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# A Reckless Guessing Game: Online Threats Against Women in the Aftermath of *Elonis v. United States*

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## I. Introduction

In May 2010, Tara Elonis left her husband, Anthony Elonis. Several months later, he directed a series of threatening posts on his Facebook page to her. Elonis wrote, “If I only knew then what I know now . . . I would have smothered your ass with a pillow. Dumped your body in the back seat. Dropped you off in Toad Creek and made it look like rape and murder.”<sup>1</sup> In another post, Elonis wrote “there's one way to love ya but a thousand ways to kill ya, And I'm not gonna rest until your body is a mess, Soaked in blood and dying from all the little cuts, Hurry up and die bitch . . .”<sup>2</sup> Fearful of these threatening messages, Tara filed for and was granted a Protection from Abuse order (“PFA”) for herself and her children.<sup>3</sup>

Despite the PFA, Elonis continued to post threatening messages online to his Facebook page, including a post in which he uses the script of a comedy sketch, which mocked the idea that it is illegal to discuss wanting to kill the president and how one would actually kill the president.<sup>4</sup> However, in posting this script on Facebook, Elonis replaced the word “president” and details of the White House with his wife and details of her home, and described how he would murder her.<sup>5</sup> In a later post, Elonis wrote “[f]old up your [protection-from-abuse order] and put it in your pocket, is it thick enough to stop a bullet?”<sup>6</sup>

The threats directed towards Tara were frightening, and the F.B.I. later intervened.<sup>7</sup> A case was brought against Elonis, and he was charged with violating 18 U.S.C. § 875(c), which makes

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<sup>1</sup> Brief for Appellee at 10, *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013) (No. 12-3798) *cert. granted*, 134 S. Ct. 2819 (2014) *rev'd and remanded*, 135 S. Ct. 2001 (2015).

<sup>2</sup> *Id.* at 11.

<sup>3</sup> *Id.* at 11-12.

<sup>4</sup> Kamatzu, *Whitest Kids U Know: It's illegal to say...*, YOUTUBE (May 2, 2007), <https://www.youtube.com/watch?v=QEQOvyGbBtY>.

<sup>5</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2006 (2015).

<sup>6</sup> *Id.*

<sup>7</sup> Included in Elonis' Facebook posts were also threats to injure “patrons and employees of the [amusement] park [where Elonis had previously worked], . . . police officers, a kindergarten class and an FBI agent.” *Id.*

it a crime to transmit a threat through interstate communications.<sup>8</sup> *Elonis*'s case eventually made its way up to the Supreme Court. Prior to the Court's ruling, nine circuits had adopted an objective intent standard in interpreting § 875(c), where criminal liability would attach when a reasonable person would have perceived the communication as a threat.<sup>9</sup> Instead, the Court held that the objective intent standard was essentially a negligence standard, and negligence of the offender was not enough for a conviction under § 875(c).<sup>10</sup> While purposefully or knowingly communicating a threat would warrant conviction, the Court declined to decide whether recklessness on the part of the offender would be enough for conviction.

Tara *Elonis* is not alone in facing online threats. In fact, a Pew Research Center study found that young women, ages 18-24, are particularly more likely to experience severe forms of online harassment, including online stalking, sexual harassment and physical threats.<sup>11</sup> As a result, women on the Internet are becoming increasingly vulnerable to situations in which they are the target of threats of sexual and physical violence. In fact, Rossayln Warren, in her e-book, *Targeted and Trolled: The Reality of Being a Woman Online* commented:

online abuse of women is not confined to sexual harassment and stalking. How many times have you . . . heard about a woman being sent a rape threat on social media . . . This type of abuse has become so woven into the fabric of the Internet that it's hard to imagine the Internet without it.<sup>12</sup>

One such example is what happened to Zoe Quinn, a video game designer. After she broke up with her boyfriend, he posted an article describing her sex life in an effort to ruin her reputation. He then sent the article to several websites whose users had a history of harassing her. As a result, her personal information (such as her home address, phone number, emails, and nude photos) was

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<sup>8</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2002 (2015); 18 U.S.C. § 875 (2016).

<sup>9</sup> There was no Circuit Split over the question because most circuits used only the objective intent standard, although two outlier circuits required intent to threaten. *Id.* at 2018 (Thomas, J., dissenting).

<sup>10</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015).

<sup>11</sup> Maeve Duggan, *Online Harassment*, PEW RESEARCH CENTER 3 (2014), [http://www.pewinternet.org/files/2014/10/PI\\_OnlineHarassment\\_72815.pdf](http://www.pewinternet.org/files/2014/10/PI_OnlineHarassment_72815.pdf).

<sup>12</sup> ROSSAYLN WARREN, *TARGETED AND TROLLED: THE REALITY OF BEING A WOMAN ONLINE* 48 (2015) (ebook).

widely distributed to these users, and she received thousands of death and rape threats.<sup>13</sup> Some of the threats directed towards Quinn included, “Next time she shows up at a conference we . . . give her a crippling injury that’s never going to fully heal . . . a good solid injury to the knees. I’d say a brain damage, but we don’t want to make it so she ends up too retarded to fear us.”<sup>14</sup> Another threat stated: “Im not only a pedophile, ive raped countless teens, this zoe bitch is my next victim, im coming slut.”<sup>15</sup> Another threat: “If I ever see you are doing a pannel [sic] at an event I am going to, I will literally kill you. You are lower than shit and deserve to be hurt, maimed, killed, and finally, graced with my piss on your rotting corpse a thousand times over.”<sup>16</sup>

To Quinn, these threats were serious enough that she left her home.<sup>17</sup> To Tara Elonis, the threats were enough that she feared for her life, and the lives of her children and family.<sup>18</sup> Other women face threats of this magnitude as well, and in 2006, the Bureau of Justice Statistics estimated that approximately 850,000 people a year experience stalking and threats through technology.<sup>19</sup> Still, only around 25 cases a year are pursued under the federal threat statute, § 875(c).<sup>20</sup>

When fighting online threats, law enforcement and prosecutors should enforce and utilize the already existing federal threat statute, § 875(c), to actually prosecute the online threats.

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<sup>13</sup> Zachary Jason, *Game of Fear*, BOSTON MAGAZINE (May 2015), <http://www.bostonmagazine.com/news/article/2015/04/28/gamergate>.

<sup>14</sup> Simon Parkin, *Zoe Quinn’s Depression Quest*, THE NEW YORKER (Sept. 9, 2014), <http://www.newyorker.com/tech/elements/zoe-quinn-depression-quest/>

<sup>15</sup> Jason, *supra* note 13.

<sup>16</sup> Jason, *supra* note 13.

<sup>17</sup> Keith Stuart, *Zoe Quinn: ‘All Gamergate has done is ruin people’s lives’*, THE GUARDIAN (Dec. 3, 2014), <http://www.theguardian.com/technology/2014/dec/03/zoe-quinn-gamergate-interview>.

<sup>18</sup> Brief for Appellee at 15, *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013) (12-3798) *cert. granted*, 134 S. Ct. 2819 (2014) *rev’d and remanded*, 135 S. Ct. 2001 (2015).

<sup>19</sup> Danielle Citron, *United States v. Elonis and the Rarity of Threat Prosecutions*, FORBES (Dec. 3, 2014), <http://www.forbes.com/sites/daniellecitron/2014/12/03/united-states-v-elonis-and-the-rarity-of-threat-prosecutions/>; *see also* Katrina Baum, Shannan Catalano & Michael Rand, *Stalking Victimization in the United States*, U.S. DEPT. OF JUST. (Jan. 2009) <http://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf>.

<sup>20</sup> Citron, *supra* note 19.

However, these online threats are unique, and are different from traditional offline forms of threats. In prosecuting online threats, the federal threat statute can be strengthened through requiring a *mens rea* of recklessness for conviction. When litigating these crimes, prosecutors and judges should take into account the entirety of the circumstances, such as the relationship between the victim and the individual communicating the threat. In doing so, prosecutors should determine whether or not the perpetrator should have been aware that the victim would feel threatened, rather than whether or not the perpetrator actually meant to carry out his or her threat. A recklessness standard would allow for conviction under § 875(c) when the individual was aware of a substantial and unjustifiable risk that his words may be received as threats, and the individual consciously disregarded that risk. Requiring recklessness under § 875(c) provides a clearer standard for conviction, which will protect more victims of online threats. Additionally, a recklessness standard will also act as a deterrent for those who wish to threaten their victims online. Because prosecutors and courts will be able to evaluate a threat under the entirety of the circumstances, perpetrators of online threats will no longer be able to claim their threats are simply innocent words or misunderstandings.

Section II of this note will discuss the Supreme Court's decision in *Elonis v. United States*.<sup>21</sup> Section III will explain nature of online threats, including how and why online threats differ from traditional offline threats. It will also address how online threats most adversely affect women, through the cyber-stalking and the online threats that women often experience. Section IV will argue that prosecutors should utilize the already existing federal threat statute, § 875(c) when prosecuting online threats. Additionally, this section will argue that a *mens rea* of recklessness is necessary to strengthen § 875(c), because a clearer standard will increase more

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<sup>21</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2001 (2015).

online threat litigation while also deterring individuals from making online threats. This section will also address several other techniques currently being used to fight online threats, including the work of non-profits organizations, efforts by social networking websites and proposed legislation in Congress.

## **II. *Elonis v. United States***

In *Elonis v. United States*, *Elonis* was charged with violating 18 U.S.C. § 875(c), which makes it a crime to “transmit in interstate . . . commerce any communication containing . . . any threat to injure the person of another.”<sup>22</sup> One of the many difficulties in prosecuting a case under § 875(c) is that the statute does not specify a defendant’s required mental state for the elements. For example, the statute itself does not explicitly state that a defendant must intend the transmitted communication to contain a threat.<sup>23</sup> Implicit in this difficulty is whether the First Amendment requires that a defendant “be aware of the threatening nature of the communication” to be convicted of making a true threat, which is a threat that is not protected by the First Amendment.<sup>24</sup>

At trial, *Elonis* argued that § 875(c) should be interpreted under a subjective intent standard, which would require the government to prove that he intended to communicate a threat.<sup>25</sup>

In contrast, the court instructed the jury to interpret § 875(c) under an objective standard, 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.<sup>26</sup>

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<sup>22</sup> 18 U.S.C. § 875(c) (2016).

<sup>23</sup> *Id.*

<sup>24</sup> *Elonis*, 135 S. Ct. at 2004.

<sup>25</sup> *Id.* at 2007.

<sup>26</sup> *Id.*

Elonis was found guilty and sentenced to three years and eight months in prison.<sup>27</sup> On appeal, the Third Circuit held that § 875(c) should be interpreted under an objective intent standard, or that “a threat is made willfully when a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm.”<sup>28</sup>

On appeal to the Supreme Court, Elonis again argued that § 875(c) should be interpreted under a subjective intent standard, and that a “conviction of violating § 875(c) requires proof that the defendant intended the charged statement to be a ‘threat.’”<sup>29</sup> Elonis argued that without a subjective intent standard, people may potentially be held criminally liable for negligent speech.<sup>30</sup> In contrast, the government again advocated for an objective intent or a “reasonable person” standard, arguing that a “conviction requires a statement that to a reasonable person communicates an intent to do harm.”<sup>31</sup>

In its decision, the Court explained that § 875(c) does not specify a *mens rea* requirement, but that such a requirement must apply to the fact that a communication contains a threat.<sup>32</sup> Moreover, Elonis’s conviction was based on how his posts would be understood by a reasonable person, and this was “inconsistent with the conventional requirement for criminal conduct—awareness of some wrongdoing.”<sup>33</sup> The Court further explained, “[h]aving liability turn on

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<sup>27</sup> *Id.*

<sup>28</sup> U.S. v. Elonis, 730 F.3d 321, 332 (3d Cir. 2013) *rev’d and remanded*, 135 S. Ct. 2001 (2015)

<sup>29</sup> Brief for Petitioner at 29, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983).

<sup>30</sup> *Id.* at 20. Additionally, Elonis raised several First Amendment arguments. *Id.* Elonis suggested that that a subjective intent standard would not violate the First Amendment, as past First Amendment jurisprudence suggests that before imposing criminal liability on speech, there first needs to be a past history and tradition of requiring proof of intent to threaten, or proof of prohibited intent before imposing such criminal liability. *Id.* Elonis also argued that a negligence standard would “impermissibly chill free speech,” as such a standard is unpredictable, given the possibility of discriminating against minority viewpoints, as well as criminalizing “misunderstandings.” *Id.*

<sup>31</sup> Brief for Petitioner at 14, Elonis v. United States, 135 S. Ct. 2001 (2015).

<sup>32</sup> Elonis v. United States, 135 S. Ct. 2001, 2011 (2015).

<sup>33</sup> *Id.*

whether a ‘reasonable person’ regards the communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence and we have long been reluctant to infer that a negligence standard was intended in criminal statutes.”<sup>34</sup> The Court held that the government’s objective intent standard was essentially a negligence standard, and that “negligence is not sufficient to support a conviction under Section 875(c).”<sup>35</sup> The Court noted that the *mens rea* requirement would be satisfied if a defendant transmitted a communication with the purpose of transmitting a threat, or if the defendant knows that the communication would be viewed as a threat.<sup>36</sup> However, in its holding, the Supreme Court declined to decide whether recklessness would be sufficient for criminal liability under § 875(c), as there was no circuit conflict over the recklessness question, nor was it sufficiently briefed or argued by *Elonis* or the government.<sup>37</sup>

The Court’s decision leaves many questions unanswered. Justice Alito expressed frustration with the Court’s decision in a concurring opinion, asking “Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess.”<sup>38</sup> Justice Alito also noted that there would be “regrettable consequences” from the decision, because “[i]f purpose or knowledge is needed and a district court instructs the jury that recklessness suffices, a defendant may be wrongly convicted. On the other hand, if recklessness is enough, and the jury is told that conviction requires proof of more, a guilty defendant may go free.”<sup>39</sup>

For Justice Alito, a finding of recklessness would have been sufficient for a conviction under § 875(c). He agreed that there needed to be more than mere negligence, but once past the

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2013.

<sup>36</sup> *Id.* at 2012.

<sup>37</sup> *Id.* at 2013.

<sup>38</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2014 (2015) (Alito, J., concurring).

<sup>39</sup> *Id.*



negligence threshold, recklessness sufficed.<sup>40</sup> A recklessness standard is not necessarily an objective standard, because “[s]omeone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway.”<sup>41</sup>

### III. Online Threats

In the wake of the *Elonis* decision, courts must now decide whether to require a *mens rea* of recklessness under § 875(c). As such, it is helpful to consider the definition of a true threat and the limits of First Amendment protection for threatening speech. While there is no clear definition of what constitutes a true threat, in his dissent in *Elonis*, Justice Thomas explained the Court’s past jurisprudence on the subject, noting that a threat is a “serious expression of an intention to commit unlawful physical violence . . . it also cannot be determined solely by the reaction of the recipient, but must instead be ‘determined by the interpretation of a reasonable recipient familiar with the context of the communication.’”<sup>42</sup> Moreover, Justice Thomas stipulates that “the communication must be one that a ‘reasonable observer would construe as a true threat to another.’”<sup>43</sup>

While the Court has not defined what constitutes a threat, the Court “in construing the same term in a related statute . . . distinguished a “true ‘threat’” from facetious or hyperbolic remarks.”<sup>44</sup> The Court first discussed threats in *Watts v. U.S.*, where Watts, at a public rally and while discussing his draft classification, stated “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”<sup>45</sup> Based on this statement, Watts was convicted of committing a

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<sup>40</sup> *Id.* at 2015.

<sup>41</sup> *Id.*

<sup>42</sup> See *Elonis*, 135 S. Ct. at 2019 (Thomas, J., dissenting) (quoting *United States v. Darby*, 37 F.3d 1059, 1066 (C.A.1994)).

<sup>43</sup> See *Id.* (Thomas, J., dissenting) (quoting *United States v. Jeffries*, 692 F.3d 473, 478 (C.A. 2012)).

<sup>44</sup> *Id.*; see also *Watts v. United States*, 394 U.S. 705, 708 (1969).

<sup>45</sup> *Watts*, 394 U.S. at 705-06.

felony by “knowing and willfully threatening the President.”<sup>46</sup> The Supreme Court reversed the lower court’s decision, and explained that “[w]hat is a threat must be distinguished from what is constitutionally protected speech.”<sup>47</sup> Here, Watts had been engaged in ‘political hyperbole’ by stating his opposition to the President.<sup>48</sup> The Court distinguished a true threat from “uninhibited, robust, and wide open . . . vehement, caustic and sometimes unpleasantly sharp attacks.”<sup>49</sup>

The Court has since consistently held that true threats, like other content-based restrictions, are not protected by the First Amendment.<sup>50</sup> In *Virginia v. Black*, the Court further discussed the concept of a “true threat”, and suggested that the speaker of the threat does not “actually need to intend to carry out the threat.”<sup>51</sup>

#### **A. Punishment of Threats**

Imagine the following scenario: Someone calls a parent of a school-aged child on the telephone and informs the parent of plans to blow up the child’s school. Sherry F. Colb described that in that situation, a parent would likely be very frightened, and would not want to send their child to school that day.<sup>52</sup> The school would probably close for the day to allow for an investigation.<sup>53</sup> That investigation would likely include a police investigation, utilizing a bomb squad.<sup>54</sup> Colb explained, “[a]ll of these effects are very destructive and an unacceptable price to

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 707.

<sup>48</sup> *Id.* at 707-708.

<sup>49</sup> *Id.* at 708.

<sup>50</sup> See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002), *as amended* (July 10, 2002); see also *U.S. v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (outlining several content-based restrictions on speech, including “advocacy intended, and likely, to incite imminent lawless action,” obscenity, defamation, speech integral to criminal conduct, “so-called ‘fighting words,’” child pornography, fraud, and “speech presenting some grave and imminent threat the government has the power to prevent.”).

<sup>51</sup> *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

<sup>52</sup> Sherry F. Colb, *The Supreme Court Considers “True Threats” and the First Amendment*, VERDICT (Dec. 10, 2014), <https://verdict.justia.com/2014/12/10/supreme-court-considers-true-threats-first-amendment>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

pay for the caller’s exercise of his freedom to call [you] and utter the words, ‘I am blowing up your child’s school today.’”<sup>55</sup>

In *Virginia v. Black*, the Court explained that prohibiting threats “protects individuals from the fear of violence” and “from the disruption that fear engenders” in addition to “protecting from the possibility that the threatened violence will occur.”<sup>56</sup> It is clear that threats result in a wide variety of detrimental and sometimes deadly effects for the individual receiving the threat, as well as creating high costs to society. For the individual, these effects are economic, emotional, psychological or even physical, including “nightmares, heart problems, inability to work, loss of appetite and insomnia.”<sup>57</sup> For example, in *Tompkins v. Cyr*, Dr. Tompkins and his wife were the victims of anonymous callers and anonymous letters that threatened their lives because Dr. Tompkins was a doctor who performed abortions.<sup>58</sup> For the Tomkins’, the threats resulted in “reactions of fear, stress, anxiety, depression, and sadness,” as well as problems with sleeping and eating.<sup>59</sup> Eventually the family hired a bodyguard, began wearing a bulletproof vests and moved Dr. Tompkins’s medical practice to another city.<sup>60</sup>

Similarly, in *Simpson v. Burrows*, after Jo Ann Simpson and her partner opened a lodge and restaurant, they began receiving letters targeting them because they were lesbians.<sup>61</sup> The letters threatened their lives, while calling them “abominations” that brought immoral and unfavorable elements into the community.<sup>62</sup> Simpson explained the effect the letters had on her life, explaining that her girlfriend had left her, and she had to buy a gun because she was afraid for

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<sup>55</sup> Colb, *supra* note 52.

<sup>56</sup> *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

<sup>57</sup> Jennifer Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 291 (2001).

<sup>58</sup> *Tompkins v. Cyr*, 202 F.3d 770, 776 (5th Cir. 2000).

<sup>59</sup> *Id.* at 782.

<sup>60</sup> *Id.* at 778.

<sup>61</sup> *Simpson v. Burrows*, 90 F. Supp. 2d 1108, 1121 (D. Or. 2000).

<sup>62</sup> *Id.*

her life.<sup>63</sup> As a result of the letters, she had trouble sleeping and had occasional nightmares.<sup>64</sup> She also stated that she “suffered various physical problems including upset stomach, headaches, and crying jags.”<sup>65</sup> Finally, Simpson explained that she had lost her trust in people.<sup>66</sup>

The affects of these threats on Simpson’s and the Tompkins’s personal lives were severe. Whether or not the anonymous stalkers actually intended that their victims feel threatened did not mitigate Simpson’s and the Tompkins’ fears, or how they dealt with these threats. Both sets of victims describe the physical effect the threats had on them, including suffering from the physical manifestations of the fear through insomnia, headaches and nausea. The fear also manifested itself psychologically and emotionally for the victims, as both describe suffering from anxiety, depression and general feelings of sadness as a result of the threats. Additionally, the threats had severe economic impact on both Simpson and the Tompkins’ as both had to find ways to protect themselves, through either purchasing guns, bulletproof vests or even hiring body guards. In the end, both had to move away and physically leave their homes.

The reactions of the Tompkins’s and Simpson are common. In its survey of online harassment, the Pew Research Center estimates that around twenty-seven percent of people who had been threatened or severely harassed online in the past found it very or extremely upsetting.<sup>67</sup> Severe online harassment includes physical threats, sexual harassment, stalking, or harassment over a sustained period of time, while mild or less severe online harassment includes actions such as name-calling or embarrassment.<sup>68</sup> The Pew Research Study found that while men and women are equally likely to have experienced some sort of severe harassment, the reactions of men and

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Duggan, *supra* note 11, at 33.

<sup>68</sup> Duggan, *supra* note 11, at 13.

women differ.<sup>69</sup> Men are more likely to experience more mild or less severe types of online harassment in the form of name-calling and embarrassment, versus the more severe forms of online harassment that women experience.<sup>70</sup>

There are many reasons for the disparate reactions of men and women to online harassment and threats. One explanation may be the different platforms where men and women experience the threats and harassment. Young men explain that they often experience online harassment within online gaming websites.<sup>71</sup> In contrast, women note that social networking websites and mobile applications are often where they are harassed or threatened.<sup>72</sup> A person's online presence on social media is often a reflection of their offline reality and personal life. However, gaming websites take place in a virtual reality where it is easy to distinguish where reality ends and fiction begins. Perhaps this difference is why women are experiencing severe reactions to online threats and harassment, as it is much more difficult to distinguish which threats are real. In fact, Pew found that around fifty-one percent of women who have "experienced severe harassment online found their most recent incident 'extremely' or 'very' upsetting."<sup>73</sup> Clearly, those who are victims of online threats are suffering from the disruption that fear engenders, and that very disruption has a significant impact on victims' lives. As such, a requisite *mens rea* of recklessness for § 875(c) is necessary to protect victims from these online threats, through acting as a powerful deterrent to perpetrators of online threats and as a necessary tool to ensure convictions under the federal threat statute.

## **B. Threats and the Internet**

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<sup>69</sup> Duggan, *supra* note 11, at 13.

<sup>70</sup> Duggan, *supra* note 11, at 13.

<sup>71</sup> Duggan, *supra* note 11, at 6, 25.

<sup>72</sup> Duggan, *supra* note 11, at 25.

<sup>73</sup> Duggan, *supra* note 11, at 33.

Threats and stalking are often inextricably linked, as a victim of one is often a victim of both, and threats are often included in stalking behavior. When the Internet is used to commit threats and stalking behavior against a victim, the victim suffers in ways that she may not have had the stalking and threats been made offline. Requiring prosecutors to show recklessness by an individual making a threat is particularly important in the context of cyber stalking and internet-based threats, because of the differences in how these crimes are experienced by online victims as opposed to traditional offline threat victims.

Since its inception, the Internet has been utilized to commit cyber crimes.<sup>74</sup> Many people have used the Internet as a means to further extend the reach of their offline criminal behavior. One such criminal behavior that is now easier to commit through the Internet is stalking. The Department of Justice defines stalking as “a pattern of repeated and unwanted attention, harassment, contact, or any other course of conduct directed at a specific person that would cause a reasonable person to feel fear.”<sup>75</sup> Traditional notions of stalking include: repeated, unwanted, intrusive and frightening communications from the perpetrator, leaving or sending the victim unwanted items such as presents or flowers, making direct or indirect threats to harm the victim, damaging or threatening to damage the victims property, or following the victim.<sup>76</sup> Today, the Department of Justice also includes in its stalking definition repeated, unwanted or intrusive communications over the phone or email, as well as posting information or spreading rumors about the victim on the Internet.<sup>77</sup>

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<sup>74</sup> See generally Randy James, *Cyber Crime*, TIME (June 1, 2009), <http://content.time.com/time/nation/article/0,8599,1902073,00.html> (outlining the history of crimes perpetrated online).

<sup>75</sup> *Stalking*, THE DEP'T OF JUST. (July 23, 2014), <http://www.justice.gov/ovw/stalking> (last visited Nov. 22, 2015).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

In fact, cyber stalking and online threats often greatly differ from traditional offline stalking and offline threats. Naomi Harlin Goodno, Assistant Professor of Law at Pepperdine University, outlined several ways in which cyber stalking and traditional offline stalking differ.<sup>78</sup> The first way in which online stalking differs from offline stalking is that when a message is posted online, it is reviewed by a larger audience, than if the same message was spoken to the individual directly.<sup>79</sup> Goodno explains, “content can be widely distributed to a larger, more public forum than any conventional form of offline stalking and it can be done so inexpensively and efficiently.”<sup>80</sup> Goodno points to online forums, chat rooms and message boards, which have the potential for thousands of people to view a single threat.<sup>81</sup> Threats posted on these forums may make a single threat against a victim more serious and severe. Rather than only the intended target viewing the threat, more people will be able to view the harassment or threats and may be able to encourage others to participate or join in the stalking and harassment of the victim. Goodno explains, “perhaps most frightening, and unique to cyber stalking, is that cyber stalkers can incite other ‘innocent’ third parties to do their stalking for them.”<sup>82</sup> What may begin as a single harassing communication may snowball into threats and stalking from an entire online community.<sup>83</sup>

Take, for example, the women who received death threats after posting on social media about the “GamerGate” controversy.<sup>84</sup> As a result, the threats and stalking directed to the women

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<sup>78</sup> See generally Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws* 72 MO. L. REV. 125, 128 (2007).

<sup>79</sup> *Id.* at 128.

<sup>80</sup> *Id.* at 129.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 132.

<sup>83</sup> See Scott Hammack, *The Internet Loophole: Why Threatening Speech on-Line Requires A Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 81-86 (2002) (explaining that the internet allows “like-minded” people to socialize and develop friendships, and “this newfound social structure provides encouragement to perform violent actions, mostly by making their beliefs seem more socially acceptable.”).

<sup>84</sup> GamerGate is a “campaign to discredit or intimidate outspoken critics of the male-dominated gaming industry and its culture.” The name “GamerGate” was “adopted by those who see ethical problems among game journalists and political correctness in their coverage. As a result of GamerGate, many critics of the gaming industry were threatened, however “[t]he more extreme threats. . . seem to be the

involved were “more intense, invigorated by the anonymity of social media and bulletin boards where groups go to cheer each other on and hatch plans for action.”<sup>85</sup> Moreover, compared to traditional means of stalking and communication of threats, such as letters or phone-calls, cyber stalking is instantaneous and remains visible online long after the victim first views the posting or email, allowing for re-victimization every time the victim logs online after.

Another way that cyber stalking and online threats differ from traditional offline stalking is that the perpetrator is able to utilize the Internet to harass and stalk their victims and communicate threats to their victims from anywhere around the world with expediency. Goodno explains the practical reality that victims face, because “[t]he uncertainty of the cyber stalker’s location can leave the victim in a state of constant panic as she is left wondering whether her stalker is in a neighboring house or a neighboring state.”<sup>86</sup> While this may be similar to traditional stalking in the sense that a stalker may contact a victim from anywhere around the world, the Internet provides “cyber stalkers a cheap and easy way to continue to contact their victim from anywhere in the world.”<sup>87</sup> The fast paced reality of the Internet allows stalkers to post threats and frightening messages with the simple click of a button.<sup>88</sup> No longer do stalkers need to wait for a victim to answer the phone or for a letter to be delivered for the stalking and threat to be communicated. The Internet facilitates the delivery of threatening communications to stalking victims.

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work of a much smaller faction and aimed at women.” Nick Wingfield, *Feminist Critics of Video Games Facing Threats in ‘GamerGate’ Campaign*, NY TIMES (Oct. 15, 2014), [http://www.nytimes.com/2014/10/16/technology/gamergate-women-video-game-threats-anita-sarkeesian.html?\\_r=0](http://www.nytimes.com/2014/10/16/technology/gamergate-women-video-game-threats-anita-sarkeesian.html?_r=0).

<sup>85</sup> *Id.*

<sup>86</sup> Goodno, *supra* note 78, at 129.

<sup>87</sup> Goodno, *supra* note 78, at 129-30.

<sup>88</sup> See Hammack, *supra* note 83, at 81-86 (explaining that “the relative low-tech nature of pre-Internet communication allowed longer periods of time between the generation of a thought and one’s ability to share it with others. This delay provided more time for deliberation and self-restraint. Now, in a fit of rage people can email or post a threat, that with even a moment’s reflection they otherwise would not have.”).



Next, cyber stalking and online threats are distinguishable from traditional offline stalking and threats in that cyber stalkers may remain truly anonymous.<sup>89</sup> Though stalkers can remain anonymous through traditional stalking, the Internet is often easily accessible and is associated with anonymity. Individuals who may never have communicated threats or stalked a victim in person are able to more easily “overcome any hesitation, unwillingness, or inabilities he may encounter when confronting a victim in person.”<sup>90</sup> Moreover, when the cyber stalker remains anonymous, the victim is unable to assess the veracity of the stalkers threats, thus contributing to the fear for the victim. Brianna Wu, a woman affected by the GamerGate controversy explained how this affected her: “I woke up twice . . . to noises in the room, gasping with fear that someone was there to murder me. I can barely function without fear or jumpiness or hesitation. I’ve been driven from my home. My husband says he feels like he’s been shot.”<sup>91</sup>

Last, online stalking and online threats differ from their offline counterparts due to police response. The advent of social media is relatively new, and when victims report cyber stalking and online threats to police, they are often met with officers who are unsure of how to respond. When Amanda Hess, a writer for Slate magazine, informed a police officer that someone had threatened to rape and kill her on Twitter, the police officer responded, “What’s Twitter?”<sup>92</sup> This reaction is not rare, and often, police do not take reports of online threats seriously because of their very nature as threats on the Internet. Instead, police are often dismissive of these online threats, and “tell victims that no one is going to come get them.”<sup>93</sup>

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<sup>89</sup> Goodno, *supra* note 78, at 130-31.

<sup>90</sup> Goodno, *supra* note 78, at 130-31.

<sup>91</sup> Brianna Wu, *IT HAPPENED TO ME: I've Been Forced Out Of My Home And Am Living In Constant Fear Because Of Relentless Death Threats From Gamergate*, XOJANE (Oct. 16, 2014), <http://www.xojane.com/it-happened-to-me/brianna-wu-gamergate>.

<sup>92</sup> Amanda Hess, *Why Women Aren't Welcome on the Internet*, PACIFIC STANDARD MAGAZINE (Jan. 6, 2014), <http://www.psmag.com/health-and-behavior/women-arent-welcome-internet-72170>.

<sup>93</sup> Danielle Citron, *Cops Don't Take Harassment of Women Seriously—Especially Online*, TIME (Oct. 17, 2014), <http://time.com/3513763/anita-sarkeesian-hate-crimes/>.

In 2014, online threats turned into a terrifying reality when a college student posted several YouTube videos in which he threatened to harm women for rejecting him, stating:

I am going to enter the hottest sorority house at UCSB and I will slaughter every single spoiled, stuck-up, blond slut I see inside there . . . I will take great pleasure in slaughtering all of you . . . Yes, after I have annihilated every single girl in the sorority house, I'll take to the streets of Isla Vista and slay every single person I see there.<sup>94</sup>

After the last video was posted, the student acted on those threats, first shooting people at a sorority house, and then shooting pedestrians on the street.”<sup>95</sup> After the violence was over, he had killed six people and wounded thirteen others.<sup>96</sup> However, the video warning that the shooter had uploaded was not his first. In fact, his family had expressed their concerns to police regarding several other disturbing videos the shooter had previously posted to YouTube.<sup>97</sup> While police visited the shooter in response to his family’s concerns, no other action was taken as the police determined the shooter appeared “polite and courteous.”<sup>98</sup> The shooter acknowledged, in a written manifesto found after the deadly shooting, that had police actually searched his apartment, they would have found plans for the massacre and the weapon he would eventually use to accomplish the killings.<sup>99</sup>

In her book, *Hate Crimes in Cyberspace*, Danielle Citron highlights the ongoing difficulty of police failing to take these threats seriously. Citron notes, “[t]he majority of law enforcement agencies do not investigate cyber stalking complaints because they lack training to understand the

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<sup>94</sup> Megan Garvey, *Transcript of the disturbing video 'Elliot Rodger's Retribution'*, THE L.A. TIMES (May 24, 2014), <http://www.latimes.com/local/lanow/la-me-ln-transcript-ucsb-shootings-video-20140524-story.html>.

<sup>95</sup> Ian Lovett and Adam Nagourney, *Video Rant, Then Deadly Rampage in California Town*, N.Y. TIMES (May 24, 2014), <http://www.nytimes.com/2014/05/25/us/california-drive-by-shooting.html>.

<sup>96</sup> *Id.*

<sup>97</sup> Antonia Molloy, *California killings: Elliot Rodger's family warned police about killer's disturbing online videos before shootings and stabbings*, INDEPENDENT (May 25, 2014), <http://www.independent.co.uk/news/world/americas/california-killings-elliott-rodger-was-described-as-polite-and-courteous-during-welfare-check-by-9432530.html>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

seriousness of the attacks, the technologies used to perpetrate them and the usefulness of existing laws.”<sup>100</sup> Often, when victims do report these threats to police, instead of receiving help, they are told to stop using the Internet or their social networking websites and to ignore the online threats or cyber-stalking.<sup>101</sup> However, this advice is often difficult to follow, and fails to appreciate the necessity of the Internet or the seriousness of the threats. Today, for many people, both work and home life is inextricably linked to the Internet, smart phones and social networking websites. Smart phones have the capabilities to link work and personal email, social networking websites, phone calls and text messaging to a single device. Pew Research Center estimates around ninety percent of American adults have a cell phone, and around sixty-four percent of American adults have a smartphone.<sup>102</sup> Moreover, the Pew Research Center estimates that seventy-four percent of Internet users use social networking websites, and around forty percent of cell phone owners use social media or a social networking site on their phone.<sup>103</sup> Encouraging victims to simply turn off their devices or computers and log off social networking websites neglects to take into account the way most people live.

Moreover, encouraging victims to simply walk away from their smartphones, computers and their social networking websites is only a very temporary and unrealistic fix to a problem that will not simply “go away” for the victims. It also allows the victims to be victimized by the

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<sup>100</sup> DANIELLE CITRON, HATE CRIMES IN CYBERSPACE 84 (2014).

<sup>101</sup> See WARREN, supra note 12 and accompanying text; see also Citron, supra note 100 (giving examples of police response to online threats and cyber harassment, ranging from advising victims to stay offline and “encouraging victims to ignore the abuse.”). In 2013, Jaclyn Munson, a writer for the Daily Beast, received death threats via Twitter, and contacted the NYPD. Jaclyn Munson, *My Run-In With Anti-Feminist Twitter Death Threats*, THE DAILY BEAST (Sept. 4, 2013), <http://www.thedailybeast.com/witw/articles/2013/09/05/my-run-in-with-anti-feminist-twitter-death-threats.html>. Instead of helping her, they informed her that “this guy is not perfectly capable of causing serious and real harm.” *Id.*

<sup>102</sup> *Cell Phone and Smartphone Ownership Demographics*, PEW RES. CENTER, <http://www.pewinternet.org/data-trend/mobile/cell-phone-and-smartphone-ownership-demographics/> (last visited Nov. 11, 2015).

<sup>103</sup> *Social Networking Fact Sheet*, PEW RES. CENTER, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited Nov. 11, 2015).

perpetrator through forcing them to forgo activities they enjoy or benefit financially from in order to protect their personal safety. Instead, actions must be taken to protect victims from the devastating effects of cyber-stalking and online threats.

### **C. Heightened Level of Online Threats Against Women**

Online threats and cyber stalking disproportionately affect women in different ways. In general, women are subject to higher rates of severe online harassment, including threats made online.<sup>104</sup> These threats can be made by anyone, and women report that the people making these threats are anonymous strangers, friends, family members and ex-romantic partners.<sup>105</sup> Text messaging, email, Facebook, Twitter, Instagram, Tumblr and countless other social networking websites become tools utilized to threaten and harass women. Through necessitating a *mens rea* of recklessness under § 875(c), prosecutors will now have a powerful tool to regulate conduct that most adversely affects women.

In her essay addressing this issue, Amanda Hess explains that while men and women both use the Internet, the majority of threatening and harassing online communications target women.<sup>106</sup> Hess pointed to a study conducted by the University of Maryland in 2006, where researchers created fake online accounts to interact with users in chat rooms.<sup>107</sup> The study found that accounts with female usernames received 25 times more threatening messages than those accounts with male or ambiguous names.<sup>108</sup> When women experience online harassment and threats, much of the harassment is gender-based. The gender based threats and harassment women face stem from an extensive history of discrimination against women, from a society that “promotes male privilege

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<sup>104</sup> Duggan, *supra* note 11, at 3.

<sup>105</sup> Duggan, *supra* note 11, at 27.

<sup>106</sup> Hess, *supra* note 92.

<sup>107</sup> *Id.*; see also *Study Finds Female-Name Chat Users Get 25 Times More Malicious Messages*, A. JAMES CLARK, SCHOOL OF ENGINEERING (May 9, 2006), [http://www.ece.umd.edu/News/news\\_story.php?id=1788](http://www.ece.umd.edu/News/news_story.php?id=1788).

<sup>108</sup> *Study Finds Female-Name Chat Users Get 25 Times More Malicious Messages*, A. JAMES CLARK, SCHOOL OF ENGINEERING (May 9, 2006), [http://www.ece.umd.edu/News/news\\_story.php?id=1788](http://www.ece.umd.edu/News/news_story.php?id=1788).

by being male dominated, male identified, and male centered . . . organized around an obsession with control and . . . the oppression of women.”<sup>109</sup> Online threats against women are distinct from the type that men may face because the online threats toward women often target an “individual’s gender in sexually threatening and degrading ways,” often in an attempt to control, dominate and silence women.<sup>110</sup>

The effects of online threats targeted at women are chilling. Instead of participating fully in society, “young women are deciding not to pursue jobs in technology to avoid the crosshairs of men who don’t think they belong. Women who are being asked to run for public office are choosing to stay on the sidelines once they see the online abuse suffered by their peers.”<sup>111</sup> In effect, women are “sacrificing their freedom of expression for safety and self-preservation.”<sup>112</sup> In a society where three women a day will be murdered by someone they know, it is clear that online communications that harass and threaten women should be taken seriously.<sup>113</sup> The Internet is now an environment where online harassment and online threats are now an expected reality of women’s online experiences, and not enough is done to provide a basic level of protection for women who are victims of online threats.

#### **D. Use of Technology to Commit Domestic Violence**

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<sup>109</sup> ALLAN G. JOHNSON, *THE GENDER KNOT* 5 (2007).

<sup>110</sup> Danielle Citron, *Law's Expressive Value in Combating Cyber Gender Harassment* 108 MICH. L. REV. 373, 378 (2009).

<sup>111</sup> Katherine Clark, Opinion, *Sexism in cyberspace*, THE HILL (Mar. 10, 2015) <http://thehill.com/opinion/oped/235070-sexism-in-cyberspace>.

<sup>112</sup> *Id.*

<sup>113</sup> See Kaofeng Lee, *Each day, 3 women die because of domestic violence*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/getinvolved/dvam/1307-dvam-blog-series-1.html>. Additionally, in January 2016 alone, “112 people were killed in suspected intimate partner homicides, including children and bystanders. Men committed 89 percent of the alleged fatal attacks, and 77 percent of the victims were women.” Melissa Jeltsen, *This Is Not A Love Story: America’s Deadly Domestic Violence Problem*, THE HUFFINGTON POST (2016) <http://testkitchen.huffingtonpost.com/this-is-not-a-love-story/>.

The use of technology to commit domestic violence is a significant problem in the United States, as more and more women are subject to cyber stalking and online threats. Women are at a greater overall risk of experiencing stalking than men.<sup>114</sup> Often, women are exposed to cyber stalking and online threats through domestic violence. The United States Department of Justice defines domestic violence as “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.”<sup>115</sup> Domestic violence includes physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person, and include any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.<sup>116</sup>

In an *amicus brief*, the National Network to End Domestic Violence explained that “these perpetrators are increasingly posting to social media with descriptions of what they intend to do to their victims and disclosures of personal, damaging, or humiliating information or pictures of them.”<sup>117</sup> As technology grows, more and more women are experiencing domestic violence through cyber stalking and online threats and the “exponential growth of technology and its impact on the way we communicate will only increase the incidence of ‘high-tech’ stalking as more digitally-native generations mature.”<sup>118</sup> In fact, the National Network to End Domestic Violence (“NNEDV”) has found that batterers often misuse technology to monitor, harass, impersonate, and stalk victims.<sup>119</sup> NNEDV conducted a survey with victim service providers, and found that “[t]he

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<sup>114</sup> Baum, Catalano & Rand, *supra* note 19.

<sup>115</sup> *Domestic Violence*, U.S. DEPT. OF JUST. (Oct. 6, 2015), <http://www.justice.gov/ovw/domestic-violence>.

<sup>116</sup> *Id.*

<sup>117</sup> Brief for the Nat’l Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondents at 12, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

<sup>118</sup> *Id.* at 13.

<sup>119</sup> *A Glimpse From the Field: How Abusers Are Misusing Technology*, NAT’L NETWORK TO END DOMESTIC VIOLENCE (2014), [http://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/54e3d1b6e4b08500fcb455a0/1424216502058/NNEDV\\_Glimpse+From+the+Field+-+2014.pdf](http://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/54e3d1b6e4b08500fcb455a0/1424216502058/NNEDV_Glimpse+From+the+Field+-+2014.pdf).

top 3 types of technology that abusers used to harass survivors were through texting (96%), social media accounts (86%), and email (78%).”<sup>120</sup> Move over, NNEDV found that around fifty-five percent of abusers post abusive content on social media.<sup>121</sup> In the end, the survey concluded that the widespread use of technology was now being used as a tool “that easily facilitates abusers’ control.”<sup>122</sup> New forms of technology have made it far easier in allowing perpetrators of domestic violence to control, manipulate, intimidate and threaten their victims. Batterer’s misuse of the Internet and social networking websites allows abusers to control and threaten their victims, without ever having to leave their home. In one instance, a batterer publically announced on his Facebook page what he planned to do to his wife, including his plans “to hogtie her, put her in a trunk, pull out her teeth one by one, then pull off her finger and toe nails, and chop her into pieces, but keep her alive long enough to feel all the hurt and pain.”<sup>123</sup>

These threats of violence, including online threats, are indicators of the likelihood of physical violence a woman may experience.<sup>124</sup> In another instance, one husband sent his estranged wife several text messages, including that “She better enjoy her last day in the motel[.] Get ready for the shocker” and “Until death do us part bitch.”<sup>125</sup> Months after he sent those text messages, he shot his wife in the head.<sup>126</sup> Many lethality and risk assessments surveys, which are tools that are used in determining a victim’s risk of being killed by her partner, have highlighted threats of violence as a risk factor that is associated with an increased risk of murder for the victim.<sup>127</sup> Taken

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Brief for the Nat’l Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondents at 5, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

<sup>124</sup> Joanne Belknap et. al., *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 DUKE J. GENDER L. & POL’Y 373, 378 (2012).

<sup>125</sup> *Dickens v. State*, 927 A.2d 32, 35 (Md. Spec. App. 2007).

<sup>126</sup> *Id.*

<sup>127</sup> See Jacquelyn C. Campbell, *Danger Assessment*, JOHNS HOPKINS U., SCH. OF NURSING (2004), <https://www.dangerassessment.org/DA.aspx>.

alone, a single threat posted on a social networking website or sent through a text message may not rise to a level of significant concern; however, in the context of domestic violence, these threats are often followed through with actual physical violence. At times, this violence can be lethal.

#### **IV. Strengthening 18 U.S.C. § 875(c) to Protect Victims of Online Threats**

While there are different laws that address online threats and cyber stalking, § 875(c) is an already existing statute that specifically makes it a crime to transmit a threat to injure a person through interstate communications.<sup>128</sup> In the aftermath of *Elonis v. United States*, the Supreme Court left the question of *mens rea* to the lower courts to decide, explaining if a person transmits a threat with the purpose of issuing a threat, or with the knowledge that the communication will be viewed as a threat, the requisite mental state for § 875(c) will be satisfied.<sup>129</sup> However, the Court did not address the question of whether recklessness would be sufficient for conviction under § 875(c).

##### **A. A Requirement of Recklessness Creates a Clearer Standard to Prosecute Online Threats**

The Supreme Court has long established that in situations where a federal statute does not expressly state the requisite mental state, it is only required to “read into a statute” the *mens rea* “which is necessary to separate wrongful conduct from otherwise innocent conduct.”<sup>130</sup> In *Elonis*, the Court explained that the legal element that separated innocent conduct from wrongful conduct was “the threatening nature of the communication,” therefore, “the mental state requirement must . . . apply to the fact that the communication contains a threat.”<sup>131</sup> While the Court held that the minimum *mens rea* level of negligence (where an actor should be aware of a substantial and

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<sup>128</sup> 18 U.S.C. § 875(c) (2016).

<sup>129</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015).

<sup>130</sup> See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *Carter v. United States*, 530 U.S. 255, 269 (2000).

<sup>131</sup> *Elonis*, 135 S. Ct. at 2011.



unjustifiable risk) was not sufficient for conviction under § 875(c), reading recklessness into § 875(c) as the requisite *mens rea* will clearly and sufficiently separate innocent conduct from wrongful and criminal conduct.<sup>132</sup>

Justice Alito, in his concurrence in *Elonis*, explained “once we have passed negligence . . . no further presumptions are defensible . . . and when Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed.”<sup>133</sup> Moreover, Justice Alito explained that “[t]here can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct” and cited several cases where the Court had described reckless conduct as morally culpable.<sup>134</sup> For example, in *Farmer v. Brennan*, the Court held that deliberate indifference to inmates harm was morally culpable.<sup>135</sup> The Court equated deliberate indifference with recklessness, and held that while deliberate indifference required something more than negligence, “it was satisfied by something less than acts for the very purpose of causing the harm, or with knowledge that harm will result.”<sup>136</sup> In *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*, the Court held that civil libel and criminal libel were morally culpable when the statement was false, and made with reckless disregard of whether the statement was true or false.<sup>137</sup> Finally, in *Tison v. Arizona*, the Court held that reckless indifference to human life may justify the death penalty.<sup>138</sup>

A person acts recklessly when “he consciously disregards a substantial and unjustifiable risk that the material element [of the crime] exists or will result from his conduct.”<sup>139</sup> Moreover,

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<sup>132</sup> MODEL PENAL CODE § 2.02 general requirements of culpability (2016).

<sup>133</sup> *Elonis*, S. Ct. at 2015 (2015) (Alito, J., concurring).

<sup>134</sup> *Id.*

<sup>135</sup> *Farmer v. Brennan*, 511 U.S. 825, 837(1994)).

<sup>136</sup> *Id.* at 835.

<sup>137</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

<sup>138</sup> *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

<sup>139</sup> MODEL PENAL CODE § 2.02 general requirements of culpability (AM. LAW INST. 2016).

“the risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>140</sup> In the context of cyber stalking and online threats, whether or not a person actually knows that someone will view the communications as a threat should not matter. Criminal culpability should attach when the person who is communicating a threat is aware of a risk that someone will view the statement as a threat, and chooses to deliberately disregard that risk and communicate the threat anyway. With a requirement of recklessness, the government will have to show that the actor was aware of a substantial and unjustifiable risk that his words may be received as threats, and that the actor consciously disregarded that risk, rather than prove that what the actor actually intended his words to be. As such, recklessness allows for a clear distinction between innocent conduct, and the wrongful conduct that engenders fear in victims.

A heightened *mens rea* requirement of purpose or knowledge would serve only to hurt victims of online threats, who would inevitably have to deal with the harmful aftermath of the threats. True threats were prohibited to protect “individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.”<sup>141</sup> Requiring a *mens rea* of purpose or knowledge in § 875(c) will be “dangerously under-inclusive” in future threat prosecutions and will undermine the protections that a prohibition on threats affords victims.<sup>142</sup> Moreover, requiring knowledge or purpose does not protect against the harms that these threats cause, and “effectively decriminalize[s] conduct that predictably and

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<sup>140</sup> *Id.*

<sup>141</sup> *Virginia v. Black*, 538 U.S. 343, 344 (2003).

<sup>142</sup> Brief for the Nat’l Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondents at 17, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

reasonably creates a genuine fear of violence with all its attendant psychological, emotional, economic, and social disruptions.”<sup>143</sup>

With a knowledge or purpose standard, it will be much more difficult to convict under § 875(c). Often, it may be difficult or impossible to prove what is going on inside an actor’s own mind. It is often difficult to understand exactly why someone chose the words they did in conveying a message that contains a threat, and whatever private reason a speaker would have for “expressing himself in the way that he did - whether he really meant to convey a threat or instead had other undisclosed reasons for making the statement in question - are never directly accessible to his audience.”<sup>144</sup> Despite undisclosed reasons, the negative effect on the victim remains the same, and “some people may experience a therapeutic or cathartic benefit only if they know their words will cause harm.”<sup>145</sup> A threat to kill or harm another individual still causes fear and disruption for that person, and ultimately has a detrimental effect on that individual’s life.<sup>146</sup>

Moreover, if § 875(c) requires a *mens rea* of purpose or knowledge to secure a conviction, a defendant could potentially avoid liability and conviction by claiming “he was voluntarily intoxicated, or had some other form of diminished capacity that he claims prevented him from forming the requisite intent, when he made the threats.”<sup>147</sup> Additionally, a defendant may argue that he was not communicating a threat, but instead was simply engaging in therapeutic venting.

<sup>148</sup> This argument is not new, and in *State v. Slide*, after threatening a judge, the defendant argued

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<sup>143</sup> Brief for the Nat’l Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondents at 22, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Brief for the Nat’l Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondents at 17-25, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

<sup>147</sup> Brief for Appellee at 33, *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013) *cert. granted*, 134 S. Ct. 2819 (2014) *rev’d and remanded*, 135 S. Ct. 2001 (2015).

<sup>148</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring).

that a jury could have “reasonable doubt as to whether it might have been intended simply as artistic emotional venting.”<sup>149</sup>

Finally, like *Elonis*, a defendant may claim that a communication is not a threat, but instead is a creative song or poem. In *U.S. v. Heineman*, the defendant e-mailed a “poem” which resulted in making the recipient fearful for his life.<sup>150</sup> Whether it is a poem, a song, therapeutic venting or a drunken threat, the words still carry a threat to the intended target. Moreover, these defenses to a charge of communicating a threat negate the experiences of the victims, as the harm to the victim remains the same whether or not the threat was a poem, song, therapeutic venting or a drunken threat. In *Elonis*, *Elonis* should have been aware that his ex-wife would view the statements as a threat, and yet he still posted his threatening “songs” and “therapeutic rants” on his Facebook.<sup>151</sup> Under a recklessness standard, that alone would have been enough to convict him. However, allowing a *mens rea* of knowledge or purpose would significantly narrow the type of threats that can be criminally prosecuted under § 875(c), which will severely diminish the available protections for victims of online threats and cyber-stalking.

## **B. A Requirement of Recklessness Will Protect Individuals from Online Threats**

Misunderstandings in online or text message communications are common. When we speak to a person face to face, we are better able to interpret the meaning of what they are saying through tone, facial expressions, body language and pacing.<sup>152</sup> A sentence can sound friendly in

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<sup>149</sup> *State v. Side*, 21 P.3d 321 (Wash. Ct. App. 2001).

<sup>150</sup> *U.S. v. Heineman*, 767 F.3d 970 (10th Cir. 2014).

<sup>151</sup> Transcript of Record, at 232, *Elonis v. United States*, 135 S. Ct. 2001 (2015).

<sup>152</sup> Daniel Goleman, *E-Mail Is Easy to Write (and to Misread)*, NY TIMES (Oct. 7, 2007), [http://www.nytimes.com/2007/10/07/jobs/07pre.html?\\_r=0](http://www.nytimes.com/2007/10/07/jobs/07pre.html?_r=0).

one instance, and menacing the next, depending on the body language and tone of the speaker. In online communications, readers are unable to see facial expressions or body language and are able to hear the speaker's tone or pace. In fact, "we tend to misinterpret positive . . . messages as more neutral, and neutral ones as more negative, than the sender intended. Even jokes are rated as less funny by recipients than by senders."<sup>153</sup>

One way that people have attempted to remedy issues such as this is through the use of emoticons or emoji.<sup>154</sup> For example, Anthony Elonis claimed that a Facebook post in which he advocated matricide against his wife was made in "jest," as he followed the threat with an emoticon of a face with a tongue sticking out.<sup>155</sup> While emoticon's can be seen as an attempt to address the problem of determining what a speaker means in an online communication, they are not an adequate solution. In 2011 a University of Michigan Law student alerted authorities that a fellow classmate had been harassing and stalking her, and had sent intimidating text messages about her to her friends.<sup>156</sup> One threatening text message included an emoji of a face with a tongue sticking out, and again, like in *Elonis*, the perpetrator suggested that the emoji indicated the text message was meant to be taken as a joke.<sup>157</sup> The judge, however, explained that "the inclusion of the emoticon, a '-D,' which appears to be a wide open-mouth smile, would not help [the perpetrator]. It does not materially alter the meaning of the text message."<sup>158</sup> Moreover, a linguistics scholar has noted that certain emoticons, such as a face tongue sticking out or a "winky" face are harder

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<sup>153</sup> *Id.*

<sup>154</sup> Merriam-Webster's dictionary defines an emoticon as "a group of keyboard characters that are used to represent a facial expression (such as a smile or frown)." *Emoticon*, MERRIAM-WEBSTER'S DICTIONARY (2015). An emoji is "is a graphic symbol, ideogram, that represents not only facial expressions, but also concepts and ideas, such as celebration, weather, vehicles and buildings, food and drink, animals and plants, or emotions, feelings, and activities." Petra Kralj Novak, Jasmina Smailović, Borut Sluban & Igor Mozeti, *Sentiment of Emojis*, JOŽEF STEFAN INST. (2015), <http://arxiv.org/pdf/1509.07761v2.pdf>.

<sup>155</sup> Brief for Petitioner at 20, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

<sup>156</sup> *Enjaian v. Schlissel*, 14-CV-13297, 2015 WL 3408805, at \*2 (E.D. Mich. May 27, 2015).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

to interpret than a smiling or frowning face, as “research has shown that the wink and the tongue are often used to denote teasing or flirting, and interpreting the subtext of those activities requires the reader to understand the power dynamics between texter and recipient. Depending on the context, the emoticons can read as either creepy or cute.”<sup>159</sup>

When reading a Facebook post or a text message, two people can read the same message and understand very different meanings behind it. The NNEDV has outlined several factors that should be taken into account in determining the context of an online threat.<sup>160</sup> These factors include how the words are likely to be understood and whether a reasonable person would interpret the words as threatening, given the identity of the speaker and the listening, the nature of the speaker and the listener, and how the words are communicated.<sup>161</sup> The NNEDV explains that “victims are often the best assessors of the risk that the threats of violence they face will be carried out.”<sup>162</sup> Understanding the context of the messages will allow a law enforcement and prosecutors to discover a simple message’s hidden meaning. A recklessness standard in § 875(c) will allow for a careful review of context in online threat situations and will allow courts to protect victims of online threats. While context can still be ascertained under a purpose or knowledge standard, context in a reckless standard is even more crucial, as it lessens the likelihood of factitious defenses of threats that are meant to be taken as jokes, or threats that are simply creative expressions online.

For example, for the women targeted during the GamerGate controversy, a recklessness standard would have allowed prosecutors to prosecute under § 875(c), as the women were the

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<sup>159</sup> Amanda Hess, *Exhibit A: ;*), SLATE (Oct. 26, 2015, 4:34 PM), [http://www.slate.com/articles/technology/users/2015/10/emoticons\\_and\\_emojis\\_as\\_evidence\\_in\\_court.2.html](http://www.slate.com/articles/technology/users/2015/10/emoticons_and_emojis_as_evidence_in_court.2.html); See generally Tyler Schnoebelen, *Do You Smile with Your Nose? Stylistic Variation in Twitter Emoticons*, U. OF PENN. WORKING PAPERS IN LINGUISTICS (2012), <http://repository.upenn.edu/cgi/viewcontent.cgi?article=1242&context=pwpl>.

<sup>160</sup> Brief for the Nat’l Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondents at 19, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at n.34.

victims of a targeted campaign of online harassment and cyber stalking.<sup>163</sup> Though the women often did not know the identity of their cyber stalkers, the stalkers knew the women's home addresses and personal information, and that information was disseminated among the stalkers. Furthermore, many of the women know that the stalkers had knowledge of their home addresses and information, and they had begun receiving death threats at their homes. An individual who communicated a threat to physically injure any of these women, and was aware that they may view that communication as a threat, but disregarded that risk and communicated that threat anyway, acted recklessly, and should be subject to criminal culpability under § 875(c).

Additionally, in the context of domestic violence, threats “are inevitably interpreted in light of that history and against the backdrop of an ever-present awareness of the correlation between threats of violence and the likelihood the threats will one day be carried out.”<sup>164</sup> Interpreting a threat from an online post can only be determined through the context of the words and the “audience’s shared understandings and expectations of what particular words mean when they are used in a particular way, in a particular context.”<sup>165</sup> For example, in *Elonis*, Elonis posted the threatening speech to his Facebook page after his wife had gotten a civil protection order. When Tara interpreted Elonis’s words, there was “no way to hear if there’s laughter in his voice . . . [b]ut we know he’s angry, he’s been fired from his job, he’s been known to sexually harass women. When we don’t have physical cues, it makes the threat more frightening.”<sup>166</sup> Elonis could have reasonably foreseen what Tara’s reaction would be, as his threatening speech was an attempt “to

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<sup>163</sup> See *supra* Part III.B.

<sup>164</sup> Brief for the Nat’l Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondents at 19, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

<sup>165</sup> *Id.*

<sup>166</sup> Jessica Valenti, *Free Speech is a Bad Excuse for Online Creeps to Threaten Rape and Murder*, THE GUARDIAN (June 18, 2014), <http://www.theguardian.com/commentisfree/2014/jun/18/free-speech-online-creeps-cyberbullying-laws>.

get inside her head and make her think there could be someone doing violence to her.”<sup>167</sup> In fact, “Elonis’s threats must be understood in an environment where 40% to 50% of murdered women are killed by people they know well.”<sup>168</sup> As such, a recklessness standard will allow a court to view the threat in light of the actual context of the threat and discover its veiled and hidden meanings. Through strengthening § 875(c) with a *mens rea* of recklessness, prosecutors will have a stronger tool to protect victims of domestic violence from further violence at the hands of batterers. Batterers are highly aware of the effects their words have on their victims, and when they chose to threaten their victims, they are consciously disregarding the risk that these words may be perceived as a threat. With a *mens rea* of recklessness, the batterer’s threats alone would be enough to bring prosecutions against the batterer. This would allow law enforcement and prosecutors to intervene before the batterer actually carries out the threat, preventing a potentially deadly and devastating outcome.

### **C. Additional Efforts to Fight Online Threats**

While a recklessness standard under § 875(c) is needed to strengthen the already existing federal threat statute, it is only a single step in a much larger movement. There is still much more that needs to be done to fully protect victims of online threats and harassment. On February 10, 2016, Zoe Quinn announced that she would be no longer pressing charges against her ex-boyfriend, who helped commit her online harassment.<sup>169</sup> In a blog entry explaining her decision, she wrote “the criminal justice system is meant to punish, not protect . . . And they’ve done nothing to protect me - it’s only made things worse and become another weapon in his arsenal, and the

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<sup>167</sup> Nina Totenberg, *Is a Threat Posted on Facebook Really a Threat?*, NPR (Dec. 1, 2014), <http://www.npr.org/2014/12/01/366534452/is-a-threat-posted-on-facebook-really-a-threat>.

<sup>168</sup> Soraya Chemaly and Mary Anne Franks, *Supreme Court May Have Made Online Abuse Easier*, TIME (June 3, 2015) <http://time.com/3903908/supreme-court-elonis-free-speech/>.

<sup>169</sup> Zoe Quinn, *Why I Just Dropped The Harassment Charges The Man Who Started Gamergate.*, TUMBLR (Feb. 10, 2016), <http://blog.unburntwitch.com/post/139084743809/why-i-just-dropped-the-harassment-charges-the-man>.



arsenal of the people out there way scarier than him.”<sup>170</sup> Realizing that the justice system was failing to protect her, and women like her, Zoe Quinn created the Crash Override Network, a community dedicated to helping individuals who are the targets of online harassments and threats through providing public resources, private casework and institutional outreach.<sup>171</sup>

Though efforts by non-profits can help victims of online threats, more acknowledgement of the severity of online threats is needed by social networking websites. These websites often harbor online threats, and stronger response is required by these websites to offer more protection to their users. However, some websites are beginning to recognize the role they play in the occurrence of online threats. On February 9, 2016, Twitter recognized its role in online harassment and threats, and announced the creation of the “Trust and Safety Council,” which will help fight online abuse, including behavior “intended to harass, intimidate, or use fear to silence another user’s voice.”<sup>172</sup> The Council is comprised of over 40 organizations, and is intended to create policies that will create a safer environment on Twitter.<sup>173</sup>

Additionally, Congress has also responded to the prevalence of online threats through proposed legislation. On March 15, 2016, Representative Katherine Clark introduced a new federal bill, called the Cybercrime Enforcement Training Assistance Act of 2016. The Cybercrime Enforcement Training Assistance Act would establish federal grants to train law enforcement personnel, prosecutors, and judges to identify and investigate cybercrimes with the goal of protecting victims of cybercrimes.<sup>174</sup> The bill would also establish federal grants to train law

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<sup>170</sup> Id.

<sup>171</sup> *How Can We Help?*, CRASH OVERRIDE NETWORK, <http://www.crashoverridenetwork.com/about.html> (last visited Mar. 13, 2016).

<sup>172</sup> Patricia Cartes, *Announcing the Twitter Trust & Safety Council*, TWITTER (Feb. 9, 2016), <https://blog.twitter.com/2016/announcing-the-twitter-trust-safety-council>; *Trust and Safety Council*, TWITTER, <https://about.twitter.com/safety/council> (last visited Mar. 13, 2016).

<sup>173</sup> Cartes, *supra*, note 173.

<sup>174</sup> Cybercrime Enforcement Training Assistance Act of 2016, H.R. 4740, 114<sup>th</sup> Cong. (2016).

enforcement personnel, prosecutors, and judges to enforce the laws that already prohibit cybercrimes.<sup>175</sup> In a column published by The Hill, Representative Clark explained that the bill is an effort to address all of the types of intense online abuse faced by women, from domestic violence victims to journalists, noting that “[w]e must not allow the Internet to be closed to female voices, and intensifying the enforcement of existing law is a critical first step to ensure the Internet is open to everyone.”<sup>176</sup>

## V. Conclusion

The online community has proven itself to be an unwelcoming environment for many. The economic, emotional, and psychological effects of online harassment are widespread and devastating. While online harassment and online threats effect many people, it disproportionately impacts women and other vulnerable communities.<sup>177</sup> Despite a growing awareness, the online community is still a place where many people, from strangers to ex-romantic partners, feel that they can attack, threaten, harass and stalk people, often women, without any consequences and with impunity. However, through strengthening the already existing federal threat statute, law enforcement and prosecutors can begin to combat online threats. With a requirement of a *mens rea* of recklessness under § 875(c), an individual who is aware of a substantial and unjustifiable risk that his words may be received as threats, and yet consciously disregards that risk, and threatens his victim anyway will be held criminally accountable for his actions. Individuals who utilize online communications to threaten others will no longer be able to hide behind justifications of their Internet anonymity, or that their communications were simply “jokes,” “artistic expression,” or “therapeutic rants.” Instead, with a *mens rea* requirement of recklessness under §

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<sup>175</sup> H.R. 4740.

<sup>176</sup> Clark, *supra* note 111.

<sup>177</sup> See *supra* Part IV.

875(c), law enforcement, prosecutors and judges can offer further protection for these victims through a strengthened federal threat statute. Victims of online threats will finally be able to hold perpetrators of online harassment and threats accountable for their actions.