

# Deseret News

## Bill of Rights a live wire, 222 years later

By: Eric Schulzke - July 3, 2013

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Nineteen-year-old Justin Carter is on suicide watch in a Texas jail, where he has been sitting since February, accused of making a "terroristic threat" on Facebook.

When an online friend told him he was "messed up in the head," he replied, "Oh yeah, I'm real messed up in the head, I'm going to go shoot up a school full of kids ... " He added "lol" and "jk," apparently to take the edge off the snark.

A Canadian Facebook user tipped off the police, who found no evidence of intent or capacity on Carter's part to harm anyone — either in the home or on his computer.

A nearly identical case in Oxford, Miss., has 19-year old Josh Pillault behind bars, nine months and counting. A video game taunt led to a tasteless joke followed by SWAT team raid a plea without a lawyer.

Under Supreme Court doctrine laid out in 1969, a tasteless and violent joke is protected, so long as there is no evidence of a "truth threat." And yet Justin Carter and Josh Pillault sit behind bars, leaving parents and supporters to wonder if casual online comments can mar young lives, just what First Amendment protections mean.

Free speech is just one of many places where the U.S. Bill of Rights remains a work in progress 222 years after it became law — a continuing struggle between government claims for order and security, and the individual's interest in clarity and freedom. This past year, the struggle played out in numerous areas, including free speech and search and seizure rules, to touch just a few.

### **Oh, Canada!**

It may not be coincidental that Justin Carter's nemesis lives in Canada. Although Canada shares a common British legal heritage with the U.S., it lacks the strong individual protections found in the U.S. Bill of Rights.

One reason Carter's legal woes in Texas shock the American mind is that U.S. free speech protections — even the right to say stupid, incendiary or hateful things — have always been more robust than those of other democratic states.

Canada's Supreme Court held earlier this year in *Saskatchewan v. Whatcott* that truth is no a defense against human rights laws that suppress "hateful speech." The case featured a fundamentalist Christian who circulated pamphlets condemning the "teaching homosexuality" in schools.

"Truthful statements can be interlaced with harmful ones or otherwise presented in a manner that would meet the definition of hate speech," Justice Marshall Rothstein wrote.

The Court further ruled that the hate speech doesn't even need to harm anyone to be banned. It's enough if the speech may "tend to expose" a group to hatred, including speech that may "ridicule, belittle, or affront the dignity of persons included in these protected groups."

The U.S. Supreme Court expects belittled groups to keep a stiff upper lip. The key decision here came in 1992, in *R.A.V. vs. St. Paul*, a case involving an iconic American hate scene — a cross burned on a black family's lawn.

The Court ruled unanimously that a local statute forbidding hate speech applied in this case violated the First Amendment if it targets the ideas of the speech, however hateful — just as the court protects offensive jokes that carry no real threat of violence.

U.S. law is thus set sharply apart from the neighbor to the North. But as Justin Carter discovered, there is often a disconnect between what the court says and what officials actually do.

### **Taping police**

Consider another form of free speech — taking pictures or videotaping local police while on duty. With camera phones now common, and with the specter of Rodney King still lurking, a number of local jurisdictions have taken to arresting, harassing or confiscating the cameras of those who attempt to film them, actions which legal scholars and the U.S. Justice Department argue violate key parts of the Bill of Rights.

In March of this year, the U.S. Department of Justice filed two letters with Maryland courts supporting the rights of citizens to film police officers. "The United States urges the Court to find that both the First and Fourth Amendments protect an individual who peacefully photographs police activity on a public street," said one letter.

"It's pretty well established in the courts that people have a First Amendment right, and quite possibly a due process right, to record police, especially in public settings," said Glenn Reynolds, a law professor at the University of Tennessee. "Police, however, don't seem to be going along."

This week in Hawthorne, Calif., for example, police handcuffed a man after attempting to film them from a public street during a burglary call. As documented in still photos shot by another observer, the police handcuffed the man, even though he had already retreated to his car. His dog then jumped out of the car to defend his master, whereupon the officers shot the dog dead.

Similar cases have occurred with frequency around the country.

"We should be able to get some bright-line rules so it's not all up to the discretion of the officers," said Walter Olson, a senior fellow at the libertarian Cato Institute, "if the person filming is not suspected of a crime and is not a threat to the safety of the officers."

## **Search and seizure**

If snooping on police is dicey, how about cops snooping on you? The Supreme Court issued four search and seizure decisions this term, according to Olson.

"Here we are 200 years later, and a lot of big, interesting questions still haven't been settled on what the Bill of Rights says about search and seizures," Olson said.

In three cases, the court sided with the defendant and in one big case, the court sided with the state. This was the DNA swab case, where the state of Maryland was capturing DNA from those arrested, even if they were not charged with a crime.

"Because of today's decision, your DNA can be taken and entered into a national database if you are ever arrested, rightly or wrongly, and for whatever reason," wrote Justice Antonin Scalia in a sharp dissent. Kennedy joined three of the liberal justices in an unusual dissenting alliance.

Olson points to a deeper problem on the DNA question, still well below the radar. Many local jurisdictions are collecting DNA on an ongoing basis, he said, including collecting samples from drinking cups and from witnesses and from drinking cups.

"They are building and building and building an identification database in the expectation that this will help them solve future crimes," Olson said. "We really need a debate about that before the inevitable abuses."

In short, Olson suggests, while the Bill of Rights grants U.S. citizens — on paper and usually in practice — far more extensive protections of individual liberty, those protections are often in flux and their implementation is often uneven.