

Supreme Court Rules on Social Media Speech

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Washington D.C.—In the case *Elonis v. United States*, the Supreme Court established on June 1, 2015, that plaintiffs must prove more than whether a “reasonable person” would find speech on social media threatening.

Anthony Elonis was arrested for violating an interstate communications code stating that any communication made with intent to injure another is illegal. Elonis posted threatening rap lyrics, with a disclaimer that the lyrics were fictitious. His lyrics alluded to killing his ex-wife and others.

In the lower courts, Elonis was convicted on the grounds that a “reasonable person” would find his lyrics threatening. The Supreme Court reversed the decision. Justice Roberts wrote that negligence was not a factor in this case. Rather, there was no true threat because Elonis had not intended to act upon his words; thus, *mens rea* (intention of the person committing a crime) was the key factor in the Court’s decision.

Elonis asserted that his lyrics were a form of therapy. In this manner, he was exercising his rights based on the “safety valve” theory. This was Elonis’ way of expressing his feelings through art. The reason the Court’s ruling could cause future conflict is that it seems to disregard the interstate communications code. However, the Court focused on Elonis’ intent, which made Elonis’ lyrics more like hate speech than fighting words. Hate speech is constitutional, while fighting words pose an immediate threat of harm. Based on this ruling, it is possible that there could be an increase in threatening language, disguised as art, on the web.

Justice Thomas (dissent) argued that the act of posting threatening messages was intent to harm and that Elonis should not be exempt from the law based on ignorance of law. In future cases, it is possible that defendants will argue ignorance. Justice Thomas further asserted that the Court’s avoidance of discussing the First Amendment issues of recklessness would cause further incertitude.

On the other hand, this case sets precedence for hyperbolic speech that uses extreme language that could be perceived as threatening. In that case, people would be able to freely participate in a free-flow dialog of democracy. The *Elonis* case had the possibility of creating a “chilling effect” on internet users, consequently stifling discussion. Elonis posted a comedian’s joke about killing the President, but replaced “President” with reference to his ex-wife. If Elonis’ case had been upheld by the Supreme Court, people would be forced to censor even casual conversation.

While Elonis’ lyrics were perceived as threatening, they did not pass as clear and present danger. The *Brandenburg* Test states that for speech to be considered unprotected by the First Amendment, it must incite immediate violence. Because of the medium that Elonis used—the internet—the threatening words did not indicate any sort of immediacy.

The Court ruled that the jury was instructed in error; the government needs to prove more than the fact that a reasonable person would perceive the lyrics as threats. Further, liability only stands when the defendant is conscious of the wrongdoing.