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## The idea of human rights

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# The idea of human rights

## **Abstract**

My brief for this piece was to write on human rights. That left two main options. I could undertake a fairly specific black letter critique of bills of rights. I am a strong opponent of these instruments, in either their entrenched, constitutionalised form or in their statutory, enacted form. The former you see in Canada and the United States of America; the latter you see in New Zealand, the United Kingdom and in Victoria. In my view *both* forms are pernicious; both forms undermine democratic decision-making; both forms unduly enhance the point-of-application power of unelected judges on a host of issues that are in effect moral and political ones – ones over which judges (committees of ex-lawyers as Jeremy Waldron continually reminds us) have no greater expertise, no superior moral perspicacity, no better pipeline to God than the rest of us non-judges, otherwise known as voters.

Here I have chosen the other option, writing about human rights more generally – what they are; where they come from; what people presumably mean when they invoke this abstraction of ‘human rights’ and when they intone, rhetorically, ‘Don’t you want your rights protected?’

## **Keywords**

human rights, bill of rights, constitution, human rights, democracy

## OPINION

### THE IDEA OF HUMAN RIGHTS

JAMES ALLAN\*

My brief for this piece was to write on human rights. That left two main options. I could undertake a fairly specific black letter critique of bills of rights. I am a strong opponent of these instruments, in either their entrenched, constitutionalised form or in their statutory, enacted form. The former you see in Canada and the United States of America; the latter you see in New Zealand, the United Kingdom and in Victoria. In my view *both* forms are pernicious; both forms undermine democratic decision-making; both forms unduly enhance the point-of-application power of unelected judges on a host of issues that are in effect moral and political ones – ones over which judges (committees of ex-lawyers as Jeremy Waldron continually reminds us) have no greater expertise, no superior moral perspicacity, no better pipeline to God than the rest of us non-judges, otherwise known as voters. I could go through the problems with bills of rights in some detail if I were to choose this option. I have written fairly extensively along these lines.<sup>1</sup>

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<sup>1</sup> See, as a sample, James Allan, 'Bills of Rights and Judicial Power – A Liberal's Quandary?' (1996) 16 *Oxford Journal of Legal Studies* 337; James Allan, 'Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990' (2000) 9 *Otago Law Review* 613; James Allan, *Sympathy and Antipathy: Essays Legal and Philosophical* (Ashgate, 2002); James Allan, 'Rights, Paternalism, Constitutions and Judges' in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002) 29; James Allan, 'Oh That I Were Made Judge in the Land' (2002) 30 *Federal Law Review* 561; James Allan, 'Paying for the Comfort of Dogma' (2003) 25 *Sydney Law Review* 63; James Allan, 'A Modest Proposal' (2003) 23 *Oxford Journal of Legal Studies* 197; James Allan, 'An Unashamed Majoritarian' (2004) 27 *Dalhousie Law Journal* 537; James Allan and Grant Huscroft, 'Rights Internationalism Coming Home to Roost?' (2006) *San Diego Law Review* 1; James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' (2006) 17 *King's College Law Journal* 1; James Allan, 'Thin Beats Fat Yet Again – Conceptions of Democracy' (2006) 25 *Law & Philosophy* 533; James Allan, 'The Victorian *Charter of Human Rights And Responsibilities*' (2006) 30 *Melbourne University Law Review* 906; James Allan, 'Jeremy Waldron and the Philosopher's Stone' (2008) 45 *San Diego Law Review* 133; James Allan, 'Meagher's

Here I have chosen the other option, writing about human rights more generally – what they are; where they come from; what people presumably mean when they invoke this abstraction of ‘human rights’ and when they intone, rhetorically, ‘Don’t you want your rights protected?’ My topic is the idea of human rights.<sup>2</sup> But I approach that subject in a rather indirect, Alistair Cooke-like way.

I start by pointing out that people often fight and argue over concepts and terms and what they mean. This is especially true of concepts or notions that carry with them a big emotive punch, where just having the word or phrase on your side is an advantage. They are rhetorical trump cards – such as the phrase ‘Rule of Law’ or the word ‘democracy’.

Everyone wants to employ these concepts to advance their side of an argument but not everyone agrees about their content. They are ‘essentially contested concepts’, as the British philosopher W.B. Gallie put it.<sup>3</sup> People disagree as to what is actually meant by ‘democracy’ or by ‘the Rule of Law’.

Acknowledging this reality that differences of opinion and disagreement can be, and are, between sides where both parties are well-intentioned, smart and well-informed is not the most notable virtue of many bill of rights proponents. Often their default position is simply to assume that the proponent’s own first order preferences and moral evaluations are, by some unexplained and wholly mysterious process, the self-evidently morally correct and right ones. These evaluations are employed when it comes to, say, where to draw the line on free speech issues, or refugee issues, or

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Mischaracterisations of Majoritarianism’ (2009) 20 *King’s Law Journal* 115; James Allan and Michael Kirby, ‘Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Honourable Michael Kirby’ (2009) 33 *Melbourne University Law Review* 1032; James Allan, ‘Not in for a Pound – In for a Penny? Must a Majoritarian Democrat Treat All Constitutional Judicial Review as Equally Egregious?’ (2010) 21 *King’s Law Journal* 233; James Allan, ‘You Don’t Always Get What You Pay For: No Bill of Rights for Australia’ (2010) *New Zealand Universities Law Review* 179; James Allan, ‘Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament’s Clear Intention and You Shake It All About’ in Tom Campbell, K D Ewing and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 108; James Allan, *The Vantage of Law: Its Role in Thinking about Law, Judging and Bills of Rights* (Ashgate, 2011).

<sup>2</sup> Parts of what follows I have taken, adapted and formalised from James Allan, *The Idea of Human Rights in a Civil Society* (May 2011) Quadrant Magazine <<http://www.quadrant.org.au/magazine/issue/2011/5/the-idea-of-human-rights-in-a-civil-society>>.

<sup>3</sup> W B Gallie, ‘Essentially Contested Concepts’ (1965) 56 *Proceedings of the Aristotelian Society* 167.

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cross-examining rape complainant issues, or same sex marriage issues, or abortion issues, or euthanasia issues, or shooting Osama Bin Laden issues, and so on to extend to any contested rights-related issue.

These proponents often talk about human rights and their side of an issue as though they are the superbly well-informed, altruistic side with a mystical and ineffable pipeline to God while the other side is best understood as being motivated by reactionary, borderline racist, and certainly stupid sentiments that could do with a few months in a re-education camp.

However, almost all disagreements in societies of 22 million or 65 million or 330 million cannot be explained away using this 'I'm morally superior and smarter than everyone who disagrees with me' template, with its concomitant claims that everyone who disagrees is defective, dumb or evil. The truth, the reality, the best description of the way the world is, almost always is that disagreement is just a fact of social life in a country where tens of millions of people live. Neither side of these debates – at least to the disinterested observer – has higher levels of moral perspicacity or personal probity or greater access to eternal truths.

People just disagree, no doubt linked in part to their upbringings and circumstances and sentiments. What is relevant here is that they disagree not just about these first-order issues but also about the meaning of important concepts and terms. That means that sometimes a debate can be won by capturing a word, even though there may be a struggle to win the debate on its merits.

Take this example. Suppose you do not have much confidence in the views, beliefs and sentiments of your fellow citizens. You do not think much of the political and moral choices of the majority, the plumbers, secretaries, teachers and even derivatives traders who make up that majority.

But of course you do not want to come out of the closet and say you are against democracy, the idea of counting all voters as equal and then letting the numbers count. It is too hard in today's world to admit openly that you are a latter day aristocrat, and prefer top judges and overseas committee members of United Nations agencies to have considerably more say on a host of debatable social policy issues than your fellow citizens.<sup>4</sup>

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<sup>4</sup> On the democracy-enerivating aspects of international law see James Allan, 'Ineffective, Opaque and Undemocratic – the IOUs of (too much) International Law, and Why a Bit of Scepticism is Warranted' (2013) *San Diego Law Review* (forthcoming).

Instead, you redefine the concept of 'democracy'.<sup>5</sup> You take the core idea related to how decisions ought to be made and stuff it full of moral abstractions; you make it more morally pregnant. Democracy now means not just 'how' decisions are taken. It also includes a judgment related to 'what' those decisions were and whether they are acceptable (to some kept-from-view aristocratic group or other).

You now get to assess how rights-respecting some statute passed by the elected legislature was, or whether it was unduly illiberal. If it was too illiberal, then on this new understanding it does not count as democratic, despite it being a product of the majority's legislature.

Of course left wholly out of sight are two things. Firstly, people disagree about what is and is not rights-respecting. Secondly, the judges and internationalists,<sup>6</sup> who will now get to make some of the authoritative calls, do not have a pipeline to God on these issues.

It is a neat trick. All of a sudden, our redefined notion of democracy builds in a role for an exclusive group of people, a role that lets them gainsay and second-guess the majority. Yet it still gets to be called 'democracy'.

That is one example of what I mean by an essentially contested concept. It may sound familiar because precisely that attempt to redefine the concept of 'democracy' has taken, and is taking, place right now in the West.

I could make much the same sort of point as regards 'the Rule of Law',<sup>7</sup> that there are two main competing notions as to what this phrase encompasses. One is a morally Spartan one about the good consequences that flow from having a legal system with general rules, known in advance, able to be complied with, and applying to everyone. But this 'thin' notion is compatible with having laws you judge to be morally bad. A newer understanding of this concept is more morally pregnant and basically builds in a 'these laws must be morally good ones, or at least not morally terrible ones' (according to me) before giving them the 'Rule of Law' tick or label.

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<sup>5</sup> I make the argument, at length, that a thin, procedural, 'letting-the-numbers-count' sense of democracy is much preferable to a fat, morally pregnant one in Allan, 'Thin Beats Fat Yet Again – Conceptions of Democracy', above n 1.

<sup>6</sup> See Allan, 'Ineffective, Opaque and Undemocratic – the IOUs of (too much) International Law', above n 4.

<sup>7</sup> I do that in James Allan, 'Reasonable Disagreement and the Diminution of Democracy: Joseph's Morally Laden Understanding of "The Rule of Law"' in Richards Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis, 2011) 79.

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I now turn to the topic of human rights. Here again, this notion of human rights does not define itself. It, too, is an essentially contested concept. People disagree about what will and will not fall under the aegis of this broad notion, just as they do about any particular enumerated claim to a human right, say the 'right to free speech'.

When I was travelling around Australia debating about bills of rights I often started by asking the audience if anyone was in favour of the right to free speech. In every audience every single person raised his or her hand as being in favour. But when you forswear the moral abstractions and ask if people are in favour of tobacco advertising on billboards outside schools, or whether they want unlimited campaign finance rules that allow billionaires to buy up television time galore to push their favoured political views, or if they want defamation laws that put a fair bit of weight on reputational concerns, or if they want to stop any speech that might be characterised as hateful by any groups at all, or if their notion of a fair trial allows for some limits on cross-examining rape complainants, you immediately find that there are all sorts of disagreements in society.

Up in the Olympian heights of moral abstractions – where we talk of the right to free speech or to freedom of religion and where disagreement tends to be finessed and glossed over – you can achieve almost universal agreement. But down in the quagmire of day-to-day social policy decision-making you never have that sort of consensus.

That means that the language of human rights can achieve a sort of bogus consensus because it deals in moral abstractions so abstract and so couched in emotively appealing connotations and generalisations that almost everyone can sign up to it. That is the power of the language of human rights.

But underneath that finessed, very abstract notion, what actions are and are not on the side of 'human rights' is not something that defines itself. It is contestable, and contested. Just because someone proclaims himself or herself to be on the side of human rights it does not necessarily follow that others – on hearing that person's views on specific issues – will agree with those views. Nor does it follow that they will concede that this proclaimer – *him or her* not them – is the one on the side of human rights.

One of the great tricks – I would say fallacies even – of those who campaign for a bill of rights in Australia is to exclaim 'Don't you want your rights protected?' As if Australians do not right now have more scope to speak their minds than Canadians do (as regards, say, potentially defamatory words, or hate speech or words related to election campaigns and the rules that finance them). You see even though Canada has a super potent, constitutionally entrenched bill of rights, and Australia has none, it turns out Australians in fact have greater scope to speak our minds.

And as if in any political system known to man you (or anyone else) will always be on the winning side of every line-drawing exercise about such things as whether women ought to be able to wear headscarves in schools or people claiming refugee status ought to be virtually unhindered in arriving in a country or whether women who allege they have been raped ought not to be subjected to the full panoply of cross-examination questions during the accused's criminal trial.

Take that last example, not least because it turns the tables on the pro-bill of rights brigade which tends to assume, unwarrantedly, that these instruments are a guarantee of nice progressive outcomes. In the United Kingdom the legislature passed a statute restricting somewhat what a defence barrister could ask a woman who was a complainant in a rape trial about her own past sexual activity.<sup>8</sup> However, the highest court in the United Kingdom, under the United Kingdom's statutory bill of rights, said this law was a breach of people's timeless, fundamental human rights, specifically the 'right to a fair trial'.<sup>9</sup>

My point is that that is a debatable call, either way. The real issue is not who is and is not on the side of human rights. The real issue is which institution should be making these debatable line-drawing decisions, the elected Parliament or the unelected judiciary (because remember, when you buy a bill of rights what you are really buying is a much enhanced decision-making role for judges, whether the bill of rights be of the statutory or constitutionalised variety). No institution will produce outcomes with which you agree 100 percent of the time. It is about which has the best hit rate on average over time. Is it the one that is accountable to the voters and can be tossed out after making calls on these moral and political issues? Or is it the one that takes these moral and political issues, translates them into pseudo-legal ones, and issues absolutist sounding claims – even when the outcome in court was 4-3 or 5-4, where if one judge had changed his or her mind your timeless, fundamental rights would magically and mysteriously be the exact opposite of what they ended up being declared to be?<sup>10</sup>

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<sup>8</sup> See *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, s 41.

<sup>9</sup> *R v A (No 2)* [2002] 1 AC 45. In this case it seems to me that what the majority judges were doing was considerably more than could have been done via common law interpretive techniques or presumptions. After all, they effectively over-ruled the clear meaning of a statute.

<sup>10</sup> The test is not whether there are some deficiencies in a country's voting arrangements or democratic institutions. All people will have their own such lists for all countries. The test is a purely comparative one. How does the elected legislature compare to seven or nine unelected top judges in terms of their relative democratic credentials? In the world's Australias, Canadas and New Zealands the answer to that is beyond serious argument.

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The least-bad option (not the perfect, unfailing or most wonderful option, but the least-bad one) is the legislature. Call it democracy if you mean it in the thin, letting the numbers count, sense.

The obverse of much of what I have just said is that you cannot, or should not, argue for a bill of rights (or think about human rights) in terms that amount to blithely asking: "Don't you want your rights protected?" Of course you do. But there is disagreement about which actions will and will not amount to protecting those rights and how best to go about structuring our institutions to do so. You simply cannot just assume that your take on when prisoners ought to be allowed to vote or your take on when speech that some in society see as hateful ought to be suppressed is the view that is the rights-respecting one. No more than some top judge who was previously a commercial barrister or a bureaucrat appointed to a human rights commission who likes to speak out on contested social policy issues, no more than theirs is your view somehow the self-evidently correct view. The person who disagrees with you about the rights-respectingness of euthanasia or abortion or headscarves in schools also thinks his or her views are morally correct.

Accordingly, a procedural rule is required to resolve these differences and disagreements in society. It is not resolved by who shouts the loudest about his attachment to human rights in the abstract. It can never be resolved by adopting some substantive test, say a Spike Lee-like 'Do the Right Thing' test. That will not work because, as I have made clear, people simply disagree about what the substantive right answers are and there is no science-like agreed method for resolving such disagreements. It is not the same as when you encounter some anti-foundationalist, deconstructionist, post-modernist literature professor who asserts that gravity, say, is socially constructed and inculcated. There, at least, you can take the deconstructionist up to your 8<sup>th</sup> floor office, open the window, and suggest they show their good faith by jumping. They will not. They too believe gravity is a mind-independent fact of life, not something socially created. It is part of the external, causal world that exists independently of how societies happen to inculcate people.<sup>11</sup>

There is no science-like equivalent for resolving social policy disagreements, even when they have been translated into the language of human rights. Even when you leave such decisions to the courts the decision making rule is wholly procedural. The decision-making rule in the High Court of Australia or any top Supreme Court is to count heads. Four votes beat three. It does not matter if the dissenting three have crafted morally uplifting judgments chock full of references to John Stuart Mill and

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<sup>11</sup> I make this point at length in Allan, 'Jeremy Waldron and the Philosopher's Stone', above n 1.

the *International Covenant on Civil and Political Rights* and the majority judges have written callow, insipid judgments, largely crafted by their law student clerks. My point is that it is a procedural test there too; it is just that the size of the franchise is somewhat more limited than when 22 million Australians vote to choose a legislature to decide such matters.

At this point I retreat a bit further to briefly discuss rights themselves. When I ask my first year law students at the University of Queensland what rights are, they struggle to give an answer. Eventually someone might say that rights are entitlements, or protections, or guarantees of a sort. Never will they tell you that analytically speaking a right amounts to an 'others must' claim.<sup>12</sup> If I have a right to free speech then others must let me speak. Similarly, if you have a right to be free of unreasonable searches then someone must avoid unreasonably searching your property. Those rights, those 'others must' claims, are linked – they are correlated – to duties. A duty is an 'I must' claim. My duty to visit my sick grandmother in the hospital is an 'I must' claim. So her right ('others must') is my duty ('I must').

Wherever there are rights there are correlated duties. You cannot have rights without duties. On rare occasions you might be able to argue there are duties without rights – for example, saying that I have a duty not to cut down a 2000 year old tree does not correlate to the tree having a right not to be cut down, at least most people still resist expanding rights-talk to such a degree.

Looking at rights analytically, not only are rights always connected to duties (which may explain the labelling of the State of Victoria's statutory bill of rights as *The Charter of Human Rights and Responsibilities*<sup>13</sup> – the lack of any obvious responsibilities having been listed notwithstanding), but the rights and duties themselves are always tied together by the concept of rules. Any right you care to mention I can transliterate into the form of a rule: 'She has the right to free speech' becomes 'There is a rule that allows her to speak her mind in the following circumstances'. Of course the language of rules does not have the same emotive punch. The language of rules does not provoke the same frisson of self-entitled excitement as does the language of rights. But analytically speaking they are exactly the same. A right is a rule.

Once you see that, you can see that rights, broadly speaking, are of two sorts. There are rights (or rules) where we all can see the basis of the claim. These are legal rights (or rules). *Habeas corpus* is a legal right. In some circumstances having recourse to

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<sup>12</sup> See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919) for the best known analytical explanation of rights.

<sup>13</sup> *The Charter of Human Rights and Responsibilities Act 2006* (Vic).

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being tried by a jury is a legal right (or rule), or what you can expect as a residential tenant. If someone asked where these sorts of rights come from, you can point to a statute, or maybe to a series of cases from the highest courts. Whether you like the substance of the right, or not, its source is clear.

But in other circumstances it is evident we are not talking about legal rights, but rather non-legal or moral rights. The claim that 'everyone has the right to free speech in China' might be a most laudable one. But plainly it is not a claim about the legal system now in existence in China, or Syria, or Myanmar. Rather, it is a moral claim about the way someone thinks the world ought to be.

Further, moral claims and whether they actually exist with this content or that are highly contestable and debatable claims in a way that is not true about whether most legal rights and rules actually exist and what their content is (to leave aside for a moment their desirability).

One of the things that the idea of human rights in civil society does is to blur this divide between legal rules and entitlements and moral rules and entitlements. When human rights language is being used often it is used to make a moral assertion – that people ought to have scope to speak their minds in China. Other times, though, these claims are being made at the intersection between law and morality, and these are ones that typically gloss over the highly contestable nature of moral claims. For example, even in a Western liberal democracy claims about there being rights to (or moral rules laying down that one can) get married to whomever one wishes, or to end the lives of foetuses when one wants, or to receive asylum wherever one wishes are divisive and argued about incessantly.

The idea and the language of human rights finesses those disagreements and helps those making rather more specific – but disguised – claims; it helps them to position themselves as though they were speaking from on high, on the mount as it were, about the right side to be on when it comes to such specific, debatable, contested issues. If it were translated into the form of 'I think there is a moral rule mandating that my position on same sex marriage and euthanasia is the correct one, and that it ought to be made legally enforceable because I am making that claim – and I have exceptionally refined moral sentiments and world renowned moral perspicacity', you might find fewer people would be cowed. That would be true even if the speaker were a well-known human rights barrister or human rights commissioner or person working for a non-governmental organisation.

The philosopher, social reformer and utilitarian Jeremy Bentham (who was very much a man of the political left) got at this idea of how the language of human rights can work in a much more devastating and concise manner two centuries ago when critiquing the French Declaration of the Rights of Man. He went through and

dissected each of the claims made in that French instrument.<sup>14</sup> 'All men are created equal' Bentham mused. Really? In what sense? Is the illegitimate daughter of the charlady born with equal life chances to the eldest son of the Earl of Hampshire? No. No one can think that. What they can think, and what they should think, is that we ought to be working towards a world where there are more equal opportunities and where people are seen as equal before the law.

What the language of human rights sometimes does is to concatenate and conflate these two ideas, the present 'is' and the desired future 'ought'. It is that conflation that can cause problems, or as Bentham rather devastatingly put it, 'Hunger is not Bread'.<sup>15</sup> Your 'oughts' do not somehow magically become 'ises' just by loudly asserting something is true, such as that everyone has the right to free speech in China. If you are not careful you will not go about reform in the correct way.

The idea of human rights can be potent and powerful and a clear force for good or it can obscure clear thinking, impede needed reforms, and constrain democratic decision-making in favour of a sort of aristocratic decision-making where the lords of yesterday are replaced by a judicial elite of today. It all depends on how you are using that idea. As the great English constitutional thinker Walter Bagehot put it, 'The most melancholy of human reflections, perhaps, is that, on the whole, it is a question whether the benevolence of mankind does most harm or good'.<sup>16</sup>

Still, if you remember that today in western liberal democracies people disagree about almost any important social policy issue down in the quagmire of detail and specifics, and that translating such disputes into the language of human rights does not remove that underlying disagreement, however much it may hide it and finesse it, then in my mind we will all be better off.

With those foundations laid there are various tangents one could follow at this point. One possibility would be to show that you can value and support rights (which are rules setting out 'others must' claims) without also thinking bills of rights are a good way of giving them legal force – because of worries about democratic legitimacy, and the likelihood of the legislature's institutional superiority.

Another would be to talk about the rebirth of natural law thinking since the end of the Second World War, and concomitantly how the last 60 years can be understood in

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<sup>14</sup> See Jeremy Bentham, 'Anarchical Fallacies' in John Bowring (ed), *The Works of Jeremy Bentham* (W. Tait, 1843) vol 2, 491.

<sup>15</sup> Ibid 501: 'But reasons for wishing there were such things as rights, are not rights; -- a reason for wishing that a certain right were established, is not that right – want is not supply – hunger is not bread.'

<sup>16</sup> Quoted in *The Week*, April 30<sup>th</sup>, 2011, p. 21.

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terms of the triumph of American-style constitutionalism in the West, with uber-powerful judges interpreting vague, amorphous, indefinite moral abstractions couched in the language of rights, and used to second-guess and gainsay the elected branches of government.

Or one might go back to Bentham and consider his claim that those people who deal in the moral abstractions of untempered, absolutist human rights thinking, often tying this way of thinking to moral realist philosophical foundations rather than to non-cognitivist ones, actually often end up taking a harder line than utilitarian consequentialists. For example, consider how such thinking can lead one to forsake waterboarding in favour of drone missile strikes that kill, rather than momentarily give the illusion of drowning – or of how it forces subscribers to kill and assassinate because all room for capturing and interrogating in any sensible way has been removed.

Maybe after all we could go and look at the State of Victoria, with its statutory bill of rights and section 15 guarantee of freedom of speech and wonder why between 2006 and June 2008 Victoria's judges issued 627 gag orders against the media while in that same period the judges in the bill of rights-free State of New South Wales issued only 54.<sup>17</sup>

We might also point out that the underlying disdain for the views of the ordinary voter – a disdain too easily glossed over with vapid references to 'the tyranny of the majority'<sup>18</sup> and one, though generally disguised, sometimes openly expressed in moments of indiscretion – is the same sort of puffed up, sanctimonious type thinking that was employed in years gone by to deny the franchise to women and blacks, because they cannot possibly have proper feelings about how to deal with those seeking refugee status or same sex marriage entitlements. Only lawyers and judges can be trusted with those sort of topics, right?

We could even go through how fundamentally undemocratic and anti-democratic so much of international law is,<sup>19</sup> or how condescending it is for constitutional law scholars to decry the many failed section 128 constitutional referenda.<sup>20</sup>

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<sup>17</sup> See Chris Merritt, 'Charter Fails the Test on Free Speech', *The Australian* (online), 29 April 2011 <<http://www.theaustralian.com.au/business/legal-affairs/charter-fails-the-test-on-free-speech/story-e6frg97x-1226046566169>>.

<sup>18</sup> See Allan, *The Vantage of Law*, above n 1, 51.

<sup>19</sup> See Allan, 'Ineffective, Opaque and Undemocratic – the IOUs of (too much) International Law', above n 4.

But those are all tangents for another article. Let me simply finish by reiterating that behind the finessing abstractions of the language of human rights is this reality. A right is a rule. That right can be a legal one whose origin and source is clear (namely a statute, judge-made ruling, constitutional provision), though its desirability is contested. Alternatively, that right can be a moral claim, the source of which is highly contestable and contested, along with its desirability. The language of human rights conflates those two sorts of rights or rules. Jeremy Bentham some two centuries ago insisted on keeping the two separate, the legal 'is' claim and the non-legal 'ought' claim. The language and absolutist inclinations of human rights thinking prefers to conflate and blend together the two. Bentham said separating the two led to better consequences in terms of human welfare than this natural law type conflation.

I am very much of Bentham's point of view.<sup>21</sup>

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<sup>20</sup> Almost none – maybe none at all – of those failed 38 out of 46 referenda were aimed at increasing democratic input or fixing federalism, which is why I would have agreed with the voters on almost every single one of those failed 'no' referenda.

<sup>21</sup> That basic point underlies much of the argument in Allan, *The Vantage of Law*, above n 1.