

# Are these threats on Facebook a crime or protected speech?

By Ruben Rosario  
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My wife left with the kids. I'm not happy. I write the following on Facebook:

"There's one way to love ya but a thousand ways to kill ya. I'm not gonna rest until your body is a mess, soaked in blood and dying from all the little cuts."

After my soon-to-be ex-wife obtains a restraining order, I write this on the popular social media site:

"Fold up your protective order and put it in your pocket. Is it thick enough to stop a bullet?"

Was I just venting out of anger or did I threaten her to the point where I should be charged with a crime and prosecuted?

A federal jury in the case of a Pennsylvania man who wrote those words found him guilty of violating an interstate commerce law that makes it a crime to communicate -- in this case through the social media network -- a threat to injure an individual.

But the man, Anthony Elonis, has essentially evoked the "Eminem" defense in an appeal argued this week in front of the U.S. Supreme Court. He maintains that what he wrote is as much protected speech as the song the popular rapper wrote in which he fantasizes about killing his ex-wife. Describing himself as an aspiring rapper, Elonis also asserted that the violent prose was not a direct threat but actually a therapeutic tool to help him cope with the breakup and subsequent divorce.

My first gut reaction? "Give me a freaking break. This guy, who is facing four years in the slammer, intended to scare the woman to get back at her. Then he hid behind the First Amendment's skirts when they came looking for him.

But what the high court will decide has little to do with Elonis' impending fate.

The stakes are much higher. Elonis' lawyer basically argued that prosecutors should have to prove subjective intent in order to make the charges stick. In contrast, government attorneys maintain that intent is irrelevant and that free speech doesn't apply in this case because any reasonable person would conclude that what Elonis wrote was a threat against his ex-wife.

"It has the possibility of becoming a very significant case if they (the court) use it as an opportunity to rewrite standards surrounding intent," said William McGeeveran, a University of Minnesota law professor and expert on technology and free speech.

Numerous cases affirm the First Amendment's protection of speech that is to many is outrageous, hateful, violent or caustic. The sick puppies who yell nasty things at the funerals of soldiers is but one example: "I just exercised my free speech here."

But there are legal limits to free speech in certain circumstances.

I can be prosecuted for yelling "Fire!" in a crowded theater or "Bomb!" at an airport or in an airplane, regardless of whether I intended no harm or was joking.

Ferguson, Mo., shooting victim Michael Brown's stepfather, Louis Head, is reportedly the subject of an inciting-to-riot criminal probe after he was captured on video shouting "Burn this bitch down!" shortly after the grand jury's decision not to indict the white police officer who fatally shot the 18-year-old black man. Head later apologized: "My emotions admittedly got the best of me. ... I was so angry and full of raw emotion as so many others were, and, granted, I screamed out words that I shouldn't have."

But Ferguson has produced its own Facebook-threats case.

According to a criminal complaint filed in federal court in Seattle, Jaleel Tariq Abdul-Jabbaar made numerous threats against Darren Wilson, the former Ferguson police officer, and his family on his Facebook page, ABC News reported. According to court documents, on Nov. 24, Abdul-Jabbaar posted a news article with the headline, "Ferguson grand jury verdict has just been reached." His comments, "Ready to go and kill some cops," and "We need to kill this white motha f--- and anything that has a badge on."

Abdul-Jabbaar is charged with three counts of making interstate threats and faces up to five years in prison.

In Elonis' trial, the jury was instructed that, in order to convict, it had to find that a reasonable person would consider that what Elonis wrote were threats to inflict bodily harm.

The problem is who defines that reasonable person in a social-media world where millions of writings, from the sublime to the ridiculous, are posted daily. Is it a 60ish jurist, a social media-savvy teen, or someone else? Should the venue matter at all?

As reported, Elonis' attorney cautioned that there could be a chilling effect on many forms of speech if prosecutors can obtain convictions by showing in the abstract that a "reasonable person" would be frightened by certain words without proving intent.

"Many of the people who are being prosecuted now are teenagers who are essentially shooting off their mouths or making sort of ill-timed, sarcastic comments, which wind up getting them thrown in jail," the lawyer, John Elwood, told the justices.

But along with prosecutorial entities, several domestic violence advocates note in friend-of-the-court briefs that stalking laws exist and have been effectively used without having to prove what was in the mind of the abuser or tormenter. Yet, *Elonis* has attracted supporters that include the Electronic Freedom Frontier, the Cato Institute, the Center for Democracy & Technology and the American Civil Liberties Union.

"A statute that proscribes speech without regard to the speaker's intended meaning runs the risk of punishing protected First Amendment expression simply because it is crudely or zealously expressed," the ACLU wrote in its brief.

McGeeveran, who has followed the case, predicts the court will not make a sweeping or precedent-setting ruling for one side or the other, but will take a middle-of-the-road approach. He also believes the court will probably affirm *Elonis*' conviction because there was enough evidence for the jury to find him guilty of violating the federal law as written.

Still, "there are plenty of crimes that require intent," McGeeveran said. "The question is whether this would constitute one of those crimes in order to protect free speech. We do need to be sensitive to context because, in the culture of social media and elsewhere, people do shoot their mouths off, but it may not necessarily translate to a crime."