The Supreme Court Considers "True Threats" and the First Amendment[1]
Reading

Last week, the U.S. Supreme Court heard argument in *Elonis v. United States*, a case that asks what a "true threat" is. In prior cases, the high Court has said that true threats may be criminally punished, notwithstanding the First Amendment protection for the freedom of speech. In *Elonis*, the question is whether the person who utters a true threat must subjectively *intend* to bring about fear of bodily harm or death or whether it is enough that a *reasonable person* uttering the words in the context would foresee that his words would be interpreted as such a threat.

In the case before the Court, the question breaks down into two parts: (1) Did Congress require intent in the statute under which Anthony Elonis was prosecuted and convicted, 18 U.S.C. §875(c); and (2) Regardless of what the statute provides, does the First Amendment right of free speech require that only a person *intending* to cause fear with his threatening utterances be subject to criminal penalties? In this column, I will examine the second, constitutional, question in light of the reason that we exclude true threats from protection for speech under the First Amendment.

True Threats
As commentators and Supreme Court Justices alike have noted, the phrase "true threats" is quite misleading. One might imagine, upon hearing the phrase without explanation, that in order to be criminally penalized, a threat must be "true" or "accurate" and that, accordingly, threats that never come to fruition remain lawful and protected under the First Amendment. Neither the Supreme Court nor any of the parties in *Elonis*, however, understands the phrase this narrowly. We know from prior cases that a threat need not be carried out to be criminally cognizable.

A true threat is a threatening utterance, i.e., a statement that is not just hyperbole, not just a joke, and not a comparably non-threatening threat-like statement. One example of something that would not count as a true threat would be the Elvis Costello song "My Aim is True," which might sound, out of context, like a threat to kill a woman named Allison, but is in fact just a song.

The petitioner, Anthony Douglas Elonis, was prosecuted and convicted of threatening his estranged wife, the state and local police, a kindergarten class, and an FBI agent. Here are some of his utterances on Facebook on the basis of which he was prosecuted:
After his wife obtained a protective order against him, Elonis posted:
Fold up your PFA [protective order] and put it in your pocket
Is it thick enough to stop a bullet?

[1] https://verdict.justia.com/2014/12/10/supreme-court-considers-true-threats-first-amendment

…

And if worse comes to worse
I've got enough explosives
To take care of the state police and the sheriff's department

The day after that communication, he posted the following:
That's it, I've had about enough
I'm checking out and making a name for myself
Enough elementary schools in a ten-mile radius
To initiate the most heinous school shooting ever
Imagined
And hell hath no fury like a crazy man in a
Kindergarten class
The only question is … which one?

After a visit from the FBI, Elonis posted this:
You know your shit's ridiculous
When you have the FBI knockin' at yo' door
Little Agent Lady stood so close
Took all the strength I had not to turn the bitch
Ghost
Pull my knife, flick my wrist, and slit her throat
….
So the next time you knock, you best be serving
a warrant
And bring yo' SWAT and an explosives expert
While you're at it
Cause little did y'all know, I was strapped wit'
A bomb
….
The jury was instructed that in order to convict, it would have to conclude that a **reasonable person** uttering the statements that Elonis made in context could have foreseen that his words would cause fear. Elonis claims that the jury should instead have been required to find, as a prerequisite to conviction, that Elonis had subjectively ***intended*** for his words to cause fear.

In the Supreme Court's last case addressing the question of true threats, *Virginia v. Black*, it used some language that supports Elonis's position. It said 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*." (Emphasis added) The Justices also rejected a jury instruction that would have allowed the jurors to infer an intent to intimidate solely on the basis of the fact that the defendant burned a cross.

This language and ruling suggest that perhaps a prosecution for a true threat must, to be constitutionally permissible, include an instruction requiring the jury to find a subjective intent in the defendant to intimidate. This conclusion, however, does not necessarily follow from *Black*, since the statute in *Black* specifically required an intent to intimidate, and the Court's language might therefore have indicated only that where a statute requires proof of intent as an element of the crime, the jury must not be invited to infer such required intent from an action that, while often intended to intimidate, can—on occasion—be intended to do something else (such as express solidarity with the white supremacist movement) and importantly, might—in context—*not* be reasonably understood as threatening.

In *Elonis*, by contrast, the statute arguably does not require proof of intent, while the instruction given *did*, unlike the instruction in *Black*, require the jury to look at context—and not the bare communication alone—to determine whether a communication was or was not a threat.

Because *Black* is distinguishable from *Elonis*, even those Justices who are strongly committed to *stare decisis* (the importance of the Court following its own precedents) are free to decide *Elonis* in accordance with their present reactions to the arguments in this case.

What Is the Difference, for Harm Prevention Purposes?

In thinking about what the best definition of true threat would be, we might begin by evaluating why we have a true threat exception to protected speech in the first place and how well the "intent" vs. "reasonably foreseeable effect" distinction maps onto the answer to that question.

True threats are subject to criminal prohibition because they have harmful effects on their targets, even when the threats are not actually carried out. If someone were to call John Doe on the telephone and say that he plans to blow up Doe's child's school today, then Doe would probably feel extremely scared, keep his child home from school, and maybe also notify the school office of the threat and thereby motivate the school to close for the day, pending a bomb squad clearance of the school grounds. Even if the caller has no plans of setting off any explosives, then, the result of his "speech" is to generate terror, to keep children out of school for a day, and to cost both money and attentional resources to ensure the safety of the school. All of these effects are very destructive and an unacceptable price to pay for the caller's exercise of his freedom to call Doe and utter the words, "I am blowing up your child's school today."

Often, when we prohibit criminal conduct because it is harmful, we do not require what is called **"specific intent,"** that is, an intent to bring about the consequences that in fact followed from the conduct. If you close your eyes and shoot a gun out a window toward the ground and kill someone, you can be guilty of homicide (and perhaps even of murder) even if you did not intend to cause anyone to die. It is enough that you intended to shoot the gun out a window, given the reality that there are people outside.

On the other hand, when we prohibit **inchoate criminal conduct**—conduct the harmful impact of which does not come to fruition—we often *do* require specific intent.

To prove attempted murder, for example, it is generally necessary to prove that the actor actually intended, by his actions, to bring about the death of another.

One reason one might think that specific intent (to generate fear) is a necessary part of proving a true threat is that threats in some ways "feel" like inchoate criminal conduct. Like shooting at someone and missing, it might seem that the harm was averted but that we are still willing to punish the actor if his behavior was intended to cause harm, both because his intentions signify his future dangerousness and because an intent to cause harm makes him a more culpable person, deserving of punishment even if he did not happen to succeed in his objectives. If one who communicates threats is engaged in an inchoate crime, if his threat has not been carried out, then maybe the same logic should apply: unless he intended his conduct as a threat, he either is not dangerous or is not sufficiently culpable to be worthy of punishment.

But the conception of a threat as an inchoate crime is inaccurate. A threat is not a failed attempt at doing something bad; it is the bad thing itself. Making a threat disrupts other people's lives by generating intense fear that is destructive in and of itself and that also causes people to take costly and otherwise harmful measures to protect themselves. What makes it wrong to threaten people, then, has little to do with identifying dangerous or culpable actors and has a lot to do with punishing those who actually inflict the harm that threats inflict on others. As Vikram David Amar and Alan E. Brownstein explained in their excellent column on the subject of this case, "threats wound by their very utterance."

Once we understand that a threat is essentially a bad act rather than a failed attempt at completing a different bad act (i.e. the threatened behavior), it makes little sense to have responsibility turn on what the actor's real purpose was in uttering the words that he or she uttered. One could certainly rank the threatening words as more or less culpable, depending on the speaker's intentions, just as we rank intentional murder more seriously than negligent homicide. But some criminal responsibility—and the corresponding exception to the First Amendment protection for free speech—ought to match up with the harmfulness of the conduct.

Provided that the speaker intentionally and actually uttered the words that he uttered, a basic legal requirement that neither side disputes, he ought to be held accountable for making a threat if a reasonable person saying those same words in the context in which he said them would foresee the impact of the words in generating fear.

What Is the Difference, for "Chilling Effect" Purposes?

In thinking about what the best definition of a true threat would be, an evaluation of harms is only part of the calculus. A second part considers how a criminal prohibition might result in self-censorship. One argument for requiring intent on the part of the speaker of true threats is a concern about chilling legitimate protected speech.

If a speaker can be guilty of uttering actionable true threats without having meant to threaten anyone, based merely on what a reasonable person would have foreseen, then some or perhaps

many speakers will refrain from saying potentially valuable things on social media (or elsewhere) that could be taken the wrong way or misunderstood. By instead requiring the prosecution to prove that the speaker really intended to scare his targets, the law would help guard the speech of those who mean no harm and who might worry that they do not think exactly like the elusive "reasonable person."

As a general matter, the worry about **chilling effects** is an important one. Whenever the Court recognizes an exception to the freedom of speech (whether for "fighting words," actionable "defamation," "incitement," "obscenity," or true threats), there is a risk that people who have valuable ideas to communicate will silence themselves out of fear that their words will come under one of the permissibly-prohibited categories. Just the other day, I listened to a podcast in which the host said something like "when people say such stupid and offensive things, I feel like I just want to take a hatchet to all of them."

Immediately after uttering these words, the podcast host added something along the lines of, "I'm probably going to end up getting arrested or having an FBI file because of what I just said." In his case, the podcast host was, of course, not chilled from speaking, but he did immediately thereafter feel the force of the First Amendment exceptions for threatening speech, notwithstanding the fact that what he said, especially given the context, would not fall within any of the unprotected categories. Next time, he might just say nothing, to be on the safe side.

It is unclear, however, that requiring proof of "intent" would diminish any of the potential chilling effect that the true threat exception to the First Amendment already has on protected speech. Consider a very astute question posed by Justice Sotomayor during oral argument. She asked, "[I]sn't the jury acting like a reasonable person in looking at the words and the circumstances and saying, did he intend this or didn't he?…. I mean, how is that different from what you intend? If you know if a reasonable person is going to read these words this way, aren't they going to assume that's what the defendant intended?"

Stated differently, a jury cannot directly view the contents of a defendant's mind to determine whether he did or did not actually intend to cause fear. Instead, a jury must necessarily ask what, given the circumstances, someone in the defendant's shoes would have meant to convey in uttering those words. This is how we generally interpret intent—we look to an individual's behavior, and we then ask ourselves what someone behaving in that way would have been trying to say or do.

To the extent that a particular speaker deviates from the norm and has intentions that differ from those of most people acting as he does, the speaker cannot simply relax about the impact of his words and assure himself that he knows that he does not intend to cause fear in anyone. Each juror will necessarily be making the judgment of what he intended from her own point of view.

A perfect illustration of how little the "intent" requirement would do to mitigate any potential chilling effect is the answer that Elonis's attorney, John P. Elwood, gave to one of Justice

Kennedy's questions at oral argument: "On the facts of this case on remand, could the government proceed on this evidence with your instruction? Would there be enough to go to the jury with your preferred instruction?" Elwood's response was, "I believe there would be enough to go to a jury. We think that this is a triable case…."

That answer means that the "intent" requirement would not, even on the petitioner's account, keep Elonis's case away from a jury. And this is actually not surprising, because it will often be the case that if the evidence supports a finding that a speaker's words would foreseeably generate fear, given the circumstances surrounding the making of the statement, then it will follow as well that the evidence supports a finding that the speaker subjectively *intended* those reasonably foreseeable consequences of his actions. It will thus ordinarily be a jury question whether a set of facts that supports a conviction under the "no-subjective-intent-necessary" standard embraced by the Third Circuit (and almost all of the other circuits to have considered the question) does or does not also support a conviction under the "subjective-intent-must-be-proved" standard pressed by the petitioner. And the jurors themselves will, in many cases, use the same mental process to answer both questions, namely, asking what a person uttering the particular defendant's statements under the circumstances would mean for their impact to be. Indeed, when the target of a true threat becomes scared, it is because *she* has answered this question affirmatively, via a similar mental process.

In Elonis's case, it will therefore likely make little difference to the ultimate outcome whether the law requires "intent" or whether it is enough that a reasonable speaker under the circumstances would foresee the fear that his words would generate. When people say things in circumstances in which a reasonable speaker in their position would foresee terrified victims at the other end, most of us—jurors and victims alike—will conclude that the speakers meant for that result to follow. In some sense, the constitutional question in this case may therefore be much ado about nothing.