STRATEGIES in Brief

ÆQUITAS

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Keep Calm and Understand *Elonis v. United States*

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In its recent decision in *Elonis v. United States*,[2] the United States Supreme Court reversed the defendant's federal conviction for the interstate transmission of threats (posted on his Facebook page) to inflict bodily injury upon his estranged wife, his coworkers and patrons of the amusement park where he worked, law enforcement officers, schoolchildren, and an FBI agent. The Court's decision was based upon its conclusion that the trial court had improperly instructed the jury that it could find the defendant guilty if a reasonable person would view his statements as threats, instead of requiring the jury to make findings as to the defendant's subjective state of mind in posting the statements. The decision has generated some degree of alarm among prosecutors, law enforcement officers, civil attorneys, and advocates who work with crimes of violence against women—particularly in the area of intimate partner violence. Many of these allied professionals are concerned that the decision might make it easier for offenders to escape accountability for their actions in threatening and stalking their victims by use of the Internet and social media.[3] Careful analysis of the decision, however, reveals that its impact is limited, and that prosecution of offenders who terrorize their victims with verbal threats—over the Internet or anywhere else—will not be made substantially more onerous as a result of the decision. This *STRATEGIES in Brief* will analyze the decision in terms of what it means for the protection of victims of battering and the prosecution of batterers, and will provide strategies to enhance the likelihood of successful prosecution for threats and stalking as well as for the securing of protective orders.[4]

A Preliminary Brief Review of Culpability Standards

The Model Penal Code (MPC), which has long served as a model for many state legislatures in drafting their own criminal statutes, describes four kinds of culpability that may be specified as the mental element, or *mens rea*, that must be proved by the state in order to convict a defendant of a crime: conduct, or the result of that conduct, must be (in descending order from most to least culpable) *purposeful*, *knowing*, *reckless*, or *negligent*.[5] There are a few state or local statutes that impose strict liability with regard to one or more elements of the offense, but most criminal codes modeled after the MPC require one of these mental states as to each element of most offenses. These states of mind or culpability standards can be summarized as follows. Under the MPC, "purposeful" denotes a state of mind where it is the defendant's conscious objective to engage in the conduct or to achieve a particular result.[6] "Knowing" refers to a state of mind where the defendant is consciously aware of his conduct and is aware that a particular result is practically certain to follow.[7] "Reckless" conduct or recklessness with regard to the result or other material element of the offense involves the conscious disregard of the risk of engaging in such conduct, causing a particular result, or that some other material element exists.[8] Finally, "negligent" conduct involves the failure to perceive a risk as to conduct, result, or other material element of the offense of which a reasonable person would have been aware.[9] If the statute prescribes a specific level of culpability for commission of the offense, that level of culpability or any greater level of culpability will suffice for proof of the defendant's guilt of the crime.[10] While many jurisdictions follow the MPC's approach of using "recklessness" as the default standard[11] when no culpability standard is specified in the statutory definition of a criminal offense, many other codes do not specify a default culpability standard. A few jurisdictions use "negligence" as the default standard, and at least one uses "knowledge" as its default.[12]

Prior to the Model Penal Code, and in many jurisdictions that have not yet adopted a version of the MPC's culpability provisions, the criminal code and case law often incorporate the common-law concepts of "general intent" or "specific intent" crimes, with "general intent" crimes requiring an act with a generally blameworthy state of mind, and "specific intent" crimes requiring some additional mental state—often, a state of mind with respect to causing a particular result (*e.g.*, intent to commit an offense during the unlawful entry as an element of burglary, or intent to cause death as an element of criminal homicide).[13]

FACTS OF THE *ELONIS* CASE

Anthony D. Elonis was emotionally distraught in the wake of his separation from his estranged wife, Tara Elonis. Following the separation, Elonis was sent home after being found crying at his desk and was the subject of five sexual harassment complaints by a coworker at the amusement park where he worked. Following those complaints, Elonis posted on his Facebook page a photo of himself in costume at the park's "Halloween Haunt," holding a prop knife against that coworker's throat, along with the caption, "I wish." When he was fired as a result of that posting, Elonis alluded on his Facebook page to the belief of park security staff that he had taken with him keys to enter the amusement park, posting: "Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so f**king scary?"[14]

Elonis also posted on his Facebook page several alarming posts describing violent acts he wished to commit against his estranged wife—some of them gruesome murder scenarios. Some of these were in the form of self-styled "rap lyrics" (though Elonis had not, prior to his marital difficulties, expressed any particular interest in rap music or lyric-writing), and one post—an adaptation of a comic's satirical sketch—was about how "illegal" it would be for Elonis to say that he wants to kill his wife. The latter post included suggestions about how someone could come to her house with firearms to shoot her, and was accompanied by an accurate diagram of her home and property. Some of the violent posts were in the form of comments on his wife's sister's Facebook page, thus ensuring she was aware of them. His wife was frightened enough by the posts to obtain a protective order against him, which resulted in another post by Elonis boasting about how the order wasn't "thick enough to stop a bullet," but that if he went to prison and "worse comes to worse," he had "enough explosives to take care of the State Police and the Sheriff's Department."[15]

A short time later, Elonis mused online about his quandary in deciding which of the many nearby elementary schools he should visit to stage "the most heinous school shooting ever imagined" in a kindergarten classroom. FBI agents went to Elonis's house to speak with him, after which he posted more "rap lyrics" about how he wanted to slit the throat of the "Little Agent Lady" who had visited him, claiming that he had been armed with a bomb that would have detonated during a patdown, and advising any agent coming back to serve a warrant to "bring yo' SWAT and an explosives expert." Elonis posted several "disclaimers" on his Facebook page that his "lyrics" were "fictitious," with no intentional "resemblance to real persons." He also claimed, in response to a comment from one of his Facebook "friends" about some of the content on his page, that his posts were "therapeutic," and he testified at trial that his writing "help[ed him] to deal with the pain." In addition, several of his violent posts alluded to his "Constitutional rights" and to "freedom of speech."[16]

LOWER COURT DECISIONS

At trial, Elonis requested a jury instruction that he could be convicted under 18 U.S.C. § 875(c)[17] only if the government proved he intended to communicate a threatening statement. The trial court rejected that request, instead instructing the jury that it need only find that the defendant "intentionally ma[de] a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual." The jury convicted Elonis on four of the five counts, acquitting him only on the charge of threatening park employees and patrons.[18]

On appeal to the Third Circuit, Elonis contended that U.S. Supreme Court precedent demanded that the prosecution prove that he had a subjective intention of making a threatening statement.[19] The Third Circuit rejected that argument, instead adopting the position of a majority of the federal Courts of Appeals that had considered the question,[20] concluding that the prosecution's burden required proof of "whether a reasonable speaker would foresee the statement would be understood as a threat."[21]

Supreme Court Decision

The majority opinion by Chief Justice Roberts, joined by all of the Justices except Alito (concurring in part and dissenting in part) and Thomas (dissenting), reversed the Third Circuit's decision (and the defendant's conviction). The Court held that the failure of the statute to specify the *mens rea* with respect to the threatening nature of the communication did not permit the Court to "read into" the statute a negligence standard as to that element of the offense.[22] Recognizing that some statutes do properly specify either a negligence standard or a strict liability standard, the Court nevertheless found that those culpability standards were inappropriate to imply, absent specific statutory language specifying one of those standards.[23] The Court noted that the criminal law generally requires some degree of "wrongfulness" or "evil" on the part of the actor before the power of the State will impose criminal liability for conduct.[24] Since a person acting negligently is not viewed as criminally culpable in the vast majority of situations—absent specific policy decisions on the part of the legislature regulating the conduct—the Court refused to presume that the legislature intended to criminalize statements that the defendant did not realize (even if he should have) would be perceived as threatening.[25]

The Court stopped short, however, of deciding exactly what mental state *would* be sufficient to support a conviction under § 875(c). The opinion implies that a defendant's *knowledge* that his statements would be perceived as threatening would be sufficient: "In this case, 'calculated purveyance' of a threat would require that Elonis know the threatening nature of his communication."[26] "There is no dispute that the mental state requirement in Section 875(c) is 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."[27] Much to the consternation of Justice Alito, however, the Court declined to decide whether recklessness with respect to the threatening nature of the statement would be sufficient, concluding that it was inappropriate to decide the issue when neither party had argued it sufficiently on appeal.[28] Based upon its disposition of the case, the Court declined to address the defendant's First Amendment argument.[29] The Court reversed the conviction, remanding the case to the Third Circuit without direction as to what the proper culpability standard should be with respect to the threatening nature of the communication.

Concurring/Dissenting Opinions

In his partial concurrence, Justice Alito agreed with the majority that the prosecution must prove some mental state on the part of the defendant with regard to the threatening nature of the communication.[30] He concluded, however, that recklessness—the knowing disregard of the risk that the communication would be viewed as a threat—would be sufficient, and chastised the majority for failing to decide that issue.[31] He expressed his belief that the Court's opinion only served to further confuse the lower courts, prosecutors, and defense attorneys as to when statements will be criminally prosecutable as threats under the statute.[32] Justice Alito further concluded that imposing a recklessness standard would not violate the First Amendment, since threats are not protected by that Constitutional provision.[33] Noting that the harm done to the victim is just as great whether the defendant intends to threaten the victim or recklessly makes the statements for "cathartic" or "therapeutic" reasons, or with a claim of "artistic expression," such justifications are insufficient to invoke the protection of the First Amendment. "A fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech."[34]

Finally, Justice Alito would have held that, because the defendant had not argued for a recklessness standard, the Third Circuit should have the opportunity to decide whether he had waived that argument and that his conviction should

therefore stand.[35] Alternatively, Justice Alito would have given the appellate court the opportunity to consider whether the error in the jury instructions would be harmless under a recklessness standard.[36]

Justice Thomas filed a dissent, concluding that there was no need to imply any mental state other than "general intent," which, in his view, required only "that a defendant knew he transmitted a communication, knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context."[37] To Justice Thomas, requiring more would be the equivalent of insisting that a defendant know that his words violated the law—akin to making ignorance of the law an excuse.[38] Justice Thomas *did* reach the First Amendment issue, concluding that threatening speech deserved no more protection than any other kind of speech properly prohibited under the First Amendment, including libelous speech, obscenity, or "fighting words," none of which require intentional conduct to be punishable.[39]

Analysis

The *Elonis* case must be viewed, in the first instance, as a case of statutory construction. The Court was construing the federal statute criminalizing interstate threats. Its holding is, therefore, technically limited to prosecutions under that statute. The opinion of the Court does not intimate the result of a challenge—on First Amendment or other grounds—to a conviction under a state or tribal code provision that explicitly requires a specific mental state less than knowledge with regard to the threatening nature of a communication (or under a statute which has been construed to require such specific mental state).[40] Traditional First Amendment jurisprudence suggests that a recklessness standard would be upheld on the same theory that supports its application in cases of obscenity, "fighting words," and libel. Thus, a statute that explicitly, or as a result of statutory construction, requires a reckless mental state would more than likely be upheld. Given the Court's historical concern with protection of speech that is truly (and reasonably) intended to be non-threatening, however, it is highly questionable whether a negligence standard would survive a First Amendment challenge where the issue is squarely presented.

Also noteworthy is that the Court's decision in the *Elonis* case was impacted not at all by the fact that the defendant communicated his statements by means of the Internet, on a social media page. The Court recognized that the public nature of a threatening communication did not diminish the harm to the victim and that the context of a communication—the circumstances under which it was made—could be considered in determining whether the communication constituted a threat.

The impact of the *Elonis* decision thus is limited in scope and effect, and should not unduly discourage prosecutors, civil attorneys, or allied professionals in their pursuit of justice for victims of threats and stalking.

Strategies

Prosecutors, or civil attorneys assisting their clients in obtaining protective orders, should first examine their own statutes that criminalize threats or stalking to see what mental states are required by the statutes' own terms. If the statute itself does not set forth a particular kind of culpability with regard to the threatening nature of the communication, check to see whether there is a statutory provision establishing a default level of culpability where none is specified.[41] It is also important to consult the case law of your jurisdiction to determine whether your courts have interpreted the statute to require a specific level of culpability. If the mental state specified is recklessness, knowledge, or purposeful conduct, it is almost certainly valid.

In preparing and presenting your cases, consider two goals: First, advocate for recklessness as the appropriate culpability standard under your state's law, if the question has not yet been resolved (either by explicit statutory language or by statutory construction in the case law). Second, work to prove the highest mental state you are certain your evidence will support, and carefully review your jury instructions to be sure the appropriate level of culpability is correctly charged.

In the *Elonis* case itself, for example, the defendant's actions in making sure his victim saw the vicious posts on his Facebook page would almost certainly have supported a finding that he made the statements *knowing* she would view them as threats. A reckless state of mind would be even more easily proved.

If your statute explicitly calls for (or has been interpreted by your courts to require) a negligence standard, consider alleging recklessness in the charging instrument and requesting that the jury be charged as to recklessness. As noted in the foregoing analysis, reckless conduct is generally readily proved in these cases, where there is often a significant history of threatening and violent conduct. Such history would put the defendant on notice that the victim would feel threatened by the communication when it is considered in context. While the Supreme Court has never explicitly held that a negligence standard would violate the First Amendment, there is substantial risk that a majority of the Court might take that position in a future case.

Make the most complete record possible, introducing as much evidence of any history of domestic violence as you can, to provide comprehensive context for the defendant's words. Introduce as well as any prior protective orders or other facts that would support the defendant's knowledge of the victim's probable interpretation of, and reaction to, his statements.[42] Where the communication was made to third parties, or in a public forum such as social media, present any available evidence that the defendant knew that the victim or others close to the victim (such as family or friends) would see or hear it and that the victim would therefore learn of it and be placed in fear. Make the most persuasive argument possible in your summation to show the jury how the history and context lead to the inescapable conclusion that the defendant knew exactly how the communication would be viewed by the victim. Such careful preparation and presentation of the case will greatly increase the likelihood that a conviction will be upheld on appeal, and that any errors will be viewed as harmless in light of the overwhelming evidence of a defendant's intention to threaten the victim or knowledge that the victim would feel threatened.

Any motions to dismiss an indictment or to dismiss a charge at the end of the State's case on First Amendment or other constitutional grounds should be vigorously opposed, and appealed on an interlocutory basis if necessary. Appellate assistance is available from AEquitas or from other organizations, such as DV LEAP.

Conclusion

The *Elonis* decision is neither a disaster for victims of domestic violence nor for the prosecutors, attorneys, and allied professionals who support their quest for justice. The opinion does not break startling new ground nor permit defendants to threaten their victims with impunity because they are using electronic forums to do so. The decision does not require proof of specific intent to threaten unless the statute itself or state case law requires that. The opinion does serve as a reminder that careful preparation and presentation of a case will always increase the chances that a hard-won conviction will be upheld on appeal. Context will continue to be critical in these cases. Prosecutors and civil attorneys can carefully but confidently continue to protect victims and hold offenders accountable for threatening communications—regardless of how they are conveyed.

ENDNOTES

1 Teresa Garvey is an Attorney Advisor with AEquitas: The Prosecutors' Resource on Violence Against Women.

2 Elonis v. United States, 135 S.Ct. 2001 (2015).

3 To the extent that the decision affects the construction of state or tribal statutes proscribing threats and stalking, it will impact the ability of victims to obtain a protective order in jurisdictions requiring the violation of particular criminal statutes as a condition for obtaining an order. *See* Brief of the Domestic Violence Legal Empowerment and Appeals Project *et al*. as Amici Curiae in Support of Respondent, at 17-31, Elonis v. United States, 135 S.Ct. 2001 (2015) (No. 13-983), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_resp_amcu_dvle-etal.authcheckdam.pdf.

4 Readers are encouraged to register for a webinar providing further in-depth analysis of the *Elonis* decision, to be presented on August 14, 2015. A few days after the webinar is presented, a recording will be available online at http://www.aequitasresource.org/webinar-recordings.cfm. Presenters will be AEquitas Attorney Advisor Teresa Garvey (author of the present article) and Joan Meier, Legal Director for the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP), who authored DV LEAP's *amicus* brief in support of the government's position in *Elonis*. DV LEAP is a non-profit organization dedicated to "empower[ing] victims and their advocates by providing expert representation for appeals; educating pro bono counsel through in-depth consultation and mentoring; training lawyers, judges, and others on cutting-edge issues; and spearheading the DV community's advocacy in Supreme Court cases." *See* http://www.DVLEAP.org. DV LEAP's *amicus* brief in *Elonis* can be found at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_resp_amcu_dvle-etal.authcheckdam.pdf.

5 MODEL PENAL CODE § 2.02.

6 MODEL PENAL CODE § 2.02(2)(a).

7 MODEL PENAL CODE § 2.02(2)(b).

8 MODEL PENAL CODE § 2.02(2)(c).

9 MODEL PENAL CODE § 2.02(2)(d).

10 MODEL PENAL CODE § 2.02(5).

11 MODEL PENAL CODE § 2.02(3).

12 Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 188 & n. 29 (2003).

13 Use of the terms "general intent" or "specific intent" can be problematic, as courts and scholars often disagree as to what those terms actually mean. *See generally,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 137-39 (6th Ed., Lexis-Nexis 2012).

14 United States v. Elonis, 730 F.3d 321, 324 (3d Cir. 2013), rev'd 135 S.Ct. 2001 (2015); *Elonis*, 135 S.Ct. at 2004-05.

15 *Elonis*, 730 F.3d at 324-26; *Elonis*, 135 S.Ct. at 2005-06; *Elonis*, 135 S.Ct. at 2017 (Alito, J., concurring).

16 *Elonis*, 730 F.3d at 325-26; *Elonis*, 135 S.Ct. at 2005-07.

17 The statute under which Elonis was charged made it a crime to "transmit[] in interstate … commerce any communication containing any threat … to injure the person of another." 18 U.S.C. § 875(c).

18 *Elonis*, 135 S.Ct. at 2007.

19 Elonis contended that Virginia v. Black, 538 U.S. 343 (2003), a case striking down a Virginia statute prohibiting cross-burning with the intent to intimidate (based upon the statute's provision permitting the burning itself to be "prima facie evidence of intent to intimidate") stood for the proposition that prosecution under *any* statute criminalizing threats required proof of the defendant's subjective intent to intimidate. *Elonis*, 730 F.3d at 327-28.

20 *Id.* at 330-32 (substantially agreeing with the position of the Fourth, Sixth, and Eighth Circuits on the effect of the *Black* decision on the *mens rea* required for prosecution of threats, and rejecting the position of the Ninth Circuit, which required subjective intent to threaten under its interpretation of *Black*).

21 *Id.* at 329-332 & n.7.

22 *Elonis*, 135 S.Ct. at 2011.

23 *Id.*

24 *Id.* at 2009.

25 *Id.* at 2011.

26 *Id.* at 2012.

27 *Id.* at 2012.

28 *Id.* at 2012-13.

29 *Id.* at 2012.

30 *Id.* at 2014-15 (Alito, J., concurring and dissenting).

31 *Id.* at 2013-16.

32 *Id.* at 2013-14.

33 *Id.* at 2016-17.

34 *Id.* at 2017.

35 *Id.* at 2017-18.

36 *Id.* at 2018.

37 *Id.* at 2018 (Thomas, J., dissenting)

38 *Id.* at 2019-23.

39 *Id.* at 2024-28.

40 The Supreme Court defers to the interpretation of state statutes by the state's own courts. *See, e.g.,* Grayned v. City of Rockford, 408 U.S. 104, 109-10 (1972).

41 *E.g.*, N.J. STAT. ANN. § 2C:2-2(c), which sets forth rules of statutory construction when a criminal statute, or the material elements thereof, are not specified.

42 Most of these prior "bad acts," unless they are part of the course of conduct alleged as part of a stalking charge, or unless charged in separate counts of the same charging instrument, will require a motion under your jurisdiction's equivalent to FED. R. EVID. 404(b). The argument should be that this history goes to the defendant's intent, or to the *mens rea* element of the crime.

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