Elonis: Proving a True Threat

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Given the value American society places on freedom of speech, courts face a challenge when limiting speech to protect victims of online threats. *Elonis v. United States*, a case decided earlier this year concerning violent threats made on Facebook, highlights the Supreme Court’s struggle to address this issue. The *Elonis* Court held that proving mere negligence on the part of a defendant is not sufficient to satisfy the federal threat statute. The *Elonis* decision weakens legal protections given to victims of abusive speech because it places an unreasonable burden on prosecutors.

In *Elonis*, Tara Elonis left her husband Anthony Elonis, the petitioner, and took their two children with her. Mr. Elonis began posting increasingly violent messages on Facebook, mostly using lyrics from rap songs. He even posted “I really, really think someone out there should kill my wife.” A grand jury indicted Mr. Elonis under 18 U.S.C. § 875, known as the federal threat statute. This statute makes it a federal crime to transmit “any communication containing any threat . . . to injure the person of another.” Mr. Elonis was later convicted under the statute. The Third Circuit upheld Elonis’s conviction, asserting that the government only had to prove that Elonis intended to write the posts and that a reasonable person would feel threatened upon reading them.

The Supreme Court avoided deciding the case on First Amendment grounds, instead opting to analyze the intent behind 18 U.S.C. § 875 itself. The Court held that lower courts had set the bar too low in the elements the government must prove. Those lower courts had imposed a traditional negligence standard under which the government merely had to prove that a reasonable person would feel threatened by a post. Chief Justice Roberts, writing for the *Elonis* majority, held that 18 U.S.C. § 875 requires proving something more than negligence or that a reasonable person would be threatened by the posts. Roberts based his opinion on a traditional criminal law standard, requiring that a defendant consciously commit a wrongdoing.

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4 *Id.*
5 *Id.* at 2005.
6 *Id.*
7 *Id.* at 2002.
8 *Id.* at 2003.
9 *Id.* Although Mr. Elonis raised a First Amendment defense at trial and on appeal, the Court did not address this claim. Justice Alito, in his concurrence, asserted that the First Amendment does not protect statements that would be perceived as threats given the context and circumstances of those statements. *Id.* at 2016.
10 *See id.* at 2011 (holding that liability under 18 U.S.C. § 875 does not rest solely on whether a reasonable person would have perceived a communication to be a threat).
11 *Id.* at 2003.
12 *Id.*
13 *Id.* at 2003.
Chief Justice Roberts clarified the two possible extremes on the spectrum of the Government’s burden. On the one hand, he stated that merely proving that a reasonable person would take the writer’s words as a threat was not enough. On the other hand, proving subjective intent, or that a person communicated a message he knew others would perceive to be a threat, would certainly be enough.

By outlining these two extremes, Chief Justice Roberts’s opinion suggests that the bar for proving a threat lies somewhere in the middle, but he unfortunately did not clarify the standard that lower courts should use. This ambiguity will leave judges and attorneys struggling to discern what sort of intent the government must prove. Future defendants will ask for the higher subjective intent standard and always claim that they lacked intent. Consequently, prosecutors will face a challenge in proving even the most heinous statements as threats.

How should the Court have ruled? As Justice Alito pointed out, the Court should have decided that proving recklessness would satisfy the statute. In the context of online threats, an individual acts recklessly by “consciously disregarding a substantial and unjustifiable risk” that his communication is in fact a threat. In other words, the individual should have known he was communicating a threat. A court would have to take into account the nature and purpose of the person’s communication and the circumstances known to the person at the time. Recklessness would give prosecutors a workable standard while still adequately protecting speech.

Applied to the facts of Elonis, the distinction between knowingly communicating a threat and recklessly disregarding an unjustifiable risk becomes apparent. After Tara Elonis left Mr. Elonis, the latter wrote her graphic Facebook posts, such as, “I’m not going to rest until your body is a mess, soaked in blood and dying from all the little cuts”; and “[r]evenge is a dish best served cold.” Afraid for her life, Tara Elonis obtained a restraining order. Three days later, Mr. Elonis wrote: “Fold up your protective order and put in your pocket. Is it thick enough to stop a bullet?” Mr. Elonis meant for Tara Elonis to read these Facebook posts, and she became justifiably scared for her life.

Under Chief Justice Roberts’s subjective intent standard, the prosecution would have to prove that Mr. Elonis actually knew Tara would view his posts to be threats. Even with the disturbing facts of the case, the prosecution may not prevail. After all, Mr. Elonis claimed that the

14 Id. at 2012.
15 Id.
16 See id. (holding that while the reasonable person standard would not define a threat, a defendant intentionally making a threat certainly would).
17 Id. at 2014 (Alito, J., concurring in part and dissenting in part) (asserting that the majority should have held that proving recklessness satisfies 18 U.S.C. 875).
19 See id.
21 Id.
22 Id.
posts quoted rap lyrics and served therapeutic purposes—how was he to know that his wife would take well-known rap lyrics to be threats? If the jury were to find Mr. Elonis credible, he may not be convicted. This result could allow an individual to communicate threats without suffering repercussions absent clear proof of subjective intent to make an actual threat.

If, however, the Court had held that a showing of recklessness is sufficient to prove that an online communication is also a threat, the outcome for Mr. Elonis would be clearer. Mr. Elonis posted disturbing excerpts from rap songs on social media. Given the relationship between Mr. Elonis and Tara Elonis, he should have known that Ms. Elonis would think she was the target of the posts and that he was threatening her. A court would likely find that Mr. Elonis had displayed a conscious disregard of a substantial and unjustifiable risk that his ex-wife would feel threatened.

After the Supreme Court’s decision came out, several legal practitioners specializing in domestic abuse criticized the effect Elonis would have on domestic abuse cases. Kim Gandy, president of the National Network to End Domestic Violence, stated that “threats play a central role in domestic abuse . . . regardless of whether the abuser intends to threaten or only intends to vent or make a joke.” Other critics pointed out that Mr. Elonis’s threats should have been contextualized by the fact that forty to fifty percent of women who are murdered are killed by people they know well. Furthermore, in the period immediately after a woman leaves her violent partner, those violent men are seventy times more likely to kill their spouses.

Although American courts should protect speech, they must balance those speech interests with the protection of victims from threats. In domestic violence cases, threats are often a precursor to physical violence. Furthermore, threats alone can cause severe emotional stress. Take Tara Elonis for instance: imagine how she felt after reading Mr. Elonis’s Facebook posts. A reasonable person in her situation would likely fear for her own life. Individuals such as Tara Elonis should have judicial recourse. Justice Alito’s recklessness standard would provide effective recourse.

Given the serious consequences of not recognizing valid threats, adopting the recklessness standard is necessary to mitigate the impact of the Elonis decision. The fact that the Court did not decide on recklessness gives circuit courts the opportunity to adopt it and thereby protect victims of true threats.

25 Chemaly & Franks, supra note 23.
26 Id.
28 Id. (“[W]hile physical injury may be the most obvious danger, the emotional and psychological consequences of domestic abuse are also severe. Emotionally abusive relationships can destroy your self-worth, lead to anxiety and depression, and make you feel helpless and alone.”).