

Fear Factor: Is Art that can be Mistaken for Terrorism Protected by the First Amendment?

JULIE HILDEN

Can art that mimics, or comments on, terrorism also *be* a kind of terrorism – or, at least, a kind of criminal conduct? The question was raised by a controversial piece of public art created by a young New York City artist, Clinton Boisvert.

In December 2002, with New Yorkers still very much on edge after the first anniversary of September 11, Boisvert placed about three dozen Federal Express boxes in the heavily trafficked Union Square subway station, during morning rush hour. Each was spray-painted black; each bore the single word ‘Fear’.

At first, no one took notice. But ultimately, the police were alerted; the bomb squad arrived; and the subway trains were stopped, leaving commuters worried, inconvenienced, and annoyed. A bomb-detecting robot was sent into the station – in vain, since the boxes were empty.

Apparently, the police feared that the boxes were part of an act of terrorism, and might contain weapons. That suspicion was hardly unreasonable, given that innocuous means of delivery – such as a shoe sole, in the case of the ‘Shoe Bomber’, or an envelope, in the case of the anthrax letters – had previously proved very dangerous indeed.

Boisvert claims that he had not anticipated that such a reaction might occur, until his teacher at the School of Visual Arts raised the possibility during class, afterward. Nevertheless, Boisvert was criminally charged for putting the boxes in the station.

Should he have been? Did New York law really prohibit what Boisvert did? Or were the laws stretched to allow him to be charged?

And even if the charges were proper, should the First Amendment have provided a complete defence for Boisvert’s actions? After all, his art event

Julie Hilden, a FindLaw columnist, practiced First Amendment law at the Washington, DC law firm of Williams and Connolly from 1996 to 1999. Her first novel, *3*, was published in 2003. Hilden maintains a website at www.juliehilden.com that include MP3 and text downloads of the novel’s first chapter.

took place in a public area, and it involved both actual speech (the word ‘Fear’) and symbolic speech, in the form of the black boxes.

The First Charge against Boisvert: Why Reckless Endangerment is a Stretch

Boisvert was charged with reckless endangerment and disorderly conduct. But, thanks to the intervention of American Civil Liberties Union attorney William Stampur, the charge was reduced to disorderly conduct alone. In the end, Boisvert was ticketed, served five days of community service, and wrote an apology letter to the police.

Putting the First Amendment issue aside, did his conduct fit these charges?

First, let’s consider reckless endangerment. It is defined under New York law as recklessly ‘engaging in conduct which creates a substantial risk of serious physical injury to another person’.

Charging Boisvert with this offence seems to me to be a stretch. Possibly, someone might have been seriously injured if panic had ensued after word of the ‘Fear’ boxes had spread in the subway station, especially if there had been a stampede towards the exit. But in fact, that did not happen, and it seems unlikely it would have done. New Yorkers have been surprisingly polite, and helpful to each other, in the face of terror threats – as the admirable conduct of those caught in or near the World Trade Center tragedy attested.

Moreover, the real harm of what Boisvert did seems to be quite different. He probably inspired fear in some commuters who saw the boxes and panicked. And he certainly wasted police department resources and time, made commuters late, and caused the loss of time and money.

More generally, Boisvert disrupted the lives of everyone involved, forcing them to defer their own concerns to deal, for the moment, with his ‘Fear’ boxes. And he inflicted this harm upon a captive audience; commuters needed to be on time for work, and might have hesitated simply to walk away, enduring their fear instead.

In sum, Boisvert’s art did harm. But it did not really accomplish the kind of harm the ‘reckless endangerment’ statute contemplates.

The Second Charge against Boisvert: Disorderly Conduct Does not Fit Either

What about disorderly conduct? Under New York law, disorderly conduct requires both a certain kind of state of mind and a certain type of conduct.

Boisvert’s state of mind, he says, was innocent. He has suggested that he did not anticipate that anyone would fear that his black boxes contained bombs or other terrorist devices. That seems hard to believe, but it becomes a

little easier when one learns he was a freshman doing a class project at the time. Freshmen are not known, after all, for their wise and prudent judgement.

The problem for Boisvert is that even if he can prove he never anticipated the fear his 'Fear' boxes would create, he is not in the clear. The disorderly conduct statute reaches those who intend 'to cause public inconvenience, annoyance or alarm'; Boisvert says he is not among them. But it also reaches those who 'recklessly creat[e] a risk' of public inconvenience, annoyance or alarm. And it can be argued that even if Boisvert never intended his boxes would alarm people, he at least recklessly created the risk that, indeed, they would.

Thus, Boisvert arguably satisfies the 'state of mind' component of the disorderly conduct statute. But what about the 'conduct' component? Boisvert's conduct was to create the boxes and place them in the subway station. And that conduct is far afield from the kind of violent, anti-social conduct the disorderly conduct statute is trying to reach.

Much of the disorderly conduct statute sounds like it is tailored to a bar fight, not an art project. The statute is triggered, for instance, by 'fighting'; 'violent, tumultuous or threatening behavior'; 'unreasonable noise'; 'abusive or obscene language'; or 'an obscene gesture'. Or all of the above – your typical barroom brawl. But Boisvert is an artist, not a fighter.

The rest of the statute seems to target certain disruptive kinds of protest. The statute reaches those who 'disturb[] any lawful assembly or meeting of persons'; 'obstruct[] vehicular or pedestrian traffic'; or 'congregat[e] with other persons in a public place and refus[e] to comply with a lawful order of the police to disperse'. Again, these activities are far afield from Boisvert's; he came and went peacefully, leaving his boxes behind.

Finally, the catchall provision in the disorderly conduct statute is more general. It reaches instances in which the culprit 'creat[es] a hazardous or physically offensive condition by any act which serves no legitimate purpose'. Again, this just does not sound like Boisvert. He scattered boxes on the platform, rather than shattering beer bottles there.

As I noted above, the boxes seem to have created a psychological, not a physical hazard. And it seems unfair to say that they served 'no legitimate purpose'. After all, should artistic purposes not count as 'legitimate' ones?

In sum, neither of the New York criminal charges brought against Boisvert – for 'reckless endangerment' or 'disorderly conduct' – was truly appropriate.

Moreover, even if Boisvert had been prosecuted under a hoax statute, rather than under these statutes, he might also have avoided conviction. Although his art had the same consequences as a hoax, he says that he did not intend it as one, and a hoax classically is thought of as an *intentional* deception.

The Potential Chilling Effect of Criminalising Art

All this is not to say, however, that Boisvert's lawyer made a mistake in not moving to dismiss the charges on the ground that they did not fit the criminal law, or in not pressing the First Amendment issue further.

To the contrary, Boisvert's attorney did his job well. The sentence ultimately imposed on Boisvert was very light, especially given the policing costs, and public anger, his art project incurred. Virtually any attorney worth his salt would have urged his client to accept it.

However, the result of Boisvert's sensible decision to accept his light punishment is that these laws still hang over the heads of New York artists – threatening them, and perhaps even Boisvert himself. In First Amendment law, that is known as a 'chilling effect'.

Presumably, a second offence of the same type, on Boisvert's part, would result in a harsher penalty. Boisvert might feel compelled to accept that penalty, rather than facing a potentially worse sentence after trial. That creates a powerful incentive for him not to create 'Fear Boxes Two' next December.

Indeed, interestingly – and perhaps significantly – Boisvert's latest work, as reported by *The New York Press*, is more a commentary on terrorism, than a facsimile of it. Boisvert's second work included a metal male figure with a penis covered with photos of September 11 victims. He placed it in Union Square (but not the subway station), apparently without permission.

In response, the Park Service carted the sculpture away in a dumpster. Those who saw the sculpture might well have been offended by the use of September 11 victims' photos. But it seems unlikely that anyone was frightened by the sculpture or inconvenienced by it. At worst, the sculpture was in bad taste, and bad taste is not a crime.

Fear Versus Offence

The distinction between Boisvert's first work of art, the 'Fear' boxes, and his second work of art, incorporating the September 11 photos, tracks an important distinction in First Amendment law as well.

The Supreme Court has made crystal clear that speech cannot be censored because it is offensive. But speech that causes fear is very much another matter. That is because speech that inspires fear includes a threat of physical – not just psychological – harm, and the First Amendment protects only 'speech', not conduct.

When speech inspires fear, the fear itself is psychological, but its object is physical harm. Thus, the speech flirts with conduct, and takes its place on the outskirts of the zone of First Amendment protection.

In contrast, being offended is purely psychological – the person who takes offence feels disgust, not physical fear – and such reactions are the price we all pay to live in a free society, and to be exposed to different ideas.

In the end, everyone will be offended by something. Personally, I am offended by Boisvert's sculpture incorporating the penis covered with September 11 photos; those are the same photos I saw on 'Missing' posters just after the attacks, and I am not ready now – or ever – to see them on a metal penis. But Boisvert might be offended by this column. So we can declare a First Amendment truce; everyone is protected, and no one is harmed.

But Boisvert's 'Fear' boxes are a bit different. The boxes had the effect of driving commuters, physically, out of the subway station; once the police came – as they predictably did – commuters had no choice but to leave. The boxes also may have put people in physical fear, triggering worry about a repeat of September 11. After all, city subways have repeatedly been named as likely al-Qaeda targets, and unlike airports, there is no security check there; anyone can enter, carrying anything they like.

For these reasons, the 'Fear' – and fear-creating – boxes raise a difficult First Amendment issue.

Obviously, threats can be punished criminally. So can cross-burning with a threatening intent, according to a recent Supreme Court decision. And so can stalking, even if it occurs solely on public sidewalks and streets.

But what about 'threatening' art like Boisvert's 'Fear' boxes – art that, indeed, can be mistaken for terrorism? I believe that the 'Fear' boxes, at a minimum, have a far better claim to First Amendment protection than direct threats, stalking or burning crosses do, for several reasons.

First, the boxes' interpretation is highly subjective, and open to debate. It is pretty clear that when someone says, 'I'm going to kill you', in certain circumstances, they mean it. And the message of a burning cross on the lawn across from an African-American family's house sends an unmistakable message. But what do the 'Fear' boxes say, exactly?

Do they say that fear can – or cannot – be confined? That it is useless to keep fear in a psychological 'box'? Do they parody New Yorkers' lingering fear of terrorism, or encourage it?

Different individuals are bound to have radically different interpretations of what the boxes mean – and, in part for this reason, radically different emotional reactions to them. Indeed, Boisvert's 'Fear' boxes might have actually *diminished* some New Yorkers' fears of terrorism.

Many New Yorkers who saw the boxes must have learned later that they actually did not contain anything dangerous at all – indeed, they were only a freshman art project. For them, the 'Fear' boxes may have acted as a welcome reminder that the climate of fear in which many New Yorkers still live, may not always reflect reality. Even among the threats, daily life – and

art, fortunately very much a part of New York's daily life – goes on. In a city always under the shadow of the Orange threat level, that is important to remember.

Finally, it is worth considering that art may be valuable precisely in that it is provocative – and one way to be provocative is to inspire anxiety, or even fear. After all, art that is not – in at least some respect – disturbing may not be worthy of the name; it may merely be entertainment.

For all these reasons, though the case is a close one, my view is that the 'Fear' boxes ought to fall under the First Amendment, not the criminal law.