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NOTE

HOW *ELONIS* FAILED TO CLARIFY THE ANALYSIS OF “TRUE THREATS” IN SOCIAL MEDIA CASES AND THE SUBSEQUENT NEED FOR CONGRESSIONAL RESPONSE

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ABSTRACT

*Social media and other internet communications have altered the way people communicate with one another, including the way people threaten one another. In 2015, the United States Supreme Court decided *Elonis v. United States*, which imposed a heightened mental state requirement for federal prosecutions of threats issued in interstate commerce. Although the statute, 18 U.S.C. § 875(c), has no mental state requirement, the Supreme Court held that, consistent with the principles of criminal law, only those with guilty minds should be convicted and thus some showing of subjective intent is required. The opinion did not name the requisite mental state, but concluded that negligence was insufficient. In addition, the opinion did not discuss the First Amendment issue at all, making it entirely unclear whether the Court thinks a heightened mental state is required by the First Amendment’s narrow exception to free speech for “true threats.” Following the opinion, the lower courts are tasked with determining both what is the appropriate mental state and determining if this mental state sufficiently protects speech under the First Amendment.*

*The case law surrounding *Elonis* reveals a bigger problem in this area: the lack of an appropriate criminal statute punishing threatening communications in a world where internet communication is increasingly frequent. Communication through social media or other internet media is different from face-to-face communication because the anonymity allows for people to say things they might not be comfortable saying in person, and the unique attributes of social media platforms (e.g. “likes,” or “retweets”) allow for a different type of communication about one’s opinions and thoughts. This Note will argue that *Elonis* demonstrated the current level of confusion in this area of the law and*

*the appropriate next step is for Congress to pass legislation geared toward internet threats that is specifically tailored for social media and other internet communication and that identifies the mental state required for conviction. First, this Note explores the statute currently used to prosecute internet threats and the problems that *Elonis* created. Next, it addresses why the Court's failure to explain the First Amendment's relation to subjective intent and "true threats" further confuses an already muddled area of law. The Note then evaluates the possible mental state requirements and the academic and legal arguments regarding which is most appropriate for online threats. Finally, this Note calls for Congress to step into the online threat arena, and draft legislation that will more adequately address the unique characteristics of social media and other internet communications, and find the best way to aid law enforcement in internet threat prosecutions and protect citizens who are threatened in this new space.*

INTRODUCTION

Social media brings many benefits to the modern world and makes staying in touch with everyone around you easier than ever. Social media has also become the place where people air their grievances. These outbursts can take many forms: comments or statuses or tweets or messages. If someone threatens another person's wellbeing in person or through the mail, he or she can be prosecuted for making that threat. Likewise, when someone uses social media to communicate a threat against an individual or a group, a serious crime has been committed and law enforcement may step in to prosecute that offender as well.

Threats on social media can be prosecuted under federal law because of the interstate commerce authority granted to the federal government.¹ The statute that has been used to prosecute offenders is 18 U.S.C. § 875(c), which reads: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."² Notably missing from this statute is a mental state requirement.³ The failure to include a mental state requirement led to a circuit split over the intent required to convict under this statute.⁴

The Supreme Court acknowledged the circuit split and granted cert for *Elonis v. United States*.⁵ In *Elonis*, rather than stating what the required

1. *Elonis v. United States*, 135 S. Ct. 2001, 2002 (2015); *see also* U.S. CONST. art. I, § 8, cl. 3.

2. 18 U.S.C.A. § 875(c) (West 1994).

3. *Elonis*, 135 S. Ct. at 2003.

4. Jing Xun Quek, *Elonis v. United States: The Next Twelve Years*, 31 BERKELEY TECH. L.J. 1109, 1111 (2016).

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

mental state should be for this threat statute, the Court only held that negligence was not sufficient and remanded the case.⁶ The Supreme Court also did not discuss whether the First Amendment, which protects the freedom of speech, required a heightened mental state.⁷ The Supreme Court has determined that speech which qualifies as a “true threat” is not protected speech under the First Amendment,⁸ but the *Elonis* opinion did not explain how the imposition of different mental state requirements affects this narrow exception to First Amendment protection.⁹ Following this case, lower courts are still left to determine what the correct mental state is for threat prosecutions, and the jurisprudence on true threats and First Amendment protections remains muddled.¹⁰

The problem in this area of the law stems not only from an unhelpful Supreme Court decision, but also from the use of a statute designed to criminalize threats issued through letters in the mail and enacted long before social media’s rise to popularity. The provision currently used to prosecute internet threats does not adequately address the nuances of social media. Given social media’s popularity, the interstate nature of the internet, and the fact that social media is being used to convey threats¹¹ and aid terrorism,¹² the most desirable outcome would be for Congress to step in and more clearly articulate what behavior is punishable by federal law. Congress could create a new criminal provision that appropriately addresses the unique circumstances that social media entails, and include the required and appropriate mental state for conviction. In crafting new legislation, Congress must take into account that the “true threat” exception to free speech is narrow, and the new statute must require that actionable speech be communicated with a purposeful or knowing intent to threaten, so as to keep free speech protection as broad as possible while still protecting public safety.

This Note will explore *Elonis* and the turmoil that has arisen in its wake as to appropriate mental state for conviction and what the First Amendment’s freedom of speech requires, and argue that clarity from Congress is urgently needed. Part One will address social media, the statute currently

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

7. Quek, *supra* note 4, at 1111.

8. *Watts v. United States*, 394 U.S. 705, 708 (1969); For the definition of “true threat,” see *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”).

9. Quek, *supra* note 4, at 1111.

10. *Id.* at 1127.

11. Alison J. Best, *Elonis v. United States: The Need to Uphold Individual Rights to Free Speech While Protecting Victims of Online True Threats*, 75 MD. L. REV. 1127, 1127 (2016).

12. Jack Nicas, Sam Schechner, & Deepa Seetharaman, *Online Terrorist Propaganda Still a Challenge for Tech Companies*, WALL ST. J. (June 5, 2017), <https://www.wsj.com/articles/online-terrorist-propaganda-still-a-challenge-for-tech-companies-1496712112>.

used to prosecute online threats, and the details of the *Elonis* opinion. Part Two will address the history of true threat jurisprudence and First Amendment protections, and will discuss the potential mental state requirements and the arguments that have been used to support each one. Finally, Part Four will be a call for clarity from Congress to choose the appropriate mental state to protect the freedom of speech in internet threat prosecutions and craft a new statute to embrace the nuanced form of communication that is social media.

I. SOCIAL MEDIA, THE TANGENTIAL STATUE, AND *ELONIS*

A. *Background on Social Media and the Incompatibility of 18 U.S.C. § 875(c)*

Social media is a novel form of communication and expression. There are a variety of different forums, and the way a user may communicate varies between these forums. Understanding the nuances of the various social media websites will aid in understanding why prosecution under the current law is unsatisfactory.

The term “social media” covers a variety of online communication forums through which individuals form online communities to share thoughts, photos, and other internet content with others in their community.¹³ The first widespread social media forum was Friendster, launched in 2002, and many others followed from 2003 to 2012.¹⁴ Four of the popular social media networks used today (Facebook, Twitter, Instagram, and Tumblr) will be discussed briefly to indicate the nuances of this form of communication. Understanding the nuances of these forums would be relevant should Congress attempt to draft legislation that adequately addresses the unique methods of expression on social media sites.

Facebook, currently the most popular forum,¹⁵ allows users to set up a personal profile, viewable by others, where they can share posts, photos, and other internet content with others in their communities. Connected individuals are called “friends,” and privacy settings allow users to limit the viewability of their profiles to friends, friends of friends, or all Facebook users. Individuals can either post their own content, including status updates or uploaded photos and videos, to a general news feed, or share the content directly with another user by posting on that user’s profile or sending a direct, private message. A “status update” is where a user posts text or photos

13. MERRIAM-WEBSTER ONLINE DICTIONARY (2013), <http://www.merriamwebster.com/dictionary/social%20media>.

14. David A. Bell, *Social Media Accounts and Ownership Rights*, 33 CORP. COUNS. REV. 1, 2 (2014).

15. Amanda Lenhart, *Teens, Social Media & Technology Overview 2015 2* (PEW RESEARCH CENTER 2015).

to share with others in the user’s community. Users can also “like” (a small thumbs-up symbol) or comment on other’s shared content.

Twitter allows users to share information with others in a slightly different manner than Facebook. On Twitter, users can send out “Tweets,”¹⁶ which are viewable by all of their followers.¹⁷ It is possible to tweet “at” someone specific by hyperlinking their Twitter name, but this will still be available for all of one’s followers to see. In addition, users can send private, direct messages to other users. To communicate with those whom one follows, users can “like” another’s tweet (similar to Facebook), or “retweet” the tweet, which will share that other person’s tweet with the user’s followers. Retweets include the name of the original poster, in addition to the user who retweeted the content.

Instagram allows users to set up an account and share photos and videos with followers.¹⁸ The modes of communication on Instagram include posting your own content, “liking” or commenting on another person’s post, or sending a direct private message to another user.

Tumblr is a “microblogging” platform.¹⁹ Tumblr was designed to allow users to produce short blogs, as well as to share content including photos, quotes, links, music, and videos.²⁰ In addition to sharing one’s own content, users can share posts by other individuals.²¹

There are three aspects of these forums that present a challenge to law enforcement looking for threats and should be taken into account by new legislation specifically geared toward social media threats. First, the context in which the posts were made may be hard to determine, as well as the seriousness or sarcasm that the user intends to portray. This can make understanding the user’s intent difficult. Second, the ability for users to share content posted by other users also creates confusion for law enforcement and prosecutors who are trying to determine someone’s intent. It may not be clear if someone is reposting or sharing content to promote it, bring negative attention to it, or signal that he or she agrees with it. Finally, someone could issue a threatening statement generally as a status update or tweet, but actually intend for it to target a specific individual or group. This distinction in method of communication can be relevant to determine the issuer’s mental state. Determining the poster’s mental state is essential, because only a state-

16. Tweets are limited to 280 characters, but can include hyperlinks to videos or news content. Tweets can also include pictures. The content of a tweet is up to the user, but often includes opinions, personal updates, or other thoughts.

17. One connects with another person by “following” them, and these people are called the user’s “followers.”

18. The “following” function is similar to Twitter.

19. *Tumblr*, TECHOPEDIA, <https://www.techopedia.com/definition/27517/tumblr> (last visited July 24, 2017).

20. *Id.*

21. This type of “sharing” is comparable to a retweet on Twitter.

ment issued with a serious intent to threaten harm is a “true threat,” and thus excluded from First Amendment free speech protection.²²

The provision currently used to prosecute online threats is found within a section of the United States Code titled, “Interstate Communications,”²³ under a chapter of the Code addressing Extortion and Threats. The provision has four parts, each dealing with a different type of threat or extortion situation; two contain a mental state requirement and two do not.²⁴ The two provisions that do require intent require, “intent to extort.”²⁵ The legislative history offers no guidance on why an intent element was left out from the other two provisions.²⁶ Subsection (c), used to prosecute interstate threats (and thus online threats), is one of the provisions without an intent element.²⁷

Enacted in 1948, the conduct Congress had in mind was not social media, but rather interstate mail or telephone calls.²⁸ The statute was most recently updated in 1994, still before the age of social media,²⁹ and the language does not reference any electronic communication. Rather, the 1994 updates amended the amount of money referenced in the extortion provisions, but did not alter subsection (c), the interstate threat provision, at all.³⁰ Although Congress has adapted to the age of the internet by implementing a cyberstalking provision into the United States Code,³¹ Congress has not updated the Interstate Communications provision to better suit internet threats.

B. *Elonis v. United States*

In *Elonis*, the defendant was convicted of multiple counts of issuing threats into interstate commerce.³² His conviction stemmed from several Facebook posts, communicated as “status updates,” which means they were available for his entire friend list to see.³³ After separating from his wife, the defendant changed his Facebook name to “Tone Dougie,” and posted angry

22. See *Black*, 538 U.S. at 359.

23. 18 U.S.C.A. § 875 (West 1994).

24. *Id.*

25. *Id.*

26. Madison Peak, *The Implications of the U.S. Supreme Court's Decision in Elonis v. United States for Victims of Domestic Violence*, 28 J. AM. ACAD. MATRIM. LAW 587, 595 (2016).

27. 18 U.S.C.A. § 875(c) (West 1994) (“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.”).

28. See, e.g., *United States v. Pennell*, 144 F. Supp. 317 (N.D. Cal. 1956).

29. See *Bell*, *supra*, note 14, at 2 (explaining the rise of a variety of social media networks).

30. Violent Crime Control and Law Enforcement Act of 1994, PL 103-322, Sept. 13, 1994, 108 Stat. 1796.

31. See 18 U.S.C.A. § 2261A (West 2013).

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

33. *Id.* at 2004.

rants and rap lyrics using violent language on his account.³⁴ The posts that led to conviction were about his former place of employment (an amusement park and its patrons), his ex-wife, and law enforcement agents.³⁵ The first post about the defendant's wife was styled as a satirical skit, and included phrases 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," and even included a diagram of the home.³⁶ After that, the defendant's wife got a restraining order against him, which prompted more hateful posts. The first was about his wife and was styled as lyrics to a rap song, including lines like, "Fold up your [protection-from-abuse order] and put it in your pocket. Is it thick enough to stop a bullet?"³⁷ In this same post, the defendant also mentioned local law enforcement: "I've got enough explosives to take care of the State Police and the Sheriff's Department."³⁸ Following an interview with FBI agents, the defendant again posted an angry rant styled as rap lyrics, targeting the agent with phrases like, "Took all the strength I had not to turn the b**** ghost. Pull my knife, flick my wrist, and slit her throat. Leave her bleedin' from her jugular in the arms of her partner."³⁹ Although many of the posts singled out individuals, they were not sent in a direct message to any individuals, but rather were issued in a public nature as a status update. The defendant testified that these lyrics were not intended to be a threat, but were his version of artistic expression; the defendant compared this expression to the lyrics of Eminem, a famous rap artist who often wrote lyrics about harming estranged women in his life.⁴⁰

The language of the threats was direct and specific, and targeted individuals by name or other identifying factors.⁴¹ At trial, the jury was instructed that:

A statement is a true threat when a defendant intentionally makes 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 the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.⁴²

34. *Id.* at 2005.

35. *Id.* at 2004.

36. *Id.* at 2005.

37. *Id.* at 2006.

38. *Id.*

39. *Id.*

40. *Id.* at 2007.

41. *Id.* at 2005-07.

42. *Id.* at 2007 (emphasis added).

The Supreme Court characterized this language as requiring an objective standard of intent, which focused on how a reasonable person would interpret the statements.⁴³

In remanding the case, Chief Justice Roberts, writing for the majority, concluded that this objective standard was insufficient to sustain a criminal conviction under the statute.⁴⁴ Although the statute contains no intent element, the Court indicated that some subjective finding of what the defendant's intent was in communicating the statements is necessary.⁴⁵ The Court, however, failed to explain what that subjective intent finding should entail. There are four generally accepted mental state requirements: purposefully, knowingly, recklessly, and negligently.⁴⁶ In rejecting the objective standard, the Court explicitly stated that "negligently" is not sufficient.⁴⁷ The Court reasoned that a statement issued, "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat," would indisputably satisfy the implied intent requirement of the statute.⁴⁸ The Court declined to answer whether or not "recklessness," where the defendant makes the statement with reckless disregard to the risk that the statement will be viewed as a threat, would satisfy the mental state requirement.⁴⁹ Although the concurrence, written by Justice Alito, makes clear that recklessness would suffice,⁵⁰ the majority opinion does not answer the question.

In addition, the majority opinion in *Elonis* does not discuss whether or not the First Amendment's freedom of speech requires a heightened intent element.⁵¹ In fact, it does not reach the First Amendment analysis at all.⁵² Although most speech is protected by the First Amendment, "true threats" are not.⁵³ This is a narrow exception to the First Amendment protection of free speech however, and the majority opinion does not articulate which mental state requirement would be consistent with this narrow exception. The defendant argued that without a heightened mental state requirement, like purposeful intent or knowing intent, the statute would violate his freedom of speech.⁵⁴ However, the majority determined that, given its disposi-

43. *Id.* at 2011.

44. *Id.* at 2012.

45. *Id.* at 2011.

46. MODEL PENAL CODE § 2.02 (AM. LAW INST. 2016).

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

48. *Id.* at 2012.

49. *Id.* (declining to reach a decision on "recklessness" because the majority claimed that the issue was not properly briefed). *But see Elonis*, 135 S. Ct. at 2014 (Alito, J., concurring in part and dissenting in part) (arguing that, to be found guilty, the jury must find that the defendant acted at least recklessly as to whether his or her statement issued a threat).

50. *Id.* at 2014.

51. Quek, *supra* note 4, at 1111.

52. *See Elonis*, 135 S. Ct. at 2012.

53. *See Watts*, 394 U.S. at 708.

54. *Elonis*, 135 S. Ct. at 2016.

tion, it did not need to reach the First Amendment discussion⁵⁵ and thus the defendant's argument went unanswered. In his concurrence, Justice Alito addressed the First Amendment issue and concluded that a mental state requirement of "recklessness" would still satisfy the First Amendment protection of freedom of speech.⁵⁶ The defendant argued that his statements were made as a version of artistic expression, similar to popular rap lyrics, not intended to threaten, and thus are protected by the First Amendment.⁵⁷ Justice Alito dismisses this argument because of the context in which the statements were made and the direct nature of the threats.⁵⁸

On remand in *Elonis*, the Third Circuit upheld the convictions.⁵⁹ The Third Circuit first addressed the newly required subjective analysis in interstate threat convictions.⁶⁰ The Court concluded that, "to satisfy the subjective component of Section 875(c), the Government must demonstrate beyond a reasonable doubt that the defendant transmitted a communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat."⁶¹ The Third Circuit, by making that statement, foreclosed the opportunity to convict based on a "recklessness" mental state showing.⁶²

II. ISSUES PERPETUATED BY *ELONIS* AND 18 U.S.C. § 875(C)

There are two separate problems which stem from the *Elonis* decision. The first problem concerns the failure by the Supreme Court to address the First Amendment argument as it relates to true threats. By failing to do so, the jurisprudence on true threats remains muddled and lower courts are likely to struggle to determine what language is a true threat and how the speaker's intent implicates the First Amendment's freedom of speech. The second problem is that the Supreme Court did not conclusively decide whether recklessness would be sufficient to convict under 18 U.S.C. § 875(c). Lower courts are now tasked with deciding if the required intent must be purposefully or knowingly, or whether recklessly will suffice.⁶³ The

55. *Id.* at 2012 ("Given our disposition, it is not necessary to consider any First Amendment issues.").

56. *Id.* at 2016.

57. *Id.*

58. *Id.*

59. *United States v. Elonis*, 841 F.3d 589, 601 (3d Cir. 2016).

60. *Id.* at 596.

61. *Id.*

62. *Id.* at 601 (The Court follows this conclusion by determining whether the flawed jury instructions were harmless to the outcome. After addressing the violent and direct nature of the defendant's Facebook posts, the Court concludes that the error was harmless and upholds the convictions.).

63. *Elonis*, 135 S. Ct. at 2014 (Alito, J., concurring in part and dissenting in part) ("Did the jury need to find that *Elonis* had the *purpose* of conveying a true threat? Was it enough if he *knew* that his words conveyed such a threat? Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess.").

two problems are related because, as will hopefully become clear, the true threat exception to the First Amendment's freedom of speech is only found where the speech intends to threaten significant harm to others⁶⁴ and, after *Elonis*, the speaker's mental state is the method used to measure that intent.⁶⁵

A. *The First Amendment, Elements of a Threat, and Online Terrorism*

The failure by the Supreme Court in *Elonis* to address the First Amendment issue left an already confusing area of the law in further disarray: true threats. The Supreme Court neglected the opportunity to clarify this area of the law in *Elonis* and did not address whether subjective intent is required for First Amendment purposes.⁶⁶ The true threat exception to the First Amendment is narrow and it will be helpful to understand what elements of a threatening statement that Courts have found make that statement a "true threat," and thus satisfy this narrow exception. In addition, the First Amendment true threat discussion extends to terrorism threats made online, and any improvement in online threat prosecution must acknowledge the implications on terrorism, which is being furthered through the use of the internet and social media.

1. Free Speech and the True Threat Exception

The First Amendment Offers Citizens the Freedom of Speech.⁶⁷ However, this Freedom is not without limits.⁶⁸ The government may not regulate speech where it finds that it is "distasteful," but rather only when the language is " 'of such slight social value . . . that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.' "⁶⁹ "True threats" are one of the few exceptions to the freedom of speech under that description.⁷⁰ Although there is a presumption to protect speech, the Court has held that true threats pose significant harm to others⁷¹

64. *Id.* at 2016.

65. *Id.* at 2012.

66. *See* U.S. v. White, 810 F.3d 212, 220 (2016) ("But, importantly, the Court's holding in *Elonis* was purely statutory; and, having resolved the question on statutory grounds, the Court declined to address whether a similar subjective intent to threaten is a necessary component of a "true threat" for purposes of the First Amendment.").

67. U.S. CONST. amend. I ("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.").

68. *Black*, 538 U.S. at 344 ("The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution.").

69. *Id.* at 358-59.

70. *Id.* at 359.

71. *Elonis*, 135 S. Ct. at 2016.

and that true threats fall outside of the scope of constitutionally protected free speech.⁷²

The true threat exception to free speech is however, narrow, and the government faces a heavy burden when trying to prove that someone’s words are not protected.⁷³ The jurisprudence on true threats indicates that the exception applies to language 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.”⁷⁴ This definition of “true threats” from *Virginia v. Black*, written by the Supreme Court over a decade before *Elonis* was decided, explicitly requires a demonstration of intent on behalf of the speaker.⁷⁵ This intent element is analogous to the mens rea requirement discussed in *Elonis*, but the Supreme Court did not take the opportunity in *Elonis* to clarify whether the subjective mental state now required is necessary under both the First Amendment and the statute (18 U.S.C. § 875(c)), or the statute alone.⁷⁶ In *Virginia v. Black*, the Supreme Court directly states that language communicated with intent to threaten is not protected,⁷⁷ and it should not be surprising that the Court in *Elonis* required more than mere negligence. However, although it seems that the Court in *Black* required a showing of intent for true threats under a First Amendment analysis, the Court in *Elonis* neglected to confirm that it would require a showing of intent for the same reason.

The Court has noted that the harm from true threats stems from the fear incited by the language itself.⁷⁸ Under *Elonis*, if the speaker intends to incite fear, he or she has issued a statement with intent to threaten.⁷⁹ However, because the Court did not pursue any First Amendment analysis under the interstate threat statute and instead relied on issues of statutory construction, there is renewed confusion regarding the scope of “true threats.” The injury from a threat is the fear that the recipient feels and the purpose of prosecuting threats is to protect the recipient from that fear.⁸⁰ Without clarification on this issue from the Court however, it is unclear if the intent to incite fear fits within the narrow First Amendment exception of “true threats,” or if that intent more closely aligns with “distasteful,” but protected, speech. Following *Elonis*, the only conclusion one can be sure of is that subjective intent is

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

73. *Id.* (holding that the statements made regarding the President were not threats, but rather were made to voice opposition to the President).

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

75. *Id.*

76. *See White*, 810 F.3d at 220.

77. *See Watts*, 394 U.S. at 708.

78. *Elonis*, 135 S. Ct. at 2016.

79. *Id.*

80. *Id.*

required under 18 U.S.C. § 875(c).⁸¹ One is still left to wonder if subjective intent is similarly required under First Amendment “true threat” doctrine.⁸²

2. Common Elements of True Threats

Although 18 U.S.C. § 875(c), does not require or list any specific elements to constitute a “threat,”⁸³ the case law, particularly that following *Elonis*, indicates that there are certain elements that provide support for a finding that the speaker had a subjective intent to threaten. Considering the relationship between subjective intent under the statute and intent required under First Amendment jurisprudence, a finding of these elements bolsters the argument that this speech should not be protected speech.⁸⁴

Following *Elonis*, many circuit courts were faced with appeals based on incorrect jury instructions.⁸⁵ In these cases, the lower courts used jury instructions that required the objective reasonable person standard, but did not include the subjective intent element now required by *Elonis*.⁸⁶ Nonetheless, the federal circuit courts of appeal have affirmed convictions in some cases, even where the jury instructions were insufficient according to the new *Elonis* standard.⁸⁷

There appear to be three factual elements that, where present, the courts are likely to affirm the conviction. These factual elements have convinced the federal circuit courts that the jury would have convicted even under the correct, more exacting subjective intent instructions, and thus indicate that a true threat has been issued. Courts most often confirm the convictions where the threats: 1) are made directly to the threatened individual, 2) include specific threatened acts, and 3) contain especially violent desires to harm or kill.⁸⁸ Where one element, or a combination of these elements, is present, the courts have determined that a reasonable jury would find that the defendant had the subjective intent to issue a threat and the incorrect jury instructions were harmless.⁸⁹

81. *Id.*

82. *See White*, 810 F.3d at 220.

83. 18 U.S.C.A. § 875(c) (West 2014).

84. Because the true threat exception is narrow, the required elements of true threats must indicate that the statements were intended to harm, rather than just distasteful. *See Watts*, 394 U.S. at 707.

85. *See, e.g., White*, 810 F.3d 212; *United States v. Haddad*, 652 F. App’x 460 (7th Cir. 2016); *United States v. Choudhry*, 649 F. App’x 60 (2d Cir. 2016).

86. *See, e.g., White*, 810 F.3d at 221.

87. *See, e.g., Haddad*, 652 F. App’x at 462; *Choudhry*, 649 F. App’x at 63; *United States v. Jordan*, 639 F. App’x 768, 770 (2d Cir. 2016); *White*, 810 F.3d at 221.

88. *See Choudhry*, 649 F. App’x at 63; *Jordan*, 639 F. App’x at 770; *White*, 810 F.3d at 222.

89. *See, e.g., Choudhry*, 649 F. App’x at 63 (“For instance, the evidence included . . . recorded conversations in which Choudhry stated to his daughter Amina, ‘Until I find you nothing is going to stop. I’m going to kill their whole family. . . . I will keep shooting at them, until you come back home . . . I will kill myself and also make sure I kill all of them.’”)

These specific and violent elements relate back to the definition of “true threats” from Supreme Court jurisprudence: “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.”⁹⁰ Such direct and violent language must be required elements to constitute a true threat in order for courts to stay true to the narrow exception made from First Amendment protection. Likewise, *Elonis*’s addition of a heightened mental state requirement to the interstate threat provision is consistent with this narrow exception to the doctrine of free speech.⁹¹

3. Online Spread of Terrorism

Unfortunately, true threat jurisprudence will likely take a new turn in the near future because of the role that social media plays in planning and recruiting for terrorist groups.⁹² In *Elonis*, one individual used social media to express direct threats toward specific targets.⁹³ However, terrorist groups are using social media to recruit members, spread their message, plan attacks, and incite violence around the globe.⁹⁴ Because of the First Amendment protections of freedom of speech, freedom of expression, and freedom of association, law enforcement officials may not intervene merely because an individual subscribes to these sites or makes comments in support of terrorist groups.⁹⁵ In order to use § 875(c) to prosecute supporters or inciters of these groups, the government would need to satisfy the subjective intent element required under *Elonis*.⁹⁶ Doing so may be even more difficult in the terrorism context, due to the often secretive planning and broad natured attacks used by these groups, rather than direct threats to one or two individuals.

The complexity of these situations will likely turn on the intricacies of social media platforms themselves and it is imperative that courts appropriately navigate the fine line between protected speech under the First Amendment and true threats. Proving one’s intent to threaten because he or she “liked” a Facebook post or “retweeted” a terrorist group on Twitter will not be an easy task and the new *Elonis* standard requiring a heighten demonstration of intent to threaten makes that task even harder. In 2016, federal law enforcement charged a woman with violating § 875(c) based on her

Choudhry further stated, ‘If you don’t come back, I will kill each and every one of them. I will go to jail,’ and explained, ‘we had to threaten them . . . in order to have them bring you back to us.’ ” (internal citations omitted).

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

91. *See Watts*, 394 U.S. at 707.

92. *See* Taylor Spencer, *Twitter in the Age of Terrorism: Can a Retweet Constitute a “True Threat”?*, 15 FIRST AMEND. L. REV. 497 (2017).

93. *Elonis*, 135 S. Ct. at 2004-07.

94. Spencer, *supra* note 92, at 499.

95. *Id.* at 503.

96. *Id.* at 503-04.

“retweets” of ISIS threats naming specific federal law enforcement officers.⁹⁷ She was indicted by a grand jury in February 2017, and the district court affirmed the indictment in April 2017.⁹⁸ The outcome of this case will prove to be very informative, and will indicate the direction of true threat jurisprudence where social media and terrorism intersect. Unlike in *Elonis*, if this case reaches the Supreme Court the Court will be unable to avoid the First Amendment discussion pertaining to the defendant’s conduct. This should result in some clarification regarding what “intent” is required under the “true threat” exception to the First Amendment.

B. *Appropriate Mental State for Online Threat Convictions*

Similarly to the First Amendment issue, the Court in *Elonis* also did not provide an answer as to which mental state should be used to prosecute interstate threats. Although the Supreme Court did indicate that knowingly or purposefully would be sufficient, the Court did not provide an answer with respect to “recklessness.”⁹⁹ Legal scholars have voiced their opinions regarding which mental state requirement is appropriate in the social media threat context following *Elonis*: some arguing for purposeful or knowing conduct, others arguing for recklessness. In addition, several federal circuit courts have been confronted with cases following *Elonis* that require them to make sense of the Supreme Court’s holding.¹⁰⁰

1. Scholars Arguing for Knowledge/Purpose

The two most exacting mental state possibilities under the Model Penal Code are purposely and knowingly.¹⁰¹ These mental states are the hardest for the government to prove.¹⁰² The Model Penal Code explains “purposely” to mean that the defendant acted where, “it is his conscious object to engage in conduct of that nature or to cause such a result,” that is described in the applicable statute.¹⁰³ The “knowingly” mental state means that the defendant, “is aware that his conduct is of that nature or that such circumstances

97. See Spencer, *supra* note 92, at 505; See also United States v. Yassin, No. 16-03024-01-CR-S-MDH, 2017 WL 1324141 at *1 (W.D. Mo. Feb. 23, 2017).

98. United States v. Yassin, No. 16-03024-01-CR-S-MDH, 2017 WL 1337438 at *1 (W.D. Mo. Apr. 6, 2017).

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

100. See, e.g., United States v. White, 810 F.3d 212; United States v. Caldwell, 75 M.J. 276 (C.A.A.F.), *cert. denied*, 137 S. Ct. 248 (2016); State v. Trey M., 383 P.3d 474 (Wash. 2016).

101. See *supra*, note 46.

102. Maria A. Brusco, *Read This Note or Else!: Conviction Under 18 U.S.C. § 875(c) for Recklessly Making a Threat*, 84 FORDHAM L. REV. 2845, 2853 (2016).

103. See *supra*, note 46.

exist,” again referencing the conduct prohibited by the statute.¹⁰⁴ Purposely and knowingly are often used interchangeably or together as one.¹⁰⁵

Some scholars argue purposely/knowingly is the appropriate mental state requirement for § 875(c) and the one most likely to be selected by the Supreme Court.¹⁰⁶ First, using one of these higher mental state standards is consistent with the Supreme Court’s goal in *Elonis* of distinguishing wrongful from innocent conduct.¹⁰⁷ In order to only convict those who are morally culpable, it is essential to only convict based on actual wrongful conduct.¹⁰⁸ These scholars argue that limiting convictions for online threats to those who acted purposely or knowingly comports with that goal.¹⁰⁹

Second, a knowledge or purpose standard is more likely to comport with the demands of the First Amendment.¹¹⁰ As already discussed, true threats are not protected speech under the First Amendment.¹¹¹ In order to limit the government’s ability to impede on the free speech doctrine, a heightened mental state is required because this narrows the potential application of the true threat exception to a limited number of cases.¹¹²

2. Scholars Arguing for Recklessness

Under the Model Penal Code, the next most exacting mental state is “recklessness.”¹¹³ The Model Penal Code describes recklessness as, “A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”¹¹⁴ The Model Penal Code further explains that reckless behavior is that which “grossly deviates” from that of a law-abiding citizen.¹¹⁵ A recklessness demonstration requires evidence of more wrongful intent than negligence, but not quite as much as purposely or knowingly.

104. *Id.*

105. Brusco, *supra* note 102, at 2853.

106. See Maris Snell, *Section 875(c): Not for All Intents and Purposes*, 68 FLA. L. REV. 1495, 1504-07 (2016); see also Michael Pierce, *Prosecuting Online Threats After Elonis*, 110 NW. L. REV. 995, 1005 (2016) (arguing that knowingly/purposely is appropriate for threats against public figures); John Villaseñor, *Technology and the Role of Intent in Constitutionally Protected Expression*, 39 HARV. J.L. & PUB. POL’Y 631, 673-74 (2016) (arguing that technological advances require a heightened mens rea analysis and recklessness is insufficient); Enrique A. Monagas & Carlos E. Monagas, *Prosecuting Threats in the Age of Social Media*, 36 N. ILL. L. REV. 57, 77 (2016) (arguing that a recklessness standard would chill speech and thus a heightened mental state requirement is necessary).

107. Snell, *supra* note 106, at 1504.

108. *Id.* at 1505.

109. *Id.*

110. *Id.* at 1506.

111. See *supra* Part II.A.

112. Snell, *supra* note 106, at 1506-07.

113. See *supra* note 46.

114. *Id.*

115. *Id.*

Although no court has given a definitive answer, some scholars argue that “recklessness” is the appropriate mental state requirement for § 875(c) threat convictions.¹¹⁶ If the intent of the statute is to protect the victims of threatening communications, the harm felt is just as severe when the speaker knew the communication was a threat or acted recklessly in making a statement that could have the damaging effect of a threat, then proving that the defendant acted purposely makes no difference in protecting the victim.¹¹⁷ Thus, these scholars suggest “recklessness” more accurately comports with the purpose of the statute.¹¹⁸

As for the First Amendment issue, these scholars contend that recklessness is enough to protect an individual’s right to free speech.¹¹⁹ Recklessness analysis depends on the context in which the threat was made, and some suggest that this contextual analysis sufficiently protects free speech.¹²⁰ If the statements are made in a context where they will not be taken seriously as a threat, the defendant is not acting recklessly with regard to his communications.¹²¹ If the context analysis cuts the other way, then the reckless speaker is not entitled to free speech protection for his communications, whose harm to victims outweighs his right to free speech.¹²²

3. Federal Circuit Court Response

In *United States v. White*, the Fourth Circuit interpreted *Elonis* and concluded that in order to convict under § 875(c), the government must show that the defendant: 1) knowingly transmits a communication into interstate commerce, 2) subjectively intended the communication as a threat, and 3) the communication contained a true threat.¹²³ The second element is where the question of which mental state is appropriate comes into play: where the intent of the speaker is considered. Under this element, courts and juries should consider the statements in the context in which they were made and evaluate the language used. This should allow for a determination of whether the defendant subjectively intended to threaten the subject (illegal), or whether the defendant intended to speak hateful but not threatening words (protected under the First Amendment).¹²⁴

116. Brusco, *supra* note 102, at 2870; *see also* Pierce, *supra* note 106, at 1005 (arguing that recklessness is the appropriate standard for threats made against private individuals); Quek, *supra* note 4, at 1135 (arguing inconclusively that recklessness might be the appropriate mental state).

117. Brusco, *supra* note 102, at 2870.

118. *Id.*

119. *Id.* at 2871.

120. *Id.* at 2873.

121. *Id.*

122. *Id.* at 2872.

123. *White*, 810 F.3d at 220-21.

124. *See Elonis* 135 S. Ct. at 2011.

All federal circuit courts that have been confronted with the issue agree that a knowingly or purposefully mental state would be sufficient; that is a demonstration that the defendant knew the communication would be viewed as a threat or issued the communication with the purpose of issuing a threat would be sufficient to satisfy the Supreme Court's requirement of a subjective intent element.¹²⁵ The Ninth and Tenth Circuits required the subjective intent element even before *Elonis*, and required a showing of knowledge or purpose.¹²⁶ No federal circuit courts have definitively held that recklessness would be sufficient.¹²⁷ Courts have addressed the possibility in dicta,¹²⁸ but have not been confronted with a defendant demonstrating a recklessness mental state. It is not clear what the outcome will be should those factual circumstances arise.

III. CALL FOR CLARITY

The speed, global reach, and evolving nature of social media make it imperative that Law enforcement has a clear handle on what constitutes an internet threat. True threat litigation has increased over the past decade as social media use has increased.¹²⁹ Because of the increased ease of communication that social media brings and the anonymity users feel when posting,¹³⁰ it is more important than ever to determine an appropriate mental state requirement for true threats and ensure that a statute exists to appropriately address online threats without infringing on First Amendment free speech protections.¹³¹

A. *Knowingly/Purposely is the Best fit for Online Threats*

Despite some legal scholar's arguments that a recklessness standard is appropriate and does not violate free speech, this Note argues that only a demonstration of purposely or knowingly intent to threaten is sufficient to convict someone for making an online threat. This heightened mental state requirement will be a challenge in the context of social media posts, where nearly all evidence will be circumstantial and the context of the situation

125. See *White*, 810 F.3d at 221; *Haddad*, 652 F. App'x at 462; *Choudhry*, 649 F. App'x at 63; *United States v. Houston*, 792 F.3d 663, 667 (6th Cir. 2015); *United States v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015).

126. See *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014); *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988).

127. See *White*, 810 F.3d at 221; *Houston*, 792 F.3d at 669.

128. See, e.g., *Houston*, 792 F.3d at 669.

129. Best, *supra* note 11, at 1127 ("Because online communications tend to allow individuals to post their thoughts on a widely accessible network, courts have seen a rise in "true threat" litigation over the past decade, which evaluates whether statements communicated by an individual qualify as threats.")

130. Julie Seaman & David Sloan Wilson, *#FreeSpeech*, 48 ARIZ. ST. L.J. 1013, 1036 (Winter 2016).

131. See Villaseñor, *supra* note 106, at 634.

may be more difficult to determine as a result of the text written on the internet.¹³² However, requiring a purposely or knowingly mental state will best separate wrongful from unsavory (but not illegal) conduct, and leave social media as free and open as possible for users to express their thoughts.

Many use social media to share thoughts and articles with their friends about their political views and other controversial topics. Conversations with adversaries on social media sites may get heated at times, but this dialogue is often critical for keeping citizens informed and bringing all viewpoints to the table. Occasionally, users may take things too far and make public statements to individuals or groups of people which may be perceived as a threat. To keep social media a free and open space for discussion, it is imperative that we only ask law enforcement to step in when threatening words are communicated with purposeful or knowing intent, whether to carry out the threat or to instill real fear in the object of the threat.

To comport with that goal, any statute governing online threats should include, or be read to include, a purposely or knowingly mental state requirement. By using a heightened mental state requirement, social media users will be free to keep using their profiles, even in times of heated anger, without risk of federal prosecution. When one steps over the line and issues a communication with intent to threaten, they have committed a crime and should be punished accordingly. However, under this framework, when one's rant gets out of control and he or she recklessly instills fear in another person without any intent to do so, no crime has been committed and law enforcement should not be permitted to step in.

The likely response to this argument is that threats are harmful to the recipients, regardless of the speaker's intent, and should be prosecuted accordingly. However, in the interstate threat context, the United States criminal justice system aims to punish wrongful conduct, not unfortunate results.¹³³ The best way to do this for online threats is to require the government to demonstrate that the speaker acted with purpose or knowledge that the communication would be perceived as a threat. By doing so, the law would require the recipient to bear the risk that the communication is harmful, rather than the speaker, because the onus of the determination rests on the speaker's subjective intent and not on the effect felt by the recipient.¹³⁴ While this solution is not perfect, it is the best way to protect free speech, while still protecting the public safety when a true threat has been issued.

132. Monagas, *supra* note 106, at 66-67 (explaining that defendants rarely admit an intention to issue a threat, so proving criminal intent will require circumstantial evidence and facts to convince a jury that the defendant was acting purposefully or knowingly to threaten.).

133. *Elonis*, 135 S. Ct. at 2009 (“The “central thought” is that a defendant must be “blameworthy in mind” before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like.”).

134. Monagas, *supra* note 106, at 77.

The Supreme Court was clear in *Elonis* that the speaker’s intent must matter,¹³⁵ and requiring a demonstration of a heightened mental state is the best way to balance the competing factors at issue.

B. Congressional Response

Congress should pass a new statute into law that prohibits threats made via the internet and in the social media context. Due to the unique nature of social media communication, a refined statute would give the most adequate guidance to law enforcement and aid in understanding which mental state requirement will withstand First Amendment scrutiny. Communication on social media can be expressed through both personal posts and “liking” or “retweeting” other’s posts. The intent and mindset behind each action may differ, and drafting legislation to address these different actions would aid law enforcement. If a new statute is drafted and passed, the statute should choose a mental state requirement and include it explicitly in the language of the statute. Further, this Note has explained why the appropriate mental state should be purposely/knowingly. Requiring this heightened mental state will ensure that social media communication receives the First Amendment protection that it is entitled to. Requiring this mental state will also ensure that only those who act intentionally to threaten (and issue “true threats”) will be prosecuted.

Alternatively, Congress could choose to act in a different way. Rather than draft legislation to adapt to online threats by individuals, Congress could pass legislation that requires social media platforms and other technology companies to be more vigilant in policing their sites. German lawmakers took this approach and passed legislation in June 2017 that would fine such companies for failing to quickly delete hate speech, libel, and other illegal content.¹³⁶ However, this type of legislation would only accomplish part of the goals in this area: threatening language may be deleted promptly and the effects on victims may be less pronounced, but this legislation would offer no guidance to law enforcement on what mental state is required for online threat prosecutions and would not address the First Amendment issue.

CONCLUSION

The Supreme Court’s holding in *Elonis v. United States* left lower courts without an answer as to whether purposely, knowingly, or recklessly was the appropriate mental state for 18 U.S.C. §875(c) convictions, particularly in the internet context, and without an answer as to what is required by the First Amendment in this space. Since that ruling in 2015, lower courts have applied the standards as they see fit. To ease this confusion, it is imperative

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

136. Anton Troianovski & Sam Schechner, *Germany to Social Networks: Delete Hate Speech Faster or Face Fines*, WALL ST. J. (June 30, 2017).

that the federal government make explicit which mental state is required for true threat convictions and which mental state best affords First Amendment protections to social media users. A new statute is needed to address threats in the internet or social media context. Clarification in this area is necessary to aid law enforcement, inform social media users of what conduct is prohibited, and protect First Amendment freedoms of U.S. citizens using these sites as a vehicle for public communication and dialogue.