

# Could Human Rights Supersede Bioethics?

Richard E. Ashcroft\*

Bioethics and human rights are now well-established sets of norms, practices, institutions and methods for regulating the life sciences and medicine in the public sphere. Recent scholarship, and to some extent states' practice, in the governance of the life sciences and medicine have suggested that the field of bioethics may become subsumed into human rights law and practice. In this article, I discuss the current relationship between bioethics and human rights as public discourses and practices of governance of the life sciences and medicine, focussing particularly on human biomedicine. I analyse the thesis, notably associated with Australian health lawyer Thomas Faunce, that international human rights law will subsume bioethics. I argue that there are various theoretical and practical difficulties in the way of this thesis, but that these may be overcome. My claim is that if they are overcome, it will not be due to intellectual necessity, but to do with historical and political contingencies. Both bioethics and human rights must be understood as messy practices emerging from the interplay of doctrine, intellectual debate, institutional form, political interests and the actions of interested parties. The question will be not, could human rights supersede bioethics, but rather, which interests would be served by such a convergence?

## 1. Introduction: Bioethics and Human Rights—Convergence or Rivalry?

Bioethics and human rights are two assemblages of concepts, practices and institutions which take a profound interest in, and exert considerable influence over, the practice of medicine, health policy and the life sciences and

---

\*Professor of Bioethics, School of Law, Queen Mary, University of London (r.ashcroft@qmul.ac.uk). This article has benefited from very generous comments and criticisms from Thérèse Murphy, Olympia Bekou, the anonymous referees for *Human Rights Law Review*, and the participants in the ESRC workshop on European Law and New Health Technologies, held on 19 March 2010 at the University of Nottingham. All remaining errors and solecisms are mine.

technologies. They present two alternative forms of governance for the life sciences and medicine. Recent commentators have begun to consider whether these alternatives are rivals or complements. Indeed, one influential line of argument suggests that human rights may subsume or replace bioethics, at least at the level of the public governance of medicine and the life sciences. In this article, I examine the most plausible current statement of this argument, developed by Thomas Faunce. In Section 2 of this article, I explain the common origins of bioethics and human rights in order to outline the scope of the field of bioethics and its relationship with human rights. In Section 3, I describe the current roles played by human rights within the field of bioethics, before going on, in Section 4, to describe and elaborate Faunce's thesis. In Section 5, I analyse the weaknesses in this thesis and then attempt, in Section 6, to repair and advance his argument. The main difficulties arise from confusion between reading his thesis as a claim about the intellectual contents of the bioethics and human rights fields, and as a claim about practices in these fields. I claim that the more interesting reading is the latter, and, in Section 7, I discuss the practical drivers which may push a convergence between bioethics and human rights. I conclude by arguing that, if the convergence does occur, this will be a contingent outcome of quite concrete institutional and political interests. Further argument is needed if we are to conclude that this outcome would be feasible or a good thing.

## **2. The Nature of Bioethics and its Common Origins with Contemporary Human Rights**

Bioethics is currently influential as a field of academic research, an institutional governance and a policy-making tool. Its scope is the analysis and development of norms for conduct and policy relating to the practice of medicine and healthcare, and the application of the life sciences and biomedicine to problems in medicine, health care, public health and health promotion. One useful definition of the field is given in the first article of the UNESCO Universal Declaration on Bioethics and Human Rights 2005:

This Declaration addresses ethical issues related to medicine, life sciences and associated technologies as applied to human beings, taking into account their social, legal and environmental dimensions.<sup>1</sup>

As the reader will note, this defines a field of interest. Although there are long-standing debates about the status of bioethics as an actual or emergent

1 Article 1.1, Universal Declaration on Bioethics and Human Rights 2005 (UDBHR), available at: <http://www.unesco.org/new.org/new/en/social.and.human.rights/> [last accessed 28 September 2010].

academic discipline, given the protean nature of the field, and its complex interweaving into a wide range of institutional and professional settings, this identification of bioethics with its scope will be most helpful in understanding its main features.

The methods of bioethics are interdisciplinary. Since its focus is on 'ethical issues', which is to say human problems of choice, governance, strategy and, in the end, the life well lived, all and any of the methods of human inquiry and research which have been devised are applicable. That noted, the field is dominated by three main disciplines. First, mainstream analytic philosophy; second, legal analysis, mainly from the common law and US constitutional law traditions and, third, applied social sciences (principally, psychology and social research). In the past, theology played an important role, but this has tended to become more and more marginal, as bioethics is positioned as a kind of 'public discourse' which eschews commitment to specific cultural or sectional traditions. Other disciplines which could play a salutary role, particularly intellectual and social history, sociology proper and branches of philosophy other than applied moral and political philosophy, have played a much smaller role. Indeed, they often take up a critical role *vis-à-vis* bioethics, in some sense challenging its pretensions and authority to speak on its field of interest.<sup>2</sup>

The development of bioethics as a field, and its gradual evolution into a distinctive set of social and intellectual practices, has attracted the attention of a number of historians and sociologists, as well as historical and autobiographical accounts given by prominent bioethicists themselves. One thing that is striking about these histories is that there is agreement on the importance of some key historical moments and trends: the reassertion of humanist universalism in the aftermath of the Second World War; the recognition that medicine can have dirty hands in the aftermath of a series of scandals in medical research from the Nazi era through to the Tuskegee syphilis study; acceptance that medical innovation can go disastrously wrong in the face of various drug disasters, most notably thalidomide; and social changes in terms of erosion of class privileges and social deference in the context of medical care, analogous to the successes of feminism and civil rights movements in the West. These factors are often invoked as explanatory both of the need for bioethics as a new form of regulation of medical practice and human subjects research, and of the specific forms that it took in the USA, the UK and elsewhere.<sup>3</sup>

- 2 Sugarman and Sulmasy (eds), *Methods in Medical Ethics* (Washington, DC: Georgetown University Press, 2001); Bosk, *What Would You Do? Juggling Bioethics and Ethnography* (Chicago, IL: University of Chicago Press, 2008); Fox and Swazey, *Observing Bioethics* (New York, NY: Oxford University Press, 2008); and Evans, *Playing God? Human Genetic Engineering and the Rationalization of Public Bioethical Debate* (Chicago, IL: University of Chicago Press, 2002).
- 3 Ibid. Furthermore, see the classical work, Rothman, *Strangers at the Bedside: A History of How Law and Bioethics Transformed Medical Decision Making* (New York, NY: Basic Books, 1991).

An interesting feature of these narratives is that much of what is said to explain the rise and form of bioethics could equally be said to explain the rise and form of international human rights. In many ways, bioethics and human rights respond to the same social and historical forces and events. There are clear differences between bioethics and human rights, as we shall see, but at this point in my argument I would like to stress their commonalities as normative discourses, and as attempts to embed these discourses into institutional forms, professional self-consciousness and constraints on, and producers of, policy. Given these commonalities, it would be natural to expect that (i) where they address different problems, contexts and constituencies they will be complementary; and (ii) that where they address common problems, contexts and constituencies, they will cohere or converge.

My purpose in this article is to consider how far we can expect bioethics and human rights to converge. This is not an idle question. In some settings, convergence is actively debated. One very notable context is UNESCO, whose Universal Declaration on Bioethics and Human Rights I cited above. Another is the World Health Organization (WHO), where policy and technical advice on public health is now frequently shaped and steered both by human rights concerns and norms, and by bioethics—recent debates about essential medicines, pandemic influenza, and, most of all, management of the HIV/AIDS crisis. In a very different register, there is now a small, but growing, literature within bioethics and within human rights scholarship about the relationship between these two fields.<sup>4</sup> Some commentators think that bioethics and

The history of bioethics can conveniently be traced through the history of research ethics since the Nuremberg Doctors' Trial of 1946/7: see Weindling, *Nazi Medicine and the Nuremberg Trials: From Medical War Crimes to Informed Consent* (Basingstoke: Palgrave MacMillan, 2004); Schmidt and Frewer (eds), *History and Theory of Human Experimentation: The Declaration of Helsinki and Modern Medical Ethics* (Stuttgart: Franz Steiner Verlag, 2007); Halpern, *Lesser Harms: The Morality of Risk in Medical Research* (Chicago, IL: University of Chicago Press, 2004); Kutcher, *Contested Medicine: Cancer Research and the Military* (Chicago IL: University of Chicago Press, 2009); and Reverby, *Examining Tuskegee: The Infamous Syphilis Study and its Legacy* (Charlotte, NC: University of North Carolina Press, 2009). The linked history of drug regulation, including the Thalidomide story, can be traced in Abraham, *Science, Politics and the Pharmaceutical Industry: Controversy and Regulation in Drug Development* (London: Routledge, 1995). Rothman places most emphasis on the civil libertarian narrative; more recent historians place more emphasis on institutional factors, including risk management and professional conflict, notably Evans, Fox and Swazey, Kutcher and, especially, Stevens, *Bioethics in America: Origins and Cultural Politics* (Baltimore, MD: Johns Hopkins University Press, 2000).

4 See, for example, Rothman and Rothman, *Trust is Not Enough: Bringing Human Rights to Medicine* (New York, NY: New York Review of Books, 2006); Farmer and Campos, 'Rethinking Medical Ethics: A View from Below', (2004) 4 *Developing World Bioethics* 17; Baxi, *Human Rights in a Posthuman World: Critical Essays* (New Delhi: Oxford University Press, 2007); Plomer, *The Law and Ethics of Medical Research: International Bioethics and Human Rights* (London: Cavendish, 2005); Murphy (ed), *New Technologies and Human Rights* (Oxford: Oxford University Press, 2009); and Francioni (ed), *Biotechnologies and International Human Rights* (Oxford: Hart, 2007).

human rights will converge; indeed that one will subsume the other. Most commentators disagree, largely because of the defects of one or the other.

In this article I will briefly review some of the major obstacles in the way of a convergence between human rights and bioethics. Essentially, they fall into two families: practical and institutional on the one hand, and theoretical on the other. In another place I develop an analysis of the theoretical obstacles to convergence.<sup>5</sup> Here I will look more closely at the practical and institutional obstacles. My conclusion is that, whatever the theoretical difficulties, human rights and bioethics need each other to flourish.

### 3. Roles for Human Rights within Bioethics

Bioethics, as noted, is a field of problems and inquiry into those problems. But to the extent that this is a practical, and not simply a theoretical or academic, field, it needs to have traction with the public and policy- and law-makers. Given the dominance of philosophy within the field, this can lead to significant problems of understanding: norms of intellectual coherence, dialogical engagement and analytical rigour may vary quite significantly between the academic seminar room and the city square, and the philosopher's study and the legislative chamber. Quite obviously, within philosophy, which is concerned as much, if not more, with questions than with answers, and with sceptical challenge to assumptions rather than consensus-seeking, conflict is commonplace within 'academic' bioethics. As I will discuss below, this is quite frequently framed as a conflict within moral theory: the merits of different approaches to normative ethics are frequently rehearsed. Sometimes, the debate is seen as one of attachment to different moral values. The place where the debate is most commonly posed in these terms is in the context of 'cross-cultural' issues, but it is also very visible in debates between religious traditions, or between secularist and religious approaches to moral debate.<sup>6</sup>

Although these academic debates are fruitful and challenging, for practical purposes they often come to impasses, and where decision-making or consensus formation matters, there is a search for a common language—a *lingua franca* which will permit 'trade' to go on between parties whose fundamental commitments and moral languages may be quite different or even hostile. Bioethics is far more than its academic version, although there is much traffic and contiguity between academic bioethics and policy bioethics. For public policy purposes, the language of human rights may well serve a useful

5 Ashcroft, 'The Troubled Relationship Between Bioethics and Human Rights', in Freeman (ed), *Law and Bioethics: Current Legal Issues, Vol II* (Oxford: Oxford University Press, 2008) 31.

6 Ashcroft, *ibid.*; and Widdows, 'Is Global Ethics Moral Neo-Colonialism?' An Investigation of the Issue in the Context of Bioethics', (2007) 21 *Bioethics* 305.

function. States, at least, and most non-governmental organisations (NGOs) and intergovernmental and international bodies, have a commitment to human rights as a framework for identifying and protecting the interests of individuals and groups worldwide. As such, casting a debate into human rights terms allows a well-tested and long-established common language, rhetoric and institutional practice to be applied in order to achieve consensus both on the nature of the problem and, ideally, on the form of possible solutions to it.

A second advantage of linking human rights and bioethics is that the international human rights normative framework interdigitates quite naturally with domestic and international legal systems. The relationship between health law and bioethics is complex, especially in common law systems, and human rights provides a useful bridgehead between them, giving a principled grounding to doctrine within health law, and a practical implementation—at least notionally—of more abstract and universalist reasoning within bioethics. As such, human rights can be seen as a developed and nuanced approach to what Beauchamp and Childress refer to as ‘midrange’ heuristics within moral reasoning about (public) moral problems, in their classic text on the *Principles of Biomedical Ethics*.<sup>7</sup>

If we restrict our interest in human rights within bioethics to these practical issues around communication and use of a commonly accepted set of tools for problem-solving in the public sphere, we could probably achieve a reasonably wide consensus on the value of human rights for these purposes. And empirically, these understandings of what human rights can do for bioethics map reasonably well onto how human rights are applied in bioethics policy-making in the international organisations such as UNESCO, WHO and the World Medical Association. Nevertheless, critics of human rights within bioethics would argue that human rights theory and practice are neither necessary nor sufficient for these purposes, and that bioethics could fulfil these roles itself, given time and intellectual maturation of the field, without appeal to a discourse which, as we will see below, is considered quite problematic by many in the field of bioethics.<sup>8</sup>

Two further, more controversial possibilities, are as follows. First, it can be claimed that the human rights discourse, aside from its normative content, represents a specific form of attention to the world. There is a kind of ‘phenomenological moment’ in human rights. To approach the social world through a human rights framework is to focus one’s attention on a specific set of features of the social world, and to act as if they are of primary importance: poverty, injustice, inequality, indignity, harm, exploitation and abuse.<sup>9</sup> To develop this

7 Beauchamp and Childress, *Principles of Biomedical Ethics*, 6th edn (New York, NY: Oxford University Press, 2008).

8 See the discussion in Ashcroft, *supra* n. 5.

9 Douzinas, *The End of Human Rights* (Oxford: Hart, 2000).

thesis adequately would require more space than is available to me here. Note, however, that there is nothing internal to human rights norms which requires this phenomenological approach to the social world; nor is there any way of ensuring either that this approach picks up all forms of human evil and misery, or that approaching the world this way minimises the harms consequent on doing so (what David Kennedy calls the 'dark side of virtue').<sup>10</sup> This noted, the human rights approach to the social world which engages an attention to ordinary and extraordinary human misery is quite different to what can be found in bioethics.

Within bioethics, although standard histories link the rise of bioethics to the civil rights and feminist movements, and to narratives of abuse overcome and prevented, analytically bioethics tends to focus more on well-being than on harm, on individual rights rather than social context and on technological developments rather than lived experiences.<sup>11</sup> As such, a human rights orientation may challenge bioethics as a social phenomenon (human rights advocates such as Paul Farmer have done so repeatedly), or instead position human rights theory and practice as supplements to or inspirations for a more socially engaged bioethics. One form in which human rights can problematise bioethics is as follows.<sup>12</sup> Public bioethics, as Mary Dixon-Woods and I have argued elsewhere, serves as a set of practices for legitimating the 'social license to practise' of medical research, and to some extent medicine generally.<sup>13</sup> It certifies that medicine is engaged with the public and its social and political context. It provides a language and a set of practises for routinising and containing this engagement. And it organises these debates into bureaucratic form. Thus, on one hand, it constructs a social stability around medicine and its moral troubles. But on the other hand, it stabilises discussion of bioethical 'issues' into predictable and sometimes eviscerated forms.<sup>14</sup> Human rights arguments have some potential—in the hands of activists, at least—to disrupt this process, by challenging the language, the types of problem recognised and considered and the working methods of the public bioethics process. This might particularly be the case where the challenge to bioethics comes from groups which have tried—and failed—to challenge the policy consensus by other methods. Examples may include disability rights

10 Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2005).

11 See the critical discussion of this point in Fox and Swazey, *supra* n. 2.

12 Thanks to Thérèse Murphy for this point.

13 Ashcroft, 'The Ethics and Governance of Medical Research: What Does Regulation Have to Do With Morality?', (2003) 1 *New Review of Bioethics* 41; and Dixon Woods and Ashcroft, 'Regulation and the Social Licence for Medical Research', (2008) 11 *Medicine, Health Care and Philosophy* 381.

14 See Evans, *supra* n. 2, for a now classical statement of this argument. For a more detailed and circumspect argument along similar lines concerning the UK Nuffield Council on Bioethics, see Brownsword, 'Bioethics: Bridging from Morality to Law?', in Freeman (ed), *supra* n. 5 at 12.

campaigners, feminists and pro-poor lobby groups, who have increasingly found that human rights discourse and institutions provide powerful leverage at WHO and elsewhere in disrupting a bioethical discourse which they see as compromised and ‘in hock’ to neoliberal governance interests. Human rights discourse has a rhetorical force, and human rights practice an institutional structure and political network, which allow these to be useful resources in outflanking public bioethics. For this strategy to be effective, either the human rights approach must in fact become more powerful than the bioethical approach (which in many contexts it is for historical and institutional reasons, for instance in policy-making about aid or intellectual property rights), or it must be able to translate the terms of bioethical debate into a form acceptable to all parties while retaining the distinctive human rights form.<sup>15</sup>

A further possibility is that human rights theory and practice, as a mature discipline, ideology and social movement combined, might provide what bioethics currently lacks, namely a foundational theory which could ground more applied and analytical work in bioethics. As noted above, bioethics works at one level as a controversial practice, allowing different approaches within moral theory to engage with practical moral problems. Yet, the public value of bioethics lies, in part, in its ability to generate robustly reasoned public arguments for positions which can command a high degree of moral and political consensus, independently of the theoretical basis for that consensus.<sup>16</sup> Indeed, the outcomes of bioethical deliberation notionally deliver the sort of moral facts which then permit more ‘fundamental’ theories to be appraised and tested. What human rights may do is function as a robust, although not final, moral theory for bioethical deliberation. This is a highly contentious thesis, since the foundations of human rights themselves are controversial. And many influential approaches in bioethics are pragmatist in inspiration, and therefore eschew the idea that a ‘fundamental’ theory is necessary.<sup>17</sup> Most crucially, it is far from clear whether human rights carries a meta-theory of interpretation and evaluation with it: the theory of how to reason using human rights as a ‘moral’ theory is quite opaque, unlike the legal practice of human rights reasoning, which is embedded in the ordinary practice of legal analysis and interpretation.<sup>18</sup>

15 This is an issue requiring intensive research, but Brownsword’s work on the competition at the level of discourse between human rights and other styles of argument in public bioethics leads the way: see Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford: Oxford University Press, 2008). On the special case of intellectual property, see Gibson, *Intellectual Property, Medicine and Health: Current Debates* (Aldershot: Ashgate, 2009).

16 A position argued most cogently in Beauchamp and Childress, *supra* n. 7, and in Daniels, *Just Health: Meeting Health Needs Fairly* (Cambridge: Cambridge University Press, 2008).

17 McGee (ed), *Pragmatic Bioethics*, 2nd edn (Cambridge, MA: MIT Press, 2003).

18 A lucid exposition of this point is Raz, ‘Human Rights Without Foundations’, in Besson and Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010)

So far, I have described some things which human rights may offer bioethics. I want now to examine in some detail a recent proposal, by the Australian lawyer and physician Thomas Faunce, that in due course bioethics will be entirely subsumed into international human rights. This seems to me both inherently an interesting claim, and also the strongest version of the thesis sketched above, that human rights usefully supplements and founds bioethics as a field and as a policy tool.

#### 4. Faunce's Thesis<sup>19</sup>

I take Faunce's article as my starting point because it states rather cleanly and clearly the question of whether bioethics will be subsumed into the international human rights system. Faunce sees medical ethics as a 'professional regulatory system,' shaped by the medical profession itself. He holds that it has 'played morally inspirational, educational, disciplinary and normative' roles in the profession, and that these roles have to some extent been extended and formalised through developments such as ethics committees, academic texts and guidelines. He sees bioethics as a more formal discourse which overlaps with traditional medical ethics in its methods, field of interest and disciplinary orientation. Bioethics and medical ethics together form a particular style of ethical governance of medical practice and science and technology governance, which are professionally led and academically informed.

Faunce argues that this style of governance is now under challenge by developments in international human rights.<sup>20</sup> This challenge is twofold. First, there is a struggle to determine which governance regime should prevail in regulating medical, scientific and technological practice. Should a doctor, institution or nation wish to know whether a particular practice is normatively acceptable, should they refer themselves to the canon of medical ethics as

321. See also Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004); and Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007).

19 This section draws heavily upon Faunce, 'Will International Human Rights Subsume Medical Ethics? Intersections in the UNESCO Universal Bioethics Declaration', (2004) 31 *Journal of Medical Ethics* 173. He has since developed some applications of his argument in this early piece, although the substance of his theoretical argument has not changed: see Faunce and Nasu, 'Normative Foundations of Technology Transfer and Transnational Benefit Principles in the UNESCO Universal Declaration on Bioethics and Human Rights', (2009) 34 *Journal of Medicine and Philosophy* 296. Similar arguments have been developed by Andorno, for instance in Andorno, 'Human Dignity and Human Rights as a Common Ground for a Global Bioethics', (2009) 34 *Journal of Medicine and Philosophy* 223, and the contributors to Turoldo (ed), *La Globalizzazione della Bioetica: Un Commento alla Dichiarazione Universale sulla Bioetica e i Diritti Umani dell'UNESCO* (Padova: Fondazione Lanza, 2007) and ten Have and Jean (eds), *The UNESCO Universal Declaration on Bioethics and Human Rights: Background, Principles and Application* (Paris: UNESCO, 2009).

20 Ibid. at 173.

developed by the profession and its aides? Or should they refer themselves to the legal norms of international human rights? Crudely put: if I want to know whether cloning is permissible, do I look to sources within academic and professional bioethics, or do I look to the sources of international human rights law? Second, there is a struggle to determine the content of the norms themselves. If the first question is about the legal or political legitimacy of one system or the other, the second is about the methods which develop and secure the internal validity of a norm within the dominant system. If I want to know whether a norm banning cloning is a good norm, the way I would establish my answer to this question will be rather different if I approach the matter from within traditional medical ethics from that I would take if I approach the matter from within international human rights. The parties I would consult—and those I must consult—would be different; the rules of argument and evidence would be different; the acceptance conditions for my deliberations would be different and so on.<sup>21</sup>

Faunce notes that, in fact, many of the traditional norms of medical ethics are carried over into international human rights declarations and conventions. And, moreover, that many of the medical and nursing professions' international guidelines and restatements of ethical principles take on forms closely comparable to human rights declarations and conventions. One area where this is particularly apparent, he argues, is in international humanitarian law, insofar as this bears on the medical care and treatment of combatants, prisoners and civilians in war. Another is in the field of human experimentation where there are parallel norms in both the medical ethics system and in formal international human rights law (in particular, Article 7 of the International Covenant on Civil and Political Rights 1966).<sup>22</sup>

Faunce goes on to make three arguments relating to the possible subsumption of medical ethics under international human rights law. First, he argues that there are strong pragmatic reasons why the current system for developing binding global norms of medical ethics cannot be effective in the long term: the development of medical ethics norms is too piecemeal, haphazard and variable in terms of local legitimacy. As medicine is globalised, and as medical research in particular is globalised, there is strong pressure for universal norms both to allow practices to be evaluated transnationally and to allow for regulation of cross-border treatment, multinational clinical trials, trade in goods and services and so on.<sup>23</sup> The international human rights system, since

21 Faunce, *supra* n. 19 at 176.

22 999 UNTS 171 (ICCPR). A very informative discussion of the to and fro between international law and medical ethics in determining applicable standards for convictions of crimes against humanity in the context of the Nuremberg doctors' trial is Schmidt, *Justice at Nuremberg: Leo Alexander and the Nazi Doctors' Trial* (London: Palgrave Macmillan, 2004).

23 Faunce develops this theme in his more recent paper with Nasu, *supra* n. 19. See also Bennett, *Health Law's Kaleidoscope: Health Law Rights in a Global Age* (Aldershot: Ashgate, 2008).

it is established specifically to generate this kind of top-down globally normative guidance, is more effective and more legitimate than reliance on the professional standards departments of national medical associations or even the World Medical Association. Second, he argues that medical ethics norms are bootstrapped into international human rights law by virtue of their standing as customary international law.<sup>24</sup> This is an interesting move in that if one can show that a medical ethical norm is ‘international custom’, which is ‘evidence of a general practice accepted as law’, then that norm is a rule of international law. Similarly, if one can show that the norm is a ‘general principle of law recognised by civilised nations,’ the same conclusion may be reached.<sup>25</sup> And third, he argues that the rather general rules in high level international human rights law relating to the right to life, or the right not to be subject to inhuman and/or degrading treatment, cover many—if not all—aspects of medical care and treatment, and therefore development of the interpretation of this body of law will involve taking up medical ethical norms. But the way in which they are taken up will be subject to the rules of interpretation and development of international human rights law, rather than the practices of consensus development in professional guideline drafting. And in this way, we will see a ‘legalisation’ of medical ethics norms.

Faunce’s argument is rather obscure in many of its details, and my presentation of it here is in the nature of a reconstruction. However, I believe it is faithful to the best account he would give of his position. On one point we must be careful, however; he himself says:

I have not argued here that medical ethics is at risk of being abolished by international human rights. Perhaps, however, by embracing its normative intersections with international human rights, medical ethics may have its credibility enhanced and may meet contemporary global challenges more effectively.<sup>26</sup>

It is always a puzzle when an author states his thesis in negative: i.e. by telling us what he is not arguing. So, for my purposes, I will take ‘Faunce’s thesis’ to be this. Medical ethics, inasmuch as it involves articulating determinate principles which guide practice and allow practice to be judged or evaluated, could, in the end, be subsumed into international human rights. Inasmuch as it is directed to professional ethos and virtue, educational practice, academic deliberation and public debate will remain independent of international human rights law. But it is arguable that the habits of reasoning and argument which dominate international human rights law could become dominating in

24 He relies on Article 38(1) of the Statute of the International Court of Justice.

25 *Ibid.* at clauses b and c, respectively.

26 Faunce, *supra* n. 19 at 177.

the theory and practice of medical ethics beyond that normative part which is formally subsumed in international human rights law.

## 5. Problems with Faunce's Argument

Before I go on to evaluate 'Faunce's thesis,' let me note some obvious difficulties with his argument in the 2004 paper. The first is that his account of international human rights is unhelpfully vague. The second is that his account of international law is seriously defective. And the third is that he does not mark carefully enough the distinction between hard and soft law in the international context. None of these are fatal to the 'Faunce thesis,' but we need to clear them away first.

Faunce's account of human rights is ambiguous in several ways. First, there is an equivocation between 'human rights' *simpliciter* and 'international human rights'. Where the former, unqualified sense of human rights might imply various things, the latter should be taken quite specifically to refer to those human rights positively recognised at international law. The claim that medical ethics might be subsumed under international human rights is quite a strong one. Such a subsumption would mean something like recognising that the norms of medical ethics and bioethics should explicitly or implicitly be taken up into international human rights doctrine. Explicitly, through their articulation and adoption in treaty or convention form; or implicitly, through a sort of 'upward interpretation' of these norms as specifications of general international human rights norms in the context of medical practice and scientific and technological development. Subsumption of medical ethics into international human rights would require *both* a reframing of medical ethics norms in the language of international human rights *and* practical activities on the part of sovereign states and judicial bodies, for instance, to incorporate this reframed medical ethics into the instruments and institutions of international human rights law and practice.

On the other hand, subsumption of medical ethics into 'human rights,' in the unqualified sense, is a much weaker proposal. It might mean little more than simply incorporation of medical ethics into human rights ideology, or a cultural change such that doctors see their work as a form of human rights work, or a theoretical change such that the preferred analytical and argumentative modes within reflective medical ethics would be the modes of analysis and argument used within human rights theory and practice. This proposal is very vague indeed.<sup>27</sup>

27 Most of the critics surveyed in Ashcroft, *supra* n. 5, attack this weaker thesis, overlooking the possibilities of the stronger thesis. The relationship between legal practices and ethical

Both proposals are present in Faunce's article, and it is not clear which one he is most interested in. On the one hand, a lot of his argument concerns the 'attitudes' and 'orientation' of medical practice, as where he laments the relative failure of modern medical ethics to take virtue seriously, as opposed to its focus on principles and guidelines.<sup>28</sup> On the other hand, he places great stress on the value of human rights instruments and institutions, from the point of view of normative legitimacy, enforcement and implementation mechanisms and global consensus formation.<sup>29</sup> Furthermore, he lays particular stress on human rights texts, such as the UNESCO Universal Declaration on Human Rights and Bioethics. On balance, I think the better interpretation of Faunce's argument is that he is arguing for the convergence of medical ethics and human rights (in the unqualified sense), and that the best instrument through which this convergence is to be achieved is through the subsumption of medical ethics into 'international human rights' in the legal and institutional sense.

The second failing of Faunce's paper is his equivocation on the scope of international law. He uses the sense of 'international' in 'international law' somewhat loosely. It does not mean 'the universal law of humanity'. Rather, it means inter-national law, law between the nations. The subjects of international law are (almost always) nations themselves, rather than citizens, corporations or the other legal persons of domestic or municipal law.<sup>30</sup> So it is puzzling what subsuming medical ethics under 'international law' would mean, save in the very indirect sense that a state might breach its international law obligations to one or more other states should it fail to uphold some principle of medical ethics. There are, of course, circumstances in which this might be the case: torture being the obvious example, or certain crimes against humanity or grave breaches of international humanitarian law, or perhaps breaches of formal treaty obligations where a medical ethical principle is invoked.<sup>31</sup> But it is notoriously difficult to bring international law into effect to protect or give remedies to individuals for wrongs done to them by other private parties.

What is unusual about international human rights law, of course, is that in some circumstances individuals can make complaints to international courts or fora, regarding breaches of their rights as individuals, either by other private

reasoning in the context of medicine is currently under theorised, but a particularly useful contribution has been made by Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Oxford: Hart, 2007).

28 Faunce, *supra* n. 19 at 175.

29 *Ibid.* at 176–77.

30 McCorquodale, 'The Individual and the International Legal System', in Evans (ed), *International Law*, 2nd edn (Cambridge: Cambridge University Press, 2006) 307.

31 Cassese, *International Criminal Law*, 2nd edn (Oxford: Oxford University Press, 2008).

actors or by states.<sup>32</sup> To this extent, subsumption of medical ethics into international 'human rights' law has some promise. The dual role of this subsumption would be: on the one hand, to give the norms of medical ethics the 'moral' force that would derive from their recognition as principles of international human rights; and on the other, to construct enforcement and reporting and supervision mechanisms which would require states to implement medical ethical norms in similar ways to the ways they are expected to implement human rights norms, and to grant private complainants similar access to international human rights courts and fora for breaches of medical ethics as they now do for breaches of more generic human rights. The long road from Nuremberg to the International Criminal Court shows how difficult, patchy and fraught with procedural problems it is to get an international crime out of a situation of even gross personal wrong-doing.<sup>33</sup>

The third difficulty in Faunce's argument is that he overlooks entirely the different types of international human rights instrument: in particular, the distinction between 'hard' and 'soft' law is ignored completely.<sup>34</sup> Soft law instruments, such as the UNESCO Universal Declaration on Bioethics and Human Rights, have their uses, but Faunce appeals to the value of clear enforcement and implementation mechanisms in his argument that a human rights framework is preferable to a professionally led medical ethics as a tool of governance. Notoriously, soft law instruments lack formal enforcement mechanisms, and, while they may have a persuasive role in judicial reasoning domestically or internationally, they do not state enforceable rules. The value of soft law instruments in this context lies in standard setting for domestic authorities, in sharing of good practice, and other advantages of 'networked governance'.<sup>35</sup> These advantages are recognised explicitly in the UNESCO Universal Declaration on Bioethics and Human Rights, in the articles on promotion of the Declaration (Articles 22–25). It is an interesting question whether certain kinds of 'bioethical offences' should attract hard law regulation, up to and including recognition as international crimes under the statute of the International Criminal Court.<sup>36</sup> Arguably, under certain conditions, human experimentation

32 Steiner, 'International Protection of Human Rights', in Evans, *supra* n. 30 at 722. See further Letsas, *supra* n. 13.

33 For an illustrative example, see Schmidt, *supra* n. 20; and more generally Cassese, *supra* n. 31 and Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 3rd edn (New York, NY: The New Press, 2006).

34 Boyle, 'Soft Law in International Law-Making', in Evans, *supra* n. 30 at 141. On this, Andorno, *supra* n. 19, is more careful and instructive.

35 Much discussed in the context of European Law: see Armstrong and Kilpatrick, 'Law, Governance or New Governance? The Changing Open Method of Coordination', (2007) 13 *Columbia Journal of European Law* 649.

36 Rome Statute of the International Criminal Court, A/Conf.138/9, 37 ILM (1998) 99.

on prisoners or without the consent of the subjects can amount to a core international crime, but beyond this the picture is very murky.<sup>37</sup>

## 6. Advancing Faunce's Thesis

Earlier, I proposed the following version of Faunce's thesis: medical ethics, inasmuch as it involves articulating determinate principles which guide practice and allow practice to be judged or evaluated, could, in the end, be subsumed into international human rights. Taking into account the criticisms of Faunce just rehearsed, this thesis must be read as relating medical ethics to international human rights law and its institutional practice. It relates primarily to the practice of states in their regulation and governance of the practices of the professions and the scientific research community. And its precise form will be determined by the approaches taken by states to mutual governance. That is to say, how much and what is made subject to 'hard' and what to 'soft' law approaches is open.

So the questions before us is whether we should expect 'Faunce's thesis' to come true, and whether we should welcome this happening. Recall that initially the issue was whether human rights would come to play an important role *within* bioethics, as a supplement to bioethics' ordinary approach to reasoning, argument and consensus-building. I indicated that within bioethics there is considerable scepticism as to whether the *intellectual* tools of human rights reasoning add anything—or indeed whether they might detract from—those in bioethics as conducted today. Faunce's paper argued the other way around: would bioethics become subsumed within human rights. After our discussion of Faunce, the argument has been refined somewhat. Given the institutional and normative weaknesses of bioethics in the international legal, institutional, policy and cultural arenas, Faunce argues that the instruments

37 Faunce, *supra* n. 19 at 175. See further Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: ICRC and Cambridge University Press, 2005) Rule 92. It will be possible to prosecute 'bioethical offences' of various kinds under the Statute of the International Criminal Court. Aside from the standard crimes under international humanitarian law (including at Article 8(2)(a)(ii), 'torture or inhuman treatment, including biological experiments'), the Statute explicitly defines a range of crimes of a eugenic nature, such as forced pregnancy and enforced sterilisation (under Article 7(1)(g), identifying these as Crimes against Humanity, and under Article 6(d), identifying group-targeted 'measures intended to prevent births' as a form of genocide). The inclusion of 'bioethical offences' into the corpus of core international crimes deserves full treatment elsewhere. The leading theoretical contribution here is Agamben, *Homo Sacer* (Palo Alto: Stanford University Press, 1998). That many of the bioethical issues directly concern violence against women is important: see Sellers, 'Individual(s) Liability for Collective Sexual Violence', in Knop (ed), *Gender and Human Rights* (Oxford: Oxford University Press, 2004) 153; and generally, Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000).

and institutions of international human rights law may absorb and take the place of the normative part of medical and bioethics, and that the institutions of international human rights may take over a significant role in the governance of the professions (either through national legal systems or alongside them) from the professions themselves.

Now a bioethicist, like myself, could make the following argument which would pour sceptical water on this claim. A bioethicist would point to the analytical shortcomings of human rights; the lack of a secure metaphysical foundation for human rights theory, confusion about the status of human rights within legal theory, opacity concerning the trading off of rights claims against each other and against the general good, the individualism of rights and so on.<sup>38</sup> This is well-known territory within moral theory, and important books have recently been published on the topic.<sup>39</sup> This argument would essentially point to the incoherence and incompleteness of human rights as both a practice of argumentation and as an applicable moral theory, and say that human rights either add nothing to existing modes of theory and argument within bioethics or, worse, actually confuse matters. Elsewhere, I have argued that this argument has sociological importance, as a fact about the relationship between contributors to bioethics and human rights debates.<sup>40</sup> But I do not think it has any significance for Faunce's thesis, which is a thesis about institutions and norm-making.

The practical appeal of international human rights, according to Faunce's thesis, is precisely that it could subsume bioethical issues, theories and arguments into an extant, and normatively very powerful, politically legitimate framework of rules, institutions and practices. This framework is open textured, allowing for development, but that development is subject to well-understood processes for rule-making, adjudication, institutional change and political governance. So in this sense, the theoretical shortcomings of international human rights are irrelevant to a consideration of its practical advantages. The bioethical critique of human rights can be understood as various essays at the rational reconstruction of human rights theory. What is more useful, I would argue, is a semi-empirical theory of human rights practice: a theory which accounts both for the normative force of human rights and the institutional, legal and practical features of its praxis.

38 An amusingly bloody-minded exchange illustrating this is Fenton and Arras, 'Bioethics and Human Rights: Curb Your Enthusiasm', (2009) 19 *Cambridge Quarterly of Healthcare Ethics* 127; Annas, 'Human Rights and American Bioethics: Resistance is Futile', (2010) 19 *Cambridge Quarterly of Healthcare Ethics* 133; and Fenton and Arras, 'Wrong Again – Rejoinder to Annas' (2010) 19 *Cambridge Quarterly of Healthcare Ethics* 141.

39 Notably Beylveled and Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2002); Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008); Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009); and Buchanan, *Human Rights, Legitimacy, & the Use of Force* (Oxford: Oxford University Press, 2010).

40 *Supra* n. 5.

On this basis, the question is not: will bioethics and international human rights converge theoretically. Theory will follow practice. Instead, the question is what—politically, sociologically—would drive a convergence? And what form would this convergence take?

## 7. Functions of International Human Rights in the Bioethics Field

A natural place to start to examine the drivers for convergence would be to look at what international human rights is already doing in the bioethics field. For a European scholar, it is clear that it is already doing quite a lot, for European Convention on Human Rights ('the European Convention') jurisprudence is rather extensive in the bioethics field. There are European Court of Human Rights (ECtHR) judgments to consider on physician-assisted suicide, assisted conception, the right to life of foetuses, the civil liberties of the mentally ill and many other core topics in bioethics and medical ethics.<sup>41</sup> However, the European Convention is not a specifically 'bioethical' instrument, and it is precisely in determining how its Articles bear on medical practice and state activities in the regulation of biomedicine where a piecemeal approach leads to confusion. Indeed, the ECtHR has tended to make rather extensive use of its interpretative powers *not* to prescribe bioethical rules to states parties.<sup>42</sup> Where an issue is considered to be a moral issue subject to extensive public debate and cultural, religious and historical variations, the Court leans rather heavily on the 'margin of appreciation' doctrine. Principled understanding of the ECtHR's jurisprudence in this area is notoriously difficult.<sup>43</sup>

41 No comprehensive overview of ECtHR jurisprudence and medical/health law exists, comparable to Hervey and McHale's survey of EU health law, *Health Law and the European Union* (Cambridge: Cambridge University Press, 2004). Excellent general surveys of ECtHR jurisprudence exist, although health law jurisprudence is somewhat marginal to their concerns: see Harris et al., *Harris, O'Boyle and Warbrick: Law of the European Convention of Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009). But on specific topics, Bartlett et al., *Mental Disability and the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2007); Choudhry and Herring, *European Human Rights and Family Law* (Oxford: Hart, 2010); and Murphy and Ó'Cuinn, 'Works in Progress: The European Court of Human Rights and New Technologies', in this issue of the *Human Rights Law Review*, are comprehensive, and Wicks, *Human Rights and Healthcare* (Oxford: Hart, 2007) has a satisfactory if now dated coverage of the impact of the Human Rights Act 1998 on English healthcare law, which permits a partial evaluation of the parallel European Convention jurisprudence on this area.

42 See Letsas, *supra* n. 13.

43 I recognise that this is a controversial view, and other commentators, for instance Murphy, are more sanguine about the positive role of the ECtHR in fixing norms in a variety of areas (notably mental healthcare law, and the intersection of family law and medical law in reproductive healthcare law, and transgender identity, for instance). My view, which is evolving, is that the Court is much more comfortable when it is able to exercise 'public law' functions of review of legislative, administrative or procedural aspects of governance relationships

As such, expecting bioethics to arise out of European Convention jurisprudence is a mistake.<sup>44</sup> Indeed, while domestic judges sometimes do incorporate bioethical reasoning into their deliberations, the discomfort shown in doing so at the ECtHR suggests that bioethical policy belongs outside the framework of the European Convention on Human Rights, on constitutional principle.<sup>45</sup> Insofar as the function of the European Convention is to regulate state practice concerning the governance of their subjects and territorial denizens, it takes a narrow view of human rights primarily being structural principles of public law rather than fundamental moral norms of human existence.<sup>46</sup>

A more promising set of clues to what international human rights may do in the bioethics field is to look at the formal instruments which have been prepared on bioethics and human rights. In addition to the UNESCO Universal Declaration on Bioethics and Human Rights mentioned above, the Council of Europe's 'Oviedo Convention' and its protocols represent the broadest coverage and most comprehensive attempts to place bioethical matters on a formal

between state and citizens/subjects, than when it is asked to address a moral issue *qua* moral issue. Further analysis of the Court's jurisprudence and practice is necessary to flesh this out fully. Cf. Murphy and Ó'Cuinn, *supra* n. 41.

- 44 This does not touch on what happens when domestic courts 'bring rights home', as the Human Rights Act 1998 requires them to do. This is clearly the case where an issue which the ECtHR handles under the 'margin of appreciation' nevertheless engages Convention rights, and appears in a domestic court: see *Re P* [2008] UKHL 38. See further Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009). However, I do not think this affects my basic thesis about the relationship between human rights considered as a normative framework for bioethical reasoning. This appears—when it does appear—in relatively pure form at the ECtHR. Whereas, the complex embedding of the European Convention in English law raises the 'different' question about the 'legalisation' of bioethics—the translation of bioethical principle into a form which is a continuation of the evolution of the common law. This question—about the supersession of bioethics by biolaw—is well treated, but with considerable scepticism, by Montgomery, 'Law and the Demoralisation of Medicine', (2006) 26 *Legal Studies* 1; Brazier and Glover 'Does Medical Law Have a Future?', in Hayton (ed), *Law's Future(s): British Legal Developments in the 21st Century* (Oxford: Hart, 2000) 371; and most recently Miola, *supra* n. 27.
- 45 This is likely to change, now that, as seems likely, the European Union (EU) will accede to the European Convention on Human Rights as a party in its own right, and that through the Lisbon Treaty the EU has incorporated the EU Charter of Fundamental Rights and Freedoms into the primary law of the EU. These developments taken together will grant the individual citizen of EU member states a range of possibilities for litigating bioethical issues which are now closed to her.
- 46 Put another way, they are pre-political, rather than political, see Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge: Cambridge University Press, 2006), for a critique of the European Convention and its jurisprudence and its weakness in promoting substantive human rights and revisionist accounts of personal dignity and freedom from the point of view of feminist, Marxist and other theories. See the more theoretical treatments of human rights in the abstract by Douzinas, *supra* n. 9; and Baxi, *supra* n. 4. But contrast Beylveled and Brownsword, *supra* n. 39, who argue that a substantive conception of human rights does inhere in human rights jurisprudence: the challenge for them is to explain how this coheres with ECtHR jurisprudence in cases such as *Vo v France* 2004-VIII; 40 EHRR 12 or *Evans v United Kingdom* 2007-IV; 46 EHRR 34, where the Court has quite determinedly stuck to a proceduralist line and applied the margin of appreciation doctrine forcefully to exclude substantive moral argument. See also Letsas, *supra* n. 18.

human rights convention footing.<sup>47</sup> For discussion purposes, let us focus on the Oviedo Convention. This instrument attempts to give a broad, principled structure for bioethical norms considered as human rights norms across the member states of the Council of Europe. Opened for signature in 1997, it has at the time of writing been signed by 34 of the 47 member states of the Council, and ratified by 23 of those signatories. The Oviedo Convention has therefore entered into force in each of those 23 countries, and also binds them before the ECtHR, although the Convention does not itself confer new rights or remedies before that Court, such that a citizen might apply directly to the Court should she claim one of the Oviedo Convention provisions has been breached 'unless' the claim can be framed as a breach of one or more rights under the European Convention on Human Rights.<sup>48</sup> So from a procedural point of view the Oviedo Convention in some sense fleshes out and interprets the older, more general European Convention on Human Rights, rather than supplementing it and adding new rights. This makes for an ambiguity. Read one way, the Oviedo Convention spells out the application of the older European Convention in the biomedical context, but does not expand it or extend its reach any further over the field of biomedicine than the older Convention's jurisprudence already recognises. Read another way, a breach of a provision of the Oviedo Convention could be creatively upwards interpreted as a breach of a European Convention on Human Rights article.

This is mere speculation, since the Oviedo Convention has been cited in only a very small number of cases, and only as persuasive authority.<sup>49</sup> However, note both the way the Oviedo Convention is gradually being taken up as an aid to interpretation of the European Convention on Human Rights at the ECtHR, and the coverage of the later Convention: consent, alternatives to consent in situations where the patient has mental disorder or there is a medical emergency, privacy and provisions relating to transplantation, genetics and medical research. The form and legislative strategy of the Oviedo Convention do represent—albeit incompletely—a taking up of medical ethics norms into international human rights legal form.

47 Convention for the Protection of Human Rights and Human Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1997, ETS 164 (Oviedo); Additional Protocol on the Prohibition of the Cloning of Human Beings 1998, ETS 168; Additional Protocol Concerning Transplantation of Organs and Tissues of Human Origin 2002, ETS 186; Additional Protocol Concerning Biomedical Research 2004, ETS 195; and Additional Protocol on Genetic Testing for Health Purposes 2008, ETS 2003.

48 Article 29 of the Oviedo Convention provides for the ECtHR to be approached for an advisory opinion on the interpretation of the Oviedo Convention, at the request of 'the Government of a Party, after having informed the other Parties' or following a 2/3 vote of the members of the Steering Committee on Bioethics established under Article 32 (or of any other committee designated by the Committee of Ministers of the Council of Europe). Clearly, this does not permit individual applications.

49 A representative case being *MAK and RK v United Kingdom* Application Nos 45901/5 and 40146/06, 23 March 2010.

For practical purposes, however, the influence of the Oviedo Convention in the courts is likely to be limited. First, as noted, its authority is relatively weak, and its usefulness to litigants is limited, given the dominance of the European Convention on Human Rights at the Strasbourg court. Second, in UK domestic courts it will have even less authority, as the UK has not signed, still less ratified it. The same applies to Germany, and while Sweden, France and Italy have signed the Oviedo Convention they have yet to ratify it. To the extent that the Oviedo Convention's provisions relate to biomedical research, it is significant that most of the countries with major pharmaceutical and life sciences industries have not taken up the Oviedo Convention. On the other hand, with some specific exceptions regarding certain specific Articles in some countries (for instance, Article 18(2) prohibiting creation of embryos for research purposes), arguably everything in the Oviedo Convention codifies, abstracts and simplifies provisions which exist in domestic law already. So, to that extent, the Oviedo Convention may be considered redundant: indeed, it is unlikely that it would have been agreed and open for signature otherwise.

So the question then becomes what the function of codification of medical ethics norms in incomplete, abstract, non-binding and arguably legally redundant form might be. Critics of the UNESCO Universal Declaration on Bioethics and Human Rights have asked the same question even more forcefully.<sup>50</sup>

A range of answers may be suggested. Firstly, as noted above, fleshing out the meaning of the European Convention on Human Rights, or, internationally, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,<sup>51</sup> has some value in aiding interpretation of these more authoritative and powerful treaties. Secondly, outside the courts in cooperative policy-making and international negotiation, the UNESCO and Council of Europe instruments can serve as benchmarks for developing national legislation and guidance, a basis for comparison between states' policies and approaches to the regulation and governance of biomedicine, and as persuasive tools for policy selection. It is sometimes argued, particularly by UNESCO officials, that the principal merit of the Universal Declaration on Bioethics and Human Rights is that it serves both as a norm that countries without law or regulation of medical practice and biomedical research can take up, and as a boilerplate for developing the legislation needed to implement that norm.<sup>52</sup> Thirdly, as Faunce would argue, to place medical ethics norms on a human rights footing serves a very important rhetorical function, by stripping them of their character as mere professional conventions and by asserting their universally binding character above and beyond the

50 See Ashcroft, *supra* n. 5, for references.

51 ICCPR, *supra* n. 22; and International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 (ICESCR), respectively.

52 See ten Have and Jean, *supra* n. 19, for the definitive statement to this effect.

custom, practice and convenience of the professions in particular times and places. This latter effect has been quite marked in the debates over torture and over international biomedical research.<sup>53</sup> Fourthly, these instruments provide a language and approach for discussion of bioethical issues and regulatory issues which is comprehensible to parties starting with a range of different practices and assumptions—a *lingua franca*.

## 8. Conclusion

In this article, I have examined several of the various intellectual, practical and sociological challenges which face proponents of the thesis that bioethics and international human rights will converge. To the extent that bioethics is a 'policy' field, rather than a merely academic discourse, I believe there are good reasons to think that convergence might occur. The dominance of human rights approaches to policy-framing and debate at the international level is great, although not complete (as debates over international trade law show clearly).<sup>54</sup> The clarity of legal form offered by international human rights is superior to anything bioethics can offer, as is the institutional base, and political and linguistic commitment on the part of states and leading NGOs. What might become of bioethics if it is taken up in this form is not clear. As we saw when considering ECtHR jurisprudence, there is no good reason to think that bioethical modes of reasoning will be taken up by courts and policy-makers as tools of reasoning 'with' human rights or as supplements to human rights discourse in contexts where the application of rights-based reasoning is unclear, ambiguous or unhelpful. Traditional modes of legal reasoning, policy formation and decision-making will not, and have no reason to, cede the field to the methods of (academic) bioethics.<sup>55</sup>

That noted, given the uncertainties of scope, interpretation and content of human rights as applied to the subject matter of bioethics, it is likely that the field of bioethics will not become entirely redundant even within the policy

53 On torture, see Miles, *Oath Betrayed: America's Torture Doctors* (Berkeley, CA: University of California Press, 2009); Allhoff (ed), *Physicians at War: The Dual-Loyalties Challenge* (Berlin: Springer, 2008); and Rodley and Pollard, *The Treatment of Prisoners Under International Law*, 3rd edn (Oxford: Oxford University Press, 2009). On international biomedical research and human rights, see Fox and Swazey, *supra* n. 2; and the works cited *supra* n. 4.

54 Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge: Cambridge University Press, 2009); and Lang, 'Re-thinking Trade and Human Rights', (2007) 15 *Tulane Journal of International and Comparative Law* 335.

55 For an illustration of this, contrast the types of report and argument made by the European Group on Ethics, reporting to the European Commission, or the UK Nuffield Council on Bioethics or Human Genetics Commission, with those made in academic research into the same topics. See, for an illuminating discussion, Brownsword, 'Bioethics: Bridging from Morality to Law', in Freeman, *supra* n. 5 at 12.

field. Attempts to place policy bioethics on a single footing, be that utilitarian, human rights- or human dignity-oriented, have so far become mired in intellectual and political controversy, and have been resisted in legal reasoning and drafting as well, at least in the international forum.<sup>56</sup> It may be argued that this is precisely because bioethics and human rights need acceptance as *linguae francae* in situations where dependence on a common set of fundamental moral values cannot be assumed or relied upon.<sup>57</sup>

There is no reason to suppose that the convergence of—or any feature of the relationship between—human rights and bioethics is determined by the form or intellectual content of these two discourses.<sup>58</sup> Human rights is, amongst other things, a social movement, a form of political rhetoric, a body of domestic and international law, a special kind of moral theory, a tool of diplomacy, a set of institutions, and a kind of cultural capital. Bioethics is also some of these things, albeit usually in weaker and less well-entrenched forms. What we must therefore expect is that, if convergence occurs, there are good social and political reasons for the convergence. The speculations in this article suggest some of the reasons that may apply. But to go further than this requires a good spyglass, and serious social scientific investigation.

56 The standard discussion of this issue is Beyleveld and Brownsword, *supra* n. 39.

57 Donnelly, *Universal Human Rights in Theory & Practice*, 2nd edn (Ithaca NY: Cornell University Press, 2003).

58 I recognise that this is a very strong thesis, and an odd one for a philosopher to maintain. But recognising that human rights are instrumental and political as much as normative and rational is crucial to an understanding of their meaning as it arises from their use. For a sociological argument to this effect, see Woodiwiss, *Human Rights* (London: Routledge, 2005). And for a general defense of this approach to understanding social life, see Winch, *The Idea of a Social Science and its Relation to Philosophy* (London: Routledge and Kegan Paul, 1958).