The U.S. Supreme Court's "Facebook Case"

by Christopher B. Hopkins

If you think of free speech proponents, you tend to recall our Founding Fathers or even famous Justices. The defendants in free speech cases, meanwhile, are often unpopular or controversial figures who distribute obscenity, burn flags, or advocate the inane "bong hits for Jesus." Florida's contribution to these legal champions, for example, was 2 Live Crew and their song, "Me So Horny."

To the extent anyone is paying attention to these beta testers of the First Amendment, we may add another name to the roster of advocates, although he is an unassuming guy who was fired from an amusement park. The case of *U.S. v. Anthony Elonis* has been heralded as one of the most important cases before the U.S. Supreme Court this term. Will the Court clarify a rare exception to the First Amendment? Will our Facebook posts now require (gasp) forethought? Is there a 2 Live Crew rap music defense?

Mr. Elonis was convicted of four counts for his threatening communications on Facebook. His social media misdeeds landed him a nearly four year prison sentence. Specifically, he wrote about murdering his ex-wife, shooting up schools, and killing an FBI agent.

As to his estranged wife, he wrote, "If I only knew then what I know now, I would have smothered your *** with a pillow… and made it look like rape and murder." On the topic of local schools, he posted, "[there are] enough elementary schools in a 10 mile radius in initiate the most heinous school shooting ever imagined." When the FBI agents arrived, he dismissed them from his doorstep and returned to Facebook to announce, "Little Agent Lady stood so close, took all the strength I had not to turn the ***** into a ghost; pull my knife… slit her throat..."

The 2013 Third Circuit opinion set out each of his posts in greater (but noticeably, not complete) detail and affirmed the judgment that Mr. Elonis had violated 18 USC 875(c). Section 875 is entitled "Interstate Communications" and has four sub-sections which criminalize: (a) demanding ransom for kidnapping; (b) extorting money; (c) threatening to kidnap or harm; and (d) extorting money relative to damaging property or reputations. Noticeably, all of those subsections require an element of intent – except section (c) underwhich Mr. Elonis was convicted. Was this an intentional omission or a Congressional oversight? More confusing, while making a "true threat" is not protected speech, the Supreme Court has yet to squarely define "true threat." Is a "true threat" something that a reasonable person would deem as threatening or must the speaker intend to make a threat?

There are unsatisfying consequences under either standard. If there is no requirement to prove intent, a speaker's careless, galling, or non-contextualized statement could be read later as threatening to some "reasonable person" even if he/she is not the intended recipient. In short, a speaker could be jailed for being provocative or just dumb. On the other hand, if the government has to prove intent, prosecuting a school shooting threat would be difficult since "just kidding!" is a defense.

The Third Circuit also marginalized some facts: Mr. Elonis posted under his rap name; he was not Facebook-friends with his ex-wife; and he hyperlinked his posts to rap and law sites for context. He even had a disclaimer. But, under a reasonable person standard, if you have to resort to an explanatory hyperlink or emoticon to soften or contextualize your statements… doesn't that imply you knew the risk that your words could be misunderstood as a threat? Mere use of a winking, tongue-in-cheek emoticon could be a perceived admission!

One of Elonis' defenses was that he was drafting rap lyrics and that the genre is embodied with violent and threatening (but protected) speech. This fell on deaf ears when his ex-wife testified that she never witnessed him write or sing rap. Compare, however, the December 2014 5th Circuit *Bell v Itawamba* opinion where a high schooler wrote allegedly threatening rap lyrics but his conviction was overturned because he entered a recording studio to produce his hyperbolic, rhetorical, and "protected" music.

On the internet, "vituperative, abusive, and inexact" language rules the comment sections of even benign news stories (that quote comes from a 1960's free speech case, *Watts v. US*). If you have spent any time on Xbox Live after, say, midnight, nearly every invective meets that description. Under a "reasonable person" standard, speakers are supposed to know, and restrain themselves ahead of time, from speech that might be viewed as threatening even if said sarcastically, in jest, or due to unbridled immaturity.

One student group's *amicus* noted that "young people are particularly at risk of being misunderstood…[because] teens post information on social media that they think is funny or is intended to give a particular impression to a narrow audience without considering how this same content might be read out of context." In an unusual alliance of PETA and abortion protestors, their *amicus* argued that, "this statute might be used as a weapon… against protesters… who challenge controversial policies or seek to promote change."

As a former amusement park employee, Mr. Elonis knows rollercoaster rides both literally and figuratively. In this case, all but one of the federal appellate circuits disagree with him. Worse, his counsel's January 2015 oral argument to the Court was confusing ("Court Difficult to Read on Facebook Threat," noted Scotusblog.com). A decision is expected mid-2015.

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