human rights. After all, these basic rights would still be established so as to protect whatever we take to be valuable about individuals. It is simply that the class of individuals that they protect would be wider. Furthermore, acknowledging the basic rights of posthumans or non-humans does not subvert the normative project of protecting the basic rights of humans. The logic of the argument presented above suggests that we ought to *extend* the scope of human rights, rather than water down existing entitlements. After all, acknowledging the basic rights of foreigners is not usually taken to mean that the civil rights of fellow nationals are thereby eroded. The bioethical insights of Harris and Fenton may be radical in demanding the extension of human rights beyond the human species, but they do not undermine the very idea of human rights.

5 Conclusion

The insights that bioethicists have made in respect of the practice and theory of human rights, cannot be claimed to constitute a new and distinctive 'bioethical approach' to human rights. Many of the contributions that thinkers like John Arras, Elizabeth Fenton and John Harris have made are already prevalent within human rights thinking. Given that human rights is such an incredibly broad field, drawing the attention of scholars from a huge range of disciplines, this should be of little surprise. Nevertheless, the contributions that Arras, Fenton and Harris have made are still incredibly valuable. As such, they ought to be reflected upon seriously by all who study and campaign for human rights. First of all, these thinkers have done us a great service in reminding us that the prima facie human rights of treaties, bills, and philosophical writing cannot be thought of as 'inviolable trumps'. Instead, these rights are norms that need to be interpreted, given meaning, prioritised and balanced. Such a fact does not undermine the status of human rights as universal norms, but does

recognise the reality that the protection of these abstract norms cannot mean the same thing for each and every right-holder. Furthermore, since our concrete rights have to be interpreted, given meaning and distributed within particular contexts, it is crucial that we have fair institutional processes to determine them. Arras and Fenton helpfully remind us that the fairness of these procedures cannot be taken for granted. Finally, in their analysis of the foundations of human rights, Fenton and Harris should be praised for recognising the radical implications of grounding human rights in morally relevant capacities. Moreover, once we recognise that human rights might be extended beyond humans to include posthumans, it is only consistent to recognise their possession by any creature who holds the morally relevant characteristics.

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