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NOTES

ELONIS V. UNITED STATES: THE NEED FOR A RECKLESSNESS STANDARD IN TRUE THREATS JURISPRUDENCE

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NOTES

ELONIS V. UNITED STATES: THE NEED FOR A RECKLESSNESS STANDARD IN TRUE THREATS JURISPRUDENCE

Marley N. Brison*

> *"Given the majority's ostensible concern for protecting innocent actors, one would have expected it to announce a clear rule—any clear rule. Its failure to do so reveals the fractured foundation upon which today's decision rests."*
>
> —*Justice Clarence Thomas*[1]

I. INTRODUCTION

When a user logs onto the international social networking website Facebook, they are prompted with a status[2] box that asks, "What's on your mind?" Interestingly enough, a poster's mindset has been central to the controversial question of whether a person's statements on Facebook qualify as "true threats" under 18 U.S.C. § 875(c).

With the enormous evolution of technology in today's society, communication is easier and faster than ever before. Individuals are able to convey communications from behind computer screens, smart phones, and social networking profiles. While

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[1] Elonis v. United States, 135 S. Ct. 2001, 2028 (2015) (Thomas, J., dissenting).

[2] "A Facebook status is an update feature which allows users to discuss their thoughts, whereabouts, or important information with their friends . . . . When a status is updated, it posts on the user's personal wall, as well as in the news feeds of their friends." Margaret Rouse, *Facebook Status*, WHATIS.COM, http://whatis.techtarget.com/definition/Facebook-status (last visited Feb. 20, 2017).

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these technological advances have facilitated interactions that were nearly impossible in the pre-digital era, they have also muddied the waters in terms of evaluating the legal impact of such communications. Context and intent play a vital role in determining whether an expression is constitutionally protected.[3] In this modern technological landscape, however, it can be extremely difficult to decipher the intent of an individual transmitting a message, and consequently whether those expressions deserve First Amendment protection.

"True threats" fall under one of the carved-out exceptions to protected speech under the First Amendment.[4] Under the true threats doctrine, an individual who "transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another" is guilty of a felony and faces up to five years' imprisonment.[5] The statute requires that "a communication be transmitted and that the communication contain a threat."[6] However, the statute does not specify the requisite level of intent required for speech to rise to the level of a true threat. Due to this lack of clarity, a jurisdictional impasse emerged with regard to a uniform interpretation of 18 U.S.C. § 875(c).[7] Some circuits have assessed whether a statement constitutes a true threat by looking to the perspective of the listener (an objective intent standard), while other circuits have evaluated a potential true threat from the perspective of the speaker (a subjective intent standard).[8]

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[3] John Villasenor, *Technology and the Role of Intent in Constitutionally Protected Expression*, 39 HARV. J.L. & PUB. POL'Y 631, 631 (2016) ("Intent and context matter enormously in communication . . . with regard to understanding the limits of First Amendment protections.").

[4] Jacob Honigman, *Can't Stop Snitchin': Criminalizing Threats Made in "Stop Snitching" Media Under the True Threats Exception to the First Amendment*, 32 COLUM. J.L. & ARTS 207, 208 (2009) ("But the First Amendment, while generally protecting speech that advocates illegal violent activity, does not protect speech that actually threatens its target, the Supreme Court has established that there is an exception to the First Amendment for 'true threats.'" (footnote omitted) (citing Virginia v. Black, 538 U.S. 343 (2003))).

[5] 18 U.S.C. § 875(c) (2012).

[6] *Elonis*, 135 S. Ct. at 2008.

[7] Jing Xun Quek, Elonis v. United States*: The Next Twelve Years*, 31 BERKELEY TECH. L.J. 1109, 1110 (2016) ("A circuit split arose among the Courts of Appeal; the Seventh, Ninth[,] and Tenth Circuits required a showing of subjective intent, while the other Circuits adhered to the long-established objective standard." (footnote omitted)).

[8] Marie-Helen Maras, *Unprotected Speech Communicated Via Social Media: What Amounts to a True Threat?*, 19 NO. 3 J. INTERNET L. 3, 4 (2015).

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The Supreme Court attempted to remedy this circuit split in *Elonis v. United States*.[9] However, the resulting decision not only failed to answer the impending mens rea inquiry, but it generated more confusion with regard to the interpretation of 18 U.S.C. § 875(c). In *Marbury v. Madison*, the Court notably proclaimed: "It is emphatically the province and duty of the judicial department to say what the law is."[10] In the Supreme Court's 2015 *Elonis* decision, the Court failed to fulfill this duty by merely stating what the law is *not*, causing further uncertainty and confusion in the realm of true threats jurisprudence.[11]

Part II(A) of this Note describes an objective intent approach to true threats, while Part II(B) explains the competing subjective intent standard. Part III(A) sets forth the factual background of *Elonis v. United States*, the case in which the U.S. Supreme Court attempted to settle the dispute between the two contending standards. The details of the Supreme Court decision are discussed in Part III(B), and Part IV illustrates the potential and already incipient consequences of the unclear decision. Part V of this Note suggests a "recklessness" standard as the proper mens rea requirement for true threats under 18 U.S.C. § 875(c). Lastly, Part VI references other First Amendment contexts to demonstrate that a recklessness standard is not only acceptable in true threats jurisprudence, but proper.

II. PRE-*ELONIS*

A. *Objective Intent*

Some courts, prior to the *Elonis* Supreme Court decision, had favored a general intent standard.[12] General intent utilizes an objective standard, focusing on whether a reasonable listener would view the defendant's words as a threat.[13] Under this standard, the government is required to show that "(1) the defendant transmitted a communication in interstate or foreign commerce, (2) the defendant transmitted that

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[9] 135 S. Ct. 2001 (2015).

[10] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[11] *See Elonis*, 135 S. Ct. 2001 (2015).

[12] *See* United States v. White, 670 F.3d 498, 508 (4th Cir. 2012); United States v. Teague, 443 F.3d 1310, 1319 (10th Cir. 2006); Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004); United States v. Fuller, 387 F.3d 643, 646 (7th Cir. 2004); United States v. Whiffen, 121 F.3d 18, 21 (1st Cir. 1997); United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994); United States v. Himelwright, 42 F.3d 777, 782–83 (3d Cir. 1994); United States v. DeAndino, 958 F.2d 146, 150 (6th Cir. 1992).

[13] Brian D. Hayes, Comment, United States v. Elonis*: Changing the Intent Requirement of Federal Threatening Communication Violations*, 39 AM. J. TRIAL ADVOC. 635, 637 (2016).

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communication knowingly, and (3) the communication would be construed by a reasonable person as a serious expression of an intent to inflict bodily harm or death."[14] An objective intent standard is equivalent to a "negligence standard, charging the defendant with responsibility for the effect of his statements on listeners."[15]

The Sixth Circuit opted for an objective intent standard in *United States v. Jeffries*.[16] In *Jeffries*, Franklin Delano Jeffries II wrote a song regarding the legal dispute over visitation rights to see his daughter.[17] Jeffries created a music video of the song and uploaded it to YouTube five days before a scheduled hearing with Chancellor Michael Moyers, the judge assigned to his custody case.[18] The video began with Jeffries saying, "[t]his song's for you, judge":

> . . . 'Cause if I have to kill a judge or a lawyer or a woman I don't care . . . . Take my child and I'll take your life. I'm not kidding, judge, you better listen to me. I killed a man downrange in war. . . . And I'm getting tired of this bull. So I promise you, judge, I will kill a man. . . . And I guarantee you, if you don't stop, I'll kill you. . . . 'Cause you don't deserve to be a judge and you don't deserve to live. You don't deserve to live in my book. And you're gonna get some crazy guy like me after your ass. And I hope I encourage other dads out there and put bombs in their goddamn cars. Blow 'em up. Because it's children we're, children we're talkin' about. . . . I can shoot you. I can kill you. . . . Do something right. Serve my daughter . . . .[19]

The court decided that a § 875(c) prosecution requires the government to establish that the defendant made a communication that "a reasonable observer would construe as a threat to another."[20] Once the government makes this showing, the court held

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[14] *Id.* (quoting United States v. Martinez, 736 F.3d 981, 988 (11th Cir. 2013), *vacated*, 135 S. Ct. 2798 (2015)).

[15] Maras, *supra* note 8, at 4 (quoting Rogers v. United States, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring)).

[16] United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012), *abrogated by* United States v. Houston, 792 F.3d 663 (2015).

[17] *Id.* at 475.

[18] *Id.*

[19] *Id.* at 475–77.

[20] *Id.* at 478.

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that "it matters not what the defendant meant by the communication, as opposed to how a reasonable observer would construe it."[21] Referencing its previous decisions and other circuit court decisions, the Sixth Circuit concluded that "the defendant's subjective intent ha[s] nothing to do with it."[22] Abiding by this objective standard, the court held that a reasonable person would believe that Jeffries was attempting to threaten and influence the judge in the custody hearing.[23]

In *United States v. Nicklas*, the Eight Circuit applied an objective standard as well.[24] In 2008, David Nicklas claimed to have a vision that the mob purchased property in Rogers, Arkansas on his behalf.[25] As a result, Nicklas wrote a series of letters to numerous individuals demanding the deed to the property.[26] His letters claimed that the mob planned to use the property as a drug and prostitution center, and that the property was placed in Nicklas's name in order to implicate him in the mob's illegal activities.[27] One of the letters Nicklas sent to the Inspector General contained a threat to kill FBI agents, stating that "for each day [Nicklas does] not receive the deed to [his] property which [the Inspector General] is illegally holding, an FBI agent will die."[28]

Nicklas was charged with transmitting a facsimile communication containing a threat to injure in violation of 18 U.S.C. § 875(c).[29] Nicklas contended that § 875(c) is a specific intent crime requiring a showing that he willfully made a threat.[30] The government argued, conversely, that § 875(c) "only requires proof that a defendant knowingly transmitted a communication, and that the communication contained a statement a reasonable person would perceive as a threat—in other words, proving the statement is a threat does not depend upon the defendant's state of mind but upon

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[21] *Id.*

[22] *Id.* at 479 ("We do not stand alone. Several circuits have expressly rejected an additional subjective requirement in construing this and related threat prohibitions.").

[23] *Id.* at 481–82.

[24] *See* United States v. Nicklas, 713 F.3d 435 (8th Cir. 2013).

[25] *Id.* at 437.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 438.

how a reasonable recipient would interpret the defendant's words."[31] The court agreed with the government, concluding that "§ 875(c) does not require the government to prove a defendant specifically intended his or her statements to be threatening, but rather requires the government to prove a reasonable recipient would have interpreted the defendant's communication as a serious threat to injure."[32] Based on witness testimony and the extensive investigation the FBI initiated upon receipt of Nicklas's letter, the court held that the FBI "took the matter very seriously," and Nicklas's conviction was affirmed.[33]

B. *Subjective Intent*

Other circuits have adopted a subjective intent standard when evaluating a potential conviction under 18 U.S.C. § 875(c). A subjective intent standard requires a showing that the defendant not only knowingly made a statement that is reasonably perceived as a threat, but also that he specifically intended for his communication to threaten the victim.[34]

In *United States v. Twine*, business entrepreneur James Twine developed a love interest in Marilyn Reed, a preschool teacher who lived in a group home.[35] When Reed's boyfriend visited her at the home, Twine became so jealous and upset that he was taken to emergency psychiatric care.[36] Months later, Twine began writing letters to Reed and telephoning her ten to fifty times a day.[37] When Reed was unreceptive to the calls and letters, Twine became "vulgar and violent."[38] His threatening calls "ranged from general threats of physical harm to specific threats . . . [of] kidnap and rape."[39] Twine was indicted on seven counts of transmitting via interstate commerce threats to kidnap and injure Reed in violation of 18 U.S.C. § 875(c) and § 876.[40]

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[31] *Id.*

[32] *Id.* at 440.

[33] *Id.*

[34] Paul Larkin & Jordan Richardson, *True Threats and the Limits of First Amendment Protection*, HERITAGE FOUNDATION 1, 5 (Dec. 8, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM142.pdf.

[35] 853 F.2d 676, 677 (9th Cir. 1988).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

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Twine argued a diminished capacity defense at trial, stating that he lacked the capacity to form the intent necessary for conviction under § 875(c).[41] The court held that the showing of an intent to threaten, as required by the statute, is a "showing of specific intent"[42]—in other words, Twine must have subjectively intended his actions to threaten Reed. Therefore, Twine was entitled to have evidence of his mental defect considered to determine whether he possessed the mental capacity necessary to form such intent.[43]

The Tenth Circuit employed a subjective intent standard in *United States v. Heineman* as well.[44] In *Heineman*, Aaron Heineman sent three emails advocating white supremacist ideology to a professor at the University of Utah.[45] After receiving the third email, the professor feared for his and his family's safety.[46] The email, titled "Poem," contained threats to "drag [the professor] as [he] choke[s] and gasps[s]," and to "slay [him], by a bowie knife shoved up into the skull from [his] pig chin."[47] Heineman was convicted on one count of sending an interstate threat under 18 U.S.C. § 875(c).[48] The court concluded that in a true threat prosecution, the government must prove that the defendant intended the recipient to feel threatened.[49] The case was remanded to the district court to determine whether Heineman subjectively intended his email to threaten the professor.[50]

III. *ELONIS V. UNITED STATES*

This issue reached the Supreme Court of the United States in 2015. In *Elonis v. United States*, the Court grappled with the legal quandary of whether to employ an objective intent standard or a subjective intent standard under 18 U.S.C. § 875(c).[51]

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[41] *Id.* at 679.

[42] *Id.* at 680.

[43] *Id.* at 681.

[44] 767 F.3d 970 (10th Cir. 2014).

[45] *Id.* at 971.

[46] *Id.* at 971–72.

[47] *Id.* at 972.

[48] *Id.* at 971.

[49] *Id.* at 975.

[50] *Id.* at 982.

[51] *See* Elonis v. United States, 135 S. Ct. 2001 (2015).

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A. Factual Background

In May 2010, Anthony Elonis's wife of almost seven years left him, taking their two young children with her.[52] Soon after, Elonis began posting self-composed rap lyrics on the social networking website Facebook as a form of emotional therapy.[53] Elonis eventually changed his Facebook user name to his rap-style penname, "Tone Dougie," in order to differentiate himself from his "on-line persona."[54] The rap lyrics Elonis posted under this penname included "graphically violent language and imagery," as well as accompanying disclaimers stating that the lyrics were "fictitious" with no intentional "resemblance to real persons."[55]

Around Halloween of 2010, Elonis posted a picture to Facebook of himself and a fellow co-worker of Dorney Park & Wildwater Kingdom amusement park.[56] The photo, taken at a "Halloween Haunt" event for the park, showed Elonis holding a knife against his co-worker's neck with the caption "I wish" attached.[57] Elonis was subsequently fired for the post.[58] In response, Elonis wrote a new entry on his Facebook page: "That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me?"[59]

Elonis's posts often included crude, demeaning, and vicious material directed toward his newly estranged wife, Tara. One post stated: "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 murder."[60] Several of Anthony Elonis's posts about Tara were in response Tara's sister's Facebook status updates.[61] For example, Tara's sister posted a status while Halloween costume shopping with her niece and

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[52] *Id.* at 2004.

[53] *Id.*

[54] *Id.* at 2005.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] United States v. Elonis, 730 F.3d 321, 324 (3d Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015).

[61] *Id.* at 324.

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nephew (Anthony and Tara's daughter and son).[62] Anthony commented[63] on the status: "Tell [their son] he should dress up as a matricide for Halloween. I don't know what his costume would entail though. Maybe [Tara Elonis's] head on a stick?"[64] In October 2010, Anthony Elonis also posted:

> 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. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.[65]

Elonis also posted an adaptation of a satirical skit called "It's Illegal to Say . . . ."[66] The original skit features a comedian who explains that it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal to say that he wants to kill the President.[67] Elonis's adaptation substituted his wife for the President, and it discussed the "best" way to kill her, which included accurate diagrams and details about his wife's home:[68]

> Did you know that it's illegal for me to say I want to kill my wife? . . . Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. . . . Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. That's illegal. Very, very illegal. But not illegal to say with a mortar launcher. Because that's its own sentence. . . . I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at

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[62] *Id.*

[63] A "comment" to a Facebook status is essentially a reaction to the status, which appears underneath the status itself. The status poster is notified directly of the incoming comment. The status poster, the commenter, and their respective Facebook "friends" can typically view the comment. For more information about Facebook "comments," see *Commenting*, FACEBOOK.COM, https://www.facebook.com/help/commenting (last visited April 19, 2017).

[64] *Elonis*, 730 F.3d at 324.

[65] *Id.*

[66] Elonis v. United States, 135 S. Ct. 2001, 2004 (2015).

[67] Kamatzu, *Whitest Kids U Know: It's illegal to say* . . . , YOUTUBE (May 2, 2007), https://www.youtube.com/watch?v=QEQOvyGbBtY.

[68] *Elonis*, 135 S. Ct. at 2006.

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> her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.[69]

After viewing these posts, Elonis's wife feared for her life and sought a protection-from-abuse order against Elonis.[70] In response, Elonis referred to the order in another Facebook post: "Fold up your [protection-from-abuse order] and put it in your pocket[.] Is it thick enough to stop a bullet? . . . I've got enough explosives to take care of the State Police and the Sheriff's Department."[71]

In the same month, Elonis posted another entry stating that he planned to commit an elementary school shooting:

> That's it, I've had about enough[.] I'm checking out and making a name for myself[.] Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined[.] And hell hath no fury like a crazy man in a kindergarten class[.] The only question is . . . which one?[72]

FBI Agent Denise Stevens visited Elonis's home in response to these recent posts, and Elonis subsequently wrote another Facebook post.[73] This entry stated:

> Took all the strength I had not to turn the bitch ghost[.] Pull my knife, flick my wrist, slit her throat[.] Leave her bleedin' from her jugular in the arms of her partner[.] [laughter][.] . . . Cause little did y'all know, I was strapped wit' a bomb . . .[.] Touch the detonator in my pocket and we're all goin' [BOOM!][74]

Elonis was arrested on December 8, 2010 and charged with transmitting in interstate commerce communications containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c).[75] The grand jury indicted Elonis on five counts of

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[69] *Elonis*, 730 F.3d at 324–25.

[70] *Id.* at 324.

[71] *Id.* at 325–26.

[72] *Id.* at 326.

[73] *Id.*

[74] *Id.*

[75] *Id.*

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making threatening communications: Count 1 was for threats to patrons and employees of Dorney Park & Wildwater Kingdom, Count 2 was for threats to his wife, Count 3 was for threats to employees of the Pennsylvania State Police and Berks County Sheriff's Department, Count 4 was for threats to a kindergarten class, and Count 5 was for threats to an FBI agent.[76] Elonis moved to dismiss the indictments against him, contending that a subjective intent to threaten was required under the true threat exception to the First Amendment.[77] He claimed that his statements were not threats but were protected speech because he did not intend them to be threatening in nature—they were merely expressive rap lyrics.[78] The District Court denied the motion to dismiss.[79]

A jury convicted Elonis on Counts 2 through 5, and the court sentenced him to forty-four months' imprisonment followed by three years of supervised release.[80] Elonis filed post-trial motions arguing that a subjective standard governs; the District Court denied the motions.[81] The U.S. Court of Appeals for the Third Circuit affirmed Elonis's conviction under 18 U.S.C. § 875(c), holding that prosecutors only had to prove that Elonis intentionally made the communication, not that he intended to make a threat.[82] The judge opined that it was enough that a "reasonable person" would foresee that others would view statements "as a serious expression of an intention to inflict bodily injury or take the life of an individual."[83] The Supreme Court of the United States ultimately reversed and remanded.[84]

B. *Majority Decision*

In the Supreme Court majority opinion, Chief Justice Roberts held that although 18 U.S.C. § 875(c) does not specify any required mental state, it does not mean that none exists.[85] He rejected the "reasonable person standard," as it is

[76] *Id.*

[77] *Id.* at 327.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 335.

[83] *Id.* at 328 (quoting United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991)).

[84] Elonis v. United States, 135 S. Ct. 2001, 2013 (2015).

[85] *Id.* at 2009.

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contradictory to the general principle that a defendant must be "blameworthy in mind" before he can be found guilty.[86] Justice Roberts elected to follow the general rule that a guilty mind is "a necessary element in the indictment and proof of every crime"[87]—"wrongdoing must be conscious to be criminal."[88] Therefore, the Court held that criminal statutes should generally be interpreted to "include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[89]

The presumption in favor of scienter is not without limitation, however—the Court may only infer the mental state "necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[90] Looking to § 875(c), "the crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication."[91] Therefore, the mens rea requirement must apply to the fact that the communication contains a threat.[92] Under these principles, the Court held that Elonis's subjective intentions do indeed matter.[93] To be convicted under § 875(c), Elonis must not only have known that he was transmitting a communication, but that the communication contained a threat as well.[94]

Elonis's conviction, however, was premised solely on how a reasonable person would understand his posts.[95] Assessing liability according to whether a reasonable person perceives the communication as a threat—irrespective of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence, and [courts] have long been reluctant to infer that a negligence standard was intended in criminal statutes."[96] In light of the fact that "[f]ederal criminal liability generally

[86] *Id.*

[87] *Id.* (citing United States v. Balint, 258 U.S. 250, 251 (1922)).

[88] *Id.*

[89] *Id.* (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994)).

[90] *Id.* at 2010 (quoting Carter v. United States, 530 U.S. 255, 269 (2000)).

[91] *Id.* at 2011.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 2012.

[95] *Id.* at 2011.

[96] *Id.* (quoting Rogers v. United States, 422 U.S. 35, 47 (1975)).

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does not turn solely on the results of an act without considering the defendant's mental state,"[97] the Supreme Court held that Elonis's conviction could not stand.[98]

Although the majority opinion made clear that negligence is not sufficient to support a conviction under § 875(c), it failed to set forth the minimum mens rea required for criminal culpability.[99] In contemplating whether a recklessness standard suffices for liability, Chief Justice Roberts "decline[d] to address it."[100] The Court also stated that it was "not necessary to consider any First Amendment issues."[101] The Court's disposition is sure to cause confusion—Justice Alito's concurring opinion questions: Must the defendant have had the *purpose* of conveying a true threat? Is it sufficient if the defendant *knew* that his words delivered a threat? Does *recklessness* suffice?[102] Since the Court refused to explain the type of intent necessary, attorneys and judges are left to speculate. "This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty."[103]

IV. CONSEQUENCES OF THE SUPREME COURT DECISION

Given the "scarcity of relevant Supreme Court precedent" regarding this mens rea impasse, confusion and puzzlement are bound to transpire throughout the lower courts without a clear-cut, definitive answer to abide by.[104] Justice Alito's concurring opinion accurately sets forth the potential consequences this imprecise decision will have on future cases. He explains that "while [the Supreme Court] has the luxury of choosing its docket, lower courts and juries are not so fortunate."[105] Lower courts must actually decide the cases, and to do so, they must have a standard to apply.

[97] *Id.* at 2012.

[98] *Id.*

[99] *Id.* at 2013.

[100] *Id.* at 2012.

[101] *Id.*

[102] *Id.* at 2013–14 (Alito, J., concurring in part and dissenting in part).

[103] *Id.* at 2018 (Thomas, J., dissenting).

[104] Note, *The Supreme Court 2014 Term: Leading Case: Federal Statutes and Regulations: Federal Threats Statute—Mens Rea and the First Amendment*—Elonis v. United States, 129 HARV. L. REV. 331, 336 (2015) [hereinafter *Mens Rea and the First Amendment*].

[105] *Elonis*, 135 S. Ct. at 2014 (Alito, J., concurring in part and dissenting in part).

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Since the proper standard for "true threats" remains a mystery in lower courts, inconsistent results and varying standards could emerge.

The Supreme Court's inexact opinion in *Elonis v. United States* has already had a concrete impact on the Sixth and Eleventh Circuits. In the Sixth Circuit case *United States v. Houston*, Clifford Leon Houston was involved in a shoot-out that resulted in the death of a sheriff's deputy and his ride-along in 2006.[106] Attorney James F. Logan provided legal services to Houston to combat Houston's murder charges.[107] In exchange, Houston's father executed a deed of trust on the Houston family property granting Logan an interest in the land.[108] Houston's first trial ended in a mistrial, and he was acquitted at the second trial.[109] Eventually, Houston was taken back to jail for a firearms offense.[110] When Houston heard that Logan visited the family property—part of which Logan now owned—Houston "went into a complete rage."[111] An official heard Houston say, "[w]hen me and my brother get out, we're going to go to that law firm and kill every last one of them."[112] When Houston placed a phone call to his girlfriend, he told her: "I'll kill that mother f[*]er when I get out. . . . The only thing [Logan]'s gonna get from me is a f[*]ing bullet!"[113] Houston was indicted for transmitting a threat in interstate commerce under 18 U.S.C. § 875(c).[114]

At Houston's jury trial, the court instructed the jury that a statement is a "threat" if "it was made under such circumstances that a reasonable person hearing the statement would understand it as a serious expression of intent to inflict injury."[115] Accordingly, Houston was found guilty and sentenced to sixty months in prison.[116] In the interim of Houston's appeal, the Supreme Court decided *Elonis v. United*

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[106] United States v. Houston, 792 F.3d 663, 665 (6th Cir. 2015).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 666.

[115] *Id.*

[116] *Id.*

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States. The *Elonis* Court invalidated a similar jury instruction,[117] which called into question Houston's conviction—the *Houston* instruction permitted a conviction based on a negligent state of mind, which was precisely what the *Elonis* decision proscribes.[118] In refusing to employ a recklessness standard, or any standard at all, the Sixth Circuit followed the same path as the U.S. Supreme Court: "We may be capable of deciding the recklessness issue, but following our usual practice of awaiting a decision below and hearing from the parties would help ensure that we decide it correctly."[119] Houston's conviction was reversed and remanded for further proceedings,[120] and a requisite mens rea requirement is still nonexistent.

The decision rendered in *United States v. Martinez* was also reevaluated due to the Court's holding in *Elonis*.[121] In *Martinez*, Ellisa Martinez was convicted under 18 U.S.C. § 875(c) for sending a threatening email to talk show host Joyce Kaufman.[122] The email stated that she was "planning something big around a government building [ ] in Broward County, maybe a post office, maybe even a school" to "teach all the government hacks working there what the [Second Amendment] is all about."[123] The email ended with "[D]on't retreat, reload! [L]et's make headlines girl!"[124] Martinez pled guilty to the charges, but preserved the right to appeal the issue of "whether § 875(c) was unconstitutionally overbroad because it did not require the Government to prove the speaker subjectively intended her statements to constitute a threat."[125] The Eleventh Circuit affirmed Martinez's conviction, and Martinez appealed. The United States Supreme Court granted certiorari, but Martinez's case was ultimately remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Elonis*.[126]

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[117] *Id.* ("*Elonis* reversed a similar conviction under § 875(c) premised on a similar instruction.").

[118] *Id.*

[119] *Id.* at 669.

[120] *Id.* at 670.

[121] United States v. Martinez, 800 F.3d 1293, 1294–95 (11th Cir. 2015) (per curiam).

[122] United States v. Martinez, 736 F.3d 981, 983 (11th Cir. 2013), *vacated*, 135 S. Ct. 2798 (2015).

[123] *Id.*

[124] *Id.*

[125] *Id.* at 983–84.

[126] Martinez v. United States, 135 S. Ct. 2798 (2015).

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The Court of Appeals overruled its original holding in *Martinez*, stating that the indictment alleged only that a reasonable person would regard Martinez's communication as a threat.[127] It failed to allege Martinez's intent with regard to the threatening nature of her email, or facts from which her mens rea could be inferred.[128] Therefore, her indictment was insufficient based on the holding in *Elonis*.[129] Martinez's conviction and sentence were vacated, and the case was remanded to the district court with instructions to dismiss the indictment without prejudice.[130]

Undoubtedly, *Elonis*'s vague "requirement of something more than general intent"[131] is already wreaking havoc on the justice system, and the proper interpretation of § 875(c) is still woefully unclear. With the circuit courts attempting to follow the proper true threats standard—or lack thereof—defendants may be convicted under § 875(c) in one jurisdiction for an action that would warrant no criminal culpability in another jurisdiction. For example, Alabama resident Jeremie Jonathan Montgomery was arrested for posting threats on Facebook to kill individuals near his home.[132] He posted: "I feel like going on a killing spree today . . . things are going to get pretty ugly . . . . I got 30 rounds and I'm trying to use[] the whole clip and some more."[133] He also posted: "Social experiment of social media network in effect LOL" and "Now I hope you guys don't actually think I was going to hurt anyone . . . ."[134] If recklessness is the proper standard, Montgomery's posts may warrant a conviction; it is likely that he was aware of the substantial risk that viewers would feel threatened by his posts, and that he consciously disregarded that risk. However, if a jury is told that a conviction requires proof beyond recklessness, Montgomery's "social experiment" may not suffice, and a guilty defendant may be freed.

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[127] United States v. Martinez, 800 F.3d 1293, 1295 (11th Cir. 2015) (per curiam).

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Brief at *5, United States v. Martinez, 800 F.3d 1293 (11th Cir. 2015) (No. 11-13295-CC), 2015 WL 4689800.

[132] Carol Robinson, *Alabama Man Threatening 'Killing Spree' on Facebook Captured by SWAT Officers*, AL.COM (last updated Nov. 2, 2015, 6:35 AM), http://www.al.com/news/birmingham/index.ssf/2015/11/man_threatening_killing_spree.html.

[133] *Id.*

[134] *Id.*

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On the other hand, if purpose or knowledge is required, and a lower court instructs the jury that recklessness suffices, a defendant may be wrongly convicted. For example, Montana resident Arthur Roy was arrested on suspicion for threatening to shoot a student after a Facebook conversation between the two.[135] Roy was angry with the student after the boy gave up a plot line to the movie Star Wars: The Force Awakens.[136] During their online dispute, Roy allegedly posted a photo of himself with a Colt 1911 gun, stating that he was "coming to find" the boy.[137] The student was afraid it was a legitimate threat and feared that Roy "might come to his school and harm him."[138] If a jury is told that recklessness suffices, when in actuality a higher requirement of purpose or knowledge is necessary, Roy may be incorrectly convicted.

V. PROPOSAL FOR A RECKLESSNESS STANDARD

In *Elonis*, Chief Justice Roberts was reluctant to infer that a negligence standard was appropriate in criminal statutes.[139] Therefore, when prosecuting under 18 U.S.C. § 875(c), the government is left with two possible remaining options: a specific intent standard or a recklessness standard. A person possesses specific intent when he acts purposely with respect to a material element of an offense—it is his "conscious object" to engage in such conduct or cause such a result.[140] A person acts recklessly with respect to a material element of an offense when he "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."[141] In the cases at bar, the material element at issue is the threatening nature of the statement or communication made. A recklessness standard, as opposed to a specific intent standard, would sufficiently separate criminal conduct from otherwise innocent behavior, comply with statutory interpretation principles, and uphold the objectives of the First Amendment.

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[135] REUTERS, *Man Arrested Over Threat to Shoot Friend Who Revealed Star Wars Spoiler*, GUARDIAN (Dec. 22, 2015), http://www.theguardian.com/us-news/2015/dec/23/man-arrested-threat-shoot-friend-revealed-star-wars-force-awakens-spoiler.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] Elonis v. United States, 135 S. Ct. 2001, 2011 (2015).

[140] MODEL PENAL CODE § 2.02(2)(a)(i).

[141] *Id.* § 2.02(2)(c).

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A. Recklessness Standard

Since the *Elonis* Court established that negligence is not sufficient for a conviction under 18 U.S.C. § 875(c),[142] an intent requirement greater than negligence must be imposed. "In the hierarchy of mental states that may be required as a condition for criminal liability, the mens rea just above negligence is recklessness."[143] As the next-level mens rea requirement, a recklessness standard would sufficiently separate wrongful from innocent conduct. As Justice Alito opined, "[t]here can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct."[144] In a wide range of circumstances, the Supreme Court has described reckless conduct as morally culpable. For example, reckless disregard of falsity,[145] deliberate indifference to an inmate's harm,[146] and reckless disregard for human life[147] have all warranted liability. A recklessness standard would adequately uphold the line between innocent and unlawful behavior in the realm of true threats as well: "Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway."[148]

A recklessness standard would also not overstep the bounds of inferring mental requirements into criminal statutes. Critics of this higher standard may reference Justice Alito's concurrence, which states that it is uncommon for a court to interpret a statute to contain a mens rea requirement that is not present in the text.[149] However, this infrequency does not eliminate the possibility altogether. Justice Alito explained that when Congress does not specify a mens rea requirement in a criminal statute, "[the Court has] no justification for inferring that anything more than recklessness is

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[142] *Elonis*, 135 S. Ct. at 2011.

[143] *Id.* at 2015 (Alito, J., concurring in part and dissenting in part). Recklessness exists "when a person disregards a risk of harm of which he is aware." Farmer v. Brennan, 511 U.S. 825, 837 (1994); MODEL PENAL CODE § 2.02(2)(c).

[144] *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part).

[145] *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

[146] *See Farmer*, 511 U.S. at 835–36.

[147] *See* Tison v. Arizona, 481 U.S. 137, 157 (1987).

[148] *Elonis*, 135 S. Ct. at 2015 (2015) (Alito, J., concurring in part and dissenting in part).

[149] *Id.*

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needed."[150] Since 18 U.S.C. § 875(c) fails to address a mental requirement, the courts are permitted to infer a recklessness standard, and nothing more.[151] Accordingly, implying a specific intent requirement into the statute is indefensible.[152] "Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment."[153]

B. Recklessness and the First Amendment

Opponents of a recklessness standard would argue that a specific intent requirement would more appropriately uphold the commands of the First Amendment by allowing more speech.[154] In its amicus brief, the American Civil Liberties Union rationalized that a great deal of social and political speech occurs online, and it is often "abbreviated, idiosyncratic, decontextualized, and ambiguous."[155] As such, it is "susceptible to multiple interpretations," and courts must "ensure adequate breathing room" for these types of "core political, artistic, and ideological speech."[156] Specific intent proponents claim that the stricter mens rea requirement would account for this adequate breathing room, acting as a very defendant-friendly standard.[157] They maintain that it would heighten the burden of proving that a communication constitutes a true threat, which would encourage and ultimately permit more speech.[158]

A specific intent requirement, however, would overprotect speech that has "negligible First Amendment value."[159] For example, two Edmonds-Woodway High

[150] *Id.*

[151] *See id.*

[152] *See id.*

[153] *Id.*

[154] *See, e.g.*, *infra* note 155; Amici Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression et al. in Support of the Petitioner at 22–24, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 4298029; Brief of People for Ethical Treatment of Animals, Inc. et al. as Amici Curiae in Support of Petitioner at 11–23, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 4215756.

[155] Amicus Curiae Brief of The American Civil Liberties Union et al. in Support of Petitioner at 6, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 4215752 [hereinafter Brief of the ACLU].

[156] *Id.* at 5–6.

[157] Michael Pierce, *Prosecuting Online Threats After Elonis*, 110 NW. U. L. REV. ONLINE 51, 53 (2015).

[158] *See* Brief of the ACLU, *supra* note 155.

[159] *Id.* at 54.

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School students were arrested for allegedly making racist threats on Facebook to kill two African American classmates.[160] They threatened to initiate a school lockdown and leave "dead bodies" all over the premises.[161] Their comments involved detailed descriptions of the killings, including "lynching" one of the targets.[162] According to a police news release, the students denied any intention of actually carrying out the threats, and they claimed they were "just trying to be funny."[163] If a specific intent standard were imposed, these students would not be subject to liability. The students explicitly stated that the comments were merely meant to be humorous.[164] It follows that they never intended to commit the acts, nor did they wish for the deaths of their classmates to actually result.[165] This state of mind would absolve them from criminal liability under a specific intent standard.[166] A recklessness standard, on the other hand, would likely impose culpability.[167] Though the students may not have had the conscious object to threaten their fellow students, surely they consciously disregarded the substantial and unjustifiable risk that their communications were threatening in nature. Therefore, a recklessness standard would more appropriately address these sensitive situations and defend only the statements intended to be protected by the First Amendment.[168]

Some critics, such as Anthony Elonis, claim that anything short of a specific intent standard would thwart the freedoms of the First Amendment by prohibiting therapeutic works of art.[169] Elonis argued that threatening statements made for "therapeutic" purposes to "deal with the pain" deserve constitutional protection,

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[160] Sara Jean Green, *2 Edmonds-Woodway Students Arrested After Black Classmates Threatened with Lynching*, SEATTLE TIMES (Dec. 15, 2015, 4:02 PM), http://www.seattletimes.com/seattle-news/crime/2-edmonds-high-students-arrested-after-black-classmate-threatened-with-lynching/.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *See id.*

[166] *See* MODEL PENAL CODE § 2.02(2)(a)(i).

[167] *See* MODEL PENAL CODE § 2.02(2)(c).

[168] *See* Elonis v. United States, 135 S. Ct. 2001, 2016–17 (Alito, J., concurring in part and dissenting in part).

[169] *See* Brief for the Petitioner at *52, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 4101234.

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particularly if the speaker does not actually intend to cause harm.[170] However, "whether or not the person making a threat intends to cause harm, the damage is the same."[171] The fact that the speaker may give the threat a therapeutic or cathartic value, especially if the speaker acts with an intentional disregard for how others may interpret the statement, "is not sufficient to justify constitutional protection."[172] Put simply, the First Amendment does not protect true threats.[173] And, as Justice Alito opined, a "fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech."[174]

Elonis also compared his words to those expressed by rappers and vocalists in public performances and soundtracks.[175] Specifically, he referred to famous rapper Eminem's song lyrics in "Kim" and "'97 Bonnie & Clyde," in which Eminem fantasizes about killing his ex-wife and dumping her body into a lake.[176] Elonis believed that if Eminem is entitled to utter such words, amateur and up-and-coming rap artists like himself should also share the same protections on social media.[177] However, "context matters."[178] Eminem's conduct, as opposed to Elonis's, would not meet the proposed recklessness standard.[179] "Lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a person."[180] Therefore, there is no substantial and unjustifiable risk that audience

[170] *See id.*

[171] *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

[172] *Id.*

[173] *See* Virginia v. Black, 538 U.S. 343, 359 (2003); R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992); Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam).

[174] *Elonis*, 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part).

[175] *Id.*

[176] EMINEM, KIM (Aftermath Entertainment, Interscope Records, Shady Records 2000); EMINEM, '97 BONNIE & CLYDE (Aftermath Entertainment, Interscope Records, Shady Records 1998).

[177] Brief for the Petitioner at *55, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 4101234 ("However hateful or offensive, those songs are entitled to full First Amendment protection. The same protections extend to the efforts of amateurs writing on comparable themes, moved by similar experiences.").

[178] *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

[179] *See id.*

[180] *Id.*

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members would interpret the lyrics as personal threats, and accordingly, established performers would not be guilty of consciously disregarding that risk.[181]

Statements on social media that are deliberately directed at their victims, on the other hand, are much more likely to be taken seriously. When users can specifically "tag"[182] the person they are intending to communicate with, a substantial risk that the viewer will regard those statements as personalized threats is more likely.[183] Therefore, evaluating whether the speaker has acted recklessly when conveying a potentially threatening statement leads to appropriate results—a famous rapper's words conveyed to millions of fans would not be punishable under a recklessness standard, while heinous statements posted directly to a victim on social media would be prohibited.[184] "To hold otherwise would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar."[185]

VI. OTHER FIRST AMENDMENT CONTEXTS

Although the majority declined to consider any First Amendment issues, First Amendment jurisprudence can be a useful guide when determining the mens rea requirement under 18 U.S.C. § 875(c).[186] Just as negligence is not sufficient to support a conviction under § 875(c), a negligence standard for speech is also inconsistent with other realms of the First Amendment.[187] Given this similarity, courts should look to other categories of unprotected speech to establish that recklessness is the proper mens rea requirement.

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[181] *See id.*

[182] Facebook "tagging" involves attaching a person's name to a user's post. When a user tags an individual in a post, he or she creates a "'special kind of link,' as Facebook puts it. It actually links a person's profile to the post, and the person tagged in the photo is always notified about it." Elise Moreau, *What is "Tagging" on Facebook?*, LIFEWIRE https://www.lifewire.com/what-is-tagging-on-facebook-3486369 (last updated Nov. 15, 2016).

[183] *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

[184] *See id.*

[185] *Id.*

[186] *See infra* Part VI(A)–(B).

[187] *See id.*

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A. Defamation

Defamation, a category of speech that is not protected by the First Amendment, includes false statements that injure a third party's reputation.[188] In *United States v. Alvarez*, the Supreme Court held that in public figure defamation cases, it has been careful to instruct that "falsity alone may not suffice to bring speech outside the First Amendment . . . the statement must be a knowing or reckless falsehood."[189] Punishing the deliverance of all false statements, regardless of the speaker/publisher's mindset, "runs the risk of inducing a cautious and restrictive exercise" of First Amendment rights and "intolerable self-censorship."[190] The lack of a mens rea requirement—or, similarly, a low standard of negligence—is inconsistent with the commands of the First Amendment; it increases an "honest speaker's fear that he may accidentally incur liability for speaking."[191]

Accordingly, the Supreme Court has held that to protect First Amendment interests, public figures alleging defamation must demonstrate that the speaker acted with "actual malice"—knowledge that the statement was false or reckless disregard for the truth.[192] An actual malice requirement (similar to a recklessness requirement) allows society to engage in important discussions that benefit the public as a whole, while still protecting the defamed individual when the false statements have been made heedlessly.[193] The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery "exists to allow more speech, not less."[194] Following this line of reasoning, true threats should require a standard of recklessness as well.[195]

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[188] Jonathan Kim, *Defamation Definition*, CORNELL U. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/defamation (last updated June 2016).

[189] 132 S. Ct. 2537, 2545 (2012).

[190] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[191] *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment).

[192] New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[193] *See id.*

[194] *Alvarez*, 132 S. Ct. at 2545.

[195] Elonis v. United States, 135 S. Ct. 2001, 2017 (2015) (Alito, J., concurring in part and dissenting in part) ("[W]e have . . . held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity. Requiring proof of recklessness is similarly sufficient here." (internal citations omitted)).

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Those who are skeptical of using the realm of defamation as an analogy to true threats could point to the standard used for private figures in defamation cases. Private figures need only show negligence by the publisher or speaker,[196] a much lower standard than the recklessness-related "actual malice" requirement. However, the *Elonis* Court expressly opined that "negligence is not sufficient to support a conviction under [§] 875(c)."[197] Therefore, defamation regarding private figures cannot be used as a precise parallel, and courts should look to the public figure realm of defamation for more accurate guidance.

B. Obscenity

Obscenity also provides an accurate comparison to true threats, and it can be used to resolve the mens rea question that lies at the heart of *Elonis*.[198] While there is no uniform national definition of obscenity, Chief Justice Warren Burger wrote that the basic guidelines include:

> (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[199]

The harms that stem from obscenity and the harms that stem from true threats are comparable—"[b]oth types of prohibitions mitigate a perceived individual and social harm that arises immediately upon mere exposure to the relevant speech by shielding audiences from expressions that produce a noncognitive—almost physical—

[196] Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 34 n.162 (1983) (citations omitted) ("Most states . . . [have] refuse[ed] to extend the actual-malice standard to actions brought by 'private figure' plaintiffs. . . . [C]ourts in 18 states and the District of Columbia expressly adopted the *Gertz* [*v. Welch*] standard of negligence when a private figure sues a *media* defendant.").

[197] *Elonis*, 135 S. Ct. at 2013.

[198] *Mens Rea and the First Amendment*, *supra* note 104, at 337.

[199] Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

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response in the recipient."[200] Therefore, it would be logical to require the same mens rea for both.[201]

The *Elonis* majority explored *Hamling v. United States*, a key obscenity precedent, in such a way as to resemble a recklessness standard. *Hamling* required that a defendant know the "character" of obscene material he or she distributes, "not simply its contents and context."[202] The case highlighted that such a requirement ensured that "not innocent but calculated purveyance of filth" was outlawed.[203] "Calculated purveyance" is not explicitly analogized to a precise mental requirement, but it strikingly resembles a recklessness standard.[204] "The defendant must know the 'character' of the material—and thus the substantial and unjustifiable risk that it is obscene—yet distribute it nonetheless."[205] Applying this standard to a true threats case, the defendant must know the "character" of the threat—and thus the substantial and unjustifiable risk that it is threatening—yet say it nonetheless. "By juxtaposing *Hamling*'s 'calculated purveyance' standard with the facts of *Elonis*, the [*Elonis*] majority invites lower courts to adopt a mens rea of recklessness for [§] 875(c)."[206]

Those who wish to distinguish "threats" from "obscenity" rely on the textual argument that the word "threat" itself contains an intentionality element.[207] However, the Court in *Elonis* rejects this argument.[208] "Without this textual hook, mandating

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[200] *Mens Rea and the First Amendment*, *supra* note 104, at 337.

[201] *Id.*

[202] *Elonis*, 135 S. Ct. at 2012.

[203] Hamling v. United States, 418 U.S. 87, 122 (1974) (quoting Mishkin v. New York, 383 U.S. 502, 510 (1966)).

[204] *Mens Rea and the First Amendment*, *supra* note 104, at 338.

[205] *Id.*

[206] *Id.* at 339.

[207] *Id.* Anthony Elonis argued that every definition of the word "threat" conveys the "notion that a 'threat' is the expression of the speaker's *intention* to injure." Brief for the Petitioner at *23, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 4101234.

[208] *Mens Rea and the First Amendment*, *supra* note 104, at 339; *see also* Elonis v. United States, 135 S. Ct. 2001, 2008 (2015) ("These definitions, however, speak to what the statement conveys—not to the mental state of the author.").

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different levels of intentionality for obscenity and threats would create a discontinuity between two otherwise analogous speech prohibitions."[209]

VII. CONCLUSION

"Given the majority's ostensible concern for protecting innocent actors, one would have expected it to announce a clear rule—any clear rule. Its failure to do so reveals the fractured foundation upon which today's decision rests."[210]

The *Elonis* Court rejected the "reasonable person standard" and necessitated a mens rea requirement for criminal liability under § 875(c). The majority decision, however, failed to set forth the minimum mental state required for criminal culpability. This cryptic holding leaves lower courts ill-informed as to which mens rea standard to apply when prosecuting under 18 U.S.C. § 875(c).

To settle this perplexing predicament, a recklessness standard should be imposed. A recklessness standard would fulfill the purpose of § 875(c) by amply separating wrongful from otherwise innocent conduct. It would ensure the most appropriate results without contravening statutory interpretation principles or circumventing the First Amendment's freedom of speech guarantee. Other areas of unprotected speech suggest that a recklessness standard is proper as well—defamation and obscenity stand as adequate analogies to true threats, and their recklessness-like requirements should be applied to true threats accordingly.

As Justice Thomas stated in his dissent, the Court should not cast aside a negligence mens rea requirement "yet offer nothing in its place."[211] "[The Supreme Court's] job is to decide questions, not create them[;]"[212] thus, a clear recklessness standard should have been enunciated. In a world where social media is an indispensable aspect of daily life, a bright-line rule is necessary in order to avoid the formidable dangers of a jurisprudential guessing game.

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[209] *Mens Rea and the First Amendment*, *supra* note 104, at 339.

[210] *Elonis*, 135 S. Ct. at 2028 (Thomas, J., dissenting).

[211] *Id.*

[212] *Id.*

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