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I. Introduction

Clearly a feature of modern life and society is the increased scope of federal criminal law,[1] sometimes in conjunction with state law and communications over the internet.[2] However, the 2015 decision of the United States Supreme Court in *Elonis v. United States*[3] was based on a 1939 federal statute,[4] serving as a reminder that some issues in federal criminal liability are not new.

Anthony Elonis made postings on Facebook of "self-styled rap lyrics containing graphically violent language and imagery concerning his wife [who had recently left him], co-workers, a Kindergarten class, and state and federal law enforcement [officials]."[5] He was investigated, arrested and charged by the Federal Bureau of Investigation (FBI) with five counts of violating section 875(c), which provides that it is a federal crime to make "any communication containing any threat…to injure the person of another."[6] Elonis was convicted on four of the counts and the United States Court of Appeals for the Third Circuit affirmed, concluding that a violation of section 875(c) requires only an intent to communicate the words in question, not an intention that the words be intended as an actual threat.

At this point in a review of the *Elonis* case a reader may suspect that this is merely another example of federal criminal law run amok,[7] and that a large number of entertainment personalities and ordinary citizens will need to be retaining criminal defense counsel if the United States government, including a United States Court of Appeals, believes this is a viable and appropriate legal standard.[8] If so, one can only say thanks to the Supreme Court for, in effect, taking a deep breath and saying wait a minute, let's give this a little more thought.

II. The Supreme Court Opinion

In essence the Supreme Court rejected the Third Circuit's conclusion that mere negligence in the use of words (without an actual intent to cause harm) is sufficient for a federal criminal conviction

1. *See, e.g.*: Brian W. Walsh & Tiffany Joslyn, Opinion, *Time to Arrest the Federal Criminalization Spree*, Wall Str. J., Jan. 29, 2015; John R. Emshwiller & Gary Fields, *For Feds, 'Lying' is a Handy Charge*, Wall Str. J., April 10, 2012, at A1; Gary Fields & John R. Emshwiller, Federal Offenses, *As Criminal Laws Proliferate, More Ensnared*, Wall Str. J., July 23 – 24, 2011, at A1; L. Gordon Crovitz, Information Age, *You Commit Three Felonies a Day*, Wall Str. J., Sept. 28, 2009, at A21. Sometimes this includes an assault on due process and disfavored speech. *See, e.g.*, Opinion, Review & Outlook, *Harvard Law Pushes Back*, Wall Str. J., Jan. 31 - Feb. 1, 2015, at A12. The free speech issue may have been implicated in *Elonis* but was not addressed by the Court. *See, e.g.*, Lyle Denniston, Opinion Analysis: *Internet Threats Still in Legal Limbo?*, SCOTUSblog, June 1, 2015, *available at* http://www.scotusblog.com/2015/06/opinion-analysis-internet-threats-still-in-legal-limbo/.

2. *See, e.g.*, Heather M. Mandelkehr, *The First Amendment and Visual Cyberbullying: How Online Sharing of a Kitten Picture Could Land You in a Tennessee Jail*, 66 Consumer Fin. L.Q. Rep. 195 (2012).

3. No. 13-983, 575 U.S. ___, 135 S.Ct. 2001, 2015 WL 2464051 (June 1, 2015).

4. 18 U.S.C. § 875(c) [section 875(c)].

5. *Elonis*, No. 13-983, slip. op. at 1 (Syllabus).

6. *Id.* (quoting 18 U.S.C. § 875(c)).

7. For other apparent examples, *see* sources cited *supra* n. note 1.

8. *See, e.g.*, almost any modern cable television series, for example *Entourage*, which depicts (with some accuracy) life in the Los Angeles area, sprinkled with frequent verbal threats of various kinds that are obviously not intended to be taken literally. Your author recognizes the increased sensitivity to these issues in view of recent and horrific instances of workplace or related or even random acts of violence; however, obviously this does not obviate the need for a viable rule of law in this context, as articulated by the Supreme Court. *See also* Mick Hume, Review, *Freedom Even for Speech That We Hate*, Wall Str. J., Aug. 22 - 23, 2015, at C3.

under section 875(c).[9] Importantly, the Court rejected the argument that the existence of a federal criminal statute dispenses with the requirement for the government to show criminal intent unless the statute expressly says otherwise.[10] It seems extraordinary that the United States Supreme Court would have to explain this, and that the FBI and the United States Court of Appeals for the Third Circuit would adopt a contrary view allowing wide-scale federal criminal convictions on the basis of speech, without evidence of wrongful intent.

Fortunately, the Supreme Court reaffirmed the basic principle that "wrongdoing must be conscious to be criminal" and that guilt requires the defendant to be "blameworthy in mind."[11] Given that so much common and ordinary behavior is now potentially subject to federal criminal law, making it essentially impossible for most of us to be certain of full compliance with every federal law and regulation, this reaffirmation of basic principles by the Supreme Court has broad implications for many ordinary citizens (as well as businesses). That the issue required a Supreme Court decision is, however, also a reminder that important legal protections often hang by a slender thread.

The Supreme Court's majority opinion presents a balanced view, also recognizing the maxim that "ignorance of the law is no excuse."[12] The resulting standard requires an analysis that left the fate of Mr. Elonis somewhat in doubt (subject to further judicial consideration).[13] For example, the Court declined to decide whether recklessness will suffice for a violation of section 875(c).[14] Some commentators have criticized the *Elonis* decision on this basis,[15] but the importance of the basic legal issues requires that complete and proper consideration be given to the full range of legal issues and competing interests, and this could only be done on remand.

III. Concurring and Dissenting Opinions

The majority opinion in *Elonis* represents an all-too-rare consensus among competing factions on the Court,[16] but there was a separate concurrence and partial dissent by Justice Alito, and a dissent by Justice Thomas.[17] Justice Alito essentially argued that the majority decision will "cause confusion" by reason of requiring an inquiry into the mental state of the defendants.[18] This is an obvious concern, but the alternative to such an inquiry is to criminalize a very broad swath of apparently common behavior, inevitably meaning that there is no real standard at all and creating a legal environment that invites arbitrary and selective enforcement. This risk demands the higher standard for prosecutors. Moreover, the issue of recklessness, advocated as a basis for affirmance by Justices Alito and Thomas, had not been litigated below and was not before the Court.[19]

Justice Thomas dissented, essentially on grounds that the majority decision left the issues in the case unresolved:

> [T]he Court casts aside the approach used in nine Circuits and leaves nothing in its place.[20]

Again this is true, and to a degree regrettable, but seemingly necessary in order to protect the larger principle. No doubt Mr. Elonis would prefer to have had his case resolved favorably, without further delay; but one strongly suspects that he (and other potential defendants similarly situated) would prefer the uncertainty that results from a proper criminal standard, in lieu of a more speedy conviction on flimsy grounds. Given the broad and potentially dangerous implications of the views advocated by the FBI and the Third Circuit, any uncertainty created by the majority opinion seems the far preferable alternative.

IV. Conclusion

One need not endorse the foolish hate speech posted by Mr. Elonis in order to recognize the even greater danger posed by the government's position and the approval of that position by the Third Circuit. The real test of due process and the rule of law is the application of basic principles even to unpopular causes and disreputable litigants. The members of the Supreme Court majority in *Elonis* deserve credit for drawing this important line, where others apparently failed to do so.

Mission Statement of the Conference on Consumer Finance Law

The general purposes of the Conference are: to encourage study and research in the field of consumer finance law; to make available information on the history, changes in, and current status of laws and regulations relating to consumer finance; to promote, through education, the sound development of consumer finance law; to stimulate, by discussion and publication, the improvement of legal procedures affecting consumer finance law; and to provide a forum through which interested parties may exchange opinions. For purposes of this [statement], consumer finance law shall be deemed to include laws affecting finance companies, consumer banks, banks, retailers, credit insurance companies, and other similar industries of related nature.

9. *Elonis*, No. 13-983, slip op. at 1 - 2 & 9 - 14.

10. *Id.*

11. *Id.* at 2 & 14 (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)).

12. *Id.* at 10.

13. *Id.* at 10 - 17. Quite appropriately, in your author's view, as the government and lower courts failed to assert or address the legal elements necessary for a conviction.

14. *Id.* at 16.

15. *See, e.g.*, Denniston, *supra* note 1, and *infra* Part III. *Cf. supra* note 13.

16. *See, e.g.*, Peggy Noonan, Opinion, Declarations, *The High Court's Disunited State*, Wall Str. J., July 3, 2015, at A13.

17. *Elonis*, No. 13-983, slip. op.

18. *Id.* (Alito concurrence at 1).

19. *Id.* (majority opinion at 17).

20. *Id.* (Thomas dissent at 1).