True Threats, Self-Defense, and the Second Amendment

Joseph Blocher and Bardia Vaseghi

Introduction

In June 2020, when a group of peaceful Black Lives Matter protestors passed by on the sidewalk outside their home in St. Louis, Mark and Patricia McCloskey emerged from the house and confronted them with firearms.[1] While Mark McCloskey wielded an AR-15-style semiautomatic rifle slung across his shoulder, Patricia McCloskey pointed her semiautomatic handgun at the crowd, shouting at protestors and keeping her finger on the gun's trigger.[2] The scene quickly sparked a nationwide debate. Although prosecutors charged both Mr. and Mrs. McCloskey with felonious use of a weapon, some argued that these charges did not go far enough and that Mrs. McCloskey — by pointing the gun at the crowd — may have committed assault.[3] Others — including the Governor of Missouri — argued that the couple was engaged in lawful self-defense, or even that their actions were covered by the Second Amendment's right to keep and bear arms.[4]

Such debates about the constitutional protection afforded gun displays have become increasingly embedded in nationwide debates over gun regulation. Less than a week after the incident in St. Louis, a white woman pointed a loaded handgun at an African-American woman and her 15-year-old daughter during a minor dispute in a Michigan parking lot, claiming that she did so out of fear for her own safety.[5] The recent killing of Ahmaud Arbery, too, highlights the ways in which race plays a part in threat perception and the privileging of some kinds of private violence.[6]

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The question that interests us here is whether the Second Amendment protects gun owners who threaten others by negligently or recklessly wielding their guns, whether in response to perceived threats or not. In *District of Columbia v. Heller*, the Supreme Court indicated that self-defense is the "core" interest protected by the Second Amendment.[7] The Court's holding raises difficult and contested empirical questions about how often firearms are used to effectuate that core interest,[8] as well as conceptual questions about whether and how to reconcile Second Amendment and self-defense doctrines, which traditionally require the use of force to be necessary and proportional to an imminent threat.[9] But *if* a person is engaged in lawful self-defense, their threats to shoot someone else are protected not only by the Second Amendment but by self-defense doctrine itself. On the flip side, a person who knowingly threatens violence against others *without* any legal justification has committed a crime (or tort) for which the Second Amendment offers no protection — *Heller* did not immunize those who commit assault with guns.

But what about the in-between cases, such as those in which a gun owner overreacts to a perceived threat? Can people be punished for recklessly pulling a gun in response to a claimed threat, or must their actions rise to the level of negligence or even knowing wrongness? In other words, assuming that the Second Amendment has some application in such a scenario, what mental state requirements might it impose?

In answering such questions, careful consideration of the First Amendment can provide some useful guidance. While not all constitutional rules can or should travel between the two Amendments,[10] judges and scholars have nonetheless turned to free speech doctrine for guidance about the scope and strength of the right to keep and bear arms.[11] Indeed, the *Heller*

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Court signaled a receptiveness to such an approach by explicitly analogizing the purpose, history, and scope of the First and Second Amendments.[12] More fundamentally, an analogy is appropriate in this specific instance because the challenge is relevantly similar: establishing how a fundamental constitutional right limits the law's power to punish threats.

This article considers a First Amendment doctrine that has thus far received little attention in the gun debate but might shed useful light on the line between self-defense and gun-related behavior like brandishing or assault: the doctrine of true threats. Free speech doctrine permits punishment of "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."[13] We suggest the same test might help show that the Second Amendment does not protect gun-carrying intended to threaten unlawful violence against another.

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A central challenge of the true threat doctrine is identifying what kind of "intent" must be required by a criminal prohibition in order to pass constitutional muster. A criminal prohibition with a stringent mental state requirement provides less room for legal liability, and, therefore, involves lower constitutional stakes. Mental state requirements are defined with varying degrees of stringency ("knowing," "negligent," "reckless," etc.). The proper standard to apply in any particular context remains a major subject of debate in the First Amendment and of course in the criminal law more broadly,[14] and we do not suppose that the Second Amendment will lend itself to a single, simple answer, either. But identifying the issue, and perhaps some doctrinal guideposts from other areas of law, is a good first step.

Our goal here is not to make the strong claim that *all* public carrying amounts to a true threat and is therefore uncovered by the Second Amendment. There is a robust historical and doctrinal debate about the constitutional status of public carrying,[15] and our contribution is relevant only to a subset of public carry. Neither do we advance the weak claim that some threats are not covered by the right to keep and bear arms, nor that *only* purposefully threatening behavior can be regulated. Rather, our hope is to zero in on the thin line that separates constitutionally legitimate gun displays from threatening activities that can be proscribed.

For purposes of this paper, we assume a broad version of the right to keep and bear arms and make two primary assumptions — both debatable — about its breadth: that the right extends outside the home and that armed self-defense outside the home comes within the core of the right.[16] Nearly all courts have held or assumed that the right extends outside the home, but the Supreme Court has not yet clearly weighed in on the issue, which remains a matter of scholarly debate.[17] Moreover, while *Heller* clearly protects some forms of "keeping" and "bearing," those verbs do not necessarily encompass the *act* of self-defense itself.[18]

Our focus here is related to, but different from, the traditional focus on mental states and threats in the Second Amendment context. A gun owner's threat perception is already baked into "good cause" requirements for public carrying, for example, which typically require a person seeking a permit to show that he or she faces threats more serious than those faced by the general population.[19] Here we ask whether and how the threats that others perceive gun owners to *pose* are protected by the Second Amendment.

The article proceeds in two parts. Part I briefly explores the evolution of the true threat doctrine in the Supreme Court, culminating in a synopsis of the true threat doctrine in its current form. Part II maps

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the doctrinal elements of true threat jurisprudence onto the considerations of the Second Amendment.

I. True Threats as First Amendment Doctrine

The Supreme Court has held that "the government may regulate certain categories of expression" that are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[20] It has recognized a prohibition on "true threats" as one such category of permissible regulation. The elaboration of that exception has led to a great deal of doctrinal nuance, especially regarding the question of what mental state a law must require in order to satisfy the First Amendment.

A. From Watts to Black

In *Watts v. United States*,[21] a 1969 per curiam decision, the Supreme Court indicated for the first time that the First Amendment does not protect speech conveying a threat to harm others, otherwise known as a "true threat." In *Watts,* an eighteen-year-old man, Robert Watts, was arrested during a public rally formed to protest the Vietnam War.[22] Watts said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," apparently causing uproarious laughter.[23] A jury nonetheless found Mr. Watts to have committed a felony by "knowingly and willfully threatening the President," in violation of a 1917 statute that proscribes threats to "inflict bodily harm upon the President of the United States."[24]

Emphasizing that the First Amendment must shield even "vehement, caustic, and … unpleasant[]" attacks on government officials to ensure that "debate on public issues" remains "uninhibited, robust, and wide-open,"[25] the Court found that Mr. Watt's statements were "crude" attempts to register "opposition to the President" rather than a "true threat."[26] The majority offered a contextual analysis to determine whether a statement constitutes a true threat, comprising factors such as (1) whether the statement was made in a political context, (2) whether the statement was "expressly conditional," and (3) the reaction of the listeners.[27]

After *Watts*, the Court did not squarely consider the true threat doctrine until 2003's *Virginia v. Black*, which addressed whether Virginia's statute prohibiting burning crosses with "an intent to intimidate a person or groups of persons" violated the First Amendment.[28] The defendants had burned crosses (a traditional symbol of the Ku Klux Klan), leading witnesses to feel "awful," "terrible," and "very scared."[29]

As in *Watts*, the Court recognized that a thin line existed between true threats and speech protected by the First Amendment. Indeed, it recognized that cross burning had been used — at different times and places — *both* to intimidate *and* as symbolic expression.[30] The question presented, then, was whether the government could regulate an activity that has both threatening and expressive qualities if it restricts its regulation only to those instances intended to intimidate others. The Court concluded that it could.[31] However, it took issue with the statute's stipulation that merely burning a cross amounted to "prima facie evidence of an intent to intimidate."[32] Rejecting a blanket prima facie evidentiary standard, the Court again underscored the importance of a contextual analysis in determining whether an activity is intended to intimidate.[33]

Building on *Watts*, the Court also held that a speaker need not "actually intend to carry out [a] threat" for the statement to be deemed a threat.[34] Indeed, restrictions on free speech established by the true threat doctrine exist also to "protect[] individuals from the fear of violence, … the disruption that fear engenders … and from the possibility that the threatened violence will occur."[35]

The Court's decision in *Virginia v. Black* reaffirmed its commitment to contextual analysis in considering true threats cases, but it left unanswered some important questions regarding the mental state — if any — that the First Amendment requires before a threat is punishable.[36]

B. Elonis v. United States

In the 2014 case *Elonis v. United States*,[37] the Supreme Court seemed poised to answer these contested questions. The defendant in *Elonis* was charged with breaching 18 U.S.C. § 875(c), which criminalizes the transmission of "threats … to injure the person of another" in interstate commerce.[38] In a series of online posts, Elonis referred to killing his estranged wife, as well as co-workers, a kindergarten class, and an FBI agent. The question before the Court was squarely presented: what mental state with respect to a statement is required to convict a speaker under a statute proscribing the communication of threats?

Although the Court averred that the statute did not explicitly include a *mens rea* requirement, it held that the "basic principle[s]" "that 'wrongdoing must be conscious to be criminal'" and that a defendant "must be blameworthy in mind" to be found guilty necessitate reading a *mens rea* requirement into the statute.[39] The Court also held that any insertion of an *implicit* state of mind requirement into a statute must be limited to

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that "*mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[40]

The Court declined to articulate the precise *mens rea* that would distinguish criminal from non-criminal conduct. Instead, as it has done with other true threat questions, the Court urged lower courts to consider context in determining the appropriate level of *mens rea*. And so, on remand, the Third Circuit held that the graphic nature of Mr. Elonis's posts and the intimate relationship between him and his wife made it highly likely that Elonis intended his communications to be a threat under any *mens rea* standard. The clearly threatening nature of the conduct thus obviated the need to declare a particular *mens rea* standard and to determine whether Mr. Elonis's conduct met it.[41]

Elonis is certainly not the last word on the First Amendment's treatment of true threats, but it does contain (and affirm) a few useful guideposts. First, punishment must involve some consideration of the speaker's subjective state of mind. Second, the government *can* constitutionally punish "those 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."[42] Third, beyond such purposeful threats, a contextual analysis is appropriate both to determine the requisite *mens rea*, and to ascertain whether a defendant's conduct meets the chosen state of mind requirement. What guidance might this approach provide for Second Amendment challenges to convictions for brandishing, assault, and other gun-related prohibitions?

II. True Threats as Second Amendment Doctrine

We can begin by ruling out the "easy" cases — lawful assertions of self-defense (which involve *justified* threats to inflict violence) and intentional threats of violence involving no claim of self-defense at all (which are *prima facie* unlawful and not protected by the Second Amendment). We focus instead on the in-between cases: those like the Missouri examples where a gun has been not merely carried but displayed in a way that menaces or threatens others in an arguably negligent or reckless manner. Assuming that the Second Amendment *does* have some application in such scenarios — an especially gun-protective assumption — what mental state would it require and what lessons might First Amendment doctrine teach?

A direct importation of free speech doctrines will not work. Courts applying heightened standards in speech cases have done so because of a concern with "chilling" legitimate speech.[43] But that particular rule is a poor candidate for doctrinal borrowing, as the Court has consistently and consciously declined to apply it outside the First Amendment context. Moreover, the reason for denying constitutional protection to true threats — the likelihood of inflicting unlawful violence — is especially acute when the very implement of such violence (i.e., a gun) is at issue. Accordingly, at least as a *prima facie* matter, there is less reason for the Second Amendment to be especially solicitous of true threats — if anything, the mental state requirements under the Second Amendment should be correspondingly lower.

Assuming that the Second Amendment does impose a mental state requirement on a crime like brandishing, the most sensible starting point is probably recklessness — the standard that Justice Alito advocated for with respect to the First Amendment in his *Elonis* concurrence. Gun owners who act recklessly — or "disregard[] a substantial and justifiable risk" that a known harm will result from their gun-related conduct — should not expect the Second Amendment to protect such conduct.[44] Their disregard, however, must be of such a nature and degree that it constitutes "a gross deviation from the standard of conduct [of] a law-abiding person" in the same situation.[45]

Such an approach comports with the principles at the heart of the Court's *mens rea* analysis. Again, the Court requires only that "*mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[46] And, as Justice Alito agreed in the First Amendment context, reckless behavior that evinces a blatant disregard of a significant risk can hardly be described as innocent. On many occasions and in different contexts, the Court has held that individuals are morally culpable — and therefore, not entirely innocent — when they act recklessly.[47] Indeed, one could reasonably conclude that the threshold for what constitutes morally culpable conduct is lower when an individual wields an instrument of deadly violence.

Adopting a recklessness standard, moreover, makes sense in light of the values underlying the Second Amendment. A person who recklessly threatens others with violence outside the context of self-defense is not furthering the personal safety interests at the core of the Second Amendment as defined by *Heller*. To the contrary, he is engaged in precisely the kind of conduct that has been subject to "longstanding prohibition[]" that the Court in *Heller* recognized as "presumptively lawful."[48] It is worth noting, however, that while virtually all courts agree that a knowledge or purpose *mens rea* requirement is sufficient to transform speech into a true threat, no such court has yet concluded that mere recklessness suffices.

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If, instead, we adopt the historical approach advanced by many gun rights advocates — evaluating the constitutionality of modern gun laws solely by reference to "text, history, and tradition" — we find that gun-related behavior like brandishing requires, at most, a minimal showing of *mens rea*. No less authority than Blackstone referred to the "offence of riding or going armed, with dangerous or unusual weapons, [as] a crime against the public peace, by terrifying the good people of the land."[49] Blackstone was referring to 1328's Statute of Northampton, which held that the King's subjects could "bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewher."[50] Scholars debate whether the Statute banned armed travel in public places,[51] or simply "those circumstances where carrying arms was unusual and therefore terrifying,"[52] or — even more stringently — applied only to cases where an intent to terrify could be shown.[53]

It is worth noting here an interpretive difficulty that arises if one attempts to articulate *mens rea* requirements based on the kind of historical analysis that Second Amendment doctrine seems increasingly poised to require: namely, that the understanding of *mens rea* has changed *immensely* since 1791.[54] The current framework (itself still evolving) can be traced to the mid-twentieth century, the 1962 Model Penal Code and other developments.[55] Following the historical approach would therefore — somewhat ironically, given that gun rights advocates often favor history — lead to an especially constrained right to keep and bear arms (i.e., one that requires no, or very little, showing of *mens rea*).

Returning to the present, consider two specific and concrete examples in which the recklessness standard might have purchase. In April 2020, thousands of protestors descended upon state capitols in Ohio, Michigan, and Pennsylvania, to show their disapproval of lockdown policies enacted in response to the COVID-19 pandemic. Many of the protesters openly carried assault rifles and handguns, and wore camouflage, body armor, and military-style helmets.[56] To our knowledge no gun-related charges have been filed against anyone in connection with those protests. But if armed protestors were to face criminal or civil liability — and again, assuming that *some* mental state requirement applied[57] — the Second Amendment would not protect those who evinced a reckless disregard for the safety of others. Such a theory of liability may discourage individuals from engaging in reckless behavior that increases the risk of unnecessary firearm-related injury or fatality in the first place.

Second, consider the case of Dmitriy Andreychenko. Days after the mass shootings in Dayton, Ohio, and El Paso, Texas, he put on body armor and carried a loaded "tactical rifle" into a Missouri Walmart.[58] His wife and sister (whom he asked to tape the incident) advised him not to, but Andreychenko later insisted that, in the words of the probable cause affidavit, "he wanted to see if the Walmart manager would respect his Second Amendment right" and that "his intentions were to buy grocery bags and [he] did not intend for anybody to act negatively towards him." A Walmart spokesman disagreed: "This was a reckless act designed to scare people, disrupt our business and it put our associates and customers at risk."

Of course, Walmart itself is not subject to the Second Amendment. But Missouri is, and Andreychenko faced a felony charge of making a terrorist threat in the second degree, pursuant to a Missouri statute criminalizing behavior that "recklessly disregards the risk of causing the evacuation of a building."[59] The constitutionality of his conviction, we have suggested, would not depend on whether he *knowingly* sought to communicate a threat of unlawful violence. What would matter is whether he did so recklessly.

Conclusion

To our knowledge, there has yet to be active litigation about the intersection of true threat doctrine, criminal and tort laws against brandishing, and the Second Amendment. But with the apparently increasing number of incidents like those discussed above, and the expansion of open carry and "stand your ground" laws, we suspect that more attention must be paid to the question of how — if at all — the Second Amendment alters what counts as a true threat punishable by law.

The importance of the question is not limited to a few headline-grabbing incidents. The line between defensive gun use (DGU) and the commission of a crime can be vanishingly thin. A person who feels threatened by a stranger on a street at night might pull out a gun in response, causing his perceived attacker to flee. In that scenario, the would-be defender is either exercising "core" Second Amendment rights[60] or engaged in the crime of brandishing,[61] or even assault.[62] Once the gun is pulled, and the intended target flees, there is little room for a third categorization. The stark binary between constitutionally laudatory activity and the commission of a crime makes it all the more important to establish an articulable legal line between the two.

Empirical studies on DGUs underscore the scope of the problem. Some self-reported surveys indicate

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between 2.2 and 2.5 million DGUs per year, 200,000 of them involving the successful wounding of an attacker.[63] But these surveys likely include enormous numbers of false positives considering that only about 100,000 shooting victims show up in hospital emergency rooms every year.[64]

This conclusion, in turn, suggests that gun owners sometimes overreact to perceived threats, perhaps pulling — or even using — a gun on a person who was simply minding his own business, or asking for directions, or happened to match the gun owner's mental image of a threatening person. In one study, researchers summarized self-reported DGUs from a survey and then sent the summaries to five criminal court judges. Even taking the facts as given, and assuming that the person with the gun had a valid permit to own and carry it, the surveyed judges found that roughly half of the incidents were potentially illegal.[65]

In short, it is empirically and legally important to draw a line between armed self-defense, which *Heller* states receives heightened constitutional protection,[66] and threats, which are punishable by law. The First Amendment's true threat doctrine can provide some general guidance in that regard. Gun-related activities which meet the strict definition of true threat — a specific, subjective intent to inflict unlawful violence on others — are punishable without offending the right to keep and bear arms. But we have also suggested that, even assuming that the Amendment does require some kind of mental state requirement, a recklessness standard is a good place to start.

Note

The authors do not have any conflicts of interest to disclose.

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64. See D. Hemenway, "Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates," *Journal Criminal Law and Criminology* 87, no. 4 (1997): 1430-1445.
65. D. Hemenway, D. Azrael, and M. Miller, "Gun Use in the United States: Results from Two National Surveys," *Injury Prevention* 6, no. 4 (2000): 263-265; *see also* O.D. Duncan, "As Compared to What? Offensive and Defensive Gun Use Surveys, 1973–1994," *National Institute of Justice Working Paper 185056* (2000): 1-21; O.D. Duncan, "Gun Use Surveys: In Numbers We Trust?" *Criminologist* 25, no. 1 (2000): 1-7.
66. See *supra* note 64.

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