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ELONIS V. UNITED STATES: THE NEED TO UPHOLD INDIVIDUAL RIGHTS TO FREE SPEECH WHILE PROTECTING VICTIMS OF ONLINE TRUE THREATS

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In American society, social networking sites and other online forums dominate modern communication. As of December 2015, over one billion people worldwide actively used Facebook on a daily basis.[1] The increased frequency with which individuals use the Internet as a primary means of communication has profoundly changed the level of access people have to posts, updates, and statements made on social media profiles.[2] Because online communications tend to allow individuals to post their thoughts on a widely accessible network, courts have seen a rise in "true threat" litigation over the past decade, which evaluates whether statements communicated by an individual qualify as threats.[3] Courts have wrestled with several complex issues regarding Internet communications, and they have particularly struggled with how to apply federal statutes prohibiting true threats in ways that do not impermissibly limit the First Amendment right to free speech.[4] As the Supreme Court has not announced a clear formula for how to interpret threatening statements on social networking sites, substantial ambiguity persists regarding what content individuals may post without risking criminal prosecution.[5]

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1. *Company Info*, FACEBOOK NEWSROOM (2016), http://newsroom.fb.com/company-info (last visited Mar. 3, 2016).

2. *See* Adrienne Scheffey, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After* Virginia v. Black, 69 U. MIAMI L. REV. 861, 867 (2015) (stating the "prevalence of, and access to, widespread speech is unprecedented worldwide with millions of users communicating daily through social media").

3. *See id.* at 864 (explaining "true threat cases are becoming more prevalent in light of the expansion of ubiquitous access to the Internet and social media"); *see infra* Part II.C (explaining that courts have found communications inciting violence and symbols of intimidation meant to instill fear of bodily harm to constitute true threats).

4. *See infra* Part II.

5. *See infra* Part IV.

In *Elonis v. United States*,[6] the Supreme Court had the chance to address this increasingly relevant issue in deciding whether an individual's Facebook posts qualified as true threats.[7] The Supreme Court erred by failing to concretely define the application of 18 U.S.C. Section 875(c),[8] which prohibits the communication of true threats to speech transmitted through online social networking.[9] The Court should have considered both the First Amendment implications and the question of which intent standard to apply when considering online posts as threats as one single issue. Because the Court chose, unfortunately, to separate these issues, it missed a vital opportunity to announce the proper intent standard under 18 U.S.C. Section 875(c).[10] The lack of a concrete standard will lead to continued confusion both in lower courts and to individuals active in social media.[11] The Court should have adopted a hybrid reasonable-speaker and reasonable-recipient standard, which would best balance the dual interests of maintaining individual free speech rights while also protecting the public from true threats.[12]

I. THE CASE

In September 2013, Anthony Douglas Elonis was found guilty of violating 18 U.S.C. Section 875(c),[13] which makes it a crime to communicate a "true threat" to injure another person.[14] The charges alleged that Elonis had issued true threats over social media to his former co-workers, law enforcement officers, an FBI agent, his ex-wife, and elementary school children.[15] Elonis regularly used Facebook to publicly air his grievances to his "friends" on the site.[16] In May 2010, Elonis's wife and two children left him after almost seven years of marriage.[17] After his

6. 135 S. Ct. 2001 (2015).
7. *Id.* at 2004.
8. 18 U.S.C. § 875(c) (2012).
9. *Elonis*, 135 S. Ct. at 2008.
10. *See infra* Part IV.
11. *See infra* Part IV.C.
12. *See infra* Part IV.C.
13. United States v. Elonis, No. 11-13, 2011 WL 5024284 (E.D. Pa. Oct. 11, 2011). Section 875(c) states that "[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."
14. *Id.* The District Court for the Eastern District of Pennsylvania posited that "[a] statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intent to inflict bodily injury or take the life of an individual." Brief for Petitioner at 17, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983).
15. United States v. Elonis, 730 F.3d 321 (3rd Cir. 2013), *rev'd*, 135 S. Ct. 2001 (2015).
16. *Id.*
17. *Id.* at 324.

family left him, Elonis started listening to violent rap music and eventually began to post lyrics of his own on his Facebook page.[18] He posted these lyrics under his rap name and musical persona, "Tone Dougie."[19] Elonis's violent lyrics were often accompanied by reminders that they were not intended to reflect actual people.[20] He wrote that the posts allowed him to express himself and to move on from the pain caused by losing his family.[21] Elonis's coworkers, employers, and ex-wife, however, considered Elonis's Facebook activity dangerous and threatening.[22]

The first post to warrant concern occurred after Elonis attended a Halloween event at the amusement park where he worked.[23] Elonis posted a photo of himself and a coworker in which he held a knife to her throat.[24] Elonis captioned the photo "I Wish."[25] After viewing the photo on Elonis's Facebook account, the Chief of Park Security fired him.[26] Elonis subsequently posted a detailed response on his Facebook page, stating that he still had access to park facility keys.[27] He wrote "Y'all think it's too dark and foggy to secure your facility from a man as mad as me. . . . Whoever thought the Halloween Haunt could be so f***ing scary?"[28] Following this post, Elonis was indicted for threatening park employees and customers.[29]

In addition to Elonis's Facebook posts regarding his former job, he routinely posted explicit material targeting his ex-wife.[30] Elonis's ex-wife viewed these posts and sought a Protection From Abuse order, which a state court granted.[31] In one particular post, Elonis wrote that it would be illegal for him to say that someone should kill his ex-wife, but nevertheless legal for him to explain that illegality.[32] He also stated that it would be illegal for him to say someone should kill his ex-wife with a mortar launcher.[33] Elonis followed the post with a diagram and detailed directions about the best

18. Brief for Petitioner, *supra* note 14, at 6–7.
19. *Id.* at 7.
20. *Id.*
21. *Id.*
22. *Elonis*, 730 F.3d at 324. Elonis's wife testified that Elonis had never listened to rap music or expressed any desire to write his own lyrics at any point during their marriage. *Id.* at 325.
23. *Id.* at 324.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 326.
30. *Id.* at 324–26.
31. *Id.* at 324.
32. *Id.*
33. *Id.*

place someone could fire the launcher into his wife's home.[34] The post was based on a stand-up comedy routine, and Elonis provided a link to the original skit, accompanied by a statement that he was "willing to go to jail for [his] constitutional rights."[35] Shortly after his ex-wife obtained the Protection From Abuse order, Elonis wrote another violent post from his Tone Dougie account.[36] The post referred to the order, asking, "[i]s it thick enough to stop a bullet?"[37] He also mentioned having "enough explosives to take care of the state police and the sheriff's department," which prompted the third count of Elonis's indictment for threatening law enforcement officers.[38]

In addition to posting lyrics directed towards his ex-wife and the local police department, Elonis used his Tone Dougie page to write that there were "[e]nough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined."[39] This post prompted the FBI to monitor Elonis's online activity more closely.[40] When agents encountered more posts alluding to school shootings, they visited Elonis at his home.[41] Immediately following the in-person visit, Elonis posted original lyrics entitled "Little Agent Lady."[42] The lyrics contained graphic descriptions about wanting to slit one of the agent's throats and "[l]eave her bleedin' from her jugular in the arms of her partner."[43] Elonis referenced plans to strap himself with a bomb and detonate the explosives if police placed him under arrest.[44] He wrote, "I'm just a crazy sociopath . . . . I'm gonna be famous [c]ause I'm just an aspiring rapper who likes the attention who happens to be under investigation for terrorism."[45]

Facebook posts related to Elonis's ex-wife, the local police station, the FBI agent, and local elementary schools provided the basis of an indictment against Elonis for making threats in violation of 18 U.S.C. Section 875(c).[46] Section 875(c) makes it a crime to communicate true threats in interstate commerce.[47] Elonis moved to dismiss the indictment in the District Court

34. *Id.* at 324–25.

35. Brief for Petitioner, *supra* note 14, at 12. The routine involved a satirical approach by comedian Trevor Moore to explain the illegality of threatening to kill the president. *Id.* at 10.

36. *Elonis*, 730 F.3d at 324.

37. *Id.* at 325.

38. *Id.* at 326.

39. *Id.*

40. *Id.*

41. *Id.*

42. Brief for Petitioner, *supra* note 14, at 14.

43. *Elonis*, 730 F.3d at 326.

44. *Id.*

45. Brief for Petitioner, *supra* note 14, at 15–16.

46. *Elonis*, 730 F.3d at 326.

47. 18 U.S.C. § 875(c) (2012) states that "whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure

for the Eastern District of Pennsylvania, arguing that it failed to accuse him of intending to threaten anyone.[48] The district court denied this motion and upheld the Third Circuit precedent interpreting 18 U.S.C. Section 875 as not requiring a finding that Elonis *intended* to threaten anyone, but only requiring a finding that he made the communication.[49] Elonis later requested a jury instruction that would have required the government to show that Elonis subjectively intended his posts as real threats.[50] The district court denied the request, and instead defined a true threat as a statement made intentionally by the defendant "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."[51] The jury found Elonis guilty on four out of five counts of the indictment, and he was sentenced to three years and eight months in jail and three years of supervised release.[52]

On appeal to the United States Court of Appeals for the Third Circuit, Elonis again challenged the jury instructions provided by the district court.[53] He stressed that the jury should have been required to find that he intended his online posts as true threats.[54] The Third Circuit rejected this argument and declined to apply a subjective intent standard.[55] Instead, it reiterated that the proper standard for intent under 18 U.S.C. Section 875(c) is that the defendant made the communication intentionally, and that a *reasonable person* would interpret the statement as a threat.[56] The Supreme Court granted certiorari to determine the proper intent standard for a threat under 18 U.S.C. Section 875(c).[57]

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the person of another, shall be fined under this title or imprisoned not more than five years, or both."

48. *Elonis*, 730 F.3d at 327.

49. *Id.* The Court applied a "general intent" standard, in which a statement would qualify as a true threat if a reasonable person would have understood the communication as a threat. *Id.* Rather than considering whether Elonis subjectively intended his posts to be interpreted as threats, the general intent standard applied by the district court only considers culpability from an objective perspective. *Id.*

50. *Id.* at 327.

51. *Id.* The government provided as witnesses several of the individuals mentioned in Elonis's posts, including his ex-wife, all of whom testified that they considered Elonis's posts threats. Brief for Petitioner, *supra* note 14, at 17–18. Elonis argued, unsuccessfully, that his lyrics resembled those of many other popular rappers, and helped him cope with the instability in his life. *Id.* at 6–7.

52. *Elonis*, 730 F.3d at 327.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 327–28.

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

II. LEGAL BACKGROUND

Section 875 governs the class of statements that do not enjoy First Amendment protections because they constitute true threats.[58] The statute provides that "whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both."[59] Historically, the Supreme Court has treated true threats as a category of speech unprotected by the First Amendment.[60] When analyzing statutory provisions that reference true threats, however, the Court has applied varying intent standards to the crimes, without referencing the First Amendment implications of these statements.[61] Parts II.A–B will address how the Supreme Court has analyzed criminal statutes that fail to delineate a requisite mental state, and how the Court has traditionally held that criminal law requires some level of intent.[62] Part II.C will then explore recent, major developments to the true threat doctrine by examining Supreme Court precedent.[63] Finally, Part II.D will address the circuit split regarding the proper intent requirement to apply 18 U.S.C. Section 875(c) and will consider what statements have qualified as true threats in the circuits.[64]

A. The Omission of an Intent Requirement in a Criminal Statute Does Not Automatically Render the Prohibited Behavior a General Intent Crime

One hallmark feature separating criminal law from other types of misconduct is the requirement that the defendant acted with a level of intent when committing the unlawful act.[65] Statutes typically require either a "general intent" or a "specific intent" standard.[66] In the context of true threats, a general, or objective intent requirement means a statement would qualify as a true threat if a reasonable person would have understood the communication as a threat.[67] A specific or subjective intent standard would consider whether the speaker subjectively intended her posts to be

58. 18 U.S.C. § 875(c) (2012).
59. *Id.*
60. *See infra* Part II.C.
61. *See infra* Part II.D.
62. *See infra* Part II.A–B.
63. *See infra* Part II.C.
64. *See infra* Part II.D.
65. Morissette v. United States, 342 U.S. 246, 250–51 (1952).
66. *See infra* Part II.B.
67. *See infra* Part II.D.

interpreted as threats and would require more than an objective showing of intent.[68]

In *Morissette v. United States*,[69] the United States Supreme Court assessed how to interpret criminal statutes lacking an explicit intent standard. It held that a court should presume the statute requires some mental element, even if Congress did not include one.[70] The defendant in *Morissette* came across a government-owned bombing test site where he found several shells he believed to be abandoned.[71] Unaware that the government owned the property, the defendant removed several shells from the field and took them to a nearby metal processing plant to exchange the metal for cash.[72] The defendant was subsequently charged under 18 U.S.C. Section 641, which states: "whoever embezzles, steals, purloins, or *knowingly converts* government property is punishable by fine and imprisonment."[73]

Because the statute itself did not specify what level of intent must be proven, the Court of Appeals for the Third Circuit applied a general intent standard, and held that the word "knowingly" only applied to the fact that the defendant knew he was removing the shells from the field.[74] The Supreme Court disagreed with the Court of Appeal's application of a general intent standard to Section 641, and focused its analysis of the importance of intent in criminal law.[75] Ultimately, the *Morissette* Court ruled that "[t]he contention that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[76]

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68. *See* United States v. DeAndino, 958 F.2d 146, 149 (6th Cir. 1992), *abrogated by* United States v. Houston, 792 F.3d 663 (6th Cir. 2015) (explaining the "difference between a specific intent and general intent crime involves the way in which the intent is proved—whether by probing the defendant's subjective state of mind or whether by objectively looking at the defendant's behavior in the totality of the circumstances" (citing United States v. Hoffman, 806 F.2d 703, 707 (7th Cir. 1986))).

69. 342 U.S. 246 (1952).

70. *Id.* at 263 (holding that "mere omission . . . of any mention of intent will not be construed as eliminating that element from the crimes denounced").

71. *Id.* at 247.

72. *Id.*

73. *Id.* at 248 (quoting 18 U.S.C. § 641 (2012) (emphasis added)).

74. *Id.* at 249–50. The Court of Appeals framed the issue as a question of whether the government only had to prove that Mr. Morissette intended to remove the property from the field, or whether the government had to prove he possessed a "felonious intent" to remove the government's property. *Id.* at 249.

75. *Id.* at 260–61. By tracing the history of larceny and other theft offenses throughout the common law, the Supreme Court highlighted the engrained practice of applying a mens rea in order to convict a person for those crimes, even though the statute failed to explicitly state an intent requirement. *Id.*

76. *Id.* at 250.

The fundamental difference between criminal and civil charges, the Supreme Court reasoned, rests on whether a person has a guilty mind when committing the offense.[77] Based on this long-established principle, the Supreme Court rejected the lower court's reasoning that the lack of an explicit intent requirement within the statute required them to apply a general intent standard.[78] The *Morissette* Court held that a general intent standard in this case was insufficient to ensure that a defendant had consciously violated the law, and therefore a subjective requirement was required.[79] Although the statute itself failed to announce an explicit level of intent, the Court interpreted the statute as requiring subjective intent, and thereby reversed Morissette's conviction.[80]

B. If a Particular Reading of a Statute Would Criminalize Innocent Behavior, the Court Should Infer That Congress Intended the Statute to Require an Element of Subjective Intent

In *Staples v. United States*,[81] the Supreme Court built on *Morissette's* principle that criminal statutes lacking an explicit intent standard should be interpreted as requiring subjective intent.[82] In *Staples*, the defendant faced charges under the National Firearms Act, which prohibits possessing a machine gun unless that person has properly registered it with the federal government.[83] The charges arose from an incident in which the police searched the defendant's home and found a weapon they suspected had been modified to have automatic firing capability.[84] Admitting that he had not properly registered the weapon, the defendant nonetheless argued he was unaware that the weapon had automatic firing capabilities and that he had never used it in that capacity.[85] Because he did not know about the weapon's modification and had not registered it with the federal government, the defendant pled not guilty.[86]

The Supreme Court began its analysis of *Staples* by once again turning to case precedent showing that statutes without a mens rea requirement are largely disfavored.[87] To accept the government's argument that this statute

77. *Id.*

78. *Id.* at 276.

79. *Id.* at 271, 273–76.

80. *Id.* at 276.

81. 511 U.S. 600 (1994).

82. *Id.*

83. *Id.* at 602. The National Firearms Act also failed to delineate an explicit intent requirement. *Id.*

84. *Id.* at 603.

85. *Id.*

86. *Id.*

87. *Id.* at 604–05 (citing Liparota v. United States, 71 U.S. 419, 424 (1985)); *see also* United States v. Balint, 258 U.S. 250, 251, 254 (1922) (holding that criminal statutes typically require

only required general intent, the Court held that it would need evidence of Congress' intent *not* to require an express mental state.[88] To discern whether Congress truly intended a statute to have no intent requirement, the Court further held that it must examine the nature of the subject matter being regulated.[89] The Court reasoned that when a statute regulates an extremely dangerous activity, or one that places the public in danger, it can assume that Congress "intended to place the burden on the defendant to 'ascertain at his peril whether [his conduct] comes within the inhibition of the statute.'"[90] The Court further reasoned that although society has a strong interest in the proper regulation of firearms, and that possession of automatic weapons qualifies as dangerous conduct, the defendant could not face charges because he did not know his actions violated the law.[91] By holding that this statute implicitly required subjective intent, the Court expressed the importance of assuring that defendants facing criminal charges clearly intended to cause the harm the statute sought to prevent.[92]

The Court's decisions in *Staples* and *Morissette* emphasized the importance of separating innocent conduct from criminal behavior when evaluating statutes that are silent on intent.[93] The Court reinforced this argument when it overturned a defendant's conviction for fraudulent food stamp use in *Liparota v. United States*.[94] At trial, Mr. Liparota requested a

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some level of subjective intent because there is a strong interest in ensuring that individuals will not be punished for truly innocent behavior).

88. *Staples*, 511 U.S. at 606. A general intent standard would not require the government to prove that the defendant had knowledge of his weapon's automatic firing capabilities. Instead, it would only be required to show that the defendant knowingly possessed the gun. *Id.*

89. *Id.* at 619 (holding that determining whether a statute requires general or specific intent "depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items"); *see also Balint*, 258 U.S. at 254 (holding that statutes which regulate very dangerous materials may omit a subjective intent element, even if they impose stringent criminal punishments). The Court also found that, in certain areas of regulation, when the public welfare is at risk and Congress has clearly indicated its commitment to protecting society's interests over protecting those individuals whose innocent behavior might subject them to criminal punishments under the statute, the statute may be read as requiring only a showing of general intent. *Id.*

90. *Staples*, 511 U.S. at 607 (quoting *Balint*, 258 U.S. at 254) (alteration in original).

91. *Id.* at 611.

92. *Id.* at 619–20 (holding that "the usual presumption that a defendant must know the facts that make his conduct illegal should apply").

93. *Id.* Throughout its analysis, the Court emphasized that it typically interprets statutes as requiring some element of subjective intent unless the statute regulates a highly dangerous activity. This analysis reflects the principle that criminal conduct requires punishment, whereas innocent conduct does not. *Id.*

94. 471 U.S. 419 (1985). The defendant purchased food stamps from an undercover government agent, and was charged under the Food Stamp Fraud Statute, which punishes a person "wh[o] knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations." *Id.* at 420–22 (quoting 7 U.S.C. § 2024(b)(1) (second alteration in original)).

jury instruction requiring the government to prove that he "knowingly did an act which the law forbids, purposely intending to violate the law."[95] The district court, however, had determined that the government only needed to show that the defendant acquired food stamps in a manner not authorized by the statute, and therefore his mental state did not affect whether his behavior qualified as criminal.[96]

On appeal to the Supreme Court, Mr. Liparota argued, and the Court accepted, that the statute had to contain an implicit mens rea requirement because otherwise it would "criminalize a broad range of apparently innocent conduct."[97] Specifically, the unclear instructions provided by the statute on how to legally obtain food stamps created opportunities for individuals to mistakenly violate the law by obtaining stamps from unauthorized sources.[98] Because of this confusing structure, the Court found that the statute too often resulted in criminalization of innocent conduct.[99] The *Liparota* Court held that the government did not have to prove that the defendant had knowledge of the specific rules governing the purchase of food stamps, but it *did* have to prove that the defendant knew his conduct was wrong.[100] Because the government failed to demonstrate that the defendant knew his method of purchasing food stamps violated the law, the Supreme Court overturned Mr. Liparota's conviction.[101] In so doing, the Court reinforced the principle that it may interpret a statute as requiring subjective intent, even if Congress has not named an explicit intent standard.[102]

C. Both Congress and the Courts Have Failed to Express a Clear Intent Requirement for the Communication of True Threats

The Supreme Court affords broad protections to speech under the First Amendment,[103] in order for a communication to fall outside First Amendment protection, the speech must constitute a true threat.[104] Categories of speech which the Court has previously held to constitute true

95. *Id.* at 422.

96. *Id.* at 422–23.

97. *Id.* at 426.

98. *Id.* at 426–27.

99. *Id.*

100. *Id.* at 434 (arguing that this proof may be established "by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal").

101. *Id.*

102. *Id.* at 426.

103. *See, e.g.*, *Brandenburg*, 395 U.S. at 449 (holding that mere advocacy of the use of force or violence qualifies as speech protected by the First Amendment).

104. *See Black*, 538 U.S. at 359 (holding that states may constitutionally restrict speech that represents an intention to cause bodily harm to a group or individual because those statements constitute true threats).

threats include speech inciting violence[105] and symbols of intimidation intentionally meant to instill fear.[106] Communications that merely express unpopular or offensive viewpoints do not constitute true threats.[107]

The United States Supreme Court first used the term "true threats" in *Watts v. United States*,[108] when it evaluated whether the defendant's statements at a public, anti-war rally violated a federal statute prohibiting a person from "knowingly and willfully making any threat to take the life or to inflict bodily harm upon the president of the United States."[109] In holding that the defendant's statements did not constitute true threats, the Supreme Court stressed the importance of protecting political speech, even though it can often be "vituperative, abusive, and inexact."[110] The Court's decision in *Watts* exemplifies the Court's commitment to protecting First Amendment rights, particularly with regard to speech that could be interpreted as unpopular.[111] The *Watts* Court set a high bar for making a successful claim for a true threat.

The Supreme Court continued to analyze threatening speech on very narrow grounds in *Brandenburg v. Ohio*,[112] a case in which the petitioner spoke at a Ku Klux Klan rally and encouraged members to participate in upcoming marches and demonstrations.[113] He also appeared in a film clip dressed in a Ku Klux Klan hood and expressed his frustrations that political and governmental leaders of the country were "suppress[ing] the white, Caucasian race" and that "there might have to be some revengeance[sic] taken."[114] The petitioner was convicted under Ohio's Syndicalism statute, which made it a crime to "advocat[e] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[115]

105. *Brandenburg*, 395 U.S. at 449.

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

107. *Brandenburg*, 395 U.S. at 448–49.

108. 394 U.S. 705 (1969).

109. *Id.* at 705 (quoting 18 U.S.C. § 871(a) (2012) (alteration in original)). The defendant's charges arose out of his statements at an anti-Vietnam war rally in which he was overheard saying "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706.

110. *Id.* at 708. The Court emphasized that the offensive nature of political speech cannot on its own be a basis for censorship, but did not express a concrete standard under which to evaluate these classes of statements. *Id.*

111. *Id.* at 707 (holding that statutes which criminalize speech "must be interpreted with the commands of the First Amendment clearly in mind" because public debate is foundational to our society).

112. 395 U.S. 444 (1969).

113. *Id.* at 445.

114. *Id.* at 446.

115. *Id.* at 444–45 (quoting Ohio Rev. Code Ann. § 2923.13 (alteration in original)).

The Supreme Court held that the Ohio statute violated the First and Fourteenth Amendments because it punished "mere advocacy," and because it made it a crime to assemble and advocate constitutionally protected views.[116] It posited that, while the petitioner's statements at the Ku Klux Klan rally promoted troublesome, white supremacist views, they did not actually incite any violence.[117] The Court stressed that in order for statements of this class to fall outside the protection of the First Amendment, the petitioner's speech would have had to amount to incitement.[118] Although actual violence need not occur for a statement to qualify as incitement, the violence communicated must be imminently likely to occur.[119] The Court's reasoning in *Brandenburg* again reinforced that only a small category of truly threatening statements will be held to violate the First Amendment, and statutes that criminalize the advocacy of offensive beliefs will likely violate the Constitution.[120]

Similarly, in *R.A.V. v. City of St. Paul, Minnesota*,[121] the Supreme Court struck down a city ordinance that prohibited burning crosses by making it illegal to display any symbols that "arous[e] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[122] Because this statute criminalized the expression of personal views, the Court found it unconstitutional on its face.[123] Although the *R.A.V.* Court explained that true threats do not enjoy free speech protection because their censorship "protect[s] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that threatened violence will occur," it held that the defendant's cross burning did not rise to the level of a true threat.[124] The Court emphasized, as it had in *Watts* and *Brandenburg*, that the offensive nature of a certain behavior or communication cannot, on its own, serve as the basis for censorship.[125]

116. *Id.* at 449.

117. *Id.*

118. *Id.* at 447–48. The Court announced a two-part test for determining whether speech qualified as incitement, which required that both the communication be aimed at producing imminent lawless conduct, and that the lawless conduct be likely to occur as a result of the communication. *Id.*

119. *Id.* at 449.

120. *Id.*

121. 505 U.S. 377 (1992).

122. *Id.* at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)).

123. *Id.* at 381.

124. *Id.* at 388 (citing Watts v. United States, 394 U.S. 705, 707 (1969)). The Court did not elaborate on, nor provide a rule regarding at which point the defendant's behavior would constitute a true threat, however.

125. *Id.* at 382 (citing, Cantwell v. Connecticut, 310 U.S. 296, 309–11 (1940); then citing Texas v. Johnson, 491 U.S. 397, 406 (1989)).

In *Virginia v. Black*,[126] the Supreme Court addressed another state statute that made cross burning illegal, and clarified the current standard under which a practice might constitute a true threat.[127] The Court held that while statutes may criminalize efforts to intimidate or instill fear in another person, displaying an offensive symbol used historically for intimidation does not in itself constitute a true threat.[128] In contrast with the St. Paul City ordinance in *R.A.V.*, which criminalized all acts of cross burning, the Virginia statute at issue in this case defined the illegal behavior as cross burning with "an intent to intimidate a person or group of persons."[129] At trial, the judge instructed the jury that the act of burning a cross constituted prima facie evidence of an "intent to intimidate," and so the defendant could be found guilty as long as the jury concluded that the defendant burned a cross.[130] The Supreme Court held that while a state may enact a statute that bans cross burning, this particular statute was over-broad, and therefore violated the First Amendment.[131]

In holding that the Virginia statute violated the First Amendment, the Supreme Court affirmed that an act of intimidation must amount to a true threat in order to constitute a crime.[132] In the context of this particular statute, the Court announced that "'[t]rue 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."[133] The Supreme Court had never applied an element of subjective intent to its definition of true threats prior to this case.[134] However, the Court stressed that states may ban intimidating behavior, as long as those statutes do not criminalize innocent behavior on the grounds that many individuals find that behavior offensive.[135] Because the act of burning crosses does not always imply "an intent to intimidate," the Court held that the statute violated the First Amendment because it posed a risk of

126. 538 U.S. 343 (2003).

127. *Id.* at 347–48.

128. *Id.* at 363.

129. *Id.* at 362–63.

130. *Id.* at 350–51. The jury instruction read that the "burning of a cross by itself is sufficient evidence from which you may infer the required intent." *Id.*

131. *Id.* at 348, 364 (holding that the prima facie evidence provision rendered the statute impermissible under the First Amendment because it removed any element of mens rea from the criminal act, and because burning crosses does not always carry with it an intent to intimidate particular people).

132. *Id.* at 359.

133. *Id.* (citing Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam)).

134. *See, e.g.*, *id.* at 359–60 (holding that a defendant need not intend to carry out the threat in order to be convicted for communicating a true threat).

135. *Id.* at 358 (noting that the First Amendment does not allow a state the "power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence" (quoting Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J. concurring))).

imposing criminal penalties on those whose conduct did not actually fall under the statute.[136]

D. The Court's Use of a Subjective Intent Component in Its Definition of a True Threat in Virginia v. Black *Has Led to a Circuit Split*

Prior to the Supreme Court's decision in *Virginia v. Black*, the definition of a true threat had never included an express reference to a subjective intent standard.[137] Because Supreme Court precedent regarding true threats has focused on a wide variety of issues, ranging from statements made in public debates to traditionally intimidating behavior, little direction exists for courts to determine the proper intent requirement to apply to true threats.[138] Due to the lack of clear Supreme Court decisions regarding this issue, the circuits are split on whether to apply an objective, a subjective, or a combination of both objective and subjective standards of intent to true threat cases.[139]

1. The Majority of Circuits Apply an Objective, Reasonable-Recipient Standard When Evaluating Criminal Intent in a True Threat Statute

As statutes criminalizing true threats typically do not contain explicit intent requirements, many circuits have relied on the presumption that such statutes only require general intent.[140] The circuits that apply general intent requirements to true threats use a reasonable person standard in evaluating whether a communication constitutes a true threat.[141] For example, in *United States v. DeAndino*,[142] the United States Court of Appeals for the Sixth Circuit held that the proper standard from which to evaluate a communication as a threat is by an objective, general intent standard. The court framed this inquiry by asking whether "a reasonable person would

136. *Id.* at 365–66.

137. *Id.* at 359.

138. *See supra* Part II.C–D.

139. *See supra* Part II.C.

140. *See* United States v. Brown, 915 F.2d 219, 225 (6th Cir. 1990) (stating that a "general rule of construction of criminal statutes [is] that where a statute does not specify a heightened mental element such as specific intent, general intent is presumed to be the required element" (citing United States v. Wilson, 884 F.2d 174, 178–79 (5th Cir. 1989); then citing United States v. Nelson, 733 F.2d 364, 370–71 (5th Cir. 1984); and citing United States v. Barber, 594 F.2d 1242, 1244 (9th Cir. 1979))).

141. *See* United States v. DeAndino, 958 F.2d 146 (6th Cir. 1992) (holding that true threats should be evaluated from the perspective of a reasonable person viewing the communication).

142. *Id.* This case has since been abrogated by United States v. Houston, 792 F.3d 663 (6th Cir. 2015), which was decided after the Supreme Court announced its decision in Elonis v. United States, 135 S. Ct. 2001 (2015), and therefore was prohibited from applying a purely objective intent standard.

consider the statement to be a threat."[143] The Sixth Circuit rejected the defendant's argument that general intent statutes heighten the risk that individuals might be punished for innocent deeds. Instead, the court reasoned that a defendant could present a defense that her acts constituted innocent deeds regardless of whether she was being charged for a general or a specific intent crime.[144] The Sixth Circuit held that, based on the plain language of the statute which did not mention any specific intent requirement, the statute must be read as a general intent crime.[145] This argument mirrors those adopted by other circuits relying on an objective standard of intent for true threats.[146]

2. Some Courts Apply an Objective Reasonable-Speaker Standard

The First Circuit favors an objective, reasonable-speaker standard as opposed to an objective, reasonable-recipient standard because the reasonable-speaker standard provides protection against juries basing their decisions on sympathy.[147] In *United States v. Fulmer*,[148] the First Circuit upheld jury instructions defining the intent requirement as such that "a reasonable person would foresee that the statement would convey to the recipient a seriousness of purpose and the apparent prospect of execution."[149] The court found that the proper intent standard for true threats must contain some element of the defendant's own intentions for his or her actions, but that a purely subjective standard would be too difficult for a prosecutor to prove.[150] The court reasoned that if a jury could find, beyond a reasonable doubt, that the speaker should have foreseen his words as a threat, the conviction would stand.[151] It explained that the jury could base its conclusion on all the circumstances surrounding the

143. *DeAndino*, 958 F.2d at 147–48. The defendant in this case was charged with violating 18 U.S.C. § 875(c), after stating to a man that he was going to "blow his brains out" and that the man was "going to die." *Id.* at 147. The district court applied a specific intent requirement, holding that in order to convict the defendant, the jury had to find that "the defendant knowingly and willfully threatened or intended to threaten" the victim. *Id.* The district court based its reasoning on the holding of *Morissette v. United States*, 342 U.S. 246, 263 (1952) in which the Court held that statutes that do not delineate a mens rea requirement should be presumed not to be strict liability statutes. *Id.* at 148.

144. *Id.* at 149.

145. *Id.*

146. *See e.g.*, United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013) (holding that true threats communicated over the Internet should be interpreted based on whether a reasonable recipient under the circumstances would have considered the statement a threat).

147. United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997).

148. *Id.* at 1486.

149. *Id.* at 1493.

150. *Id.* at 1494 (holding that "there is no way directly to scrutinize the works of someone else's mind or his state of mind").

151. *Id.* at 1493–94.

communication, such as the tone of voice of the speaker, the speaker's normal demeanor, and the speaker and recipient's relationship.[152]

3. A Minority of Courts Have Applied a Hybrid Intent Standard That Includes Both Subjective and Objective Elements

For some courts, neither a completely objective nor a completely subjective intent requirement suffices, and the government must show elements of both in order to support a conviction for issuing a true threat.[153] For example, in *United States v. Bagdasarian*,[154] the Ninth Circuit adopted the reasoning that criminal statutes require a mens rea element in order to separate innocent behavior from criminal conduct.[155] Therefore, a speaker has to demonstrate his or her intent to intimidate or threaten a person, or group of persons, both subjectively *and* objectively.[156] The Ninth Circuit held that criminal statutes must require a fact-finder to objectively "look at the entire factual context of [the] statements including the surrounding events, the listeners' reaction, and whether the words are conditional."[157] Because Bagdasarian's statements failed to constitute true threats under both an objective and a subjective intent standard, the court reversed his conviction.[158]

III. THE COURT'S REASONING

In *Elonis v. United States*, the United States Supreme Court reversed the decision of the Court of Appeals for the Third Circuit and held that 18 U.S.C. Section 875(c) requires a higher mens rea requirement than general intent.[159] The Court first examined the plain language of Section 875(c), concluding that the statute did not announce a particular intent requirement.[160] It then relied on the presumption that criminal statutes require a mens rea element, and ultimately decided that a purely objective

152. *Id.*

153. *See* United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011) (holding that true threats require both an element of subjective and of objective intent).

154. 652 F.3d 1113 (9th Cir. 2011).

155. *Id.* at 1116–18.

156. *Id.* at 1116 (holding that a state can only punish a threat "if 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" (quoting Virginia v. Black, 538 U.S. 343, 359 (2003))).

157. *Id.* at 1119 (quoting United States v. Gordon, 974 F.2d 1110, 1117 (9th Cir. 1992)).

158. *Id.* at 1117. The alleged true threats in this case were the defendant's racially-charged, violent posts about President Obama to an online message board, which included links to videos of explosions and emails to friends with links to ads for various firearms. *Id.* at 1115–16.

159. 135 S. Ct. 2001, 2012 (2015).

160. *Id.*

standard for true threats could not stand.[161] The *Elonis* Court chose not to consider any First Amendment issues, and rejected the argument that its failure to announce a concrete intent standard for true threats would perpetuate the circuit split.[162] Both the concurring and dissenting opinions criticized the majority for its failure to clarify the requisite intent standard for Section 875(c), and rejected the holding that true threats require a showing of subjective intent.[163]

The Court began its analysis by evaluating the text of Section 875(c), which states that a person who "transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another shall be fined under this title or imprisoned not more than five years, or both."[164] The Court noted that neither the government nor Elonis presented a concrete mens rea argument under Section 875(c), particularly because the statute itself does not reference intent.[165]

The Court, relying on precedent, reasoned that although a statute fails to mention the specific level of criminal intent necessary for a conviction, a requisite level of intent may nevertheless exist.[166] The Court found that if a statute does not include a standard of intent, it should interpret the statute to require "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[167] In the context of Facebook communications, the Court explained that posting offensive or violent material does not automatically qualify those statements as true threats.[168] A person may write violent posts that a court could interpret as innocent conduct.[169] In evaluating whether Elonis's statements crossed over into wrongful conduct, the Court determined it would focus on the mental state Elonis had at the time he made the Facebook posts.[170]

161. *Id.* at 2011.

162. *Id.* at 2012–13.

163. *Id.* at 2013.

164. *Id.*; *see also* 18 U.S.C. § 875(c) (2012). The Court, however, failed to articulate the standard.

165. *Elonis*, 135 S. Ct. at 2008–09.

166. *Id.*; *see also* Morissette v. United States, 342 U.S. 246, 276 (1952) (holding that the defendant, who took shell casings from a government military test range under the impression they were abandoned property, could not be found guilty for "knowingly convert[ing]" government property unless he had actual knowledge that the government owned the casings); Liparota v. United States, 471 U.S. 419, 426 (1985) (holding that the Court may not interpret a statute that is silent as to the requisite mental state in a way that would criminalize a "broad range of apparently innocent conduct").

167. *Elonis*, 135 S. Ct. at 2010 (quoting Carter v. United States, 530 U.S. 255, 269 (2000)).

168. *Id.* at 2011.

169. *Id.*

170. *Id.*

By framing the issue this way, the Court rejected the government's argument that because Elonis consciously posted his statements and a reasonable person would have considered the posts true threats, Elonis acted with sufficient criminal intent under Section 875(c).[171] The Court found that the government's approach, which read a negligence standard into the statute, does not give rise to criminal liability.[172] Because most federal criminal statutes expressly mention an intent requirement, the Court held Section 875(c) not to be different.[173] The Court stressed the importance of intent standards in criminal law, particularly because of the concern that a negligence standard might lead to punishing individuals for innocent activity.[174] Therefore, the Court held that Elonis could not be convicted merely because a reasonable person would have interpreted his Facebook posts as threats.[175] A jury would have had to find that Elonis consciously engaged in wrongdoing, which could be established if he possessed a requisite mental state higher than negligence.[176] Though the Court found that something more than general intent was required to impose criminal liability under 18 U.S.C. Section 875(c), it did not specify the details of such a standard.[177] Because the jury only addressed the issue from a negligence standard, the Court held that Elonis's conviction could not stand.[178] The Court reversed the decision of the Third Circuit, and remanded the case so that a jury could consider the facts in light of the higher intent standard for Section 875(c).[179]

In his concurring opinion, Justice Alito agreed with the majority that Section 875(c) required a mental state higher than negligence, but criticized the Court for failing to concretely establish the appropriate standard.[180] Justice Alito expressed his concern that the failure to declare the proper intent standard would lead to confusion in the lower courts as they would likely encounter this issue again.[181] Justice Alito wrote that the Court granted certiorari in order to resolve a circuit split regarding the requisite

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 2012.
176. *Id.*
177. *Id.* at 2013.
178. *Id.* at 2012. The Court held that a negligence standard was not sufficient to support a conviction under Section 875(c), and also rejected the arguments of Justice Alito and Justice Thomas that the Court should have considered whether recklessness could serve as the proper intent standard. Because no courts of appeals had addressed the recklessness standard, the *Elonis* Court chose not to explore it. *Id.* at 2103.
179. *Id.* at 2013.
180. *Id.* (Alito, J., concurring in part and dissenting in part).
181. *Id.* at 2014.

mental state for Section 875(c), and failed to do so.[182] Further, Justice Alito argued that the proper intent standard for Section 875(c) should be whether a person recklessly "disregards a risk of harm of which he is aware," and that the majority should have announced that standard.[183] He agreed with the majority's decision to apply the presumption that federal criminal statutes typically require some degree of intent.[184] Justice Alito argued that recklessness properly addresses the need for a higher intent requirement than negligence in a criminal statute.[185] Furthermore, because Congress was silent as to what standard Section 875 requires, Justice Alito believed the Court should only apply a slightly higher requirement.[186]

Additionally, Justice Alito reasoned that the Court should have addressed the First Amendment issue raised by Elonis.[187] Elonis argued that an intent standard as low as recklessness would violate the First Amendment—a claim which Justice Alito strongly rejected.[188] Elonis claimed that his constitutional right to free speech should have protected him from prosecution because he did not consider his Facebook statements threats.[189] He argued that his writing afforded him therapeutic benefits and helped him recover emotionally from the dissolution of his marriage.[190] Justice Alito, in contrast, argued that the Constitution does not, and never has, afforded protection for threats.[191] Regardless of the alleged benefit Elonis received from expressing himself through his posts, Justice Alito reasoned that the context behind the posts and their detailed nature indicated that Elonis acted recklessly, and caused significant psychological harm to the targets of his statements.[192] Because Justice Alito believed that the statements, when viewed from a recklessness standard, constituted true threats, he rejected the argument that the First Amendment protected Elonis.[193]

Voicing similar concerns on the majority's failure to resolve the circuit split on Section 875(c)'s appropriate mens rea requirement, Justice Thomas dissented from the judgment.[194] Instead of advocating for a recklessness

182. *Id.*
183. *Id.* at 2015 (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)).
184. *Id.* at 2014.
185. *Id.*
186. *Id.* at 2015.
187. *Id.* at 2016.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* (citing Virginia v. Black, 538 U.S. 343, 359–60 (2003); then citing R.A.V. v. St. Paul, Minn., 505 U.S. 377, 388 (1992); and then citing Watts v. United States, 394 U.S. 705, 707–08 (1969)).
192. *Id.*
193. *Id.*
194. *Id.* at 2018 (Thomas, J., dissenting).

standard like Justice Alito, however, Justice Thomas argued the Court of Appeals had not erred by applying a general intent standard.[195] Justice Thomas agreed with the majority and Justice Alito that criminal statutes typically include some requisite mental state, but argued that statutes concerning speech have historically adopted objective, general intent standards.[196] Justice Thomas argued that a general intent standard adequately permits an individual to understand whether his conduct constitutes wrongdoing.[197] Justice Thomas stressed that even if Elonis did not intend his posts as threats, the fact that they contained violent scenarios indicated that Elonis acted with sufficient criminal intent.[198] Justice Thomas rejected the majority's view that a general intent standard in this case would amount to mere negligence.[199] Justice Thomas framed his interpretation as a factual analysis, rather than focusing on the mental state possessed by an individual at the time a threat is made.[200] Justice Thomas reasoned that the Court should only consider whether the words communicated by the defendant fell under the legal definition of a threat, and therefore he believed the Court of Appeals had correctly applied a general intent standard.[201]

Justice Thomas also briefly addressed the First Amendment issue raised by Justice Alito, and largely agreed with him.[202] Through an historical analysis of Supreme Court precedent, Justice Thomas stressed that the Court has never allowed threats to enjoy any constitutional protection.[203] He also argued that the importance of protecting victims from threats supersedes the danger that innocent conduct may be punished should the Court choose not to adopt a higher standard of intent.[204] Given that Justice Thomas did not believe the First Amendment protected Elonis's statements and he agreed with the Court of Appeals decision to apply a general intent standard to Section 875(c), Justice Thomas argued the Court should have affirmed the decision of the Third Circuit.[205]

195. *Id.*

196. *Id.* at 2019 (citing *Watts*, 394 U.S. at 708; then quoting United States v. Darby, 37 F.3d 1059, 1066 (C.A.4 1994); then citing Cox v. Louisiana, 379 U.S. 536, 551 (1965); and then quoting United States v. Jeffries, 692 F.3d 473, 478 (C.A.6 2012)).

197. *Id.* at 2021.

198. *Id.*

199. *Id.* at 2023.

200. *Id.*

201. *Id.* at 2013.

202. *Id.* at 2024.

203. *Id.* at 2027 (citing Cohen v. California, 403 U.S. 15 (1971); then citing Chantwell v. Connecticut, 310 U.S. 296 (1940); and then citing State v. Chaplinsky, 18 A.2d 754 (1941)).

204. *Id.* at 2028.

205. *Id.*

IV. ANALYSIS

The Supreme Court erred in *Elonis v. United States* by failing to concretely define the intent requirement of 18 U.S.C. Section 875(c) to include speech transmitted through online social networking.[206] The Court should have treated the two issues—whether Elonis's Facebook posts violated the First Amendment and which intent standard to apply to alleged true threats—as one intertwined issue.[207] Because the Court chose to separate these issues, it missed a vital opportunity to resolve the circuit split regarding the proper intent standard for Section 875(c).[208] To determine the proper intent standard under the true threat doctrine, the Court should have considered what standard would ensure that innocent speakers will not face punishment, while still providing adequate protection to victims and recipients of true threats.[209] The Court could have achieved this balance by adopting a hybrid standard, combining the reasonable-speaker and reasonable-recipient tests, which would protect the right to free speech while allowing for criminal punishment of individuals whose statements fall outside the protections of the First Amendment.[210] Part IV.A of this Note will address the intersection of the true threat doctrine's development under the First Amendment under the presumption that criminal statutes require mens rea.

A. While The Court Affords Broad Protections for Unpopular and Offensive Speech Under the First Amendment, Elonis's Statements Rose to the Level of True Threats

The Supreme Court has historically required a high burden in order to show that statements or behaviors constitute true threats.[211] It has repeatedly held that communications may not be censored simply because they are offensive or express unpopular beliefs.[212] However, in the context of Elonis's Internet threats, the statements caused extreme harm to the recipients, and therefore constituted true threats punishable under 18 U.S.C. Section 875(c).[213] Although the Supreme Court did not deem Elonis's statements true threats, they should have because Elonis's posts did not constitute justifiable political speech under *Watts*, and they amounted to threats of intimidation under *Brandenburg*.[214] As discussed in Part II.B

206. 135 S. Ct. 2001 (2015).
207. *See infra* Part IV.C.
208. *See infra* Part IV.C.
209. *See infra* Part IV.C.
210. *See infra* Part IV.C.
211. *See supra* Part II.C.
212. *See supra* Part II.C.
213. *See infra* text accompanying notes 217–224.
214. *See infra* Part IV.C.

supra, the Court first addressed the issue of true threats in *Watts v. United States*.[215] In holding that the defendant's aggressive statements, directed towards the President of the United States, did not constitute true threats, the Court repeatedly emphasized the importance of protecting public debate and political speech.[216] Because many individuals can interpret politically charged speech as offensive or abusive, the Court reasoned those elements alone cannot serve as a basis for censorship.[217] To constitute a true threat, the Court held that the communication "must be distinguished from what is constitutionally protected speech," and must do more harm than merely making individuals uncomfortable. [218]

In the case of *Elonis v. United States*, the defendant's online statements exceeded the level of causing mere offense or discomfort, and should have qualified under *Watt*s as communications that do not enjoy constitutional protection.[219] In *Watts*, the Court emphasized the context of the defendant's statements as a primary basis for their constitutionality.[220] Because the defendant made his threatening statements during a public debate involving a highly contested political decision, his statements served an important function in American society and were therefore constitutional.[221] Elonis's statements, however, had nothing to do with an issue of political importance, and were not related to public debate.[222] Instead, Elonis posted graphic material on his social media profile that instilled fear in those who viewed it.[223] Elonis's lyrics, directed at schoolchildren, park-goers, his ex-wife, FBI agents, and local police officers did not contribute to any ongoing public debate, nor did they have

215. 394 U.S. 705 (1969) (per curiam).

216. *Id.* at 707–08.

217. *Id.*

218. *Id.* at 707. However, the Court did not announce a clear standard for what types of speech would qualify as unprotected by the Constitution. *Id.* at 708. It tailored its holding narrowly, and argued that the statements at issue in this particular situation did not constitute true threats. *Id.*

219. *Id.* at 707 (holding that communications, including threats to inflict bodily harm voiced outside the context of a political debate, may qualify as true threats).

220. *Id.* at 707–08 (reasoning that because the statements occurred at a political debate—a setting in which individuals often make emotionally charged statements—the context indicated that the defendant's statements did not constitute true threats and were merely offensive speech).

221. *Id.* (holding that because the defendant's statements were typical of political speech, which can "often be vituperative, abusive and inexact," the Court should be conscious of protecting the defendant's First Amendment rights because the right to express personal views, however unpopular, is a constitutionally protected value).

222. *See infra* Part III.

223. Elonis v. United States, 135 S. Ct. 2001, 2007 (2015). At Elonis's trial, multiple individuals testified that they found his posts extremely disturbing and that they were afraid for their safety after reading them. *Id.* at 2005–07. Furthermore, Elonis's wife obtained a Protection From Abuse order after she became aware of the posts directed at her, which included extensively detailed scenarios of how Elonis wished her to die. *Id.* at 2006.

any social value.[224] The *Watts* Court stressed the importance of interpreting statements "with the commands of the First Amendment clearly in mind."[225] Because the First Amendment prohibits censoring speech unless that speech causes harm, the Court should extend protection to public debates such as in *Watts*, but should not allow individuals to make continuous violent and threatening communications toward others.[226]

The Supreme Court also should have ruled that Elonis's statements constituted true threats because they were acts of intimidation.[227] In *Brandenburg v. Ohio*, the Supreme Court held that a statute may not criminalize statements or conduct simply because they advocate traditionally unpopular beliefs.[228] To amount to behavior that violates the First Amendment, the Court found that a person's acts or statements must incite violence, or at least render the possibility of violence imminent and likely to occur.[229] While Elonis's statements failed to incite any acts of violence, he did call for abusive action, particularly in the posts directed at his ex-wife.[230] These posts did not call upon any particular individual to commit a violent act against Elonis's ex-wife, but they did cause her to obtain a Protection From Abuse order, indicating she feared a likely and imminent attack on her safety.[231] Elonis's Facebook posts fortunately did not result in violence, but the level of detail with which he described plans to kill his wife could certainly have resulted in harm.[232]

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224. *Id.* at 2007; *see also* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 388 (1992) (holding that the prohibition on true threats "protect[s] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that threatened violence will occur"); Virginia v. Black, 538 U.S. 343, 358–59 (2003) (holding communications whose benefits "are clearly outweighed by the social interest in order and morality" may be restricted under the First Amendment (citing *R.A.V.*, 505 U.S. at 382–83)); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 200 (2014) (explaining that true threats are not constitutionally protected speech because "low-value speech can be regulated due to [its] propensity to bring about serious harms and slight contribution to free speech values").

225. *Watts*, 394 U.S. at 707.

226. *See id.* (holding "[w]hat is a threat must be distinguished from what is constitutionally protected speech" and that while public debate often may not be censored, speech that communicates an intent to commit bodily harm against another qualifies as a true threat).

227. *See infra* text accompanying note 230.

228. 395 U.S. 444, 449 (1969) (per curiam).

229. *Id.* at 448–49.

230. *See* Elonis v. United States, 135 S. Ct. 2001, 2005–06 (2015). Elonis provided an accurate map depicting his wife's home as a caption to one of his Facebook posts that stated it would be illegal for him to state that someone should kill his wife with a mortar launcher. *Id.* The map included the best location for someone to position his or herself outside the home in order to have a clear shot into the home. *Id.*

231. *Elonis*, 135 S. Ct. at 2006; *see also Brandenburg*, 395 U.S. at 449 (holding that a statute cannot punish statements that merely advocate for a cause, but may punish statements if they incite violence that is imminent and likely to occur).

232. *See Elonis*, 135 S. Ct. at 2005–06; *supra* note 230 and accompanying text.

The Supreme Court has clearly announced that acts of intimidation may qualify as true threats.[233] Its decisions in cases involving cross burning, however, indicate that mere use of an offensive symbol does not amount to intimidation.[234] In *Elonis*, however, the defendant's statements were directed at identifiable individuals and contained detailed descriptions of violence.[235] They could therefore be distinguished from categories of behavior such as cross burning that the Court traditionally has held does not amount to a true threat.[236] The Court struck down statutes criminalizing cross burning in both *R.A.V. v. City of St. Paul, Minnesota* and *Virginia v. Black* on the grounds that an act itself cannot serve as evidence of a person's intent to intimidate.[237] However, the Court emphasized that statements that threaten imminent violence do not enjoy First Amendment protection.[238] Because Elonis specifically targeted individuals, such as his ex-wife and the FBI agent who visited him at his home, his statements amounted to more than a symbol of violence and intimidation.[239] Elonis's statements had an identifiable impact on their recipients, and the Court should have understood them as true threats of violence.[240]

B. The Court's Use of Subjective Intent in Virginia v. Black *Only Applies in the Context of the Challenged State Statute, and Therefore Does Not Apply to 18 U.S.C. Section 875(c)*

Prior to its decision in *Virginia v. Black*, the Supreme Court had never before included an element of subjective intent in its definition of true threats.[241] However, the Supreme Court's insertion of a subjective element for true threats in *Virginia v. Black* should only be read in context of that specific, challenged state statute.[242] The *Black* Court evaluated the constitutionality of a Virginia state statute banning the burning of crosses

233. *See supra* Part II.C.

234. *See supra* Part II.C.

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

236. *See supra* Part II.C.

237. R.A.V. v. St. Paul, Minn., 505 U.S. 377 (1992); Virginia v. Black, 538 U.S. 343, 348 (2003).

238. *R.A.V.*, 505 U.S. at 388.

239. 135 S. Ct. at 2005–07; *see* Megan Chester, *Lost in Translation: The Case for the Addition of a Directness Test in Online True Threat Analysis*, 23 COMMLAW CONSPECTUS 395, 398 (2015) (arguing that because social media presents unique difficulties when it comes to understanding how serious a person's statements are meant due to the lack of body language and tone of voice, the Court should consider the directness of the speech through objective evaluation of the statement's recipient in order to define it as a true threat).

240. *See Elonis*, 135 S. Ct. at 2007. The victims of Elonis's Facebook posts testified to the fear that they experienced after viewing Mr. Elonis's statements. *Id.*

241. *See supra* Part II.C.

242. *See Black*, 538 U.S. at 364 (holding that the statute at issue was unconstitutional because it contained a provision stating that burning a cross would be prima facie evidence of intimidation, which criminalized a range of behavior that was too broad).

"with an intent to intimidate a person or group of persons."[243] Unlike federal statutes that prohibit true threats, such as Section 875(c) under which Elonis was charged, the challenged state statute in *Virginia v. Black* had always included an element of subjective intent.[244]

Furthermore, the issue that the *Black* Court faced did not involve determining the proper standard of intent to apply to the Virginia cross-burning statute.[245] Rather, the Court addressed whether the act of burning a cross could serve as prima facie evidence of the intent to intimidate a group of persons.[246] Unlike the challenge in *Elonis*, which focused directly on whether Section 875(c) required a showing of general or specific intent, the *Virginia v. Black* issue involved what level of evidence was required to establish whether an individual's cross burning constituted an act of intimidation.[247] Although the Court struck down the statute at issue in *Virginia v. Black*, it stressed that a state may restrict speech when the "benefits . . . [are] clearly outweighed by the social interest in order and morality."[248] This logic indicates that the Court would not consider every statute limiting free speech in the context of intimidation as a violation of the First Amendment, particularly if the speech limited did not serve a socially valuable interest.[249] Ultimately, the Court rejected the Virginia statute because it criminalized the act of cross burning in an impermissibly broad manner.[250] Keeping this context at the forefront, *Virginia v. Black* should not be read as requiring an element of subjective intent for true threats. Instead, its application should be limited to evaluating the scope of behavior a statute may limit.[251]

C. The Court Should Have Announced a Concrete Intent Standard for 18 U.S.C. Section 875(c), Requiring a Combination of the Reasonable-Recipient and Reasonable-Speaker Tests

As discussed in Part II.D *supra*, the circuit courts have struggled to agree on which intent standard properly governs true threats.[252] Aside from

243. *Id.* at 347.

244. *Id.*; 18 U.S.C. § 875(c) (2012).

245. *Black*, 538 U.S. at 347 (defining the issue as "whether the Commonwealth of Virginia's statute banning cross burning with 'an intent to intimidate a person or group of persons' violates the First Amendment" (quoting Va. Code Ann. § 18.2–423 (1996))).

246. *Id.* at 351. The Court granted certiorari to determine whether a jury instruction "that the burning of a cross by itself is sufficient evidence from which you may infer the required intent" was unconstitutional. *Id.* at 350–51.

247. *Id.* at 362–63.

248. *Id.* at 358–59 (quoting R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382–83 (1992)).

249. *Id.* at 363.

250. *Id.* at 364.

251. *Id.*

252. *See supra* Part II.D.

Virginia v. Black, the Supreme Court's definition of true threats has remained silent as to the required element of intent, and prior to *Elonis v. United States*, the Court had never evaluated the intent issue.[253] Rather than taking the opportunity to announce the proper mens rea requirement for issuing a true threat, however, the *Elonis* Court failed to address the current circuit split.[254] The Court did acknowledge that Congress failed to delineate the required mental state for 18 U.S.C. Section 875(c), but it nonetheless chose not to resolve this statutory ambiguity.[255] Although the Court rejected a fully objective intent requirement for true threats, it did not elaborate on a better alternative, and instead left this decision up to the Court of Appeals for the Third Circuit on remand.[256] The hesitance of the Supreme Court to announce the proper intent requirement under Section 875(c) not only perpetuates the disagreement between the circuit courts, but it also leaves individuals without a concrete standard under which to ensure their conduct does not warrant criminal charges.[257]

The Supreme Court should have adopted a hybrid, reasonable-speaker and reasonable-recipient intent standard for 18 U.S.C. Section 875(c).[258] The hybrid reasonable-speaker and reasonable-recipient test heightens the scrutiny from an objective standard by requiring juries to consider how the person issuing the statement *and* the targeted individual interpreted the statement.[259] It therefore provides a workable principle under which courts may assess true threats.[260] Because a purely subjective or purely objective intent standard would compromise the ultimate goals of the true threat doctrine—to protect individual free speech while shielding victims from the harmful consequences of threats—this hybrid standard would help courts to achieve both aims.[261] A purely objective standard too often results in censorship to speech that should enjoy the protections of the First

253. *See supra* Part II.C.

254. Elonis v. United States, 135 S. Ct. 2001, 2013 (2015). The Court stated that no significant circuit split existed regarding the proper standard of intent for 18 U.S.C. § 875(c), and reasoned that by requiring more than a negligence standard, the courts of appeals would have sufficient guidance on how to interpret true threats in future cases. *Id.*

255. *Id.* at 2008–09.

256. *Id.* at 2009 (holding that negligence is not sufficient to support a conviction under Section 875(c)).

257. *See* Scheffey, *supra* note 2 (arguing that "[a]s a result of the tension created by the circuit courts conflicting standards for assessing the requisite intent for true threats, it is nearly impossible for a speaker whose words could easily reach any circuit via the Internet to predict what speech is protected and what speech is not").

258. *See infra* Part IV.C.

259. *See* Chester, *supra* note 239, at 407–09 (arguing that a purely objective test that fails to require any subjective element restricts free speech in violation of the First Amendment; therefore, there should be some consideration of the speaker's motives in evaluating true threats).

260. *Id.*

261. *See infra* Part II.C.

Amendment.[262] While a purely subjective intent standard presents too high of a burden of proof by requiring prosecutors to prove an individual's actual motives in issuing potential threats, the reasonable-speaker and reasonable-recipient combination standard provides a perfect balance.[263]

1. A Purely Objective Intent Standard Impermissibly Limits the First Amendment

In analyzing the proper intent standard for 18 U.S.C. Section 875(c), the Court should have considered the purpose of the true threat doctrine. The substance of the debate in the circuits over whether to apply a subjective or objective element of intent primarily concerns how best to protect individuals from intimidation and fear of bodily harm while upholding the constitutional protections of free speech.[264] Throughout the development of the true threat doctrine, the Supreme Court has strongly emphasized that unpopular and vulgar speech still enjoys First Amendment protection, and consequently, has set a high standard for determining what activities qualify as unconstitutional.[265] The Court almost always, however, includes a caveat that states have an interest in banning intimidation and in curtailing speech that has little-to-no social value.[266] In *Elonis v. United States*, the Supreme Court argued that a purely objective intent standard, which amounts to negligence in the criminal law, does not afford enough protection to free speech.[267] The Court stressed that a purely reasonable-person standard, which would only evaluate how a reasonable person would interpret a statement, does not adequately address the dual mental state requirements of criminal law.[268]

In the context of Internet threats, many scholars agree that a purely objective standard criminalizes behavior that actually constitutes constitutionally protected speech.[269] Scholars argue that the unique

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262. *See infra* Part II.C.

263. *See infra* Part II.C.

264. *See generally* Scheffey, *supra* note 2, at 876–77 (arguing that confusion persists among the circuits over what degree of objectivity or subjectivity must be shown in order to convict for true threats, and explaining that purely objective standards result in too many convictions, whereas purely subjective standards often provide too little relief for victims of violent online posts); *see also* CITRON, *supra* note 224, at 201 (explaining that true threats do not enjoy constitutional protection because they "generate profound fear of physical harm that disrupts victims' daily lives" and lead to "extreme emotional disturbance").

265. *See supra* Part II.

266. *See supra* Part III.

267. Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) (holding that "wrongdoing must be conscious to be criminal" (quoting Morissette v. United States, 342 U.S. 246, 252 (1952))).

268. *Id.* at 2011.

269. *See* Thomas DeBauche, Note, *Bursting Bottles: Doubting the Objective-Only Approach to 18 U.S.C. § 875(c) in Light of* United States v. Jeffries *and the Norms of Online Social Networking*, 51 HOUS. L. REV. 981, 1013–14 (2014) (arguing that individuals who engage in

intersection between publicity and privacy that social media profiles occupy allows users to communicate more candidly than they might in other mediums.[270] These scholars typically advocate a more stringent, subjective intent requirement for true threat statutes because so many individuals posting on the Internet fail to appreciate how their statements might be interpreted by those who view them.[271] Furthermore, the semi-public nature of a statement made over social media makes it difficult to ascertain the author's actual intended audience, and can result in unwarranted fear by those who read statements out of context.[272] These concerns are rooted in the notion that statutes cannot criminalize innocent behavior, and applying a loose standard of intent for true threats would result in unwarranted convictions.[273]

Additionally, a purely objective, reasonable-recipient standard poses the danger that juries will be overly sympathetic to victims.[274] Although this standard requires jurors to consider statements in light of how a reasonable person might interpret them, juries often hear direct testimony from victims of the statements.[275] By listening to how the statements have negatively affected these victims, jurors can be swayed by sympathy, making it harder to analyze the situation from the viewpoint of an objectively reasonable person.[276] Furthermore, in cases that involve

communications over social media are less likely to consider their lack of privacy; therefore, a purely objective standard punishes behavior that, while irresponsible, does not rise to a criminal level).

270. *Id.* at 1010 (stating that "[s]tudies show that even when an Internet user is not anonymous and knows the recipient of his communicated message, the speaker is more likely to be disinhibited when engaged in computer-mediated communication than in other types of communications").

271. *See* Chester, *supra* note 239, at 407–08. Chester argues that applying an intent standard that fails to take into consideration the speaker's intent may restrict free speech because individual posters often don't appreciate that their online profiles might be widely viewable. Additionally, many "status" updates are not intended to be directed at one particular person on the Internet, and therefore, without considering the intent of the Facebook user, and only relying on how an objective person might interpret a generalized statement, a person's innocent speech could be mistakenly criminalized. *Id.*

272. *See* DeBauche, *supra* note 269, at 984 (arguing that adopting a reasonable recipient intent standard for online communications puts First Amendment rights at risk because individuals viewing posts might not be able to understand the context or perspective of the person posting, and, therefore, the posts can too easily be interpreted as threats).

273. *See* United States v. Liparota, 471 U.S. 419, 426–27 (holding that statutes cannot be read as criminalizing innocent behavior and when they are, courts should require a higher standard of intent).

274. United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997) (holding a reasonable-speaker test "better avoids the perils that inhere in the 'reasonable-recipient standard,' namely that the jury will consider the unique sensitivity of the recipient").

275. *See e.g.*, Elonis v. United States, 135 S. Ct. 2001, 2007 (2015). The government called as a witness at least one member of each group that Elonis was charged with directing threats toward in the original indictment. *Id.*

276. *See supra* note 272 and accompanying text.

particularly sensitive recipients, a juror may be more inclined to convict a defendant based on the emotional reaction of the victim, rather than on the objective evaluation of the statement itself.[277] For these reasons, many courts and scholars advocate applying a higher level of scrutiny to the required intent of a true threat.[278]

2. A Purely Subjective Intent Standard for True Threats Fails to Adequately Protect Victims of Violent Communications

While protecting an individual's ability to post his or her opinions and express his or her personal views online should certainly be a priority for courts and for Congress, applying a purely subjective intent standard raises concerns that true threats would be too hard to prove in the context of social media.[279] In *United States v. Fulmer*,[280] the court rejected the defendant's claim that true threats require a showing of subjective intent and held that "there is no way to directly scrutinize the works of someone else's mind or his state of mind."[281] Requiring a prosecutor to show, beyond a reasonable doubt, that a defendant clearly intended to instill the fear of bodily harm in the targets of Facebook posts or other Internet communications provides too high a protection for online posters whose statements cause substantial psychological harm to those who read them.[282]

3. A Hybrid Reasonable-Speaker and Reasonable-Recipient Intent Standard Protects Both an Individual's First Amendment Rights and the Potential Victims of True Threats

In order to strike a balance between the overly broad objective-recipient standard, which risks criminalizing innocent behavior, and the extremely difficult-to-prove subjective intent standard, courts should instead apply a hybrid, reasonable-recipient and reasonable-speaker test.[283]

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277. *See* Scheffey, *supra* note 2, at 883 (explaining the flaws in a reasonable-recipient standard because juries process information based on the demeanor of the victim on the stand and the test "fails to weed out overly sensitive recipients or jurors").

278. *Id.*

279. *See* Chester, *supra* note 239, at 409 (arguing that purely subjective intent standards may afford greater protections to free speech but still result in difficulties for just prosecution because no concrete test to determine what a person truly thought at the time he or she issued an Internet post exists).

280. 108 F.3d 1486 (1st Cir. 1997).

281. *Id.* at 1494.

282. *See* CITRON, *supra* note 224, at 212–18 (discussing the severe consequences victims of online threats endure, including fear, psychological harm, and emotional distress, and highlighting that the First Amendment does not protect true threats that cause these damaging mental responses).

283. *See supra* note 269 and accompanying text.

The reasonable-speaker test evaluates intent based on whether a person "should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made."[284] Adding an element of intent from the perspective of the speaker raises the level of scrutiny above a fully objective intent standard, and therefore may prevent innocent speakers from facing criminal charges.[285]

Combining the reasonable-speaker test with the reasonable-recipient test also protects First Amendment rights because it ensures that a jury will find, beyond a reasonable doubt, that both the speaker and the recipient would interpret the statement as a threat.[286] This intent standard helps to protect the rights of both parties involved.[287] Individuals posting offensive or violent statements would be adequately protected because, in order to constitute a true threat, a jury would have to find that *both* a reasonable person would foresee that the statement would be interpreted as a threat, *and* that a reasonable recipient would interpret it as a threat.[288] Adding this extra element of protection helps to ensure that individuals do not face punishment for voicing unpopular opinions.[289] This hybrid intent standard also protects potential victims of true threats because the burden of proof is not as high as it would be under a purely subjective standard.[290] By combining both the reasonable-speaker and reasonable-recipient tests to create a dual intent standard, the Court would serve both the victims' interest in protecting against threats and the First Amendment rights of the speaker.[291]

In *Elonis v. United States*, the Court should have explicitly adopted this combination standard of intent. This adoption would have resolved the circuit split and provided clarity to the modern true threat doctrine.[292] Instead, the Court emphasized that the reasonable-recipient standard employed by the Third Circuit in *United States v. Elonis* constituted an

284. *Fulmer*, 108 F.3d at 1491.

285. *Id.* (arguing for a reasonable-speaker test and against a reasonable-recipient test because "a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant").

286. *See supra* Part IV.C.

287. *See supra* Part IV.C.

288. *See supra* Part IV.C.

289. *See* CITRON, *supra* note 224, at 199 (explaining "[a] bedrock principle underlying the First Amendment is that government cannot censor the expression of an idea because society finds the idea itself offensive or distasteful"); *see also Fulmer*, 108 F.3d at 1491 (holding that a reasonable-recipient standard does not adequately protect the First Amendment rights of speakers because it results in convictions based on jury members' sympathies for victims rather than on factual context of alleged threats).

290. *See Fulmer*, 108 F.3d at 1494 (arguing that a purely subjective intent standard results in an extremely difficult burden of proof for the prosecution because it is nearly impossible to prove what another person was thinking).

291. *See* text accompanying note 288.

292. *See supra* Part IV.C.

impermissibly lenient intent requirement.[293] The Court reasoned that only evaluating Elonis's Facebook posts from the perspective of his ex-wife, his co-workers, the local police departments, and the FBI agents who investigated him—without considering Elonis's motives in issuing the statements—resulted in a conviction that could not stand.[294] The recipients of Elonis's communications clearly interpreted the posts as threats, and suffered from fear and psychological distress as a result of viewing them.[295] The reactions of those who Elonis targeted in his posts should not have been ignored by the Court.[296] Instead, the Court should have also considered Elonis's statements from the perspective of a reasonable speaker. Elonis's statements contained extremely violent descriptions targeted at identifiable individuals.[297] Due to the graphic language used by Elonis and the specificity of his posts, a reasonable person should have known that these statements would be interpreted by those who viewed them as credible threats.[298] Both a reasonable-speaker and a reasonable-recipient would have understood Elonis's communications as true threats. Because this hybrid test serves the dual interests of the true threat doctrine, the Court should have adopted this intent standard and upheld Elonis's conviction under 18 U.S.C. Section 875(c).

V. CONCLUSION

In *Elonis v. United States*, the Supreme Court erred by failing to announce a concrete intent requirement to 18 U.S.C. Section 875(c).[299] Because Supreme Court precedent on the true threat doctrine never explicitly decided the issue of intent for true threats, the circuits have split on which standard to apply.[300] This circuit split not only results in inconsistent decisions within the courts; it also leads to ambiguity for individuals trying to determine what forms of communication are truly protected by the First Amendment.[301] While the Court was correct in rejecting a purely objective intent standard and choosing not to adopt a fully subjective intent requirement, it should have held that Elonis's statements qualified as true threats. Had the Court adopted a hybrid reasonable-speaker and reasonable-recipient test for intent, it would have resolved the

293. *See supra* Part III.

294. Elonis v. United States, 135 S. Ct. 2001, 2011 (2015).

295. *See supra* Part IV.A.

296. *See supra* Part IV.A.

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

298. *See* United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997) (holding that including an element of intent based on the perspective of a reasonable speaker allows a jury to "tak[e] into account the factual context in which the statement was made").

299. 135 S. Ct. 2001 (2015).

300. *See supra* Part II.C.

301. *See supra* Part IV.

circuit split and solidified a standard that both protects the right to free speech and simultaneously allows victims of true threats to receive justice against those who instilled in them fear, intimidation, and emotional distress.[302]

302. *See supra* Part IV.C.