UIC Law Review

Volume 50 | Issue 1 Article 6

Fall 2016

Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After Elonis, 50 J. Marshall L. Rev. 167 (2016)

Georgette Geha

THINK TWICE BEFORE POSTING ONLINE: CRIMINALIZING THREATS UNDER 18 U.S.C. § 875(C) AFTER *ELONIS*

GEORGETTE GEHA*

I. INTRODUCTION

"Slut, you think I won't choke no whore? 'Til the vocal chords don't work in her throat no more?"[1] These are lyrics to Eminem's[2] song "Kill Me."[3] In *Elonis v. United States*, the Supreme Court took up the issue of whether a person can be convicted for posting rap lyrics like these on social media.[4] That case involved Anthony Douglas Elonis, a man who wrote rap lyrics and posted them on his Facebook[5] page.[6] Elonis went by the pseudonym "Tone Dougie" on Facebook.[7] His rap lyrics were often violent, and many who viewed those

* J.D. Candidate, 2017, The John Marshall Law School; B.A. in Political Science and B.S. in Psychology, 2012, Loyola University Chicago. I would like to thank my family and friends for their support and encouragement throughout this process. I especially want to thank my mother, Virginia Geha, for being my number one supporter and pushing me to achieve my goals. I would also like to thank Professor Timothy O'Neill for suggesting this topic and helping me get started on my research.

1. EMINEM, *Kill Me*, *on* THE MARSHALL MATHERS LP (Interscope Records 2000).

2. Eminem is a best-selling American rapper who is considered one of the greatest of all time. He has produced seven rap CDs and continues to be popular after many years in the music industry. *Eminem*, WIKIPEDIA, https://en.wikipedia.org/wiki/Eminem (last visited Mar. 29, 2017).

3. Eminem, *supra* note 1.

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

5. Facebook is a social networking website. Users can create a personal Facebook page or a page for their brand or corporation. It is a place to connect with others and share stories. *About Facebook*, FACEBOOK, www.facebook.com/help/174987089221178 (last visited Mar. 18, 2016).

6. *Elonis*, 135 S. Ct. at 2004-05.

7. *Id.* at 2005.

lyrics perceived them to be threatening.[8] A grand jury indicted Elonis for threatening his wife, coworkers, police officers, a sheriff's department, a kindergarten class, and an FBI agent in violation of 18 U.S.C. § 875(c) ("875(c)").[9] Elonis challenged the conviction and argued that his posts were protected under the First Amendment right to free speech.[10]

One of Elonis's Facebook posts included a photo of him holding a fake knife to his coworker's neck at a work-related Halloween event with the caption "I wish."[11] His boss saw the picture and subsequently fired him.[12] After his termination, he posted a message on Facebook suggesting that he was a mad man and insinuated that the work facility was not safe from him.[13] Elonis also made several remarks about his wife, whom he was divorcing.[14] He posted a message stating that it is illegal to say he wants to kill his wife but not illegal to talk about that fact.[15] His wife felt threatened by the post, and the court granted a restraining order against him.[16] Upon learning about the order, Elonis posted a Facebook status update[17] stating that the order was not "thick enough to stop a bullet."[18] He also insinuated that he had "enough explosives to take care of the State Police and Sheriff's Department."[19] In another status update, Elonis posted a comment about wanting to shoot up a kindergarten class.[20] The FBI began monitoring his Facebook page after learning about his

---

8. *Id*.

9. United States v. Elonis, No. 11-13, 2011 U.S. Dist. LEXIS 121401, at *2 (E.D. Pa. Oct. 20, 2011); Interstate Communications, 18 U.S.C. § 875(c) (2012). The statute provides:

> (c) 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.

Id.

10. *Elonis*, 2011 U.S. Dist. LEXIS 121401, at *3.

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

12. *Id*.

13. *Id*. In that post, Elonis said, "Y'all think it's too dark and foggy to secure your facility from a man as mad as me?" *Id.*

14. *Id*. at 2005-06.

15. *Id*. In this message, Elonis said, "Did you know that it's illegal for me to say I want to kill my wife?" *Id.* He also said "it was okay for me to say it right then because I was just telling you that it's illegal for me to say [that] . . . But not illegal to say with a mortar launcher." *Id.* In that post, he suggested that someone should kill his wife and went on to describe her house in detail. *Id.* at 2006. He even included an illustrated diagram of the house. *Id*. Elonis got the idea for this post from a comedian's skit. *Id*. He posted the link to that skit and said, "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?" *Id*. Elonis basically took that skit word for word swapping out "the President" for "my wife." *Id*; *see* Whitest Kids U' Know, *It's Illegal to Say . . .*, www.youtube.com/watch?v=QEQOvy GbBtY (explaining how it is illegal to talk about killing the president, but not illegal to talk about the illegality of it.).

16. United States v. Elonis, 730 F.3d 321, 325 (3d Cir. 2013). Elonis's wife testified that she was scared for her own life and the lives of her children and family. *Id*. She also said she felt "like [she] was being stalked." *Id.*

17. A status update is a feature on Facebook that allows users to post messages and share content on their profiles. *What is a Facebook Status?*, TECHOPEDIA www.techopedia .com/definition/15442/facebook-status (last visited Dec. 18, 2015).

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

19. *Id*.

20. *Id*.

troubling posts.[21] Several FBI agents visited his house, and afterward, he made a post about one of them.[22] A grand jury indicted him for transmitting threats in violation of 875(c).[23] Elonis challenged the jury instruction, which stated that he should be convicted if a reasonable person would perceive his posts as threats.[24] He claimed that writing the lyrics was therapeutic, and he did not do it with the intent to threaten.[25] He challenged the jury instruction both at the district court level and at the court of appeals.[26] Both courts disagreed with his contention that a jury must prove he intended his posts as threats.[27]

The Supreme Court granted certiorari[28] and reversed Elonis's conviction.[29] It stated that while the statute does not specify a mental state or *mens rea*,[30] a guilty mind is still a requirement for a criminal conviction.[31] However, the Court did not specify the *mens rea* that would suffice; it found negligence insufficient; nevertheless, the Court refused to decide whether recklessness would be adequate.[32] The Court then remanded the case to the trial court to address whether Elonis had the requisite mental state to be convicted under the statute.[33] In his partial dissent, Justice Samuel Alito agreed with the reversal of Elonis's conviction; however, he recommended the Court resolve the recklessness issue to offer clarity to the lower courts.[34]

The government has an interest in ensuring that "[i]nternet communications and all other means of communication via the mail or in interstate commerce are free of threatening messages."[35] However, *Elonis* created some challenges for lower courts when determining the proper *mens*

---

21. *Id*.

22. *Id*. at 2006-07. In that post, he said "[t]ook all the strength I had not to turn the b**** ghost, [p]ull my knife, flick my wrist, and slit her throat, [l]eave her bleedin' from her jugular in the arms of her partner." *Id.* He also suggested that when the agent visited him, he was wearing a bomb. *Id.*

23. *Elonis*, 2011 U.S. Dist. LEXIS 121401, at *2.

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

25. *Id*.

26. *Id*. Elonis wanted the jury instruction to say, "the government must prove that he intended to communicate a true threat." *Id*.

27. *Id*.

28. Certiorari literally means "to be more fully informed." BRYAN A. GARNER, BLACK'S LAW DICTIONARY: POCKET EDITION 104 (4th ed. 2011). Certiorari is a writ by an appellate court asking a lower court to deliver the case record for the appellate court to review. *Id.*

29. *Elonis*, 135 S. Ct. at 2008.

30. "Mens rea" refers to a Latin phrase meaning guilty mind. *Mens Rea*, LEGAL INFORMATION INSTITUTE, www.law.cornell.edu/wex/mens_rea.

31. *Elonis*, 135 S. Ct. at 2009.

32. *Id*. at 2013. The Court said that it was capable of deciding whether recklessness is a proper *mens rea* for communicating online threats; however, it declined to make a judgment because neither party briefed or argued the issue. *Id.* "We may be 'capable of deciding the recklessness issue,' but following our usual practice of awaiting a decision below and hearing from the parties would help ensure that we decide it correctly." *Id*.

33. *Id*.

34. *Id*. at 2013-14 (Alito, J. concurring in part, dissenting in part).

35. Zane D. Memeger, *Confronting First Amendement Challenges in Internet Stalking and Threat Cases*, UNITED STATES DEPARTMENT OF JUSTICE: OFFICES OF THE UNITED STATES ATTORNEYS (July 20, 2015), www.justice.gov/usao/priority- areas/cyber-crime/internet-stalking.

rea to criminalize a Facebook threat under 875(c).[36] The Supreme Court left the question of whether recklessness is enough to convict under the statute unresolved in its *Elonis* opinion.[37]

This comment analyzes 875(c) and the absence of a required mental state. Part II of this comment explores the First Amendment's exception to true threats and how it impacts 875(c). Part II also explores the *mens rea* requirement in criminal cases and how lower courts have decided similar cases. Part III analyzes the different arguments as to what the required mental state should be. Part IV proposes why 875(c) should require specific intent for a conviction and underscores the need for a national campaign to educate internet users about the consequences of what they post online. Finally, Part V concludes and reiterates the need for a heightened mens rea and why more should be done to educate online users about the dangers of posting online.

II. BACKGROUND

A. The First Amendment's Exception on True Threats

In *Elonis*, Anthony Elonis challenged his 875(c) conviction stating that his posts were protected by the First Amendment right to free speech.[38] The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[39] The government cannot prohibit individuals from speaking, even when they express unpopular or controversial opinions.[40] The Supreme Court has stressed that the First Amendment right to free speech exists to allow for the "free trade in ideas," even if most people disagree with those ideas or opinions.[41] However, not all speech is protected equally; speech intended to incite lawless action[42] and fighting words[43] may be punishable.[44] This type of speech is considered to be a "limited class[ ] of speech" because it lacks value and fails to contribute to the "exposition of ideas."[45]

---

36. *Elonis*, 135 S. Ct. at 2014 (Alito, J. concurring in part, dissenting in part).

37. *Elonis*, 135 S. Ct. at 2013.

38. *Elonis*, 2011 U.S. Dist. LEXIS 121401, at *3.

39. U.S. CONST. amend. I.

40. Texas v. Johnson, 491 U.S. 397, 419 (1989) (holding that a ban on flag burning is an impermissible prohibition on free speech).

41. Virginia v. Black, 538 U.S. 343, 358 (2003) (finding that punishment for cross burning with intent to intimidate was not in violation of the First Amendment); *see also* Watts v. United States, 394 U.S. 705 (1969) (holding that political hyperbole is not a true threat).

42. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (finding that the government can punish a speaker for incitement if it results in "imminent lawless action").

43. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining fighting words as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

44. *Black*, 538 U.S. at 358.

45. *Chaplinsky*, 315 U.S. at 571-72.

The government may also punish "true threats."[46] The Supreme Court defined "true threats" as statements a speaker makes which express "intent to commit an act of unlawful violence to a particular individual or group of individuals."[47] As long as the speaker intends to make a threat, he or she can be punished for making a true threat.[48] The reason behind the true threat prohibition is to protect people from "the fear of violence," the disruption that fear creates, and the possible fulfillment of that threat.[49] Speech may be punishable when it crosses the line and becomes threatening.[50]

Elonis questioned whether the First Amendment protected violent "rap lyrics" on Facebook or whether the true threats doctrine prohibited them.[51] However, that question remains unanswered.[52] The Supreme Court declined to address that issue in its opinion;[53] instead, it opted to evaluate 875(c) and whether Elonis had the proper mental state to be convicted under the statute.[54] In doing so, the Court recognized that in order to convict under the statute, a person must have a "guilty mind" or a subjective intent to threaten.[55]

---

46. *Black*, 538 U.S. at 359.

47. *Id*.

48. *Id*. at 359-60.

49. *Id*. at 360.

50. *Id*.

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

52. The Supreme Court had the opportunity to address this issue in *Elonis*, but it declined to do so. *Elonis*, 135 S. Ct. at 2001. Anthony Elonis was a fan of Eminem. *Id.* at 2007. Elonis testified that his lyrics were an emulation of Eminem's lyrics, in which he fantasized about killing his ex-wife. *Id.* In Eminem's song "Kim," he raps about his wife cheating on him. EMINEM, *Kim*, *on* THE MARSHALL MATHERS LP (Interscope Records 2000). The lyrics portray a fictional argument he is having with her and at the end of the song, he chokes her to death. *Id.* Like several other rap songs, Eminem's songs often make references to violence. Brief for the Marion B. Brechner First Amendment Project and Rap Music Scholars (Professors Erik Nielson and Charis E. Kubrin) as Amici Curiae Supporting Petitioner, Elonis v. United States, 135 S. Ct. at 2001 (2015) (No. 13-983), www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13983_pet_amcu_mbbfap.authcheckdam.pdf. (hereinafter "Brechner Amicus Brief").

While Eminem's lyrics may seem threatening, they are not to be taken literally, as he cautions in his song "Sing for the Moment." EMINEM, *Sing for the Moment*, *on* THE EMINEM SHOW (Aftermath 2002). In that song, he sings, "[i]t's all political, if my music is literal, and I'm a criminal, how the f*** could I raise a little girl, I couldn't, I wouldn't be fit to . . . ." *Id.*

The Marion B. Brechner First Amendment Project and Rap Music Scholars wrote an amicus brief in support of Anthony Elonis. In that brief, they discuss how rap music often includes wordplay in which insults may be compliments and threats can be jokes. Brechner Amicus Brief at 3. What a rapper means and what he intends may be completely different. *Id.* That is because rap music cherishes ambiguity. *Id.* Like other forms of poetry, rap music often contains symbolism and metaphors. *Id.* Since rap music is often ambiguous, it is difficult to interpret the meaning of the lyrics. *Id.*; *see* Cohen v. Cal., 403 U.S. 15 (1971) ("one man's vulgarity is another's lyric").

53. *Elonis*, 135 S. Ct. at 2001. Justice Thomas briefly discussed the issue in his dissent. *Id*. at 2019 (Thomas, J. dissenting).

54. *Id*. at 2009.

55. *Id*. at 2003.

B. Objective versus Subjective Intent

Prior to *Elonis*, there was a circuit split concerning the true threats doctrine's requirement on intent.[56] Subjective intent means the defendant specifically intends to threaten.[57] Specific intent requires that the defendant knows the result of his actions and desires that result.[58] On the other hand, objective intent looks to whether a reasonable person would perceive the defendant's statement as a threat.[59] Nine circuit courts have found that an objective standard is enough to convict,[60] while only two circuits have held that a defendant must be found to have a subjective intent to threaten.[61]

In reaching its conclusion, the First Circuit adopted the *Fulmer* test.[62] It applied the standard of whether the defendant could reasonably foresee that others would perceive his statement as a threat.[63] The First Circuit explained that the objective standard protects a speaker from being punished for making innocent comments a sensitive listener perceives as a threat.[64] Additionally, it protects the listener from statements "reasonably interpreted as threats" even when the speaker has no subjective intent.[65]

---

56. *Id*. at 2018. (Thomas, J. dissenting).

57. United States v. Cassel, 408 F.3d 622, 634 (9th Cir. 2005) (vacating the conviction of a man who threatened potential buyers of his former girlfriend's property).

58. United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995) (upholding defendant's guilty plea for gambling because he had the requisite specific intent).

59. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004) (finding that expulsion of a student was unreasonable because his brother accidentally brought his violent drawing to school).

60. *See* United States v. Nishnianidze, 342 F.3d 6 (lst Cir. 2003) (maintaining the conviction of a man who threatened a couple for whom he facilitated an adoption); *see* United States v. Sovie, 122 F.3d 122 (2d Cir. 1997) (upholding the conviction of a man who made threatening calls to his former girlfriend and her son); *see* United States v. Elonis, 730 F.3d 321 (4th Cir. 2013), cert granted (maintaining Elonis's conviction under an objective intent standard); *see* United States v. White, 670 F.3d 498 (4th Cir. 2012) (affirming conviction of a man who threatened and intimidated several people); *see* United States v. Jeffries, 692 F.3d 473, 479-480 (6th Cir. 2012), cert denied, 134 S. Ct. 59 (2013) (sustaining the conviction of a man who posted a YouTube video in which he threatening to kill the judge assigned to his child custody case); *see* United States v. Stewart, 411 F.3d 825, 828 (7th Cir. 2005) (upholding defendants conviction for threatening to blow up the Union office that represented him in several phone calls); *see* United States v. Mabie, 663 F.3d 322, 330-32 (8th Cir. 2011), cert. denied, 133 S. Ct. 107 (2012) (affirming conviction of defendant who mailed threatening letters to several different people under an objective standard); *see* United States v. Martinez, 736 F.3d 981, 988 (11th Cir. 2013) (finding the conviction of a man who sent an anonymous email threatening to shoot up a school to stand).

61. *See Cassel*, 408 F.3d at 634; *see also* Heineman, 767 F.3d 970 (10th Cir. 2014) (reversing the conviction of defendant and remanding the case to the jury to find whether the defendant had subjective intent to threaten in his email).

62. United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997). The Fulmer test provides that "whether he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made." *Id*.

63. *Whiffen*, 121 F.3d at 21.

64. *Id*.

65. *Id*.

The Sixth Circuit stressed the defendant's intent does not matter; instead, what matters is how a reasonable observer would interpret the statements.[66] Similarly, the Seventh Circuit has determined that guilt is dependent solely on whether a person viewing the statements reasonably perceives them as threats.[67] In *Elonis*, the Third Circuit stressed that requiring subjective intent fails to protect individuals who see violent posts from fear.[68] According to the Third Circuit, punishing those who post threats online is acceptable because it protects those who would fear those posts.[69] Additionally, because these threats "contribute nothing to public discourse," they do not receive First Amendment protection; and any objective showing of intent may be sufficient to convict a speaker.[70] While these circuit courts have nuances in their standards, all of the tests highlight the importance of objective intent.[71]

The Ninth[72] and Tenth[73] Circuits were the only circuit courts to hold the minority view that subjective intent is required to convict someone for making threats.[74] The Ninth Circuit construed the true threats doctrine to require an intent to threaten.[75] It reasoned that intent separates "protected expression from unprotected criminal behavior."[76] Similarly, the Tenth Circuit required more than simply communicating a threat.[77] It required that the speaker intend for the listener to believe he or she desires to carry out the threat.[78] The Court relied on the Supreme Court's decision in *Virginia v. Black*, and stressed, "[w]hen the Court says that the speaker must mean to communicate a serious expression of an intent, it is requiring more than a purpose to communicate just the threatening words. It is requiring that the speaker want the recipient to believe that the speaker intends to act violently."[79] The Supreme Court resolved the circuit split in the context of 875(c) and held that courts must consider the defendant's mental state when determining guilt under the statute.[80]

---

66. *Jeffries*, 692 F.3d at 478.

67. *Stewart*, 411 F.3d at 828.

68. *Elonis*, 730 F.3d 321 at 330.

69. *Id*.

70. *Martinez*, 736 F.3d at 984.

71. *Nishnianidze*, 342 F.3d at 16; *Sovie*, 122 F.3d at 125; *Elonis*, 730 F.3d at 332; *White*, 670 F.3d at 507; *Jeffries*, 692 F.3d at 479-80; *Stewart*, 411 F.3d at 828; *Mabie*, 663 F.3d at 330-32; *Martinez*, 736 F.3d at 988.

72. *Cassel*, 408 F.3d at 622.

73. *Heineman*, 767 F.3d at 970.

74. The Supreme Courts of Massachusetts, Rhode Island, and Vermont have all found that a subjective standard is required in order to convict a person for making a threat. *See* O'Brien v. Borowski, 961 N.E.2d 547, 557 (Mass. 2012); State v. Grayhurst, 852 A.2d 491, 515 (R.I. 2004); State v. Miles, 15 A.3d 596, 599 (Vt. 2011).

75. *Cassel*, 408 F.3d at 634.

76. *Id.* at 632.

77. *Heineman*, 767 F.3d at 978.

78. *Id*.

79. *Id.* (citing *Black*, 538 U.S. at 360) (internal citations omitted).

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

C. Mens Rea Requirement When the Legislature is Silent

While the Supreme Court held that a defendant must have subjective intent to threaten under 875(c), it did not say which *mens rea* standard would be enough to convict.[81] The Supreme Court held that in addition to committing a crime, a culpable *mens rea* is required to convict a person under a criminal statute.[82] The Court stressed that Congress's silence does not eliminate the *mens rea* requirement.[83] Moreover, "Anglo-American criminal jurisprudence" requires this rule; it is not the exception.[84] In order to dispense with the *mens rea* requirement, Congress must indicate it expressly or impliedly intends to do so.[85] The idea that someone must intend to violate a law is "universal and persistent in mature systems of law."[86]

Criminal law recognizes four culpable mental states: purposefully (or intentionally), knowingly, recklessness, and negligence.[87] These mental states are hierarchical, with purposefully being the most culpable and negligence being the least culpable.[88] A person acts "purposefully" if he acts with a "conscious desire" to achieve a result.[89] Whereas a person acts "knowingly" if he is sure that a particular result will follow.[90] On the other hand, recklessness requires a conscious disregard of "a substantial and unjustifiable risk that the material element exists or will result from his conduct."[91] The disregard must be a gross deviation from a law-abiding person's standard of care.[92] Finally, a person is negligent when he "should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct."[93] The risk "must be of such a nature and degree that the actor's failure to perceive it" grossly deviates from a reasonable person's standard of care.[94]

The Supreme Court prefers *mens rea* requirements that give individuals "breathing room" to speak without fear of "accidentally incur[ring]

81. *Id*.

82. Staples v. United States, 511 U.S. 600, 606 (1994) (finding that in order to convict a defendant, the defendant must "know the facts that make his conduct fit the description of the offense"). *Staples* introduced strict liability as offenses with no *mens rea* requirement. *Id*. at 607. This decision gave Congress the authority to enact legislation with no *mens rea* requirement. *Id*. However, Congress must expressly or impliedly indicate that no *mens rea* is required. *Id*.

83. *Id*.

84. Dennis v. United States, 341 U.S. 494, 500 (1951).

85. *Staples*, 511 U.S. at 600.

86. Morissette v. United States, 342 U.S. 246, 250 (1952) (finding that the omission of intent from a crime statute should not be construed to require no intent).

87. United States v. Bailey, 444 U.S. 394, 404 (1980) (reversing the appellate court's jury instruction to exclude evidence of the jail conditions that pushed them to escape).

88. *Id*.

89. United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978) (reversing defendants antitrust violations because the judge's actions were reversible error).

90. *Id*.

91. MODEL PENAL CODE § 2.02 (Prop. Official Draft 1962).

92. *Id*.

93. *Id*.

94. *Id*.

liability."[95] In his concurring opinion in *Rogers v. United States*, Justice Marshall cautioned against adopting negligence as the proper *mens rea* in statutes regulating speech.[96] He noted that earlier Supreme Court decisions were reluctant to find negligence to be sufficient in criminal statutes where the legislature has been silent.[97] In *Elonis*, the Supreme Court cited this opinion and stressed that negligence was not enough to convict a person for violating 875(c).[98] The Court opined that the fact-finder must consider the defendant's *mens rea* when determining federal criminal liability.[99] However, it did not determine the required *mens rea* for violations of 875(c) and whether recklessness would suffice.[100]

D. Determining Intent on Social Media

Depending on the *mens rea* standard to apply, it is necessary for the fact-finder to consider the context of the post. This may be difficult to do.[101] A problem that arises with online postings is the potential for misinterpreting a speaker's intent.[102] For example, if a person posts something sarcastic, a reader may not be able to tell whether the speaker intended the post to be literal. Due to the lack of non-verbal communication, individuals easily misinterpret online speech.[103] The speaker knows what he intends to say, but his intent may not be obvious to the person on the other side of the conversation.[104] Sometimes online users use "emojis" or "emoticons" to convey their message.[105] An emoji is a picture that can be anything from a smiley face to a "whimsical ghost."[106] An emoticon by contrast is "a typographic display of a facial representation, used to convey emotion in a text only medium."[107] However, emojis and emoticons are often ambiguous themselves.[108] Internet

95. United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (holding that there is no general exception to free speech that allows punishment for any false statements).

96. Rogers v. United States, 422 U.S. 35, 47 (1975) (Marshall, J., concurring).

97. *Id*.

98. *Elonis*, 135 S. Ct. at 2001.

99. *Id*.

100. *Id*.

101. Justin Kruger et al., *Egocentrism Over E-Mail: Can We Communicate as Well as We Think?*, 89 J. PERSONALITY & SOC. PSYCHOL. 925, 926 (2005).

102. *Id*.

103. *Id*. It is difficult to tell whether a person is being "sarcastic or serious, disrespectful or deferential, and sanguine or somber." *Id.*

104. *Id*.

105. *Id.*

106. Alex Hern, *Don't know the difference between emoji and emoticons? Let me explain*, THE GUARDIAN (Feb. 6, 2015), www.theguardian.com/technology/2015/feb/06/difference-between-emoji-and-emoticons-explained.

107. *Id.*

108. Kruger, *supra* note 101; Eyder Peralta, *Lost In Translation: Study Finds Interpretation Of Emojis Can Vary Widely*, WBEZ (Apr. 12, 2016), www.wbez.org/shows/npr/lost-in-translation-study-finds-interpretation-of-emojis-can-vary-widely/d2dc5c01-7838-4e37-bddb9b09aed36b55. This article discussed a study which found that people have different views on the meaning of emojis. *Id.* For instance, some people may believe an emoji is positive and others may believe that same emoji is negative. *Id.*

usage has taken away context for both the speaker and the reader, making it difficult to understand a speaker's actual intent.[109]

The Internet also allows people to say things they would not ordinarily say in a face-to-face conversation.[110] It is easier to be anonymous online so individuals believe they can say anything without fear of consequences.[111] This too poses challenges for true threats as individuals may post comments that others perceive as threats. While the person posting the comment does not consider it to be a threat, others viewing the post may.

E. The Application of 875(c) Beyond Elonis

Another problem with online postings is that many online users do not think about the content that are posting online and how others may perceive it. This is particularly true among teenagers.[112] One study found that 8 out of 10 teenagers do not think twice before they post something online.[113] This fact was apparent when Justin Carter, a 19-year-old, was arrested and went to jail for posting a sarcastic comment on his Facebook page.[114] He was on Facebook arguing with others about a video game.[115] After someone called him insane, he responded by saying, "Oh yeah, I'm real messed up in the head. I'm going to go shoot up a school full of kids and eat their still-beating hearts."[116] He said that this post was sarcastic, however, the police arrested him and jailed him for five months.[117] Likewise, some teenagers also engage in cyberbullying.[118] This is particularly true among the Millennial generation,[119]

---

109. Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 SW. L. REV., 43, 73 (2012).

110. *Id.*

111. *Id.*; *see also* Youth IGF Project – Childnet International, *Global Perspectives on Online Anonymity: Age trends in the use of anonymity online and its impact on human behaviour and freedom of expression* (Oct. 2013), www.youthigfproject.com/uploads/8/5/3/6/8536818/global_perspectives_on_onli ne_anonymity.pdf (surveying children ages 13 and up about their experiences speaking anonymously online).

112. Multi-Country Ask.fm, *As Digital and Offline Lives Merge, 8 Out of 10 US Teens Post to Social Media Without a Second Thought*, PR NEWSWIRE (2015), www.prnewswire.com/news-releases/as-digital-and-offline-lives-merge-8-out-of-10-us-teens-post-to-social-media-without-a-second-thought-300134097.html.

113. *Id.*

114. Doug Gross, *Teen in Jail for Months Over 'Sarcastic' Facebook Threat*, CNN (July 3, 2013), www.cnn.com/2013/07/02/tech/social-media/facebook-threat-carter/.

115. *Id.*

116. *Id.*

117. Brandon Griggs, *Teen jailed for Facebook 'joke' is released*, CNN (July 13, 2013), www.cnn.com/2013/07/12/tech/social-media/facebook-jailed-teen/.

118. Ellen Kraft, *An exploratory study of the Cyberbullying and Cyberstalking experiences and factors related to victimization of students at a public liberal Arts College*, www.researchgate.net/profile/Ellen_Kraft/publication/220256917_An_Exploratory_Study_of_the_Cyberbullying_and_Cyberstalking_Experiences_and_Factors_Related_to_Victimization_of_Students_at_a_Public_Liberal_Arts_College/links/555b64f608aec5ac22323c51.pdf (Oct. 2010). Cyberbullying refers to when an individual uses the Internet to engage in "deliberate, repeated and hostile behavior" intended to harm others. *Id.* at 75.

119. Millenials are the generation of people who were born between 1980 and 2000. Sam Tanenhaus, *Generation Nice: The Millennials Are Generation Nice*, N.Y. TIMES (Aug. 15, 2014), www.nytimes.com/2016/12/07/fashion/coach-house-opens-on-fifth-avenu

who grew up using the Internet.[120] The Internet is a major part of their lives, and they use it on a regular basis.[121] This is problematic because many of these teenagers do not understand the consequences of what they post online and how their posts can affect others.[122]

As the Court in *Elonis* declined to rule on the required *mens rea* for posting an online threat in violation of 875(c), it left the door open to obscurity. Problems arise due to the difficulty in determining whether an online posting is actually a threat. Absent context and other non-verbal communication cues that individuals observe in a face-to-face conversation, misinterpretation is common. Additionally, because online users are unaware that their posts may be perceived in a threatening manner, it is important to establish clearer *mens rea* guidelines. The next section analyzes the different *mens rea* requirements and argues why recklessness should not be enough to convict.

III. ANALYSIS

The Supreme Court held that negligence is not enough to convict under 875(c), but it did not say whether recklessness, knowledge or intent should be the proper standard. In his partial dissent, Justice Alito disagreed with the majority's silence as to the proper *mens rea* to convict a person under 875(c).[123] He pointed out that the majority decision will not offer clarity for lower courts.[124] Lower courts and juries must decide cases and apply their own standard.[125] If recklessness is the proper standard, and a district court instructs the jury that a more culpable *mens rea* is required, those guilty of communicating threats could be let off the hook.[126] On the other hand, Justice Thomas suggested in his dissent that negligence or "general intent" was enough to convict.[127] What should the proper standard be: general intent, specific intent, or recklessness? This section will first evaluate the arguments for and against general intent. Second, it will analyze the recklessness standard. Third, it will explore the specific intent standard and explain why specific intent should be the appropriate standard. Finally, it will explore how to determine context in online postings.

---

e.html?ribbon-ad-idx=3&rref=fashion&module=ArrowsNav&contentCollection=Fashion%20%26%20Style&action=click&region=FixedRight&pgtype=article.

120. Kraft, *supra* note 118, at 74.

121. *Id.*

122. Multi-Country Ask.fm, *supra* note 112.

123. *Elonis*, 135 S. Ct. at 2013-14 (Alito, J. concurring in part and dissenting in part).

124. *Id.* at 2014.

125. *Id.* Justice Alito contends that the possibility for wrongful conviction may increase if a district court instructs the jury on a less culpable *mens rea* if the proper standard is a more culpable one. *Id.*

126. *Id.*

127. *Id.* at 2021.

A. General Intent

General intent protects a defendant from being convicted based on certain facts he does not perceive.[128] Accordingly, the defendant must know that he is committing the prohibited act.[129] Justice Thomas argued that Congress should have included a heightened *mens rea* if it intended one; in this instance, Congress remained silent on this issue.[130] He discounted the majority's opinion, and argued that allowing general intent would not punish innocent conduct.[131] Justice Thomas stressed that it is acceptable to punish an individual for posting a threat online.[132] He reasoned that an individual likely knows the true meaning of his post and how others can perceive it.[133]

Like Justice Thomas, the Anti-Defamation League, an organization dedicated to combatting anti-Semitism and other forms of discrimination,[134] argued in its amicus brief[135] that an objective standard allows Courts to evaluate the complete circumstances of the threat and consider all the evidence.[136] The Anti-Defamation League argued that a jury should determine whether the speech crosses the line from protected speech to true threat because of the reasonable fear and disruption that it creates.[137] The League argued that a stricter standard is improper because speakers will be under little pressure to behave within social norms.[138] Online threats can cause fear, waste a police department's time and resources and place people in danger.[139]

---

128. *Id*. (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 73 (1994); *Staples*, 511 U.S. at 614-15; *Morissette*, 342 U.S. at 270-71). Justice Thomas cites to *Morissette*, where the Supreme Court held that a person is guilty of theft when he knowingly takes the property of another. Likewise, in *X-Citement*, the Court found that knowledge was enough to convict a person of transporting, shipping, receiving, distributing, or reproducing child pornography. However, these cases are distinguishable from *Elonis*. Neither case involves online speech, nor do those cases discuss speech at all.

129. *Id*.

130. *Elonis*, 135 S. Ct. at 2021-22 (Thomas, J. dissenting).

131. *Id*.

132. *Id.*

133. *Id.*

134. Brief for the Anti-Defamation League as Amici Curiae Supporting Respondents, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_resp_amcu_adl.authcheckdam.pdf at *1-2.

135. An amicus brief or amicus curiae is a brief written by a non-party to the suit who has an interest in the outcome of the case. *Amicus Curiae*, LEGAL INFORMATION INST., www.law.cornell.edu/wex/amicus_curiae (last visited Nov. 15, 2015). Amicus curiae is a Latin phrase that literally translates to "friend of the court." *Id.*

136. Brief for the Anti-Defamation League, *supra* note 134, at *4. This brief argues why the objective standard should be applied. *Id*. The Anti-Defamation League indicates that the Internet has created a whole new arena for people to harass and intimidate others with relative ease. *Id*. at 8. It argues that "[a]n attacker can make contact with a specific target, virtually anywhere, without ever having to know his or her physical location." *Id*. The message is immediately received by the target. *Id*. The attacker does not even need to know the location of his target. *Id*.

137. *Id*.

138. *Id.*

139. *Id*. at 9-10.

Similarly, the National Network to End Domestic Violence expressed concern that domestic violence perpetrators are increasingly using social media as a tool.[140] According to the National Network to End Domestic Violence, social medial allows these perpetrators the opportunity to harass their victims after they have managed to escape the abuse.[141] The National Network to End Domestic Violence argued that an objective threat will cause fear in a victim of domestic abuse regardless of the perpetrator's intent.[142] It also stressed that the speaker's intent is not often different from the objective interpretation of the speech.[143]

On the other hand, the majority opinion argues that general intent should not be enough because the Court is concerned about punishing innocent conduct.[144] The Court stressed that when the legislature is silent as to the *mens rea*, it reads in a *mens rea* that separates criminal conduct from innocent conduct.[145] A general intent standard would be detrimental because an individual could potentially be punished for innocent conduct.[146] The Court emphasized that knowingly transmitting a communication is not criminal; however, the *mens rea* requirement must take the fact that the speaker communicated a threat into account.[147] In its amicus brief, the American Civil Liberties Union ("ACLU") points out that in some instances intent will be easy to determine.[148] However, in other cases, particularly in online contexts, it will be more difficult.[149] The ACLU emphasizes that an objective standard encroaches too far on First Amendment protected speech.[150] Moreover, people holding unpopular opinions will have an increased risk of criminal prosecution.[151] The objective standard allows individuals to be convicted for "negligently making a threatening statement," which may chill political speech and violate the First Amendment.[152]

In *United States v. Martinez*, the Eleventh Circuit overturned a conviction based on the *Elonis* decision.[153] *Martinez* involved a woman who

140. Brief for The National Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondent. Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_resp_amcu_nnedv-etal.authcheckdam.pdf, at *2. This brief discusses several victims of domestic violence who have been harassed even after leaving their partner. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Elonis*, 135 S. Ct. at 2010.

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

146. *Elonis*, 135 S. Ct. at 2010.

147. *Id.*

148. Brief for The American Civil Liberties Union as Amici Curiae Supporting Petitioner. Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_pet_amcu_aclu-etal.authcheckdam.pdf, at *18.

149. *Id.*

150. *Id.*

151. *Id.* at 19. (citing *White*, 670 F.3d 498, 525 (4th Cir. 2012)) (opinion of Floyd, J.) (explaining that a reasonable person is more likely to feel threatened by "violent and extreme rhetoric" even if the speaker did not intend to threaten).

152. *Id.*

153. United States v. Martinez, 800 F.3d 1293, 1295 (11th Cir. 2015).

sent a letter to a congressional candidate applauding that candidate's speech on gun rights.[154] In that letter, she suggested that she was planning to do "something big" at a government building.[155] She also said that she was going to teach government officials about the Second Amendment's meaning.[156] A jury convicted her under a general intent standard.[157] While it was unclear what she intended to do because her letter was ambiguous, under this standard, if a reasonable person perceived her comment to be a threat, a jury would convict her.[158] The jury found that the circumstances satisfied the general intent standard.[159] Martinez could have meant that she was going to visit a school or post office and discuss gun rights in an innocent way. This is precisely the kind of speech that the First Amendment protects. Under a general intent standard, a jury could convict her regardless of what she thought or intended. The law would be punishing an individual for exercising a right guaranteed by the First Amendment. For these reasons, a general intent standard is improper.

B. Recklessness

In his partial dissent, Justice Alito suggested that recklessness was enough because our criminal laws justify it.[160] He distinguishes negligence from recklessness, in that negligence requires that the defendant should have been "aware of a substantial and unjustifiable risk."[161] On the other hand, recklessness exists when an individual knows the risks of his conduct and disregards those risks.[162] The negligence standard requires that the defendant lack awareness of a risk.[163] Whereas, recklessness requires that the defendant know the risks of his conduct and ignores those risks.[164] Justice Alito stressed that in the mental state hierarchy, once an individual's actions are more than negligent, a more culpable *mens rea* is indefensible.[165] He argued a person recklessly conveying a threat is not careless; that individual is aware that others may view his comments as threats, but still posts them anyway.[166] However, this argument is unavailing because negligence and recklessness are not all that different. Punishing individuals for recklessly conveying an online threat could punish them for posting innocent comments the First Amendment

154. United States v. Martinez, No. 10-60332, 2011 U.S. Dist. LEXIS 29393 (S.D. Fla. 2011).
155. *Id.*
156. *Id.*
157. *Martinez*, 800 F.3d at 1295.
158. *Martinez*, 2011 U.S. Dist. LEXIS 29393.
159. *Id.*
160. *Elonis*, 135 S. Ct. at 2015 (Alito, J. concurring in part and dissenting in part).
161. *Id.* (citing ALI Model Penal Code § 2.02(2)(d), pg. 226 (1985)).
162. *Id.* (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)).
163. MODEL PENAL CODE § 2.02.
164. *Id.*
165. *Elonis*, 135 S. Ct. at 2015 (Alito, J. concurring in part and dissenting in part).
166. *Id.*

protects.[167] Moreover, the cases Justice Alito cites in support of his argument involves public figures unlike *Elonis*.[168]

The difference between negligence and recklessness is the awareness of a risk.[169] Negligence involves an absence of the awareness of a risk, whereas recklessness involves a "reckless disregard" of a risk.[170] In *Elonis*, the majority stressed that negligence was not enough because the defendant must have some awareness of wrongdoing, which he denied having.[171] The Court noted that Elonis's thoughts matter.[172]

Under recklessness, if Elonis were aware that others may find his statements to be threatening, and he still made the statements, then a jury would find he is criminally liable, regardless of whether he intended the posts as threats.[173] The recklessness standard, like the general intent standard, encompasses too broad a scope. It has the potential for crossing the line from permissibly punishing an actual threat to impermissibly punishing innocent speech. This standard could punish a person for posting a joke online because it is difficult to interpret the defendant's state of mind when reading the post. For these reasons, recklessness should not be enough to prosecute an online threat.

Although it is true that recklessness can punish guilty comments, it has the potential to cross the line and punish innocent comments. This is problematic because it encroaches on individuals' rights to free speech and runs afoul of the First Amendment. The law may punish individuals for communicating true threats; however, the standard for true threats requires specific intent.[174]

C. Specific Intent

Under a specific intent standard, a jury would have to find that an individual had a specific intent to threaten.[175] Elonis argued that he was merely

167. This would not allow "breathing room" for speech protected by the First Amendment. The Supreme Court has drawn a line between protected speech and unprotected speech. Leslie Kendrick, *Speech, Intent, And The Chilling Effect*, 54 WM. & MARY L. REV. 1633 (Apr. 2013) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)). That area of free speech is called the "breathing space." *Id.* The government may not "chill" or prohibit this speech. *Id.* Applying recklessness to online threats cases would potentially prohibit speech that falls within the "breathing space."

168. *Elonis*, 135 S. Ct. at 2015. Justice Alito cites *Sullivan*, 376 U.S. at 279-80 (1964) (finding that recklessness is sufficient to prove liability for libeling a public figure in a civil suit) and Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (finding that the recklessness is sufficient to criminally convict a person for defaming a public figure).

169. MODEL PENAL CODE § 2.02.

170. *Id.*

171. *Elonis*, 135 S. Ct. at 2011.

172. *Id.*

173. *Id.* at 2007.

174. *Id.* at 2007; *Black*, 538 U.S. at 359-60. Juries may convict individuals for communicating true threats if they can prove that the individuals intended to communicate threats. *Id.* The jury need not prove that the defendant intended to act on the threat. *Id.*

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

posting rap lyrics on his Facebook page.[176] The Supreme Court has continually held that the First Amendment protects musical expression as a form of artistic expression.[177] Not only is musical expression protected under the First Amendment, so too are comedy and satire, political hyperbole and "trash talk."[178]

Social media websites allow users to limit the control of who can see their online posts.[179] The intended audience may correctly interpret what the speaker is saying, in a different way than an objective reasonable person may interpret the statements.[180] A specific intent standard is more appropriate because a speaker may not intend for a particular recipient to see what he posts online.[181]

One of the main arguments against requiring specific intent is it is very difficult to prove a defendant's intent beyond a reasonable doubt.[182] However, while it may be difficult to prove a defendant's intent, that does not mean the law should punish a speaker for posting something he did not intend as a threat. In *Morissette v. United States*, the Supreme Court stressed that "wrongdoing must be conscious to be criminal."[183] If a speaker is posting rap lyrics others perceive as threats for instance, he may not be aware that he is doing something wrong.

An additional argument against specific intent is that specific intent would overprotect threats that have little to no value or that the law should hold a person who commits a wrongful act accountable regardless of whether or not he intended to do it.[184] However, these arguments fail to recognize the possibility that innocent conduct may be punished. The recklessness standard may be overbroad or vague and punish more speech than necessary or not give individuals the opportunity to understand what behavior the government may

176. *Id.*

177. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (holding that the city regulations on volume at a concert were constitutional as they were valid content-neutral regulations and they were narrowly tailored to the city's interest in "protecting its citizens from unwelcome noise").

178. Brief for the Thomas Jefferson Center for the Protection of Free Expression, The Pennsylvania Center for the First Amendment, Cartoonists Rights Network International, and Chris Dickey as Amici Curiae Supporting Petitioner, Elonis v. United States, 135 S. Ct. 2001, 7-15 (2015) (No. 13-983), www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_pet_amcu_tj-etal.authcheckdam.pdf, at 6 (citing Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602–03 (1998)).

179. *Id.* at 15.

180. *Id.*

181. *Id.*

182. Brief for the Criminal Justice Legal Foundation as Amici Curiae Supporting Respondent, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_resp_amcu_cjlf.authcheckdam.pdf, at *8 (citing Giles v. California, 554 U.S. 353, 387 (2008) (Breyer, J. dissenting)).

183. *Morissette*, 342 U.S. at 252.

184. Michael Pierce, *Prosecuting Online Threats After Elonis*, 110 NW. U. L. REV. ONLINE 51, 54 (2015).

punish.[185] For these reasons, as the Supreme Court noted in *Hoffman Estates v. Flipside*, a law that is overbroad or vague may run afoul of the First Amendment and accordingly is unconstitutional.[186] In this instance, under the recklessness standard, a reasonable person may not know whether the government may punish him under 875(c) for posting rap lyrics online. The government may punish him under 875(c) for posting rap lyrics, a form of musical expression, which the First Amendment protects.[187]

D. Determining Context

Social media has made it easier to communicate with others, and it has created an environment where people will say things they would not say in person.[188] Approximately 70 percent of Americans regularly communicate through social media.[189] The "barriers for entry" on the Internet are low, and it is equally easy for both speakers and listeners to have access to the Internet.[190] This means that any person can transmit a lot of information online.[191] People tend to reveal more about themselves online and act out more than they would in face-to-face conversations.[192] The Supreme Court has recognized that individuals have an increased availability to the Internet.[193] Moreover, individuals with internet access can communicate and retrieve information utilizing a wide array of methods.[194] Due to the increased amount of online users and people sharing more things online than before, there will likely be more instances of perceived threats online. This poses challenges because without context, it is difficult to understand what a speaker means when he or she posts online.

---

185. Hoffman Estates v. Flipside, 455 U.S. 489, 494, 498 (1982) (finding that an ordinance requiring businesses to obtain a license to sell products "designed or marketed for use with illegal cannabis or drugs" was not vague or overbroad). Under the vagueness doctrine, a government regulation that does not give reasonable people the opportunity to know what the regulation prohibits and what it allows is unconstitutional. *Id.* at 498. Similarly, the overbreadth doctrine prohibits government regulations that sweep up a substantial amount of constitutionally protected speech. *Id.* at 494.

186. *Id.* at 494.

187. *Ward*, 491 U.S. at 790.

188. Brief for the Student Press Law Center, The Electronic Frontier Foundation, and Pen American Center as Amici Curiae Supporting Petitioner, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), 7, www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_pet_amcu_splc-etal.authcheckdam.pdf.

189. *Id.* at 9.

190. *Id.* (citing Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1666-67 (1998)).

191. *Id.*

192. *Id.* (citing John Suler, *The Online Disinhibition Effect*, CYBERPSYCHOLOGY & BEHAVIOR 321, Vol. 7, No. 3 (2004) and Adam N. Joinson, *Disinhibition and the Internet*, PSYCHOLOGY & THE INTERNET 75, 79-81 (Jayne Gachenback ed., 2d ed. 2007)). The Online Disinhibition Effect is the name of a phenomenon where people say more online that they would in an ordinary conversation. *Id.* This phenomenon has become so prevalent, hence a term surfaced to describe it. *Id.*

193. Reno v. ACLU, 521 U.S. 850 (1997).

194. Student Press Law Center, *supra* note 188.

Misinterpreting online postings is a common occurrence.[195] As illustrated with Justin Carter, young people do not understand the consequences of their online posts.[196] For this reason, others may take their posts out of context.[197] Under the negligence standard and possibly even the recklessness standard, juries may convict people like Justin Carter for sarcastic comments like the ones he made.[198] That may be especially true among teenagers since 79 percent of teenagers in the United States post things online without thinking about them beforehand.[199] In light of these statistics, more people like Justin Carter who post jokes that are perceived as threats will be convicted.

IV. PROPOSAL

Due to these challenges, courts should apply a specific intent standard for prosecuting threats under 875(c).[200] Courts should adopt this standard to ensure that the law does not punish innocent conduct while still ensuring that the law convicts those who post actual threats. The Supreme Court left the door open for recklessness in *Elonis*, however this standard has the potential to punish innocent conduct, including speech the First Amendment protects.[201] In analyzing specific intent, general intent, and recklessness, courts should adopt a specific intent test for cases involving online threats. That test should require a specific intent to communicate a threat. In conjunction with this specific intent requirement, courts should analyze the defendant's mental state on a case-by-case basis. This would entail looking to the totality of the circumstances[202] and the context of that threatening post to determine whether a defendant intended to communicate a threat. This section will first discuss the proposed specific intent standard. Afterwards, it will discuss the totality of the circumstances for case-by-case analysis and the several factors courts should look to when assessing a speaker's intent. Finally, this section proposes a plan to educate online users about the dangers of posting threats online.

A. Requiring Specific Intent in Online Threat Cases

In his concurring opinion in *Rogers v. United States*, Justice Thurgood Marshall said juries should convict speakers who intend to express threats to

195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. Multi-Country Ask.fm, *supra* note 112.
200. While a specific intent standard may be difficult to prove, this standard is the one that provides individuals the most "breathing space" for speech, while still allowing juries to convict those who intend to transmit threats. Kendrick, *supra* note 167.
201. *Elonis*, 135 S. Ct. at 2013.
202. The totality of circumstances standard looks to all the relevant factors as a whole. Illinois v. Gates, 462 U.S. 213, 230 (1982) (holding that probable cause is determined by the totality of circumstances). While no one factor is determinative, the factors when looked at as a whole provide the basis for probable cause. *Id.*

harm or kill.[203] Similarly, in *Watts v. United States*, an 18-year-old while at a public rally said,

> They always holler at us to get an education. And now 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 they ever make me carry a rifle the first man I want to get in my sights is L. B. J.[204]

After expressing these comments about President Lyndon B. Johnson, the 18-year-old was convicted for violating a 1917 statute.[205] That statute required knowingly and willingly threatening the President of the United States.[206] The Court reversed his conviction finding that the willfulness standard was not satisfied as the defendant did not utter the words voluntarily with the intent to carry them out.[207] This standard should extend to online threats. An online speaker should only be punished if he posts a threat and intends to make a threat.

In the context of online speech, it is inequitable to punish people for posting things they did not mean to be threats. That is especially true because a reasonable person may think an online posting is a threat when the speaker was posting rap lyrics for instance. Since specific intent requires that a person desire to commit an unlawful act and achieve the result, the government will not prosecute innocent speech.[208] In *United States v. Cassel*, the Ninth Circuit held that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."[209] Similarly, in *United States v. Stewart*, the Ninth Circuit required specific intent.[210] Requiring specific intent makes it less likely that the government will prosecute comments not intended as threats. Courts should apply this standard to ensure that juries do not convict individuals who post innocent comments online.

B. Analyzing the Totality of the Circumstances

Since specific intent is such a demanding standard, courts should rely on the totality of the circumstances in assessing a speaker's intent. This standard is traditionally applied in Fourth Amendment cases and entails looking to all the surrounding factors.[211] No one factor is determinative; all factors must be looked at as a whole.[212] This will make it more likely that the government will convict those individuals who intend to threaten and allow innocent conduct to go unpunished. When looking at the totality of the circumstances, juries and courts should consider several factors. These factors include: (1) the context

203. Rogers v. United States, 422 U.S. 35, 43-48 (1975).
204. *Watts*, 394 U.S. at 706 (Marshall, J. concurring).
205. *Id.* at 705.
206. *Id.*
207. *Id.* at 707.
208. U.S. v. Blair, 54 F.3d 639 (10th Cir. 1995).
209. *Cassel*, 408 F.3d at 633.
210. United States v. Stewart, 420 F.3d 1007 (9th Cir. 2005).
211. *Gates*, 462 U.S. at 230.
212. *Id.*

of the threat; (2) whether the threat was directed at a person or group of people; (3) the social media history of the speaker; and (4) the overall specificity or vagueness of the threat.

As for the first factor, when looking to the context of the threat, the fact finder should determine whether the online posting was actually a threat. If it is determined that the threat is actually a rap lyric, hyperbole or a joke, the intent standard is not satisfied. Elonis said his posts were rap lyrics.[213] The First Amendment protects rap lyrics as they are a form of artistic expression.[214] Juries and judges should determine the context of the online postings so that people do not get punished for posting "rap lyrics" or other innocent postings, even when those postings are unpopular. They can look to the post itself and the circumstances surrounding the post, for instance whether the online user has posted rap lyrics before. To avoid prosecuting protected speech under 875(c), fact-finders should look to the context of the online posting as a whole. That would require a trier of fact to consider the post's actual meaning and determining whether that meaning could be interpreted in an innocent way.

The second factor involves determining whether the speaker directs the threat at a specific person or group of people. If a speaker directs a post to a person or a group of people, it is more likely a serious threat than a post that is not directed at anyone. Elonis mentioned his wife in his Facebook posts.[215] He did not "tag"[216] her in the posts, and he was not even "friends" with her on Facebook.[217] Rather, his wife saw the posts because other people warned her about them.[218] Considerations like these make it less probable that the speaker intends his or her posts as threats because a threat is more likely to be legitimate if it is directed at a person or a group. If Elonis directed the posts at his wife or "tagged" her in them, that would be a stronger case for intent. Similarly, the relationship between the speaker and the person "tagged" or mentioned in the threatening posting is important. For instance, if the speaker "tags" a celebrity, the threat is less likely to be credible than if the speaker threatens an ex-spouse.

---

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

214. *Ward*, 491 U.S. at 790.

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

216. Tagging a person on Facebook alerts that person that they were mentioned in a post. Facebook, *How Tagging Works*, www.facebook.com/about/tagging (last visited Nov. 14, 2015). Any Facebook user (depending on his or her security settings) may be tagged in a Facebook post. *Id*. There are several reasons to tag a person. *Id*. One reason is alerting a person that they were in a picture that you posted. *Id*. Another reason is to alert a person about a post you made about them. *Id*. A user can also tag a person in a post made by another person or page. *Id*. The person being tagged in a post has the option of removing a tag. *Id*.

217. *Elonis*, 135 S. Ct. at 2005. A person who is not friends with the speaker on Facebook will not be able to directly see the content that the speaker posts. Facebook, *Finding Friends and Users that You May Know*, www.facebook.com/help/433894009984645/ (last visited Dec. 28, 2015). That person may not be able to see the speaker's posts unless he or she looks up the speaker's page. *Id*. Depending on the speaker's privacy settings a person who is not friends with him or her may not be able to see the content that the speaker posts. *Id.*

218. *Elonis*, 135 S. Ct. at 2015.

The third factor involves looking at the speaker's social media history.[219] A trier of fact can look to the speaker's other online postings to determine intent. Analyzing social media will involve looking at the speaker's posts on all their social media accounts. More and more people are on social media,[220] making it a major forum for speech. Looking to the speaker's postings on all their social media accounts will help shine a light on the speaker's mindset. Some people use their social media accounts to share their emotions. Frequently, people share negative emotions and experiences.[221] A jury should take into consideration whether an individual is "venting" in an online posting. Some people may impulsively post something online that they may regret later. That is especially true among teenagers; they tend to post things online without fully thinking about the consequences.[222] YouGov conducted a study in which 79 percent of teenagers said they seldom regret what they post online.[223] These considerations should be taken into account.

The final factor is the overall specificity or vagueness of the threat. If a threat is specific, it is more likely that the speaker intended the threat. For example, if a threat gives details including time, place and manner in addition to the threat, it is more likely to be true than a threat that lacks those details. If a posting is vague or ambiguous, it is less likely that the speaker intends it as a threat. An online threat that provides details about committing an offense, including the location and time may be more serious than a threat that lacks any detail.

No single factor is determinative of a person's intent. Moreover, the inquiry on the speaker's intent should not be limited to these four factors.

---

219. Evidence of social media history may pose admissibility challenges. *How to get social media evidence admitted to court*, ABA (Nov. 2016), www.americanbar.org/publications/youraba/2016/november-2016/how-to-get-social-media-evidence-admitted-to-court.html. The evidence must be relevant and the value of the evidence must outweigh any prejudice to the defendant. *Id.* If there is a hearsay problem, the social media history will only be admitted if a hearsay exception exists. *Id.* Authentication is another problem. *Id.* The party seeking to admit evidence of social media history must show that the individual owns the account and posted the material on the account. *Id.*

220. Andrew Perrin, *Social Media Usage*: 2005-2015, PEW RES. CTR. (Oct. 8, 2015), www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/. Since 2005, there has been a 7 percent increase in adult internet usage. *Id*.

221. Harri Jalonen, *Social Media – An Arena for Venting Negative Emotions*, INTERNATIONAL CONFERENCE ON COMMUNICATION, MEDIA, TECHNOLOGY AND DESIGN, (Apr. 2014) at 224, www.cmdconf.net/2014/pdf/36.pdf. This article addresses how more and more people are using social media to convey negative emotions. People "vent" on social media for three primary reasons: (1) they vent to feel better about themselves; (2) they vent to help others; and (3) they vent to help consumer companies solve problems. *Id.* at 225.

222. Multi-Country Ask.fm, *supra* note 112.

223. *Id.* This study was conducted on behalf of Ask.fm. *Id.* Ask.fm is a social networking site in which users ask and answer questions. *Our Premise is Simple…*, ASKFM, http://about.ask.fm/about/ (last visited Mar. 19, 2016). The social media website has a safety center which explains online dangers that teenagers may run into when using ASK.fm. *ASKfm Teen Guide: Being Smart & Safe on ASKfm*, ASKFM, http://safety.ask.fm/safety-guidelines-for-teens/ (last visited Mar. 19, 2016). One of the guidelines is titled "Think before you post." *Id.* It warns teenagers that their posts are public and can be seen by anyone. *Id.*

Depending on the case, other factors may come into play to help determine the speaker's intent. Juries should use any and all evidence that will allow them to make inferences of intent where the facts permit. This standard should not interfere with law enforcement officers' ability to do their jobs. Law enforcement officials should investigate all credible threats and prosecute individuals who they find made an actual threat.

C. Educating Individuals About the Consequences of their Online Postings

Society should do more to educate individuals about the consequences of their online postings. One way to do this is for Congress to require social media websites to warn users to be mindful about what they post online. Most social media websites already have pages describing the importance of safety while using their websites,[224] but the message is not getting across. Many users, particularly children and teenagers do not understand the impact of their online postings.[225] Requiring social media websites to warn users about the consequences of their posts can protect people from making mistakes that open them up to criminal liability.[226] One way to do this would be to require users to watch a video informing them about the dangers that they may encounter while using the social media website. Another way to educate others about proper online postings would be to have periodic quizzes on social media websites to allow users to answer questions about safety issues. To ensure compliance with these safety measures, the website could prevent users from accessing their accounts until they have fully completed answering the quizzes and surveys.

Another way to combat online threats is for Congress to pass a law requiring schools to educate children and teenagers about the dangers of what they post online. An effective law would require schools to teach students about the dangers of using the Internet, ideally in their computer classes. Teachers should explain how to set privacy measures to ensure that the students' content is viewed by only the people they intend to view it; for

224. The social media website has a safety center which explains online dangers that teenagers may run into when using ASK.fm. *ASKfm Teen Guide: Being Smart & Safe on ASKfm*, ASKFM, http://safety.ask.fm/safety-guidelines-for-teens/ (last visited Mar. 19, 2016). One of the guidelines is titled "Think before you post." *Id.* It warns teenagers that their posts are public and can be seen by anyone. *Id.*; Facebook and Twitter have similar pages. *Playing it safe*, FACEBOOK, www.facebook.com/safety/groups/teens/ (last visited Apr. 1, 2016); *Tips for Teens*, TWITTER, https://about.twitter.com/safety/teens (last visited Apr. 1, 2016).

225. The National Center for Missing and Exploited Children reported that a study found one in seventeen internet users under 17 years of age was harassed or threatened online in 2000. Education World, *Teaching Kids and Parents About Internet Safety*, www.educationworld.com/a_tech/tech043.shtml (2000).

226. Most teenagers and children have used social media, in fact about 90 percent of them have been on social media. *Teaching Kids to be Smart About Social Media*, KIDS HEALTH, http://kidshealth.org/parent/positive/family/social-media-smarts.html# (Aug. 2014). Additionally, about 75 percent of teenagers maintain a social media profile. *Id.* Having this requirement could teach children to be mindful about cyberbullying as well.

example, teachers can show students how to make their social media profiles private so that only people they are connected with can see the content students post online. Teachers should also educate children on what they should not post online and potential consequences. For instance, students should not bully other students or say mean things to each other. Teachers can also explain to students that they should not threaten anyone online, even if the students mean it as a joke. An education program like this could potentially reduce the instance of online threats.

V. CONCLUSION

In concluding that negligence is not enough to prosecute someone for posting an online threat, the Supreme Court in the *Elonis* case held that something more was required.[227] The question remains open as to whether recklessness will suffice to convict a person for posting an online threat. While the Supreme Court has not decided the issue, there are several problems with recklessness that can result in convicting innocent conduct.

This comment has provided guidance in resolving the question regarding the *mens rea* required to prosecute under 875(c), which the Supreme Court left open in *Elonis v. United States*.[228] This comment proposes a two-part solution. First, there should be at minimum, a specific intent requirement when prosecuting online threats. Second, when analyzing whether an online posting meets that requirement, courts should look to the context of the posting to determine the speaker's intent. This analysis involves looking at the totality of the circumstances and the facts of the case to determine intent. Overall, social media complicates "true threats" even more and makes it difficult to determine whether a speaker intends to threaten. Due to these challenges, society should do more to educate people on the dangers of what they post on social media. Speakers should be wary of the consequences of their posts. The concern is that posting threats, whether they are intended or not, can create panic and fear in the people viewing them.[229] Since the Supreme Court declined to address the recklessness issue in the context of 875(c), individuals who post things online that reasonable people perceive to be threats can accidentally open themselves up to criminal liability. Educating social media users and requiring specific intent for 875(c) violations will work to lessen that possibility.

227. *Elonis*, 135 S. Ct. at 2013.

228. *Id.*

229. *Threat Assessment: School Threats, Social Media, Texting and Rumors*, NATIONAL SCHOOL SAFETY AND SECURITY SERVICES, www.schoolsecurity.org/trends/threat-assessment-threats-rumors-text-messages/ (last visited Apr. 1, 2016).