

The Blurred Line Between Therapy and Enhancement: A Consideration of Human Rights, Disability Rights and Transhumanism

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Abstract: Arguably, if equal rights are based on our sharing a common human form, technologies that alter that form also threaten those equal rights. In turn, it has been argued that these technologies should be limited to therapeutic purposes to treat the sick and disabled and enhancements prohibited. However, I argue that there is no clear way to distinguish between therapy and enhancement because there is no set standard for normal health or agreement on the meaning of disability. Because a flexible definition of health relates to a flexible definition of the disabled, any attempt to prohibit access to enhancement technology can be challenged as a violation of disability rights. Presented this way, disability rights are the gateway for the application of transhumanism. Any attempt to identify a moral or natural hazard associated with enhancement technology must also include some limitation of disability rights, which seems to go against the entire direction of human rights legislation over the last century. All told, this blurred line between therapy and enhancement represents a profound problem for contemporary human rights regimes.

I The Definition of the Human as the Foundation of Human Rights

Early rights documents such as the English *Bill of Rights*, the American *Declaration of Independence*, and the French *Declaration of the Rights Man and Citizen* can be understood as efforts to articulate a set of natural rights, which stem from unwritten natural laws for living a moral or good life, and to then allow these rights to be practiced within the structure of positive laws. The relationship between natural right and positive law is clear in the *Declaration of Independence* where it is stated that among the “unalienable Rights” endowed to men by “their Creator” are “Life, Liberty & the pursuit of Happiness” and that Governments instituted by men and the laws they make are only legitimate when they conform to, are guided by, or allow for the practice of these rights. The *Declaration* of 1776 was written because its author believed that the laws of the English government had lost legitimacy, failing to conform to the natural rights

shared by all human beings. Somewhat differently, the 1789 Declaration emphasizes that “the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights” and that “These limits can only be determined by law.”

However, most contemporary human rights documents place far less emphasis on legitimacy stemming from conformity to natural right. Jürgen Habermas notes this important change:

As long as one was able to fall back on a religiously or metaphysically grounded natural law, the whirlpool of temporality enveloping positive law could be held in check by morality. Even temporalized positive law was at first supposed to remain *subordinate to*, and be permanently oriented by, the eternally valid moral law, which was conceived of as a “higher law.” But in pluralistic societies such integrating worldviews and collectively binding ethical systems have disintegrated (89).¹

In other words, the legitimation of contemporary human rights documents such as the *Universal Declaration of Human Rights* (UDHR) could not possibly be based on a correspondingly universal moral framework but instead upon the worldwide legal acceptance and enforcement of human rights by democratic nation-states. Rather than getting entangled in a web of “self-evident” truths based on differing moral and ethical systems, today’s structure of international human rights is built upon ongoing forums of negotiations and agreements between diverse individuals, groups and, most importantly, governments.² The debate now is focused on things

¹ For example, John Locke argued that men have a natural right to life, liberty, and property. The English Bill of

The positivization of law necessarily results from the rationalization of its validity basis. As a result, modern law can stabilize behavioral expectations in a complex society with structurally differentiated lifeworlds and functionally independent subsystems only if law, as regent for a “societal community” that has transformed itself into civil society, can maintain the inherited claim to solidarity in the abstract form of an acceptable claim to legitimacy (76).

² Jeremy Bentham anticipates this change, dismissing the whole notion of natural rights:

like whether these negotiations and agreements can allow for the achievement of, what Charles Taylor calls, the “strong collective goals” of the predominant culture or only sanction the equal rights of citizens regardless of history or heritage.³

And yet, at least in its first 20 articles, the UDHR seems to harken back to the older natural rights documents mentioned above. For example, Article 1 declares that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” and Article 3 states that “Everyone has the right to life, liberty and security of person.” Differently, Articles 21 through 30 describe things such as “the right of equal access to public service” (21); “the right to social security” (22); “the right to rest and leisure” (24) and “the right to a standard of living adequate for health and well-being” (25). These last 10 articles better reflect the positivist tradition in that institutions such as the public service, social security, holidays and medicine are not endowed by the Creator or some metaphysical source but are the products of laws made by governments. The distinction between these two set of articles is sometimes described as the difference between “political and civil rights” and “economic and social rights.”⁴

Nonetheless, a component of natural right relevant to both of these categories serves as a foundation upon which these two kinds of rights can stand together: the definition of an individual human being. That is to say, rights apply primarily to individuals, not peoples, nations

Rights is the child of law; from real law come real rights; but from imaginary laws, from law of nature,¹ come imaginary rights . . . Natural rights is simple nonsense; natural and imprescriptible rights (an American phrase), rhetorical nonsense, nonsense upon stilts (Article II, *Anarchical Fallacies*).

Justice Holmes similarly explains that common law is not “a brooding omnipresence in the sky, but the articulate[d] voice of some sovereign.”

³ Taylor, for example, describes a model of “nonprocedural liberalism” in response to the “procedural liberalism” of John Rawls, Ronald Dworkin and Will Kymlicka. This debate is often framed as one of communitarianism vs. individualism and has more recently manifested in the distinction between interculturalism and multiculturalism.

⁴ The former being akin to natural rights and the latter positive rights.

or communities (e.g. the self-determination right⁵ of the German people is secondary to the rights of an individual that lives in Germany) and, whatever the negotiation or agreement, rights only apply to those beings that qualify as human. The contemporary history of human rights is as much about the articulation of a particular list of rights that “provide legitimate barriers that prevented the sovereign will of the people from encroaching on inviolable spheres of individual freedom” (Habermas 89) as it is about the further expansion of the definition of the human to include more and more individuals that were hitherto part of unrecognized groups. Jack Donnelly clarifies:

Human rights, following the manifest literal sense of the term, are ordinarily understood to be the rights that one has simply because one is human. As such, they are equal rights, because we either are or are not human beings, equally. Human rights are also inalienable rights, because being or not being human usually is seen as an inalterable fact of nature, not something that is either earned or can be lost. Human rights are thus “universal” rights in the sense that they are held “universally” by all human beings (2007: 282-3).⁶

So, while we might now agree that particular rights are not endowed to us by God but decided upon by people, we still accept the older idea that, whatever their substance, these rights still reflect things like inherent dignity and individual freedom (or some other agreed upon list of things) that are equally, universally and inalienably shared by all human beings. George J. Annas puts it succinctly: “Membership in the human species is central to the meaning and enforcement of human right, and respect for basic human rights is essential for the survival of the human

⁵ The “right to self-determination of peoples” is included the International Human Rights Covenants (Article 1). This is the only right included in UNDHR that does not apply to an individual.

⁶ In *Universal Human Rights in Theory and Practice*, he similarly writes:

Human rights are *equal* rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all). They are also *inalienable* rights: one cannot stop being human, no matter how badly one behaves nor how barbarously one is treated. And they are *universal* rights, in the sense that today we consider all member of the species *Homo sapiens* “human beings,” and thus holders of human rights (2013: 10).

species” (44). In good part, the human rights movement has been and continues to be about overcoming ignorance and resistance that excludes certain human beings from their “human” right to these things regardless of citizenship, class, ethnicity, religion, gender, or sexual orientation. To be clear, this is not to say that certain rights somehow emanate from human nature only that those beings defined as humans share in what they themselves decide to call human rights.

II **The Definition of the Human is Malleable**

Unfortunately, even the seemingly straightforward idea that all humans should hold these rights remains problematic. Many groups may still have to “earn” recognition under the definition of human. Today, for example, we continue to debate whether beings such as the “unborn” or the “non-human animal” should be recognized. Disagreement also abounds whether a patient in persistent vegetative state has “lost” being human and, in turn, should no longer be recognized as a holder of universal rights. Finally, the development of intelligent machines, genetically altered or created sentient organisms as well as a variety of technological enhancements suggest that the human is neither “inalterable” nor “a fact of nature.”

The above examples of “earning” or “losing” the definition of human are controversial and worrisome on a variety of ethical and legal grounds. If the unborn are defined as human, it may infringe upon the individual freedom of women. If non-human animals are defined as human, a carnivore could be charged with murder after eating dinner. If a being in a persistent vegetative state is no longer considered human, it may be unclear whether they still have the right to medical treatment or even the right to die. But, the last example in the paragraph above

presents a different set of problems. Whereas recognition of the unborn, non-human animals, and the vegetative would not necessarily compromise the universal and equal application of rights,⁷ the introduction of rights for the technologically derived or enhanced may. This is one of the major concerns put forward by Francis Fukuyama in his 2002 *Our Posthuman Future: Consequences of the Biotechnology Revolution*. He argues that biotechnology may lead to the development of “supra-humans” which will have “malign consequences for liberal democracy and the nature of politics itself” (7). According to Fukuyama, the political problem of technological enhanced post-humans is that they create a divide between enhanced and unenhanced individuals eventually leaving the latter group enslaved to the superiority of the former group.⁸ The conservative bioethicist Leon Kass suggests that this problem extends well beyond biotechnology. For example, on organ transplants, he writes:

... we have made a start on a road that leads imperceptibly but surely toward a destination that none of us wants to reach . . . Yet the first step, overcoming reluctance, was defensible on benevolent and rational grounds: save life using organs no longer useful to their owners and otherwise lost to worms. Now, embarked on the journey, we cannot go back . . . there is neither a natural nor a rational place to stop (1992: 86).

Elsewhere, he raises similar concerns about other “techniques of prolonging life” such as respirators, cardiac pacemakers, artificial kidneys as well as genetic engineering, predicting that their ever-increasing use will lead the uncontrollable alteration of the human form and mind.⁹ Both Fukuyama and Kass argue that technological enhancements lead to “dehumanization” or

⁷ In the same way that same-sex marriage does not compromise different-sex marriage.

⁸ Michael Shapiro explores similar questions in his article "Does technological enhancement of human traits threaten human equality and democracy?"

⁹ Leon Kass, “The New Biology: What Price of Reliving Man's Estate?,” in *Bioethics*, ed. Thomas A. Shannon (New York: Paulist Press, 1976). For more on Kass’s considerable and often controversial work on bioethics see his *Toward a More Natural Science: Biology and Human Affairs* (New York Free Press, 1985) and *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* (San Francisco: Encounter Books, 2004).

the diminishment of human life in general. To differing degrees, they call for tight regulation and prohibition of particular technologies that manipulate human nature and, in turn, imply the need to ban the technological creation of new intelligent species.

The bioethicist David Resnik identifies these kinds of moral arguments against the altering of the human form as embracing a “natural law approach.” He explains, “This argument assumes that the human form has inherent worth and that any changes to that form defile or destroy its worth” (370). On the face of it, it is fairly easy to accept this basic logic and the need to ban certain enhancement technologies. If our equal rights are based on our sharing a common human form, technologies that alter that form also threaten those equal rights.

III The Therapy-Enhancement Distinction

Of course, we might be far less inclined to agree with Kass’ call for the prohibition of medical technologies that lengthen and save lives, mitigate pain and suffering. Even though they may manipulate the human form to some degree, it seems cruel to ban these technologies, as they really are therapies rather than enhancements. Resnik explains this important distinction using the example of genetic intervention:

Perhaps the most popular way of thinking about the moral significance of the therapy-enhancement distinction is to argue that the aim of genetic therapy is to treat human diseases while the aim of genetic enhancement is to perform other kinds of interventions, such as altering or “improving” the human body. Since genetic therapy serves morally legitimate goals, genetic therapy is morally acceptable; but since genetic enhancement serves morally questionable or illicit goals, genetic enhancement is not morally acceptable (366).

Therapeutic treatments for disease would not violate natural law because they would simply bring the human form back into line, as nature intended. Of course, Kass might argue back that disease, pain, suffering, and death are also part of our tragic human condition and thus are also part of nature. Leaving aside Kass's objection for the moment, this application of natural law might help answer the earlier questions about the definition of the human in relation to the application of human rights. Only beings that correspond with the human form (in body and mind) qualify to hold human rights; which would leave out non-human animals because they do not match up. Of course, it helps less with questions about the unborn, vegetative, or technologically enhanced/derived because each of these beings may fit with some characteristics of the human form but not others. At the very least, it could still provide a threshold or standard for the regulation of particular therapies, as Kass seems to want, as well as prohibiting enhancements that go too far in their alteration of the human form, as Fukuyama calls for.¹⁰

Unfortunately, the therapy-enhancement distinction is itself problematic because it is not able to distinguish between disease and health or abnormality and normality. As Karpin and Mykituk argue:

The concept of enhancement presupposes too many certainties about the so-called normal state beyond which it would or should be wrong to journey, while the concept of therapy embraces a standard of health and embodiedness that insists that those who do not meet it should desire to meet it, and need to meet it. The underlying assumption built into the therapy/enhancement distinction, that there are universal ideas of acceptable or desirable embodiment that must be interrogated (417).

Of course, as Kass implies above, this blurring of lines between therapy and enhancement could apply to almost any medical intervention or treatment. It may be that an individual simply

¹⁰ See also C. Elliot, *Better than Well: American Medicine Meets the American Dream* (W.W. Norton 2003); M.J. Sandel, *The Case Against Perfection: Ethics in the Age of Genetic Engineering* (Belknap Press of Harvard University Press (2007) for similar arguments.

accepts their declining health as part of a normal life plan; to treat their disease would not be a therapy to return to a norm but an enhancement deviating from nature. Similarly, many autistic and deaf people do not see themselves as disabled but rather uniquely normal and would thus view therapies designed to “cure” them as morally reprehensible.¹¹

IV Disability Rights as a Gateway to Transhumanism

None of this would practically matter if there were not proliferating technologies designed to treat or enhance or simply alter the human form from one state to another. Now, individuals and families have the option to choose such alterations.

Exploring the connection between disability rights and enhancement, Gregor Wolbring points to the aforementioned Article 25 of the UDHR, which reads fully:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

He also highlights the preamble of the World Health Organization constitution which asserts, “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being....” Wolbring goes on to explain that, if disability can be broadly understood as a matter of personal opinion then such declarations and statements of the rights of the disabled would require access to any and all technologies, regardless of their categorization as a therapy or an enhancement (2005). Surprisingly, then, in the context of new technologies, the legal rights

¹¹ For a discussion of cochlear implants as genocide of deaf culture see *Cochlear Implants in Children: Ethics and Choices* edited by John B. Christiansen, Irene Leigh (Gallaudet University Press, 2002.)

described in Article 25 of the UDHR seem to undermine the natural rights that serve as the basis of the first 20 articles and, more broadly, the foundation of “individual human rights.” To be clear, if the legal right to medical care via enhancement technology means that the content of the human form is forever alterable, the basis of “individual human rights” erodes.¹² Wolbring suggests this possibility in his discussion of transhumanism:

Within the transhumanist/enhancement model of health, the concept of health no longer has the endpoint that someone is “healthy” if the biological systems function within species-typical, normative frameworks. Within the transhumanist/enhancement model, all *Homo sapiens* – no matter how conventionally “medically healthy” are defined as limited, defective, and in need of constant improvement made possible by new technologies appearing on the horizon (a little bit like the constant software upgrades we do on our computers). Health in this model is the concept of having obtained maximum (at any given time) enhancement (improvement) of one’s abilities, functioning, and body structure. Disease, in this case, is identified in accordance with a negative self-perception (confined to the “normal” human body) of one’s non-enhanced body (2005: 19).

And, as he notes in another piece, “Disabled people are seen to play a key role in mainstreaming and in increasing the acceptance of beyond species-typical functioning, of ‘therapeutic enhancements.’ Transhumanists see the potential of using disabled people as a trailblazer for the acceptance of transhumanist ideas and products” (2008: 156). In part, disabled people play this role because disability rights law makes it problematic to prohibit access to therapeutic technologies. Because a flexible definition of health relates to a flexible definition of the disabled, any attempt to prohibit access to enhancement technology is challenged by legal requirements to allow for such access. Presented this way, disability rights are the gateway for the application of transhumanism. In turn, any attempt to identify a moral or natural hazard

¹² In his book *American Bioethics: Crossing Human Rights and Health Law Boundaries*, George J. Annas asks:

What is unique about human beings and about being human; what makes humans human? What qualities of the human species must we preserve to preserve humanity itself? What would a “better human” be like? If genetic engineering techniques work, are there human qualities we should try to temper and others we should try to enhance? If human rights and human dignity depend on our human nature, can we change our “humanness” without undermining our dignity and our rights (27)?

associated with enhancement technology must also include some limitation of disability rights, which seems to go against the entire direction of human rights legislation over the last century.

This tension also highlights an important new development in the field of disability studies. As Adrienne Asch points out, the traditional questions of disability in relation to bioethics focused on “right to die” and/or the “right to kill” of disabled people rather than broader issues associated with disability that may have implications for society as a whole (2001, 297). Writing about the traditional parameters of disability studies, she explains that “the complex life-and-death decisions made by individuals and families cannot remain its only concern” and must extend to considerations of “life-creating or life-changing technologies” (298). Furthermore, according to Asch, instead of the bioethical definition of disability as a departure from species-typical functioning, the newer “minority group model” of disability suggests that “the culprit is not biological, psychic, or cognitive equipment but the social, institutional, and physical world in which people with impairments must function—a world designed with the characteristics and needs of the nondisabled majority in mind” (300). With this model in mind, the onus is placed on redesigning society, institutions and the “physical world” to accommodate the disabled in way that ultimately erases the line between ability and disability. This consideration of the environmental changes required to overcome the distinction between normal and abnormal functioning, or health and sickness, mirrors the blurring of lines between therapy and enhancement discussed above. Considering the conclusions of both Wolbring and Asch, it seems that the bodily and environmental parameters that might now distinguish typical human functioning, whether of an enhanced or restricted kind, are blurred or disappear in a world modeled and remodeled by technology.

V **How the Enhanced “Disabled” might influence the Unenhanced “Disadvantaged”**

A much discussed example of this new problem of therapies that become enhancements, as well as its larger environmental effect, is the case of Oscar Pistorius, the South African sprinter nick-named “the Blade Runner” for his “Flex-Foot Cheetah” prosthetic legs. The International Association of Athletics Federations (IAAF) at first banned him from participation in the 2008 Summer Olympics because his artificial legs were deemed to be a “technical device...that provides a user with an advantage over another athlete not using such a device” (134, rule 144.2). However, after much debate and legal wrangling, Pistorius was allowed to compete at the 2012 games. While he did not win a medal, it seems likely that future generations of prosthetics will offer an obvious and overwhelming advantage to their users. In turn, we are faced with three possible scenarios:

1. Athletes with such prosthetics are banned from “able-bodied” venues but should still be allowed to compete in events for the disabled such as the Paralympics;
2. Athletes with such prosthetics could run in a separate bionic track event and;
3. Athletes with such prosthetics should be allowed to compete in the same venues as all other athletes.

Scenario 1 would still allow for such athletes to compete in the Paralympics. But, this would in essence allow for Scenario 2, where the Paralympics would become a bionic event, possibly attracting new athletes that would trade in their legs for high-performance prosthetics. In theory, this would also be the case in Scenario 3, where every athlete would need bionic legs to be competitive. In a sense, the introduction of the still hypothetical high-performance prosthetic, changes the essence of the sport from a competition of natural abilities to a competition of

technological capability.¹³ Of course, it seems rather far-fetched to believe that anyone would have their legs replaced by bionics for the sake of winning a running race.

But, if these scenarios are re-run using a different example, such as the nootropic drug modafinil, the result may be more illustrative and convincing. Modafinil was developed to treat diseases that range from Parkinson's and Alzheimer's as well as a variety of psychiatric disorders. It also is said to enhance learning and memory.

1. Students taking modafinil should be banned from regular schools but should still be allowed to attend alternative schools;
2. Students taking modafinil could learn at elite institutions and;
3. Students taking modafinil should be allowed to learn and study in the same venues as all other students.

Scenario 1 would still allow for such students to study in separate schools. This would in essence allow for Scenario 2, where these separate schools would become elite institutions, attracting new students that would trade their natural brain chemistry in for the drug-aided chemistry. Of course, this would also be the case in Scenario 3, where every student would need modafinil to complete advanced lessons and assignments. As in the discussion of prosthetics, the introduction of the drug changes the essence of education from the development of natural abilities to the development of technological capability.

At least through the lens of the “natural law approach,” this would demonstrate dehumanization. Moreover, in both of these examples, any attempt to ban or regulate access to these technologies would have to address the rights of the disabled. As it has been presented

¹³ Perhaps fancifully, we could go further to imagine newer and newer refinements and additions to these limbs and other body parts.

above, it would be quite tough, if not cruel, to deny access to those that need these technologies in order to be healthy. Still, it is not entirely clear how Fukuyama's concern about the enhanced enslaving the unenhanced plays out here. If these technologies were readily available to everyone then this would not really be a problem; we would be able to compete on an even playing field. After all, as the transhumanist suggest, there would also be immense pressure on everyone to use the new technology or get the upgrade which would undoubtedly alter the human form. And, while the natural law believers would still consider this dehumanizing, the human could simply be redefined to correspond to technological changes such as those described above. A purely positivistic, legalistic, utilitarian or constructivist definition of the human would have the further benefit of jettisoning the remnants of natural law that have hindered the further expansion of human rights to other beings such as non-human animals. Through similar international institutional mechanisms that helped produce the UDHR, we could also decide how to define and redefine human beings. Annas, for example, calls the creation of an international "Convention on the Preservation of the Human Species" in light of the threat of genetic engineering and argues that "If we humans are to be masters of our own destiny and not simply products of our new technologies (a big "if"), we will need to build international institutions sturdier than the United Nations and the International Criminal Court to help channel and control our newfound powers and to protect basic human rights" (37-57). Problematically, while this kind of enforcement mechanism might limit "enhancement" technologies, Annas fails to address the blurred line between enhancement and therapy and, in turn, his proposal either keeps the backdoor to transhumanism unlocked or prohibits access to legitimate treatments for disability and/or ill-health.

VI Conclusion: The Problem of Technological Relativism

But, the rapid proliferation and application of these technologies suggests the further problem of a technologically induced relativism. Consider this passage from Aristotle's *Politics*:

We must also notice that analogy drawn from the arts is false. To change the practice of an art is not the same as to change the operation of a law. It is from habit, and only from habit, that law derives the validity which secures obedience. But habit can be created only by the passage of time; and a readiness to change from existing to new and different laws will accordingly tend to weaken the general power of law.¹⁴

For Aristotle, just because a change may offer some improvement or efficiency, does not mean that it should be adopted into law. Applied to the argument here, the lack of any consistent definition of the human would lessen the possibility of common agreement on what makes up human rights or how we might best protect their practice. Eligible negotiators of any such agreements might have radically diverse characteristics (in body and mind) and, in turn, their collective ability to articulate a set of shared rights would be quite challenging. At basis, we would no longer share the common habits of being human and thus would have difficulty expressing the basic things we would require for its practice.

This might then represent a fundamental threat to liberal democracy, as Fukuyama contends. Not surprisingly, his solution is for a return to natural right, based on a corresponding human nature and human reason. "Human nature," he contends, "is what gives us a moral sense, provides us with the social skills to live in society, and serves as a ground for more sophisticated philosophical discussions of rights, justice, and morality" (101-2). Therefore, any technology that fundamentally alters this nature should be prohibited. Of course, this seems to bring us back to the last sentence of the quote from Habermas that began the essay: "But in pluralistic societies such integrating worldviews and collectively binding ethical systems have disintegrated." That is

¹⁴ Book 2, Chapter 8 (1269a).

to say, there is no agreed upon “moral sense” on how best to be human or live the good life. So-called natural rights, like the right to keep and bear arms enshrined in the American *Bill of Rights*, seems an obvious product of particular people in a particular time and place and not at all a reflection of timeless and universal moral sensibility.

A better solution might be a thoughtful reexamination of the intersection of disability rights and technology. By recognizing that our flexible definition of disability is a potential backdoor to transhumanism, we might be able to draw a brighter line between therapy and enhancement. This would require some agreed upon definition of what makes up the normal human form, in both mind and body, as well as some protocol on how to change this definition. In Aristotelian terms, this would at least give us time to learn and maintain the habit of being human as it is practice in our technological age.

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