

**A RECKLESS GUESSING GAME: ONLINE THREATS
AGAINST WOMEN IN THE AFTERMATH OF *ELONIS V.*
*UNITED STATES***

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I. INTRODUCTION 118

II. *ELONIS V. UNITED STATES* 121

III. ONLINE THREATS 124

 A. Punishment of Threats 125

 B. Threats and the Internet..... 128

 C. Heightened Level of Online Threats Against Women
 133

 D. Use of Technology to Commit Domestic Violence 135

IV. STRENGTHENING 18 U.S.C. § 875(C) TO PROTECT VICTIMS OF
ONLINE THREATS 137

 A. A Requirement of Recklessness Creates a Clearer Standard
 to Prosecute Online Threats 137

 B. A Requirement of Recklessness Will Protect Individuals
 from Online Threats 140

 C. Additional Efforts to Fight Online Threats 143

V. CONCLUSION 145

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I. INTRODUCTION

In May 2010, Tara Elonis left her husband, Anthony Elonis.¹ Several months later, he directed a series of threatening posts on his Facebook page to her, writing, “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.”² In another post, Elonis wrote, “[T]here’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 . . .”³ Fearful of these threatening messages, Tara filed for and was granted a Protection from Abuse order (“PFA”) for herself and her children.⁴

Despite the PFA, Elonis continued to threaten Tara online by posting messages on his Facebook page. In one such message, he posted a script of a comedy sketch that mocked the idea that it is illegal to discuss wanting to kill the president and how one could actually kill the president.⁵ However, in posting the script on Facebook, Elonis replaced the word “president” and details of the White House with his wife’s name and details of her home, and described how he would murder her.⁶ In a later post, Elonis wrote, “Fold up your [protection-from-abuse order] and put it in your pocket, is it thick enough to stop a bullet?”⁷

The threats directed towards Tara were frightening, causing the F.B.I. to later intervene.⁸ A lawsuit was brought against Elonis, charging him with violating 18 U.S.C. § 875(c), the federal threat statute, which makes it a crime to transmit a threat through interstate communications.⁹ Elonis’s case eventually made its way up to the Supreme Court.¹⁰ Prior to the Court’s ruling, nine circuits had adopted an objective intent standard for interpreting § 875(c), holding that criminal liability attaches if a reasonable person would have perceived the communication as a

¹ Brief for Appellee at 10, *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013) (No. 12-3798), *rev’d and remanded*, 135 S. Ct. 2001 (2015).

² *Id.*

³ *Id.* at 11.

⁴ *Id.* at 11-12.

⁵ Kamatzu, *Whitest Kids U Know: It’s Illegal to Say. . .*, YOUTUBE (May 2, 2007), <https://www.youtube.com/watch?v=QEEOvyGbBtY>.

⁶ *Elonis v. United States*, 135 S. Ct. 2001, 2005-06 (2015).

⁷ *Id.*

⁸ 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.*

⁹ *Elonis*, 135 S. Ct. at 2002; 18 U.S.C. § 875 (2016).

¹⁰ *Elonis*, 135 S. Ct. at 2001.

threat.¹¹ However, the Supreme Court disagreed and held that the objective intent standard was essentially a negligence standard, and that mere negligence on the part of the offender was not sufficient for a conviction under § 875(c).¹² 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.¹³

Tara Elonis is not alone in facing online threats. In fact, a Pew Research Center study found that young women ages eighteen to twenty-four are the most likely of all Internet users to experience severe forms of online harassment including online stalking, sexual harassment, and physical threats.¹⁴ 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 her e-book, *Targeted and Trolled: The Reality of Being a Woman Online*, Rossalyn Warren commented, [O]nline 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.¹⁵

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.¹⁶ He then sent the article to several website users who had a history of harassing her.¹⁷ As a result, Quinn's personal information, such as her home address, phone number, emails, and nude photos, was widely distributed to these users, and she received thousands of death and rape threats.¹⁸ Some of the threats that she received 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

¹¹ 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. *Elonis*, at 2018 (Thomas, J., dissenting).

¹² *Id.* at 2013.

¹³ *Id.*

¹⁴ Maeve Duggan, *Online Harassment*, PEW RESEARCH CTR. 4-5 (2014), http://www.pewinternet.org/files/2014/10/PI_OnlineHarassment_72815.pdf.

¹⁵ ROSSAYLN WARREN, *TARGETED AND TROLLED: THE REALITY OF BEING A WOMAN ONLINE* 48 (2015) (ebook).

¹⁶ Zachary Jason, *Game of Fear*, BOSTON MAGAZINE (May 2015), <http://www.bostonmagazine.com/news/article/2015/04/28/gamergate>.

¹⁷ *Id.*

¹⁸ *Id.*

don't want to make it so she ends up too retarded to fear us.”¹⁹ Another threat stated, “Im not only a pedophile, ive raped countless teens, this zoe bitch is my next victim, im coming slut.”²⁰ Another threat read, “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.”²¹

To Quinn, these threats were serious enough to evoke fear that caused her to leave her own home.²² To Tara Elonis, the threats were enough to cause her to fear for her life, her children's lives, and the well-being of her family.²³ And they are not alone: other women face threats of this magnitude as well; in 2006, the Bureau of Justice Statistics estimated that approximately 850,000 people a year experience stalking and threats via technology.²⁴ And yet only around twenty-five cases each year are pursued under the federal threat statute, 18 U.S.C. § 875(c).²⁵

When fighting online threats, law enforcement officials and prosecutors should enforce and utilize the already existing federal threat statute, § 875(c), to prosecute online threats. However, these officials must also recognize that these online threats are unique and therefore different from traditional offline forms of threats. In prosecuting online threats, the federal threat statute can be strengthened through a requirement of a recklessness for conviction. When litigating these crimes, prosecutors and judges should take into account the entirety of the circumstances, including the relationship between the victim and the individual who is communicating the threat. In doing so, prosecutors would determine whether or not the perpetrator should have been aware that the victim would feel threatened, as opposed to whether or not the perpetrator actually intended to carry out his or her threat. A recklessness

¹⁹ Simon Parkin, *Zoe Quinn's Depression Quest*, THE NEW YORKER (Sept. 9, 2014), <http://www.newyorker.com/tech/elements/zoe-quinns-depression-quest/>.

²⁰ Jason, *supra* note 16.

²¹ Jason, *supra* note 16.

²² 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>.

²³ Brief for Appellee at 15, *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013) (12-3798), *rev'd and remanded*, 135 S. Ct. 2001 (2015).

²⁴ 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. DEP'T. OF JUSTICE (Jan. 2009), <http://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf>.

²⁵ Citron, *supra* note 24.

standard would allow for conviction under § 875(c) when the individual was aware of a substantial and unjustifiable risk that his words may be perceived as threats, and yet this individual consciously disregarded that risk. Requiring recklessness under § 875(c) provides a clearer standard for conviction, which will serve to protect more victims of online threats. Additionally, a recklessness standard would act as a deterrent for those who wish to threaten their victims online. Because prosecutors and courts would be able to evaluate a threat under the entirety of the circumstances, perpetrators of online threats would no longer be able to claim that 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*.²⁶ Section III will explain the nature of online threats, including how and why online threats differ from traditional offline threats. 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 in order to strengthen § 875(c) because not only will a clearer standard generate more online threat litigation, but it will also deter individuals from making online threats. This section will also address several other techniques that are currently being used to fight online threats, including the work of non-profit 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 the federal threat statute, 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.”²⁷ 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. The statute itself does not explicitly state that a defendant must intend that the transmitted communication contain a threat.²⁸ Implicit in this difficulty is whether the First Amendment requires a defendant to “be aware of the threatening nature of the communication” in order to be convicted of making a true threat, which is a threat that is not protected by the First Amendment.²⁹

At trial, *Elonis* argued that § 875(c) should be interpreted under a subjective intent standard, which would require the government to prove

²⁶ *Elonis v. United States*, 135 S. Ct. 2001, 2001 (2015).

²⁷ 18 U.S.C. § 875(c) (2016).

²⁸ *Id.*

²⁹ *Elonis*, 135 S. Ct. at 2004.

that Elonis intended to communicate a threat.³⁰ In contrast, the Court instructed the jury to interpret § 875(c) under an objective standard, stating,

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.³¹

Elonis was found guilty and sentenced to three years and eight months in prison.³² On appeal, the Third Circuit held that § 875(c) should be interpreted under an objective intent standard, whereby 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.”³³

On appeal to the Supreme Court, Elonis again argued that § 875(c) should be interpreted under a subjective intent standard and explained that a “conviction of violating § 875(c) requires proof that the defendant intended the charged statement to be a ‘threat.’”³⁴ Elonis argued that without a subjective intent standard, people could be held criminally liable for negligent speech.³⁵ 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.”³⁶

In its decision, the Court explained that § 875(c) does not specify a *mens rea* requirement, but such a requirement must apply to establish the fact that a communication contains a threat.³⁷ Moreover, Elonis’s

³⁰ *Id.* at 2007.

³¹ *Id.*

³² *Id.*

³³ U.S. v. Elonis, 730 F.3d 321, 332 (3d Cir. 2013) (citations omitted), *rev’d and remanded*, 135 S. Ct. 2001 (2015).

³⁴ Brief for Petitioner at 29, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

³⁵ *Id.* at 20. Additionally, Elonis raised several First Amendment arguments. *Id.* Elonis suggested 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 must first 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.*

³⁶ Brief for the United States at 14, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

³⁷ *Elonis*, 135 S. Ct. at 2011.

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.”³⁸ The Court further explained, “Having liability turn on 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.”³⁹ 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).”⁴⁰ The Court noted that the *mens rea* requirement would be satisfied if a defendant either transmitted a communication with the purpose of transmitting a threat or if the defendant knew that the communication would be viewed as a threat.⁴¹ The Supreme Court, however, declined to determine whether recklessness would be sufficient for criminal liability under § 875(c) since there was no circuit conflict over the recklessness question and it was not sufficiently briefed or argued by *Elonis* or the government.⁴²

The Court’s decision leaves many questions unanswered. Justice Alito expressed frustration with the Court’s decision in a concurring opinion wherein he asked, “Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess.”⁴³ Justice Alito also noted that the decision would have “regrettable consequences” 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.”⁴⁴

For Justice Alito, a finding of recklessness would have been sufficient for conviction under § 875(c). He agreed that there needed to be more than mere negligence for conviction, but once past the negligence threshold, recklessness sufficed.⁴⁵ 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

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 2013.

⁴¹ *Id.* at 2012.

⁴² *Id.* at 2013.

⁴³ *Elonis*, 135 S. Ct. at 2014 (Alito, J., concurring).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2015.

that others could regard his statements as a threat, but he delivers them anyway.”⁴⁶

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 over threatening speech. While there is no clear definition of what constitutes a true threat, Justice Thomas, in his *Elonis* dissent, 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.’”⁴⁷ Moreover, Justice Thomas stipulated that “the communication must be one that a ‘reasonable observer would construe as a true threat to another.’”⁴⁸

While the Court has not defined what constitutes a threat, “in construing the same term in a related statute” the Court “distinguished a ‘true “threat”’ from facetious or hyperbolic remarks.”⁴⁹ The Court first discussed threats in *Watts v. United States*, where Watts, while discussing his draft classification at a public rally, stated, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”⁵⁰ Based on this statement, Watts was convicted of committing a felony by “knowingly and willfully threatening the President.”⁵¹ 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.”⁵² Here, Watts had been engaged in “political hyperbole” by stating his opposition to the President.⁵³ The Court distinguished a true threat from “uninhibited, robust, and wide open . . . vehement, caustic and sometimes unpleasantly sharp attacks.”⁵⁴

The Court has since consistently held that true threats, like other

⁴⁶ *Id.*

⁴⁷ *See Elonis*, 135 S. Ct. at 2019 (Thomas, J., dissenting) (quoting *United States v. Darby*, 37 F.3d 1059, 1066 (C.A. 1994)).

⁴⁸ *See id.* (Thomas, J., dissenting) (quoting *United States v. Jeffries*, 692 F.3d 473, 478 (C.A. 2012)).

⁴⁹ *Id.*; *see also Watts v. United States*, 394 U.S. 705, 708 (1969).

⁵⁰ *Watts*, 394 U.S. at 705-06.

⁵¹ *Id.*

⁵² *Id.* at 707.

⁵³ *Id.* at 707-08.

⁵⁴ *Id.* at 708.

content-based restrictions, are not protected by the First Amendment.⁵⁵ 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.”⁵⁶

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 said that in such a situation, a parent would likely be very frightened and would not want to send his or her child to school that day.⁵⁷ The school would probably close for the day to investigate.⁵⁸ That investigation would likely involve police and the use of a bomb squad.⁵⁹ Colb explained, “All of these effects are very destructive and an unacceptable price to 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.’”⁶⁰

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.”⁶¹ It is clear that threats result in a wide variety of detrimental and sometimes deadly effects for the individual who is receiving the threat, and they also create high costs for 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.”⁶² For example, in *Tompkins v. Cyr*, Dr. Tompkins and his wife were the victims of anonymous callers and anonymous letters that threatened their lives

⁵⁵ 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”).

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

⁵⁷ 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>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Colb, *supra* note 57.

⁶¹ *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

⁶² Jennifer Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 291 (2001).

because Dr. Tompkins was a doctor who performed abortions.⁶³ For the Tompkins, the threats resulted in “reactions of fear, stress, anxiety, depression, and sadness,” as well as problems with sleeping and eating.⁶⁴ Eventually the family hired a bodyguard, began wearing bulletproof vests, and moved Dr. Tompkins’s medical practice to another city.⁶⁵

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.⁶⁶ The letters threatened their lives while calling them “abominations” that brought immoral and unfavorable elements into the community.⁶⁷ 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 feared for her life.⁶⁸ As a result of the letters, she had trouble sleeping and had occasional nightmares.⁶⁹ She also stated that she “suffered various physical problems including upset stomach, headaches, and crying jags.”⁷⁰ Finally, Simpson explained that she lost her trust in people.⁷¹

The effects of these threats on Simpson’s and the Tompkins’ personal lives were severe. Whether or not the anonymous stalkers actually intended that their victims felt threatened had no bearing on 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 manifestations of the fear through insomnia, headaches, and nausea.⁷² The fear also manifested itself psychologically and emotionally; the victims both describe suffering from anxiety, depression, and general feelings of sadness as a result of the threats.⁷³ Additionally, the threats had a severe economic impact on both Simpson and the Tompkins as both had to find ways to protect themselves by either purchasing guns, wearing bulletproof vests, or even hiring bodyguards. In the end, both had to move away, physically leaving their homes.⁷⁴

The reactions of the Tompkins and Simpson are common; in its

⁶³ *Tompkins v. Cyr*, 202 F.3d 770, 776 (5th Cir. 2000).

⁶⁴ *Id.* at 782.

⁶⁵ *Id.* at 777.

⁶⁶ *Simpson v. Burrows*, 90 F. Supp. 2d 1108, 1118 (D. Or. 2000).

⁶⁷ *Id.*

⁶⁸ *Id.* at 1121.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See generally *Simpson v. Burrows*, 90 F. Supp. 2d 1108 (D. Or. 2000); *Tompkins v. Cyr*, 202 F.3d 770 (5th Cir. 2000).

⁷³ See generally, *supra* note 72.

⁷⁴ See generally, *supra* note 72.

2017]

A RECKLESS GUESSING GAME

127

survey of online harassment, the Pew Research Center estimated that around twenty-seven percent of people who had been threatened or severely harassed online in the past found it very or extremely upsetting.⁷⁵ 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.⁷⁶ 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 women differed.⁷⁷ Men are more likely to experience more mild or less severe types of online harassment in the form of name-calling and embarrassment while women are more likely to experience severe forms of online harassment.⁷⁸

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.⁷⁹ In contrast, women note that social networking websites and mobile applications are often where they are harassed or threatened.⁸⁰ 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 the line where reality ends and fiction begins. Perhaps this difference is why women experience more severe reactions to online threats and harassment as compared to men—it is much more difficult outside of online gaming websites 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.”⁸¹ Those who are victims of online threats suffer 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 to convict under § 875(c) is necessary to protect victims from these online threats. A recklessness standard will serve as a powerful deterrent to perpetrators of online threats and as a necessary tool to ensure convictions under the federal threat statute.

⁷⁵ Duggan, *supra* note 14, at 32.

⁷⁶ Duggan, *supra* note 14, at 13.

⁷⁷ Duggan, *supra* note 14, at 13.

⁷⁸ Duggan, *supra* note 14, at 13.

⁷⁹ Duggan, *supra* note 14, at 6, 25.

⁸⁰ Duggan, *supra* note 14, at 25.

⁸¹ Duggan, *supra* note 14, at 33.

B. Threats and the Internet

Threats and stalking are often inextricably linked. A victim of one is often a victim of both because threats are often included in stalking behavior.⁸² When the Internet is used to communicate threats and stalking behavior against a victim, the victim suffers in ways that she may not have if the stalking and threats had been made offline. Requiring prosecutors to show recklessness by an individual who is making a threat is particularly important in the context of cyberstalking and internet-based threats because of the inherent 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 as a tool to commit crime.⁸³ Many people have used the Internet as a means to further extend the reach of their offline criminal behavior. Stalking is one type of criminal behavior that is now easier to commit through the Internet.⁸⁴ 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.”⁸⁵ 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 victim’s property, or following the victim.⁸⁶ 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 over the Internet.⁸⁷

In fact, online stalking through technology and online threats often differ greatly from traditional offline stalking and offline threats. Naomi Harlin Goodno, Assistant Professor of Law at Pepperdine University, outlined several aspects in which the use of technology to stalk and

⁸² See *Stalking*, THE DEP’T OF JUSTICE, <http://www.justice.gov/ovw/stalking> (last updated Jan. 6, 2016) [hereinafter *Stalking*].

⁸³ 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 perpetuated online).

⁸⁴ *Hi-Tech Stalking*, NAT’L NETWORK TO END DOMESTIC VIOLENCE (2009), http://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/54e3d1b6e4b08500fcb455a0/1424216502058/NNEDV_Glimpse+From+the+Field+-+2014.pdf.

⁸⁵ *Stalking*, *supra* note 82.

⁸⁶ *Stalking*, *supra* note 82.

⁸⁷ *Stalking*, *supra* note 82.

traditional offline stalking are different.⁸⁸ The first is that when a message is posted online, it is reviewed by a larger audience than if the same message was spoken directly to an individual.⁸⁹ Goodno explains that “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.”⁹⁰ Goodno points to online forums, chat rooms, and message boards, which have the potential for thousands of people to view a single threat.⁹¹ 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 can view the harassment or threat and may be able to encourage others to participate or join in the stalking and harassment of the victim. Goodno explains, “[P]erhaps most frightening, and unique to cyberstalking, is that cyberstalkers can incite other ‘innocent’ third parties to do their stalking for them.”⁹² What may begin as a single harassing communication may snowball into threats and stalking from an entire online community.⁹³

Take, for example, the women who received death threats after posting on social media about the “GamerGate” controversy.⁹⁴ As a result, the threats and stalking directed to the women 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

⁸⁸ 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). This note will describe “cyber-stalking” as “the use of technology to stalk” or “online stalking.” See *From the Desk of the Director: Eliminating “Cyber-Confusion”*, NAT’L NETWORK TO END DOMESTIC VIOLENCE (2003), <https://victimsofcrime.org/docs/src/eliminating-cyber-confusion.pdf?sfvrsn=2>.

⁸⁹ Goodno, *supra* note 88, at 128.

⁹⁰ Goodno, *supra* note 88, at 128.

⁹¹ Goodno, *supra* note 88, at 128.

⁹² Goodno, *supra* note 88, at 132.

⁹³ 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”).

⁹⁴ 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 the more extreme threats. . . seem to be the work of a much smaller faction and aimed at women.” Nick Wingfield, *Feminist Critics of Video Games Facing Threats in ‘GamerGate’ Campaign*, N.Y. TIMES (Oct. 15, 2014), http://www.nytimes.com/2014/10/16/technology/gamergate-women-video-game-threats-anita-sarkeesian.html?_r=0.

action.”⁹⁵ Moreover, compared to traditional means of stalking and communication of threats, such as letters or phone calls, the use of technology to stalk is instantaneous and remains visible online long after the victim first views the posting or email, allowing for revictimization every time the victim logs online.

Another way that online stalking and online threats differ from traditional offline stalking is that in the former, perpetrators are able to utilize the Internet to harass and stalk their victims and communicate threats to their victims from anywhere around the world with expediency.⁹⁶ Goodno explains the practical reality that victims face because “[t]he uncertainty of the cyberstalker’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.”⁹⁷ While this is 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.”⁹⁸ The fast-paced reality of the Internet allows stalkers to post threats and frightening messages with the simple click of a button.⁹⁹ Stalkers no longer need to wait for a victim to answer the phone or for a letter to be delivered for the stalking and the threat to be communicated. The Internet facilitates the delivery of threatening communications to stalking victims.

Next, online stalking and online threats are distinguishable from traditional offline stalking and threats in that those who use technology to stalk may remain truly anonymous.¹⁰⁰ 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 can more easily “overcome any hesitation, unwillingness, or inabilities he may encounter when confronting a victim in person.”¹⁰¹ Moreover, when the perpetrator remains anonymous, the victim is unable to assess the veracity of the

⁹⁵ *Id.*

⁹⁶ Goodno, *supra* note 88, at 129 (“Cyberstalkers can be physically far removed from their victim.”).

⁹⁷ Goodno, *supra* note 88, at 129.

⁹⁸ Goodno, *supra* note 88, at 129-30.

⁹⁹ See Hammack, *supra* note 93, at 81-86 (“[T]he 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.”).

¹⁰⁰ Goodno, *supra* note 88, at 130-31.

¹⁰¹ Goodno, *supra* note 88, at 130-31.

stalkers threats, thus contributing to the fear of the victim. Brianna Wu, a woman targeted in 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.”¹⁰²

Finally, online stalking and online threats differ from their offline counterparts due to police response.¹⁰³ The advent of social media is relatively new, and when victims report online stalking and online threats, they are often met with officers who are unsure how to respond.¹⁰⁴ 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?”¹⁰⁵ 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.¹⁰⁶ Instead, police are often dismissive of these online threats and “tell victims that no one is going to come get them.”¹⁰⁷

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.¹⁰⁸

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.¹⁰⁹ After the violence was over, he had killed six people and

¹⁰² 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>.

¹⁰³ DANIELLE K. CITRON, HATE CRIMES IN CYBERSPACE 84 (2014) [hereinafter “HATE CRIMES”].

¹⁰⁴ *Id.*

¹⁰⁵ Amanda Hess, *Why Women Aren’t Welcome on the Internet*, PACIFIC STANDARD MAGAZINE (Jan. 6, 2014), <https://psmag.com/why-women-aren-t-welcome-on-the-internet-aa21fdb8d6#i3a3vwu8z>.

¹⁰⁶ Danielle Citron, *Cops Don’t Take Harassment of Women Seriously—Especially Online*, TIME (Oct. 17, 2014), <http://time.com/3513763/anita-sarkeesian-hate-crimes/>.

¹⁰⁷ *Id.*

¹⁰⁸ Megan Garvey, *Transcript of the Disturbing Video ‘Elliot Rodger’s Retribution’*, L.A. TIMES (May 24, 2014), <http://www.latimes.com/local/lanow/la-me-ln-transcript-ucsb-shootings-video-20140524-story.html>.

¹⁰⁹ Ian Lovett & 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->

wounded thirteen others.¹¹⁰ However, the shooter's video warning was not the first video that he had uploaded. In fact, his family had expressed their concerns to police regarding several other disturbing videos the shooter previously posted on YouTube.¹¹¹ While police visited the shooter in response to his family's concerns, no other action was taken as the police determined that he appeared "polite and courteous."¹¹² 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 during his killing spree.¹¹³

In her book, *Hate Crimes in Cyberspace*, Danielle Citron highlights the ongoing difficulty of police failing to take these threats seriously. Citron notes, "The majority of law enforcement agencies do not investigate online stalking complaints because they lack training to understand the seriousness of the attacks, the technologies used to perpetrate them and the usefulness of existing laws."¹¹⁴ 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 online stalking.¹¹⁵ However, this advice is often difficult to follow and fails to appreciate both the necessity of the Internet and the seriousness of the threats. Today, for many people, both work and home life are inextricably linked to the Internet, smart phones, and social networking websites. Smart phones have the capability to link work and personal email, social networking websites, phone calls, and text messaging to a single device. Pew Research Center estimates that around ninety percent of American adults have a cell phone, and around

by-shooting.html.

¹¹⁰ *Id.*

¹¹¹ 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>.

html.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ HATE CRIMES, *supra* note 103.

¹¹⁵ See WARREN, *supra* note 15 and accompanying text; see also Citron, *supra* note 106 (giving examples of police response to online threats and cyber harassment, ranging from advising victims to stay offline and "encourage[ing] 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.*

sixty-four percent of American adults have a smartphone.¹¹⁶ Moreover, the Pew Research Center estimates that seventy-four percent of Internet users use social networking websites, and around forty percent of cellphone owners use social media or social networking sites on their phone.¹¹⁷ 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 temporary and unrealistic fix to a problem that will not simply “go away” for the victims. It also allows individuals to be further victimized by the perpetrator by 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 cyberstalking and online threats.

C. Heightened Level of Online Threats Against Women

Women are subject to higher rates of severe online harassment, including online threats, compared to men.¹¹⁸ 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.¹¹⁹ Text messages, email, Facebook, Twitter, Instagram, Tumblr, and countless other social networking platforms become tools utilized to threaten and harass women. By requiring a *mens rea* of recklessness to convict under § 875(c), prosecutors will 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.¹²⁰ 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.¹²¹ The study found that accounts with female usernames received twenty-five

¹¹⁶ *Cell Phone and Smartphone Ownership Demographics*, PEW RES. CTR., <http://www.pewinternet.org/data-trend/mobile/cell-phone-and-smartphone-ownership-demographics/> (last visited Nov. 11, 2015).

¹¹⁷ *Social Networking Fact Sheet*, PEW RES. CTR., <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited Nov. 11, 2015).

¹¹⁸ Duggan, *supra* note 14, at 3.

¹¹⁹ Duggan, *supra* note 14, at 27.

¹²⁰ Hess, *supra* note 105.

¹²¹ Hess, *supra* note 105; *see also Study Finds Female-Name Chat Users Get 25 Times More Malicious Messages*, A. JAMES CLARK, SCH. OF ENG'G (May 9, 2006), http://www.ece.umd.edu/News/news_story.php?id=1788.

times more threatening messages than those accounts with male or ambiguous names.¹²² When women experience online harassment and threats, much of the harassment is gender-based.¹²³ The gender-based threats and harassment women face stem from an extensive history of discrimination against women from a society that “promotes male privilege by being male dominated, male identified, and male centered . . . organized around an obsession with control and . . . the oppression of women.”¹²⁴ Online threats against women are distinct from the type of threats that men may face because the online threats directed toward women often target an “individual’s gender in sexually threatening and degrading ways,” often in an attempt to control, dominate, and silence women.¹²⁵

The effects of online threats targeted at women are chilling. Instead of fully participating 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.”¹²⁶ In short, women are “sacrificing their freedom of expression for safety and self-preservation.”¹²⁷ 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.¹²⁸ The Internet has now evolved into an environment where online harassment and online threats are an expected reality of women’s online experiences. The law must now evolve as well, and provide a basic level of protection for women who are victims of online threats.

¹²² *Study Finds Female-Name Chat Users Get 25 Times More Malicious Messages*, A. JAMES CLARK, SCH. OF ENG’G (May 9, 2006), http://www.ece.umd.edu/News/news_story.php?id=1788.

¹²³ Danielle Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 378 (2009) [hereinafter “*Law’s Expressive Value*”].

¹²⁴ ALLAN G. JOHNSON, *THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY* 5 (2007).

¹²⁵ *Law’s Expressive Value*, *supra* note 123.

¹²⁶ Katherine Clark, Op-Ed., *Sexism in Cyberspace*, THE HILL (Mar. 10, 2015), <http://thehill.com/opinion/op-ed/235070-sexism-in-cyberspace>.

¹²⁷ *Id.*

¹²⁸ See Kaofeng Lee, *Each Day, 3 Women Die Because of Domestic Violence*, NAT’L 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/>.

D. Use of Technology to Commit Domestic Violence

The use of technology to commit domestic violence has become a significant problem in the United States as more and more women are subject to online stalking and online threats. Women are at a greater overall risk of experiencing stalking than men.¹²⁹ Often, women are exposed to cyberstalking and online threats through domestic violence.¹³⁰ 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.”¹³¹ Domestic violence includes “physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person,” and includes “any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.”¹³²

In an *amicus brief*, the National Network to End Domestic Violence (“NNEDV”) 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.”¹³³ An increasing number of women are experiencing domestic violence through cyberstalking 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.”¹³⁴ In fact, NNEDV has found that batterers often misuse technology to monitor, harass, impersonate, and stalk victims.¹³⁵ NNEDV conducted a survey with victim service providers and found that “[t]he top 3 types of technology that abusers used to harass survivors were through texting (96%), social media accounts (86%), and email (78%).”¹³⁶ Moreover, NNEDV found that around fifty-five percent of abusers post abusive content on social

¹²⁹ Baum, Catalano & Rand, *supra* note 24.

¹³⁰ *Law’s Expressive Value*, *supra* note 123.

¹³¹ *Domestic Violence*, U.S. DEP’T. OF JUSTICE (Oct. 6, 2015), <http://www.justice.gov/ovw/domestic-violence>.

¹³² *Id.*

¹³³ 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).

¹³⁴ *Id.* at 13.

¹³⁵ *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.

¹³⁶ *Id.*

media.¹³⁷ In the end, the survey concluded that the widespread use of technology is now being used as a tool “that easily facilitates abusers’ control.”¹³⁸ New forms of technology have made it far easier for perpetrators of domestic violence to control, manipulate, intimidate, and threaten their victims.¹³⁹ Furthermore, abusers’ misuse of the Internet and social networking websites allows them 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 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.”¹⁴⁰

These threats of violence—including online threats—are indicators that a woman may experience actual physical violence in the future.¹⁴¹ In another instance, one husband sent his estranged wife several text messages, including statements that “[s]he better enjoy her last day in the motel[.] Get ready for the shocker” and “Until death do us part bitch.”¹⁴² Months after he sent those text messages, he shot his wife in the head.¹⁴³ Many lethality and risk assessment surveys—tools used to determine a victim’s risk of being killed by her partner—have highlighted threats of violence as a risk factor associated with an increased risk of murder for the victim.¹⁴⁴ Taken 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.¹⁴⁵ At times, this violence can be lethal.¹⁴⁶

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See generally, Brief for the Nat’l Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983); *A Glimpse from the Field: How Abusers are Misusing Technology*, *supra* note 135.

¹⁴⁰ 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).

¹⁴¹ 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).

¹⁴² *Dickens v. State*, 927 A.2d 32, 35 (Md. Spec. App. 2007).

¹⁴³ *Id.*

¹⁴⁴ See Jacquelyn C. Campbell, *Danger Assessment*, JOHNS HOPKINS U., SCH. OF NURSING (2004), <https://www.dangerassessment.org/DA.aspx>.

¹⁴⁵ *Id.*

¹⁴⁶ *Dickens*, 927 A.2d at 35.

2017]

A RECKLESS GUESSING GAME

137

IV. STRENGTHENING 18 U.S.C. § 875(C) TO PROTECT VICTIMS OF ONLINE THREATS

While there are different laws that address online threats and cyberstalking, § 875(c) specifically makes it a crime to transmit a threat to injure a person through interstate communications.¹⁴⁷ In the aftermath of *Elonis v. United States*, the Supreme Court left the question of *mens rea* to the lower courts to decide, explaining that, if a person transmits a threat with the purpose of issuing a threat or with the knowledge that the recipient will view the communication as a threat, the requisite mental state for § 875(c) will be satisfied.¹⁴⁸ 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 needed to be found guilty of a crime, it is required that a *mens rea* be read into a statute “which is necessary to separate wrongful conduct from otherwise innocent conduct.”¹⁴⁹ 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.”¹⁵⁰ While the Court held that the minimum *mens rea* level of negligence—where an actor should be aware of a substantial and unjustifiable risk—was not sufficient for conviction under § 875(c), reading recklessness into § 875(c) as the requisite *mens rea* would clearly and sufficiently separate innocent conduct from wrongful and criminal conduct.¹⁵¹

¹⁴⁷ 18 U.S.C. § 875(c) (2016).

¹⁴⁸ *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015). On remand, the Third Circuit upheld *Elonis*’s conviction, determining that the error in the jury instruction was harmless and concluding “beyond a reasonable doubt that *Elonis* would have been convicted if the jury had been properly instructed.” *United States v. Elonis*, No. 12-3798, 2016 WL 6310803, at *10 (3d Cir. Oct. 28, 2016). The Third Circuit declined to address whether recklessness would be sufficient for conviction under § 875(c), noting, “Our disposition on the issue of harmless error decides this case. Accordingly, we have no occasion to determine whether a finding of recklessness would be sufficient to satisfy the mental state requirement of § 875(c). We will leave that question for another day.” *Id.*

¹⁴⁹ *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

¹⁵⁰ *Elonis*, 135 S. Ct. at 2011.

¹⁵¹ MODEL PENAL CODE § 2.02 General Requirements of Culpability (AM. LAW INST. 2016).

Justice Alito, in his concurrence in *Elonis*, explained, “[O]nce 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.”¹⁵² Moreover, Justice Alito stated that “[t]here can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct” and he cited several cases where the Court had described reckless conduct as morally culpable.¹⁵³ For example, in *Farmer v. Brennan*, the Court held that deliberate indifference to inmates harm was morally culpable.¹⁵⁴ 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.”¹⁵⁵ 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.¹⁵⁶ Finally, in *Tison v. Arizona*, the Court held that reckless indifference to human life may justify the death penalty.¹⁵⁷

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.”¹⁵⁸ Moreover, “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.”¹⁵⁹ In the context of cyberstalking 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, chooses to deliberately disregard that risk, and proceeds to communicate the threat anyway. With a requirement of recklessness, the government will have to show that the actor was aware

¹⁵² *Elonis*, 135 S. Ct. at 2015 (2015) (Alito, J., concurring).

¹⁵³ *Id.*

¹⁵⁴ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

¹⁵⁵ *Id.* at 835.

¹⁵⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

¹⁵⁷ *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

¹⁵⁸ MODEL PENAL CODE § 2.02 General Requirements of Culpability (AM. LAW INST. 2016).

¹⁵⁹ *Id.*

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 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.”¹⁶⁰ Requiring a *mens rea* of purpose or knowledge in § 875(c) would be “dangerously underinclusive” in future threat prosecutions and would undermine the protections that a prohibition on threats affords victims.¹⁶¹ Moreover, requiring knowledge or purpose does not protect against the harms that these threats cause, but rather it “effectively decriminalize[s] conduct that predictably and reasonably creates a genuine fear of violence with all its attendant psychological, emotional, economic, and social disruptions.”¹⁶²

With a knowledge or purpose standard, it would 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 mind. It can be hard to understand exactly why someone chose the words they did in conveying a message that contained a threat. Whatever private reasons a speaker has 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.”¹⁶³ Despite these undisclosed reasons, the negative effect on the victims remains the same, and “some people may experience a therapeutic or cathartic benefit only if they know their words will cause harm.”¹⁶⁴ 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.¹⁶⁵

Moreover, if § 875(c) requires a *mens rea* of purpose or knowledge

¹⁶⁰ *Virginia v. Black*, 538 U.S. 343, 344 (2003).

¹⁶¹ Brief for the Nat’l Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 28, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983) (internal citations omitted).

¹⁶² *Id.* at 35.

¹⁶³ *Id.* at 30-31.

¹⁶⁴ *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015).

¹⁶⁵ 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).

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.”¹⁶⁶ Additionally, a defendant may argue that he was not communicating a threat, but instead was simply engaging in therapeutic venting.¹⁶⁷ This argument is not new, and in *State v. Slide*, after threatening a judge, the defendant argued that a jury could have “reasonable doubt as to whether it might have been intended simply as artistic emotional venting.”¹⁶⁸

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.¹⁶⁹ Whether it is a poem, a song, therapeutic venting, or a drunken threat, the words still convey a threat to the intended target, and the victims of these threats still suffer as a result of the 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 page.¹⁷⁰ Under a recklessness standard, that alone would have been enough to convict him. However, requiring a *mens rea* of knowledge or purpose would significantly limit the type of threats that can be criminally prosecuted under § 875(c), which would severely diminish the available protections for victims of online threats and online stalking.

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

Misunderstandings through 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 say through tone, facial expressions, body language, and pacing.¹⁷¹ A sentence can sound friendly in 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 unable to hear the speaker’s tone or pace. In fact, “we tend to misinterpret positive . . . messages as more

¹⁶⁶ Brief for Appellee at 33, *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013), *rev’d and remanded*, 135 S. Ct. 2001 (2015).

¹⁶⁷ *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring).

¹⁶⁸ Brief for Appellee at 33, *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013), *rev’d and remanded*, 135 S. Ct. 2001 (2015).

¹⁶⁹ *U.S. v. Heineman*, 767 F.3d 970 (10th Cir. 2014).

¹⁷⁰ Transcript of Record at 232, *Elonis v. United States*, 135 S. Ct. 2001 (2015).

¹⁷¹ Daniel Goleman, *E-Mail is Easy to Write (and to Misread)*, N.Y. TIMES (Oct. 7, 2007), http://www.nytimes.com/2007/10/07/jobs/07pre.html?_r=0.

neutral, and neutral ones as more negative, than the sender intended. Even jokes are rated as less funny by recipients than by senders.”¹⁷²

One way people have attempted to remedy this issue is through the use of emoticons or emojis.¹⁷³ 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.¹⁷⁴ While emoticons 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; he had sent intimidating text messages about her to her friends.¹⁷⁵ One threatening text message included an emoji of a face with a tongue sticking out, and again, similar to *Elonis*, the perpetrator suggested that the emoji indicated the text message was meant to be taken as a joke.¹⁷⁶ 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.”¹⁷⁷ Moreover, a linguistics scholar has noted that certain emoticons, such as a face with a tongue sticking out and a “winky” face, are harder to interpret than a smiling or frowning face.¹⁷⁸ “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.”¹⁷⁹

¹⁷² *Id.*

¹⁷³ 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 Smailovi’c, Borut Sluban & Igor Mozeti, *Sentiment of Emojis*, JOŽEF STEFAN INST. (2015), <http://arxiv.org/pdf/1509.07761v2.pdf>.

¹⁷⁴ Brief for Petitioner at 20, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

¹⁷⁵ *Enjaian v. Schlissel*, 14-CV-13297, 2015 WL 3408805, at *2 n.10 (E.D. Mich. May 27, 2015).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Amanda Hess, *Exhibit A: ;*, SLATE (Oct. 26, 2015), 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=wppl>.

¹⁷⁹ Hess, *supra* note 178.

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.¹⁸⁰ These factors include how the words are likely to be understood; whether a reasonable person would interpret the words as threatening, given the identities of the speaker and the listener; the nature of the speaker and the listener; and how the words are communicated.¹⁸¹ The NNEDV explains that “victims are often the best assessors of the risk that the threats of violence they face will be carried out.”¹⁸² Understanding the context of the messages will allow law enforcement and prosecutors to discover a simple message’s hidden meaning. A recklessness standard in § 875(c) would allow for a careful review of context in online threat situations and would allow courts to protect victims accordingly. 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 pretextual defenses that an online threat was intended as a joke or as a means of creative expression.

For example, for the women targeted during the GamerGate controversy, a recklessness standard would have permitted prosecutors to prosecute the individuals who harassed and stalked the women under § 875(c).¹⁸³ Though the women often did not know the identity of their online stalkers, these individuals knew the women’s home addresses and personal information. Moreover, many of the victims knew that the stalkers had knowledge of their home addresses and personal information, and 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 the women may view the 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.”¹⁸⁴ Interpreting

¹⁸⁰ 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).

¹⁸¹ *Id.*

¹⁸² *Id.* at n.34.

¹⁸³ *See supra* Part III.B.

¹⁸⁴ 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).

a threat from an online post can only be determined through the context of the threat's 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."¹⁸⁵ For example, in *Elonis*, *Elonis* posted the threatening speech to his Facebook page after his wife had gotten a civil protection order.¹⁸⁶ When Tara interpreted *Elonis*' words, there was "no way [for Tara] 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."¹⁸⁷ *Elonis* could have reasonably foreseen Tara's reaction because his threatening speech was an attempt "to get inside her head and make her think there could be someone doing violence to her."¹⁸⁸ In fact, "*Elonis*' threats must be understood in an environment where 40% to 50% of murdered women are killed by people they know well."¹⁸⁹ As such, a recklessness standard would allow a court to view the threat in light of the context of the threat and discover its veiled and hidden meanings. Through strengthening § 875(c) with a *mens rea* of recklessness, prosecutors would 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 choose to threaten their victims, they are consciously disregarding the risk that their 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 carried 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,

¹⁸⁵ *Id.*

¹⁸⁶ *Elonis*, 135 S. Ct. at 2006.

¹⁸⁷ 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>.

¹⁸⁸ 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>.

¹⁸⁹ Soraya Chemaly & Mary Anne Franks, *Supreme Court may have made Online Abuse Easier*, TIME (June 3, 2015), <http://time.com/3903908/supreme-court-elonis-free-speech/>.

Zoe Quinn announced that she would no longer be pressing charges against her ex-boyfriend who aided in her online harassment.¹⁹⁰ In a blog entry explaining her decision, she wrote, “[T]he 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 arsenal of the people out there way scarier than him.”¹⁹¹ 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.¹⁹²

Though efforts by non-profits can help victims of online threats, social networking websites also need to acknowledge the severity of online threats on their respective platforms. These websites often harbor online threats and a stronger response is required by these website owners to offer more protection to their users. Fortunately, some websites are beginning to recognize the role they play in the occurrence of online threats. On February 9, 2016, Twitter announced the creation of the “Trust and Safety Council” to help fight online abuse, including behavior “intended to harass, intimidate, or use fear to silence another user’s voice.”¹⁹³ The Council is comprised of over forty organizations and is intended to create policies that will create a safer environment on Twitter.¹⁹⁴

Congress has also responded to the prevalence of online threats through proposed legislation. On March 15, 2016, Congresswoman Katherine Clark introduced a new federal bill, called the Cybercrime Enforcement Training Assistance Act of 2016.¹⁹⁵ 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

¹⁹⁰ 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>.

¹⁹¹ *Id.*

¹⁹² *How Can We Help?*, CRASH OVERRIDE NETWORK, <http://www.crashoverride.network.com/about.html> (last visited Mar. 13, 2016).

¹⁹³ 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).

¹⁹⁴ *Supra* note 193.

¹⁹⁵ Cybercrime Enforcement Training Assistance Act of 2016, H.R. 4740, 114th Cong. (2016).

cybercrimes.¹⁹⁶ The bill would also establish federal grants to train law enforcement personnel, prosecutors, and judges to enforce the existing laws that already prohibit cybercrimes.¹⁹⁷ In a column published by The Hill, Congresswoman 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.”¹⁹⁸

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 affect many people, they disproportionately impact women and other vulnerable communities.¹⁹⁹ 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 these online threats. With a required *mens rea* of recklessness to convict under the federal threat statute, 18 U.S.C. § 875(c), an individual can be held criminally liable for threatening a person when he consciously disregards a substantial and unjustifiable risk that his words may be received as threats. Individuals who utilize online communications to threaten others will no longer be able to hide behind justifications of their Internet anonymity, or their assertion that the communications were simply “jokes,” “artistic expression,” or “therapeutic rants.” Instead, by imposing a *mens rea* requirement of recklessness under § 875(c), law enforcement, prosecutors, and judges will be enabled to offer greater protections for these victims. With these efforts, victims of online threats will finally be able to hold perpetrators of online harassment and threats accountable for their actions.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Clark, *supra* note 126.

¹⁹⁹ *See supra* Part III.