Unprotected Speech Communicated via Social Media: What Amounts to a True Threat?

By Marie-Helen Maras

Social media has become indispensable to individuals, corporations, research organizations, educational institutions, and governments worldwide. Through social media sites, such as Twitter, Facebook, YouTube, and Instagram (to name a few), individuals can create and share resources, communicate, network, and develop and maintain relationships with others around the globe. These sites also have become indispensable for the exercise of civic, political, and social rights. Nevertheless, there is a dark side to social media. In particular, these sites have been utilized as forums within which to engage in antisocial behaviors, such as harassment and bullying, and to communicate criminalized speech.

The right to freedom of speech enables Internet users to impart information that is protected under human rights legislation and constitutional law. As the European Court of Human Rights held in *Handyside v. the United Kingdom*, this right exists "regardless of frontiers."[1] Yet, not all forms of speech are protected. In the United States, incitement to violence,[2] fighting words,[3] true threats,[4] obscene speech,[5] false statement of facts,[6] and words protected by intellectual property law,[7] are not protected by the First Amendment to the US Constitution.[8]

This article focuses on one form of unprotected speech, namely, true threats. US jurisprudence reveals that while advocating for violence is considered protected speech, threatening a particular individual with violence is not. This restriction is for good reason: True threats have "little if any social value" and can "inflict great harm;"[9] as such, protecting individuals from true threats is essential because doing so "protect … [s] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[10] Given the importance of social media today in a wide variety of communications, the differences between protected and unprotected speech online should be elucidated. To provide this clarity, US case law on true threats needs to be critically examined. This article seeks to do just that by analyzing the types of communication that amount to a true threat (looking at prior cases), recent cases involving true threats communicated via social media, and the impact of the recent Supreme Court case, *Elonis v. United States*,[11] on the way true threats are interpreted.

THE WAY IT WAS

The primary law that is violated when a true threat is communicated is 18 U.S.C. § 875(c). Under Section 875(c), "[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." This law makes no mention of the intent of

Dr. Marie-Helen Maras *is an associate professor at the Department of Security, Fire, and Emergency Management at John Jay College of Criminal Justice where she serves as the Deputy Chair for Security. She also is part of the faculty of the MS program in Digital Forensics and Cybersecurity at John Jay College of Criminal Justice. Dr. Maras has a DPhil in Law and an MPhil in Criminology and Criminal Justice from the University of Oxford, a graduate degree in Industrial and Organizational Psychology from the University of New Haven, and undergraduate degrees in Computer and Information Science and Psychology from UMUC. She is the author of:* Computer Forensics: Cybercriminals, Laws, and Evidence *(now in its second edition);* Counterterrorism *(2012);* CRC Press Terrorism Reader *(2013); and* Transnational Security *(2014), among other publications.*

the perpetrator. For that reason, states have varied in their interpretation of this statute, whereby the majority of the courts have assessed true threats from the perspective of the listener and the minority of the courts have interpreted the threats from the perspective of the speaker.

FROM THE VIEW OF THE LISTENER

When a true threat is interpreted from the perspective of the listener (*i.e.*, the objective intent standard), a reasonable person must interpret the communication as threatening;[12] that is, "as a declaration of intention, purpose, design, goal, or determination to inflict [bodily injury] on another."[13] The threat does not need to be directly communicated to a victim[14] to amount to a true threat, but it must be directed at an identifiable individual or group. This means that threatening posts on social media sites could amount to true threats if they are directed at specific individuals or groups and would be interpreted by a reasonable person as a true threat.

One of the most well-known cases utilizing the objective intent standard is *Watts v. United States*.[15] In *Watts*, the Court required the audience's reaction to a statement to be taken into account when seeking to determine if that statement amounts to a true threat; as such, the context within which the speech occurs is important. This was the view of the court in *Planned Parenthood v. American Coalition of Life Activists*, which concluded that "threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners."[16] Therefore, an objective analysis of the facts and circumstances of the case is essential to assessments of true threats.[17]

When examining cases involving violations of 18 U.S.C. § 875(c), the courts have ruled that analyses of the subjective intent of a perpetrator are irrelevant.[18] This was stated explicitly in the Court's ruling in *Planned Parenthood v. American Coalition of Life Activists*: particularly, "[i]t is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat."[19] This approach to examining true threats is by no means unique. The subjective intent of perpetrators also is not considered when examining other forms of unprotected speech, such as fighting words.[20] In these cases, only objective intent is considered.

The objective intent standard is equivalent to a "negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners."[21] The majority of the courts have accepted a general intent requirement. Pursuant to this requirement an offender must be aware that a communication was transmitted, understood the words he or she was using in the communications, and the meaning of them in the context within which they were used.[22]

FROM THE VIEW OF THE SPEAKER

When a true threat is interpreted from the perspective of the speaker (*i.e.*, the subjective intent standard), a reasonable person understood and intended his or her actions to cause some form of harm to the target (*e.g.*, fear and distress). This "state-of-mind evidence" is "most relevant … [when determining whether] … the defendant knew or reasonably should have known that his actions would produce such a state of mind in the victim."[23] The subjective intent standard thus "separate[s] protected expression from unprotected criminal behavior,"[24] by ensuring that a person cannot be criminally convicted of communicating a threat unless he or she intended to provoke fear, distress, or other type of harm in the target with his or her words.

Cases involving true threats communicated via telecommunications and mail have required proof of intent to communicate a true threat to convict an alleged offender.[25] Nonetheless, this standard has not been commonly applied by US courts when assessing true threats via electronic communications. Some courts have evaluated true threats based on both a reasonable person viewing the communications as threatening and the communicator intending the communications to be viewed as threats. A case in point is *United States v. Bagdasarian*, where the court held that both objective and subjective intent were required to convict an individual for posting statements online encouraging the killing of a presidential candidate, Barack Obama.[26] Other courts primarily have relied on the objective test in their assessment of true threats but also have included subjective factors in their instructions to the jury. This was the case

in *United States v. Jefferies*.[27] In *Jefferies*, the jury was instructed to determine if a reasonable person would view "the communication was done to effect some change or achieve some goal through intimidation."[28]

The *Jeffries* case involved the defendant's (Franklin Delano Jeffries II) use of social media—YouTube—to communicate a true threat. A YouTube video could violate 18 U.S.C. § 875(c) if the threats in the video are directed at a specific individual or group and if the purpose of the posting is to cause change or achieve some goal through intimidation. In *Jeffries*, the court found that the defendant sought to influence his custody hearing through his YouTube video. His YouTube video included (but was not limited to) the following statements:

> I've had enough of this abuse from you.
> It has been goin' on for 13 years.
> I have been to war and killed a man.
> I don't care if I go to jail for 2,000 years.
> 'Cause this is my daughter we're talkin' about,
> And when I come to court this better be the last time.
> I'm not kidding at all, I'm making this video public.
> 'Cause if I have to kill a judge or a lawyer or a woman I don't care.
> 'Cause this is my daughter we're talking about.
> I'm getting tired of abuse and the parent alienation.
> You know its abuse.
>
> …
>
> Take my child and I'll take your life.
> I'm not kidding, judge, you better listen to me.
> I killed a man downrange in war.
> I have nothing against you, but I'm tellin' you this better be the last court date.
>
> …
>
> And I'm getting tired of you sickos
> Thinking it's the right thing for the children.
> You think it's the best interest of the child,
> But look at my daughter from her mother's abuse.
> She's mentally and physically abused her,
> And I'm getting tired of this bull.
> So I promise you, judge, I will kill a man.
>
> …
>
> And I guarantee you, if you don't stop, I'll kill you.
> 'Cause I am gonna make a point either way you look at it somebody's gotta pay,
> And I'm telling you right now live on the Internet.
> So put me in jail and make a big scene.
> Everybody else needs to know the truth.
>
> …
>
> Believe that. Believe that, or I'll come after you after court. Believe that.
>
> …
>
> And I don't care if everybody sees this Internet site
> 'Cause you don't deserve to be a judge and you don't deserve to live.
> You don't deserve to live in my book.
> And you're gonna get some crazy guy like me after your ass.
> And I hope I encourage other dads to go out there and put bombs in their … cars.
> Blow 'em up. Because it's children we're, children we're talkin' about.
>
> …
>
> And I'm willing to go to prison,
> But somebody's gonna listen to me,
> …I can shoot you. I can kill you. … Be my friend. Do something right. Serve my daughter.
>
> …
>
> Do the right thing July 14th.[29]

The video clearly references his custody hearing, even mentioning the date of the hearing, and contains threats to the judge. Jeffries did not email the video to the judge. Instead, he uploaded the video to YouTube and shared the YouTube link with other "Facebook users, including Tennessee State Representative

Stacey Campfield, WBIR Channel 10 in Knoxville, and DADS of Tennessee, Inc.," among others.[30] He even encouraged some of the individuals to share the link with the judge of the custody case by sending them messages such as: "take it to the judge;" "Give this to Danny and the Judge;" "Give this to the Judge for court;" and "Tell the judge."[31] From these statements it is clear that Jeffries did intend for the judge to view these videos. Moreover, his statements included threats towards the judge in an attempt to intimidate him. These threats were communicated with an objective, to have the judge decide the custody case in favor of the defendant. This is evident from his comment on the video for the judge to "do the right thing July 14th."[32] Upon viewing Jeffries' statements, a reasonable person would believe that that Jeffries was trying to influence the judge in the custody hearing.

The case of *Elonis v. United States*[33] was similar to *Jeffries*. Like *Jeffries*, *Elonis* involved the communication of a threat via social media. Anthony Douglas Elonis had a history of engaging in harassing and threatening communications. In one instance, Elonis posted a photograph of himself with a colleague (that he had a record of harassing) on Facebook. However, this was no ordinary photo. Elonis had a knife to the colleague's throat with the caption "I wish" under the picture.[34] He subsequently was fired from work. What followed were Facebook posts, where he targeted not only his supervisor but also law enforcement agencies.

Elonis' former employer, Dorney Park, had contacted the Federal Bureau of Investigation (FBI) after Elonis started posting threatening messages on Facebook about the company and its employees.[35] The FBI subsequently traveled "to Elonis' house to interview him."[36] After the visit to his home, Elonis posted about the incident on Facebook:

> 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
> Leave her bleedin' from her jugular in the arms of her partner
> [laughter]
> 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
> Why do you think it took me so long to get dressed with no shoes on?
> I was jus' waitin' for y'all to handcuff me and pat me down
> Touch the detonator in my pocket and we're all goin'
> [BOOM!][37]

The post included details of what happened during the FBI visit; for example, the delay in Elonis coming to the door to speak to agents and how he spoke to them in the doorway.[38] In addition to his employer, colleagues, and law enforcement authorities, Elonis' posts discussed harm to elementary schools.

> 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?[39]

Moreover, he targeted his wife, Tara, in his Facebook posts. One post read: "There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts."[40] Other posts similarly referred to killing his wife; for example: "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder."[41]

Despite Elonis' claims to the contrary, his posts and the threats they included were directed at Tara. In fact, his posts made explicit references to his wife. What's more, he intended his wife to see his posts about her;[42] for instance, one of these posts was made to the Facebook page of Tara's sister. Specifically, Elonis posted a comment on her sisters' wall that Tara's son "should dress up as matricide for Halloween … .Maybe [Tara …] head on a stick?"[43] This comment was made after Tara had posted to her sister's wall about the picture. By the very nature

of Facebook, even though he was not Facebook friends with Tara she would have seen the post because of the update she would receive concerning her Facebook friend's (*i.e.*, her sister's) activities. Indeed, because Tara was Facebook friends with her sister, Elonis' posts would have popped up in the News feed on Facebook. Furthermore, Elonis' posts were designed to intimidate his wife. Tara reported feeling threatened by his posts, to such an extent that she filed for and successfully obtained an order of protection. Even after the order and being informed of the impact of his behavior, he continued to engage in similar actions posting threatening messages on Facebook:

> Did you know that it's illegal for me to say I want to kill my wife?…
> It's one of the only sentences that I'm not allowed to say…
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.…
> Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.…
> But not illegal to say with a mortar launcher.
> Because that's its own sentence.…
> I also found out that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.…
> Yet even more illegal to show an illustrated diagram.
> [diagram of the house].…[44]

Another post in particular referred to the protection order:

> Fold up your PFA and put it in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order
> That was improperly granted in the first place
> Me thinks the judge needs an education on true threat jurisprudence
> …And prison time will add zeroes 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.[45]

From an objective standpoint, his wife felt fear that she would be harmed.[46] Based solely on the objective intent standard, Elonis was charged and convicted for communicating a true threat.

THE WAY IT IS—A LOST OPPORTUNITY

Elonis' case was brought before the Supreme Court to determine whether the objective intent standard alone was enough to convict an individual for communicating a true threat. More specifically, the Supreme Court examined how a true threat can be determined: Either through the subjective intent of the perpetrator (which is the reasoning followed by the Ninth Circuit, and the Supreme Courts of Massachusetts, Vermont, and Rhode Island) or through objective intent, that is, if a reasonable person would regard the statement as threatening (this is the position held by other federal courts of appeal and the state courts of last resort).[47] In June 2015, the Supreme Court ultimately held that sole reliance on an objective intent standard in assessing true threats would not suffice. By ruling in this manner, the Supreme Court diverted from existing precedent on true threats and other forms of unprotected speech (*e.g.*, fighting words).[48]

In reaching its decision, the Supreme Court majority in *Elonis* pointed out that the "mere omission from a criminal enactment of any mention of criminal intent" ought not be interpreted "as dispensing with it."[49] Accordingly, they concluded that 18 U.S.C. § 875(c) had a *mens rea* requirement that must be satisfied if someone is to be convicted with the statute. The Supreme Court concluded that this mental state requirement could be "satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."[50] The Supreme Court, however, did not create a standard for measuring subjective intent (*e.g.*, whether the recklessness standard would suffice; that is, whether the offender should have knowledge that there is a risk that his or her actions would be viewed as a

threat); only mentioning that general intent was inadequate.[51]

As such, the decision of the Supreme Court failed to provide the necessary clarity on true threats communicated online. While the decision in *Elonis* clearly set the requisite standard for future decisions involving the communication of true threats (*i.e.*, subjective intent), it did not provide sufficient information about what level of intent was needed for someone to be held liable under 18 U.S.C. § 875(c). In so doing, the court missed its opportunity to provide clarity on this issue. The Supreme Court also missed its opportunity to provide the much needed clarity on what constitutes unprotected speech on social media sites.

Social media has become indispensable to daily life. The posts on these sites enable users to broadcast thoughts and ideas to a wider audience. True threats can be communicated on these platforms either directly or indirectly. US jurisprudence has revealed that true threats do not need to be directly sent to an individual via social media to violate 18 U.S.C. § 875(c). However, they do need to be directed against a specific individual and/or group. Overall, what constitutes a true threat is context specific—it depends on the circumstances of the case, what is being communicated, and the context within which such communications are occurring. The standard to be used in future cases involving the communication of a true threat is the subjective intent of the speaker. Using this standard, social media posts need to be analyzed to determine the intent of the speaker in communicating a threat to a particular individual or group. To determine a user's intent, his or her words and actions need to be examined along with other contextual factors. Ultimately, what constitutes a true threat depends on the facts of the case, the nature of the threat, and the intent of the communicator of the purported threat. What is still unknown after the *Elonis* decision is what level of intent is needed to convict the communicator of a true threat. Given that no clear rule was provided by the Supreme Court, this will be left up to the courts to interpret. In the end, a case will have to be brought to the US Supreme Court asking what level of intent is required for 18 U.S.C. § 875(c) violations in order for a clear answer to be given to the question: What amounts to a true threat on social media?

NOTES

1. Handyside v. the United Kingdom, (A/24) 1 EHRR 737 (1976).
2. Brandenburg v. Ohio, 395 U.S. 444 (1969).
3. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
4. Watts v. United States, 394 U.S. 705 (1969).
5. Roth v. United States, 354 U. S. 476 (1957); Miller v. California, 413 U.S. 15 (1973).
6. Gertz v. Welch, 418 U.S. 323 (1974).
7. Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539 (1985).
8. The First Amendment to the US Constitution holds that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
9. Elonis v. United States, 575 U. S. ____ (2015) (Alito, J., concurring in part and dissenting in part), 5.
10. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).
11. Elonis v. United States, 575 U. S. ____ (2015).
12. *See, e.g.*, United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973); United States v. Roberts, 915 F.2d 889, 890-891 (4th Cir. 1990); United States v. Darby, 37 F.3d 1059 (4th Cir. 1994); United States v. Beale, 620 F.3d 856, 865 (8th Cir. 2010); United States v. Mabie, 663 F.3d 322, 332 (8th Cir. 2011); United States v. Clemens, 738 F.3d 1, 7 (1st Cir. 2013).
13. United States v. Viefhaus, 168 F.3d 392, 395 (10th Cir. 1999).
14. United States v. Morales, 272 F.3d 284, 288 (5th Cir. 2001).
15. Watts v. United States, 394 U.S. 705 (1969).
16. Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002).
17. United States v. DeAndino, 958 F.2d 146, 148 (6th Cir. 1992).
18. United States v. Alkhabaz, 104 F.3d 1493, 1496 (6th Cir. 1997).
19. *Planned Parenthood* at 1077.
20. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
21. Rogers v. United States, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring).
22. *Elonis* at 1 (Thomas, J., dissenting).
23. United States v. Goodoak, 836 F.2d 708, 712 (1st Cir. 1988) *quoted* in United States v. Fulmer, 108 F.3d 1486, 1500 (1st Cir. 1997).
24. United States v. Gilbert, 813 F.2d 1523, 1529 (9th Cir. 1987).
25. For example, United States v. Twine, 853 F.2d 676, 681 (9th Cir. 1988).
26. United States v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011).
27. United States v. Jeffries, 692 F.3d 473 (6th Cir. 2012).
28. *Id.* at 477.
29. *Id.* at 475-477.
30. *Id.* at 477.
31. *Id.* at 481-482.
32. *Id.* at 481.
33. *Elonis*, 575 U. S. ____ (2015).
34. United States v. Elonis, 730 F.3d 321, 325 (2013).
35. *Id.* at 326.
36. *Id.*

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 324.
41. *Id.*
42. *Elonis*, 575 U. S. ____(Alito, J., concurring in part and dissenting in part), 7.
43. *Elonis*, 730 F.3d 321, 324.
44. *Id.* at 324-325.
45. *Id.* at 325-326.
46. *Elonis*, 575 U. S. ____ (Alito, J., concurring in part and dissenting in part), 7.
47. Elonis v. United States, No. 13983, Brief for the United States in Opposition on Petition, 20-23.
48. Cohen v. California, 403 U. S. 15, 20 (1971) and Chaplinsky v. New Hampshire, 315 U. S. 568, 572-573 (1942), *cited* in *Elonis*, 575 U. S. ____ (Thomas, J., dissenting), 18.
49. Morissette v. United States, 342 U. S. 246, 250 (1952) *cited* in Elonis, 575 U. S. ____, 9.
50. *Elonis*, 575 U. S. ____, 16.
51. *Id.* (Thomas, J., dissenting), 17.