

The Atlantic

Prosecute Those Making ‘True Threats’ Against Ford and Kavanaugh

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October 4, 2018

When Christine Blasey Ford appeared before the Senate last week, she testified that her greatest fears about going public with sexual-assault claims were realized upon receiving messages that shook her to her core. “My family and I have been the target of constant harassment and death threats,” she said. “People have posted my personal information and that of my parents online. This has resulted in additional emails, calls, and threats.” They fled their home and acquired guards.

Meanwhile, the U.S. Marshals Service “is investigating threats against Supreme Court nominee Brett Kavanaugh and his family,” according to Time. The Wall Street Journal reports that it reviewed two emails sent to the nominee’s wife: “One of the notes to Mrs. Kavanaugh, a town manager in the suburbs of Washington, D.C., reads, ‘May you, your husband and your kids burn in hell.’ The other, whose subject line reads, ‘Hi, Ashley,’ says she should tell her husband to ‘put a bullet in his ... skull.’”

Most Americans agree that such behavior is abhorrent. The subset of hateful messages that cross the line into “true threats” is unlawful. And those messages harm not only recipients, but whole societies, as citizens made aware of intimidation tactics resolve to participate less in public life.

Are threats of the unlawful sort inescapable? Perhaps. And it is likely best for recipients to simply ignore threats as best they can, knowing how empirically rare it is for any actual violence to ensue.

Still, the frequency of unlawful threats is not fixed. And those directed at Ford and Kavanaugh provide an unusually opportune moment for law enforcement to deter some future threats by showing that those who’ve issued them *on either side* of this highly visible, intensely polarizing matter have put themselves at risk of legal punishment. For that reason, more resources than usual should be dedicated to pursuing those who sent intentional, unlawful threats about this matter.

I do not urge a crackdown lightly. In general, I believe the United States is over-policed, that nonviolent crimes are frequently the best place to ease off, and that a culture of free speech is

hugely important. The First Amendment protects lots of hateful, morally odious missives (including “May you, your husband, and your kids burn in hell” and “Tell your husband to kill himself”). Authors of merely odious messages should be left alone by police, consistent with what the Supreme Court has called America’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

To be even more specific about what a crackdown should not include, I’d quote an amicus brief once filed by the ACLU and the Cato Institute:

Words are slippery things, and one person’s opprobrium may be another’s threat. A statute that proscribes speech without regard to the speaker’s intended meaning runs the risk of punishing protected First Amendment expression ... Moreover, where the line between protected and unprotected speech is unclear, a speaker may engage in self-censorship ... Statutes criminalizing threats without requiring the government to demonstrate a culpable *mens rea* are thus likely to sweep in speech protected under the First Amendment ... To ensure adequate breathing room for such speech ... subjective intent to threaten is an essential element of any constitutionally proscribable true threat.

At the same time, the federal courts and the Supreme Court have kept the “true threats” exception to the First Amendment relatively narrow (even in spite of ambiguities that remain after *Elonis v. United States*), reining in prosecutors who might otherwise make mischief. Those who intentionally threaten prominent civic actors chill political speech. And securing convictions against lawbreakers who threatened both Ford *and* Kavanaugh would underscore the fact that such behavior is legally and morally wrong regardless of the merits of the respective target’s behavior.

Allowing both to be threatened with impunity is *more* chilling, in my estimation, than successfully prosecuting egregious lawbreakers. While there are always competing demands on law-enforcement resources, it may be a long time before there is a better opportunity to reach the right and the left with the deterring message that illegal threats are made at one’s peril.

Perhaps affirming that message will help conserve the shrinking patch of common ground that most partisan Republicans and Democrats still share.