

**Amy Howe** *Editor/Reporter*

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Drawing a line between therapy and threats: In Plain English

[Protesting](#) at the funeral of a fallen soldier. [Lying about your military record](#). [Violent video games for children](#). [Making videos about dogfighting](#). In the past few years, the Supreme Court has held that the First Amendment protects all of these forms of expression, even when very unpopular or offensive. Next week the Justices will hear oral arguments to determine whether Anthony Elonis's Facebook posts, which left his ex-wife "extremely scared" and an FBI agent worried about her family's safety, are entitled to the same kind of protection. Let's talk about [Elonis v. United States](#) in Plain English.

Elonis's legal troubles date back to 2010, when his wife left him, taking their two young children with her. He began to post lyrics from popular songs on Facebook, and he soon moved on to post his own, sometimes violent, rap lyrics. As part of his posts, Elonis included disclaimers about how his lyrics were merely fictitious, and that he was just "exercising his constitutional right to freedom of speech." He also sometimes included links to [the Wikipedia entry on the First Amendment](#) and even the text of the [First Amendment](#) itself.

In the fall of 2010, Elonis's Facebook posts included several that discussed harming his ex-wife. One post was a take-off on a comedy routine available on [YouTube](#): Elonis asked his Facebook friends whether they knew that it was illegal for him to say that he wanted to kill his ex-wife, and he added that it would be "incredibly illegal" to suggest that someone could kill his ex-wife by firing a mortar launcher from the cornfield behind her house. A day later, Elonis put up a post about shooting a kindergarten class.

These posts earned Elonis a visit from an FBI agent. After the visit, he posted about that encounter too, suggesting in rap lyrics that he had strapped a bomb to his body and would have detonated it if he had been arrested. This post was apparently the last straw for the FBI: a few weeks later, Elonis was arrested and charged with violating 18 U.S.C. § 875(c), which makes it a crime to communicate threats in interstate commerce – for example, over the Internet.

Elonis claimed that the charges against him should be dismissed because you can only violate the law if you intend to threaten someone. And he didn't have any plans to threaten his ex-wife, the FBI agent, or anyone else: his rap lyrics and "venting" about his problems on Facebook just made him feel better. But if he can be convicted without any intent to threaten anyone, he added, that would violate the First Amendment. A federal trial court rejected both of his arguments. Instead, it instructed the jury, it could find Elonis guilty if the average person, looking at a statement objectively, would believe that it was intended to be a threat. The jury convicted Elonis, and he was sentenced to nearly four years in prison.

As Elonis emphasized in his Facebook posts, the First Amendment protects a right to free speech. But that right is not unlimited; the classic example is that you can't shout "Fire!" in a crowded movie theater when there is actually no fire, because the resulting chaos could lead to injuries or even death. The Supreme Court has held that the First Amendment also does not protect "true threats," but it has not specifically said how courts should decide what is (or is not) a "true threat. This case could give it that opportunity.

In his briefs at the Supreme Court, Elonis argues that a "threat" by its very nature requires an intent to cause fear. Because the whole point of a crime, he says, is that the defendant meant to do something wrong, the Court has interpreted criminal laws as requiring a wrongful intent even when they did not explicitly do so. Making it a crime to threaten someone even if you didn't intend to threaten them, he contends, would cause people not to speak at all, because they would be worried about whether they could go to jail based on a jury's possible misinterpretation of their comments. This is particularly true, he concludes, when you are talking about alleged threats on social media and email, where nuance and tone matter so much and it's so easy to misconstrue what someone says.

The federal government counters that, as the trial court in this case instructed the jury, courts should determine whether something is a "true threat" by looking at whether an average person would interpret the statement as reflecting a serious intent to harm someone. The government emphasizes that courts and juries can and should look at the context in which the alleged threat was made, and at the reactions of the people who heard the alleged threat, but they should not consider whether the defendant himself actually intended to threaten. This, the government explains, is because even if Elonis didn't intend to threaten his ex-wife or the FBI agent, they were still afraid and their lives were still disrupted: the First Amendment doesn't protect him even if *he* knew that he didn't mean to threaten them.

We don't generally think of the Justices of the Supreme Court as especially savvy about technology. They did acquit themselves well last Term, in a case involving whether police need a warrant to search someone's cellphone after they arrest him. But that may have been easier because they all have cellphones. It is far less likely that any of these nine intensely private public figures are on Facebook or any other form of social media, so it will be interesting to watch them grapple with these issues.

Their deliberations could be further complicated by the effect that their eventual decision could have on victims of domestic violence. In two “friend of the court” briefs, groups devoted to preventing domestic violence urge the Court to rule for the government. They say that many abusers use social media, especially Facebook, to make threats that are both frightening on their own and good predictors of who will in fact become violent. And they warn the Justices that, if they rule that someone like *Elonis* can only be convicted if he actually intended to threaten, it could have a significant impact on the ability of victims to obtain civil protection orders, which are so important to deterring domestic violence.

How much weight will the arguments by the government and the domestic violence groups carry? Will it matter that the speech at issue took place on Facebook – a medium with which the Justices are almost certainly very unfamiliar? We will have a better idea after next week’s argument, and we’ll be back with a full report in Plain English.

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