

February 2016

Incitement, Threats, and Constitutional Guarantees: First Amendment Protections pre- and post-*Elonis*

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Mark Strasser, *Incitement, Threats, and Constitutional Guarantees: First Amendment Protections pre- and post-Elonis*, 14 U.N.H. L. REV. 163 (2016), available at http://scholars.unh.edu/unh_lr/vol14/iss1/5

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Incitement, Threats, and Constitutional Guarantees: First Amendment Protections pre- and post-*Elonis*

MARK STRASSER*

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INTRODUCTION

While the First Amendment to the United States Constitution protects the freedom of expression, individuals issuing threats or advocating illegal conduct may be subject to punishment. What constitutes proscribable speech has long been evolving, and the recent jurisprudence suggests that First Amendment protections are more robust for advocacy of illegal conduct than for threats. *Elonis v. United States*¹ provided the Court with a golden opportunity to clarify First Amendment threat jurisprudence; however, those hoping for an illuminating analysis cannot help but be disappointed.

Part I of this Article discusses the developing First Amendment jurisprudence regarding the regulation of incitement, focusing on how constitutional protections for such speech have increased over time. Part II discusses the constitutional limitations on the regulation of threats, noting the Court's consistent refusal to address what kind of subjective intent is necessary in order for an individual to be convicted of having made a threat. Part III focuses on *Elonis* in particular, explaining how

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¹ 135 S. Ct. 2001 (2015).

the case wasted the opportunity to clarify a number of First Amendment issues. The article concludes by pointing to several areas the Court may be forced to address in the not-too-distant future, including some of the confusions created by the *Elonis* opinion itself.

I. INCITEMENT AND THE FIRST AMENDMENT

The First Amendment incitement jurisprudence has been developing for almost a century. Some of the early cases involved the application of the Espionage Act to individuals accused of obstructing the draft. The clear and present danger test used in those cases later evolved into the *Brandenburg* test, which focuses on both imminence and the intent to cause harm. The protections of this test, when applicable, have proven very difficult to overcome. In *Schenck v. United States*,² the Court examined the constitutionality of the Espionage Act, which criminalized “causing and attempting to cause insubordination . . . in the military and naval forces of the United States,”³ as well as attempting “to obstruct the recruiting and enlistment service of the United States.”⁴ The focus of the prosecution was on a leaflet sent by Schenck, the “general secretary of the Socialist party,”⁵ to individuals who had been drafted.⁶ The leaflet included text from the Thirteenth Amendment to the United States Constitution:⁷ “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁸

After quoting the constitutional text, the leaflet suggested that the draft, which involved “despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few,”⁹ violated the spirit of the Thirteenth Amendment.¹⁰ The draft rendered “a conscript . . . little better than a convict.”¹¹

² 249 U.S. 47 (1919).

³ *Id.* at 48–49 (citing Espionage Act, ch. 30, 40 Stat. 217, 219 (1917) (current version at 18 U.S.C.A. §792 *et seq.*)).

⁴ *Id.* at 49.

⁵ *Id.*

⁶ *Id.* at 49–50.

⁷ *See id.* at 50.

⁸ U.S. CONST. amend. XIII, § 1.

⁹ *Schenck*, 249 U.S. at 50–51.

¹⁰ *Id.* at 50.

¹¹ *Id.* at 50–51.

Urging readers not to submit to intimidation,¹² the leaflet “in form at least confined itself to peaceful measures such as a petition for the repeal of the act.”¹³ It exhorted individuals to assert their rights for their own and others’ good.¹⁴ “If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.”¹⁵

A number of issues were implicated in *Schenck*, including the purpose behind the distribution of the leaflets and whether distributing them was protected by the First Amendment.¹⁶ Writing for the Court, Justice Holmes reasoned that “the document[] would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.”¹⁷ Yet, the leaflet on its face only advocated legal action such as seeking repeal of the draft,¹⁸ and those subject to the draft might have been thought especially interested in taking concrete steps to have the draft repealed. Thus, the leaflet might have been designed to urge interested parties to engage in legal action.

The *Schenck* Court admitted that the contents of the leaflet would normally be constitutionally protected.¹⁹ However, the normal rules may not apply during times of war,²⁰ and “the character of every act depends upon the circumstances in which it is done.”²¹ For example, the “most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”²²

Why is falsely yelling fire in a crowded theater subject to punishment? In a crowded theater, there may be no time to figure out whether such a warning is accurate, and it would be unsurprising for those packed in the closed space to panic.²³ But Holmes’s point that

¹² *Id.* at 51.

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *Schenck*, 249 U.S. at 51.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 52.

²⁰ *Id.*

²¹ *Schenck*, 249 U.S. at 52 (citing *Aikens v. Wisconsin*, 195 U.S. 194, 205–06 (1904)).

²² *Id.*

²³ Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 *Nw. U.L. Rev.* 54, 78 (1989).

falsely yelling fire should not be protected is only obviously correct because of some implicit assumptions, for example, that the individual knew that there was no fire. If, instead, an individual reasonably but wrongly believed there was a fire and yelled in order to save lives, then he presumably should not be prosecuted,²⁴ although perhaps not because of First Amendment guarantees.²⁵

The mailing at issue in *Schenck* was disanalogous to the person shouting “Fire” in at least two respects. First, unlike the person who was aware there was no fire and shouted “Fire” nonetheless, Schenck believed what was said in the leaflet, so he was more analogous to the individual who sincerely but mistakenly believed that there was a fire. Second, a mailing received at home, especially one with a political message attempting to persuade people to do something like work towards the repeal of the draft,²⁶ is much less likely to cause a panic than is shouting fire in a crowded theater.²⁷ In short, the comparison was inapt.²⁸

The *Schenck* Court announced the relevant standard: “[W]hether 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.”²⁹ By making constitutional protections turn on “proximity and degree,”³⁰ the Court implied that judgment was required to determine which kinds of statements, protected during safer times, nonetheless could be prohibited because too dangerous to articulate in the circumstances at hand. At least one difficulty in *Schenck* was that the mailing did not plausibly constitute a clear and present danger.³¹

²⁴ See Mark Strasser, *Mill, Holmes, Brandeis and a True Threat to Brandenburg*, 26 BYU J. PUB. L. 37, 44 (2011) (discussing individual who reasonably but falsely yells “Fire!” in a crowded theater). *But cf.* L.A. Powe, Jr., *Searching for the False Shout of “Fire,”* 19 CONST. COMMENT. 345, 348–49 (2002) (speculating that Holmes’s example might have been based on an event in which an individual had wrongly believed that there was a fire and then caused a panic when he warned everyone).

²⁵ *Cf. City of San Angelo Fire Dep’t v. Hudson*, 179 S.W.3d 695, 706 (3d. Cir. 2005) (concluding that a fire truck driver is immune from suit for causing accident when “a reasonable fire truck driver in Hood’s [the driver’s] position could have believed that his actions were justified”).

²⁶ See *supra* notes 13–15 and accompanying text.

²⁷ See Strasser, *supra* note 24.

²⁸ Powe, *supra* note 24, at 346.

²⁹ *Schenck*, 249 U.S. at 52.

³⁰ *Id.*

³¹ See Strasser, *supra* note 24, at 45; see also Floyd Abrams, *A Worthy Tradition: The Scholar and the First Amendment*, 103 HARV. L. REV. 1162, 1164 n.16 (1990) (reviewing

Justice Holmes provided further explanation of the Court's First Amendment approach to incitement in *Frohwerk v. United States*.³² Frohwerk was charged with violating the Espionage Act for his part in the preparation and publication of a series of anti-war articles in a newspaper.³³ One article, ostensibly condemning anti-draft riots,³⁴ was written "in language that might be taken to convey an innuendo of a different sort."³⁵ The article, "made as moving as the writer was able to make it,"³⁶ recounted the story of a drafted man who became disillusioned after being sent overseas.³⁷

Justice Holmes explained that *Schenck* establishes "that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion,"³⁸ although there are circumstances, even during wartime, when printing articles critical of the government's policies would not be a crime.³⁹ After all, the newspaper had not targeted individuals subject to the draft⁴⁰ and the paper had a small circulation.⁴¹ Nonetheless, the Court was unwilling to overturn the conviction of conspiracy to obstruct recruitment⁴² because "the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that . . . fact was known and relied upon by those who sent the paper out."⁴³ Once again, the Court's willingness to affirm the conviction in light of the recently announced "clear and present danger" test⁴⁴ suggested the burden thereby imposed was not particularly onerous, because the Court refused to

HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1988) (Jamie Kalven ed., 1988) (discussing how "difficult . . . the affirmance of Schenck's conviction is to comprehend today").

³² 249 U.S. 204 (1919).

³³ *Id.* at 205.

³⁴ *See id.* at 207.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Frohwerk*, 249 U.S. at 207.

³⁸ *Id.* at 206.

³⁹ *Id.* at 208.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.* at 209.

⁴³ *Frohwerk*, 249 U.S. at 209.

⁴⁴ Michael C. Shaughnessy, Comment, *Praising the Enemy: Could the United States Criminalize the Glorification of Terror under an Act Similar to the United Kingdom's Terrorism Act 2006?*, 113 PENN ST. L. REV. 923, 952 n.200 (2009) ("*Frohwerk* did not explicitly rely upon the clear and present danger test articulated in *Schenck*, but the Court nevertheless cited the earlier opinion in its reasoning.>").

overturn the conviction based on the mere possibility that the publication might result in obstruction.⁴⁵

*Debs v. United States*⁴⁶ also illustrated that the clear and present danger test was relatively easy to meet.⁴⁷ Debs gave a public speech and was accused of having “obstructed and attempted to obstruct the recruiting and enlistment service of the United States.”⁴⁸ The Court described the address, noting that Debs had begun by saying that “he had just returned from a visit to the workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class[,] . . . ha[ving] been convicted of aiding and abetting another in failing to register for the draft.”⁴⁹ Debs explained that “he had to be prudent and might not be able to say all that he thought,”⁵⁰ which the Court took to be “intimating to his hearers that they might infer that he meant more.”⁵¹

The Court reviewed Debs’s trial, noting that he had announced to the jury that that he was opposed to war.⁵² But if Debs’s opposition to war was also reflected in his public address and if “one purpose of the speech . . . was to oppose not only war in general but this war, and that . . . opposition was so expressed that its natural and intended effect would be to obstruct recruiting,”⁵³ then the conviction could withstand a constitutional challenge.⁵⁴

Although there was no evidence of the prohibited expression in *Debs*, *Frohwerk*, or *Schenck* having caused a disturbance,⁵⁵ Eugene Debs was a great orator who had thousands of followers.⁵⁶ His words might have been expected to have a greater impact than the published words at

⁴⁵ Lieutenant Dennis R. Neutze, JAGC, USN, *Yardsticks of Expression in the Military Environment*, 27 JAG J. 180, 187 (1973) (discussing “the Court’s reliance in *Frohwerk* on the jury’s finding of the size of the possible conflagration caused by an admittedly speculative spark”).

⁴⁶ 249 U.S. 211 (1919).

⁴⁷ See *Abrams*, *supra* note 31, at 1163 (discussing “the even more disastrous *Debs v. United States*”).

⁴⁸ *Debs*, 249 U.S. at 212.

⁴⁹ *Id.* at 212–13.

⁵⁰ *Id.* at 213.

⁵¹ *Id.*

⁵² *Id.* at 214.

⁵³ *Id.* at 214–15.

⁵⁴ *Debs*, 249 U.S. at 215.

⁵⁵ Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten*, 61 U. COLO. L. REV. 1, 17 (1990).

⁵⁶ Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538 (1998).

issue in *Frohwerk*;⁵⁷ yet Debs had consciously limited what he said out of prudence,⁵⁸ perhaps because he realized that there were individuals in the crowd hoping to use his words against him in a court of law.⁵⁹ Just as the *Schenck* Court had noted that while the words themselves had not crossed the line it was safe to assume that promotion of illegal activity was the goal,⁶⁰ the *Debs* Court seemed to adopt that same approach of imputing a desire to promote illegal activity.⁶¹

One difficulty with the approach employed by the Court in *Debs*, *Frohwerk*, and *Schenck* is that individuals contemplating making certain statements would not know prospectively whether their speech was constitutionally protected—the line between protected and unprotected speech was difficult to discern.⁶² An additional difficulty was that the Court seemed to uphold convictions for speech that had been carefully crafted to be on the *correct* side of the law based on the Court’s fear that the audience might read between the lines⁶³ and infer a meaning that would likely have been subject to criminal sanction if stated expressly.⁶⁴

In *Abrams v. United States*,⁶⁵ the defendants were charged *inter alia* with attempting to interfere with the production of war materials.⁶⁶ Fearing that munitions would be used against Russia, the defendants

⁵⁷ Cf. Judah A. Druck, *Droning on: The War Powers Resolution and the Numbing Effect of Technology-Driven Warfare*, 98 CORNELL L. REV. 209, 224 (2012).

⁵⁸ *Debs*, 249 U.S. at 213.

⁵⁹ Nathan Goetting, *A Perfect Peace Too Horrible to Contemplate: Justice Holmes and the Perpetual Conviction of Eugene Victor Debs*, 63 GUILD PRAC. 135, 140 (2006) (“He [Debs] knew that agents would be out there among the auditors, sniffing at every word, trying to make the case that his speech had obstructed the draft; so he chose his words carefully.”).

⁶⁰ See *supra* note 17 and accompanying text.

⁶¹ See *supra* notes 49–50 and accompanying text.

⁶² See Mark D. Salisbury, *Questions of Vagueness and State Constitutional Legitimacy: The State Constitutional Challenge to Minnesota’s Obscenity Statute: State v. Davidson*, 481 N.W.2d 51 (Minn. 1992), 16 HAMLIN L. REV. 281, 308 (1992) (noting that “when [a] statute involves speech that may be protected by the First Amendment, the requirement of fair notice is particularly important”).

⁶³ Cf. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1262 (1983) (discussing “Holmes’s reliance on possible innuendo”).

⁶⁴ Michele Munn, *The Effects of Free Speech: Mass Communication Theory and the Criminal Punishment of Speech*, 21 AM. J. CRIM. L. 433, 455 (1994) (“*Debs* would chill political speech because it would be hard to criticize the war effort without falling under the umbrella of criminal intent to obstruct the recruiting of troops.”).

⁶⁵ 250 U.S. 616 (1919).

⁶⁶ *Id.* at 617.

attempted to dissuade munitions workers from performing their jobs.⁶⁷ The *Abrams* Court reasoned that “[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce,”⁶⁷ and the intended result of their work stoppage would have been to aid Germany, a country with whom the United States was at war.⁶⁸ The Court seemed to incorporate the test that had been used in the *Schenck*, *Frohwerk*, and *Debs*, decisions all authored by Justice Holmes.⁶⁹ However, Justice Holmes dissented in *Abrams*, noting the defendants were not German sympathizers,⁷⁰ and suggesting that the intent to aid Germany could not fairly be attributed to the defendants.⁷¹ “[A] deed is not done with intent to produce a consequence unless that consequence is the aim of the deed.”⁷² Holmes did not believe that the mere likelihood of hindering the war effort would or should suffice as a basis for conviction.⁷³

A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime.⁷⁴

Justice Holmes was correct that a patriot who persuaded others that we should spend less on planes should not be punished, even if that advocacy impeded a war effort. But that point is not particularly helpful without further discussion of why that is so. Suppose, for example, that the individual persuading others to reduce expenditures on the air force

⁶⁷ *Id.* at 620–21.

⁶⁷ *Id.* at 621.

⁶⁸ *See id.* at 617 (noting that “the United States was at war with the Imperial Government of Germany”).

⁶⁹ *See* Rabban, *supra* note 63 at 1208 (discussing the “postwar opinions by Holmes in *Schenck v. United States*, *Frohwerk v. United States*, and *Debs v. United States*”).

⁷⁰ *Abrams*, 250 U.S. at 625 (Holmes, J., dissenting) (“A note adds ‘It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reason for denouncing German militarism than has the coward of the White House.’”).

⁷¹ *Id.*

⁷² *Id.* at 627.

⁷³ *Id.*

⁷⁴ *Id.*

was not a patriot but, instead, was someone who simply wanted a lower tax burden. That still would not have provided the basis for prosecution, even though his actions would have (foreseeably and actually) contributed to weakening the military and those actions would not have been motivated by patriotism. But if even the non-patriot who advocates for a reduction in air force expenditures should not be punished, then there are more relevant considerations than whether particular conduct is likely to undermine the war effort and whether the person's motivation is patriotic.

Justice Holmes's discussion in his *Abrams* dissent of the patriot who sought to divert airplane funding to other sources suggests that Holmes' focus was not purely on the probability of an action having negative consequences,⁷⁵ although he also implied that the leaflets at issue could not reasonably have been thought likely to harm government efforts.⁷⁶ “[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.”⁷⁷ While Justice Holmes may have been correct about the likelihood that these flyers would hurt the war effort, the implicit standard adopted in *Frohwerk* doomed *Abrams*, because “circulation of the [circular] . . . in quarters where a little breath would be enough to kindle a flame”⁷⁸ sufficed to uphold the conviction.

Schenck, *Frohwerk*, *Debs*, and *Abrams* offer the following test to determine whether speech can be criminalized: if there is a clear and present danger that the speech at issue will cause the kind of harm that is within the power of the state to prevent, then the First Amendment will not protect the speech at issue.⁷⁹ Arguably, that test was misapplied in that convictions were upheld even when the expression at issue did not pose a clear and present danger.⁸⁰ However, that test was supplanted with a more protective test in *Brandenburg v. Ohio*.⁸¹

⁷⁵ *Id.* at 625–27.

⁷⁶ *Abrams*, 250 U.S. at 626, 628 (Holmes, J., dissenting).

⁷⁷ *Id.* at 628

⁷⁸ *Frohwerk v. United States*, 249 U.S. 204, 209 (1919).

⁷⁹ *Cf. Dennis v. United States*, 341 U.S. 494, 505 (1951) (“[A] conviction relying upon speech . . . as evidence of violation may be sustained only when the speech . . . created a ‘clear and present danger’ of attempting or accomplishing the prohibited crime, e.g., interference with enlistment”).

⁸⁰ See *supra* notes 30, 44, and 74 and accompanying text.

⁸¹ 395 U.S. 444 (1969).

At issue in *Brandenburg* was Ohio's criminal syndicalism statute, which "punishe[d] persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform.'" ⁸² A Ku Klux Klan leader had invited a TV reporter to a Klan rally. ⁸³ The rally was filmed, some of which was later broadcast on TV, ⁸⁴ including a speech by the appellant: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." ⁸⁵ Another film showed the appellant expressing his opinion that "the nigger should be returned to Africa, the Jew returned to Israel." ⁸⁶ Some of the individuals in the film carried weapons. ⁸⁷ The leader was convicted under Ohio law, ⁸⁸ and he appealed. ⁸⁹

Striking down the statute as unconstitutional, the Court explained that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." ⁹⁰ This standard was distinct from the clear and present danger test ⁹¹ in its emphasis both on imminence and on the likelihood of the

⁸² *Id.* at 448.

⁸³ *Id.* at 444–45 ("The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan 'rally' to be held at a farm in Hamilton County.").

⁸⁴ *Id.* ("With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.").

⁸⁵ *Id.* at 446.

⁸⁶ *Id.* at 447.

⁸⁷ *Brandenburg*, 395 U.S. at 447 ("[S]ome of the figures in the films carried weapons").

⁸⁸ *Id.* at 444 ("The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute").

⁸⁹ *See id.* at 445 ("Appeal was taken to this Court").

⁹⁰ *Id.* at 447, 449.

⁹¹ *See* Susan M. Gilles, *Brandenburg v. State of Ohio: An "Accidental," "Too Easy," and "Incomplete" Landmark Case*, 38 CAP. U. L. REV. 517, 520 (2010) ("*Brandenburg* is famous for abandoning the 'clear and present danger' test"); John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 438 (2002) ("the [*Brandenburg*] Court repudiated the 'clear and present danger' test and brought into power the modern-day incitement test"); *cf.* *Brandenburg*, 395 U.S. at 449–50 (Black, J., concurring) ("I agree with the views expressed by Mr. Justice Douglas in his concurring opinion in this case that the 'clear and present danger' doctrine should have no place in the interpretation of the First Amendment.").

harm.⁹² The Court did not discuss whether *Brandenburg* could also be understood as a case involving threats in addition to incitement.⁹³

*Hess v. Indiana*⁹⁴ provided further explanation of *Brandenburg*. Hess had taken part in an antiwar demonstration at Indiana University.⁹⁵ While police were clearing the streets, he had said that “[w]e’ll take the fucking street later”⁹⁶ or, perhaps, “[w]e’ll take the fucking street again.”⁹⁷ When making this comment, he “did not appear to be exhorting the crowd to go back into the street,”⁹⁸ although he was facing the crowd and did not appear to be speaking to anyone in particular.⁹⁹ Hess was convicted of disorderly conduct.¹⁰⁰

The Indiana Supreme Court interpreted Hess’ speech as advocacy of illegal conduct that was likely to occur.¹⁰¹ But the United States Supreme Court concluded the speech “at worst . . . amounted to nothing more than advocacy of illegal action at some indefinite future time,”¹⁰² and thus was “not sufficient to permit the State to punish Hess’ speech.”¹⁰³ The lack of imminence meant the speech at issue could not be criminalized under *Brandenburg*.¹⁰⁴ The Court did not address whether Hess’ statement could have been interpreted as a threat and, if so, what constitutional test would be applied to determine whether such a threat would be constitutionally protected.¹⁰⁵

⁹² See *Brandenburg*, 395 U.S. at 447, 449.

⁹³ Cf. Marc Rohr, *Grand Illusion?*, 38 WILLAMETTE L. REV. 1, 23 (2002) (“The speech that the Court . . . found protected under *Brandenburg* did indeed amount to threats of physical harm.”).

⁹⁴ 414 U.S. 105 (1973).

⁹⁵ *Id.* at 106 (“The events leading to Hess’ conviction began with an antiwar demonstration on the campus of Indiana University.”).

⁹⁶ *Id.* at 106–07.

⁹⁷ *Id.* at 107.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Hess*, 414 U.S. at 105 (“Gregory Hess appeals from his conviction in the Indiana courts for violating the State’s disorderly conduct statute.”).

¹⁰¹ *Id.* at 108 (“The Indiana Supreme Court placed primary reliance on the trial court’s finding that Hess’ statement ‘was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action.’”) (citing *Hess v. State*, 297 N.E.2d 413, 415 (Ind. 1973)).

¹⁰² *Hess*, 414 U.S. at 108.

¹⁰³ *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

¹⁰⁴ *Id.*

¹⁰⁵ See Jordan Strauss, *Context Is Everything: Towards a More Flexible Rule for Evaluating True Threats under the First Amendment*, 32 SW. U. L. REV. 231, 246 (2003) (“The Court . . . avoided discussing Hess’ statement as a threat”); see also Rohr, *supra*

N.A.A.C.P. v. Claiborne Hardware Co., which involved a First Amendment challenge to an imposition of damages resulting from a boycott, further explicated *Brandenburg*.¹⁰⁶ The Claiborne County chapter of the NAACP sought to promote the hiring of “Negro clerks and cashiers”¹⁰⁷ by local stores. When demands for equal opportunity were not received favorably, the NAACP voted to boycott white merchants.¹⁰⁸ Charles Evers, one of the boycott organizers, stated that “boycott violators would be ‘disciplined’ by their own people and warned that the Sheriff could not sleep with boycott violators at night.”¹⁰⁹ Evers reportedly said during one speech: “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”¹¹⁰

Some incidents involving violence against African-Americans willing to patronize white merchants allegedly occurred before Evers had made these statements,¹¹¹ but there were no identified incidents after these speeches.¹¹² That said, however, punishments were inflicted on those who did not participate in the boycott.¹¹³ The *Claiborne Hardware* Court noted that “names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper,”¹¹⁴ which was characterized as an attempt “to persuade others to join the boycott through social pressure and the ‘threat’ of social ostracism.”¹¹⁵ The Court found the state could not “prohibit peaceful political activity such as that found in the boycott in this case.”¹¹⁶

While the First Amendment protects speech, it does not protect violence or threats of violence,¹¹⁷ and “there [was] no question that acts of violence occurred.”¹¹⁸ Nonetheless, because the First Amendment

note 93, at 10 (“Hess involved a participant in an antiwar demonstration on a university campus whose speech can best be characterized as a statement of intent to take illegal action in the future—a statement that can also be described as a threat”).

¹⁰⁶ See 458 U.S. 886, 927–28 (1982).

¹⁰⁷ *Id.* at 899–900.

¹⁰⁸ *Id.* at 900.

¹⁰⁹ *Id.* at 902.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 903 (“[The chancellor] . . . did identify, however, several significant incidents of boycott-related violence that occurred some years earlier.”).

¹¹² *Claiborne Hardware*, 458 U.S. at 903 (“The chancellor identified no incident of violence that occurred after the suit was brought.”).

¹¹³ *Id.* at 903–04.

¹¹⁴ *Id.* at 909.

¹¹⁵ *Id.* at 909–10.

¹¹⁶ *Id.* at 913.

¹¹⁷ *Id.* at 916 (“The First Amendment does not protect violence.”).

¹¹⁸ *Claiborne Hardware*, 458 U.S. at 916.

was implicated, “‘precision of regulation’ [was] demanded.”¹¹⁹ The Court reasoned that the boycotters “withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality.”¹²⁰ This made it rather difficult to tell which losses should be attributed to threats of violence rather than to protected activity,¹²¹ i.e., which losses could be attributed to intimidation rather than to a voluntary decision not to patronize certain businesses out of a common desire to bring about change.

The Court examined the speech of Evers.¹²² “While many of the comments in Evers’ speeches might have contemplated ‘discipline’ in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message.”¹²³ However, the Court reasoned that “[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases.”¹²⁴ Had violence resulted from his speeches, “a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct.”¹²⁵ However, because no violence resulted and because “there [was] no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence,”¹²⁶ the judgment of damages could not withstand the constitutional challenge.¹²⁷

The Court justified its holding by noting that “mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.”¹²⁸ The Court neither announced nor applied a test to determine the conditions under which threats were constitutionally

¹¹⁹ *Id.* (citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)).

¹²⁰ *Claiborne Hardware*, 458 U.S. at 918.

¹²¹ *Id.* (“While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.”).

¹²² *Id.* at 926–27.

¹²³ *Id.* at 927.

¹²⁴ *Id.* at 928.

¹²⁵ *Id.*

¹²⁶ *Id.* at 929.

¹²⁷ *Claiborne Hardware*, 458 U.S. at 929 (“The findings are constitutionally inadequate to support the damages judgment against him.”).

¹²⁸ *Id.* at 927.

protected. It was unclear whether *Brandenburg*, *Hess*, and *Claiborne Hardware* were implicitly applying a constitutional test protecting threats in some circumstances,¹²⁹ or whether, instead, the Court was simply leaving that issue to be determined on another day.

II. THREATS AND THE FIRST AMENDMENT

The articulated constitutional protections implicated in cases involving threats differ from those implicated in the advocacy of illegal action. The focus in the former jurisprudence has been on whether the statement at issue was a threat rather than a joke or political statement rather than on whether the threatened action was imminent. But this focus means that the Court has neither explained whether threats fall under the *Brandenburg* analysis nor, if not, why they do not.¹³⁰

A. Watts

*Watts v. United States*¹³¹ involved Robert Watts who, during a public rally in the District of Columbia, said that he had already received his draft classification but was not planning on showing up.¹³² He then added that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.”¹³³ Based on this statement, Watts was convicted of making a threat against President Lyndon Baines Johnson.¹³⁴

The Supreme Court cautioned that a statute criminalizing speech (criminalizing the making of a threat against the President of the United States)¹³⁵ had to comport with constitutional guarantees.¹³⁶ After noting that “the statute initially requires the Government to prove a true

¹²⁹ Cf. Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 549 (2000) (“the doctrine emerging from *Watts*, *Brandenburg*, and *Hess* protects potentially serious threats”).

¹³⁰ Cf. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 329 (2001) (“The Supreme Court’s analysis of threats in *NAACP v. Claiborne Hardware* suggests that the requirements of *Brandenburg* are not the test for threats, but that they apply when no true threat has been shown.”). *But see supra* note 129.

¹³¹ 394 U.S. 705 (1969).

¹³² *Id.* at 706 (“And now I have already received my draft classification as I-A and I have got to report for my physical this Monday coming. I am not going.”).

¹³³ *Id.*

¹³⁴ *Id.* (“On the basis of this statement, the jury found that petitioner had committed a felony by knowingly and willfully threatening the President.”).

¹³⁵ See 18 U.S.C. § 871(a) (1962) (amended 1994).

¹³⁶ *Watts*, 394 U.S. at 707.

‘threat,’¹³⁷ the Court rejected that “the kind of political hyperbole indulged in by petitioner fits within that statutory term.”¹³⁸ Instead, the Court agreed that the petitioner’s “only offense here was ‘a kind of very crude offensive method of stating a political opposition to the President.’”¹³⁹

One issue is whether a statement can plausibly be construed as a threat as opposed to a joke or political hyperbole. A related issue is whether an apparently threatening statement might credibly be thought to pose any danger.

B. Rogers

*Rogers v. United States*¹⁴⁰ involved statements made by George Rogers about what he would do to President Richard Nixon.¹⁴¹ Early one morning, Rogers, an alcoholic, came into a coffee shop in Shreveport, Louisiana,¹⁴² where he reportedly said that “he was Jesus Christ and that he was opposed to President Nixon's visiting China because the Chinese had a bomb that only he knew about, which might be used against the people of this country.”¹⁴³ In addition, Rogers proclaimed that “he was going to go to Washington to ‘whip Nixon’s ass,’ or to ‘kill him in order to save the United States.’”¹⁴⁴

The police were called.¹⁴⁵ The arresting officer asked Rogers whether he had threatened the President,¹⁴⁶ and Rogers had said he did not approve of “the idea of the President's going to China and making friends with the Chinese, our enemies.”¹⁴⁷ Rogers then stated: “I’m going to Washington and I’m going to beat his ass off. Better yet, I will

¹³⁷ *Id.* at 708.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ 422 U.S. 35 (1975).

¹⁴¹ *Id.* at 41–42 (Marshall, J., concurring) (“Rogers announced that he was going to go to Washington to ‘whip Nixon’s ass,’ or to ‘kill him in order to save the United States.’”).

¹⁴² *Id.* at 41.

¹⁴³ *Id.* at 41–42.

¹⁴⁴ *Id.* at 42.

¹⁴⁵ *Rogers*, 422 U.S. at 42 (Marshall, J., concurring).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

go kill him.”¹⁴⁸ Rogers, who did not like cars, suggested that he would walk to D.C.,¹⁴⁹ a distance of about 1,200 miles by road.¹⁵⁰

Rogers was not charged with any crimes under state law, but a Secret Service agent who was informed of the incident had Rogers arrested under a federal warrant.¹⁵¹ The jury who had convicted Rogers had been told that “it was not required to find that [Rogers] actually intended to kill or injure the President, or even that he made a statement that he thought might be taken as a serious threat.”¹⁵² Rather, “the jury was permitted to convict on a showing merely that a reasonable man in [Rogers’] place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act.”¹⁵³

Even when given this instruction, the jury had been unsure what to do.¹⁵⁴ After two hours of deliberating, the foreman sent a note to the judge asking whether “the court would accept the Verdict—‘Guilty as charged with extreme mercy of the Court.’”¹⁵⁵ When the judge answered in the affirmative, the jury rendered a verdict within five minutes.¹⁵⁶ The Fifth Circuit Court of Appeals affirmed the conviction.¹⁵⁷ The Supreme Court worried “the trial judge’s response may have induced unanimity by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise.”¹⁵⁸ The Court noted the trial court judge did not “remind[] the jury that the recommendation would not be binding in any way”¹⁵⁹ and did not “include[] the admonition that the jury had no sentencing function and should reach its verdict without regard to what sentence might be imposed.”¹⁶⁰ Accordingly, the Court reversed the circuit court and remanded the case.¹⁶¹

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Distance from Washington, DC to Shreveport, LA*, DISTANCE BETWEEN CITIES, <http://www.distance-cities.com/distance-washington-dc-to-shreveport-la> (last visited October 28, 2015) (“There are 1,035 miles from Washington and Shreveport and 1,196 miles by car.”).

¹⁵¹ *Rogers*, 422 U.S. at 42 (Marshall, J., concurring).

¹⁵² *Id.* at 43.

¹⁵³ *Id.* at 43–44.

¹⁵⁴ *Id.* at 40 (majority opinion).

¹⁵⁵ *Id.* at 36.

¹⁵⁶ *Id.* at 37.

¹⁵⁷ *United States v. Rogers*, 488 F.2d 512 (5th Cir. 1974).

¹⁵⁸ *Rogers*, 422 U.S. at 40.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (citing *United States v. Louie Gim Hall*, 245 F.2d 38 (2d Cir. 1957)).

¹⁶¹ *Id.* at 41.

In his concurrence, Justice Marshall argued that the statute “require[s] proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out.”¹⁶² The statute had prohibited “knowingly and willfully . . . [making a] threat against the President,”¹⁶³ which Justice Marshall interpreted as including a requirement that the speaker understand that his speech would likely be interpreted as communicating a threat rather than an expression of disapproval of Nixon’s actions or policies.¹⁶⁴ However, the Court did not need to address the proper construction of the statute because of the procedural irregularity that had occurred at trial.¹⁶⁵

C. Black

In *Virginia v. Black*,¹⁶⁶ the Court offered further discussion of what constitutes a threat.¹⁶⁷ At issue was the constitutionality of a Virginia law banning cross-burning with an intent to intimidate.¹⁶⁸ Individuals in two different cases had been convicted of violating the statute. One case involved Richard Elliott and Jonathan O’Mara, who had attempted to burn a cross in the yard of a neighbor, James Jubilee.¹⁶⁹ Apparently, Jubilee complained to Elliott’s mother about shots that had been fired in the Elliott’s backyard.¹⁷⁰ The cross had been burned in Jubilee’s yard to punish him for complaining about the shooting.¹⁷¹ When Jubilee saw the partially burned cross in his yard the following day, he became very nervous, not knowing what to expect.¹⁷² Neither Elliott nor O’Mara was affiliated with the Ku Klux Klan.¹⁷³

¹⁶² *Id.* at 48 (Marshall, J. concurring).

¹⁶³ See *Rothman*, *supra* note 130 (including the text of the statute).

¹⁶⁴ See *Rogers*, 422 U.S. at 42 (Marshall, J., concurring).

¹⁶⁵ See *id.* at 42–43.

¹⁶⁶ 538 U.S. 343 (2003).

¹⁶⁷ *Id.* at 357.

¹⁶⁸ See VA. CODE ANN. § 18.2–423 (West 1983); see also *Black*, 538 U.S. at 365 (striking down part of the statute that made the burning itself *prima facie* evidence); *Elliott v. Com.*, 593 S.E.2d 263, 267 (Va. 2004) (recognizing the statute as unconstitutional) (“[W]e affirm our prior holding that the *prima facie* evidence provision of Code § 18.2–423 is overbroad.”).

¹⁶⁹ *Black*, 538 U.S. at 350.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

In the other case, Barry Black led a Ku Klux Klan rally on private property with the permission of the owner.¹⁷⁴ “At the conclusion of the rally, they set fire to a 25-30 foot cross.”¹⁷⁵ The property was located near a state highway,¹⁷⁶ and the cross burning was visible from the road.¹⁷⁷ The police reported that an African American family had seen the burning cross and sped away in a car.¹⁷⁸ Black was apprehended, charged, and convicted of violating the law.¹⁷⁹

An onlooker (a relative of the property owner) watched the rally.¹⁸⁰ After hearing various racist comments, she, “a white neighbor,”¹⁸¹ testified that she felt “very . . . scared”¹⁸² and that “the cross burning made her feel ‘awful’ and ‘terrible.’”¹⁸³

The plurality began its analysis of these convictions under the Virginia statute by defining a true threat. “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁸⁴ Regrettably, this definition leaves open a number of issues.

It is not entirely clear what counts as an intentional communication of a serious expression of an intent to commit harm. Suppose an individual purposely says something that a reasonable individual would interpret as an intent to commit harm. Would that qualify? The answer depends upon whether the person must subjectively wish to communicate an intent to harm or whether, instead, the person merely has to intentionally say something that might be interpreted as threatening, even if the speaker has no desire to issue a threat.

The Court did not specify whether the threat must be made to the threatened individual or group or whether, instead, a communication to someone who is not the subject of the threat will suffice. For example, even assuming that Rogers intended to harm President Nixon, the threat

¹⁷⁴ *Id.* at 348.

¹⁷⁵ *Black*, 538 U.S. at 349.

¹⁷⁶ *Id.* at 348.

¹⁷⁷ *See id.* at 349.

¹⁷⁸ *See* Shannon McCaffrey, *Cross-burning law gets a hearing Va. case could shed light on free speech vs. hate speech*, PHILLY.COM (Dec. 9, 2002), http://articles.philly.com/2002-12-09/news/25358936_1_cross-burning-law-jonathan-omara-flaming-cross.

¹⁷⁹ *See Black*, 538 U.S. at 349–50.

¹⁸⁰ *Id.* at 348.

¹⁸¹ *See* McCaffrey *supra* note 178.

¹⁸² *Black*, 538 U.S. at 349.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 359.

was not made to Nixon. Rogers would not have been subject to prosecution if there was a requirement that the threat be made to the individual subject to the threat. So, too, while the speakers at the Klan rally “talked real bad about the blacks and the Mexicans,”¹⁸⁵ there were presumably no minorities attending the rally at whom the threat was directed, although minorities might have passed by the rally while traveling on the state road.¹⁸⁶ Even had it been true that no minorities had seen the cross burning, the rally nonetheless was presumably communicating a serious threat against other individuals.

Intimidation is “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”¹⁸⁷ The plurality noted that “cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed.”¹⁸⁸ When would a cross burning not be intimidating? “For its own members, [burning] the cross was a sign of celebration and ceremony.”¹⁸⁹ However, “when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm.”¹⁹⁰

Perhaps a cross burning would not be seen as intimidating if the only persons seeing it were members of the group,¹⁹¹ although even a member of that group might feel intimidated if, for example, he found himself questioning the group’s purposes or goals. But even if the possible reactions of a doubting member are not considered, the Klan cross burning at issue in *Black* was visible to passersby and thus might well have been intimidating to them, even if it was not intimidating to members of the group.¹⁹² Thus, it was inaccurate to suggest that this cross burning was either intimidating or non-intimidating, since it might have been both,¹⁹³ given the differing individuals likely to have seen it.

At least one question raised in *Black* is whether the Klan’s burning a cross near a public highway should be interpreted as directing the

¹⁸⁵ *Id.* at 349.

¹⁸⁶ McCaffrey, *supra* note 178.

¹⁸⁷ *Black*, 538 U.S. at 360.

¹⁸⁸ *Id.* at 357 (emphasis in original).

¹⁸⁹ *Id.* at 356.

¹⁹⁰ *Id.* at 357.

¹⁹¹ *Id.* at 365–66.

¹⁹² *Id.* at 385 (Souter, J., concurring in the judgment in part and dissenting in part).

¹⁹³ *Black*, 538 U.S. at 381.

message of the burning cross to those who happen to drive along the state route or, instead, whether the only individuals to whom the message is *directed* are the Klan members, themselves. Suppose that Black had said he wanted to burn the cross to express solidarity with the other members of the Klan and that others seeing the burning cross and becoming fearful would have pleased Black, even if he had not specifically intended to bring about that fear. Would that have counted as an intimidating threat because he had a reckless disregard for whether any passersby might have become fearful? Further, because threats include more than intimidating statements, his communicating to like-minded individuals a threat of harm to others might still constitute communication of a threat, even if those at whom the threat was directed were not present to hear the threat. Returning to *Rogers*, the difficulty there was in whether Rogers was really making a threat rather than in whether the President could be threatened even if he did not receive and was unlikely to receive the threat.

A separate issue is whether Black's communication of a threat against others violated existing law. But the resolution of that issue does not somehow determine whether the statement can be classified as a threat at all.

Still another issue was whether any of the cross-burners intended to harm anyone. It may be that Elliott and O'Mara had no intention of physically harming Jubilee or any member of his family, just as Black and the other Klan members attending the rally might not have intended to harm passersby. But the Court made clear that the intention to carry out the threat is not required to be convicted of having made a threat.¹⁹⁴

Black leaves open what kind of subjective intent is required before an individual can be convicted of having made a threat. It seems pretty clear that Elliott and O'Mara wanted to scare Jubilee, even if they intended to do nothing further, which suffices to establish that they threatened him. A surprising aspect of the *Black* opinion was its failure to issue a remand to determine whether the intent behind burning the cross near a state highway was solely to express solidarity with others who were like-minded or whether, in addition, there had been (1) an attempt to intimidate passersby who did not share Klan values, or (2) a communication to like-minded individuals of a threat against others.

¹⁹⁴ *Id.* at 359–60 (majority opinion).

III. *ELONIS*

*Elonis v. United States*¹⁹⁵ had the potential to clear up numerous constitutional questions, for example, whether incitement and threats are subject to the same constitutional protections and, if not, why not. Further, the Court might have described the kind of subjective intent required before one could be prosecuted for either incitement or threats. Regrettably, the Court shed very little light on these constitutional questions, and its statutory analysis offered too little direction to be helpful for lower courts.¹⁹⁶

A. *Elonis* Background

After his wife and children moved out of their home,¹⁹⁷ Anthony Elonis made various postings on the internet that caused others to fear for their physical safety.¹⁹⁸ His family's leaving caused him great distress—he broke down crying at his job on several occasions and was so upset that he could not work.¹⁹⁹

Elonis was accused of sexually harassing a woman with whom he worked.²⁰⁰ He later posted a photograph on Facebook where he and that woman were dressed in Halloween attire and he was holding a knife to her neck.²⁰¹ Next to that photo, he wrote, “I wish.”²⁰² Elonis's supervisor saw the photo and caption and fired Elonis that very day.²⁰³

After recounting the series of events involving the Halloween costumes, the Supreme Court noted that “Elonis was not Facebook friends with the co-worker and did not ‘tag’ her, a Facebook feature that

¹⁹⁵ 135 S. Ct. 2001 (2015).

¹⁹⁶ *See id.* at 2013 (Alito, J., concurring in part and dissenting in part) (“The Court's disposition of this case is certain to cause confusion and serious problems.”).

¹⁹⁷ *Id.* at 2004 (majority opinion).

¹⁹⁸ *Id.* at 2005 (“Elonis's co-workers and friends viewed the posts in a different light. Around Halloween of 2010, Elonis posted a photograph of himself and a co-worker at a ‘Halloween Haunt’ event at the amusement park where they worked. In the photograph, Elonis was holding a toy knife against his co-worker's neck, and in the caption Elonis wrote, ‘I wish.’”).

¹⁹⁹ *United States v. Elonis*, 730 F.3d 321, 324 (3d Cir. 2013), rev'd, 135 S. Ct. 2001 (2015).

²⁰⁰ *Id.*

²⁰¹ *Elonis*, 135 S. Ct. at 2005.

²⁰² *Id.*

²⁰³ *Id.*

would have alerted her to the posting.”²⁰⁴ Although the Court did not explain why Elonis’s failure to alert her about the posting was relevant, that may have been because the failure to alert supported the claim that the posting was a way to vent anger or frustration rather than to have issued a threat.²⁰⁵

Elonis posted other violent statements, including one about his estranged wife, Tara: “If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder.”²⁰⁶

Elonis posted the following on his sister-in-law’s Facebook page:

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.²⁰⁷

Based on this posting, Tara Elonis was able to secure an order of protection against her husband.²⁰⁸ The protective order did not dissuade him from posting additional threatening statements.²⁰⁹ On the contrary, he seemed infuriated by the order. One of his postings stated:

Did you know that it’s illegal for me to say I want to kill my wife?
It’s illegal.
It’s indirect criminal contempt.
It’s one of the only sentences that I’m not allowed to say.
Now it was okay for me to say it right then because I was just telling you that it’s illegal for me to say I want to kill my wife.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 2007.

²⁰⁶ *Elonis*, 730 F.3d at 324.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

I'm not actually saying it.
I'm just letting you know that it's illegal for me to say that.
It's kind of like a public service.
I'm letting you know so that you don't accidentally go out and say something like that
Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.
That's illegal.
Very, very illegal.
But not illegal to say with a mortar launcher.
Because that's its own sentence.
It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.
Perfectly legal.²¹⁰

Elonis also sought to educate the public about the proper understanding of true threat jurisprudence:

Fold up your PFA [protection from abuse order] and put it in your pocket Is it thick enough to stop a bullet?
Try to enforce an Order
That was improperly granted in the first place Me thinks the judge needs an education on true threat jurisprudence
And prison time will add zeroes to my settlement
Which you won't see a lick
Because you suck dog dick in front of children
* * *
And if worse comes to worse
I've got enough explosives to take care of the state police and the sheriff's department.²¹¹

Tara Elonis testified that she took these statements to be threats against her and her children.²¹² She also testified that she felt as if she and her children were being stalked.²¹³

²¹⁰ *Id.* at 324–25.

²¹¹ *Id.* at 325–26.

²¹² *Elonis*, 730 F.3d at 325 (“Tara Elonis testified at trial that she took these statements seriously, saying, ‘I felt like I was being stalked. I felt extremely afraid for mine and my

Elonis talked about other ways that he might become famous.

That's it, I've had about enough
I'm checking out and making a name for myself
Enough elementary schools in a ten mile radius to
initiate the most heinous school shooting ever imagined
And hell hath no fury like a crazy man in a kindergarten
class
The only question is . . . which one?²¹⁴

An FBI agent, Denise Stevens, had been monitoring Elonis's public Facebook postings.²¹⁵ Agent Stevens went to interview Elonis.²¹⁶ After that, Elonis posted again:

Little Agent Lady stood so close
Took all the strength I had not to turn the bitch ghost
Pull my knife, flick my wrist, and slit her throat Leave
her bleedin' from her jugular in the arms of her partner
[laughter]
So the next time you knock, you best be serving a
warrant
And bring yo' SWAT and an explosives expert while
you're at it
Cause little did y'all know, I was strapped wit' a bomb
Why do you think it took me so long to get dressed with
no shoes on?
I was jus' waitin' for y'all to handcuff me and pat me
down
Touch the detonator in my pocket and we're all goin'
[BOOM!]²¹⁷

Elonis was arrested for transmitting threats against another person via communications in interstate commerce.²¹⁸ He argued his statements

children's and my families' lives.'") (citing Transcript of Record at 97, *United States v. Elonis*, 2011 WL 5024284 (E.D. Pa. Oct. 20, 2011)).

²¹³ *Id.*

²¹⁴ *Id.* at 326.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

were protected speech,²¹⁹ but the district court held that whether he had made true threats was a matter for the jury to decide.²²⁰ Elonis also challenged the jury instruction that had been offered:

A statement is a true threat when a defendant intentionally makes 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.²²¹

Elonis argued that the jury instruction was incorrect because “the speaker must both intend to communicate and intend for the language to threaten the victim.”²²² But the Third Circuit rejected that the speaker had to intend for his speech to be threatening—“[l]imiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from ‘the fear of violence’ and the ‘disruption that fear engenders,’ because it would protect speech that a reasonable speaker would understand to be threatening.”²²³ Here, the Third Circuit was attempting to apply the reasoning offered in *Black*, where the Court denied that for a speaker to make a threat he must in addition intend to carry it out.²²⁴ The Court justified its refusal to require an intent to carry out the threat by noting that a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.”²²⁵

The *Black* Court and the Third Circuit were addressing differing aspects of the true threat jurisprudence. Basically, the *Black* Court was suggesting that one could issue a threat without intending to carry it out, whereas the Third Circuit was suggesting that one could issue what

²¹⁸ *Elonis*, 730 F.3d at 326.

²¹⁹ *Id.* at 327.

²²⁰ *Id.* (citing *United States v. Elonis*, 2011 WL 5024284, at *3 (E.D.Pa. Oct. 20, 2011)).

²²¹ *Id.*

²²² *Id.* at 329.

²²³ *Id.* at 330 (citing *Virginia v. Black*, 538 U.S. 343, 360 (2003)).

²²⁴ *Black*, 538 U.S. at 359–60.

²²⁵ *Id.* at 360 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

constituted a threat without having had a subjective intention to threaten.²²⁶

Consider the cross burning attempt by Elliott and O'Mara. Assume they had wanted Jubilee to become very afraid, even though they had no intention of harming him or his family. In that case, they wanted to communicate a threat (even though they knew that they had no intention of carrying it out). A different situation involves an individual who intentionally says something but does not intend for that statement to make a threat, even though the hearer reasonably perceives what is said as threatening. The former might be characterized as an empty threat, while the latter might be thought not to be a threat at all, even though in both cases the statement caused someone to be quite fearful and, perhaps, to have taken steps to decrease the probability that a threat might successfully be carried out.

B. Reversal of the Third Circuit

The Supreme Court reversed the Third Circuit on statutory grounds.²²⁷ While the Court clarified a few issues, it raised many more questions than it answered and basically left for another day some of the difficult issues that need resolution in this area.²²⁸

The statute under which *Elonis* was convicted reads: "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."²²⁹ The Court explained that the "statute requires that a communication be transmitted and that the

²²⁶ *Id.* at 359–60 ("True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."); see *Watts v. United States*, 394 U.S. 705, 708 (1969) ("[P]olitical hyberbole" is not a true threat); *R. A. V.*, 505 U.S. at 388. ("The speaker need not actually intend to carry out the threat."); *Elonis*, 730 F.3d at 330 ("We do not find that the unconstitutionality of Virginia's prima facie evidence provision means the true threats exception requires a subjective intent to threaten.").

²²⁷ See *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015).

²²⁸ See *id.* at 2013–14 (Alito, J., concurring in part and dissenting in part) ("The Court holds that the jury instructions in this case were defective because they required only negligence in conveying a threat. But the Court refuses to explain what type of intent was necessary. Did the jury need to find that *Elonis* had the *purpose* of conveying a true threat? Was it enough if he *knew* that his words conveyed such a threat? Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess." (emphasis in original)).

²²⁹ 18 U.S.C.A. § 875(c) (West 2015).

communication contain a threat.²³⁰ It does not specify that the defendant must have any mental state with respect to these elements.²³¹ For example, “it does not indicate whether the defendant must intend that his communication contain a threat.”²³² Indeed, the Third Circuit interpreted the statute to require only that the accused intend “to communicate words that [he] . . . understands, and that a reasonable person would view as a threat.”²³³

Elonis argued that because he could not be convicted of violating the statute unless he had intended to communicate a threat,²³⁴ the state had to establish that he had the intent to harm.²³⁵ But the Court rejected Elonis’s position, explaining that “an anonymous letter that says ‘I’m going to kill you’ is ‘an expression of an intention to inflict loss or harm’ regardless of the author’s intent.”²³⁶ The Court concluded that “[a] victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.”²³⁷

Were the issue simply whether the Constitution requires the speaker to have a subjective intent to harm before he can be convicted of making a threat, then the Court would have sided with the Third Circuit rather than Elonis.²³⁸ But the issue was not so simple. The Court interpreted the statute as implicitly incorporating a mens rea component, noting that “the ‘general rule’ is that a guilty mind is ‘a necessary element in the indictment and proof of every crime.’”²³⁹ For example, consider an individual who picks up “spent shell casings from a Government bombing range, believing them to have been abandoned.”²⁴⁰ The Court rejected that the mere fact that the individual picked up property belonging to another sufficed for conviction.²⁴¹ To be convicted, the

²³⁰ *Elonis*, 135 S. Ct. 2001 at 2008.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 2007.

²³⁴ *Id.*

²³⁵ *Id.* at 2008.

²³⁶ *Elonis*, 135 S. Ct. at 2008.

²³⁷ *Id.*

²³⁸ *See id.* at 2012.

²³⁹ *Id.* at 2009 (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922)).

²⁴⁰ *Elonis*, 135 S. Ct. at 2009 (discussing the facts of *Morrisette v. United States*, 342 U.S. 246 (1952)).

²⁴¹ *Elonis*, 135 S. Ct. at 2009

individual “had to know not only that he was taking the casings, but also that someone else still had property rights in them.”²⁴²

Suppose that an individual mailed a letter to someone without knowing the contents of the envelope, and that the letter contained a threat against that person. The individual would have knowingly transmitted a communication (which in fact contained a threat), even though the individual would not have intended to threaten anyone, much less through interstate commerce. This innocent communication of a threat would not have been subject to punishment.²⁴³

While the statute under which *Elonis* was convicted was not intended to provide a basis for prosecuting the innocent communicator, a separate question involves what mens rea is required when the statute is silent on that issue.²⁴⁴ The Court announced that “[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute ‘only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.’”²⁴⁵ Yet, even here, the Court’s meaning was unclear. Negligent behavior is distinguishable from innocent conduct, so one might have inferred that a showing of negligence would have sufficed. But the Court made clear that mere negligence did not suffice,²⁴⁶ even while refusing to specify what mens rea was required.²⁴⁷

The Court offered another example to illustrate its approach. Federal law precluded individuals from using food stamps in an unapproved way, e.g., buying goods at a store that charged more for products purchased with food stamps than with a different payment method.²⁴⁸ The Court interpreted the statute to require the individual to have knowledge that the store was engaging in the forbidden practice,²⁴⁹ although admitting that Congress could have cast a wider net had it been so inclined.²⁵⁰ But

²⁴² *Id.*

²⁴³ *Id.* at 2011.

²⁴⁴ *Id.*

²⁴⁵ *Id.* (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

²⁴⁶ See *Elonis*, 135 S. Ct at 2011–12.

²⁴⁷ *Id.* at 2012.

²⁴⁸ *Id.* at 2009–10 (discussing an example offered in *Liparota v. United States*, 471 U.S. 419 (1985)).

²⁴⁹ *Id.* at 2010 (citing *Liparota*, 471 U.S. at 425).

²⁵⁰ See *id.* at 2010 (“The Court noted that Congress *could* have intended to cover such a ‘broad range of conduct,’ but declined ‘to adopt such a sweeping interpretation’ in the absence of a clear indication that Congress intended that result.”) (citing *Liparota*, 471 U.S. at 427) (emphasis in original); see also *Liparota*, 471 U.S. at 427 (“Congress *could* have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such harsh results.

if Congress could have imposed a lower level of culpability had it been so inclined, then Congress was not precluded from doing so. But if that is so, then the Court's comments about imputing the "mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct"²⁵¹ has to be interpreted in a particular way, i.e., suggesting that where Congress has been silent with respect to the mens rea requirement, the Court must impute a mens rea requirement that will not be met by merely negligent behavior.²⁵²

Of course, such a proposed rule of construction applies to federal law generally²⁵³ and is not only triggered when First Amendment issues are implicated.²⁵⁴ After *Elonis*, in many of the cases in which it will be claimed that the requisite mens rea has not been shown, the issue will not be whether purely innocent behavior can nonetheless be criminalized,²⁵⁵ but the degree of culpability that must be established—negligence versus some higher standard.²⁵⁶ But if the degree of culpability is the relevant question, then it is at best regrettable that the Court wrote that "[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state,"²⁵⁷ as if the issue were simply whether innocent parties could be convicted under the statute.

At least one question raised by the *Elonis* opinion is what the jury instruction should say. For example, it might suggest that an individual should not be convicted of having made a threat unless he intended the communication to be perceived as a threat or, at least, knew that it would be.²⁵⁸ But such an instruction would not include an individual who, while not knowing that the statement would be perceived as a threat, was recklessly indifferent to whether it would be so perceived, and the Court expressly "declin[ed] to address"²⁵⁹ whether recklessness would meet the

However, given the paucity of material suggesting that Congress did so intend, we are reluctant to adopt such a sweeping interpretation." (emphasis in original)).

²⁵¹ *Elonis*, 135 S. Ct. at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

²⁵² See *Elonis*, 135 S. Ct. at 2010.

²⁵³ *Id.* at 2012.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 2009 ("Although there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.'") (citing *United States v. Balint*, 258 U.S. 250, 251 (1922)). But see *id.* at 2010 ("In some cases, a general requirement that a defendant act knowingly is itself an adequate safeguard.")

²⁵⁶ See *id.* at 2012.

²⁵⁷ *Elonis*, 135 S. Ct. at 2012.

²⁵⁸ See *id.*

²⁵⁹ *Id.*

mens rea requirement. Perhaps the instruction quoted in the Third Circuit opinion²⁶⁰ should be amended to be something like:

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein [the defendant knew] . . . that the statement would be interpreted . . . as a serious expression of an intention to inflict bodily injury or take the life of an individual [or where the defendant “disregards a risk of harm of which he is aware”].²⁶¹

Would such an instruction protect too many messages reasonably construed as threatening? That would be a matter for Congress to address. On at least one reading of *Elonis*, Congress could amend the statute at issue and specify a reasonable person standard, which would make the Court’s construction of the existing statute moot because the employed interpretive presumption was only applicable to “federal criminal statutes that are silent on the required mental state.”²⁶²

In this case, *Elonis* knew his previous postings resulted in his wife getting a protective order. While he might have thought that the order should not have been issued,²⁶³ it does not seem credible for him to have believed that his postings did not cause his wife to construe them as threats, although he might have claimed that she was lying about her fear and knew very well that he had no intent to harm her or the children.²⁶⁴ This would be for the jury to decide.

If *Elonis* knew that the previous postings were perceived by her to have been threatening, it would be difficult to deny (credibly) that he did not know his later postings describing his desire to kill his wife²⁶⁵ would be viewed as threatening. At the very least, the jury might find that he either knew the statements would be perceived as threatening or that he had a reckless disregard for how they might be perceived. But if that is so and if recklessness is sufficient to meet the mens rea requirement,²⁶⁶

²⁶⁰ *Elonis*, 730 F.3d at 327.

²⁶¹ *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

²⁶² *Elonis*, 135 S. Ct. at 2010 (majority opinion).

²⁶³ See *supra* note 205 and accompanying text.

²⁶⁴ *Elonis*, 730 F.3d at 333.

²⁶⁵ See *supra* note 210 and accompanying text.

²⁶⁶ *Elonis*, 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part).

then one would have expected the Third Circuit to have been able to uphold the conviction because the correct instructions would have also yielded a conviction and the instruction error was harmless.²⁶⁷

Elonis claimed that he was making these postings because doing so was therapeutic.²⁶⁸ But it was not as if he were writing this in his diary, which he kept under lock and key. On the contrary, he made sure that his ex-wife saw the writings.²⁶⁹ Ironically, the Court specifically mentioned when the subject of Elonis's violent postings had not been alerted to their existence and thus was not likely to see them, as if that were relevant to the analysis,²⁷⁰ but failed to focus on the great likelihood that Tara would become aware of the postings on her sister's Facebook page.²⁷¹

The reversal of Elonis's conviction was surprising, given the facts of the case. An extremely upset individual was making postings on the internet "includ[ing] graphically violent language and imagery"²⁷² about the person perceived to be causing him great pain. This was not a case involving a negligent transmission of a private document containing venting—Elonis made several postings to his sister-in-law's Facebook page, e.g., suggesting that his son "should dress up as matricide for Halloween,"²⁷³ a costume that might have included Tara's "head on a stick."²⁷⁴ One would need to be more than negligent not to realize that Tara would have perceived these postings as threatening.

Suppose different facts. An individual negligently posts on Facebook something that he knows would be perceived as threatening. Would that be subject to punishment? The Court implied (but did not state) that the mens rea requirement would not be met in this case either.²⁷⁵ Presumably, the posting of the statement would itself have to be intentional or, at least, reckless in order to be prosecuted.

Suppose *Elonis* had threatened Tara in an email to his ex-sister-in-law, who had forwarded that threat to Tara. Would Tara's sister be

²⁶⁷ *Id.* at 2018.

²⁶⁸ *Id.* at 2005 (majority opinion).

²⁶⁹ *Id.* at 2017 (Alito, J., concurring in part and dissenting in part).

²⁷⁰ See *supra* notes 204–205 and accompanying text.

²⁷¹ *Elonis*, 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part).

²⁷² *Id.* at 2005 (majority opinion).

²⁷³ *Elonis*, 730 F.3d at 324.

²⁷⁴ *Id.*

²⁷⁵ See *Elonis*, 135 S. Ct. at 2011 ("The 'presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct.'") (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)) (emphasis added).

subject to prosecution for having knowingly transmitted a threat, even though the purpose behind the transmission was to warn Tara so that protective action could be taken? Certainly, a prosecutor might decide not to prosecute such a transmission, but that would not speak to whether the statute as written would include such behavior.²⁷⁶

The *Elonis* Court suggested that the intent to threaten was not an element of the crime—the knowledge that the communication would be perceived as threatening would suffice.²⁷⁷ But this opens up to prosecution a whole range of communications that presumably were not within the intent of Congress to criminalize. For example, assuming that those televising the Klan rally at issue in *Brandenburg*²⁷⁸ knew that some individuals living in the geographical area would find the telecast personally threatening, would the television station executives have been subject to prosecution? If not, why not?

Elonis' posting included some statements that might have been interpreted as incitement of illegal activity:

Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.

That's illegal.

Very, very illegal.

But not illegal to say with a mortar launcher.

Because that's its own sentence.

It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.

Perfectly legal.

I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.

Insanely illegal.

Ridiculously, wrecklessly, insanely illegal.

²⁷⁶ *Liparota v. United States*, 471 U.S. 419, 427 (1985) (“Congress *could* have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid . . . harsh results.”) (emphasis in original).

²⁷⁷ *Elonis*, 135 S. Ct. at 2012.

²⁷⁸ See *supra* notes 80–84 and accompanying text.

Yet even more illegal to show an illustrated diagram.²⁷⁹

Presumably, were this posting construed as incitement, it could not be prosecuted (say, under a different statute)²⁸⁰ under *Brandenburg*, because it would not be likely to result in imminent wrongful action.²⁸¹ At some point, the Court will have to discuss whether and why as a constitutional matter threatening material posted on the internet can be prosecuted but inciting material posted on the internet cannot be (assuming that the latter is not likely to lead to imminent lawless action). In both kinds of cases, victims might be genuinely fearful and might also be forced to take concrete steps to protect themselves and their families. But the *Elonis* focus was not on the difficult balancing of the importance of free speech on the one hand and the importance of protecting the public on the other, so there has been no helpful guidance on how to approach these thorny issues.

IV. CONCLUSION

The *Elonis* Court reversed a conviction based on a faulty jury instruction.²⁸² But the opinion was written in such a way that it is likely to make a variety of legal matters more rather than less confusing if only because the Court was not transparent with respect to what it was doing.

The Court may merely have been offering a rule of statutory construction for federal criminal statutes where Congress has failed to specify the required mens rea.²⁸³ But it is eminently foreseeable that *Elonis* will be construed in other ways.²⁸⁴ Some may interpret the decision to stand for the proposition that federal criminal law requires a

²⁷⁹ *Elonis*, 730 F.3d at 325.

²⁸⁰ Jennifer Spencer, *No Service: Free Speech, the Communications Act, and Bart's Cell Phone Network Shutdown*, 27 BERKELEY TECH. L.J. 767, 789 (2012) (discussing commentators who “have argued that the Internet . . . changes the traditional framework for determining incitement of illegal activity”).

²⁸¹ See *supra* note 87 and accompanying text.

²⁸² *Elonis*, 135 S. Ct. at 2012.

²⁸³ *Id.* at 2010 (citing *Carter v. United States*, 530 U.S. 255, 269 (2000)).

²⁸⁴ See Adam Liptak, *Supreme Court Overturns Conviction in Online Threats Case, Citing Intent*, N.Y. TIMES (Jun. 1, 2015), <http://www.nytimes.com/2015/06/02/us/supreme-court-rules-in-anthony-elonis-online-threats-case.html> (“The majority opinion was modest, even cryptic.”).

showing of more than negligence for conviction,²⁸⁵ which would mean that convictions under federal law based on negligence may be at risk. It would be unsurprising to see a conflict in the circuits about a variety of federal convictions having nothing to do with speech, but because of differing possible readings of *Elonis*. While it is not unusual for Supreme Court decisions to be read in different ways, this decision almost invites such conflicts, leading to decreased clarity in areas that might previously have been thought fairly clear.

Following *Elonis*, what rules apply to Facebook postings? That is unclear.²⁸⁶ Some individuals may (wrongly?) feel freer to post statements that might reasonably be construed as threatening, especially given the Court's reversal of a conviction of an individual subject to a protective order who had posted statements reasonably construed as threatening the very person protected by that order.²⁸⁷ Perhaps the Court was trying to send a message to prosecutors that they as a general matter should be more wary of prosecuting individuals who arguably made threats, although the *Elonis* Court's focus on statutory construction where Congress has been silent with respect to mens rea requirements would likely mute such a message.

What is clear is that the Court has missed an opportunity to clarify First Amendment law and provide more notice to internet users about what kinds of postings are actionable.²⁸⁸ Those interested in reconciling or even understanding the differing constitutional approaches to incitement, threats, and speech more generally should be sorely disappointed by *Elonis*, and will simply have to hope that the Court provides more guidance next time.

²⁸⁵ Jay Michaelson, *Supreme Court: Your Facebook Threats Aren't Necessarily Real Threats*, DAILY BEAST (Jun. 1, 2015, 4:25 PM), <http://www.thedailybeast.com/articles/2015/06/01/supreme-court-your-facebook-threats-are-protected-speech-like-rap-lyrics.html> ("Criminal law requires mens rea, an 'evil mind,' and in this case, the Court held that there must be some specific intention to threaten.").

²⁸⁶ *Elonis*, 135 S. Ct. at 2018 (Thomas, J., dissenting) ("This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.").

²⁸⁷ See *id.* at 2006, 2012 (majority opinion).

²⁸⁸ Neil Ross, *Elonis v US: online free speech still in the dock, free speech NOW!*, SPIKED (Jun. 3, 2015), http://www.spiked-online.com/freespeechnow/fsn_article/elonis-v-us-online-free-speech-still-in-the-dock#.VXia86PEkd0 ("One can't help but feel that the Supreme Court justices have missed an opportunity here.").