

LEFT OF BOOM

MONTHLY NEWSLETTER OF CLINICAL SECURITY SOLUTIONS



WHEN IS A THREAT A “TRUE THREAT?”

1st Amendment Issues for Threat Management Teams to Consider

Threat Management Teams face many challenges in keeping our communities, schools, and workplaces safe. TMTs must constantly determine whether a person making a threat actually poses a threat. The two are quite different. The First Amendment of the United States Constitution guarantees the right to freedom of speech and expression. This right is not unlimited or unconditional. While political speech, satire, and parody are all protected by the First Amendment, true threats are not. TMTs must determine whether a statement is a true threat or protected speech and in most cases, such analysis must consider context and the specific circumstances of the situation.

What is a true threat?

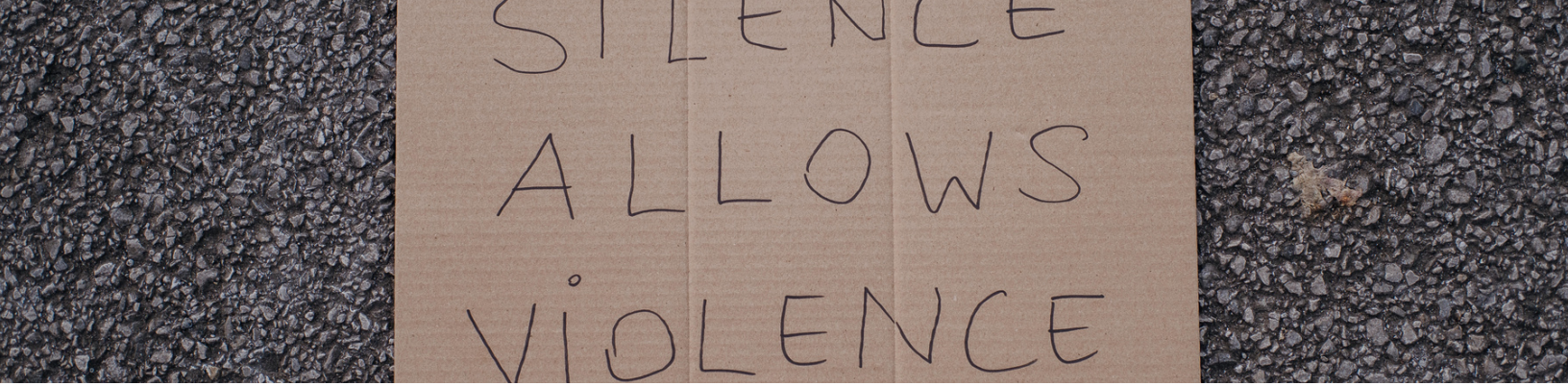
The Supreme Court in *Virginia v. Black*, 538 U. S. 343, 359 (2003), defined a true threat as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”

The explosive growth of social media as a communications platform has only further clouded the issue. In the context of social media, true threats can take many forms. They can be made in the form of direct messages, comments on posts, or even in the form of memes or other forms of digital content. Social media platforms have become a breeding ground for threats, as they allow individuals to hide behind anonymous accounts and make statements that they might not make in person.

The issue of true threats and social media was addressed by the Supreme Court in *Elonis v. United States*, 575 U.S. 723 (2015). It was the first time the Court has heard a case considering true threats and the limits of speech on social media.

Case Study: Anthony Elonis

Anthony Elonis was enraged after his wife left him, taking custody of their two small children. She initiated divorce proceedings. Elonis began making threatening posts on Facebook directed at his wife. Elonis did not send messages directly to his ex-wife but he made sure that she would see them on Facebook. He used a fine print disclaimer claiming that he was just writing rap lyrics. Elonis included other disclaimers in his posts such as “I ain’t a legitimate threat” and links to the Wikipedia article explaining “Freedom of Speech.”



SILENCE
ALLOWS
VIOLENCE

The following are some of his threatening posts:

"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."

Did you know that it is illegal for me to say I want to kill my wife?

Art is about pushing limits, I'm willing to go to jail for my Constitutional rights, Are you?

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 a murder.

Shortly after his wife left him, he was fired from his job after several complaints about sexual harassment and threatening social media posts directed against co-workers. After his termination, Elonis continued to threaten his co-workers in social media posts.

Elonis's ex-wife ultimately obtained a Protection from Abuse (PFA) order from the court. Elonis responded with the following Facebook post:

"Fold up your PFA and put it in your pocket

Is it thick enough to stop a bullet?"

Enraged by the PFA order he also threatened police:

"And if worse comes to worse I've got enough explosives to take care of the state police and the sheriff's department"

That's it, I've had about enough. I'm checking out and making a name for myself

Elonis finally attracted the attention of law enforcement when he made a post threatening to conduct a school shooting:

Enough elementary schools within a ten-mile radius to initiate the most heinous school shooting ever imagined.

Two FBI agents went to his residence and interviewed Elonis. After they left, he posted the following rap lyrics:

"You know your shit's ridiculous when you have the FBI knockin' at yo' door

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"



Elonis was arrested and convicted federally under 18 U. S. C. §875 (c) which criminalizes the transmission of threats in interstate commerce. He was sentenced to 44 months in federal prison.

Elonis appealed and argued that "true threats" require a subjective intent to threaten. He stated that all his social media posts were in fact, harmless rap lyrics and were protected speech under the 1st Amendment. The U.S. Court of Appeals for the Third Circuit affirmed Elonis' conviction and Elonis then appealed to the U. S. Supreme Court.

The Supreme Court reversed the conviction, not First Amendment grounds but over a faulty jury instruction which was one other point on which Elonis based his appeal. The Court did not address the 1st Amendment question in this case. In a later appellate court hearing the conviction was reinstated after that court concluded beyond a reasonable doubt that Elonis would have been convicted if the jury had been properly instructed at trial. There were no further appeals and Elonis served his sentence.

Notably, the Supreme Court did not answer the legal question regarding what level of proof would be required to determine if a statement is a true threat. In a separate concurring opinion, Supreme Court Justice Alito did attempt to address the 1st Amendment issue. He wrote, **"lyrics in songs that are performed for an audience or sold in the recorded form are unlikely to be interpreted as a real threat to a real person.... Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously."**

Absent clear case law, lower courts have differing interpretations on whether the 1st Amendment requires specific proof of a person's intent to threaten or whether a reasonable person standard is sufficient.

A new case – a new chance to clarify the issue.

The Supreme Court recently agreed to hear another "true threat" case. Billy Counterman is seeking to overturn his conviction for sending threatening and abusive Facebook messages to another individual.

The appeal argues that the conviction is invalid because the jury was not required to make any finding about whether Counterman intended his comments to be genuine threats. His attorney argues that if such messages are not true threats, they are deemed protected speech under the Constitution's First Amendment. Counterman v. Colorado Docket # 22-138. This case gives the Supreme Court another opportunity to definitively articulate a legal standard for what constitutes a "true threat." We will monitor this case and report the outcome.



Lacking clear legal guidance on this matter we recommend the following:

Recommendations for Threat Managers Regarding Free Speech Threat Issues:

- Collect and memorialize any evidence that tends to prove a person of concern who transmitted a threatening message did so for the purpose of issuing a threat or with the knowledge that the communication will be viewed as a threat.
- If the subject alleges he intended only sarcasm or humor, look for evidence that contradicts this allegation such as collateral comments to witnesses.
- Any evidence that counters a defense that threats were just “artistic expression” may be helpful.
- If an admonishment or warning was given, document it as well as the subject’s responses, demeanor, and behavior.
- Courts will look at the time, place, manner of expression, and organizational and individual impact of the threat.
- Context is important and should be considered and documented in assessments.

How do we create a culture of collaboration between first-line supervisors and managers, Human Resources, Security, and our Threat Management Teams?

It is one thing to have written policy or plan to address workplace violence, but have we trained and empowered first line supervisors and managers to implement these plans?

We can help.

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The goal of this certification is to elevate professional standards, enhance individual performance by identifying those who strive to be the “best in the business.” Certified Threat Managers not only have a solid knowledge of the core competencies tested by a rigorous examination but are also committed to maintain currency on new trends, research, and public policies through continued education.