True-Threat Doctrine and Mental State at the Time of Speech

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> Me thinks the Judge needs an education
>
> on true threat jurisprudence
>
> And prison time'll add zeros to my settlement . . .
>
> And if worse comes to worse
>
> I've got enough explosives
>
> To take care of the State Police and the Sheriff's Department… [Ref. 1, p 7].

These are the words of Anthony Douglas Elonis, posted on Facebook in 2010, one of a litany of Facebook posts that resulted in Mr. Elonis' indictment on five counts of criminal threats under 18 U.S.C. § 875(c) which makes it a federal crime to make "any communication containing any threat . . . to injure the person of another."[1]

The First Amendment protects freedom of speech as an essential right of Americans. It has long been established that there is one type of speech that is not afforded protection: the "true threat." The law recognizes that a verbal threat can cause harm, even if the threat is never carried out. Some words, by their very utterance, can cause injury or incite a breach of the peace, and these statements do not receive constitutional protection. For example, when Mr. Elonis posted violent prose about carrying out a mass shooting at a nearby kindergarten class, the parent of a child who attends that neighboring school might have suffered fear and emotional distress due to the utterance of the threat, even if the threat is never acted upon. In cases of true threat, the speech is the thing; it is the "act" in question.

Forensic psychiatrists commonly provide assessment of an individual's mental state at the time of alleged acts. These types of evaluations focus on the presence or absence of mental impairment, the subjective mental state at the time of the act (including motivation and level of intent), as well as the degree of cognitive understanding of the contextual elements of the alleged action. In the aftermath of the Supreme Court's ruling in *Elonis v. United States,* it is crucial that forensic psychiatrists be prepared to offer their expertise in matters that involved distinguishing the act of pure speech from the act of verbal threat.

Background: *United States v. Elonis*

The facts of the case are perhaps best conveyed through Mr. Elonis' own illustrative language. If the quotation above did not impress you, how about this one?

> That's it. I've had 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 . . . [Ref. 1, p 8].

After that Facebook post, the Federal Bureau of Investigation (FBI) paid a visit to Mr. Elonis at his home. This visit prompted Mr. Elonis to post the following Facebook entry titled, "Little Agent Lady":

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> . . . 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 . . .
>
> . . . And bring yo' SWAT and an explosive expert while you're at it
>
> Cause little did y'all know, I was strapped wit' bomb . . . [Ref. 1, p 8–9].

All of this started when Mr. Elonis and his wife began having marital problems. His wife left him in May of 2010, and shortly after, Mr. Elonis began posting Facebook messages filled with violent imagery and statements about wanting her dead. Some examples: . . . I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts . . . [Ref. 1, p 5].

. . . Someone out there should kill my wife . . . [Ref. 1, p 6].

. . . Fold up your PFA and put it in your pocket [i]s it thick enough to stop a bullet? [Ref. 1, p 7].

He also posted messages about his desire to kill a female coworker. The FBI began to monitor Mr. Elonis' Facebook account after his boss reported him for the posts threatening his coworker.

The FBI ultimately arrested Mr. Elonis, and a grand jury indicted him for making threats to harm coworkers, his estranged wife, a kindergarten class, and the FBI agent.[1] Mr. Elonis contended that under the pseudonym "Tone Dougie" he was only posting his rap music lyrics. He pointed out that these graphically violent lyrics were often intermingled with disclaimer statements saying that the lyrics were fictitious. He suggested that he was aware that these statements might be provocative and he clearly made claim to exercising his "First Amendment rights." However, many individuals in Mr. Elonis' life, including his boss (who fired him for threatening coworkers) and his wife (who got a restraining order) were scared and experienced his posts as threatening.

Mr. Elonis was convicted on four of the five counts. After his conviction, Elonis filed motions arguing that the government should have been required to prove his subjective intent (i.e., that he intended to threaten with his posted statements). The district court disagreed and sentenced Elonis to 44 months' imprisonment followed by three years' supervised release. The Third Circuit used an objective test to convict Mr. Elonis (i.e., whether a reasonable person would find Mr. Elonis' statements threatening). The court of appeals affirmed, rejecting Elonis' argument that conviction required a subjective intent to threaten. The Supreme Court granted *certiorari* to rule on the question of whether the conviction of threatening another person (under 18 U.S.C. § 875(c)) requires proof of the defendant's subjective intent to threaten.[2]

Supreme Court Case Law on True Threat

Many legal scholars have noted that the Supreme Court's true threat cases have failed to provide clear guidance for lower courts. Lower courts have struggled with what level of intent is necessary for a speaker's utterance to be considered a criminal act. For example, is it necessary that a speaker subjectively intend to intimidate or threaten others? Or is it sufficient that a recipient believes the statement is a threat? Should true threats be interpreted under a "reasonable speaker" or "reasonable recipient" standard?

Watts v. United States[3] was the first true-threat case considered by the U.S. Supreme Court. Robert Watts, an 18-year-old man, threatened the President of the United States by making the statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. . . . " at a political rally. Watts was convicted of knowingly and willfully threatening the president and he appealed his conviction. The Supreme Court found the statute constitutional (although it reversed the conviction of Watts) and thereby established the "true threat" exception to free speech while emphasizing that the statement must be viewed in its situational context and distinguished from political hyperbole or satire.

In *NAACP. v. Claiborne Hardware* (1982), the Supreme Court unanimously reversed a finding that Charles Evers and the NAACP could be found civilly liable for speech advocating the boycott of certain white-owned businesses.[4] Evers, field secretary for the NAACP in Mississippi, had given impassioned speeches encouraging fellow African-Americans to participate in the boycott, making statements such as "If we catch any of you going in any of them racist stores, we're gonna break your damn neck . . . " The Court found that Evers' statements did not constitute incitement to lawlessness or a true threat. Along with *Watts*, the Court reinforced constitutional protection for charged political speech.

In *Virginia v. Black* (2003), the Supreme Court considered a pair of cases (later consolidated) in which Klu Klux Klan leader Barry Elton Black

burned crosses, including one on the front lawn of an African-American family.[5] The Supreme Court examined the constitutionality of a Virginia state law that prohibited "any person or group of persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place" (Ref. 5). The Court upheld most of the Virginia law, but invalidated the section that provided that all cross-burnings could be presumed (*primae facie* evidence) to be intimidating. The Court in *Black* observed that a factfinder must consider "all of the contextual factors . . . to decide whether a particular cross burning is intended to intimidate." The Court opined that cross burning could be construed as a true threat only if the state proved the intent to intimidate by the act. Otherwise, the cross-burning act could be constitutionally protected under the First Amendment as "messages of shared ideology."

True Threat Doctrine and Lower Courts

Lower courts have struggled to define true threat and to apply the precedents in light of the profound importance of the First Amendment. Before *Elonis*, there have been a variety of tests that lower courts have used to define whether an individual's speech constitutes a true threat, including the objective response of the recipient of the speech (e.g., if he felt threatened or if he had reason to believe the speaker was capable of engaging in violence), known as the "reasonable listener test." Whether the threat was conditional, whether the speaker had made threats before, the situational context of the threat, and whether the speech was delivered directly to the victim, are all factors that have been considered in the designation of a true threat.[6,7] Many court rulings determined that the situational context is one of the central elements in determining the legality of a threat communication. To this end, legal inquiry and criminal investigations have centered on the relationship between the involved parties, the circumstances leading up to the speech, the behavioral patterns of the person making the threat, and the setting of the communication. Although this construct attempts to take into consideration the degree of fear and intimidation conveyed by a threat, it fails to take into consideration the intention of the speaker. Until the 2015 decision in *Elonis v. United States,* the predominant definition of a true threat has been that if the speech causes "a reasonable person" to fear for his safety or that of his family, it is not protected by the First Amendment.[8] Most lower courts used an objective standard (the "reasonable listener" standard) and some courts employed a subjective standard requiring that the speaker must subjectively intend to threaten someone for statements to be considered a threat.

The Ninth U.S. Circuit Court of Appeals case *United States v. Cassel* (2005)[9] was a case involving a man who allegedly threatened prospective buyers to discourage them from purchasing land next to his property. Jury instructions in the case stated: "Intimidation is to make a person timid or fearful through the use of words and conduct that would put an ordinary, reasonable person in fear or apprehension for the purpose of compelling or deterring legal conduct of that person." The Ninth Circuit opined that the jury instructions were constitutionally deficient, because they did not require the government to prove that the defendant made the statements and knowingly intended to intimidate. However, other courts have interpreted *Virginia v. Black* as requiring only that the speaker knowingly intended to communicate to another person. These courts have not required that it be proven that the speaker subjectively intended to threaten another person. In other words, these lower courts focused on whether there was an intention to communicate and whether a reasonable listener would regard the communication as a threat.

In *Planned Parenthood v. American Coalition for Life Activists* (*ACLA*),[10] Planned Parenthood sued the ACLA for distributing materials including posters and Internet web pages listing the names and addresses of the doctors who perform abortions. In 1996, the ACLA revealed its "Nuremberg Files" which published dossiers on abortion providers, politicians, judges, clinic employees, and other abortion rights supporters. Neither the posters nor the website contained any explicit threats against the doctors, but those who were targeted in the publications knew that similar publications had preceded violence in the past. The doctors felt threatened enough to wear bulletproof vests to work and were guarded by U.S. Marshalls in some cases. In a special verdict, the jury found that the statements of the ACLA were true threats and awarded the doctors $107 million in actual and punitive damages. The ACLA appealed the verdict on First Amendment grounds. The United States Court of Appeals, Ninth Circuit, overturned the decision, citing *NAACP. v. Claiborne Hardware*.[4]

In the decision, Judge Alex Kozinski wrote: " . . . If Charles Evers' speech was protected by the First Amendment, then ACLA's speech is also protected. Like Evers, ACLA did not communicate privately with its targets; the statements were made in public fora . . . ." However, in an *en banc* rehearing, the Ninth Circuit Court of Appeals re-reversed and affirmed the decision in all aspects except for punitive damages.[10]

In response to *Planned Parenthood v. American Coalition for Life Activists*, the American Civil Liberties Union (ACLU) wrote an *amicus curiae* brief to highlight that the Supreme Court had not offered any extensive analysis of true threat doctrine, instead leaving it to the lower courts.[11] The ACLU advocated that threats should be evaluated in light of their entire factual context, including the surrounding events, the awareness of the communicator of how the recipient of their communication might react, and the actual reaction of the recipient. The ACLU asserts that only in situations where the communicator "realizes and expects" the adverse intimidation reaction in the listener should he be held responsible for making a true threat. The ACLU offered two tests including an "objective test" that requires that the statement be interpreted by a reasonable person as communicating a serious intent to inflict or cause harm and a "subjective test" whereby the speaker specifically intended his statement be taken as a threat by the recipient to place the recipient in fear for his safety, regardless of whether the speaker intended to carry out the threat. This ACLU *amicus* urged that both the subjective and the objective tests should be met for a determination that a threat is a true threat, falling outside the protection of the First Amendment.

Speaking to the matter of *Elonis v. United States*, the ACLU again authored an *amicus curiae* brief asserting the importance of subjective intent to threaten as an essential element of a true threat.[12] In a statement perhaps best encapsulating this opinion, the authors wrote:

> . . . Statutes criminalizing threats without requiring the government to demonstrate a culpable *mens rea* are thus likely to sweep in speech protected under the First Amendment, including core political, artistic, and ideological speech. To ensure adequate breathing room for such speech, this Court should make clear that subjective intent to threaten is an essential element of any constitutionally proscribable true threat . . . [Ref. 12, p 6].

The ACLU brief argued that without the subjective element of the speaker's intent, the standard would be one of "negligence." In other words, it would criminally convict a defendant, not because he intended his words to be threatening, but because he "should have known others would see it that way."[12]

U.S. Supreme Court Ruling in *Elonis v. United States*

In *Elonis v. United States*, the Supreme Court granted *certiorari* to address whether the conviction of threatening another person (under 18 U.S.C. § 875 I) requires proof of the defendant's subjective intent to threaten.[2] The question in this case was whether the constitutional definition of a true threat includes both a subjective element (the speaker intended his words to be taken as a threat) as well as an objective element (a reasonable listener would have understood the words as a threat). The Supreme Court also considered what level of intent the statute requires for a conviction.

On June 1, 2015, the Supreme Court reversed Elonis' conviction in an eight-to-one decision. The Supreme Court held that the speaker's subjective intent to threaten is necessary for the designation of a true threat. However, whereas the Court required the government to prove more than mere negligence in prosecutions under the federal antithreat law, it declined to specify the correct *mens rea* requirement necessary to prove a violation of the federal threat statute. Chief Justice John G. Roberts wrote for the majority, Associate Justice Samuel Alito wrote an opinion concurring in part and dissenting in part, and Associate Justice Clarence Thomas authored a dissenting opinion. The finding of the circuit court was reversed and the matter remanded.

The majority opinion did not rule on First Amendment matters or on the question of whether recklessness is sufficient *mens rea* to show intent. It did rule that *mens rea* is necessary to prove the commission of a crime under §875(c). Although the Court declined to set a specific standard, Justice Alito opined that the Court should have assisted lower courts by clarifying the standard in the decision, stating that recklessness is sufficient to show a crime under this provision. Justice Alito wrote: " . . . Accordingly, I would hold that a defendant may be convicted under §875(c) if he or she consciously disregards the risk that the communication transmitted

will be interpreted as a true threat . . . [Ref. 2, p 5]." He also commented on the importance of the circumstantial issues, stating: " . . . lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person," however, " . . . [s]tatements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously . . . " (Ref. 2, p 6). Justice Thomas wrote a dissent opining that general intent is sufficient for statutes that regulate speech.

Questions of Intent

All crimes, except strict liability crimes, require both a guilty act (*actus reus*) and criminal intent (i.e., a guilty mind (*mens rea*)). In *Elonis v. United States*, the Supreme Court considered the requisite level of intent necessary for criminal conviction of someone for an act of speech that communicates a threat. Forensic psychiatrists are commonly called on in a wide variety of litigation situations to assess an individual's state of mind at the time of an act. For example, in the criminal justice system in many jurisdictions, forensic psychiatrists are frequently called on to evaluate whether a defendant had the capacity to form the requisite intent for a crime. In diminished-capacity evaluations, the legal defense is focused on whether a person had a mental impairment that influenced his ability to form the specific intent to commit a crime. These types of *mens rea* defenses are frequently used in murder trials where a mental state evidencing premeditation, deliberation, and malice can be used to distinguish first-degree murder from second-degree murder and manslaughter. In these types of criminal cases, the forensic psychiatrist evaluates whether the defendant was able to form a particular culpable state of mind as defined by state or federal penal code. In many states, impairments including those caused by volitional substance intoxication at the time of an act can be used as a basis for partial *mens rea* defenses. In federal jurisdictions, impairment due to mental illness can be a basis for lowered sentencing on the basis of diminished capacity.

In light of *Elonis v. United States* clarifying that an individual's subjective intent is the key question in determining the criminality of speech, it is likely that forensic psychiatrists will be called on more and more to make important contributions in cases such as these where our First Amendment right to free speech is weighed against society's need for psychological (and physical) safety. Understanding an individual's mental state at the time of speech may serve to protect individuals who impulsively make a provocative verbal statement in a moment of strong affect such as anger. Often investigation of statements that could be considered unlawful threats (e.g., the unfortunately all too common workplace utterance, "I'm going to go postal!" or the ubiquitous, "I could kill you!") reveal them to be impulsive speech born of frustration intolerance, with no intent to cause others truly to fear for their safety. The behavioral patterns of the individual and a contextual understanding of the speech act are essential factors to be evaluated.

Analysis of behavior and mental state at the time of an act is the purview of the forensic psychiatrist. In the analysis of the act of speech (as a behavior), evaluation of any possible functional impairment causing mood lability, verbal impulsivity, or psychosis will be important to consider in evaluations of intent to threaten. Volitional intoxication can lead to impulsive verbal statements without the requisite intent to threaten. The Court in *Black* rightly observed that a factfinder must consider "all of the contextual factors . . . to decide whether a particular cross burning is intended to intimidate."[5] Likewise, when applying a subjective standard in the context of true threats, the facts and circumstances of the communication must be related to the speaker to determine criminal culpability. In both civil litigation (e.g., claims of sexual harassment and hostile work environment claims) and in the criminal arena, forensic psychiatrists make important contributions to society by providing expertise in the analysis of mental states including motivation and intentionality.

Verbal Threats and the Threat Assessment Model of Violence Prevention

Forensic psychiatrists often have a key role in the growing field of threat assessment, working with law enforcement and security professionals to prevent targeted physical violence. Different from violence risk assessment which attempts to predict an individual's capacity to commit acts of physical violence by risk stratification, threat assessment employs a preventive model that attempts to stop people who appear to be on a pathway to committing predatory, targeted violence. We know that verbal or written threat statements made by an individual often form a pretext to concerns for potential physical violence. However, while direct communication to others may

be part of a behavioral pathway to violence, in the threat assessment model communication alone is not used as a threshold for appraisal of risk or taking protective action. The threat assessment literature supports that although some people who make verbal threats ultimately go on to pose a threat, many do not.[13]

Assessment of individuals who make threatening statements may or may not be part of a larger effort to assess risk of targeted physical violence through a multidisciplinary threat assessment team. As forensic psychiatrists, we are uniquely qualified to have a key role in determining the intentionality of verbal threats as well as whether those threats are likely to be acted on. As experts in psychopathy, violence risk assessment and criminal behavior, with special expertise at discriminating severe psychopathology, our skillset can be vital to the process of threat assessment in some cases. Having broad experience in gathering, corroborating, and incorporating collateral information from multiple sources in relationship to analysis of a particular act or set of acts is important for any threat assessment professional. As forensic psychiatrists, we are familiar with applying our psychiatric skills in systems outside of the mental health establishment such as in workplaces, on school campuses, and in legal settings, making us useful as consultants and collaborators in the threat assessment approach.

In threat assessment, investigators make a distinction between individuals who may make verbal threats and those who actually pose a threat.[13] However, many of the fundamental principles of the threat assessment model are applicable to assessments of alleged verbal threats. Questions such as what has motivated the individual to make the statement? What has the individual communicated to others about his intentions? Has the individual engaged in other behaviors intended to intimidate, such as stalking or harassing behaviors? Does the individual have a history of mental illness that could play a role in promoting the verbal statements? What is the context of the verbal remark in the setting of the individual's life and environment? What is the relationship between the speaker and the recipient of the communication? What is the reaction of the recipient of the communication? Was the statement impulsive and spontaneous, or was it a part of a more longstanding pattern of feelings and behaviors? These questions, which flow from the principles of threat assessment techniques developed by the Secret Service,[14] provide a useful framework for assessing the thinking and behavior of an individual at the time of an act of speech.

Conclusions

With the *Elonis v. Unites States* decision and the ever-increasing utilization of social media, forensic psychiatrists are likely to see an increase in referrals for assessment of mental state at the time of speech. In some ways *Elonis v. Unites States,* in demonstrating the uncomfortable tension between our society's valued freedoms and our concurrent wish for safety, captures the zeitgeist of our post-9/11, post-Virginia Tech, post-Sandy Hook times. This is an important moment for forensic psychiatry to own and offer our expertise, including our roots in analytic understanding of human behavior, to assist society in preserving the sanctity of the First Amendment while also helping to guard public safety.

As psychiatrists, in a profession that is based in its essence in language, we uniquely understand the power of words. We know that words can heal and that they also can harm. We understand the importance of being able to speak freely in all of the forms that such a freedom may take. We understand the importance of being able to be surprised by what we might find ourselves saying, but we are also aware of the burdens of having to take seriously what we say. We uniquely understand conflict: the wanting of two things that are opposed at the same time. We recognize that the vicissitudes of political correctness can be the enemy of free speech, silencing the ability of individuals to express the truth of their subjectivity, the truth of their human experience. Contemporary forensic psychiatry is privileged to be positioned at the crossroads of these crucial concerns. We should be thoughtfully prepared to contribute, through our work and our words, to the discussion.

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