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ELONIS V. UNITED STATES: THE NEXT TWELVE YEARS

Jing Xun Quek[†]

First Amendment speech protections are broad and strong. One exception to its nearly blanket protection is for true threats¹—those threats that arise when someone makes an honest threat to harm another. In a 2003 case, *Virginia v. Black*,² the Supreme Court reaffirmed the true threat doctrine. It remained silent, however, on the requisite mens rea for establishing a true threat. In the twelve years that followed, lower courts have been sharply divided on how to apply the doctrine. This question finally reached the Supreme Court in *Elonis v. United States*, where a criminal defendant was accused of posting threatening rap lyrics on Facebook. The Court, however, did not rule on the First Amendment question, instead limiting its decision to the statutory requirements of 18 U.S.C. § 875. What will follow is potentially another twelve years of an unclear true threat doctrine, until the Court chooses to address the mens rea and intent questions in a more direct manner.

“Congress shall make no law . . . abridging the freedom of speech”³ The First Amendment, perhaps more than any other element of American jurisprudence, has come to characterize the tremendous freedoms guaranteed by United States law. Many forms of expression are permitted simply by virtue of First Amendment protection. Commentators both local and abroad have often been surprised by our Supreme Court’s protection for flag burning,⁴ campaign contributions,⁵ and offensive protests.⁶ As

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1. *Watts v. United States*, 394 U.S. 705, 707 (1969) (“What is a threat must be distinguished from what is constitutionally protected speech.”).

2. 538 U.S. 343 (2003).

3. U.S. CONST. amend. I.

4. *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (finding in a flag burning case that “Johnson was convicted for engaging in expressive conduct”).

5. *See Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“Section 441b’s prohibition on corporate independent expenditures is thus a ban on speech.”).

6. *See Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (“As a Nation we have chosen . . . a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”).

Justice Brennan noted in *Texas v. Johnson*: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁷ Yet as wide and far reaching as it may seem, freedom of speech is not an absolute right. Statutes and case law have created exceptions to broad First Amendment protections. Categories of speech such as obscenity,⁸ defamation,⁹ and (most relevant to the case at hand) true threats¹⁰ have all been held to fall outside the umbrella of First Amendment protection. Thus, they are subject to prosecution or liability.

In *Virginia v. Black*, the Supreme Court reaffirmed its earlier decision in *Watts v. United States*,¹¹ and established that the First Amendment does not protect true threats. Thus, makers of true threats are subject to prosecution and liability.¹² Since *Black*, however, lower courts have been sharply divided in their handling of true threat cases. In particular, the standard of intent necessary to sustain a true threat conviction is unclear.¹³ A circuit split arose among the Courts of Appeal; the Seventh, Ninth and Tenth Circuits required a showing of subjective intent,¹⁴ while the other Circuits adhered to the long-established objective standard.¹⁵ State Supreme Courts have similarly conflicted.¹⁶

7. *Johnson*, 491 U.S. at 414.

8. See *Miller v. California*, 413 U.S. 15, 18 (1973) (“[T]he States have a legitimate interest in prohibiting dissemination or exhibition of obscene material . . .”).

9. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (“[T]he Constitution does not protect libelous publications.”).

10. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain . . . classes of speech [which are not constitutionally protected, including] ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”).

11. 394 U.S. 705 (1969).

12. See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“[T]he First Amendment also permits a State to ban a ‘true threat.’”).

13. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 302 (2001) (noting that the “Supreme Court’s minimal guidance has left each circuit to fashion its own test,” and courts have applied either a subjective or objective intent standard).

14. See *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005).

15. Paul T. Crane, “*True Threats*” and the Issue of Intent, 92 VA. L. REV. 1225, 1243 (2006) (“[T]he preferred approach of the lower courts, by an overwhelming margin, was the objective test.”).

16. Petition for a Writ of Certiorari at 16, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983) (“State courts of last resort are likewise in conflict.”).

In addition to judicial disparities, there is significant variance among statutory treatment of true threats at both the federal and state level. For example, the federal statute at issue in *Elonis v. United States*,¹⁷ 18 U.S.C. § 875(c), does not explicitly state what level of intent is required to convict a defendant for transmitting interstate threats; the majority position merely required an objective standard.¹⁸ In contrast to § 875(c), § 871(a) begins with the phrase “[w]hoever knowingly and willfully,”¹⁹ providing the applicable mens rea. State laws are similarly varied.²⁰ This inconsistency in the statutory language results not only in confusion among lower courts, but also means that similar cases will be treated differently based simply on the jurisdiction in which a defendant is charged.²¹

Facing this uncertain doctrinal backdrop, *Elonis* represented a golden opportunity for the Supreme Court to clarify the true threat doctrine, especially in light of the jurisdictional split that arose in the twelve years since *Virginia v. Black*. *Elonis* presented two crucial questions: (1) what mens rea is required for federal true threat conviction, and (2) do First Amendment protections require a heightened standard for such cases?²² Given that *Elonis* communicated his alleged threats exclusively over social media,²³ the holding could have also considered how true threats should be prosecuted in the realm of the Internet in general, and social media in particular.²⁴

Unfortunately, the Court’s extremely narrow holding turned on statutory interpretation more than mens rea doctrine, and did not reach the First Amendment question at all.²⁵ The Court also was silent on the topic

17. 135 S. Ct. 2001 (2015).

18. 18 U.S.C. § 875(c) (2012) (“Whoever transmits in interstate . . . commerce any communication containing . . . any threat to injure the person of another . . .”).

19. *Id.* § 871(a) (dealing with threats made against the president of the United States).

20. *See* Petition for a Writ of Certiorari, *supra* note 16, at 16 (“[S]tate and federal courts in *eight* states take opposing views . . .”) (emphasis in original).

21. *Id.* at 16–17 (“[T]he breadth of First Amendment protection turns on the happenstance of which prosecutor brings charges.”).

22. *Elonis*, 135 S. Ct. at 2004 (“[W]hether the statute [§ 875(c)] also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.”).

23. Anthony Elonis posted the statements in question on his Facebook wall.

24. P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT. L.J. 37, 39 (2015) (“[Elonis] promises to clarify the issue of whether the First Amendment requires courts to consider the subjective intent of the speaker to uphold a conviction under all true threats statutes.”).

25. *Elonis*, 135 S. Ct. at 2012 (“Given our disposition, it is not necessary to consider any First Amendment issues.”).

of how, if at all, the rise of the Internet and social media has affected true threat doctrine. In the wake of the Court's decision in *Elonis*, lower courts have already begun to show signs of renewed confusion.²⁶

Part I of this Note summarizes the true threat and intent doctrines, two key areas of law involved in *Elonis*. Part II details the facts in *Elonis*, as well as its procedural history and the Supreme Court decision. Part III discusses some of the uncertainty left in the wake of the *Elonis* decision, and highlights subsequent cases that show its narrow application as precedent. Part IV switches gears to examine how the Court's view of the Internet might be antiquated, and how the evolving social media era might require a different look at true threat doctrine.

I. FIRST AMENDMENT DOCTRINE

The two statutes often revisited in the cases below are § 875(c) and § 871(a). § 875(c) states that “[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another” shall be criminally liable,²⁷ and § 871(a) concerns threats made against the president and vice president.²⁸ The latter has an intent requirement (knowingly and willfully) written into the statute,²⁹ while the former lacks it.

A. THE TRUE THREAT DOCTRINE

The Supreme Court defines true threats as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”³⁰ *Chaplinsky v. New Hampshire* placed true threats outside broad First Amendment protection, holding that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional

26. See generally *United States v. Wright-Darrisaw*, 617 F. App'x 107 (2d Cir. 2015) (deferring consideration until after the Supreme Court decided *Elonis*; the Second Circuit considered subjective intent to have been considered by the different statutory language of § 871(a)); *Cole v. Barnes*, No. 1:13-cv-00052, 2015 WL 5178050 (M.D. Tenn. Sept. 4, 2015) (following the *Elonis* decision, the district court simultaneously considered both objective and subjective standards, and found that the speech in question was protected under either); *People v. Murillo*, 238 Cal. App. 4th 1122 (2015) (requesting that the parties brief the effect of the *Elonis* decision, the Court of Appeal of California then distinguished the case at bar because charges had been filed under a different, state statute).

27. 18 U.S.C. § 875(c) (2012).

28. 18 U.S.C. § 871(a) (2012).

29. *Id.*

30. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

problem . . . includ[ing] . . . the insulting or ‘fighting’ words—those which by their very utterance inflict injury.”³¹ In *Chaplinsky*, the Supreme Court considered a state statute prohibiting the “use of offensive words when addressed by one person in a public place,” and applied a reasonableness standard when considering whether a statement constituted a true threat.³² *Chaplinsky* placed true threats outside the scope of constitutional protection, and allowed their prosecution and conviction under criminal statutes.³³ While the Court did not examine how the statements hurt the victim, true threats were held instead to constitute a prima facie infliction of harm.³⁴ However, *Chaplinsky* did not elaborate much on how true threats should be prosecuted, leaving open questions about intent, context, and effect to be addressed by later cases.

In 1969, *Watts v. United States* clarified true threat convictions, and established that threatening statements should not be examined in isolation.³⁵ In reversing a conviction for making threats against the president, the Court held that although the statute in question (§ 871(a), which made it a crime to threaten the president) itself was constitutional, the context in which the offending statements were made rendered them not a true threat.³⁶ Instead, it considered the statements expressions of political opinion, a category of speech protected under the First Amendment.³⁷ However, this case is distinguishable from *Elonis* by virtue of the statutory language in § 871(a): “knowingly and willfully” sets out a mens rea requirement notably absent from § 875(c).³⁸ Nevertheless, *Watts* is instructive in that it directs a court to consider the totality of the circumstances surrounding a particular expression to determine whether it constitutes a true threat or not.³⁹

31. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

32. *Id.* at 568. “The test is what men of common intelligence would understand.” *Id.* at 573.

33. *Id.* at 572.

34. *Id.* (finding that true threats are “those which by their very utterance inflict injury”).

35. 394 U.S. 705 (1969); *see also* *Brandenburg v. Ohio*, 395 U.S. 444 (1960) (making imminence more relevant in examining intent in First Amendment cases).

36. *Watts*, 394 U.S. at 707 (applying § 871(a)).

37. *Id.* at 708 (“Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.”).

38. 18 U.S.C. § 871(a); *see also* *Watts*, 394 U.S. at 706; *Elonis*, 135 S. Ct. at 2004.

39. *Watts*, 394 U.S. at 708 (“Taken in context . . . we do not see how it could be interpreted otherwise.”); *see also* *Cohen v. California*, 403 U.S. 15 (1971) (holding that citizens must be put on notice as to what actions constitute unlawful behavior).

Prior to *Elonis*, the most recent Supreme Court case regarding the true threat doctrine under the First Amendment was the 2003 case *Virginia v. Black*,⁴⁰ in which the concept of “fighting words” laid out in *Chaplinsky* was further developed into “true threats” as a categorical exemption from First Amendment protections.⁴¹ The Court found that a statute holding cross burning as “prima facie evidence of intent to intimidate” was unconstitutional,⁴² but noted that “a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate.”⁴³

The Supreme Court laid the groundwork for the true threat doctrine, noting that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”⁴⁴ Finding that the “prima facie evidence provision . . . ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate,” the Court once again highlighted the importance of context in determining whether a statement constitutes a true threat.⁴⁵

There (as in *Elonis*), the Court acted with caution to prevent accidental convictions, and the restrictions on free speech those would entail.⁴⁶ Yet, the Court declined to lay out what standard of intent was required to sustain a true threat conviction.⁴⁷ That remaining open question caused inconsistent application of *Black* in the lower courts.⁴⁸ By 2015, as many as eight opposing views existed among state and federal courts.⁴⁹

This conflict set the stage for *Elonis*. *Elonis* provided an opportunity for the Supreme Court to revisit the limits of First Amendment protections as

40. 538 U.S. 343 (2003).

41. *Id.* at 359 (“True threats’ encompass 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. *Id.* at 348.

43. *Id.* at 347.

44. *Id.* at 360.

45. *Id.* at 367.

46. *Id.*

47. *Black* repeatedly mentions “intent to intimidate,” but never discusses specifics of the level of criminal intent required.

48. See Rothman, *supra* note 13, at 302; see also United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011); United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008); United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005).

49. See Petition for a Writ of Certiorari, *supra* note 16, at 16 (“Indeed, the need for this Court’s review is particularly acute because the state and federal courts in *eight* states take opposing views.”) (emphasis in original).

they extend to true threats, an issue that had been left unanswered for more than a decade. *Elonis* “promise[d] to clarify the issue of whether the First Amendment requires courts to consider the subjective intent of the speaker to uphold a conviction under all true threat statutes.”⁵⁰

B. THE INTENT DOCTRINE

Yet instead of considering the true threat doctrine, the Supreme Court’s narrow holding in *Elonis* revolved around criminal intent.⁵¹ The Court rejected the approach taken by the majority of circuit courts,⁵² which had held that negligence or a “reasonable person” standard was sufficient to convict an individual of making a true threat.⁵³ However, the Court left unclear if the higher standard of recklessness would be sufficient for a true threat conviction.⁵⁴

Negligence is the lowest standard of criminal intent.⁵⁵ The Model Penal Code defines negligence as when an individual “should be aware of a substantial and unjustifiable risk” that the offense will occur.⁵⁶ Placed in context, the individual’s actions must represent a deviation from the standard of care a reasonable person would observe in his situation (therefore it is also known as a “reasonable person” standard).⁵⁷

The next level of intent is recklessness, which functions as a sort of middle ground for intent between negligently on the low end of the spectrum and knowingly and purposefully on the high end. The Model Penal Code defines recklessness as when an individual “consciously disregards a substantial and unjustifiable risk.”⁵⁸ Recklessness differs from negligence in that the defendant must actually be aware of the risk posed; to be negligent, he merely *should* have been aware.⁵⁹ *Elonis* left unclear whether a finding of recklessness would allow a conviction⁶⁰ for making

50. Fuller, *supra* note 24, at 39.

51. *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (“Given our disposition, it is not necessary to consider any First Amendment issues.”).

52. *Id.* at 2013 (“[N]egligence is not sufficient to support a conviction under [§] 875(c).”).

53. Crane, *supra* note 15, at 1243.

54. *Elonis*, 135 S. Ct. at 2012 (“Neither *Elonis* nor the [g]overnment has briefed or argued [whether recklessness is sufficient intent], and we accordingly decline to address it.”).

55. MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1962).

56. *Id.*

57. *Id.*

58. MODEL PENAL CODE § 2.02(2)(c).

59. *Id.* at § 2.02(2)(d) (“he should be aware”).

60. *Elonis* is currently on remand before the Third Circuit.

threatening statements. Although the concurrence and dissent believed it should be sufficient, the majority opinion declined to address the issue, noting that neither party had satisfactorily argued it in their briefs.⁶¹

The highest⁶² standard of intent is “purposefully”—under the Model Penal Code, this standard is met when the defendant consciously wants to cause a certain result.⁶³ This is a hard standard to prove in court, and possibly inappropriate for true threat cases—if purposefulness were required for true threat prosecutions, it would make it difficult to prosecute a prohibited category of speech outside the First Amendment umbrella. This would make it very difficult to prosecute individuals for threat crimes, defined in *Black* as statements that cause injury by their very communication, with the question of subjective intent still unresolved.⁶⁴ Meeting the purposefulness standard makes it more likely that a conviction will be sustained. The majority opinion in *Elonis* makes it clear that a finding of purposeful intent would be sufficient for § 875(c).⁶⁵ The Court’s opinion in *Elonis* allowed for “knowing” intent to also be sufficient to support a true threat conviction.⁶⁶ The Model Penal Code defines “knowingly” as when an individual “is practically certain that his conduct will cause such a result.”⁶⁷

These various standards of intent⁶⁸ raise an interesting question. Should true threat convictions run along a scale, instead of being simply black or white? In other words, should we have “degrees” of threatening statements? These intentional gradations are most famous for their use in the various degrees of homicide charges; the higher up you go on the scale, the more serious the offense, and the harder the prosecution has to work to prove it.⁶⁹ It is possible to argue that such gradations could be useful in thinking about true threat cases. Given similar contexts, one expects the statement: “I am

61. *Elonis*, 135 S. Ct. at 2012–13.

62. In this particular common spectrum.

63. MODEL PENAL CODE § 2.02(2)(a)(i).

64. *Virginia v. Black*, 538 U.S. 343, 360 (2003).

65. *Elonis*, 135 S. Ct. at 2012 (“There is no dispute that the mental state requirement in [§] 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat.”).

66. *Id.* (explaining that mens rea “is satisfied if the defendant transmits a communication . . . *with knowledge* that [it] will be viewed as a threat”) (emphasis added).

67. MODEL PENAL CODE § 2.02(2)(b)(ii).

68. Standards of intent include negligently, recklessly, and purposely.

69. See generally Chad S.C. Stover, Best Practices in Proving Specific Intent and Malice (Apr. 2014) (conference paper presented at the American Bar Association Section on Litigation Annual Conference), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/best_practices.authcheckdam.pdf [<https://perma.cc/25TY-TVMD>].

going to unlock the door with my key, walk up the stairs, and shoot you with the gun in the closet” to cause more fear and harm than the statement “I am going to kill you.”⁷⁰ These gradations would also have the effect of guaranteeing a “floor” for true threat prosecutions. A prosecutor can still get some sort of penalty even if he finds it difficult to cross a higher intent threshold, which would still meet the policy goal of providing a deterring effect on threatening speech. Unfortunately, the Court in *Elonis* offered little guidance on this issue.

II. *ELONIS V. UNITED STATES*

Following the above discussion regarding true threats and intent, the doctrinal framework surrounding *Elonis* is clearer. *Elonis* progressed from the fact pattern that inspired the initial charges under § 875(c), through *Elonis*’s trial at the Eastern District of Pennsylvania, up to appeal to the Third Circuit, and finally to the Supreme Court.

A. THE FACTS OF *ELONIS*

In 2010, Anthony Douglas *Elonis*’s wife left him and he lost custody of his two children.⁷¹ Following the breakup, *Elonis* changed his Facebook user name to “Tone Dougie”—presumably, he did this to mimic similar rap-style nicknames and distinguish his real life “from his on-line persona.”⁷² He began using Facebook as a platform to post allegedly threatening statements in the guise of “self-styled rap lyrics.”⁷³ The situation escalated rapidly, starting with a Halloween photo (in which he appeared to threaten a co-worker with a toy knife), and ending with him posting “lyrics” about being “ready to turn the Valley into Fallujah” in a post threatening an FBI agent.⁷⁴ *Elonis* also frequently posted “lyrics” that included “crude, degrading, and violent material about his soon-to-be ex-wife.”⁷⁵ In one instance, he even posted an accurate diagram of the area surrounding his wife’s house, with accompanying “lyrics” encouraging others to fire a mortar into the house.⁷⁶

70. The level of specificity makes the threat appear more legitimate and immediate.

71. *Elonis*, 135 S. Ct. at 2004.

72. *Id.* at 2005 (internal quotation marks omitted).

73. *Id.* (internal quotation marks omitted).

74. *Id.* at 2005–07.

75. *Id.* at 2005.

76. *Id.* at 2005–06.

Elonis claimed that the “writing [was] therapeutic,” that it helped him deal with the pain, and often included disclaimers that “the lyrics were fictitious, with no intentional resemblance to real persons.”⁷⁷

From a purely textual standpoint, Elonis’s “lyrics” did appear similar to commercial rap lyrics. Taken at face value, this supports his contention that he had posted “nothing . . . that ha[d]n’t been said already,”⁷⁸ specifically alleging that his posts emulated the lyrics of the well-known professional rapper Eminem.⁷⁹ For example, in his 2000 track “Kim,” Eminem wrote: “Don’t you get it, b****, no one can hear you? Now shut the f*** up and get what’s coming to you.”⁸⁰ He wrote this song about his on-again, off-again wife, and the record was described by *Entertainment Weekly* as “[an] enactment of domestic violence so real it chills.”⁸¹ These commercial lyrics bear more than a thematic resemblance to Elonis’s Facebook entry titled “Little Agent Lady,” in which he wrote; “Little Agent lady stood so close/Took all the strength I had not to turn the b**** ghost.”⁸² The similarities go on.⁸³

B. DISTRICT COURT TRIAL

Elonis was indicted by a federal grand jury on five separate counts under § 875(c) for threatening to injure patrons and employees of the park where he had worked, his ex-wife, police officers, a kindergarten class, and the FBI agent who had been investigating him.⁸⁴ Section 875(c) reads: “Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”⁸⁵

At trial in the Eastern District of Pennsylvania, Elonis argued that his statements should be examined under the subjective test, that is, whether he

77. *Id.* at 2005 (internal quotation marks omitted).

78. *Id.* at 2007.

79. *Id.* Eminem is a stage name; the rapper’s real name is Marshall Mathers. The author admits to more than a passing familiarity with Mr. Mathers’s work.

80. EMINEM, *Kim*, on THE MARSHALL MATHERS LP (Aftermath/Interscope 2000). For the lyrics to the song *Kim*, see *Eminem Lyrics — Kim*, AZLYRICS, <http://www.azlyrics.com/lyrics/eminem/kim.html> [<https://perma.cc/36BS-6477>].

81. Will Hermes, *The Marshall Mathers LP*, ENT. WKLY. (May 24, 2000), <http://www.ew.com/article/2000/05/24/marshall-mathers-lp> [<https://perma.cc/T3ZG-M7J8>].

82. *Elonis*, 135 S. Ct. at 2006.

83. The Supreme Court reproduced a good deal of Elonis’s posts in its opinion.

84. *Id.* at 2007.

85. 18 U.S.C. § 875(c).

intended them as threats.⁸⁶ He repeatedly claimed that his words were not subjectively intended as threats, and alleged that the government had failed to demonstrate that “he had intended to threaten anyone.”⁸⁷ Elonis requested the jury be instructed that “the government must prove that he intended to communicate a true threat.”⁸⁸ But the District Court sided with the government, which presented evidence that Elonis’s wife and co-workers viewed his posts as “serious threats.”⁸⁹ In their closing argument, the government also emphasized that Elonis’s subjective mental state was irrelevant—the District Court agreed with this assessment.⁹⁰ The court instructed the jury that § 875(c) is “a general intent crime,” and that the prosecution only had to prove that the act itself was “performed knowingly and intentionally.”⁹¹ The jury convicted him on four out of the five counts, acquitting him only on the charge of threatening park patrons and employees.⁹² Elonis was then sentenced to almost four years in prison.⁹³

C. APPEAL TO THE THIRD CIRCUIT COURT OF APPEALS

Elonis appealed to the Third Circuit to challenge his conviction under § 875(c) based on the jury instruction.⁹⁴ On appeal, the Third Circuit held that the District Court did not err in instructing the jury to use a reasonable person standard in examining Elonis’s alleged threats.⁹⁵ He argued that “the Supreme Court decision in *Virginia v. Black* requires that a defendant subjectively intend to threaten.”⁹⁶ The Third Circuit disagreed, holding that “the reasonable person standard does encompass context to determine whether the statement was a serious expression of intent,” and noted that “[t]he majority of circuits that have considered this question have not found the Supreme Court decision in *Black* to require a subjective intent to

86. *Elonis*, 135 S. Ct. at 2007 (“Elonis requested a jury instruction that ‘the government must prove that he intended to communicate a true threat.’”).

87. *Id.*

88. *Id.*

89. *Id.*

90. *United States v. Elonis*, 897 F. Supp. 2d 335, 341 (E.D. Pa. 2012), *rev’d*, 135 S. Ct. 2001 (2015) (“It is not required that the defendant intend to make a threat.”).

91. *Id.* at 341.

92. *Id.* at 338.

93. *Elonis*, 135 S. Ct. at 2007.

94. *United States v. Elonis*, 730 F.3d 321, 323 (3d Cir. 2013), *rev’d*, 135 S. Ct. 2001 (2015).

95. *Id.* at 330 (“We do not find that . . . the true threats exception requires a subjective intent to threaten.”).

96. *Id.* at 327.

threaten.”⁹⁷ The Third Circuit affirmed the lower court’s decision and held that no showing of subjective intent is required under § 875(c).⁹⁸

D. PETITION FOR A WRIT OF CERTIORARI

In his certiorari petition, Elonis argued that proof of subjective intent to threaten was required under the First Amendment’s exception for true threats.⁹⁹ He noted that the First Amendment protected offensive, ill-thought out speech, and that it was just such vitality of protection that gave “constitutionally protected speech . . . enough ‘breathing space to survive.’”¹⁰⁰ He asserted that the use of an objective standard would allow one to be convicted of making threatening statements by accident, which would be “fundamentally inconsistent with basic First Amendment principles.”¹⁰¹

The government argued that the objective reasonable person standard was appropriate, and that the nature of the criminal trial allows statements to be properly placed in context, providing a safeguard against accidental true threat convictions.¹⁰² The government further asserted that requiring proof of subjective intent would undermine the very purpose of the true threat doctrine, and that as long as actual harm resulted, the intent of the speaker was irrelevant.¹⁰³

In granting certiorari, the Supreme Court instructed the parties to additionally brief and argue “[w]hether, as a matter of statutory interpretation, conviction of threatening another person under § 875(c) requires proof of the defendant’s subjective intent to threaten.”¹⁰⁴ In briefing the matter, neither side dealt with whether a finding of recklessness would suffice; this issue was only briefly raised at oral argument.¹⁰⁵

The question posed to the Court was as follows: “whether the statute [§ 875(c)] also requires that the defendant be aware of the threatening

97. *Id.* at 330.

98. *Id.* (“[T]he . . . objective intent standard applies to this case and the District Court did not err in instructing the jury.”).

99. Petition for a Writ of Certiorari, *supra* note 16, at 28–29.

100. *Id.* at 29 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

101. *Id.* at 30 (“The notion that one could commit a ‘speech crime’ *by accident* is chilling.”) (emphasis in original).

102. Brief for The United States in Opposition at 14, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983) (“The jury instructions here already screened out statements that constituted ‘idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger.’”).

103. *Id.* at 15.

104. *Elonis v. United States*, 134 S. Ct. 2819 (2014) (mem.) (granting certiorari).

105. See Transcript of Oral Argument at 8, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

nature of the communication, and—if not—whether the First Amendment requires such [awareness]?”¹⁰⁶ This raised two distinct elements the Court could potentially address: First, what is the mens rea requirement for true threats under § 875(c), and second, do First Amendment protections require a heightened standard?¹⁰⁷ *Elonis* argued that the statute required such a finding, relying on dictionary definitions of the word “threat.”¹⁰⁸ The government, by contrast, maintained that as the other subsections of the same statute contained explicit references to an “intent to extort,” and that the lack of similar language in § 875(c) should prevent courts from requiring such a showing of intent to sustain a conviction.¹⁰⁹

E. *ELONIS AT THE SUPREME COURT*

The Supreme Court reversed the Third Circuit decision on June 1, 2015, in an eight-to-one decision, with Justice Alito concurring in part and dissenting in part.

1. *The Majority Opinion*

Writing for the majority, Chief Justice Roberts first noted the statutory language of § 875(c), which made it a crime “to transmit in interstate commerce ‘any communication containing any threat . . . to injure the person of another.’”¹¹⁰ The statute does not, however, indicate the mental state required to sustain a conviction, nor whether “the defendant must intend that his communication contain a threat.”¹¹¹

The Court found both *Elonis* and the government unconvincing, and noted that neither side had given “any indication of a particular mental state requirement.”¹¹² The Court held that *Elonis*’s exclusive focus on the author’s intent ignored the fact that a message intended as a joke can still be threatening if misunderstood,¹¹³ and that the government’s argument went too far in suggesting that Congress intended to “exclude a requirement that a defendant act with a certain mental state.”¹¹⁴

Turning to general principles of criminal law, the Court found that “wrongdoing must be conscious to be criminal,” and that a defendant “must

106. *Elonis v. United States*, 135 S. Ct. 2001, 2004 (2015).

107. *Id.*

108. *Id.* at 2009.

109. *Id.* at 2008.

110. *Id.* at 2002 (quoting § 875(c) (2012)) (omission in original).

111. *Id.* at 2008.

112. *Id.* at 2008–09.

113. *Id.* at 2008.

114. *Id.*

be ‘blameworthy in mind’ before he can be found guilty.”¹¹⁵ Drawing from various precedent, the Court held that ignoring such a specific intent requirement could potentially criminalize “a broad range of apparently innocent conduct,”¹¹⁶ and that in cases where federal criminal statutes did not indicate a required mental state, the judiciary should imply “only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”¹¹⁷ The Court found that for statutory purposes, what separated “legal innocence from wrongful conduct” was the fact that the communication was threatening in nature.¹¹⁸ Therefore, the *mens rea* should “apply to the fact that the communication contains a threat.”¹¹⁹

The Court took issue with Elonis’s conviction, as it was “premised solely on how his posts would be understood by a reasonable person.”¹²⁰ Justice Roberts wrote that the Court has “long been reluctant to infer that a negligence standard was intended in criminal statutes,” and denied the government’s characterization of its position as requiring anything else.¹²¹

The Court held that the implicit *mens rea* requirement for a conviction under § 875(c) would be satisfied if the defendant subjectively intended his communication as a threat, or had “knowledge that the communication will be viewed as a threat.”¹²² This standard appears very similar to the intent requirement in § 871(a), which requires that a defendant perform his actions “knowingly and willfully.”¹²³ The Court declined to go further; neither party had briefed or argued as to whether a finding of recklessness—disregarding a risk of harm of which he is aware—would be sufficient to sustain a conviction.¹²⁴ The Court also avoided any First Amendment analysis, given that it decided the case on a statutory basis before reaching the constitutional question.¹²⁵ The majority opinion justified its relatively narrow scope, and dismissed the dissent’s concerns, by noting that the Court

115. *Id.* at 2009 (quoting *Morrisette v. United States*, 342 U.S. 246, 252 (1952)).

116. *Id.* (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985)).

117. *Id.* at 2010 (citing *Carter v. United States*, 530 U.S. 255, 269 (2000)).

118. *Id.* at 2011.

119. *Id.*

120. *Id.* This refers to the standard of negligence that Elonis was convicted under.

121. *Id.* (quoting *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring)).

122. *Id.* at 2012.

123. 18 U.S.C. § 871(a) (dealing with threats made against the president).

124. *Elonis*, 135 S. Ct. at 2012.

125. *Id.* (“Given our disposition, it is not necessary to consider any First Amendment issues.”).

declined “to be the first appellate tribunal” to address whether a finding of recklessness satisfies the mens rea required under § 875(c).¹²⁶

2. *Justice Alito’s Concurrence*

In his concurrence, Justice Alito agreed with the action taken, but dissented from some of the reasoning in the majority opinion.¹²⁷ He noted that what he perceived to be the lack of a bright line rule (regarding the sufficiency of a recklessness finding) would create the potential for confusion among lower courts.¹²⁸ He agreed with the majority that a criminal conviction requires a finding of specific intent, but opined that recklessness should meet that requirement, noting that the Court had previously “described reckless conduct as morally culpable.”¹²⁹ He would have sustained a conviction if the defendant “consciously disregard[ed] the risk that the communication transmitted w[ould] be interpreted as a true threat.”¹³⁰

Justice Alito also examined the case through the lens of First Amendment free speech protections.¹³¹ He rejected Elonis’s argument that “to require no more than recklessness . . . would violate the First Amendment,” noting that “the Constitution does not protect true threats.”¹³² He wrote that simply having a “therapeutic or cathartic” purpose for making threatening statements should not make such speech constitutionally protected,¹³³ and also dismissed Elonis’s assertions that his threats were “constitutionally protected works of art,” noting that “[s]tatements on social media that are pointedly directed at their victims” could still cause harm.¹³⁴ Finally, Justice Alito noted that the Third Circuit should be allowed to uphold the conviction on harmless error grounds.¹³⁵

126. *Id.* at 2013.

127. *Id.* at 2017 (Alito, J., concurring in part and dissenting in part) (“I would . . . remand for the Court of Appeals to decide in the first instance whether Elonis’s conviction could be upheld under a recklessness standard.”).

128. *Id.* at 2013–14.

129. *Id.* at 2015.

130. *Id.* at 2016.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 2018.

3. *Justice Thomas's Dissent*

Justice Thomas dissented, sharing concerns similar to those Justice Alito expressed in his concurrence.¹³⁶ Justice Thomas believed that the opinion overruled the majority view held by the circuits without replacing it with a bright-line rule.¹³⁷ While understanding the majority's policy concerns regarding overly-broad threat prosecutions, he felt it inappropriate to abandon the "traditional approach to state-of-mind requirements in criminal law."¹³⁸ He would have affirmed the conviction because Elonis's communications were "true threats" and fell completely outside the scope of First Amendment protections, and further argued that proof of general intent was sufficient to support a conviction under § 875(c).¹³⁹ He found it "difficult to conclude that the Congress [intended § 875(c) to contain] an implicit mental-state requirement apart from general intent."¹⁴⁰

Justice Thomas further sought to differentiate his position from a requirement of mere negligence.¹⁴¹ He argued that negligence does not require intent to commit a specific act, while general intent requires intent to commit said act, but "no mental state . . . concerning the 'fact' that certain words meet the legal definition of a threat."¹⁴² Justice Thomas concluded his dissent by noting that had Elonis instead mailed obscene materials to his ex-wife and the kindergarten class, his intent to offend (or a reckless disregard of the possibility of causing offense) would have been irrelevant to the prosecution.¹⁴³ He bemoaned the fact that in *merely* threatening to kill them, Elonis's intent "suddenly becomes highly relevant."¹⁴⁴

III. UNCERTAINTY IN THE WAKE OF *ELONIS*

The *Elonis* decision will play a role in case law going forward, as some subsequent cases make apparent. Less than a year later, some confusion is evident; the usefulness of *Elonis* as precedent is also in question.

136. *Id.* (Thomas, J., dissenting).

137. *Id.* (Thomas, J., dissenting). ("[T]he Court casts aside the approach used in nine Circuits and leaves nothing in its place.")

138. *Id.*

139. *Id.* at 2021.

140. *Id.*

141. *Id.* at 2022 ("Requiring general intent in this context is not the same as requiring mere negligence.")

142. *Id.* (emphasis omitted).

143. *Id.* at 2028. An interesting juxtaposition, considering that most would consider receiving obscene material preferable to receiving death threats.

144. *Id.*

A. UNCLEAR PRECEDENT

A case steeped in First Amendment issues, and heralded as the first look at true threat doctrine in more than a decade, resulted in a majority holding with no significant free speech analysis.¹⁴⁵ The Court's narrow holding in *Elonis* raises more questions than it answers, and does little to alleviate the confusion among the lower courts in the wake of *Virginia v. Black*.¹⁴⁶ It leaves unanswered questions about the constitutional status of true threats, and how they should be handled in the era of social media. For a case that deals with threats made over Facebook, the Court declined to consider anything outside of the criminal intent issue.¹⁴⁷ The word "Internet" never even appears in the opinion. Nevertheless, because context represents a key element in considering the severity of the threat,¹⁴⁸ courts will have to grapple with the different circumstances surrounding online speech. The majority opinion from the *Elonis* Court avoided such consideration because they resolved the case on statutory interpretation alone.¹⁴⁹

It is worth noting that the majority's hesitance to engage with First Amendment issues might stem from a desire to avoid judicial overreach. Here, presented with an opportunity to decide the case on statutory rather than constitutional grounds, the Court opted for the narrower approach.¹⁵⁰ However, the fact that some of the Justices wanted to touch on First Amendment issues¹⁵¹ suggests there was perhaps room for the Court as a whole to do so.

While the Court reversed and remanded *Elonis's* case, it is unclear exactly what the government will have to prove on remand to get a conviction.¹⁵² The Court ruled that mere negligence was an insufficient level of intent to support a conviction for making true threats in general, and

145. *Id.*

146. *See id.* at 2015; 538 U.S. 343 (2003).

147. *See Elonis*, 135 S. Ct. at 2012 ("Given our disposition, it is not necessary to consider any First Amendment issues.").

148. *See generally* *Watts v. United States*, 394 U.S. 705, 708 (1969) ("Taken in context . . . we do not see how it could be interpreted otherwise.").

149. *Elonis*, 135 S. Ct. at 2012 ("Given our disposition, it is not necessary to consider any First Amendment issues.").

150. *Id.* at 2013 (describing this decision as "prudence"). It is worth noting that the Court almost always decides cases on the narrowest grounds possible to avoid overreach. However, in doing so the Court declined to resolve the intent requirements causing the circuit split, thus leaving in place an issue the Court may have taken the case to resolve.

151. *Id.* at 2016 ("There remains the question whether interpreting § 875(c) to require no more than recklessness . . . would violate the First amendment . . . I would reject that argument.").

152. Specifically, whether a finding of recklessness will suffice.

under § 875(c) in particular.¹⁵³ This is the reasonable person standard that was the majority opinion among the circuit courts prior to *Elonis*, a standard that the Court explicitly rejected.¹⁵⁴ In its place, the Court required a showing of either subjective intention to threaten, or knowledge that the communication would be viewed as a threat.¹⁵⁵

The first standard appears similar to regular criminal intent. At trial, the prosecution would rely on statements made by the defendant to cohorts, and assembling different pieces of evidence, in order to convince the fact finder that the defendant possessed specific intent to commit a particular crime.¹⁵⁶

The second standard, knowledge that the communication would be viewed as a threat, however, is less clear. Proving that a defendant had knowledge the communication would be viewed as a threat is a test very much based on contextual factors.¹⁵⁷ Close contextual analysis would be necessary, reinforcing the importance of context to true threat doctrine. Indeed, the history of true threat doctrine is replete with reference to contextual analysis.¹⁵⁸

Notably, the problem with the initial conviction in *Virginia v. Black* was due to the fact that a prima facie standard explicitly declines to consider context in assigning guilt.¹⁵⁹ In order to engage in contextual analysis of any given case, however, one must necessarily refer to how the average person views the context of a communication.¹⁶⁰ The alternative would be to allow

153. *Elonis*, 135 S. Ct. at 2013 (“Our holding makes clear that negligence is not sufficient to support a conviction under [§] 875(c).”).

154. *Id.* (noting its decision was “contrary to the view of nine Courts of Appeals”).

155. *Id.* at 2012 (“[T]he mental state requirement . . . is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.”).

156. See generally *Stover*, *supra* note 69.

157. Contextual factors may include, for example, the medium of the communication, the speaker’s relationship with the victim, and the tone and level of specificity.

158. See generally *Virginia v. Black*, 538 U.S. 343 (2003) (ruling as unconstitutional a statute that stated flag burning was prima facie evidence of intent to threaten); *Watts v. United States*, 349 U.S. 705 (1969) (examining allegedly threatening statements in context); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (analyzing threatening statements as “fighting words,” which necessarily involve context).

159. *Black*, 538 U.S. at 347–48. The act in question was cross-burning, an action full of historical significance and undertones of meaning. *Id.* at 352–53. Nevertheless, the Court held that even under such circumstances, context still warranted consideration. *Id.* at 367 (“The prima facie evidence provision in this case ignores all of the contextual factors that are necessary . . .”).

160. *Elonis*, 135 S. Ct. at 2016 (“[C]ontext matters . . . [s]tatements on social media that are pointedly directed at their victims . . . are much more likely to be taken seriously.”).

defendants to escape liability simply by proclaiming, at trial, that they did not intend to threaten, and did not know that their communication would be viewed as such. This would extend free speech protection to a previously unprotected category of communications, and perhaps protect speech that should not be allowed as a matter of policy and constitutional interpretation.¹⁶¹

In examining context, however, it seems likely that questions of reasonableness would inevitably creep in. For example, it would be unfair to let an individual claim she did not subjectively know a communication would be viewed as a threat, after her partner had let her know he or she felt threatened, and had perhaps already gone to law enforcement or the judicial system for protection. The fact finder in such a situation would have to consider context before reaching any sort of conclusion.

The Court's second standard (knowing that a communication will be interpreted as a threat) is a slightly higher requirement than recklessness. Instead of consciously disregarding a significant possibility, it asks for actual knowledge.¹⁶² As mentioned above, the Court is silent on whether a finding of recklessness would be sufficient.¹⁶³ Justices Alito and Thomas certainly believe that it would be enough.¹⁶⁴

B. SUBSEQUENT CASES

Subsequent cases are already demonstrating a continued lack of clarity among lower courts as to the standard of intent they should apply to true threat cases. In *Cole v. Barnes*,¹⁶⁵ the district court acknowledged the subjective standard intent requirement from *Elonis*. However, in analyzing the plaintiff's speech (a threatening display on plaintiff's front porch including a toilet bowl), the court found it unnecessary to "choose between an objective and subjective standard."¹⁶⁶ The court found that "no reasonable person would have expected viewers to interpret the message as a true threat

161. See generally *Chaplinsky*, 315 U.S. at 572 (holding that the statute's purpose was to "preserve the public peace").

162. *Elonis*, 135 S. Ct. at 2012 (holding that § 875(c) is satisfied only if the threat is issued purposely or knowingly).

163. *Id.* at 2013 (declining to be the first appellate tribunal to decide whether recklessness is sufficient for liability in these circumstances).

164. *Id.* at 2017–18. Justice Alito would remand to decide whether "Elonis's conviction could be upheld under a recklessness standard," and Justice Thomas would affirm the Third Circuit's judgment finding that negligence was sufficient. *Id.*

165. No. 1:13-cv-00052, 2015 WL 5178050 at *12 (M.D. Tenn. Sept. 3, 2015).

166. *Id.* Plaintiff had also left a banner saying "F*** you" and "special place in hell for u [sic]," mentioning the officer who had conducted the search by name; this resulted in the charge of communicating a true threat. *Id.*

of serious harm,” calling into question which standard was ultimately used in deciding the case.¹⁶⁷

The court addressed the subjective standard, but on the strength of plaintiff’s testimony, held that the plaintiff “did not intend her statements to threaten serious harm to anyone.”¹⁶⁸ If under the subjective standard individuals can avoid liability by simply saying they did not intend the statements as threats, the possibility raises questions about how such threats will be prosecuted in the future. Does the prosecution have to engage in a lengthy and comprehensive intent analysis to disprove statements that certain communications were not intended as threats? This would appear to afford protection to a category of speech clearly outside of current First Amendment protections, and make it more likely that true threats would go unpunished.

Additional subsequent cases include *United States v. Wright-Darrisaw*¹⁶⁹ and *People v. Murillo*,¹⁷⁰ both of which show the narrow value of *Elonis* as precedent. In both instances above, the courts distinguished the case from *Elonis* by noting that the statutory language was different; both contained explicit references to a required level of intent for conviction.¹⁷¹ This highlights the importance of close reading of statutory language, and again raises the issue presented in the original certiorari petition for *Elonis*: criminal liability could end up being dependent on where the suit is brought.¹⁷² This issue takes on even more importance when the Internet and social media are used as a platform. Especially if a communication was aimed at a class rather than an individual, prosecutors could simply forum shop to find the jurisdiction with the lowest statutory intent burden and bring the case there.¹⁷³

167. *Id.*

168. *Id.*

169. 617 F. App’x 107, 108 (2d Cir. 2015) (“In this case, the Supreme Court’s holding in *Elonis* does not significantly alter the standard by which we determine whether a threat is a true threat . . .”).

170. 238 Cal. App. 4th 1122, 1129 (2015) (“Therefore, we do not discuss *Elonis*.”).

171. 18 U.S.C. § 871(a); CAL. PENAL CODE § 140 (2012); *Wright-Darrisaw*, 617 F. App’x at 108 (“knowingly and willfully”); *Murillo*, 238 Cal. App. 4th at 1127 (“[S]ection 140 requires a general intent and not a specific intent.”).

172. Petition for a Writ of Certiorari, *supra* note 16, at 41 (noting that it “increases the risk of opportunistic behavior by law enforcement officials, who would have an incentive to prosecute the case in whichever jurisdiction applied the objective test”).

173. *Id.* The unequal protections afforded by a patchwork of different state and federal laws, especially their different intent requirements, also raises Fourteenth Amendment issues.

The Supreme Court has yet to resolve all of the disputes between the circuits, and we will likely see this issue back in front of the Court soon. In striking down the negligence standard in *Elonis*,¹⁷⁴ the opinion simply left too many unanswered questions, and lower courts are unsure how to proceed. Cases subsequent to *Elonis* show that courts either try to address both levels of intent (objective and subjective), or simply distinguish their present case from *Elonis* when state and local statutes impose a different standard from § 875(c).¹⁷⁵ Neither of these approaches is optimal, and the Court might be compelled to take a similar case to clarify both the split among lower courts, as well as the variations in statutory language across federal and state laws.

IV. THE COURT'S VIEW OF THE INTERNET

A question related to the Court's treatment of the *Elonis* decision may inform future First Amendment jurisprudence: should the nature of the medium (i.e., the Internet in general, and social media in particular) affect the nature of the true threat doctrine going forward?

A. CHANGING VIEW OF THE INTERNET

New communication technologies, which have dramatically changed the dynamics of social relationships, compound the potential harm of true threats. Online social media platforms have blurred the line between online and offline personas. In *Reno v. ACLU*, the Rehnquist Court wrote that accessing “the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial,”¹⁷⁶ and considered the Internet as merely a kind of barrier-less broadcast media, with the ability to turn “any person with a phone line [into] a town crier.”¹⁷⁷ Far from being the one-directional broadcast medium contemplated by the Supreme Court in 1997,¹⁷⁸ an individual's activities and experiences online increasingly affect their offline existence.

174. *Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015) (“[N]egligence is not sufficient to support a conviction under [§] 875(c) . . .”).

175. *See Murillo*, 238 Cal. App. 4th at 1127 (noting that the statute in question, CAL. PENAL CODE § 140 (2012), has an explicit intent requirement).

176. 521 U.S. 844, 854 (1997).

177. *Id.* at 870 (using of the phrase “town crier” reinforces the idea that the Internet merely facilitates information transfer).

178. *See id.* at 844.

Cases like *Kowalski v. Berkeley County Schools*,¹⁷⁹ *United States v. Drew*,¹⁸⁰ and *State v. Melchert-Dinkel*¹⁸¹ have, sometimes tragically, shown that actions and words in the online realm can just as easily cause harm as their real-world counterparts. Indeed, the ease with which such threats can be made over the Internet, coupled with the inherent anonymity of the medium acting as a shield against retaliation, has made it far easier for an individual to threaten another in a manner that causes actual harm.¹⁸²

The nature of Elonis's threats raises a third question, especially in light of the Court's landmark decision in *Reno*¹⁸³: does the nature of the Internet require a different standard for online speech? In *Elonis*, a case dealing with threats made over the Internet on a social media website, it was surprising that the opinion failed to mention the word "Internet" a single time.¹⁸⁴ Furthermore, the majority opinion only referred to "social networking" once.¹⁸⁵ There does not seem to be any engagement with the fact that through the use of the Internet and social media, the traditional framework for thinking about true threat cases may no longer hold true.

The blurring of the lines between online and offline personas may mean that the Court's conception of the Internet in *Reno* is no longer accurate.¹⁸⁶ In light of the damage that results when such blurring inevitably occurs,¹⁸⁷ it might be necessary to apply a different standard of intent in order to update true threat doctrine for the rapidly evolving era of social media.

179. 652 F.3d 565 (4th Cir. 2011) (addressing a situation where one student created a website alleging that a fellow student had herpes).

180. 259 F.R.D. 449 (C.D. Cal. 2009) (addressing a situation where a student's mother created an online profile to bully her daughter's schoolmate, and thus contributed to the suicide of said schoolmate).

181. 844 N.W.2d 13 (Minn. 2014) (addressing a situation where defendant encouraged and advised others to commit suicide).

182. See also Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE (Sept. 17, 2013), <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917> [<https://perma.cc/3SKP-XA2J>].

183. *Reno v. ACLU*, 521 U.S. 844 (1997).

184. *Elonis*, 135 S. Ct. at 2001. This was likely an intentional choice, guided by the decision to root the opinion in statutory analysis.

185. *Id.* at 2004 ("Anthony Douglas Elonis was an active user of the *social networking* Web site Facebook.") (emphasis added).

186. *Reno*, 521 U.S. at 849–55. The Court characterized the Internet as a one-directional broadcast medium that required a series of affirmative steps to access content. Furthermore, most people's social media accounts list their real name and picture, making it even harder to distinguish between the two.

187. See, e.g., *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009). A student's mother created an online profile to bully her daughter's schoolmate, and thus contributed to the suicide of said schoolmate.

In *Reno*, the Court characterized the Internet as facilitating the one-directional flow of information, from sources on the Internet to an individual accessing online materials.¹⁸⁸ In addressing provisions of the Communications Decency Act¹⁸⁹ and whether they impinged too strongly on free speech protections, the Court noted that unlike in broadcast media, multiple affirmative steps were necessary to access the Internet.¹⁹⁰ The Internet was seen as a benign, huge trove of information, and any consideration of its potential for networking was limited to the ability of an individual to reach a large number of people fairly easily.¹⁹¹

In *Elonis*, the context is entirely different. Social media sites have become far more popular, which has changed the dynamic of how the Internet interacts with off-line, “real world” lives. As of 2014, seventy-four percent of adults with Internet access utilize some form of social networking, and seventy-one percent of those used Facebook.¹⁹² That number climbs to ninety percent for the for adults aged eighteen to forty-nine (as of 2013).¹⁹³ In addition, more than fifty percent of cell phone users aged eighteen to forty-nine used a social networking site on their cell phone (as of 2012).¹⁹⁴

Those percentages reflect millions of people (admittedly at varying levels of engagement) living portions of their lives on the Internet. They suggest that far from being a personal research terminal of sorts, the Internet has become intertwined with “real life.”¹⁹⁵ With such blurring comes a greater potential for actions in one to have an effect in the other. In *Elonis*, Facebook was the sole medium for allegedly communicating interstate threats.¹⁹⁶ There, lower courts were willing to find that a “communication”

188. *Reno*, 521 U.S. at 853 (“The Web is thus comparable . . . to both a vast library . . . and a sprawling mall.”).

189. 47 U.S.C. § 609 (2012). This statute imposed criminal sanctions for indecency on the Internet; portions of it were struck down as unconstitutional. *Reno*, 521 U.S. at 882 (“[T]he CDA places an unacceptably heavy burden on protected speech . . .”).

190. *Reno*, 521 U.S. at 854.

191. *Id.* at 851 (“Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods.”).

192. Pew Research Center, *Social Networking Fact Sheet*, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet> [<https://perma.cc/7Q8B-MXCK>].

193. *Id.* This is significant also because younger people tend to have more difficulty disassociating their “real” lives from their online experiences.

194. *Id.*

195. *Id.*

196. *Elonis v. United States*, 135 S. Ct. 2001, 2004–07 (2015). Cyberbullying is another recent phenomenon where actions taken solely online can cause drastic harm offline.

occurred, despite Elonis posting the offending “lyrics” solely on his own Facebook wall.¹⁹⁷

B. INCREASING POPULARITY OF SOCIAL MEDIA

Social media platforms like Facebook and Myspace have made possible avenues of communication that were difficult to imagine a mere decade ago. Posts on a user’s Facebook wall,¹⁹⁸ for example in *Elonis*,¹⁹⁹ may be closer to the broadcast platform envisioned by the Court in *Reno*,²⁰⁰ although the notifications feature alerting “friends” to the post complicate that analysis. If people use social media not just as a communication platform but also as a part of their day-to-day activities, having a notification pop up represents more of a personal intrusion than a sign on someone’s lawn or a headline in a newspaper—it bridges the gap between a “broadcast,” and a directed communication.

Individuals are also more likely to place greater emphasis on communications from other social media users, as compared to broadcasts through traditional media, because the former feel more individually addressed and personal. They are likely to give more weight to a message from “Josh Evans”²⁰¹ who they see as a real person using Myspace, than they are to a pamphlet or mailer addressed to “resident.” This gives the individual behind “Josh Evans” a heightened ability to influence the thoughts and emotions of the victim, as the nature of the platform implicitly cloaks them in the veneer of personhood. For Megan Meier,²⁰² the communications from “Josh Evans” were real and direct, and appeared to come from a discrete person²⁰³—this masquerade would not have been possible without the advent of social media.

A closely-linked point is the tremendous measure of perceived anonymity that the Internet grants its users, an anonymity that does not

197. Brief for the Petitioner at 5, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983) (“This case arises out of posts petitioner made . . . [on] Facebook [which] provides its users with a home page on which a user can post . . .”).

198. A location on a user’s page where people can post messages, including videos and images, for others to see.

199. *Elonis*, 135 S. Ct. at 2004–07.

200. *Reno v. ACLU*, 521 U.S. 844, 849–53 (1997).

201. This was the name attached to the fake Myspace profile Lori Drew used to communicate with Megan Meier. *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

202. The student who committed suicide following Lori Drew’s communications while pretending to be “Josh Evans.”

203. *Drew*, 259 F.R.D. at 452.

always extend in both directions.²⁰⁴ For example, in *Drew*, Megan Meier never knew that the individual behind the “Josh Evans” account, who had contacted and flirted with her on Myspace, was not a sixteen-year-old male, but instead the mother of a classmate.²⁰⁵ Drew herself, however, had no trouble identifying Meier on the Myspace platform, where the latter listed her real name along with other identifying characteristics.²⁰⁶ A similar dynamic took place in *State v. Melchert-Dinkel*, where the defendant, in using a number of different usernames, adopted a false persona in order to encourage people around the globe to commit suicide.²⁰⁷ In both these cases, the victims accurately represented themselves on the Internet, while the respective defendants manufactured personalities that were accepted as being true.

From the perspective of the true threat doctrine, the age of social media has changed the threshold of what can cause injury. In the past, communications had to be directed to an individual and detailed enough for someone to feel threatened; this also made proving intent far easier. For example, if Elonis had appeared at his ex-wife’s window and shouted his threatening statements there, prosecution would have been far more straightforward. Posting them on his Facebook wall can be analogized more to putting a sign up on his lawn—a form of speech protected in the 1994 case *City of Ladue v. Gilleo*.²⁰⁸ However, the fact that it was on social media changed the context around the posting; rather than reaching the handful of people who drove past a lawn every day, everyone with a connection to Elonis’s Facebook page was able to see it, including his ex-wife. The message thus not only reached far more people, but was also communicated through a more personal medium.

Also, certain features about social media make true threat statements less harmful than if they were delivered in person. Internet communications can be blocked in numerous ways that in-person statements cannot be. Online communications also take place in differing contexts, which may lessen the “threatening” nature of a missive. It can be hard to take seriously

204. See generally *id.* It is worth noting that while people presume that their online actions remain anonymous, it might be easier to track communications on the Internet than to figure out who threw a rock through your window.

205. *Id.*

206. *Id.* at 453 (noting that users would “register by filling in personal information (such as name, email address, date of birth, country/state/postal code, and gender)”).

207. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16–17 (Minn. 2014).

208. 512 U.S. 43, 49 (1994) (“[S]igns are a form of expression protected by the Free Speech Clause . . .”).

a statement made in the context of a wide-ranging chatroom discussion, while the same statement taken in a vacuum appears to be a true threat.

Yet it is also far easier to make threatening statements online than in person. It takes not only a high level of intentionality to go up to someone and threaten them in person, but also great commitment; there is the real possibility of a violent reaction from the threatened individual.²⁰⁹ The possibility of a violent result acts as a natural inhibitor against threatening words in person. While internet use does bring with it certain inhibitions, those inherent in social media use offer markedly less deterrence than real-life consequences. While people should and do work to protect their online reputations just as they do their offline reputations, there is a difference between being worried that others might have a negative opinion of you, and the fear that someone will respond to your words with physical violence. Furthermore, not only are communications on the Internet transmitted far more easily, but senders get to cloak themselves in anonymity, as well as distance themselves from any potential hostile reactions. For their part, victims are placed in a somewhat helpless situation.

Not all these factors (most significantly, despite *Elonis*'s online nickname, anonymity was not an issue) were present in *Elonis*.²¹⁰ After all, it was clear to all parties who exactly was making the postings that the district court and Third Circuit found threatening.²¹¹ Furthermore, not every element inherent to social media exacerbates the threatening nature of online communications. However, it is concerning that the Supreme Court's opinion in *Elonis* failed to engage with any of these nuances. When the Court revisits this issue, it will have to address exactly how the Internet changes the communication of threatening statements.²¹²

V. CONCLUSION

The Supreme Court, in penning its majority opinion, declined to engage with First Amendment issues or consider recent technological developments that have affected the modern application of true threat doctrine. The narrow holding in *Elonis* makes sense from a standpoint of judicial prudence, though. The Court had to balance First Amendment free speech protections against limiting true threats, and in so doing try to avoid

209. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). After all, *Chaplinsky* originally described this category of speech as "fighting words."

210. *Elonis v. United States*, 135 S. Ct. 2001 (2015).

211. *Id.* at 2004–07. It was not disputed that the posts at issue were written by *Elonis*.

212. See generally Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619 (1995).

over- or under-criminalizing threatening statements made under § 875(c). Any action the Court took would have had unanticipated ripple effects on true threat prosecution, in ways that the Court might not have been prepared to consider. The advent of the Internet and the incredible growth of social media have also changed the way our judicial system thinks about true threats in unclear ways. Perhaps the Court was unwilling to use *Elonis* to engage with the changes since *Reno* in 1997.

Nevertheless, the Court will likely have to revisit this issue in the near future. The primary deficiency in the holding seems to be the majority's failure to address whether a finding of recklessness would be enough to sustain a conviction under § 875(c). Recklessness might be a more appropriate standard; applying a negligence standard raises issues of community and interpretation, and could potentially over-criminalize true threats. For example, statements could be made in one community and transmitted over the Internet to another that finds them offensive; a "reasonable person" standard could find the communication to be a threat in the latter community. With the immense potential audience that can be reached over the Internet, such a standard would over-criminalize true threats and risk chilling free speech to an unacceptable level. Requiring a higher level of intent such as "knowingly," however, could risk under-criminalizing threatening communications, a dangerous prospect when the nature of social media exacerbates the dangers inherent in true threats.

A clearer holding would also have addressed the jurisdictional differences that exist in true threat statutes. *Elonis* offers some clarity to prosecutions under § 875(c), but subsequent cases have already distanced themselves from this precedent by finding differences in statutory language. *Elonis* offered the Court a chance to address these concerns, and the failure to do so here suggests that the Court will have to revisit the issue in the future.

