Facebook 'rapper' urges high court to adopt subjective test for online threats

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Teed up before the U.S. Supreme Court is *Elonis v. United States*, No. 13-983, which involves "speech crime," an interesting intersection between criminal behavior and freedom of speech protected by the First Amendment. This is one of many cases before the court this term with significant implications for technology and those who interact with it.

Argument held
Dec. 1

From case style alone, this looks to be yet another criminal case before the court, with constitutional issues under the Fourth, Fifth and Sixth Amendments presented. However, *Elonis* presents these issues in the 21st century. Essentially, it asks, with today's technology, when is it a federal crime to post on the Internet "any threat to injure the person of another"?[1] In other words, and in a situation we have all encountered, when does a threatening Internet post, such as a Facebook status update or comment, become a federal crime?

At this stage, the court appears more narrowly focused on the issue of whether proof of the defendant's *subjective* intent to threaten a person is necessary, rather than asking whether a *reasonable person* would understand the statement to be a threat. This issue is likely critical to the proper formulation of the jury charge and during closing arguments.

> Essentially, *Elonis* asks, With today's technology, when is it a federal crime to post on the Internet "any threat to injure the person of another"?

Regardless of where the court comes out, the notion that Internet speech can be punished only if the speaker *subjectively* intends to threaten another is not likely to dampen the ardor of prosecutors and grand juries. They may still see speech amounting to an objective threat as warranting prosecution.

BACKGROUND

The case arises out of posts that Anthony D. Elonis wrote on Facebook after he was fired from his job in October 2010. He posted about his wife and children leaving him and him losing his job, frequently in the form of rap lyrics with "crude, spontaneous and emotional language expressing frustration."[2]

Many of the posts contained violent themes; however, Elonis made disclaimers in his Facebook profile that his posts were "fictitious lyrics," "exercising [his] constitutional right to freedom of speech."[3] Elonis' Facebook page was public and, therefore, viewable by anyone. But, he posted under the pseudonym "Tone Dougie," rather than list his actual name.

Elonis' "threatening" Facebook posts included:

- A photograph of himself and a co-worker performing in costume for a Halloween event, in which Elonis was holding a toy knife against the co-worker's neck.
- A comment that his son should dress up in a costume with Elonis' ex-wife's head on a stick, ending the post with an emoticon of a face sticking its tongue out, in jest. This update was in response to a status update from Elonis' sister-in-law, who wrote that she was shopping for Halloween costumes with his children.
- An adaption of a sketch by the "Whitest Kids U' Know" comedy troupe. In that sketch, a member of the troupe explains it is illegal to say you wish to kill the president, but not illegal to explain that saying so is illegal. Elonis included a link to the original video and the statement: "I'm willing to go to jail for my constitutional rights." Elonis' wife was not tagged in that, or any other, post.
- A mockery of the "protection from abuse" order his wife received against him, including, "Fold up your PFA and put it in your pocket, Is it think enough to stop a bullet?"
- Writing the phrase, "Enough elementary schools in a 10 mile radius to initiate the most heinous school shooting ever imagine."



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- A "note" titled "Little Agent Lady," styled as a rap song, suggesting Elonis was wearing a bomb during a recent visit by an FBI agent to his house, and including the line, "Pull my knife, flick my wrist and slit her throat."[4]

Elonis was arrested shortly thereafter and charged with violating 18 U.S.C. § 875(c), a federal statute that criminalizes sending interstate communications that contain threats to kidnap or injure another person. He was indicted by the grand jury, and convicted after a jury trial. The U.S. District Court for the Eastern District of Pennsylvania sentenced Elonis to 44 months in prison, followed by three years of supervised release.[5]

The 3rd U.S. Circuit Court of Appeals affirmed, holding that precedent was clear that prosecutions under Section 875(c) required only proof that "a reasonable person would foresee that the statement would be interpreted" as a threat. It recognized a circuit split on the issue, however.[6]

The Supreme Court granted *certiorari* June 16.[7]

ISSUE PRESENTED FOR REVIEW

In his petition for review, Elonis asked the high court if the federal statute criminalizing the act of threatening another person via the Internet requires proof of the defendant's subjective intent to threaten, as required by the 9th Circuit and several state supreme courts, or whether it is enough to show that a "reasonable person" would regard the statement as threatening.

Question presented

It is a federal crime to "transmit[] in interstate or foreign commerce any communication containing ... any threat to injure the person of another," 18 U.S.C. § 875(c)? Numerous states have adopted analogous crimes.

The question presented is:
Whether, consistent with the First Amendment and *Virginia v. Black,* 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten, as required by the 9th Circuit and the supreme courts of Massachusetts, Rhode Island and Vermont, or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.

In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten."

CURRENT LAW: WHEN SPEECH IS A CRIME

Underlying the debate between which standard is appropriate to criminalize threatening speech is the issue of whether an individual, like Elonis, enjoys the right to engage in such speech under the Constitution. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech."[9] The Supreme Court has also ruled that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[10] Thus, on first glance, it appears that Elonis' speech should enjoy robust First Amendment protection, even if it is distasteful.

> The notion that Internet speech can be punished only if the speaker *subjectively* intends to threaten another is not likely to dampen the ardor of prosecutors and grand juries.

Elonis advocates for a subjective standard, following the 9th Circuit and a few state courts. "Permitting conviction based on negligence for a crime of pure speech is contrary to basic First Amendment principles," he contends.[8]

The United States, on the other hand, contends that subjective intent is not an element of Section 875(c), based on the plain language of the statute, which says, "containing *any* threat." Additionally, the government argues, one reason to treat threats as unprotected speech — protecting the audience — applies equally to all true threats, regardless of the speaker's intent.

However, even Elonis acknowledges — and there is little room for debate — that the First Amendment does not protect "true threats."[11] However, it remains unclear what constitutes a "true threat," and whether this requires the speaker to intend to threaten another or whether a reasonable person would feel threatened by a statement.

In a 2003 case, *Virginia v. Black,* the Supreme Court for the first time defined the term "true threat," holding that the term refers to "those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[12] *Black* involved a Virginia statute that criminalized burning a cross in public "with the intent of intimidating any person," and provided that the public burning of a cross "shall be *prima facie* evidence of an intent to intimidate." A plurality of the court agreed on the constitutional necessity of a subjective intent requirement.

Most lower courts — including nine federal appeals courts and numerous state courts — have adopted an "objective" standard, looking to whether a reasonable person would understand a statement to be a threat.[13] The 3rd Circuit followed suit in Elonis' case, holding that a statement is a "true threat," unprotected by the First Amendment, whenever "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm."[14]

However, the 9th Circuit and a few state courts have held that the subjective test set forth in *Virginia v. Black*, 538 U.S. 343 (2003), "must be read into all threat statutes that criminalize pure speech."[15]

In the jurisdictions favoring an objective definition, the courts have made the decision to "protect[] listeners from statements that are reasonably interpreted as threats, even if the speaker lacks the subjective, specific intent to threaten."[16] This was reasonable following the Supreme Court's focus on the speech's context, rather than on the speaker's intent, in determining whether the speech was constitutionally protected in *Watts v. United States*.[17]

Watts involved a prosecution for threatening the president under 18 U.S.C. § 871(a). Based on Robert Watts' statement, which happened during a draft-protest rally, the court concluded his remark was not a true threat because it was made at a political event, was conditioned on the unlikely draft of the speaker and the crowd responded with laughter. However, the validity of this view as a matter of statutory construction in light of *Virginia v. Black* is debatable.

The practical implication of this split has been that the breadth of speech protected for the individual varies based on the governmental entity prosecuting him — not only state or federal, but circuit by circuit.

Moreover, the federal venue statute establishes that venue is not only in the jurisdiction where the alleged threat is *made*, but also where it is *read*.[22] As applied to communications made using the Internet — such as Elonis' Facebook posts and where prosecutions are increasingly made — which may be read anywhere, the speaker may literally be subject to prosecution *anywhere* and subject, nearly at random, to either an objective or subjective standard, leaving charging authorities with intriguing choices. Thus, the speaker (assuming some knowledge of possible criminal liability), if most prudent, significantly curtails his speech based on the possibility of prosecution under the most restrictive law.

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Courts applying the objective standard have limited the applicability of *Black* to only the Virginia statute at issue that classified public cross burning as *prima facie* evidence of an intent to intimidate instead of interpreting *Black* to mean that all threats, regardless of the specific statute, are determined by a subjective analysis.

On the other hand, courts that have applied a subjective analysis have focused on providing the protection for the widest amount of speech, holding that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."[18] While the speaker "need not actually intend to carry out the threat," they must "intend for his language to *threaten* the victim."[19]

In *United States v. Cassel*, for example, the 9th Circuit concluded that the "clear import" of the Supreme Court's definition" of "true threats" in *Black* is that only *intentional* threats are criminally punishable consistently with the First Amendment."[20] This follows the Supreme Court's comment in *Black* that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death."[21]

Thus, applying a subjective standard, only those threats made with the required mental state can be criminal, and speech meant merely to be expressive, offensive as it may be, is protected by the First Amendment.

FORESEEABLE IMPLICATIONS

The academic implications of the Supreme Court's decision in *Elonis* may be significant because it will further define the relationship between First Amendment rights and criminal law.[23] Additionally, the court's decision will be critical in formulating jury charges and closing arguments when defending those indicted under 18 U.S.C. § 875(c). However, the court's decision is unlikely to have any practical impact for the average American penning violent phrases or sharing troubling images on the Internet.

When the next individual posts on Facebook or captions a picture about putting a bullet through a specific person, regardless of the outcome of *Elonis*, his odds of arrest remain high. Even if his criminal defense attorney must only defend against a subjective standard and convince the jury that the client did not intend his comment to be a threat, the attorney must still attempt to explain the difference in "art" or a "true threat" to a jury — a likely difficult task if a reasonable person may regard the speech as threatening.

Perhaps on appeal the distinction between an objective and subjective standard becomes relevant after *Elonis*, but whether this distinction is enough to provide perceived security to the individual who wishes to share violent words or images on the Internet is questionable. In sum, if the Supreme Court embraces a subjective standard, to borrow an old adage, the Facebook "artist" "may beat the rap," but it's questionable whether he will "beat the ride." WJ

NOTES

1 18 U.S.C. § 875(c).

2 *United States v. Elonis,* No. 5:11-cr-00013, *indictment filed* (E.D. Pa. Jan. 6, 2011).

3 Brief for Petitioner at *7, *Elonis v. United States,* No. 13-983 (U.S. Aug. 15, 2014), 2014 WL 4101234, at *7.

4 *Id.* at *5-16.

5 *United States v. Elonis,* 897 F. Supp. 2d 335 (E.D. Pa. 2012).

6 *United States v. Elonis,* 730 F.3d 321 (3d Cir. 2013).

7 *Elonis v. United States,* No. 13-983, *cert. granted* (U.S. June 16, 2014).

8 *Elonis*, Brief for Petitioner at *3.

9 U.S. Const. amend. I.

10 *Texas v. Johnson,* 491 U.S. 397, 414 (1989).

11 *Watts v. United States,* 394 U.S. 705, 708 (1969) (*per curiam*).

12 538 U.S. 343 (2003).

13 *See* Paul T. Crane, *Note, 'True Threats' and the Issue of Intent,* 92 Va. L. Rev. 1225, 1243-44 (2006).

14 730 F.3d 321 (3d Cir. 2013).

15 *See, e.g., United States v. Bagdasarian,* 652 F.3d 1113, 1117 (9th Cir. 2011).

16 *United States v. Whiffen,* 121 F.3d 18, 21 (1st Cir. 1997).

17 *Watts*, 394 U.S. 705.

18 *United States v. Cassel,* 408 F.3d 622, 633 (9th Cir. 2005).

19 *Id.* at 631.

20 *Id.*

21 *Black*, 538 U.S. at 360.

22 18 U.S.C. § 3237,

23 *See, e.g.,* Brief for Anti-Defamation League as Amici Curiae Supporting Respondent, *Elonis v. United States,* No. 13-983 (U.S. Oct. 6, 2014), 2014 WL 4978892; Brief of the Marion B. Brechner First Amendment Project and Rap Music Scholars as *Amici Curiae* in Support of Petitioner, *Elonis v. United States,* No. 13-983 (U.S. Aug. 18, 2014), 2014 WL 4180919.