

## NOTES

### **READ THIS NOTE OR ELSE!: CONVICTION UNDER 18 U.S.C. § 875(C) FOR RECKLESSLY MAKING A THREAT**

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*What does it mean to make a threat, and under what circumstances can a speaker be convicted for making one? This Note examines these questions in light of *Elonis v. United States*, a Supreme Court case decided in June 2015. There, the Court held that when a speaker subjectively intends a statement be taken as a threat or knows that it will be taken as a threat, she may be convicted under 18 U.S.C. § 875(c). The Court did not decide whether a speaker who recklessly makes a threat may be convicted under the statute. This Note argues that convicting a reckless speaker would be consistent with both principles of statutory interpretation and the First Amendment. It advocates for this result particularly because it would protect victims of domestic violence.*

*This Note argues that courts should interpret the statute to allow a speaker who makes a threat recklessly to be convicted for three reasons. First, such interpretation is consistent with principles of statutory interpretation. Second, it is consistent with the First Amendment. Finally, this interpretation is appropriate because threats are an integral part of a pattern of domestic abuse, and given this unique power structure, defining the crime in this way protects the victims. Precedent supports using policy to interpret a statute, and courts should do so here.*

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#### INTRODUCTION

In June 2015, the Supreme Court decided *Elonis v. United States*,<sup>1</sup> a much-anticipated case that concerns the crime of making a threat. The Court held that although the text of 18 U.S.C. § 875(c)<sup>2</sup> does not expressly contain a mens rea requirement, a speaker may be convicted when she “transmits a communication for the *purpose* of issuing a threat, or with the *knowledge* that the communication will be viewed as a threat” and not when she conveys a statement that may objectively be a threat but not subjectively intended as such.<sup>3</sup> The majority declined to decide whether a defendant who makes a *reckless* threat, i.e., one who knowingly disregards a substantial and unjustifiable risk that the communication would be interpreted as a true threat, may be convicted under the statute.<sup>4</sup> Justice Alito concurred with the Court’s rejection of the negligence standard. However, he dissented on the Court’s avoidance of the recklessness question, stating that the Court “granted review in this case to resolve a disagreement among the Circuits,” but “[t]he Court has compounded—not clarified—the confusion.”<sup>5</sup>

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1. 135 S. Ct. 2001 (2015).

2. 18 U.S.C. § 875(c) (2012) (“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.”).

3. *Elonis*, 135 S. Ct. at 2012 (emphasis added).

4. *Id.*

5. *Id.* at 2014.

There is much scholarship on internet speech,<sup>6</sup> violence in rap lyrics,<sup>7</sup> mens rea standards in threat statutes,<sup>8</sup> and intent standards in other kinds of speech torts and crimes.<sup>9</sup> The question *Elonis* left open can be analyzed using these ideas explored in previous scholarship.

*Elonis* rejected the rule used by the majority of courts of appeals.<sup>10</sup> Prior to *Elonis*, the majority of courts of appeals held that whether a statement is a criminal threat turns on whether a reasonable person would understand it as such, not whether the speaker intended it to be a threat.<sup>11</sup> After *Elonis*, the circuits must apply the (previously minority) rule that a speaker may be convicted when she intends a statement to be or knows a statement will be taken as a threat. The circuits must now resolve the ambiguity regarding recklessness.<sup>12</sup>

There are several important reasons for courts to resolve this ambiguity. Speakers need a clear standard, both before and after they speak. Before artists disseminate work, they need to know whether they are protected or can be convicted for their knowing disregard of a substantial and unjustifiable risk that someone will interpret the statement as a true threat. After a threat has been made, a clear standard is critical both to speakers, who stand to lose their liberty to criminal sanctions, and to victims, whose safety may depend on the speaker's conviction or acquittal. This statute also has a profound impact on domestic violence victims, and so courts should continue to develop the doctrine of threats following *Elonis*, particularly with the victims of domestic violence in mind. There is a need to analyze the public policy implications of convicting reckless speakers, taking into account that fact-finding comes with often-substantial costs, both to the prosecution and to the victims of threats.

Threats are instrumental in gaining control of a victim through intimidation, isolation, and control—a strategy that forms the core of domestic abuse.<sup>13</sup> K. Daniel O'Leary, a psychologist, argues that the issue

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6. See, e.g., Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 *FORDHAM L. REV.* 1629 (2014); P. Brooks Fuller, *Evaluating Intent in True Threat Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 *HASTINGS COMM. & ENT. L.J.* 37 (2015).

7. See, e.g., Clay Calvert et al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 *COLUM. J.L. & ARTS* 1 (2014).

8. See, e.g., Karen Roenfield, Note, *Redefining the Question: Applying a Hierarchical Structure to the Mens Rea Requirement for Section 875(c)*, 29 *CARDOZO L. REV.* 1837 (2008).

9. See, e.g., Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 *IOWA L. REV.* 887 (2005); Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 *VA. L. REV.* 1225 (2006).

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

11. *United States v. Elonis*, 730 F.3d 321, 330 (3d Cir. 2013).

12. Because *Elonis* was not decided on constitutional grounds, Congress could resolve this issue by amending the statute. But it is likely that charges will be brought under § 875(c) before Congress can act, if it decides to do so. Thus, courts will consider this issue in the near future.

13. Brief of Amici Curiae National Network to End Domestic Violence et al. in Support of Respondent at 14 & nn.11–12, *Elonis*, 135 S. Ct. 2001 (No. 13-983) [hereinafter NNEDV Br.].

of psychological abuse, including threats, deserves analysis, targeted treatment, and deterrents separate from those aimed at physical abuse.<sup>14</sup> His empirical research shows that “psychological abuse almost always precedes physical abuse,”<sup>15</sup> and there are “direct paths from psychological aggression to physical aggression.”<sup>16</sup> Further, “Overall comparisons of physical and psychological aggression . . . indicate that the psychological abuse [has] a greater impact than the physical abuse.”<sup>17</sup> His research shows this striking relationship:

To address the question of the relative impact of emotional and physical abuse, subjects rated whether emotional or physical abuse had a more negative impact on them. Seventy-two percent of the women rated emotional abuse as having a more negative impact on them than the physical abuse. . . . Approximately half of the sample (54 [percent]) could predict the physical abuse they might receive from the emotional abuse they received. Threats of abuse . . . were predictors of later physical violence. Using a regression analysis, it was determined that threat of abuse was a very strong predictor that physical abuse would follow.<sup>18</sup>

And as a National Network to End Domestic Violence amicus curiae brief argued, modern technology, particularly social media platforms, gives abusers “potent tools to threaten their victims.”<sup>19</sup> The organization in part attributes this growing danger to the ease and immediacy of social media: “Emotional impulses that in the past were often tempered by distance and time can now immediately be turned into easily-communicated threats.”<sup>20</sup>

Further, the resolution of this issue affects how civil protection orders, “arguably [the] most important legal remedy for domestic violence,” are issued.<sup>21</sup> Many states require proof of a crime to receive a civil protection order.<sup>22</sup> Judges tasked with these cases thus reference the criminal law in issuing a civil remedy. A tougher criminal standard may lead to suboptimal protection for domestic violence victims.<sup>23</sup>

This Note addresses the central question left open by *Elonis* and its weighty implications: What is the lowest mens rea burden the government must carry to convict a speaker under § 875(c)? Part I of this Note

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14. K. Daniel O’Leary, *Psychological Abuse: A Variable Deserving Critical Attention in Domestic Violence*, 14 VIOLENCE & VICTIMS 3, 11–15 (1999).

15. *Id.* at 3.

16. *Id.* at 12.

17. *Id.* at 19.

18. *Id.* at 13.

19. NNEDV Br., *supra* note 13, at 4. The National Network to End Domestic Violence brief points out that “almost ninety percent of the 759 agencies [in fifty-five of the fifty-nine states and territories] reported that their victims had been intimidated or threatened via technology.” *Id.* at 14.

20. *Id.* at 15.

21. Brief of the Domestic Violence Legal Empowerment & Appeals Project & Professor Margaret Drew as Amici Curiae in Support of Respondent at 18, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983) [hereinafter DVLE Br.].

22. *Id.* at 30.

23. *Id.* at 42–43.

discusses the *Elonis* case, its precedent, and the legal standards surrounding mens rea, speech crimes, and the Supreme Court's interpretations of similar statutes. Part II articulates the question the Supreme Court left open and the tools that lower courts likely will use to resolve it. Finally, Part III concludes that conviction of a reckless speaker is acceptable as a matter of statutory and constitutional interpretation and that lower courts should adopt this standard.

## I. THE LANDSCAPE OF THREATS

This part discusses the legal doctrine regarding criminal intent standards, the nature of threats and the legal doctrines governing them, and principles of statutory interpretation. It then explores a spectrum of protected and unprotected threats. These legal issues set the stage for the question presented to the Supreme Court in *Elonis*.

### A. *Elonis v. United States: The Current Standard*

Fold up your [protection-from-abuse order] and put it in your pocket/Is it thick enough to stop a bullet?<sup>24</sup>

In May 2010, Tara *Elonis* left her husband, petitioner Anthony Douglas *Elonis*.<sup>25</sup> They had been married for nearly seven years and had two children together.<sup>26</sup>

After Tara moved out with their children, Anthony posted violent statements specifically referencing, and apparently speaking directly to, her on Facebook, a social media website.<sup>27</sup> These statements included: "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder," and "[t]here'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. . . . So hurry up and die, bitch, so I can forgive you."<sup>28</sup> Tara was not his "friend" on Facebook, but the posts were public, and she saw them within two days.<sup>29</sup>

In part as a result of these posts, Tara obtained a protection from abuse order (PFA) against Anthony.<sup>30</sup> During a three-hour hearing before a judge, Tara presented Anthony's Facebook posts with other evidence to show that he was a danger to her and their children.<sup>31</sup> The judge granted

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24. *Elonis*, 135 S. Ct. at 2006 (quoting the lyrics that Anthony Douglas *Elonis* posted on Facebook).

25. *United States v. Elonis*, 730 F.3d 321, 324 (3d Cir. 2013).

26. *Elonis*, 135 S. Ct. at 2004; *Elonis*, 730 F.3d at 324.

27. *Elonis*, 730 F.3d at 324.

28. *Id.*

29. Petition for Writ of Certiorari at 21–22, *Elonis*, 135 S. Ct. 2001 (No. 13-983).

30. *Elonis*, 730 F.3d at 324.

31. Joint Appendix at 149, *Elonis*, 135 S. Ct. 2001 (No. 13-938).

the order, and Anthony was barred from threatening, harassing, or contacting Tara both directly and indirectly.<sup>32</sup>

After the PFA was issued, Anthony continued to post statements on Facebook about and addressed to Tara. Just three days after his wife received the PFA, Anthony posted the script of a comedy sketch he and Tara had seen together.<sup>33</sup> He altered the script to reference his wife in a manner she found threatening.<sup>34</sup> The edited version made fun of the distinction between threatening to kill his wife and talking about threatening to kill his wife (the original work made fun of the same distinction with respect to threatening to kill the President, a reference to 18 U.S.C. § 871).<sup>35</sup>

Where the original sketch discussed specific plans to kill the target, Anthony substituted accurate details about where Tara was living with their children at that time.<sup>36</sup> The details included an accurate diagram of the home and highlighted one location as “the best place to fire a mortar launcher . . . because of easy access to a getaway road and . . . a clear line of sight through the sun room.”<sup>37</sup> He concluded the post with a link to the original comedy sketch and stated: “Art is about pushing limits. I’m willing to go to jail for my Constitutional rights. Are you?”<sup>38</sup>

Tara “never considered any of [the posts] false just because [they were] in lyric form.”<sup>39</sup> She testified that the post made her feel “like [she] was being stalked,” and she “felt extremely afraid for [herself], [her] children and [her] family’s lives.”<sup>40</sup> She also testified that Anthony had no aspiration to become a rapper and in fact “very rarely [listened] to rap music.”<sup>41</sup>

From violent statements written in prose and rewriting the script of a comedy sketch, Anthony progressed to posting original rap lyrics conveying violent messages directed at his ex-wife, judges, and FBI agents. The lyrics included:

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32. Nina Totenburg, *Is a Threat Posted on Facebook Really a Threat?*, NPR (Dec. 1, 2014), <http://www.npr.org/2014/12/01/366534452/is-a-threat-posted-on-facebook-really-a-threat> [<https://perma.cc/T6H6-8SZR>].

33. Petition for Writ of Certiorari, *supra* note 29, at 18 (quoting a satirical sketch by the sketch comedy group “Whitest Kids U’Know”).

34. *Id.*

35. See *Elonis*, 135 S. Ct. at 2005 (“Did you know that it’s illegal for me to say I want to kill my wife?/ . . . 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 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.”).

36. Joint Appendix, *supra* note 31, at 145–55.

37. *Elonis*, 135 S. Ct. at 2005.

38. *Id.* at 2006.

39. Joint Appendix, *supra* note 31, at 160.

40. Adam Liptak, *On the Next Docket: How the First Amendment Applies to Social Media*, N.Y. TIMES (June 30, 2014), [http://www.nytimes.com/2014/07/01/us/politics/supreme-court-facebook-rap-lyrics-free-speech.html?\\_r=0](http://www.nytimes.com/2014/07/01/us/politics/supreme-court-facebook-rap-lyrics-free-speech.html?_r=0) [<https://perma.cc/YE6B-U2KN>].

41. *Elonis v. United States*, 730 F.3d 321, 325 (3d. Cir. 2013) (discussing Tara’s testimony that she had never heard Anthony rap in their seven years of marriage and rarely even saw him listen to rap music); Joint Appendix, *supra* note 31, at 159.

Fold up your PFA and put it in your pocket  
 Is it thick enough to stop a bullet?  
 . . . Me thinks the Judge needs an education  
 on true threat jurisprudence  
 [And] I've got enough explosives  
 to take care of the State Police and the Sheriff's department  
 . . . So the next time you knock, you best be serving a warrant  
 . . . Cause little did y'all know, I was strapped wit' a bomb  
 Why do you think it took me so long to get dressed with no shoes on?<sup>42</sup>

After another violent post in which he alluded to shooting up an elementary school, a female agent visited Anthony's home to investigate.<sup>43</sup> In response, Anthony posted: "You know your shit's ridiculous/when you have the FBI knockin' at yo' door/Little Agent lady stood so close/Took all the strength I had not to turn the bitch ghost/Pull my knife, flick my wrist, and slit her throat/Leave her bleedin' from her jugular in the arms of her partner."<sup>44</sup>

At the end of several posts, Anthony claimed that the lyrics were purely expressive and a form of art. He stated that the lyrics were strictly "fictitious" and that he was "doing this for [himself]" because "writing is therapeutic."<sup>45</sup> He later testified that posting the lyrics helped him "deal with the pain."<sup>46</sup>

### B. Criminal Intent Standards for Threats

This Note now addresses the legal standards relevant to 18 U.S.C. § 875(c), the statute at issue in *Elonis*. This section begins by discussing the nature of threats, then proceeds to explain the kinds of intent recognized in criminal law, and finally discusses how courts have interpreted statutes that are silent as to the requisite intent in previous cases.

#### 1. What Is a Threat?

The ambiguity over what it means to make a threat<sup>47</sup> generated the issue in *Elonis* and the cases that came before it.<sup>48</sup> Before analyzing whether the

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42. *Elonis*, 730 F.3d at 325–26.

43. *Id.* at 326.

44. *Id.* In the context of Anthony's other posts, it seems possible that these lyrics also were written about his wife. This is a conjecture, but it seems killing a woman and leaving her bleeding in the arms of her (romantic or police) partner could refer to his wife as well as the FBI agent, which may be why Tara understood this post as a real threat against her.

45. *Elonis v. United States*, 135 S. Ct. 2001, 2005 (2015).

46. *Id.*

47. The word "threat" is the noun form of the word "threatens," which is the verb found in § 875(c). The word "threat" also can bear a slightly different meaning when used as a subject, predicate, or complement noun, e.g., "she was a threat to those around her," but this Note only discusses the word as it relates to the verb in the statute.

48. Courts have tried to resolve this ambiguity and define the word "threat." See *United States v. Kelnor*, 534 F.2d 1020, 1027 (2d Cir. 1976), *abrogated by Elonis*, 135 S. Ct. 2001 (adopting an objective test for § 875(c), and holding that "a narrow construction of the word 'threat' . . . is consonant with the protection of First Amendment interests. . . . So long as the threat on its face and in the circumstances in which it is made is so unequivocal,

statute allows convicting a speaker for making a reckless threat, it is important to note that “threat” has been interpreted and defined in many ways since and before the statute was enacted.<sup>49</sup>

*Black’s Law Dictionary* defines “threat” as “[a] communicated intent to inflict harm or loss on another.”<sup>50</sup> Webster’s dictionary defines it as “an expression of intention to inflict evil, injury, or damage.”<sup>51</sup> These and other definitions are unclear as to whether the speaker must intend to inflict the harm that results from the communication, or may merely intend to communicate something that does in fact inflict harm. Specifically, the ambiguity is over whether the “communicated intent” must accurately reflect the speaker’s intent to inflict the harm.

## 2. Standards of Intent

Even a dog distinguishes between being stumbled over and being kicked.<sup>52</sup>

Federal statutory crimes consist of an act or omission (the *actus reus*) and a mental state with respect to that act (the *mens rea*).<sup>53</sup> The objective elements of *actus reus* are the conduct, its result, and the attendant circumstances, and the statute may attach different *mens reas* to each of these elements.<sup>54</sup> As is the case in § 875(c), statutes rarely perfectly

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unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied”); *infra* Part I.C.

49. As a threshold matter, Chief Justice Roberts opined that neither Anthony *Elonis* nor the Government “identified any indication of a particular mental state requirement in the text of [§] 875(c).” *Elonis*, 135 S. Ct. at 2008–09.

50. *Threat*, BLACK’S LAW DICTIONARY (10th ed. 2014).

51. *Threat*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1976). Justice Alito endorses this definition in his concurring opinion. *Elonis*, 135 S. Ct. at 2014 (Alito, J., concurring).

52. *Morrisette v. United States*, 342 U.S. 246, 252 n.9 (1952) (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 3 (1881)).

53. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436–37 (1978).

54. *Elonis* resolved a split in the circuits over whether § 875(c) was a crime of specific or general intent—holding unequivocally that the statute requires specific intent. See *Elonis*, 135 S. Ct. at 2012. The difference between specific and general intent is the actor’s mental state with respect to the consequences of her conduct. A general intent crime requires that the defendant “possessed knowledge with respect to the *actus reus* of the crime” and has no mental state requirement as to the result or circumstances. *Carter v. United States*, 530 U.S. 255, 268 (2000). For the majority in *Carter*, Justice Thomas succinctly articulated the distinction between specific and general intent using an example:

In *Lewis*, a person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying “general intent”), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy “specific intent”).

*Id.* at 268–69 (citing *United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir. 1980), *cert. denied*, 450 U.S. 924 (1981); 1 WAYNE R. LAFAYE, CRIMINAL LAW § 3.5, 315 (2d ed. 2015)). In his dissent in *Elonis*, Justice Thomas opined that for § 875(c) threats, “general intent . . . requires no more than that a defendant knew he transmitted a communication,

articulate the mens rea with respect to each element; thus, courts must decide what mens rea is sufficient for conviction.<sup>55</sup>

Model Penal Code<sup>56</sup> (MPC) section 2.02 defines the four mental states usually included in a statute: acting purposely, knowingly, recklessly, and negligently.<sup>57</sup> The definitions in the MPC provide the basic ideas of each mental state, but when applied, courts need to interpret them in a more nuanced manner to capture the behavior the statute was intended to criminalize.<sup>58</sup>

The mental states most difficult for the government to prove are purpose<sup>59</sup> and knowledge, and the line between them is “razor-thin.”<sup>60</sup> According to the MPC, a defendant acts “purposely” when her conscious object is to engage in conduct that produces the result while she is aware of the attendant circumstances.<sup>61</sup> A defendant acts “knowingly” when she is aware that her conduct is of a specific nature, is “practically certain” that the result will obtain, and is aware that the circumstances exist.<sup>62</sup> For crimes requiring purpose or knowledge, the defendant need only be aware of the attendant circumstances.

Before the MPC defined these terms, knowledge and purpose often were conflated.<sup>63</sup> But even with the definitions, it is difficult to articulate the practical difference between a result that is the defendant’s conscious object and a result that the defendant practically is certain will obtain. Some academics suggest abandoning it.<sup>64</sup> Even with the MPC definitions,

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knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context.” *Elonis*, 135 S. Ct. at 2018.

55. *Liparota v. United States*, 471 U.S. 419, 424–25 (1985).

56. The MPC is not a statute; it is written by the American Law Institute. It is instructive, but carries no legal authority on its own. Each state has its own criminal code defining these terms.

57. MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985). Many statutes use other terms like “maliciously” or “corruptly.” At oral arguments in *Elonis*, the attorneys and justices discussed only the four articulated in the MPC, and thus this Note focuses only on those four. The MPC does not rely on definitions of specific and general intent. *See* Justin Myer Lichterman, Note, *True Threats: Evolving Mens Rea Requirements for Violations of 18 U.S.C. § 875(c)*, 22 CARDOZO L. REV. 1961, 1990 n.159 (2001) (noting that the MPC definitions “disregard the awkward concepts of specific intent and general intent”).

58. 1 LAFAVE, *supra* note 54, at 257–58.

59. Confusingly, “purpose” and “intent” are used broadly and sometimes interchangeably. *See* Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79, 82 (2013) (“[N]ot every jurisdiction understands intent in the same way. . . . The word is notoriously vague and captures situations where the defendant desires a particular outcome as well as situations where the defendant is aware of the practical certainty of the outcome but is indifferent to the result. This is precisely why [the MPC] abandoned the ambiguous language of intent in favor of the more precise categories of purpose and knowledge.”).

60. Transcript of Oral Argument at 43:6, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

61. MODEL PENAL CODE § 2.02(2)(a) (AM. LAW INST. 1985).

62. *Id.* § 2.02(2)(b).

63. 1 LAFAVE, *supra* note 54, at 261.

64. *See, e.g.*, Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147 (2008).

distinguishing between purpose and intent, both as a legal matter and on the facts of a case, is difficult.<sup>65</sup>

There is a bigger conceptual difference between knowledge and recklessness. According to the MPC, a defendant is reckless with respect to an element of a crime when she “consciously disregards a substantial and unjustifiable risk that the material element exists” and doing so is a “gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>66</sup>

Finally, the distinction between recklessness and negligence also is significant. To prove a defendant was reckless, the prosecution must show beyond a reasonable doubt that she was aware of the substantial and unjustifiable risk.<sup>67</sup> To prove negligence, the prosecution need only show an actor should have been aware of the risk.<sup>68</sup>

### 3. Silent Statutes

Some statutes, like 18 U.S.C. § 875(c), do not specify the required mens rea—or whether a mens rea is required at all. In *Elonis*, the Supreme Court relied on its precedent regarding statutes that are ambiguous or silent with respect to mens rea.<sup>69</sup> In the precedent cited in *Elonis*, the Court definitively closed the gap that the legislature left open in writing the statute. In *Elonis*, the majority used this reasoning but explicitly left open the recklessness question.<sup>70</sup>

The MPC states that acting recklessly will satisfy the mens rea requirement when the statute does not articulate a mens rea.<sup>71</sup> A minimum of recklessness means that being at least aware of and disregarding a substantial and unjustifiable risk of wrongdoing (recklessness) suffices for conviction, and lacking that awareness (negligence) is insufficient. In this way, the MPC sets the default mens rea that separates wrongful from innocent conduct. But, if this construction is contrary to the clear interpretation of the statute, courts do not hesitate to insert a different mental state.<sup>72</sup>

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65. See 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.2 (2d ed. 2015) (“The meaning of the word “intent” in the criminal law has always been rather obscure. . . . Intent has traditionally been defined to include knowledge, and thus it is usually said that one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts. The modern view, however, is that it is better to draw a distinction between intent (or purpose) on the one hand and knowledge on the other.”).

66. MODEL PENAL CODE § 2.02(2)(c).

67. *Id.*

68. See *id.* § 2.02(2)(d).

69. See *Elonis v. United States*, 135 S. Ct. 2001, 2009–11 (2015).

70. *Id.* at 2013.

71. MODEL PENAL CODE § 2.02(3).

72. See 1 LAFAVE, *supra* note 65, at 257.

*a. Statutory Interpretation*

When a statute does not explicitly include a mens rea, the Court does not assume that Congress intended for a crime to be strict liability; rather, the Court “construe[s] the statute in light of [the common law] in which the requirement of some mens rea for a crime is firmly embedded,”<sup>73</sup> “[a]bsent clear congressional intent to the contrary.”<sup>74</sup> The relevant background rule that a statute should distinguish between those who act “knowingly, intentionally, or recklessly from those who [act] by accident or by mistake, is ‘as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.’”<sup>75</sup> The goal is to isolate the wrongful part of the act to avoid criminalizing “apparently innocent conduct.”<sup>76</sup>

The Court identifies the appropriate mental state using the plain language of the statute,<sup>77</sup> background principles of the relevant area of law,<sup>78</sup> and other tools.<sup>79</sup> Congress’s intent in enacting the statute is the “lodestar” in “determining the mental state of a defendant that the government must prove.”<sup>80</sup> As then-Judge Sotomayor noted in *United States v. Figueroa*,<sup>81</sup> those principles include “a very strong presumption that some mental state is required” and the “equally strong” presumption that the actor have a “guilty mind.”<sup>82</sup>

The Court held in *Morissette v. United States*,<sup>83</sup> a case regarding conversion of government property that the defendant believed to be abandoned, that a statute’s silence with respect to mens rea was not a rejection of an intent requirement. Rather, the silence “merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation” because crime generally results from the “concurrence of an evil-meaning mind with an evil-doing hand.”<sup>84</sup>

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73. *Staples v. United States*, 511 U.S. 600, 604–05 (1994).

74. *United States v. Figueroa*, 165 F.3d 111, 116 (2d Cir. 1998). In some statutes without an explicit mens rea requirement, particularly when the repercussions for conviction are small, an interpretation of strict liability is appropriate. *See Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960) (“[W]here a federal criminal statute omits mention of intent and . . . where the penalty is relatively small, where conviction does not gravely besmirch, [and] where the statutory crime is not one taken over from the common law, . . . the statute can be construed as one not requiring criminal intent.”).

75. *Id.* at 115 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1951)).

76. *Liparota v. United States*, 471 U.S. 419, 426 (1984).

77. *See Caminetti v. United States*, 242 U.S. 470, 485 (1916).

78. *See Figueroa*, 165 F.3d at 115.

79. *Id.* (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978)).

80. *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 86 (2d Cir. 2000).

81. 165 F.3d 111 (2d Cir. 1998).

82. *Id.* at 115.

83. 342 U.S. 246 (1952).

84. *Id.* at 251–52. In this case, the defendant collected and sold spent shell casings that he believed in good faith were abandoned. *Id.* at 248–49. The casings in fact belonged to the U.S. government. *Id.* The Supreme Court reversed his conviction for “knowingly convert[ing]” government property because he did not have the requisite mental state, i.e., he did not know the property belonged to the government. *Id.* at 271.

Similarly, the Court used these principles to interpret a statute silent on mens rea in *Liparota v. United States*,<sup>85</sup> a case regarding unauthorized use of food stamps. It noted that Congress's "failure . . . to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law."<sup>86</sup> In fact, interpreting the statute to include an intent requirement is especially important when omitting such a requirement would "criminalize a broad range of apparently innocent conduct."<sup>87</sup> Thus, the Court held that a statute criminalizing knowingly using or possessing food stamps in an unauthorized manner required that the defendant know "the facts that made the use of the food stamps unauthorized."<sup>88</sup>

*b. Policy in Interpretation*

Commentators have argued that the Court uses policy as well as canons of statutory construction.<sup>89</sup> On at least two occasions, the Court arguably has used policy to justify its result when interpreting a criminal statute that is silent as to mens rea. First, in *Posters 'N' Things, Ltd. v. United States*,<sup>90</sup> the Court was tasked with deciding whether to interpret a statutory term subjectively or objectively.<sup>91</sup> The Anti-Drug Abuse Act of 1986 made transporting "drug paraphernalia," defined as "any equipment . . . primarily intended or designed for use" with illegal drugs, a crime.<sup>92</sup> The Court held that this was an objective definition; items generally used with drugs satisfy the statute, regardless of whether the defendant intended the items to be used with drugs.<sup>93</sup>

The Court relied on the plain text and structure of the statute.<sup>94</sup> It noted that Congress's choice of words was meaningful and distinguished the objective "designed for use" from "primarily intended."<sup>95</sup> The Court further held that Congress could have left out one of these terms or required evidence that the defendant have subjective intent toward the use of the materials.<sup>96</sup> Combined with the natural reading of the statute and these considerations, the Court held that "intended for use" does not require that the defendant intend the product be used with drugs, but rather "refers

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85. 471 U.S. 419 (1985).

86. *Id.* at 426.

87. *Id.*

88. *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015) (citing *Liparota*, 471 U.S. at 425).

89. See Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 342, 398–400 nn.249–51 (2001).

90. 511 U.S. 513 (1994).

91. *Id.* at 514.

92. *Id.* at 517 (citing Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 18 U.S.C. 857(d))).

93. *Id.* at 517–18.

94. See *id.*

95. See *id.* at 518–19 (discussing that some paraphernalia has no other use besides with drugs and thus must be "designed for use" with a drug).

96. *Id.* at 520.

generally to an item's likely use."<sup>97</sup> In addition, the Court held that these principles require "the Government to prove that the defendant knowingly [was] part of a scheme to sell items that he knew were likely to be used with illegal drugs."<sup>98</sup>

Professor Robert Batey argues that judges tend to interpret a statute to include the mental state that achieves results they think are best rather than the one that is truest to the statute.<sup>99</sup> He argues that the decision in *Posters 'N' Things* was based in anti-drug policy choices rather than rules of statutory construction.<sup>100</sup> This interpretation made convictions in drug cases easier for the prosecution to obtain. Professor Batey describes the decision as "result-oriented" and reflecting the justices' desire "not to saddle federal prosecutors with the difficult burden" of proving the defendant wanted the items to be used with drugs.<sup>101</sup> *Posters 'N' Things's* rhetoric fits the policy goal of being tough on drugs, which was popular at the time.<sup>102</sup>

Furthermore, in *United States v. X-Citement Video, Inc.*,<sup>103</sup> the Court again isolated the wrongful action that a statute intended to ban and read the statute to capture only that content.<sup>104</sup> The statute criminalized "knowingly" transporting material that "involves the use of a minor engaging in sexually explicit conduct."<sup>105</sup> After reviewing the grammatical structure of the statute, the Court held that "knowingly" modifies both "transport" and "use of a minor."<sup>106</sup>

Justice Scalia dissented, arguing that the majority carried the rules of construction too far because the presumption in favor of a mental state overpowered his reading of the plain text of the statute.<sup>107</sup> He wrote that "[t]oday's opinion converts the rule of interpretation into a rule of law, contradicting the plain import of what Congress has specifically prescribed regarding criminal intent."<sup>108</sup>

Justice Scalia's interpretation of this statute also relied on policy considerations. He argued that the statute under which the defendant was convicted clearly was intended to protect children.<sup>109</sup> He pointed out that the majority narrowed the group of defendants who can be convicted for

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97. *Id.* at 521.

98. *Id.* at 523–24.

99. Batey, *supra* note 89, at 344.

100. *Id.* at 384 nn.249–51.

101. *Id.* at 348.

102. See, e.g., Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 24 n.102 (1997); see also Batey, *supra* note 89, at 348; Eric E. Sterling, *Drug Laws and Snitching: A Primer*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer> (last visited Apr. 29, 2016) [<https://perma.cc/2988-C47S>].

103. 513 U.S. 64 (1994).

104. *Id.*

105. Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2252(a)(1)(A) (1977).

106. *X-Citement Video, Inc.*, 513 U.S. at 78.

107. *Id.* at 81 (Scalia, J., dissenting).

108. *Id.*

109. *Id.* at 85.

transporting child pornography.<sup>110</sup> Because “the producers of these materials are not always readily found” and the majority’s interpretation means that fewer people who transport the pornography will be convicted, Justice Scalia argued that child pornography may now be bought and sold more frequently.<sup>111</sup> The majority’s interpretation will change how child pornography is produced and will strengthen its market, rather than “dry it up” as Congress intended.<sup>112</sup> He noted that he was “concerned that the Court’s suggestion [would] leave the world’s children inadequately protected.”<sup>113</sup>

Further, Justice Scalia argued that stricter liability would not violate defendants’ First Amendment rights. Recalling the policy goals of the First Amendment,<sup>114</sup> he wrote, “the First Amendment will lose none of its value to a free society if those who knowingly place themselves in the stream of pornographic commerce are obliged to make sure that they are not subsidizing child abuse.”<sup>115</sup>

### C. A Spectrum of Speech

Speech is regulated and protected according to its form and content. A First Amendment analysis always is necessary when a law governs a type of speech, like political speech, which it usually fiercely protects.<sup>116</sup> Other speech is so harmful and of such little value to society that it may be proscribed without offending the First Amendment. The Court has protected speech in the vast middle of that spectrum in accordance with the principles of the First Amendment.

The federal courts have developed doctrines to distinguish among these kinds of speech and to determine to what extent regulation is constitutionally permissible. In the following cases, the Supreme Court evaluates laws prohibiting speech in light of the mental state of a speaker.

#### 1. Fighting Words

You are . . . a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.<sup>117</sup>

In *Chaplinsky v. New Hampshire*,<sup>118</sup> the Supreme Court held that the First Amendment does not protect these and other fighting words.<sup>119</sup> There, petitioner was standing on a public sidewalk denouncing other religions in

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 83.

114. *See infra* Part I.C.

115. *X-Citement Video*, 513 U.S. at 85.

116. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“The First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989))).

117. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 568 (1942).

118. 315 U.S. 568 (1942).

119. *Id.* at 568.

accordance with his faith as a Jehovah's Witness.<sup>120</sup> A "disturbance" followed, and Chaplinsky was arrested under a New Hampshire statute prohibiting "address[ing] any offensive, derisive or annoying word . . . with intent to deride, offend or annoy [any person in a public place]."<sup>121</sup>

The Court held that fighting words "by their very utterance inflict injury," and thus proscribing "fighting words" like "the lewd and obscene, the profane, the libelous" is not unconstitutional.<sup>122</sup> Though the words may be attached to protected expression, the gravamen of the statutory offense is inciting the fear and panic inherent in the words and the manner in which they are spoken.<sup>123</sup> Proscribing these "well-defined and narrowly limited classes of speech [has] never been thought to raise any Constitutional problem."<sup>124</sup>

The Court highlighted one theory that justified the inclusion of the First Amendment in the Constitution: speech and free discourse must be protected because they are necessary for a functioning democracy.<sup>125</sup> The value of speech as personal expression is secondary to its value as a mode of societal development.<sup>126</sup> Therefore, the Court defines the bounds of First Amendment protection in light of this policy goal imagined by the Framers that continues to be important today.<sup>127</sup> Fighting words do not promote the exchange of ideas. They do not improve democracy or social order. The speech is of low value and afforded little to no First Amendment protection.<sup>128</sup>

## 2. Political Hyperbole and Acts

[N]ow I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If

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120. *Id.* at 569–70.

121. *Id.*

122. *Id.* at 572. This list of categories has changed significantly since 1942. While *Chaplinsky* is still good law, the decision has been criticized. *See, e.g.,* Burton Caine, *The Trouble with "Fighting Words": Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 450 (2004).

123. *See* Caine, *supra* note 122.

124. *Chaplinsky*, 315 U.S. at 571–72.

125. *Id.* at 572 ("[Fighting words] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."); *see also* *Whitney v. California*, 274 U.S. 357, 375 (1927) ("[The Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.").

126. *See Whitney*, 274 U.S. at 375; *see also* *Burton v. Crowell Pub. Co.*, 82 F.2d 154, 156 (1936) ("The only reason why the law makes truth a defense is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation; it is like a privileged communication, which is privileged only because the law prefers it conditionally to reputation.").

127. *See, e.g.,* Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2203 (2006) (noting that the First Amendment promotes discourse and strengthens democracy because it protects unpopular ideas on the fringes of the political spectrum and allows them to be heard).

128. But this view has been criticized. *See id.*

they ever make me carry a rifle the first man I want to get in my sights is L.B.J. . . . They are not going to make me kill my black brothers.<sup>129</sup>

Like speech that incites violence, true threats are unprotected by the First Amendment. The challenge since *Watts v. United States*<sup>130</sup> has been defining “true threats.”<sup>131</sup> In *Watts*, an eighteen-year-old boy was convicted for “knowingly and willfully” making a threat against the President in violation of 18 U.S.C. § 871(a) after he made the above statement at a public rally.<sup>132</sup> On appeal, the Court held that conviction “requires the Government to prove a true threat” and the statement was a “kind of political hyperbole” that does not fit within the statutory meaning of “threat.”<sup>133</sup>

The Court evaluated the speech and statute and decided the case using the same policy grounding of the First Amendment as it did in *Chaplinsky*.<sup>134</sup> The decision also introduced the true threats doctrine.<sup>135</sup> The Court balanced the societal interest in protecting the President<sup>136</sup> “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, [including] vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>137</sup>

The Court, however, did not develop the idea of true threats in its short per curiam decision. A line of cases following *Watts*, including *Elonis*, articulated the nuances of what counts as a true threat.<sup>138</sup>

129. *Watts v. United States*, 394 U.S. 705, 706 (1969) (per curiam).

130. 394 U.S. 705 (1969).

131. *See id.* at 706.

132. *See id.* at 705–06; 18 U.S.C. § 871(a) (2012) (criminalizing making “any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States”). In *Watts*, the Court did not reach whether the lower court’s interpretation of the statute’s “willfulness” requirement was correct, but it expressed “grave doubts” about the lower court’s interpretation. *See Watts*, 394 U.S. at 708.

133. *Watts*, 394 U.S. at 708.

134. *Id.*

135. *Id.*

136. *Id.* at 707 (“The [United States] undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.” (citing H.R. 652, 64th Cong. (1916))).

137. *Id.* at 708 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). *Sullivan*, discussed *infra* Part I.C.4, is a landmark case concerning the tort of libel and the intent standard sufficient to protect society from defamation but still promote public discourse on important societal issues. Though *Sullivan* is a tort case, it is cited frequently in discussing true threats and other speech act crimes. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 421 (1992) (Stevens, J., concurring) (supporting the proposition that “the level of protection given to speech depends upon its subject matter . . . . Much of our First Amendment jurisprudence is premised on the assumption that content makes a difference.”); *Rogers v. United States*, 422 U.S. 35, 47–48 (1975) (noting that a statute prohibiting threats against the President will only deter speakers who intend to make a threat, and “that degree of deterrence would have substantial costs in discouraging the ‘uninhibited, robust, and wide-open’ debate that the First Amendment is intended to protect” (quoting *Sullivan*, 376 U.S. at 270)).

138. *See generally R.A.V.*, 505 U.S. 377; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *see also Virginia v. Black*, 538 U.S. 343 (2003).

These are the far ends of the field of verbal speech: on one side, speech that is so harmful that even without any mental state attached, it may be proscribed and, on the other, speech that is so hyperbolic and wrapped in the heart of the First Amendment—political speech—that the Constitution protects it. Anthony Elonis’s social media posts are reminiscent of both; he criticizes policies of the judiciary and the police, but also very realistically indicates how and why his soon-to-be ex-wife should be murdered.<sup>139</sup>

### 3. Cross Burning

Not all threats require words. This Note now turns to the Supreme Court’s interpretations of statutes proscribing nonverbal threats that fall in the middle of the speech spectrum. In *Virginia v. Black*,<sup>140</sup> the Court used intent to intimidate to distinguish between cross burnings that are true threats and cross burnings that are protected by the First Amendment.<sup>141</sup> As in *Chaplinsky* and *Watts*, the Court balanced the societal interest in promoting expression of political beliefs with the real harm such statements can cause.<sup>142</sup>

The respondents in *Black* were convicted under a Virginia statute that criminalized burning a cross with intent to intimidate and also made the act of burning a cross prima facie evidence of intent to intimidate.<sup>143</sup> One respondent had burned a cross at a Ku Klux Klan rally in an open, privately owned field with the permission of the owner.<sup>144</sup> Attendees at the rally spoke about “what they were” and “what they believed in.”<sup>145</sup> The other two respondents had driven “a truck onto [an African-American neighbor’s] property, planted a cross, and set it on fire. Their apparent motive was to ‘get back’ at [the neighbor] for complaining.”<sup>146</sup>

The majority opinion further developed the true threat doctrine introduced in *Watts*.<sup>147</sup> The Court held that “[t]rue 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.”<sup>148</sup> Again, the Court emphasized that

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139. See *Elonis v. United States*, 135 S. Ct. 2001, 2005 (2015) (“I also found out that it’s incredibly illegal [to say] the best place to fire a mortar launcher at 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.”).

140. 538 U.S. 343 (2003).

141. *Id.* at 361–62.

142. See *id.*

143. *Id.* at 348 (citing VA. CODE ANN. § 18.2-423 (1950) (“It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. . . . Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”)).

144. *Id.*

145. *Id.*

146. *Id.* at 350.

147. *Id.* at 359.

148. *Id.* (emphasis added). The emphasized words generated the circuit split that *Elonis* resolved.

these threats are actions that may be regulated like actions even if they have political content because “a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders.’”<sup>149</sup> Therefore, these true threats may be proscribed constitutionally because they are sufficiently different from speech that is scary to its audience but nonetheless protected.

The majority for the Court also held that the prima facie evidence provision of the statute “strips away the very reason why a State may ban cross burning with the intent to intimidate.”<sup>150</sup> If the defendant exercised her constitutional right not to defend herself, the prima facie provision requires that she be convicted of making a threat on the act of burning a cross alone, which is the very reason proscribing cross burning does not violate the First Amendment.<sup>151</sup> In that case, the intent requirement effectively would be written out of the statute because a jury could convict her based on the act of cross burning alone.<sup>152</sup>

The intent requirement, the Court held, is the difference between “core political speech” and “constitutionally proscribable intimidation.”<sup>153</sup> 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,” and thus the provision captures too much protected speech.<sup>154</sup> The true threats analysis requires a more nuanced distinction that does not “blur[] the line between these two meanings of a burning cross”<sup>155</sup> and does not punish “crudely worded ideas.”<sup>156</sup> The Court did not, however, distinguish between the different levels of mens rea encompassed within the word “intent.”

Justice Thomas dissented, arguing that the statute is constitutional in its entirety because intent to threaten is inseparable from cross burning.<sup>157</sup> There is a well-documented history of violence that almost always followed cross burning, which he argued is inseparable from the act. Intimidation (reasonably) always accompanies the act, and thus there is no protected expression in the act of burning a cross.<sup>158</sup>

Unlike the majority, Justice Thomas would focus on the objective result of the action in context of the American history of violence associated with

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149. *Id.* at 359–60 (citations omitted).

150. *Id.* at 365.

151. *Id.*

152. *Id.*

153. *Id.* The defendants in this case showed this difference clearly; the defendant who burned a cross at the Ku Klux Klan rally was expressly political and did not directly target a specific person, whereas the defendants who burned a cross in a neighbor’s yard specifically and personally targeted a person they did not like.

154. *Id.* at 367.

155. *Id.* at 365.

156. Crane, *supra* note 9, at 1272.

157. See *Black*, 538 U.S. at 400 (Thomas, J., dissenting).

158. *Id.* at 388, 394–95 (“And, just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.”).

a burning cross, not the subjective intent of the actor.<sup>159</sup> Because burning a cross reasonably is expected to provoke fear and intimidation given the historically strong connection between a burning cross and horrific violence, Justice Thomas would hold that this does not violate the First Amendment.<sup>160</sup> And, even if protected content were present in the action, the prima facie evidence provision is rebuttable so the defendant would not be deprived of her due process.<sup>161</sup>

This line of cases developing the true threat doctrine left an open question for the circuits<sup>162</sup>: Must an alleged threat be subjectively intended to be a threat or just objectively threatening? Or both?

#### 4. Libelous Words

Under defamation law, speech also is regulated based on the mental state of the author at the time she published the statement.<sup>163</sup> Since 1964 when the Supreme Court first announced the actual malice standard in *New York Times Co. v. Sullivan*,<sup>164</sup> the Court has required that a defendant act with some level of intent to be held liable for various kinds of libel.<sup>165</sup> The Court chose these standards of intent by considering the value of the speech to society, public policy goals, democratic ideals, and the boundaries of the First Amendment.<sup>166</sup> Because this jurisprudence also concerns mental states and is more clearly and fully developed than true threat jurisprudence,<sup>167</sup> comparing the two areas is useful to the analysis of criminal threats defined in § 875(c).<sup>168</sup>

In *Sullivan*, the foundational libel case, the Supreme Court held that a public official who brings a libel suit against a defendant for publishing a defamatory statement may not prevail unless she proves by clear and

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159. *Id.* at 388 (“In every culture, certain things acquire meaning well beyond what outsiders can comprehend.”).

160. *Id.*

161. *Id.* at 395–98.

162. *See supra* note 148 and accompanying text.

163. *See generally* Bezanson & Cranberg, *supra* note 9.

164. 376 U.S. 254 (1964).

165. The notable difference between libel law and *Elonis* is that the former is civil common law and the latter involves statutory and criminal law. *Elonis*, *Chaplinsky*, *Watts*, *R.A.V.*, and *Black* all concern interpretations of intent in a statute and whether and what kind of intent is required. *See supra* Part I. Both statutory and common law regulations of speech are subject to First Amendment analysis.

166. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4, 8 (1971); *see also infra* Part I.B.3.

167. *See generally* Crane, *supra* note 9, at 1231 n.25.

168. *See* Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 114 n.7 (2008) (“In fact, courts have sought to harmonize criminal and tort concepts of recklessness and regularly apply the same definition in each context.”); *see also* *Lamb v. Anderson*, 147 P.3d 736, 744–45 (Alaska 2006) (criminal and tort standards for recklessness are virtually identical); *Sandler v. Commonwealth*, 644 N.E.2d 641, 643 (Mass. 1995) (“Our long-standing custom has been to measure reckless conduct by the same test whether reckless conduct is alleged as the basis for liability in tort or as the basis for guilt of involuntary manslaughter.”).

convincing evidence that the author acted with “actual malice.”<sup>169</sup> The Court defined actual malice as acting “with *knowledge* that [a statement is] false or with *reckless disregard* of whether it was false or not.”<sup>170</sup>

Proving by clear and convincing evidence that a defendant acted with actual malice is expensive, difficult, and invasive.<sup>171</sup> The Supreme Court justified imposing this high burden because free criticism of public officials is necessary for a functioning democracy.<sup>172</sup> Thus, the Court used the First Amendment as an instrument to protect society when the speech performs a function crucial to a healthy democracy, just as it did in *Chaplinsky* and *Watts*.

The actual malice standard requires the fact finder to inquire into the reporter’s mental state at the time she published the statement, much as fact finders in criminal cases are required to identify the defendant’s mental state at the time of the crime.<sup>173</sup> But it has not been a clean solution. In a 5-4 decision with four separate dissents, the Court held in *Gertz v. Robert Welch, Inc.*<sup>174</sup> that private-figure plaintiffs must show that the defendant acted with at least fault, but left to the states’ discretion whether to require a higher standard.<sup>175</sup> As in *Elonis*, the Court set a minimum for liability and left the states to decide whether to require a higher standard of intent.<sup>176</sup>

In his dissent, Justice Douglas criticized the *Gertz* majority and argued that a “more than fault” standard was unwieldy, particularly when the subject of the speech is, as in this case, politically controversial.<sup>177</sup> He opined that “a jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage.”<sup>178</sup> Similarly, in *Elonis*, Justice Alito noted, “Attorneys and judges need to know which mental state is required for conviction [but they] are left to guess.”<sup>179</sup>

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169. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

170. *Id.* at 280 (emphasis added).

171. See Bezanson & Cranberg, *supra* note 9, at 890–91 (“The test’s demand that the mind of the reporter be proved with ‘convincing clarity’ has proven difficult, invasive, and so expensive that the losers are indistinguishable from the winners in public libel cases.” (quoting *Sullivan*, 376 U.S. at 285–86, and citing RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 4–5 (1987))).

172. *Sullivan*, 376 U.S. at 299.

173. See *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 685–86 (1989) (describing the actual malice standard as one with uncertain scope but depending on a fact-specific inquiry).

174. 418 U.S. 323 (1974).

175. *Id.* at 347.

176. *Id.*

177. *Id.* at 360 (Douglas, J., dissenting). The allegedly defamatory articles concerned “[c]ommunist plots,” ‘conspiracies against law enforcement agencies,’ and the killing of a private citizen by the police.” *Id.*

178. *Id.*

179. *Elonis v. United States*, 135 S. Ct. 2001, 2013–14 (2015) (Alito, J., dissenting in part).

In *Philadelphia Newspapers v. Hepps*,<sup>180</sup> the Court recognized that the allocation of the burden of proof alone can in some cases dispose of the case.<sup>181</sup> To decide where to place the cost of difficult, costly, or impossible fact-finding, the Court resorted to policy considerations.<sup>182</sup>

In *Hepps*, a newspaper published articles asserting that the plaintiff, a local public official, had ties to organized crime.<sup>183</sup> The Court held that the plaintiff bore the burden of showing both that the publisher was at fault and that the statement was actually false.<sup>184</sup> The majority reasoned that if the burden of proving the statement is true were on the defendant, then the newspaper would be faced with a difficult choice: reveal its sources or face defamation liability.<sup>185</sup> Shifting the burden of proof is a solution grounded in a policy decision to protect newspapers that publish stories about dangerous people and require confidential sources and avoid this problem.<sup>186</sup> It is particularly important in cases like *Hepps* where the stories are about organized crime and the sources face severe backlash if they are exposed. Justice O'Connor emphasized the policy goal, opining that "[i]n a case . . . where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in the favor of protecting true speech."<sup>187</sup>

The Court further recognized that "[t]here will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive."<sup>188</sup> Similarly, in cases of threats and possible domestic violence, the fact-finding process may be invasive and expensive.<sup>189</sup> Allocation of the burden of proof in those cases disposes of the action. And in cases of threats, as in *Hepps*, the Court must make a policy choice and decide on which party to place the cost of fact-finding. In *Hepps*, the Court was comfortable shifting which party has to bear the cost of proving elements of the claim to serve the important function of promoting free discourse on dangerous topics.<sup>190</sup> In § 875(c) cases, the Court should consider protecting the party that, in the Court's judgment, is at the heart of the goals of the law by noting who has to prove what and interpreting the statute accordingly.

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180. 475 U.S. 767 (1986).

181. *Id.* at 776.

182. *Id.* at 776–77 (discussing the chilling effects that potentially would result from holding otherwise).

183. *Id.* at 769.

184. *Id.* at 776.

185. *Id.* at 779.

186. *Id.*

187. *Id.* at 776.

188. *Id.*

189. See Alafair S. Burke, *Domestic Violence As a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 101 (2007).

190. *Hepps*, 475 U.S. at 776.

## II. THE QUESTION THAT IS LEFT: IS RECKLESSNESS ENOUGH?

*Elonis* applied this messy doctrine to threats and resolved a circuit split that developed regarding whether the true threat must be subjectively intended to be threatening or objectively interpreted as a threat. But the Court did not apply the doctrine to defendants who speak recklessly over the protests of Justices Alito and Thomas. As Justice Thomas noted, with respect to recklessness, the Court “cast[] aside the approach used in nine Circuits and [left] nothing in its place.”<sup>191</sup> “Lower courts are thus left to guess at the appropriate mental state for § 875(c).”<sup>192</sup>

In his partially dissenting opinion, Justice Alito agreed with the majority that the Court should read in some mental state as to the nature of the communication.<sup>193</sup> But, he reasoned, “once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.”<sup>194</sup> The definition of recklessness<sup>195</sup> includes some wrongful behavior, and thus the defendant necessarily knows her conduct is not innocent.

Below, this Note analyzes the law *Elonis* did articulate, how the Court construed the statute, and the decision’s impact on the First Amendment.

### A. *The Law of Elonis at the Third Circuit*

In December 2010, Anthony Elonis was arrested and charged with five counts of making a threat in violation of § 875(c) on the basis of his Facebook posts.<sup>196</sup> At trial, Anthony requested the jury be instructed that conviction requires “inten[t] to communicate a true threat.”<sup>197</sup> Instead, the trial court instructed the jury that conviction requires “intentionally [making] a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates . . . as a serious expression of an intention to inflict bodily injury or take the life of an individual.”<sup>198</sup> Following this instruction, the jury found Anthony guilty of four of the five counts, and he was sentenced to forty-four months in prison.<sup>199</sup>

The Court of Appeals for the Third Circuit affirmed the conviction, holding that recent Supreme Court cases including, *Virginia v. Black*, did not displace the Third Circuit’s own precedent that used an objective

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191. *Elonis v. United States*, 135 S. Ct. 2001, 2018 (2015).

192. *Id.*

193. *Id.* at 2015 (Alito, J., concurring in part).

194. *Id.*

195. See *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994) (defining recklessness as “when a person disregards a risk of harm of which he is aware”); MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985).

196. *Elonis v. United States*, 730 F.3d 321, 324–26 (3d Cir. 2013); see *infra* Part I.A.

197. Petition for Writ of Certiorari, *supra* note 29, at 14.

198. *Elonis*, 730 F.3d at 327 (citing Trial Transcript at 127, *id.* (No. 12-3798)).

199. Liptak, *supra* note 40.

standard.<sup>200</sup> It recognized that in *Black*, the Supreme Court did not qualify “*means to communicate* a serious expression of an intent to commit an act of unlawful violence,”<sup>201</sup> with a requirement that the speaker intend the listener to understand the statement as a threat. Thus, the Third Circuit panel affirmed Anthony’s conviction.<sup>202</sup>

In his petition for a writ of certiorari, Anthony argued that the objective rule adopted by the Third Circuit and some other courts is inconsistent with bedrock First Amendment principles and *Black*.<sup>203</sup> The government can punish speech without violating the First Amendment in very limited circumstances, he argued, and music lyrics posted on social media without intent to intimidate the audience is not one of them.<sup>204</sup> He argued that accepting the Third Circuit’s rule “that one could commit a ‘speech crime’ *by accident* is chilling . . . and would erode the breathing space that safeguards the free exchange of ideas.”<sup>205</sup>

Petitioner noted that the Court has afforded “breathing space” for other speech crimes and torts; in *Sullivan*, it established the actual malice standard for defamation of public figures,<sup>206</sup> in *Brandenburg v. Ohio*,<sup>207</sup> it established the standard of directed speech for incitement,<sup>208</sup> and in *United States v. Alvarez*,<sup>209</sup> it established that in cases where a statute criminalizes making a false statement, the court assumes that the speaker intended her statement to be understood as true. The speech regulated by § 875(c), he argued, similarly needs the “breathing space” of the subjective intent standard.<sup>210</sup> Many kinds of music and art use violent hyperbole and have First Amendment value, even if mainstream listeners do not like the music or message.<sup>211</sup> Generally criminalizing statements that use those literary devices “institutionalizes discrimination against minority viewpoints.”<sup>212</sup>

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200. *Elonis*, 730 F.3d at 330; *see, e.g.*, *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) (holding that a phone call was a true threat when the defendant knowingly and willfully placed the call and the call was reasonably perceived as a threat); *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (holding that a true threat against the President is a statement “in a context . . . wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm” (citations omitted)).

201. *Elonis*, 730 F.3d at 329 (emphasis added) (quoting *Virginia v. Black*, 533 U.S. 343, 359–60 (2003)).

202. *Id.* at 331 (citing *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005)). The Third Circuit noted that, of all the circuits that had considered the issue at that time, only the Ninth Circuit used a nonobjective standard. *Id.*

203. Petition for Writ of Certiorari, *supra* note 29, at 28–29.

204. *Id.* at 39; *see also* *Watts v. United States*, 394 U.S. 709 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

205. Petition for Writ of Certiorari, *supra* note 29, at 30.

206. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964) (holding that negligence is a constitutionally insufficient standard for imposing liability for speech).

207. 395 U.S. 444 (1969).

208. *Id.* at 447.

209. 132 S. Ct. 2537 (2012) (plurality opinion).

210. *Id.* at 2553.

211. *See infra* note 256 and accompanying text.

212. Brief for Petitioner at 48, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-9837).

In opposition, the Government argued that the purpose of prohibiting threats is to “‘protect individuals from the fear of violence’ and ‘from the disruption that fear engenders.’”<sup>213</sup> The respondent argued that *Black* requires proof of subjective intent only in threat statutes that are not content neutral and therefore not within § 875(c).<sup>214</sup> The respondent noted that even within the Ninth Circuit, which used the minority test of subjective intent, panels of judges inconsistently applied intent standards in statutes requiring subjective intent.<sup>215</sup>

### B. Statutory Construction at the Supreme Court

The Supreme Court granted certiorari and reversed the Third Circuit. The majority opinion, authored by Chief Justice Roberts, read § 875(c) as requiring that the speaker have knowledge or intent that her statement will be taken as a threat, rather than merely requiring that a reasonable person would take the statement as a threat.<sup>216</sup>

The Court recognized that, as a general rule, all criminal statutes require some mental state.<sup>217</sup> Although the text of § 875(c) may not contain any particular mental state, the Court has interpreted similarly silent statutes to include the mental state that is “‘necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”<sup>218</sup> Accordingly, the Court construed § 875(c) to include a mental state, just as it had done in precedent like *Morissette*, *Liparota*, *Posters ‘N’ Things*, and *X-Citement Video*.<sup>219</sup>

To insert a mental state that adequately separates wrongful conduct from innocent conduct, the Court identified the reason the action was criminalized in the first place: “[C]ommunicating something is not what makes the conduct ‘wrongful.’ Here ‘the crucial element separating legal innocent from wrongful conduct’ is the threatening nature of the communication.”<sup>220</sup> “The mental state requirement must therefore apply to the fact that the communication contains a threat.”<sup>221</sup>

### C. The First Amendment

Chief Justice Roberts’s majority opinion decided the case in favor of Anthony Elonis on statutory interpretation grounds<sup>222</sup> and did not reach the

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213. Brief for Respondent at 16, *Elonis*, 135 S. Ct. 2001 (No. 13-9837); *Virginia v. Black*, 538 U.S. 343, 360 (2003).

214. Brief for Respondent, *supra* note 213, at 43.

215. *Id.* at 26–37.

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

217. See *Morissette v. United States*, 342 U.S. 246, 252, 250 (1952) (noting that the basic principle that “‘wrongdoing must be conscious to be criminal” is “as universal and persistent in mature systems of law as belief in the freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil”).

218. *Elonis*, 135 S. Ct. at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

219. See *supra* Part I.B.3.a.

220. *Elonis*, 135 S. Ct. at 2011 (emphasis omitted).

221. *Id.*

222. *Id.* at 2010–11.

First Amendment questions.<sup>223</sup> Both Justice Alito’s partial dissent and Justice Thomas’s dissent arrived at less defendant-friendly positions on the statutory issue and therefore continued on to the First Amendment issue.<sup>224</sup>

Justice Alito argued that conviction using a recklessness standard would not offend the First Amendment.<sup>225</sup> As *Watts*, *Black*, and other cases have established, the First Amendment does not protect true threats.<sup>226</sup> The First Amendment clearly protects some art (possibly including the kind of lyrics Anthony posted), but the context matters; just “[a] fig leaf of artistic expression” does not save hateful, criminally threatening speech from being hateful and criminally threatening.<sup>227</sup>

Moreover, a recklessness standard does not violate the First Amendment and leaves adequate “breathing space” for free speech.<sup>228</sup> A negligent speaker is one who “should be aware of a substantial and unjustifiable risk[, and failure to perceive the risk] involves a gross deviation from the standard of care that a reasonable person would observe.”<sup>229</sup> This definition of negligence requires that the speaker *not* be aware of the threatening character of the speech. By contrast, the definition of a reckless speaker requires being aware of the harm and disregarding it.<sup>230</sup> The gap between these definitions leaves sufficient breathing room to avoid the problem of chilling First Amendment-protected speech. Because the recklessness standard does not present any First Amendment problems, Justice Alito argues that the Court is justified only in eliminating negligence as a standard for conviction.<sup>231</sup>

Justice Thomas dissented, focusing on “ordinary background principles” of criminal law to interpret the statute while reading in as little as possible.<sup>232</sup> Citing statutes and early state cases, he argued that the long history of the government limiting speech without requiring specific intent and without violating the First Amendment shows that his interpretation of § 875(c) does not violate the First Amendment.<sup>233</sup> Because the Court expressly declined to address the First Amendment question in *Watts*, and the focus of *Black* was the prima facie evidence of intent to intimidate rather than the circumstances under which threats constitutionally may be protected, neither case precludes his reading of the statute on First Amendment grounds.<sup>234</sup>

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223. *Id.* at 2012.

224. *Id.* at 2016 (Alito, J., dissenting in part); *id.* at 2024 (Thomas, J., dissenting).

225. *Id.* at 2016 (Alito, J., dissenting in part).

226. *Id.*

227. *Id.* at 2016–17.

228. *Id.* at 2016 (citations omitted).

229. MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985).

230. *Id.* § 2.02(2)(c).

231. *Elonis*, 135 S. Ct. at 2016 (Alito, J., dissenting in part).

232. *Id.* at 2022 (Thomas, J., dissenting).

233. *See id.* at 2024 (citing statutes and early cases that penalize “transmitting a communication containing a threat without proof of a demand to extort something from the victim”).

234. *Id.* at 2026–27.

## III. RECKLESSNESS SHOULD SUFFICE FOR CONVICTION

The lower courts likely will resolve this open question the same way the Supreme Court has resolved similar questions in *Elonis* and previous cases: through statutory interpretation, by applying the First Amendment, and by considering policy. This Note now addresses each with respect to recklessness in turn. It concludes that requiring recklessness is a proper statutory interpretation, does not violate the First Amendment, and supports important policy considerations including protecting domestic violence victims.

A. *Statutory Interpretation*

This section argues that courts could interpret § 875(c) to allow a reckless speaker to be convicted consistently with principles of statutory interpretation and the First Amendment. Ideally, Congress would amend § 875(c) and clearly articulate the required mens rea. Because *Elonis* was decided on statutory, not constitutional, grounds, Congress is free to supersede the case and amend § 875(c) to require any mental state it deems appropriate to capture the activity it intended to criminalize.<sup>235</sup>

As the *Elonis* Court concluded, the plain text of § 875(c) does not specify any mental state, recklessness or otherwise, and thus courts interpreting the statute must read in a mental state.<sup>236</sup> As the Court concluded in *Morissette* and its progeny, lack of a mental state does not mean Congress intended the crime to be a strict liability crime.<sup>237</sup> The Court must use principles of law and rules of construction to insert a mental state.<sup>238</sup>

MPC section 2.02(3) sets recklessness as the default minimum mens rea.<sup>239</sup> This suggests that courts could insert the recklessness mens rea consistent with rules of statutory construction. Although the Supreme Court used the MPC definition of mens rea at oral argument and in its opinions, it did not discuss section 2.02(3). Lower courts remain free to consider this provision when interpreting § 875(c).

The Supreme Court repeatedly has isolated the wrongdoing in the proscribed act and interpreted the statute to criminalize just that activity.<sup>240</sup> In the case of threats, the wrongdoing is causing the real, tangible harm that follows after making a threat; “threats of violence are, in themselves, harmful—they cause fear and all its attendant damaging and disruptive psychological, emotional, and physical effects.”<sup>241</sup> They have “serious and long-lasting psychological and emotional consequences,” particularly for

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235. See Lichterman, *supra* note 57, at 1966 (“Congress should insert a mens rea requirement of ‘recklessness’ into 18 U.S.C. § 875(c) in order to ensure uniform application in the federal courts.”).

236. See *Elonis*, 135 S. Ct. at 2001; see also *supra* Part II.B.

237. See *Morissette v. United States*, 342 U.S. 246 (1952); see also *supra* Part I.B.3.a.

238. See *supra* Part I.B.3.a.

239. MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 1985); see *supra* Part I.B.2.

240. See *supra* Part I.B.3.

241. *NNEDV Br.*, *supra* note 13, at 16.

victims of domestic violence.<sup>242</sup> True threats inflict this serious harm but have “little if any social value.”<sup>243</sup>

Because they cause immediate and direct harm, threats are more like the fighting words in *Chaplinsky* than political hyperbole in *Watts*, even when they contain some semblance of political content.<sup>244</sup> Threats and fighting words both “by their very utterance inflict injury”<sup>245</sup> because they “creat[e] in their recipients a sense of fear and disturb[] their sense of security.”<sup>246</sup> Some protected speech like political hyperbole can use rhetorical devices to achieve the legitimate goal of criticizing the government or another institution.<sup>247</sup> True threats do not have that content, unlike other acts like, burning a cross, which may have both protected political content and unprotected threatening content.<sup>248</sup>

### B. The First Amendment

Art mixed with a threat is still a threat. Words are not always protected merely because they are mixed with protected action;<sup>249</sup> thus, the recklessness standard does not necessarily violate the First Amendment merely because some threats also may be art. The First Amendment is designed to promote discourse in the public sphere.<sup>250</sup> In particular, safeguarding political speech is “central to the meaning and purpose of the First Amendment.”<sup>251</sup>

For example, the fighting words in *Chaplinsky* were exclaimed as the defendant was exercising his religion as a Jehovah’s Witness by distributing pamphlets.<sup>252</sup> Practicing religion is protected by the First Amendment, but the protection does not “cloak [the speaker] with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute.”<sup>253</sup> Similarly, threats cloaked in art may be analyzed as

242. DVLE Br., *supra* note 21, at 24 (citing Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, NAT’L INST. HEALTH, 2008, at 2).

243. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., dissenting in part).

244. *See supra* Part I.C.1–2.

245. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

246. NNEDV Br., *supra* note 13, at 17 (citing *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991)) (“The threat alone is disruptive of the recipient’s sense of personal safety and well-being and is the gravamen of the offense.”).

247. *See Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (noting that the alleged threat was phrased in the conditional, it was in the context of a political rally, and the audience laughed after Watts said it); *supra* Part I.C.2.

248. *See Virginia v. Black*, 538 U.S. 343, 361–65 (2003); *infra* Part III.C. *But see Black*, 538 U.S. at 388 (Thomas, J., dissenting) (arguing cross burning is always in itself threatening because it is inseparable from its history of preceding violence).

249. *See, e.g., United States v. O’Brien*, 391 U.S. 367, 384 (1968); *Chaplinsky*, 315 U.S. at 569 (holding that fighting words accusing the government of being “Fascists or agents of Fascists” were not protected by the First Amendment); *supra* Part I.C.3. *But see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56–57 (1988) (holding that an advertisement with potentially libelous content was protected by the First Amendment because it was a parody).

250. *See supra* Part I.C.; *see also supra* note 126.

251. *Citizens United v. FEC*, 558 U.S. 310, 329 (2010).

252. *Chaplinsky*, 315 U.S. at 570.

253. *Id.* at 571.

threats, and it is well established that true threats do not receive First Amendment protection.<sup>254</sup> As Justice Alito succinctly put it, “A fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech.”<sup>255</sup>

Rap lyrics and music as a genre may employ more violent language as an artistic device than other forms of expression.<sup>256</sup> In *Elonis*, one amicus argued that rap music is not always meant to be taken literally and is often a means of political expression.<sup>257</sup> Such lyrics, despite their violent tone, still can have First Amendment value; rap music “often serves as an explicit, even confrontational, vehicle for political commentary and resistance.”<sup>258</sup> Even Anthony Elonis’s lyrics had political content, as he challenged the legitimacy of the PFA and of FBI officers investigating his home.<sup>259</sup>

But political content does not entitle all violent lyrics to First Amendment artistic protection; rather, it means that in determining whether such lyrics constitute a true threat, the court may consider the political hyperbole idea of *Watts* more than the fighting words idea of *Chaplinsky*. If the words are like the statement in *Watts* and make a political point without causing the kind of harm that a true threat causes or otherwise meet the definition of a true threat, then they are not true threats and are entitled to First Amendment protection. Therefore, the First Amendment does not preclude adopting recklessness as the minimum mens rea for conviction under § 875(c).

Further, as Justice Scalia argued in his dissenting opinion in *X-Citement Video*, proscribing harmful material that may be attached to material that “has artistic or other social value” does not violate the First Amendment.<sup>260</sup> In that case, Justice Scalia argued that the minimal or nonexistent First Amendment value attached to the pornography was clearly outweighed by the harm to children involved in creating the pornography.<sup>261</sup> Similarly, in cases of recklessly made threats, the First Amendment value is outweighed by the harmful effects of the threat itself to the victims.<sup>262</sup> As in *X-*

254. See *supra* Part I.C.

255. *Elonis v. United States*, 135 S. Ct. 2001, 2017 (2015).

256. Violent and misogynistic lyrics are far from unique to rap. Lyrics in many genres of music use lyrical hyperbole, and listeners and audience members do not take them literally. See, e.g., THE BEATLES, *Run for Your Life*, on RUBBER SOUL (Apple Records 1965) (“I’d rather see you dead, little girl than to be with another . . . You better run for your life if you can, little girl/Hide your head in the sand little girl/Catch you with another man, that’s the end ah little girl.”); FOSTER THE PEOPLE, *Pumped Up Kicks*, on FOSTER THE PEOPLE (Columbia 2011) (“All the other kids with the pumped up kicks/You better . . . outrun my gun/ . . . You better run . . . faster than my bullet.”); ODESZA, *It’s Only (feat. Zyra)*, on IN RETURN (Foreign Family Collective 2014) (“Don’t struggle too much now/While I kill you in your sleep.”); FLORENCE AND THE MACHINE, *Kiss with a Fist*, on LUNGS (Universal Island 2008).

257. Amicus Curiae Brief of the Marion B. Brechner First Amendment Project and Rap Music Scholars in Support of Petitioner at 6, *Elonis*, 135 S. Ct. 2001 (No. 13-983).

258. *Id.* at 11.

259. See *supra* Part I.A; see also *supra* note 42 and accompanying text.

260. *X-Citement Video v. United States*, 513 U.S. 64, 84 (1994) (Scalia, J., dissenting).

261. *Id.* at 85.

262. See *supra* Parts I.B.1, III.A.

*Citement Video*, in cases of threats, children can be the victims of the crime, and failing to convict speakers who make threats recklessly may leave them underprotected.<sup>263</sup>

Lastly, the context of the threat—the facts of which determine whether the threat was made recklessly or with another level of mens rea—matters to the First Amendment analysis. As Justice Alito argued in his partial dissent, if Anthony’s Facebook threats were made in a context where the audience clearly would understand that the lyrics were *not* meant to be taken literally, they would not constitute reckless threats, or, by some definitions, even threats at all.<sup>264</sup> In his dissent in *Black*, Justice Thomas argued that the violent history of cross burning cannot be separated from the act of burning a cross itself, and thus the First Amendment does not preclude imputing intent on to the act of burning a cross.<sup>265</sup> Though the majority did not address it, this principle is convincing and applicable to threats. Making statements recklessly in some contexts—notably, those marked by domestic violence or abuse—causes just the same harm as an intentionally made threat and understandably instills in its victims a well-grounded fear of physical violence.<sup>266</sup>

Thus, a speaker is sufficiently protected by the First Amendment even if a court interprets § 875(c) as allowing conviction of a speaker who made a threat recklessly.

### C. *The Impact on Domestic Violence Victims*

This Note has argued that courts could interpret § 875(c) to include recklessness on statutory interpretation grounds and that doing so would not violate the First Amendment. But should courts adopt this interpretation? The following section argues that in defining the bounds of the crime, the courts should protect the victims, particularly the victims of domestic violence. As courts establish precedent, many applying the subjective threat analysis for the first time, they will balance values and consider policy as they did in previous cases in addition to using tools of statutory construction and examining the First Amendment.<sup>267</sup> In particular, courts should take into account two major policy considerations: (1) the impact of their interpretation of the statute on victims of domestic violence, and (2) the parties that will bear the costs of imperfect fact-finding under each interpretation of the crime, given that the dynamics of an abusive relationship may impede conviction of those who act in ways Congress intended to prohibit.

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263. See *DVLE Br.*, *supra* note 21, at 23 (“Often, perpetrators threaten not only the victim, but also the victim’s children, family, friends, and pets.”).

264. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., dissenting in part).

265. *Virginia v. Black*, 538 U.S. 343, 388–91 (2003) (Thomas, J., dissenting) (“In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.”).

266. *DVLE Br.*, *supra* note 21, at 24–25 (“[T]hreats often escalate and culminate in acts of physical violence. . . . Thus, victims’ fear in response to threats [is] well-founded.”).

267. See *supra* Part I.A.3.b.

### 1. The Victims of Threats

Because domestic violence is such a serious problem and interpretation of this statute will directly affect litigation in this area, courts should strongly and explicitly weigh the effect of the doctrine on abuse victims when defining the gray area around recklessness after *Elonis*.<sup>268</sup>

Threats are an integral part of the pattern of domestic abuse, scholars and researchers argue.<sup>269</sup> Threats that instill fear in a victim are intended to confer control over the victim on the abuser.<sup>270</sup> Threats are part of a pattern of abuse, often precede physical violence, and are disturbingly common.<sup>271</sup>

The Court's decision in *Elonis*, shifting from an objective to a subjective standard, already gave more power to abusers.<sup>272</sup> Technology and social media lower barriers to making a threat.<sup>273</sup> These facts render women and children less protected from perpetrators of domestic abuse. Raising the minimum mens rea also raises the cost of fact-finding to both the victim and the government—which further disadvantages victims.

The courts should be especially sensitive to the plight of victims in § 875(c) cases because the structure of litigation gives more power to the defendants. Some scholars argue that the legal system as an institution does not adequately protect victims of domestic abuse against this harm because the structure of litigation is not conducive to giving victims adequate representation.<sup>274</sup> Further, the nature of the abuser's control over the victim can create a significant barrier to the victim pressing charges.<sup>275</sup>

Finally, requiring a higher mens rea for conviction under § 875(c) will translate in some cases to a higher burden on victims in seeking a civil protection order.<sup>276</sup> Civil protection orders are issued in every state and often turn on the definition of federal crimes.<sup>277</sup> The orders are not punitive, but rather exist to protect potential victims against (further) crimes.<sup>278</sup> In eighteen states, victims seeking these orders must “*prove the*

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268. Burke, *supra* note 189, at 104 (“Outside the realm of criminal law, social scientists almost universally describe domestic violence as an ongoing pattern of conduct motivated by the batterer’s desire for power and control over the victim. In contrast, the criminal statutes used to prosecute domestic violence almost universally describe discrete acts.”).

269. NNEDV Br., *supra* note 13, at 7–15.

270. Burke, *supra* note 189, at 119–20 (“To obtain or maintain control over their intimate partners, batterers do not limit themselves to physical abuse. They also resort to emotional abuse that is not itself criminalized and is therefore not considered in a prosecution brought under a general criminal statute. The violence itself might be relatively minor, but it is used as part of an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman’s life, including sexuality; material necessities; relations with family, children, and friends; and work.” (citations omitted)).

271. See *supra* notes 13–21 and accompanying text.

272. Soraya Chemaly & Mary Anne Franks, *Supreme Court May Have Made Online Abuse Easier*, TIME (June 3, 2015), <http://time.com/3903908/supreme-court-elonis-free-speech> [<https://perma.cc/WY55-X8EH>].

273. See *id.*

274. DVLE Br., *supra* note 21, at 30–31.

275. *Id.*

276. *Id.*

277. See *id.* at 19.

278. See *id.* at 21.

*crime of threats* in order to receive a *civil* protection order based on threats.”<sup>279</sup> A higher mens rea standard would make receiving these pre-litigation, nonpunitive protection orders even more difficult for victims of domestic violence. Further, the timing of issuing these orders is important; they are “designed to offer flexible remedies, tailored to a victim’s particular circumstances.”<sup>280</sup> They can be issued when “harm seems imminent.”<sup>281</sup> Requiring the victim to prove a more difficult mens rea impedes this important function of civil protection orders. Thus, an interpretation of § 875(c) making proving the crime of threats more difficult may lead to suboptimal protection via civil protection orders.

## 2. Defining the Crime to Protect the Victim

Fact-finding is costly and imperfect. Congress, knowing that the costs of fact-finding can fall on the parties unequally and alone can resolve the case, can nonetheless write criminal statutes in ways that allow those committing the “evil to be cured” to be convicted.<sup>282</sup> As courts interpret the mental state required for conviction under § 875(c), they should be cognizant that a higher fact-finding burden could disproportionately fall on victims of threats both in lawsuits and in earlier nonpunitive proceedings, like civil protection orders. Courts should be cognizant of this implication as they select the minimum mens rea and set precedent in this area.

The Court has used policy to interpret statutory crimes throughout its cases concerning harmful speech, and it should do so again here. In *Sullivan*, the Court ratcheted up the burden on a public-figure plaintiff alleging defamation to protect discourse on issues of public concern.<sup>283</sup> Requiring juries to find that the defendant acted with actual malice—a subjective inquiry—by clear and convincing evidence plus directing courts of appeals to take on searching reviews of the facts did not change the substance of the law. Rather, it shifted procedure to protect public discourse. Similarly, to achieve the policy goal of encouraging investigative reporting on dangerous topics like organized crime in *Hepps*, the Court shifted the burden of proving the veracity of a defamatory statement from the defendant to the plaintiff. In cases of threats, it is appropriate for courts to do the same. Because a minimum mens rea of recklessness is consistent with the statute and the defendant’s First Amendment rights, selecting a lower mens rea requirement to make convicting perpetrators of domestic violence less difficult is an acceptable solution.

In § 875(c) cases, the court considers not only the procedural burdens as in *Sullivan* and *Hepps*, but also the substance of the law and the “evil to be cured” that Congress identified in the statute. If the “evil to be cured” that

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279. *Id.* at 27.

280. *Id.* at 20.

281. *Id.*

282. See WAYNE R. LAFAYE, CRIMINAL LAW § 2.2(e) (4th ed. 2003).

283. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 291–92 (1964).

§ 875(c) targets is captured using a recklessness standard, the Court should not require the higher mens rea standard. To hold otherwise would frustrate the point of criminalizing this behavior when applied to victims of domestic violence because the threats are uniquely harmful, the threats are often linked to physical violence, and litigation within those relationships has different dynamics and different impediments than typical litigation.<sup>284</sup> The backstories to these cases are fundamentally different from those in other litigation. Courts can and should recognize and address this.

This implication is particularly important in cases of domestic violence where showing that an abuser acted with knowledge or purpose may be difficult, expensive, and emotionally charged.<sup>285</sup> When the lowest burden the government must bear is recklessness, victims are better protected because it is easier to convict an abuser. When the standard is higher, speakers are more strongly protected. Litigants must expend more resources to meet that burden, and many are financially unable to do so.<sup>286</sup> Thus, the court's selection of a minimum mens rea is a policy choice as much as it is a question of statutory interpretation and a normative question of culpability.

It is true that the Court has repeatedly emphasized the need for “breathing room” for speech so as not to chill speech with high First Amendment value.<sup>287</sup> For this reason, a court may be inclined to interpret the statute to protect speakers and set knowledge as the minimum mens rea requirement.

But *Elonis* did set out adequate “breathing room” for speech by holding that the defendant must have a subjective mental state with respect to the threatening nature of the communication and that negligence is too low a standard. Statements that are objectively threats and threats made negligently cause the same harm as subjectively intended threats, but are protected under the decision.<sup>288</sup> Statements with First Amendment value, like political hyperbole, still receive First Amendment protection and protection in the very definition of “true threats.”

Further, as Justice Alito points out, the Court held in *Sullivan* that “the law provides adequate breathing space when it requires proof that false

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284. See *supra* Part I.B.3.

285. See generally Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567 (2003).

286. See *id.* at 593 (arguing that the cost of representation is prohibitive for many litigants in domestic violence cases that frequently demand substantial attorney time and do not involve money settlements).

287. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1220–21 (2011) (holding that some outrageous speech must be tolerated to provide adequate protection of freedom of speech in a political context); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“First Amendment freedoms need breathing space to survive.”). But see *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (noting that “our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged,” but still applying the heightened actual malice standard).

288. See *supra* Part III.B.

statements were made with reckless disregard of their falsity.”<sup>289</sup> Just as in that case where a standard of recklessness was held not to inappropriately chill speech, here, too, the recklessness standard provides sufficient protection to speech to satisfy the First Amendment.

Finally, recklessness is not a low standard for the prosecution to prove, and, if courts adopt it, defendants are still left with significant substantive and procedural protection. As the MPC defines it, recklessness requires conscious disregard of a substantial and unjustifiable risk that is a “gross deviation” from the conduct of a reasonable person.<sup>290</sup> Thus, by definition, a threat made recklessly is not an accident or slight overstatement.<sup>291</sup> To meet this standard, the speaker must have acted with significant wrongdoing. This definition provides a good balance between protecting the perpetrator from unduly harsh sanctions and protecting the victim from the legitimate harms this crime causes.

#### CONCLUSION

Threats jurisprudence, constitutional regulation of speech, and required mens rea standards have changed significantly in the history of the United States. *Elonis* recently further developed the doctrine, but left large holes that lower courts must now fill using statutory interpretation principles. In deciding these cases, courts have the authority to, and they should, consider policy issues. Particularly, courts should examine the practical effect their rulings will have on domestic abuse victims explicitly and should decide the issue in a way that protects both the victims and the constitutional rights of defendants: that one who recklessly makes a threat may be convicted under § 875(c).

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289. *Elonis v. United States*, 135 S. Ct. 2001, 2017 (2015) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (Alito, J., dissenting in part)).

290. See MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985).

291. *Id.*