2023

The Mens Rea Requirement Under 875(c)

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I. Introduction of 875(c)

A) General Background

"Land of the free and home of the brave." While this famous slogan rings true in many aspects of American citizens lives today, including speech, it is no mistake this slogan is not without limits. For example, as seen in Virginia v Black, the government has the right to criminalize true threats. 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. The speaker need not actually intend to carry out the threat.[1] These limits are not only constrained to our speech in person, but also in regard to our communication online.

In 1946 congress enacted 18 U.S. Code § 875 Interstate communications which governs the demand or request for ransom for the release of a kidnapped person, the intent to extort for a threat to person to kidnap or other, whoever transmits a threat to injure, and whoever with the intent to extort transmits a threat to injure property or reputation.[2] It is important to note there is no clear mens rea for 875(c), while other prongs of the statute include the term "with intent".[3]

Throughout this paper we will be analyzing the current standard of intent for 875(c) required under Elonis but also various other possible standards. The reason I am writing about this topic is Mr. Elonis stalked my sister in middle school and continues to brag about how he never "learned his lesson".

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[1] In Virginia v Black The United States Supreme Court held, While cross-burning could constitute expression, such expressive conduct was not proscribed unless it was done with the intent to intimidate. However, a plurality of the Supreme Court found any cross-burning was prima facie evidence of intent to intimidate Virginia v. Black, 538 U.S. 343, 347, 123 S. Ct. 1536, 1541 (2003).

[2] 18 U.S.C § 875

[3] Id.

B) My Sisters Experience With Mr. Elonis

Growing up my sister attended Northeast Middle School in Bethlehem. In only 6th grade she became of this weird kid "Dougie" (Mr. Elonis), that would stare at her throughout class. Soon after these stares became stalking as Mr. Elonis began following my sister from the school all the way to my mother's car. After numerous unsuccessful attempts to notify the school and have something done about the situation, the middle school confiscated a note written by Mr. Elonis of sexual acts he wanted to perform on my sister. Soon after my sister was brought in to a conference at the school where Mr. Elonis was represented by an attorney. Unsure if he was asked to leave or expelled, Mr. Elonis never returned to Northeast Middle School again. Flash forward to my sisters freshmen year of high school, my sister was in the library when she ran into Mr. Elonis again. He then followed my sister as she left the area until she requested help from other gentleman in the hallway. This was the last time my sister would see Mr. Elonis in person but it not the last time she would hear from him.

While I do believe that people can change, particularly from when they were a minor, I am afraid that this is not the case when it comes to Mr. Elonis. About two years ago, Mr. Elonis attempted to reach out to my sister. Mr. Elonis messaged her on Facebook stating," Do you remember me? If so, I apologize for what I did to you all those years ago at Northeast. I guess I never really learned my lesson because I continued my behavior through adulthood and was rewarded with a successful case before the United States Supreme Court." After my sister blocked that profile, Mr. Elonis soon messaged her again saying "Hi" from another Facebook account. Following these messages from Mr. Elonis, my sister instructed the rest of my family to block the accounts. When proceeding to block the accounts, my other sister saw a post along

from Mr. Elonis eluding to my sister being disrespectful for not responding and the he had "changed someone's life".

From my sister's experience with Mr. Elonis it is clear not only that he has been a lifetime offender, but he continues to try to harass women on Facebook. This may be a learned behavior, seen from him and his family using a lawyer even when he was a child to defeat harassment claims. However, not only does bragging about winning his case shows a lack of remorse for his victims, but also continuing to attempt to message my sister shows he will continue to harass people on Facebook. I understand the first amendment concerns of the court, however 875(c) should not create loopholes for people like Mr. Elonis to harass their victims so long as it is disguised as a song.

II. Mens Rea

A) Mens Rea When Legislation Is Silent

Mens rea refers to the state of mind statutorily required in order to convict a particular defendant of a particular criminal. The Model Penal Code recognizes four different levels of mens rea: purpose (same as intent), knowledge, recklessness and negligence.[4] Having no mens rea in a statute may be disfavored for criminal culpability but not fatal.[5] In Staples, a man was indicted for unlawful possession of an unregistered machinegun following the recovery of a weapon from his home. At trial, petitioner testified that the weapon had never fired automatically, and that he was ignorant of the weapon's automatic firing capability. The district court rejected his contention that § 5861(d) contained a mens rea requirement. However, the Supreme court overturned holding to obtain a conviction under the Act, the government was

[4] Mens Rea, Legal Informative Institute (2022). https://www.law.cornell.edu/wex/mens_rea
[5] Staples v. United States,511 U.S. 600(1994).

required to prove that petitioner knew of the features of his weapon. The court noted that the silence as to the mens rea requirement in § 5861(d) did not suggest a congressional intent that such requirement be eliminated. The court noted that the potentially harsh penalty attached to a violation of § 5861(d) provided further support for the proposition that a mens rea requirement existed.[6]

B) Circuit Splits Before Elonis

Before Elonis there was uncertainty of what mens rea was required to apply to 875(c). Nine circuit courts, although they have slight differences, had found that an objective standard is enough to convict. While only two circuits have held that a defendant must be found to have a subjective intent to threaten. [7]

The First Circuit adopted the Fulmer test and applied the standard of whether the defendant could reasonably foresee that others would perceive his statement as a threat.[8] The First Circuit explained the objective standard protects a speaker from being punished for making innocent comments a sensitive listener perceives as a threat. Additionally, it protects the listener from statements "reasonably interpreted as threats" even when the speaker has no subjective intent.[9] The Sixth Circuit stressed the defendant's intent does not matter; instead, what matters is how a reasonable observer would interpret the statements. [10] Similarly, the Seventh Circuit relied on a

[6] Id.
[7] Georgette Geha, Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After Elonis, 50 J. Marshall L. Rev. 167 (2016) https://repository.law.uic.edu/lawreview/vol50/iss1/6
[8] United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997).
[9] ID. The Fulmer test provides that "whether he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made."
[10] United States v. Jeffries, 692 F.3d 473 (6th Cir. 2012). The sixth circuit held a man who wrote song lyrics threatening a judge was guilty regardless of intent.

knowing standard from a similar statute.[11] The Third Circuit stressed that requiring subjective intent fails to protect individuals who see violent posts from fear.[12]

The Ninth and Tenth Circuits were the only circuit courts to hold the minority view that subjective intent is required to convict someone for making threats.[13]). In United States v Cassel the Ninth Circuit construed the true threats doctrine to require an intent to threaten. It reasoned that intent separates "protected expression from unprotected criminal behavior."[14] Similarly, in United States v. Heineman the Tenth Circuit required the speaker intend for the listener to believe he or she desires to carry out the threat.[15]

III. The Elonis Case

A) Background Facts of The Elonis Case

Out of the third circuit and Pennsylvania we areive at Elonis v US.[16] In May 2010, Elonis's wife of seven years moved out of their home with their two young children. Following this

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[11] United States v. Stewart, 411 F.3d 825 (7th Cir. 2005) a court held specific intent was not needed to find a man who threatened to blow up a building. The court stated," we see no meaningful distinction between the text of 18 U.S.C. § 875(c) and the part of 18 U.S.C. § 876 relied on in Khorrami and Aman. True, § 876(c) explicitly includes the word "knowingly" ("Whoever knowingly so deposits or causes to be delivered") and § 875(c) is silent as to the appropriate mental state ("Whoever transmits"). But we do not see, and Stewart declines to argue, how this textual difference should lead to a more strenuous mens rea requirement for § 875(c)."

[12] United States v. Elonis, 730 F.3d 321 (3d Cir. 2013)

[13] Georgette Geha, Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After Elonis, 50 J. Marshall L. Rev. 167 (2016) https://repository.law.uic.edu/lawreview/vol50/iss1/6

[14] United States v. Cassel, 408 F.3d 622, 635 (9th Cir. 2005) In US v Cassell the court held 18 U.S.C. § 1860 includes a mens rea element of subjective intent. "It is not enough that the defendant intend to influence the potential bidder; rather, he must intend to do so by means of a threat." United States v. Cassel, 408 F.3d 622, 635 (9th Cir. 2005)

[15] United States v. Heineman, 767 F.3d 970 (10th Cir. 2014) In Us v Heineman, the court found the defendant's conviction under 18 U.S.C.S. § 875(c) for an e-mail espousing white supremacist ideology sent to a university professor that made the professor fear for his safety and the safety of his family, violated the First Amendment because Black required the government to prove that defendant intended the professor to feel threatened, and the district court only found that defendant knowingly sent an e-mail that caused the professor, as recipient, to reasonably fear bodily harm.

[16] United States v. Elonis, 730 F.3d 321 (3d Cir. 2013)

separation, Elonis began experiencing trouble at work at Dorney Park & Wildwater Kingdom amusement park as an operations supervisor and a communications technician.[17]

On October 17, 2010 Elonis posted on his Facebook page a photograph taken for the Dorney Park Halloween Haunt. The photograph showed Elonis in costume holding a knife to Morrissey's neck. Elonis added the caption "I wish" under the photograph. Elonis's supervisor saw the Facebook posting and fired Elonis that same day.[18]

Two days after he was fired, Elonis began posting violent statements on his Facebook page. Elonis also began posting statements about his estranged wife, Tara Elonis, including the following: "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder."[19] Based on these statements a state court issued Tara Elonis a Protection From Abuse order against Elonis.

Following the issuance of the state court Protection From Abuse order, Elonis posted several statements on Facebook expressing intent to harm his wife.[20] This statement was the basis both of Count 2, threats to Elonis's wife, and Count 3, threats to local law enforcement. A post the following day on November 16 involving an elementary school was the basis of Count 4.[21] After

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[17] Id. One of the employees Elonis supervised, Amber Morrissey, made five sexual harassment reports against him. According to Morrissey, Elonis came into the office where she was working alone late at night, and began to undress in front of her. She left the building after he removed his shirt. Morrissey also reported another incident where Elonis made a minor female employee uncomfortable when he placed himself close to her and told her to stick out her tongue

[18] Id.

[19] Id. Elonis also posted in October 2010: “There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch…”

[20] Id. On November 15 Elonis posted on his Facebook page: Fold up your PFA and put it in your pocket Is it thick enough to stop a bullet? Try to enforce an Order That was improperly granted in the first place…” Referring to the local police Elonis mentioned “…And if worse comes to worse I've got enough explosives to take care of the state police and the sheriff's department”

[21] Id. Elonis posted,”Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined And hell hath no fury like a crazy man in a kindergarten class The only question is . . . which one?”

reading these and other Facebook posts by Elonis, Agent Stevens and another FBI agent went to Elonis's house to interview him. The agents waited several minutes until Elonis came to the door wearing a t-shirt, jeans, and no shoes. Elonis asked the agents if they were law enforcement and asked if he was free to go. After the agents identified themselves and told him he was free to go, Elonis went inside and closed the door. Later that day, Elonis posted again on Facebook. These statements were the basis of Count 5 of the indictment.[22]

Elonis was arrested on December 8, 2010 and charged with transmitting in interstate commerce communications containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c).[23] Elonis moved to dismiss the indictments against him, contending the Supreme Court held in Virginia v. Black, that a subjective intent to threaten was required under the true threat exception to the First Amendment and that his statements were not threats but were protected speech.[24] The District Court denied the motion to dismiss because even if the subjective intent standard applied, Elonis's intent and the attendant circumstances showing whether or not the statements were true threats were questions of fact for the jury.

A jury convicted Elonis on Counts 2 through 5, and the court sentenced him to 44 months' imprisonment followed by three years supervised release. he court also stated the objective intent standard conformed with Third Circuit precedent. The court found the evidence supported the jury's finding that the statements in Count 3 and Count 5 were true threats.[25]

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[22] Id. In reference to the FBI stop the post included,"… So the next time you knock, you best be serving a warrant And bring yo' SWAT and an explosives expert while you're at it Cause little did y'all know, I was strapped wit' a bomb Why do you think it took me so long to get dressed with no shoes on? I was jus' waitin' for y'all to handcuff me and pat me down Touch the detonator in my pocket and we're all goin' [BOOM!]"

[23] Id.

[24] Id.

[25] Id.

B) The Third Circuit's Decision

The third circuit went on to affirm the district courts contention and rejecting the idea that there needed to be an intent to threated. Instead the court found the only intent needed was the intent to make the communication.[26]

In reference to this case and Virginia v Black the court stated, "the Court did not have occasion to make such a sweeping holding, because the challenged Virginia statute already required a subjective intent to intimidate."[27] The court went on to find the only intent needed was the intent to make the communication stating, "We do not infer from the use of the term "intent" that the Court invalidated the objective intent standard the majority of circuits applied to true threats. Instead, we read "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" to mean that the speaker must intend to make the communication. It would require adding language the Court did not write to read the passage as "statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence." This is not what the Court wrote, and it is inconsistent with the logic animating the true threats exception."[28]

C) The Supreme Court's Majority Opinion

The Supreme court overturned and went on to find that specific intent of making a threat was required.[29] The court found 18 U.S.C.S. § 875(c) requires proof that a communication was

[26] Id.
[27] Id.
[28] Id.
[29] Elonis v. United States, 575 U.S. 723, 741, 135 S. Ct. 2001, 2013 (2015)

transmitted and that it contained a threat. The presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct. Merely communicating something is not what makes the conduct wrongful. The crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat. [30]

As commentators have noted, the Court stressed that when the legislature is silent as to the mens rea, it reads in a mens rea that separates criminal conduct from innocent conduct. A general intent standard would be detrimental because an individual could potentially be punished for innocent conduct.[31] However, the supreme court acknowledged they were limiting their ruling that negligence was not enough to be found guilty under 875(c). In reference to if recklessness would be a high enough level of culpability, the court refrained from answering.[32]

D) Justice Alito's Concurrence

Beyond being disturbed by the courts inability to tackle the recklessness question, Justice Alito went on to find recklessness should be enough.[33] Justice Alito stated," Once we have passed negligence, however, no further presumptions are defensible. In the hierarchy of mental

[30] Elonis v. United States, 575 U.S. 723, 741, 135 S. Ct. 2001, 2013 (2015)

[31] Georgette Geha, Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After Elonis, 50 J. Marshall L. Rev. 167 (2016) https://repository.law.uic.edu/lawreview/vol50/iss1/6

[32] Elonis v. United States, 575 U.S. 723, 741, 135 S. Ct. 2001, 2013 (2015) The Majority went on to state in it's opinion," Both Justice Alito and Justice Thomas complain about our not deciding whether recklessness suffices for liability under Section 875(c). "Our holding makes clear that negligence is not sufficient to support a conviction under Section 875(c), contrary to the view of nine Courts of Appeals. Pet. for Cert. 17. There was and is no circuit conflict over the question Justice Alito and Justice Thomas would have us decide—whether recklessness suffices for liability under Section 875(c). No Court of Appeals has even addressed that question. We think that is more than sufficient "justification," post, at 743, 192 L. Ed. 2d, at 20 (opinion of Alito, J.), for us to decline to be the first appellate tribunal to do so."

[33] Elonis v. United States, 575 U.S. 723, 741, 135 S. Ct. 2001, 2013 (2015)

states that may be required as a condition for criminal liability, the mens rea just above negligence is recklessness. Negligence requires only that the defendant "should [have] be[en] aware of a substantial and unjustifiable risk,…,), while recklessness exists "when a person disregards a risk of harm of which he is aware,…,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."[34]

Justice Alito also pointed out to constitutionally protect these statements would allow perpetrators to dress up their statements in an attempt to get around the law stating, "Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously. To hold otherwise would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar." [35]

Applied here Alito found Elonis would likely be guilty under a recklessness standard. However, because a standard of only negligence was used, not recklessness or greater, Justice Alito agreed the circuit's opinion should be overturned.[36]

E) Justice Thomas' Dissent

Justice Thomas not only was upset by the courts inability to give clarity to the recklessness standard, but also would find that general intent is all that is required. [37] Alito finding negligence would be enough stating," Under this "conventional mens rea element," "the defendant [must] know the facts that make his conduct illegal,"[38],but he need not know that those

[34] Id.
[35] Id.
[36] Id.
[37] Id.
[38] Staples, supra, at 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608

facts make his conduct illegal. It has long been settled that "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." Additionally, Justice Thomas reasoned our default rule in favor of general intent applies with full force to criminal statutes addressing speech.[39]

Arguing for a general intent standard, Justice Thomas believes knowing the communication contains a threat would avoid first amendment concerns while also capturing people like Elonis under its web. "General intent divides those who know the facts constituting the actus reus of this crime from those who do not. For example, someone who transmits a threat who does not know English—or who knows English, but perhaps does not know a threatening idiom—lacks the general intent required under §875(c)."[40] However Justice Thomas goes on to say A defendant like Elonis, however, who admits that he "knew that what [he] was saying was violent" but supposedly "just wanted to express [him]self," App. 205, acted with the general intent required under §875(c), even if he did not know that a jury would conclude that his communication constituted a "threat" as a matter of law.[41]

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[39] Elonis v. United States, 575 U.S. 723, 741, 135 S. Ct. 2001, 2013 (2015) Applying ordinary rules of statutory construction, I would read §875(c) to require proof of general intent. To "know the facts that make his conduct illegal" under §875(c), see Staples, 511 U. S., at 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 , a defendant must know that he transmitted a communication in interstate or foreign commerce that contained a threat. Knowing that the communication [****49] contains a "threat"—a serious expression of an intention to engage in unlawful physical violence—does not, however, require knowing that a jury will conclude that the communication contains a threat as a matter of law. Instead, like one who mails an "obscene" publication and is prosecuted under the federal obscenity statute, a defendant prosecuted under §875(c) must know only the words used in that communication, along with their ordinary meaning in context."

[40] Id. See Ragansky, supra, at 645 ("[A] foreigner, ignorant of the English language, repeating [threatening] words without knowledge of their meaning, may not knowingly have made a threat"). Likewise, the hapless mailman who delivers a threatening letter, ignorant of its contents, should not fear prosecution

[41] Id.

IV. The Different standards

A) Recklessness

As mentioned above, the Elonis case was limited to a ruling that negligence was not enough. This does not mean that recklessness is enough, however it is possible that it is. In his partial dissent, Justice Alito suggested that recklessness was enough because our criminal laws justify it. He distinguishes negligence from recklessness, in that negligence requires that the defendant should have been "aware of a substantial and unjustifiable risk." On the other hand, recklessness exists when an individual knows the risks of his conduct and disregards those risks.[42]

However, some commentators believe that Justice Alito is mistaken, and recklessness will allow innocent people be punished.[43] Punishing individuals for recklessly conveying an online threat could punish them for posting innocent comments the First Amendment As stated by Georgette Geha, "However, this argument is unavailing because negligence and recklessness are not all that different. Although it is true that recklessness can punish guilty comments, it has the potential to cross the line and punish innocent comments. This is problematic because it encroaches on individuals' rights to free speech and runs afoul of the First Amendment. The law may punish individuals for communicating true threats; however, the standard for true threats requires specific intent."[44]

In argument for the recklessness standard, Justice Alito points out that nothing above negligence is required for criminal culpability.[45] This is not to say there is not knowledge

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[42] MPC § 2.02
[43] Georgette Geha, Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After Elonis, 50 J. Marshall L. Rev. 167 (2016) https://repository.law.uic.edu/lawreview/vol50/iss1/6
[44] Id.
[45] Elonis v. United States, 575 U.S. 723, 741, 135 S. Ct. 2001, 2013 (2015

required at all, but instead one must know the risks of their conduct. I believe that this is a justifiable level of mens rea. While it is very close to negligence, the element of knowing the risks would prevent most innocent prosecutions. In addition, courts may be able to consider things such as the totality of the circumstances to determine when negligence turns into recklessness. In particular, courts could look to factors such as the number of messages and the proximity to the defendant help establish the difference. With the use of these factors, I believe courts will not infringe on first amendment concerns too far to be unconstitutional.

However, up to the courts discretion there is always room for error and if in application becomes too broad may need to be reassessed. I believe the interests offended by limiting the first amendment in this fashion are outweighed by the victims interest, The first priority should be for legislation to give the victims relief. Additionally, this standard would likely capture people like Mr. Elonis under its web as Justice Alito points out.[46]

B) General Intent

General intent is defined as actual intent to perform some act, but without a wish for the consequences that result from that act.[47] In the Elonis case, Justice Thomas dissented general intent was enough under 875(c) for a conviction.[48] Arguing for general intent, Justice Thomas stressed Congress should have included a heightened mens rea if it intended one like they had for the other prongs of the statute.[49] Additionally, Justice Thomas believes general intent will not punish the innocent. Distinguishing Elonis from an innocent man uncertain of the English

[46] Elonis v. United States, 575 U.S. 723, 741, 135 S. Ct. 2001, 2013 (2015)
[47] General Intent, Legal Informative Institute (2022). https://www.law.cornell.edu/wex/general_intent

[48] Elonis v. United States, 575 U.S. 723, 741, 135 S. Ct. 2001, 2013 (2015)
[49] Id.

language, Justice Thomas points out criminals like Elonis, who admit the words used are violent, will be guilty under a general intent standard while the innocent man will not.[50]

Commentators against the general intent standard such as Georgette Geha often point to the United States v. Martinez case as proof.[51] In United States v. Martinez, the Eleventh Circuit overturned a conviction based on the Elonis decision.[52] Martinez was a woman who sent a letter to a congressional candidate. In that letter, she suggested that she was planning to do "something big" at a government building. She also said that she was going to teach government officials about the Second Amendment's meaning.[53] A jury convicted her under a general intent standard. Geha notes, "While it was unclear what she intended to do because her letter was ambiguous, under this standard, if a reasonable person perceived her comment to be a threat, a jury would convict her.[54] The jury found that the circumstances satisfied the general intent standard. Martinez could have meant that she was going to visit a school or post office and discuss gun rights in an innocent way. This is precisely the kind of speech that the First Amendment protects. Under a general intent standard, a jury could convict her regardless of what she thought or intended. The law would be punishing an individual for exercising a right guaranteed by the First amendment."[55]

In response to commentators such as Geha, I believe that Martinez should be found guilty. Although it is possible that she did not mean for the other party to interpret her words as

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[50] Id.
[51] Georgette Geha, Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After Elonis, 50 J. Marshall L. Rev. 167 (2016) https://repository.law.uic.edu/lawreview/vol50/iss1/6
[52] United States v. Martinez, No. 10-60332, 2011 U.S. Dist. LEXIS 29393 (S.D. Fla.2011).
[53] Id.
[54] Georgette Geha, Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After Elonis, 50 J. Marshall L. Rev. 167 (2016) https://repository.law.uic.edu/lawreview/vol50/iss1/6
[55] Id.

a threat, I do not think someone sending this letter isn't aware of the suggestions they are making. Instead, if we do not allow for prosecutions in these circumstances, we allow people to just avoid being specific to avoid violating 875(c). For the commentators who believe that it would be wrong to prosecute Marinez, I wonder how they would react to someone sending them a letter saying they were coming to their office and have something big planned.

While I do agree that this is ambiguous and hard to discern the meaning of, unless this came from a close friend I would think of this as a threat. Additionally, by worrying about the interest of someone who is not specific in there message, I believe Geha is forgetting about the interest of the victim. If Geha's opinion was adopted there would be the ability to avoid 875(c) claims by just remaining broad and ominous in your threats. Take for example if Elonis would have constantly messages his ex-wife instead that he was planning a big surprise if she liked it or not. Because a reasonable person would still see this as a reasonable threat, regardless of the intent or specificity of the threat, the harm still remains to the victim yet no action would be taken. Thus, if specific intent is required the courts are prioritizing the rights of the criminal over the victim.

However, I also do see trouble with reconciling Justice Thomas' dissent with Virginia v Black. Justice Thomas in Elonis stressed that the words chosen by Elonis he knew were violent which would allow for prosecution.[56] However, in Virginia v Black the court held that the act of burning crosses itself was not enough.[57] To say that something is inherently violent could be troublesome in it of itself as well as trying to reconcile old law. If acts or terms are deemed inherently violent, while this may be agreeable to some terms, if contract law has shown us

[56] United States v. Elonis, 730 F.3d 321 (3d Cir. 2013)
[57] Virginia v. Black, 538 U.S. 343, 347, 123 S. Ct. 1536, 1541 (2003).

anything it is that agreeing on what terms actually mean can be more difficult then it sounds. For instance, if we were to deem gun and knife as inherently violent, would this apply also to context of needing to open a box or to go shooting for sport? While I believe the terms used should be looked at, but anything being inherently violent is too broad.

C) Specific Intent

For there to be specific intent, the one making the threat must actually be attempting to threaten someone.[58] In the context of Section 875(c), that requires proof that a communication was transmitted and that it contained a threat. And because "the crucial element separating legal innocence from wrongful conduct," is the threatening nature of the communication, the mental state requirement must apply to the fact that the communication contains a threat.[59]

Although it may be the hardest standard to prove, some commentators have sided with the majority prioritizing first amendment concerns. Geha states," One of the main arguments against requiring specific intent is it is very difficult to prove a defendant's intent beyond a reasonable doubt. However, while it may be difficult to prove a defendant's intent, that does not mean the law should punish a speaker for posting something he did not intend as a threat. In Morissette v. United States, the Supreme Court stressed that "wrongdoing must be conscious to be criminal." If a speaker is posting rap lyrics others perceive as threats for instance, he may not be aware that he is doing something wrong." [60]

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[58] Mens Rea, Legal Informative Institute (2022). https://www.law.cornell.edu/wex/mens_rea

[59] Elonis v. United States, 575 U.S. 723, 724, 135 S. Ct. 2001, 2003 (2015).

[60] Georgette Geha, Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After Elonis, 50 J. Marshall L. Rev. 167 (2016) https://repository.law.uic.edu/lawreview/vol50/iss1/6 citing (Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240 (1952))

While I will admit the difficulty in understanding communication becomes more difficult online without context, I do not believe we should prioritize this concern over our victims. By allowing for a specific intent standard, they are essentially allowing for threats to take place so long as the person disguises the threat in a way, such as song lyrics in the Elonis case. While this does protect first amendment concerns this is not enough to protect the victims.

While commentators in favor of this standard admit this may be a hard standard to reach, they fail to realize that if it does not encapsulate people like Elonis, the standard is flawed. If we are to protect against true threats, this standard makes it impossible to accomplish that goal. With loopholes existing like this you will find people who seek to use the law to allow them to threaten and harass their victims without repercussions.

As mentioned in my sister's experience with Mr. Elonis, he has been trying to use the law to defend his actions from the beginning. In addition, he clearly continues to get joy from his actions bragging about them to others online. While I do admit there is some interest in protecting the free speech rights of someone who makes a threat, the interest of the victim to be free from this harm is more important to me and should be prioritized. Thus, because loopholes will exist with specific intent required, the courts should decide to not require specific intent.

D) My Proposed Standard

As seen from above, I believe the courts should allow for both a general intent standard and recklessness standard to be sufficient for a claim under 875(c). I believe that congress should amend 875(c) to expressly include anyone who is reckless can be found culpable. Under the recklessness standard flushed out by Alito, one would have to have knowledge that the messages could be conceived as a threat. This is perfect for people such as Elonis, who make

continuous statements harassing their victims. So long as the statements are seen as violent, it is likely that under a recklessness standard any repeat conduct will be culpable. At the same time this is a decent enough safety net to protect those who are mistaken for innocent language and offers more protection than a general intent standard.

While I personally like the idea of a general intent standard, I believe it is too easy of a criteria to meet for first amendment concerns without some limitations. In a perfect world I think it is fine, but in actual application I believe that sometimes a reasonable person may feel threatened by something they do not understand completely. It is no secret that a lot of the communications we see online are ambiguous and in the case of Elonis and music, it is part of the craft to be ambiguous and metaphorical. Would it be reasonable for someone to take a metaphor the wrong way and feel threatened, sure. But, I do not believe it is just for someone to be punished because the audience of their message misconstrued them.

However, if certain factors similar to those mentioned for the recklessness standard were in the analysis, I believe this also should be sufficient. This could include factors such as the number of communications made as well as if anything was reasonably believed to be violent in the communication. Unlike Viginia v Black, this would not take the same risks of something being deemed inherently violent because this would consider the totality of the circumstances in deciding if the terms were violent.

Finally, in regards to specific intent I do believe this standard is useless. By essentially allowing a carveout for people to just say this is for artistic purposes before threatening their victim the law has become useless. Maybe examples like Elonis are rare, but although rare the law should not allow them to sneak through the cracks. If the law wants to provide a useful remedy to victims of threats, requiring an intent to threaten is too much.

E) Factors To Consider In Analysis

One thing that I believe would help with this analysis is a totality of the circumstances factor test. These factors could include things such as; proximity, number of messages, medium the threat is communicated in, and the description of the threat. By using these factors, the courts would have better guidance in defining what would be reckless behavior and culpable. As mentioned by Justice Alito and Justice Thomas, it was a mistake for the majority to not give additional guidance in regard to recklessness to clear up the ambiguity.[61] These factors go beyond that and would take interpretation even farther out of the lower court hands.

. In regard to the number of messages, I believe this would help in the analysis differentiating between negligent and reckless behavior. While someone may not be aware of the risks when making one statement, the repeated nature would show that they were very aware of the impact it had and thus continued it. For example, in the Elonis case the number of messages and proximity to the victims would weigh against him being reckless. At the same time this would favor against the person who makes a statement that is misunderstood like the example mentioned by Justice Thomas.[62]

In support of the proximity factor, it should be noted the proximity a very real effect on the reasonableness of the threat. For someone who lives in the same town they may have immediate fear of their life, where as if the threat is from across the globe a reasonable person likely wouldn't be as concerned. The same line of reasoning would go for the reasonableness of the threats and the medium they were distributed in. For example a

[61] Elonis v. United States, 575 U.S. 723, 724, 135 S. Ct. 2001, 2003 (2015).
[62] Id.

communication directly emailed to someone would be much more of a reasonable to be fearful from than a communication that occurs on some online video game communication. Additionally, for cases like Martinez where the threat is not clear in regard to the threat would favor the person who made the communication and help resolve some commentators worries.

Obviously this is not a complete list and just a few examples of what could be considered, but what is important in these factors is the underlying idea that they help determine either how reasonable it was for a victim to fear from the threat or if the person making the threat should have known the effect of their communications. It should also be noted that even under such guidance, it is plausible that courts end up applying the recklessness standard too broad and a later decision to add factors that need to be mandatory could be made.

V. Additional Things of Consideration in the Analysis

A) Effectiveness of Protection Orders

As seen in the Elonis case, his ex-wife was able to get a protection from abuse order, however it served little use. Even after the order Elonis threats and impact on the victim continued.[63] Tara Elonis testified at trial that she took these statements seriously, saying, "I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives.".[64] Without further act from legislation to help hold people like Mr. Elonis culpable these

[63] United States v. Elonis, 730 F.3d 321 (3d Cir. 2013)
[64] Trial Tr. 97, Oct. 19, 2011

victims are essentially without a remedy. The internet allows these perpetrators to continue to harass their victims even at a distance.

Not only are protection orders not effective in the case of Elonis, but this serves true at a larger scale as well. While it is noted that there are issues in getting accurate data on how effective protection orders are, the data we do have shows they are not effective enough to be seen as the only remedy.[65] According to the Journal of the American Academy of Psychiatry and the Law the most compelling sign of protection orders being effective is the reduction in violation being eighty percent in a study of over two thousand women who received protection orders.[66] However, as the report notes this is only limited to reported events after the protection order and the amount that are ineffective could be far greater.[67]

In another study it was shown that after a protection order was given, there was approximately a fifty-percent reduction in offenses.[68] In addition they found that of these offenses, there was a high probability that they were smaller offenses.[69] Finally the study concluded that women in general were less fearful of the person the protective order was filed against.[70]

While I am a fan of protection orders and think all measures we allow victims of abuse to take to be protected are net positives. However, being the only remedy when a claim is not

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[65] Christopher T. Benitez, Dale E. McNiel and Renée L. Binder, Do Protection Orders Protect. Journal of the American Academy of Psychiatry and the Law Online September 2010, 38 (3) 376-385; https://jaapl.org/content/38/3/376#:~:text=In%20a%20study%20involving%202%2C691,to%20police%2C%20Holt%20et%20al.&text=found%20that%20having%20a%20permanent,violence%20in%20the%20next%20year.
[66] Id.
[67] Id.
[68] T K Logan, Robert Walker. Civil protective order effectiveness: justice or just a piece of paper? PubMed https://pubmed.ncbi.nlm.nih.gov/20565005/
[69] Id.
[70] Id.

available for a lack of intent these are insufficient. In my opinion a showing anywhere between twenty and fifty percent of victims have a sufficient remedy from the protection order, that is a staggering amount that do not. This includes instances like Elonis, whose ex-wife states continued to be in fear while Mr. Elonis made fund of the protection order in one of his songs.[71]

VI Conclusion to intent under 875(c)

In conclusion, the specific intent standard is too high to bring real justice to victims under 875(c). While the first amendment concerns are valid, it essentially creates a loophole for people like Elonis to threaten their targets free of punishment. Instead a recklessness standard and general intent standard including a factor analysis of the totality of the circumstances would allow for greater justice, while not infringing on the first amendment too far. Without legislation or courts taking this action they force people like Mr. Elonis' ex-wife to have no true remedy. Hopefully something is done before either someone like Mr. Elonis harms a victim, or a victim who feels like they have no other choice harms the person making the threats.

VI. Revenge Porn Laws and Their Similarity to 875(c)

A) Overview

Revenge porn is defined by Oxford as revealing or sexually explicit images or videos of a person posted on the internet, typically by a former sexual partner, without the consent of the subject and in order to cause them distress or embarrassment.[72] Similar to the majority's opinion of 875(c) in Elonis, for a claim to exist for distributing revenge porn there must be intent to

[71] United States v. Elonis, 730 F.3d 321 (3d Cir. 2013)
[72] Oxford Reference. https://www.oxfordreference.com/display/10.1093/acref/9780191803093.001.0001/acref-9780191803093l231;jsessionid=BF3571B440ACBD976A30185859517C38#:~:text=Sexually%20explicit%20images%20or%20videos,....%20...

harm. However, as mentioned by commentators this intent requirement prevents from the true harm of the revenge porn being distributed, which I believe to be fairly similar to the issues underlying 875(c).[73]

B) Intent Under Revenge Porn Laws

As noted by Dudley, the ACLU claim against Arizona is largely to thank for this higher standard. As Dudley mentions, in 2014 Arizona has passed a law preventing the distribution of revenge porn without intent needed.[74] However, after the ACLU filed suit Arizona soon amended their statute to include an intent requirement and ever since almost all states have followed.[75]

In 2015, Nevada passed NRS 200.780, the Unlawful Dissemination of an Intimate Image, that provides: intent to harass, harm or terrorize another person is required for a claim.[76] As commentators such as Dudley have mentioned, the intent standard misidentifies the harm and prevents defendants suffering the same harm to recover based on intent.[77] Dudley correctly states, while nonconsensual pornography certainly can involve harassment or terror, it " always involves ... an invasion of privacy." Likewise, while nonconsensual pornography can inflict psychological, emotional, reputational, financial, educational, professional, or discriminatory harm, "it always inflicts ... a loss of privacy."[78]

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[73] Camila Dudley, EXPOSED: THE PITFALLS IN NEVADA'S NONCONSENSUAL PORNOGRAPHY STATUTE AND A PROPOSAL FOR MORE PROTECTION https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1807&context=nlj
[74] Id.
[75] Id.
[76] NEV. REV. STAT. § 200.780(1) (2019).
[77] Camila Dudley, EXPOSED: THE PITFALLS IN NEVADA'S NONCONSENSUAL PORNOGRAPHY STATUTE AND A PROPOSAL FOR MORE PROTECTION https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1807&context=nlj
[78] Id.

Dudley uses the example of a case involving a Penn State fraternity and a victim they did not know. One of the fraternity brothers argued the conduct "wasn't malicious whatsoever. It wasn't intended to hurt anyone. It wasn't intended to demean anyone. It was an entirely satirical group..." As Dudley points out, an unconscious young woman's privacy is just as violated as an individual whose naked selfie is maliciously posted without permission on MyEx.com.[79]

While I do agree with Dudley I fail to see how Nevada is able to lower the standard under Elonis. They could instead reduce the standard to recklessness, however this would run the chance of failing constitutional scrutiny. However, as a policy matter I think this may point to why legislation needs to step in and amend 875(c). By failing to punish those who claim to mean no harm when posting nude photographs of their victims, legislation is failing to give the victims a remedy and failing to deter the person posting the pictures. This is similar to those who do not have intent when they harass their victims under 875(c).

This is not to say congress hasn't taken any measures, although they may have failed to implement any. In 2017 the Ending Nonconsensual Online User Graphic Harassment Act of 2017 (the "ENOUGH Act") was introduced to the house and senate.[80] The ENOUGH Act included a general intent element requiring that the proof that the perpetrator acted with "reckless disregard of harm that the victim "could" suffer.[81] However, the ENOUGH Act failed to progress to the floor of the House or Senate..[82]

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[79] Id.
[80] Jonathan S. Sales and Jessica A. Magaldi , SYMPOSIUM: WOMEN'S RIGHTS IN THE CRIMINAL JUSTICE SYSTEM: ARTICLE: DECONSTRUCTING THE STATUTORY LANDSCAPE OF "REVENGE PORN": AN EVALUATION OF THE ELEMENTS THAT MAKE AN EFFECTIVE NONCONSENSUAL PORNOGRAPHY STATUTE, 57 Am. Crim. L. Rev. 1499
[81] Id.
[82] Id.

C) Conclusion

In conclusion revenge porn laws suffer from the same underlying issues of 875(c) under the Elonis standard. By requiring a specific intent congress in both instances fails to correctly identify the harm and fails to give the victims remedies. The psychological harm is done to the victim in both instances regardless of the intent. Not only is this a failure to give remedies to certain victims but is an example of horizontal inequity when victims in similar situations can seek different remedies.[83] As a result either congress or the courts should take action to allow for a charge under general intent and a recklessness standard such as the proposed Enough Act. While first amendment interests may suffer, the interest of the victim are more important in this instance.

[83] Horizontal inequity in the healthcare industry (HI) arises when individuals with the same condition or level of health need have different levels of treatment. Mohammad Habibullah Pulok, Kees van Gool, Mohammad Hajizadeh, Sara Allin & Jane Hall, Measuring horizontal inequity in healthcare utilisation: a review of methodological developments and debates. https://link.springer.com/article/10.1007/s10198-019-01118-2