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COMMENT: *ELONIS*, TRUE THREATS,
AND THE ONTOLOGY OF FACEBOOK

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Abstract: *Elonis v. United States*, which will be argued before the Supreme Court this December, raises the question of the applicable standard for determining whether speech is a true threat. Of particular interest in *Elonis* is how the Court will interpret appellant's speech, which took place on Facebook and often took the form of quoted rap lyrics. This Comment argues that, despite changes the Internet has wrought in how speech is delivered, the appropriate standard for determining whether speech is a true threat is an objective one, as such a standard best addresses the concerns that gave rise to the true threats exception. This Comment further discusses some of the challenges courts have faced in properly conceiving of rap music and urges that a particular view of rap not be enshrined as a matter of Supreme Court jurisprudence.

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INTRODUCTION



his December the United States Supreme Court is set to hear oral argument in *Elonis v. United States*.¹ *Elonis* raises the question of what standard must be applied to determine if potentially threatening language is constitutionally protected speech, or if it is a “true threat”—one of a limited number of categories of speech that the Court has excluded from First Amendment protection.² Is it necessary to determine whether the speaker actually intended his or her speech to act as a threat—a subjective standard? Or, instead, is the proper standard one that relies upon a reasonable speaker, or reasonable recipient—an objective standard?³

Anthony D. Elonis was convicted in federal court of making threatening statements under an objective standard,⁴ and his conviction was upheld on appeal.⁵ Elonis is

¹ *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013), *petition for cert. filed*, No. 13-983 (U.S. Feb. 14, 2014).

² The First Amendment to the United States Constitution reads, “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.” U.S. CONST. amend. I. There are several categorical exemptions to the protections of the First Amendment, including for so-called “true threats,” the exception at issue in *Elonis*. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

³ See generally Jennifer Rothman, Note, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 289 (2001). Rothman’s terminology and mine differ. Following common terminology among scholars, commentary about *Elonis*, and the language of the advocates in *Elonis*, I call the first type of standard the “subjective standard” and the second type of standard the “objective standard.” Courts use a variety of terminology to refer to the same issue. See Pedro Celis, Note, *When Is a YouTube Video a “True Threat”?*, 9 WASH. J. L. TECH. & ARTS 227, 230 (2014) (“Courts frame the mens rea issues. . . using the terms ‘general intent,’ ‘specific intent,’ ‘subjective intent,’ and ‘objective intent.’ These terms are used interchangeably. . . .”) (citation omitted).

⁴ See Brief for Petitioner at 2–4, *Elonis v. United States*, No. 13-983 (U.S. filed Feb. 14, 2014), 2014 WL 4101234.

asking the Supreme Court to address an issue that has split the U.S. courts of appeals: whether a determination that speech is a true threat may be made under an objective standard, or must be made under a subjective one. Subjective standards ask whether the speaker did, in fact, subjectively mean to threaten.⁶ *Elonis* contends that a subjective standard is required.

Elonis' argument relies heavily on the Supreme Court decision in *Virginia v. Black*,⁷ which held unconstitutional a state statute that criminalized flag burning.⁸ Currently, the Court of Appeals for the Ninth Circuit requires proof of subjective intent in order to find speech constitutes a true threat. The other courts of appeals, however, continue to rely on some variant of the objective standard.⁹ *Elonis* argues that, especially in light of changing technology, the Court should require a subjective standard in true threat cases; that a subjective standard was mandated by *Black*; and that his conviction is therefore invalid.¹⁰

THE *ELONIS* CASE

Elonis was convicted in the Eastern District of Pennsylvania of violating 18 U.S.C. § 875(c), which criminalizes transmitting threats in interstate commerce.¹¹ The Court of Appeals for the Third Circuit upheld his conviction under an objective standard for true threats, asking whether "a reasonable speaker would foresee the statement would be interpreted as a threat."¹²

The underlying charge and facts

In December of 2010, *Elonis* was charged with five counts of violating the federal threat statute based on a series of Facebook posts he wrote.¹³

⁵ *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013).

⁶ See Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1347 (2006) ("In some cases where courts have held that a speaker has forfeited First Amendment protection by reason of the threats exception, a statute has prescribed punishment or civil liability only for speakers who act with the actual ('subjective') intention to cause the target to believe that he or she is in danger of harm to be inflicted by the speaker . . .").

⁷ *Virginia v. Black*, 538 U.S. 343 (2003).

⁸ *Id.* at 345.

⁹ See *Celis*, *supra* note 3, at 230 ("Currently, only the Ninth Circuit requires subjective intent. Other circuits require only objective intent. However, some circuits . . . functionally require subjective intent through the application of the true threat test.") (citations omitted).

¹⁰ Brief for the Petitioner, *supra* note 4, at 5.

¹¹ "Whoever 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." 18 U.S.C. § 875(c) (2013).

¹² *United States v. Elonis*, 730 F.3d 321, 323 (3d Cir. 2013).

¹³ *Id.* at 326.

Elonis' wife left him in May of that year.¹⁴ He began having trouble at work, and was reported for sexual harassment five times by an employee he supervised.¹⁵ After hearing about these reports, Elonis posted a photograph on his Facebook account of himself and the complaining employee in costume from a Halloween event.¹⁶ In the photograph, Elonis was holding a knife to the neck of the employee. When he posted the picture, he added the caption "I wish."¹⁷ His supervisor saw the post and fired Elonis.¹⁸

This apparently opened the floodgates. Elonis began posting not only statements about his former employer, but also about his estranged wife Tara Elonis.¹⁹ Some were responses to his sister-in-law's (Tara Elonis's sister) Facebook posts, including a suggestion that his son "dress up as matricide for Halloween," and parade his wife's head around on a stick.²⁰ Other posts were rap lyrics with words changed to apparently be about Tara, including:

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. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.²¹

Based on these statements, a state court granted Tara Elonis a protective order.²² Elonis continued posting to Facebook, including posts that helped form the basis for the counts of threatening his wife, and a count of threatening law enforcement.²³

Elonis argued that, in order to find him guilty, the jury should have had to find he subjectively intended to threaten Tara.²⁴ As evidence that he did not so intend, Elonis

¹⁴ *Id.* at 324.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* This comment was made after Tara Elonis had already commented on her sister's post. Brief for the Petitioner, *supra* note 4, at 10 ("After his wife responded [to the photo], petitioner posted that his son 'should dress up as matricide for Halloween.'"). Because Facebook generally notifies people of comments on posts that the original user has already commented on, this made it very likely that Tara Elonis was notified when Elonis posted his subsequent comment.

²¹ *Elonis*, 730 F.3d at 324.

²² *Id.*

²³ *Id.* at 326.

²⁴ *Id.* at 329; Brief for the United States in Opposition at 12, *Elonis v. United States*, No. 13-983 (U.S. filed Feb. 14, 2014), 2014 WL 1603331 ("Petitioner contends . . . that his conviction for transmitting a threatening communication in violation of 18 U.S.C. 875(c) must be reversed because the district court did not instruct the jury that it must find that petitioner subjectively intended to threaten his wife. . . .").

argued that he is not Facebook friends with Tara, and that he did not tag her in any posts.²⁵ Elonis argued that the posts are a protected form of speech.²⁶ Despite this, a jury convicted Elonis on four counts and sentenced him to forty-four months' imprisonment followed by three years of supervised release.²⁷

STANDARDS, CERTIFIED QUESTION, AND CIRCUIT SPLIT

The Supreme Court granted *certiorari* in *Elonis* to resolve two questions: (1) whether proof of subjective intent is necessary for conviction under 18 U.S.C. § 875(c), and (2) whether proof of intent to threaten is required for speech to be deemed a true threat, and therefore fall outside of the protection of the First Amendment.²⁸

Elonis argues that the 2003 Supreme Court ruling in *Virginia v. Black* mandates a subjective standard.²⁹ In *Black*, the Supreme Court held that a statute criminalizing cross burning was unconstitutional to the extent that it created a presumption of intent to intimidate.³⁰ The language in *Black* could be interpreted to, but does not necessarily, re-

²⁵ See Petition for Writ of Certiorari at 10, *Elonis v. United States*, No. 13-983 (U.S. filed Feb. 14, 2014), 2014 WL 645438. However, Elonis posted publicly to Facebook, such that his posts would be accessible to anybody on Facebook, not only his friends. *Elonis*, 730 F.3d at 326 (“FBI Agent Denise Stevens was monitoring Elonis’s public Facebook postings. . . .”). Additionally, as stated above, some of Elonis’s posts were made as comments on Tara’s sister’s wall, including a photograph of Elonis’s son. As Elonis stated in briefing at the trial level, “Facebook users who affirmatively chose to be designated a ‘Facebook friend’ of Elonis’s would see his postings, alongside those of their other ‘friends.’ . . . Others would see Elonis’s posts only if they actively sought them out.” Corrected Brief of Appellant Anthony Douglas Elonis and Appendix Volume I (Pages App-1 Through App-26) at 8–9, *Elonis v. United States*, 730 F.3d 321 (3d Cir. 2013) (No. 12-3798), 2013 WL 431402. By posting on Tara’s sister’s wall, Elonis made it likely that Tara would see his posts, since activity on Tara’s sister’s Facebook would be shown to her if the sisters were Facebook friends.

²⁶ *United States v. Elonis*, CRIM.A. 11-13, 2011 WL 5024284, at *1 (E.D. Pa. Oct. 20, 2011) *aff’d*, 730 F.3d 321 (3d Cir. 2013) (“Mr. Elonis contends that his Facebook postings are protected speech under the First Amendment and, therefore, cannot be criminal.”).

²⁷ *Elonis*, 730 F.3d at 327.

²⁸ See Brief for the Petitioner, *supra* note 4, at I.

²⁹ *Elonis*, 730 F.3d at 327.

³⁰ *Virginia v. Black*, 538 U.S. 343, 364 (2003) (“The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional.”). The opinion makes clear that the problem was not that Virginia had regulated speech, or prohibited flag-burning: “The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. . . . A ban on cross burning carried out with the intent to intimidate . . . is proscribable under the First Amendment.” *Id.* at 363. Rather, it was the prima facie provision that caused the problem: “The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.” *Id.* at 365. This would “create an unacceptable risk of the suppression of ideas.” *Id.* (citing *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984) & *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984)).

quire proof of subjective intent—while the opinion makes clear it is impermissible to ascribe intent to an individual who burns a cross as a matter of presumption, it does not say that proof of true threat requires proof of intent in all cases.

Courts of appeals have generally ruled that the holding in *Black* does not require that all threats be judged under a subjective standard.³¹ Even after *Black*, jurisdictions generally have not required proof of subjective intent: The Ninth Circuit does require such proof.³² But in addition to the Third Circuit, the First Circuit,³³ Second Circuit,³⁴ Fourth Circuit,³⁵ Fifth Circuit,³⁶ Sixth Circuit,³⁷ Seventh Circuit,³⁸ Eighth Circuit,³⁹ Tenth Circuit,⁴⁰ and Eleventh Circuit⁴¹ use objective standards.⁴²

³¹ See *infra* notes 32–42. Some cases specifically found that *Black*'s holding was limited to the over-breadth of the statute at issue. See, e.g., *United States v. Martinez*, 736 F.3d 981, 986–87 (11th Cir. 2013) (“*Black* did not import a subjective-intent analysis into the true threats doctrine. Rather, *Black* was primarily a case about the overbreadth of a specific statute—not whether all threats are determined by a subjective or objective analysis in the abstract.”); *United States v. White*, 670 F.3d 498, 508 (“A careful reading of the requirements of § 875(c), together with the definition from *Black*, does not, in our opinion, lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement . . . § 875(c) [is] a general intent crime and therefore require[s] application of an objective test in determining whether a true threat was transmitted.”). While nearly all federal courts of appeals have addressed this question, there is a dearth of law on this subject in the D.C. Circuit. Cf. *In re S.W.*, 45 A.3d 151, 156 n.14 (D.C. 2012).

³² See *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) (“Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.”). See also *Celis*, *supra* note 3, at 230 (“Currently, only the Ninth Circuit requires subjective intent.”).

³³ See *United States v. Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997); see also *United States v. Clemens*, 738 F.3d 1, 2 (1st Cir. 2013) (“[W]e see no reason to depart from this circuit's law that an objective test of defendant's intent is used. . . .”) (citing *Whiffen*).

³⁴ See *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994); see also *United States v. Turner*, 720 F.3d 411, 419 (2013) (citing *Malik*).

³⁵ See *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012).

³⁶ See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (“Speech is a ‘true threat’ and therefore unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm.”) (internal quotation marks omitted).

³⁷ See *United States v. Alkhabaz*, 104 F.3d 1492, 1496 (6th Cir. 1997); see also *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) *cert. denied*, 134 S. Ct. 59 (2013).

³⁸ See *United States v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004) (“[A] communication is a ‘true threat’ if 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 harm”) (internal quotation marks omitted).

³⁹ See *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (en banc); see also *United States v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011) (holding that the objective test measures whether a reasonable observer would find the communication conveyed intent to cause harm); *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013) (finding no requirement of subjective intent to threaten).

⁴⁰ See *United States v. Viefhaus*, 168 F.3d 392, 396 (10th Cir. 1999); see also *United States v. Heineman*, No. 13-4043, 2014 WL 4548863, at *1 (10th Cir. filed Sept. 15, 2014) (citing and quoting *Viefhaus*).

Elonis and many of the *amici* contend that a subjective standard is necessary to protect speakers communicating via the Internet. They argue that the Internet in general, and social media in particular, permit speech to be disseminated in novel ways and reach an online audience that is unforeseeable to the speaker.⁴³ They also argue that the Internet as a medium so changes the nature of communication that standard tests should not apply.⁴⁴ However, an objective standard could adequately encompass many of the concerns about online communication, including this concern about its potential for broad disbursement, upon which many other concerns hinge.⁴⁵ Additionally, an objective standard takes into account the circumstances in which a statement is made, and can easily import a “reasonable Internet user” standard without backing into pure subjectivity.

⁴¹ See *United States v. Callahan*, 702 F.2d 964, 965 (11th Cir. 1983); see also *United States v. Martinez*, 736 F.3d 981, 986 (11th Cir. 2013) (“We agree with the Sixth Circuit that *Black* did not work a ‘sea change,’ tacitly overruling decades of case law by importing a requirement of subjective intent into all threat-prohibiting statutes.”).

⁴² There are variations among objective standards—broadly speaking, one type of objective standard asks whether a reasonable listener would be threatened, the other whether a reasonable speaker would know a listener would find their statement threatening. The Third Circuit uses a reasonable speaker standard, asking if a reasonable speaker would know their statement could be taken as a threat. See *Elonis v. United States*, 730 F.3d 321, 332 (3d Cir. 2013) (“A threat is made willfully when 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 harm.”) (quotations omitted).

⁴³ See, e.g., Brief of the Student Press Law Center et al. as Amici Curiae in Support of Petitioner at 4, *Elonis v. United States*, No. 13-983 (Aug. 22, 2014), 2014 WL 4215754. (“In the age of social media, courts across the country will often face quite a different challenge in true threat prosecutions. Now messages including content that might be interpreted as a threat may be made anonymously on an Internet message board or other social networking platform. At the time such statements are made, the audience will often not know who the speaker is or where he is, and likewise will not be able to observe the speaker’s demeanor or know whether he is armed. . . . [The audience is] as hidden and anonymous as the speaker. And the reaction of “the crowd” will in many instances be only very imperfectly understood, if not entirely unknowable, because the only information available may be the reaction of other Internet users if they respond to the speaker’s message.”).

⁴⁴ See, e.g., Brief of the Rutherford Institute as Amicus Curiae in Support of the Petitioner at 8, *Elonis v. United States*, No. 13-983, 2014 WL 4215757 (brief filed Aug. 22, 2014) (“the very nature of the internet as an open and unrestricted medium for communication, provides fertile ground for overstatement a hyperbole, and . . . a significant number of statements that would be considered ‘threatening’ in face-to-face interactions, are not taken as seriously when made on the internet. . . . [T]hreatening statements made on the internet do not necessarily imply any actual intent to carry out a violent act. . . .”). This fails to recognize that this is true of speech in *any* medium—things that literally communicate a threat may not imply an actual intent to carry out a violent act, and the existing jurisprudence recognizes this fact.

⁴⁵ For example, if it were not the case that the Internet allowed for wide distribution of speech, there would be minimal concern that someone completely removed from the context of the speech would be affected by it. See *Petition for Writ of Certiorari*, *supra* note 25, at 34–35 (“[M]odern media allow personal reflections intended for a small audience (or *no* audience) to be viewed widely by people who are unfamiliar with the context in which the statements were made and thus who may interpret the statements much differently than the speaker intended. Internet-based communication has thus eroded the shared frame of background context that allowed speakers and hearers to apply context to language, increasing the significance of courts’ refusal to consider a speaker’s intent.”) (citation omitted).

Just as someone shouting “fire!” in a crowded theater can reasonably know his speech will be heard by a broad audience, so too can a person who posts publicly to Facebook reasonably know that his speech may be ‘overheard’ by a broad audience.⁴⁶ If someone in Elonis’ position wanted to ensure his speech were private, he could make his Facebook posts private.⁴⁷ Even if somehow someone who was not in the intended audience came across the posts, a private post would be a much clearer indication that the speech was not intended as a threat and likely receive First Amendment protection.⁴⁸

This idea is borne out by previous rulings across courts of appeals. Consider, for example, the outcome of *United States v. Alkhabaz*:⁴⁹ In *Alkhabaz*, the defendant and an acquaintance exchanged emails in which they discussed their interest in torture and rape, including a story Alkhabaz wrote about the rape and murder of a woman who shared the name of a classmate of his.⁵⁰ Alkhabaz posted the story to an interactive website dedicated to hosting erotic literature.⁵¹ Even though the story ultimately made it back to the woman, it was protected because it was apparent from the circumstances of the speech that it was intended to “foster a friendship based on shared sexual fantasies” rather than to intimidate the woman.⁵² Insofar as private Facebook posts are limited to smaller audi-

⁴⁶ See Amy E. McCann, Comment, *Are Courts Taking Internet Threats Seriously Enough? An Analysis of True Threats Transmitted over the Internet, as Interpreted in United States v. Carmichael*, 26 PACE L. REV. 523, 539 (2006) (“The Internet is a vast marketplace for ideas, making strong First Amendment protection important. However, this marketplace also provides huge potential for abuse, by allowing threats to be heard by a much larger audience.”). McCann goes on to explain why a particular line of reasoning in *United States v. Carmichael*, 326 F. Supp. 2d 1267 (M.D. Ala. 2004), is inaccurate. McCann rightly points out that Internet speech is different than political speech diffused over a broad audience, which is less likely to be a threat, and that this analogy does not stand. *Id.* at 540–43.

⁴⁷ Facebook allows users to control with which audiences their information and “posts” are shared, from private to a select group of friends (manually selected by the user), to all the friends they have accepted, all the way through completely public and searchable. Data Use Policy, FACEBOOK, <https://www.facebook.com/about/privacy/your-info-on-fb> (last visited Oct 27, 2014). It is true that there are a variety of ways that “private” Facebook speech could be made public, such as a person taking a screen capture image of a post and sharing it. However, this does not appear to so change the nature of speech that it should require a new test for true threats. Speech has always been able to be quoted, taken out of context, reported and generally spread. See *infra* note 64. That speech may be shared beyond its original audience is not new; rather, it is a difference of degree that an objective standard can account for through sensitivity to context. As explained throughout this Comment, context is always of importance in true threat cases.

⁴⁸ Here, in fact, Elonis’ speech was virtually guaranteed to reach his wife, as he posted on a photograph of her son, on her sister’s wall, after she had already commented on it. Replies to the same posting are one of the circumstances in which Facebook sends notifications to users. See FACEBOOK, *supra* note 47. If she had not seen it by virtue of it being on her sister’s wall, she almost certainly would have received a notification of Elonis’ posting.

⁴⁹ *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). For a discussion of *Alkhabaz* and e-mail threats, see Joshua Azriel, *First Amendment Implications for E-mail Threats: Are There Any Free Speech Protections?*, 23 J. MARSHALL J. COMPUTER & INFO. L. 845, 846 (2005).

⁵⁰ *Alkhabaz*, 104 F.3d at 1493.

⁵¹ *Id.*

⁵² *Id.* at 1496.

ences or shared among like-minded individuals, they can be understood as akin to the communications in *Alkhabaz*, fostering friendships with a close circle of Facebook users, and not posts made to a broad, public audience.⁵³

Adoption of a subjective standard would likely increase the burden of proof on the prosecution.⁵⁴ Regardless of whether an objective or subjective standard is used, the type of evidence consulted will likely be similar. Generally, intent is proved through circumstantial evidence, rather than direct testimony.⁵⁵ To this end, evidence that might tend to support a finding of a true threat in an objective test would be used in a jury's determination of whether a speaker intended to threaten. In the case of *Elonis*, the defendant's statements and other actions, the context of the remarks, and the actual fear his wife felt would bear heavily on the objective standard.⁵⁶ Both standards would be proved through circumstantial evidence; proof of subjective intent would require significantly more evidence than the proof required to pass an objective, reasonable person standard.

THE PURPOSE BEHIND THE TRUE THREATS EXCEPTION AND APPLYING THE DOCTRINE TO *ELONIS*

The true threats doctrine arises from *Schenck v. United States*, in which Justice Holmes announced the now-famous "clear and present danger" test for unprotected speech.⁵⁷ The seminal Supreme Court case recognizing true threats as a category of

⁵³ At least some judges of the Second Circuit has endorsed this view. See *United States v. Turner*, 720 F.3d 411, 432–34 (2d Cir. 2013) (Pooler, J., dissent), *cert. denied*, 2014 WL 1093163. Turner operated a blog on which he threatened the lives of several Seventh Circuit judges. For a thorough discussion of *Turner*, see Recent Case, *Second Circuit Affirms Threats Conviction in Internet Speech Case*—*United States v. Turner*, 127 HARV. L. REV. 2585 (2014).

⁵⁴ See Karst, *supra* note 6, at 1392–93. (Discussing proof of an "unequivocal" threat as a heightened burden of proof). Similarly, requiring proof of intent would require "unambiguous" proof that intent "be clearly and convincingly apparent." *Id.*

⁵⁵ David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1061 (2010) ("Unless the actor confesses his intent, proof of this element must be supplied circumstantially by inductive inference.").

⁵⁶ See McCann, *supra* note 46, at 535 ("[T]here are three factors to consider in order to determine whether speech is a threat: (1) the language itself, (2) the context in which the communication was made (i.e., would a reasonable person construe it as a serious intention to inflict bodily harm?), and (3) testimony by the recipient of the communication.") (citing *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1281 (M.D. Ala. 2004)). See also Rothman, *supra* note 3, at 319 ("Almost every circuit that uses the reasonable speaker/listener test allows evidence of the target's reaction to demonstrate the likely reaction of a reasonable listener."). I disagree with Rothman's analysis of the deleterious effects of this admission. Given the vast importance of context and circumstance in determining whether something is a true threat, circumstantial evidence will be used no matter the test; it will simply take *more* of it to convince a jury of intent.

⁵⁷ *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.").

speech unprotected by the First Amendment was *Watts v. United States*.⁵⁸ In *R.A.V. v. City of St. Paul*, the Court expanded on the reasoning behind the true threats exception, stating that its purpose was to “protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”⁵⁹

Many of the famous cases through the development of the true threats doctrine have involved either political speech, or speech that was purportedly political.⁶⁰ In these contexts, the Court has had occasion to comment on balancing public discourse and the marketplace of ideas against the potentially threatening nature of speech, but *Elonis* was not engaging in political speech.

What *Elonis* does show is that the harms identified in *R.A.V.* can be particularly poignant in the sort of exchange dramatized in *Elonis*: Tara *Elonis*, fearing for her safety in light of her husband’s posts, sought legal protection and seems genuinely to have been living in fear.⁶¹ As *amici* in support of the United States point out, the objective standard protects against the harms identified in *R.A.V.* that a subjective standard may miss.⁶²

⁵⁸ *Watts v. United States*, 394 U.S. 705, 708 (1969) (“[T]he statute initially requires the Government to prove a true ‘threat.’”).

⁵⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). For discussion of a potential additional purpose, *viz.* to prevent people from being coerced against their will, see Rothman, *supra* note 3, at 290–91. *But see* Karst, *supra* note 6, at 1340 (suggesting the first reason from *R.A.V.* encompasses Rothman’s fourth reason). For a thorough discussion of the deleterious psychological and health effects of living in fear due to threats, see *id.* at 1341–45.

⁶⁰ The cases frequently cited as central to the true threats doctrine involve political speech. *Watts v. United States* arose from a teenager (*Watts*) giving a speech that included his disapproval of the draft, while at a protest. He made comments that were construed as a threat against the President’s life, but which were adjudged political speech due in part to the political-rally context. 394 U.S. at 708. Another case central to true threats doctrine, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), involved alleged threats arising during political rallies and boycotts of businesses by African Americans in the 1960s and 1970s. A more recent—and notorious—case, *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003), involved purportedly political speech against abortion providers. See Karst, *supra* note 6, for an in-depth discussion of *Planned Parenthood*. In allied areas of First Amendment jurisprudence, such as incitement, the speech involved is also often arguably political in nature. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also *McCann*, *supra* note 46, at 525–27 (discussing the origins of true threat doctrine).

⁶¹ Tara *Elonis* testified at trial that she did, indeed, take the threats seriously. See *Elonis v. United States*, 730 F.3d 321, 325 (3d Cir. 2013).

⁶² See, e.g., Brief of Wisconsin et al. as Amici Curiae in Support of Respondent at 29, *Elonis v. United States*, No. 13-983 (Aug. 22, 2014), 2014 WL 4978891 (“The harm caused by a threat is not a function of any unexpressed, subjective purpose of the speaker, but rather results directly from the impact of the threat as it is understood by its recipients. A narrow focus on a speaker’s subjective intent unrealistically decontextualizes threatening communications from the background that gives them meaning and that determines their harmful impact. In contrast, the objective threat standard properly promotes the States’ interest in combating the harms caused by threats by realisti-

ELONIS AND JUDICIAL DISCUSSION OF MODERN LIFE

Elonis brings to the foreground issues that arise with increasing frequency in modern life—and modern court cases. Two, in particular, have piqued the public’s interest in *Elonis*: Facebook and rap music. What the Supreme Court says about these issues (and Internet speech more generally) will have far-reaching effects on future cases. The Supreme Court is only beginning to confront these issues, and with questionable understanding thus far. What they say in *Elonis* will help set the landscape for how courts will conceive of future cases.

Social Media

The issue that has caused the most interest in *Elonis* is not the question of objective versus subjective standard. Rather, commentators and *amici* are concerned about how technology will play into the decision. *Elonis* presents one of the first opportunities for the Court to comment on the characteristics of Facebook and what the nature of social media means for speech transmitted via its channels.⁶³ Indeed, many of the numerous *amicus* briefs filed in *Elonis* in support of *Elonis* focus on issues surrounding Facebook.⁶⁴

cally focusing on the objective meaning of the threatening speech as it would be understood by reasonable persons under all of the relevant circumstances.”).

⁶³ See, e.g., Clay Calvert et al, *Rap Lyrics Or True Threats? It’s Time For The High Court To Decide*, FORBES.COM (May 24, 2014, 12:32 AM), <http://www.forbes.com/sites/realspin/2014/05/24/rap-lyrics-or-true-threats-its-time-for-the-high-court-to-decide/> (“The nation’s high court has never considered a threats case involving either online social media or messages conveyed in a controversial form of artistic expression like rap music. Instead, it has addressed decidedly low-tech cases involving, for example, speech made at a political rally (*Watts v. U.S.*, 1969) and cross burning (*Virginia v. Black*, 2003).”). Of the *amicus* briefs filed in the case, at least four explicitly mention social media. E.g., Brief of the Student Press Law Center, *supra* note 43 4–5; Amicus Curiae Brief of the American Civil Liberties Union et al. in Support of Petitioner at 3, 24, & 27, *Elonis v. United States*, No. 13-983, 2014 WL 4215752 (brief filed Aug. 22, 2014); Brief of the Rutherford Institute, *supra* note 44 at 9; Amici Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression et al. in Support of the Petitioner at 17–19, *Elonis v. United States*, No. 13-983 (Aug. 22, 2014), 2014 WL 4298029. At least two more discuss the purportedly unique nature of Internet speech. E.g., Brief of Amicus Curiae National Center for Victims of Crime in Support of Respondent United States at 3, *Elonis v. United States*, No. 13-983, (Aug. 22, 2014), 2014 WL 4749502; Amicus Curiae Brief of the Center for Individual Rights in Support of Petitioner at 3, *Elonis v. United States*, No. 13-983, (Aug. 22, 2014), 2014 WL 4215755.

⁶⁴ At least eight *amicus* briefs filed at the time of this writing were in support of *Elonis*. See *Elonis v. United States*, SCOTUSBLOG.COM, <http://www.scotusblog.com/case-files/cases/elonis-v-united-states/> (last visited Oct. 20, 2014). Some *amici* focus on protecting political speech and journalistic integrity. Both of these concerns are somewhat inapt to a case arising from the sort of private speech *Elonis* was engaged in and does not require balancing the harms identified in *R.A.V.* against First Amendment protection of public exchange. See Karst, *supra* note 6, at 1389 (quoting Judge Stephen Reinhardt’s dissent in *Planned Parenthood of the Columbia/Willamette v. America Coalition of Life Activists*, 290 F.3d 1058, 1089 (2002) (Reinhardt, J., dissenting), which “emphasize[d] the difference between publicly delivered political speech, even ‘ugly or frightening,’ which ‘lies at the heart of our democratic process’ and thus deserves the First Amendment’s full protection, and private threats delivered one on one, which do not.”). See generally Eric J. Segall, *The Internet as a Game Changer: Reevaluating the True Threats Doctrine*, 44 Tex. Tech L. Rev. 183 (2011) (throughout the argument, highlighting the importance of the distinction between “core political speech cases” and other cases).

Because of the importance of circumstances in determining whether a statement is a true threat—regardless of the type of test used—it is likely that the Court will end up discussing the nature of Facebook.

Facebook, which topped one billion regular users in 2012⁶⁵ and continues to grow,⁶⁶ has been increasing in importance in the legal sphere in myriad ways. In September of this year a court permitted service of legal papers through Facebook for the first time.⁶⁷ Questions about the nature of Facebook and other social media have arisen in the context of discovery,⁶⁸ determination of procedural issues,⁶⁹ and privacy cases.⁷⁰ Lower courts have been increasingly called upon to decide questions that hinge on what, exactly, speech on Facebook *is*,⁷¹ how individuals who use Facebook relate to their varied and

Academics and commentators have also insisted on the importance of the distinction between “an open statement” and “writ[ing] a statement . . . with the intention of keeping the writing to one’s self.” See, e.g., Karst, *supra* note 6, at 1373. There are also simple distinctions the Court can draw to address concerns about freedom of the press in reporting threats made by others or inserting commentary into the public sphere. See Brief of the Reporters Committee for Freedom of the Press et al. in Support of Petitioner at 4–5, *Elonis v. United States*, No. 13-983, (Aug. 22, 2014), 2014 WL 4215753 (warning of threats, reporting threats, or commenting about threats are all easily distinguishable from making threats or directly engaging in threatening speech). Indeed, all these types of speech lack one element that some have deemed key to true threat jurisprudence: that the threat could be carried out by the speaker, or at least someone close to the speaker. See Rothman, *supra* note 3, at 321–23. Karst, *supra* note 6 at 1374–75, also discusses the distinction between threats and intentions to harm; even an objective standard is tied to the belief that the threatener is posing danger to the recipient, not merely that the speech gives the recipient some cause for concern.

⁶⁵ Barbara Ortutay, *Facebook tops 1 billion users*, USA TODAY (Oct. 4, 2012, 4:44 PM), <http://www.usatoday.com/story/tech/2012/10/04/facebook-tops-1-billion-users/1612613/>.

⁶⁶ See *Number of monthly active Facebook users worldwide from 3rd quarter 2008 to 2nd quarter 2014 (in millions)*, STATISTA, <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (last visited Oct. 27, 2014); Ami Sedghi, *Facebook: 10 years of social networking, in numbers*, THE GUARDIAN (Feb. 4, 2014, 9:38 AM), <http://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics>.

⁶⁷ Lily Hay Newman, *Family Court Rules That You Can Serve Someone With Legal Papers Over Facebook*, SLATE.COM (Sep. 22, 2014, 12:14 PM), http://www.slate.com/blogs/future_tense/2014/09/22/family_court_official_rules_that_staten_island_man_can_use_facebook_to_serve.html.

⁶⁸ See, e.g., *People v. Harris*, 949 N.Y.S.2d 590, 593 (Crim. Ct. 2012), *appeal dismissed*, 971 N.Y.S.2d 73 (App. Term 2013) (Discussing whether Tweets on Twitter are discoverable and stating that “[t]weets are not e-mails sent to a single party. At best, the defense may argue that this is more akin to an e-mail that is sent to a party and carbon copied to hundreds of others.”).

⁶⁹ See, e.g., *Lyons v. Rienzi & Sons, Inc.*, 09-CV-4253, 2012 WL 1393020, *5 (E.D.N.Y. Apr. 23, 2012) (holding that being able to view a Facebook page in a state is insufficient to establish contacts to create personal jurisdiction).

⁷⁰ See, e.g., *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 665–66 (D.N.J. 2013) (“The first issue before the Court is whether the [Stored Communications Act] applies to Facebook wall posts.”).

⁷¹ For instance, in 2012, a trial court had to consider whether a Facebook “like” was expressive speech. *Bland v. Roberts*, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012) *aff’d in part, rev’d in part and remanded*, 730 F.3d 368 (4th Cir. 2013).

various audiences, and—more generally—what exactly Facebook users are doing when they use the site.⁷²

This has caused no small amount of concern. The image of the Supreme Court as somewhat technologically illiterate (if not technophobic) is not from nowhere. In 1997, when deciding *Reno v. ACLU*,⁷³ Supreme Court clerks had to wheel computers into the Court to educate the justices about the Internet.⁷⁴ In the Rehnquist court, only three of the nine justices ultimately used email to communicate regularly.⁷⁵ Chief Justice Roberts, in 2010, had to ask the difference between e-mail and a pager.⁷⁶ Justice Antonin Scalia stated in an interview with *New York Magazine* that he “do[esn’t] know why anyone would like to be ‘friended’ on the network.”⁷⁷

One area into which the Court will almost certainly have to delve is whether an individual who posts on Facebook can reasonably be said to intend to keep such speech to himself.⁷⁸ This is a central issue in *Elonis*: Anthony Elonis has stated that he was not Facebook “friends” with his estranged wife and that therefore his posts were not intended to reach her.⁷⁹ But Elonis’ posts were public, making it accessible to his wife as well as the general public.⁸⁰ Prior true threat cases have discussed the effect of speech on publicly available websites, but these cases have not yielded a singular view of Internet

⁷² See, e.g., *Bland v. Roberts*, 730 F.3d 368, 384–86 (4th Cir. 2013) (delving into the mechanics of Facebook and what various uses of Facebook mean for the purposes of legal analysis).

⁷³ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁷⁴ See Tony Mauro, *Justices Get Schooled in Rap: Amicus briefs emerge in First Amendment Case*, NAT’L L.J. (Sept. 15, 2014), <http://www.nationallawjournal.com/home/id=1202669974445/Justices-Get-Schooled-in-Rap-?slreturn=20140816185710> (“The law clerks’ role in educating their justices about technology is behind the scenes, but important. For *Reno v. ACLU*, the first Internet case in 1997, clerks wheeled computers into justices’ chambers. More recently, clerks helped justices understand video games for *Brown v. Entertainment Merchants Association*, the 2011 ruling that struck down restrictions on the sale of violent video games. ‘The justices are not necessarily the most technologically sophisticated people,’ Justice Elena Kagan said afterward.”).

⁷⁵ JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 57 (2008) (“After e-mail became ubiquitous, the memos [that the justices used to communicate] also circulated electronically, but always with paper copies as well; among the justices, only Thomas and Breyer, and eventually Stevens, were fully comfortable communicating by e-mail.”).

⁷⁶ Bianca Bosker, *Sexting Case Befuddles Supreme Court: ‘What’s The Difference Between Email And A Pager?’*, HUFFINGTON POST (June 21, 2010), http://www.huffingtonpost.com/2010/04/21/ontario-quon-sexting-case_n_545764.html.

⁷⁷ Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK MAGAZINE (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/index2.html>.

⁷⁸ This issue is allied with the question of whether Facebook speech is private. See *supra* notes 70–72 and accompanying text. However, these questions may be irrelevant given that Elonis’ Facebook posts were public.

⁷⁹ Brooks Fuller, *United States Supreme Court to hear Facebook true threats case*, UNC CENTER FOR MEDIA LAW & POLICY (Aug. 5, 2014), <http://medialaw.unc.edu/2014/08/5539/> (“Elonis testified that he was not Facebook friends with his wife and that he never tagged her in the posts.”).

⁸⁰ See Oliver Bateman, *Why intent shouldn’t matter with online threats*, AL JAZEERA AM. (June 26, 2014), <http://america.aljazeera.com/opinions/2014/6/online-threats-internetfirstamendmentfacebook-supremecourt.html>.

threats.⁸¹ Whether the Court will determine that a public Facebook post is akin to a post on a public website, waiting for individuals to come across it and in a sense advertising itself to the world, remains to be seen. And certainly, what the Court says will color the legal discussions of Facebook in cases to come.

Rap Music

There is another feature of modern life that has cropped up in media coverage of the case and in *amicus* briefs: whether or not the Court will be able to truly understand rap lyrics.⁸² One of the *amicus* briefs in *Elonis* focuses largely on rap music.⁸³ *Amici* argue that rap is “especially susceptible to misreading and misinterpretation” and are concerned that an objective standard will illicitly criminalize this particular art form.⁸⁴

In other circumstances, courts have found both that performing a rap does not count as a true threat⁸⁵ and that giving a written copy of rap lyrics that threaten violence to another person does constitute a true threat.⁸⁶ Here, as with all true threats, context matters; the bare fact that rap is involved does not clearly cut in any particular direction.

There are some data available that suggest both that juries tend to view rap lyrics more negatively than violent lyrics from other styles of music.⁸⁷ Additionally, as explained in the *amicus* brief for the Thomas Jefferson Center for the Protection of Free Expression, et al., this can have serious effects on outcomes in criminal trials, including in threat cases.⁸⁸ This is to say nothing of the concern that broader racial prejudice plays into negative views of rap music.⁸⁹

⁸¹ See generally McCann, *supra* note 46; Karst, *supra* note 6.

⁸² See Dahlia Lithwick, *Schooling the Supreme Court on Rap Music*, SLATE.COM (Sept. 17, 2014, 4:49 PM), http://www.slate.com/articles/health_and_science/jurisprudence/2014/09/elonis_v_united_states_facebook_free_speech_case_supreme_court_justices.html; see also, *Amici Curiae Brief of the Marion B. Brechner First Amendment Project et al., Elonis v. United States*, No. 13-983, (Aug. 18, 2014), 2014 WL 4180919.

⁸³ *Amici Curiae Brief of the Marion B. Brechner First Amendment Project et al.*, *supra* note 82.

⁸⁴ *Id.* at 3.

⁸⁵ *In re S.W.*, 45 A.3d 151, 152 (D.C. 2012) (“[T]he fact that S.W. paraded back and forth on the sidewalk in front of [the victim], performing to a laughing audience and singing a modified rap song about setting the block and her house on fire, cannot reasonably be perceived as communicating a threat”) (The context of laughing neighbors and an obvious joke figured into the court’s analysis).

⁸⁶ *Jones v. State*, 64 S.W.3d 728, 735 (Ark. 2002) (determining that a student giving his rap song, which threatened violence, to another student was a true threat).

⁸⁷ See generally Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999).

⁸⁸ Brief of the Thomas Jefferson Center for the Protection of Free Expression, et al. as *Amici Curiae* in Support of the Petition for a Writ of Certiorari, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983), 2013 WL 8123046 at 8 (“As a result of . . . stereotypes broadly associated with rap, a speaker who communicates through quoted verses or who frames his message in a particularly extreme style of rap may find the legal deck stacked against him in a true threat case, with listeners (both intended and unintended), jurors, and even judges perhaps wrongly assuming that the mere form of expression makes it

The question is whether rap falls on deaf ears (no pun intended) when it comes to the Supreme Court. Issues of the distinction between performance and speech are not new—indeed, the Court recently upheld the proposition that entertainment is protected by the First Amendment⁹⁰—and, as some commentators have pointed out, the Justices are partial to other forms of music that portray violent acts, especially opera.⁹¹ But if it is true that rap is culturally maligned and misunderstood, *Elonis* is an opportunity for the Court to make clear that, at least as a genre of music, rap ought to be afforded the same First Amendment protection as other artistic expression. Though if a “threat is set to music, or rapped,” it can still be punished: As Professor Timothy Zick stated, “Merely setting something to music [or claiming it’s art] does not necessarily save the speaker from prosecution.”⁹²

Commentators have questioned whether the “writing of violent rap lyrics by amateur rappers on Facebook, Youtube, or Soundcloud” could end up being viewed as a crime because of bias against rap music.⁹³ This is not to say that music or lyrics can never be used to transmit a true threat, or that rap music should never be viewed as doing so. At least one federal case has, in fact, brought criminal charges against individuals based on a YouTube video of them performing a rap.⁹⁴ But, as has been emphasized throughout this

more likely to be a true threat. In short, rap carries with it into court the heavy baggage of negative controversy and stigmatization; it is an entire genre of artistic expression prime for judicial and juror abuse.”)

⁸⁹ See generally Amici Curiae Brief of the Marion B. Brechner First Amendment Project et al., *supra* note 82, at 3, 9–13.

⁹⁰ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2741–42 (2011). *Brown* centered around the sale and rental of violent video games to minors. The Court held that “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices . . . and through features distinctive to the medium That suffices to confer First Amendment protection. Under our Constitution, ‘esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.’” *Id.* at 2733 (quoting *United States v. Playboy Entm’t Grp, Inc.*, 529 U.S. 803, 818 (2000)). The Court made reference to attempts to regulate music lyrics, as well. *Id.* at 2737.

⁹¹ See Tony Mauro, *Justices Get Schooled in Rap: Amicus Briefs Emerge in First Amendment Case*, NAT’L L.J. (Sept. 15, 2014), <http://www.nationallawjournal.com/id=1202669974445/Justices-Get-Schooled-in-Rap-?slreturn=20140906023143> (“Whatever the justices think about rap music, their interest in other kinds of music is well-established. . . . Yet none of the *Elonis* briefs mention the violence—love-triangle murders and suicides galore—found in many operas and their lyrics.”).

⁹² Lauren C. Williams, *When Does Music Become A Criminal Threat?*, THINKPROGRESS (updated June 19, 2014, 1:27 PM), <http://thinkprogress.org/justice/2014/06/19/3450412/how-real-are-threats-made-on-social-media/> (quoting an interview with Prof. Timothy Zick) (alteration in original).

⁹³ A.J. Akfari, *Is Rapping on Facebook a Crime? The Unsympathetic Case of a Wanna-Be Eminem*, TECHLAWGIC (June 19, 2014), <http://techlawgic.com/2014/06/elonis-facebook-rapping-about-wife-a-crime/>.

⁹⁴ *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012), *cert. denied*, 134 S. Ct. 59 (2013); see also *Celis*, *supra* note 3, at 228. A state court in Pennsylvania also found two defendants guilty after they made a rap video that contained violent statements aimed at police. *Commonwealth v. Knox*, MJ-05206-CR-0000151-2013 (Pa. Commw. Ct. 2013). The case is tied up with other charges, including evading arrest. See Paula Reed Ward, *Sentence Issued for Anti-Police Rap Video*, PITTSBURGH POST-GAZETTE, Feb. 6, 2014, <http://www.post-gazette.com/local/city/2014/02/07/Sentence-issued-for-anti-police-rap-video/stories/201402070084>.

Comment, context is of utmost importance—a lesson repeated since *Schenck*'s first statement that words must be viewed in their circumstances.⁹⁵ The Court ought not to let misunderstanding of a genre factor into their analysis of whether *Elonis*' speech was a threat or, through dicta in *Elonis*, enshrine a particular view of rap music that will color doctrine for the foreseeable future.

CONCLUSION

Elonis enters the Supreme Court docket in order to—hopefully—smooth out a narrow but deep split in the circuits about the standard for adjudging true threat cases. It will be an opportunity for the Court to explain its intent in *Black*, and to clarify its own view of true threats. *Elonis* will also require the Court to make statements about the nature of Facebook and online communication, and in some sense the artistic value of rap music. Both of these discussions will be key to determining the proper standard for true threat cases and, ultimately, in determining whether *Elonis* engaged in threatening speech.

It is true that online communication was not foreseen when true threats doctrine was first developed, and that the changing context of communication requires taking a nuanced view of Internet speech. But this is an area of doctrine in which context is already a paramount consideration. There is no reason that posting privately or to a limited audience on Facebook cannot be distinguished from posting publicly on Facebook. Individuals who create or perform rap can plausibly be viewed differently from those who merely parrot lyrics—and even those who parrot lyrics can be viewed differentially depending on the context in which their parroting occurs. In order to truly combat those dangers identified in *R.A.V.* (namely, freedom from reasonable fear and its effects) in the context of non-political speech such as in *Elonis*, an objective standard should be maintained.



⁹⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1919).