

## **Don't entrust liberty to madcap judges**

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If you want to see how crazy a bill of rights is then you should go to Canada, advises James Allan

EACH year when I return from our family's short mid-year trip to our native Canada, I come stocked with over-the-top examples of what the unelected judiciary can do with a bill of rights.

This year's is the most amazing one of all. You might even wonder if the judge was sane, or had overdosed on a steady diet of Boston Legal television viewing. Here are the essential facts. A divorced father had custody of his 12-year-old daughter. The daughter accesses sites on the internet that the dad thought were inappropriate. So he tells her those sites are forbidden and, in particular, that she is not to post photos of herself on an online dating website.

The daughter ignores her dad so he punishes her. He doesn't smack her or ground her for a year. He forbids her attending the upcoming school year-end camping trip (which in Australian terms, is a fun end-of-year weekend trip run by the school).

What does the daughter do? She calls a lawyer. The lawyer goes to a judge and, relying on the bill of rights, challenges the girl's punishment in court. Most readers, I'm pretty sure, will be thinking that if a child going on to inappropriate websites is not a solid ground for punishing the child, then it's hard to see what is. But the judge -- and a superior court judge at that -- ruled that the father's punishment was too harsh. It infringed the girl's fundamental rights.

The sad, presumably unintended consequence of this piece of judicial lunacy in Canada is that the father is rethinking his custodianship. Who wants to have to go to court to find out how much time one's children can be asked to put into their studies, or what punishment shoplifting or rudeness to others warrants. Heck, it's not as if top lawyers and judges beat the societal average when it comes to how well they raise their own kids.

My point isn't just that this judge, or rather one with a brain in his or her head, should have laughed this thing out of court, though of course I do think that. The point is that once you hand over society's moral and political line-drawing decisions to a coterie of unelected ex-lawyers, which is precisely and unavoidably what a bill of rights does, then you have no idea where things will go in future. All you know for sure is that it will be the judges' personal values -- not those of the majority of citizens -- that will prevail.

The judges will end up simply reading their own values into one or other of the various indeterminate, gaseous platitudes that are the moral abstractions that comprise the enumerated rights in any bill of rights.

The evidence for this seems to me to be overwhelming, not just in Canada but in the US, Britain and New Zealand.

If you look around and think that the social and cultural sentiments of top lawyers are more likely to align with your own first order moral preferences than are those of the majority of your fellow

citizens, then a bill of rights is for you. Or rather, if you have no democratic scruples, and don't mind this end-run around the views of all those many others who will disagree with you on all sorts of such issues, then a bill of rights is for you.

Some might reply that these sorts of lunacies are worth suffering in order to get judges involved on the big issues: things such as freedom of speech. But the fact is, as I never tire of repeating, that there is far more freedom to say what you want here in Australia (without any national bill of rights and none at all outside of Victoria and what amounts to the city council of Canberra) than there is in Canada, where there is one of the strongest, most powerful bills of rights on the planet.

Be clear about this. Having a bill of rights that says ``you have the right to free speech'' does not mean you will get more scope to express your own views.

Got that? It simply means that unelected judges, rather than elected politicians, will ultimately decide what you can and cannot say. I know where I'd put my money.

James Allan is Garrick professor of law at the University of Queensland.