Should Musicians Be Jailed for Their Threatening Lyrics?

Alan E Garfield
Should musicians be jailed for their threatening lyrics?

ALAN GARFIELD

Anthony Elonis' life had unraveled. His wife of seven years had left and taken their two kids. Five months later, Elonis lost his job at an amusement park.

Angry and despairing, Elonis turned to his Facebook page to vent. He changed his username to what his lawyers call “a rap-style pseudonym.” But his page was still linked to the same list of “friends,” including co-workers from the amusement park and friends and family members of his wife. His page was also accessible to any Facebook user.

Elonis had something ominous to say to everyone. For his former colleagues at the amusement park, he posted, “Y’all think it’s too dark and foggy to secure your facility from a man as mad as me?”

For his wife, he posted, “There’s one way to love ya but a thousand ways to kill ya.” For the public-at-large, he warned of committing a mass shooting at an elementary school, noting that “hell hath no fury like a crazy man in a kindergarten class.” And for a female FBI agent who came to interview him, he described this swift maneuver: “Pull my knife, flick my wrist, and slit her throat.”

Elonis was convicted of violating a federal law that makes it illegal to use interstate transmissions to communicate a “threat to injure the person of another.”

On Monday, the Supreme Court is reviewing his conviction. The central question is whether the trial judge properly instructed the jury as to what the government had to prove.

The trial judge told the jury to use an “objective” test for determining whether Elonis' statements were punishable threats. That meant that if a reasonable person in Elonis' shoes would have foreseen that his statements would be perceived as threatening, then Elonis could be convicted.

Elonis insists that the jury should have used a “subjective” test. That would have required the government to prove that Elonis had personally intended his statements to be threatening. This doesn’t mean that Elonis would be automatically acquitted if he testified that he didn’t intend to threaten. A jury could still choose not to believe his testimony.

Elonis contends speech will be chilled if people can be criminally punished whenever a reasonable person could find their statements threatening. He notes that music frequently contains threatening references. Guns N’ Roses sings about how “I used to love her but I had to kill her.” Bob Dylan croons “I don’t want to brag, but I’m going to wring your neck.” Miranda Lambert chants of loading “my shotgun” to “wait by the door.”

Can these musicians be sent to jail if a third person finds their statements threatening? If not, then why can Elonis? He claims to be a budding rap lyricist and says his Facebook postings were merely poetic rants to vent his frustration.

Elonis notes that some of his posts expressly indicated that they were “fictitious” and for “entertainment purposes only,” and that he was exercising his “constitutional right of free speech.” He points out that one post linked to a Wikipedia article on “Freedom of Speech” and another concluded, “Art is about pushing limits. I’m willing to go to jail for my constitutional rights.”

Elonis did get sentenced to jail. But it’s not clear his rights were violated.

Sure, he’s right that there’s a risk to holding people accountable based on how others interpret their words. That might be acceptable if we’re deciding whether someone is bound to a contract. It might not justify sending someone to prison.

But Elonis might be wrong to think that a subjective standard would have helped him. There’s an obvious difference between a popular song with lyrics threatening no one in particular and Elonis’ personalized threats toward his wife.

The former might not be threatening under either an objective or subjective standard. The latter might be threatening under both.

Still, if Elonis convinces the Supreme Court that the trial judge used the wrong standard, he will likely receive a new trial.

Alan Garfield is a professor at Widener University School of Law.