THE NEW LAW OF THREATS: BUT WHAT IF THE DEFENDANT IS NOT A "REASONABLE PERSON"?

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INTRODUCTION

When Anthony Elonis's wife of nearly seven years left him, taking their two young children with her, he responded by posting "crude, degrading, and violent material" about her, including explicit threats to kill her, on Facebook, causing her great distress.[1] Elonis was indicted by a grand jury, tried, and convicted of making threats.[2] In an eight to one opinion, *Elonis v. United States*,[3] the Supreme Court reversed Elonis's conviction on the ground that the jury was not instructed to consider whether he acted with an "intent to threaten."[4]

While the fact is not mentioned in the Court's opinion, Elonis's appeal was brought, briefed, and argued as a constitutional challenge to his conviction: Elonis asserted that his communications were protected by the First Amendment.[5] Under the Supreme Court's decision in *Virginia v. Black*,[6] he contended, the First Amendment exempts from its protection only "true threats," which require proof of "a subjective intent to threaten."[7] The Court of Appeals for the Third Circuit rejected this claim, holding that "a statement is a true threat when a reasonable speaker would foresee the statement would be interpreted as a threat" and that *Black* had not "invalidated the objective intent standard the majority of circuits applied to true threats."[8] The Supreme Court granted certiorari to answer this

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1. Elonis v. United States, 135 S. Ct. 2001, 2005–06 (2015).
2. *Id.* at 2007.
3. *Id.*
4. *Id.* at 2012.
5. *See, e.g.*, Brief for the Petitioner at 20, *Elonis*, 135 S. Ct. 2001 (No. 13-983) ("Without a subjective intent requirement, Section 875(c) would impose criminal punishment for negligent speech in violation of the First Amendment."); *cf. Elonis*, 135 S. Ct. at 2012 ("Given our disposition, it is not necessary to consider any First Amendment issues.").
6. 538 U.S. 343 (2003).
7. United States v. Elonis, 730 F.3d 321, 327 (3d Cir. 2013).
8. *Id.* at 323, 329.

question but apparently saw the First Amendment issue as so serious that it decided to avoid the issue by reading the requirement of an "intent to threaten" into the federal criminal statute at issue.[9]

The resulting decision, made on a basis not briefed or argued, is questionable in every respect. As a practical matter, it converts 18 U.S.C. § 875(c) from a prohibition on threatening to a prohibition on intending to threaten, creating a distinction that many lower courts (and others) find difficult to believe or understand. It changes a "general intent" offense, requiring the government to show only intentional communication of a threat, to a "subjective intent"[10] offense, requiring the government to also show an intent to threaten—to commit the offense.[11] This subjective intent may not be inferred from the fact of the threatening communication.[12] The decision radically complicates and weakens the law of threats, in the apparent absence of an excess of threat prosecutions or other need for change, by changing the inquiry from the "objective" issue of what a "reasonable person" thinks to the elusive issue of what the defendant thought.[13] Perhaps even more important, it arguably adds an elusive subjective intent requirement to a wide variety of crimes.[14]

As a matter of doctrine, the Court was also faced with the contrary decisions of at least nine of the courts of appeals, which it summarily disposed of by declaring them overruled.[15] The Court's principal (if not only) authority, incredibly enough, was a one-judge *dubitante* opinion that was clearly mistaken in basing its creation of a subjective intent requirement on a Supreme Court opinion that did not mention any such requirement.[16] The Court's other authorities

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9. *Compare* Petition for a Writ of Certiorari at 1, *Elonis*, 135 S. Ct. 2001 (No. 13-983) (describing the case as one that "concern[ed] an important First Amendment question"), *with Elonis*, 135 S. Ct. at 2011 (finding that the "mental state requirement" in § 875(c) requires that the defendant know "that the communication contains a threat").

10. The Court appeared to carefully avoid using the term "subjective" (as well as "objective," "general," and "specific"), as if reluctant to emphasize the change. *See Elonis*, 135 S. Ct. at 2011. The next year, in *Voisine v. United States*, 136 S. Ct. 2272 (2016), the Court criticized such terms as being "overlapping and, frankly, confusing phrases to describe culpable mental states." *Id.* at 2281.

11. *See Elonis*, 135 S. Ct. at 2011 ("The mental state requirement [in § 875(c)] must . . . apply to the fact that the communication contains a threat.").

12. *See id.* at 2012 (holding that Elonis's conviction could not stand, despite there being "no dispute that Elonis knew the words he communicated").

13. As Justice Ginsburg asked at oral argument:

> How does one prove what's in somebody else's mind? This case, the standard was would a reasonable person think that the words would put someone in fear, and reasonable people can make that judgment. But how would the government prove whether this threat in the mind of the threatener was genuine?

Transcript of Oral Argument at 4–5, *Elonis*, 135 S. Ct. 2001 (No. 13-983).

14. *See infra* Part IV.

15. *See Elonis*, 135 S. Ct. at 2013.

16. *See infra* notes 108–11 and accompanying text.

did not clearly support, if they did not contradict, the Court's holding, and the Court ignored or questionably distinguished decisions that seemed to contradict it.[17]

I.

The Supreme Court's statement of the facts in *Elonis* differs from those of the lower courts in both inclusions and exclusions. The Court's adoption of the subjective standard led it to include a detailed description of Elonis's background, taken from the record, that the lower courts had not considered relevant.[18] On the other hand, it neglected to include some of the most serious of Elonis's threats against his wife. These included: "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder," and "Tell [our son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [your] head on a stick?"[19] Another post read:

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.[20]

The Court did include the following, which it identified as "an adaptation of a satirical sketch that" Elonis had watched with his wife[21]:

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17. *See infra* Part II.

18. When his wife left him,

> Elonis began "listening to more violent music" and posting self-styled "rap" lyrics inspired by the music. Eventually, Elonis changed the user name on his Facebook page from his actual name to a rap-style nom de plume, "Tone Dougie," to distinguish himself from his "on-line persona." The lyrics Elonis posted as "Tone Dougie" included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were "fictitious," with no intentional "resemblance to real persons." Elonis posted an explanation to another Facebook user that "I'm doing this for me. My writing is therapeutic."

Elonis, 135 S. Ct. at 2004–05 (citations omitted); *see also id.* at 2005 (observing Elonis testified that his writing "helps [him] to deal with the pain" (alteration in original)).

19. United States v. Elonis, 730 F.3d 321, 324 (3d Cir. 2013).

20. *Id.* Later in its opinion, the Court mentioned that "Elonis testified that his posts emulated the rap lyrics of the well-known performer Eminem, some of which involve fantasies about killing his ex-wife. In Elonis's view he had posted 'nothing . . . that hasn't been said already.'" *Elonis*, 135 S. Ct. at 2007 (citations omitted).

21. *Elonis*, 135 S. Ct. at 2005.

> Hi, I'm Tone Elonis.
>
> Did you know that it's illegal for me to say I want to kill my wife? . . .
>
> It's one of the only sentences that I'm not allowed to say. . . .
>
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. . . .
>
> Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. . . .
>
> But not illegal to say with a mortar launcher.
>
> Because that's its own sentence. . . .
>
> I also found out that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room. . . .
>
> Yet even more illegal to show an illustrated diagram.
>
> [diagram of the house]. . . .[22]

The Court acknowledged that "[t]he details about the home were accurate."[23] When these posts caused Elonis's wife to obtain a state court protection order, Elonis responded by posting:

> Fold up your [protection-from-abuse order] and put it in your pocket
>
> Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> that was improperly granted in the first place
>
> Me thinks the Judge needs an education
>
> on true threat jurisprudence
>
> And prison time'll add zeroes to my settlement . . .

22. *Id.* at 2005–06 (alteration in original).
23. *Id.* at 2006. "At the bottom of this post," the Court added, "Elonis included a link to the video of the original skit, and wrote, 'Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?'" *Id.*

> And if worse comes to worse
>
> I've got enough explosives
>
> to take care of the State Police and the Sheriff's Department.[24]

The court of appeals, in its opinion, noted that Elonis's wife took these postings seriously and quoted her testimony regarding her fears: "I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives."[25] The Supreme Court put it more briefly: "[H]is wife felt 'extremely afraid for [her] life.'"[26]

A grand jury indicted Elonis for making threats to his wife and others in violation of 18 U.S.C. § 875(c), which provides that anyone 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," is guilty of a felony punishable by up to five years in prison.[27] The district court denied both Elonis's motion to dismiss the indictment—which argued the indictment "fail[ed] to allege that he had intended to threaten anyone"—and his request for a jury instruction that "the government must prove that he intended to communicate a true threat."[28] The district court instead instructed the jury:

> 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.[29]

Elonis was convicted on four of five counts of making threats, including the count relating to his wife, and sentenced to three years and eight months of imprisonment and three years of supervised release.[30] The Court of Appeals for the Third Circuit affirmed, rejecting Elonis's claim that "the Supreme Court decision in *Virginia*

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24. *Id.* (alteration in original). "At the bottom of this post," the Court noted, "was a link to the Wikipedia article on 'Freedom of speech.'" *Id.*

25. *Elonis*, 730 F.3d at 325.

26. *Elonis*, 135 S. Ct. at 2006.

27. 18 U.S.C. § 875(c) (2012); *see Elonis*, 135 S. Ct. at 2007.

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

29. *Id.*

30. *Id.* One of the other counts, threatening a kindergarten class, was based on a post that stated in part:

> Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined
>
> And hell hath no fury like a crazy man in a Kindergarten class
>
> The only question is . . . which one?

Id. at 2006.

v. Black require[d] that a defendant subjectively intend to threaten, and overturn[ed] the reasonable speaker standard"—a standard which required only (1) an intentional statement and (2) that "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicate[d] the statement as a serious expression of an intention to inflict bodily harm."[31] The Supreme Court granted Elonis's petition for certiorari to consider "whether consistent with the First Amendment and *Virginia v. Black*," a conviction under § 875(c) "requires proof of the defendant's subjective intent to threaten."[32] Apparently anticipating its final decision, however, the Court required Elonis to add a different issue that he had not raised and that had not been mentioned in the lower courts: "Whether, as a matter of statutory interpretation, [a] conviction . . . under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten."[33]

That threat prosecutions raise a First Amendment issue was first made clear by the Supreme Court in a brief per curiam opinion in *Watts v. United States*,[34] a prosecution for allegedly threatening the president, which held that the First Amendment protects "political hyperbole" but not "true 'threat[s].'"[35] In *Black*, a prosecution for an intimidating cross-burning, the Court stated:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or groups of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.[36]

In Elonis's case, the Third Circuit rejected the contention that *Black* "invalidated the objective intent standard the majority of circuits applied to true threats," citing cases from all the circuits (including the Federal Circuit) except the Ninth.[37] The Third Circuit

31. United States v. Elonis, 730 F.3d 321, 327–28 (3d Cir. 2013) (quoting United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991)).

32. Petition for a Writ of Certiorari at I, *Elonis*, 135 S. Ct. 2001 (No. 13-983).

33. Elonis v. United States, 134 S. Ct. 2819 (2014) (mem.) (emphasis added).

34. 394 U.S. 705 (1969) (per curiam).

35. *Id.* at 707–08.

36. Virginia v. Black, 538 U.S. 343, 359–60 (2003) (citations omitted) (first citing *Watts*, 394 U.S. at 708 ("political hyperbole" is not a true threat); and then quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

37. United States v. Elonis, 730 F.3d 321, 329 (3d Cir. 2013).

agreed with the Fourth Circuit that "*Black* 'gave no indication it was redefining a general intent crime such as § 875(c) to be a specific intent crime.'"[38] Requiring a subjective intent to threaten, the court pointed out, "would fail to protect individuals from 'the fear of violence' and the 'disruption that fear [would] engender[]' because it would protect speech that a reasonable speaker would understand to be threatening."[39]

The Supreme Court, in an opinion by Chief Justice Roberts, with Justice Alito concurring in part and dissenting in part and Justice Thomas dissenting, reversed the Third Circuit without mentioning *Black*.[40] The question, Roberts said, was whether, in addition to the making of a communication that "a reasonable person would regard as a threat," § 875(c) "also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing."[41] Because the Court concluded that § 875(c) did have a subjective intent requirement, invalidating Elonis's conviction, the First Amendment issue was rendered moot.[42]

II.

A violation of § 875(c) requires, Chief Justice Roberts began, "that a communication be transmitted and that the communication contain a threat."[43] There was no doubt that Elonis's conduct met these requirements, but that did not establish a violation, Roberts said, because the statute "does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat."[44] Roberts rejected Elonis's textual

38. *Id.* at 331 (quoting United States v. White, 670 F.3d 498, 509 (4th Cir. 2010)).
39. *Id.* at 330 (quoting *Black*, 538 U.S. 343, 360 (2003)).
40. *See* Elonis v. United States, 135 S. Ct. 2001, 2013 (2015).
41. *Id.* at 2004.
42. *Id.* at 2012.
43. *Id.* at 2008.
44. *Id.* This might seem an odd observation to a layperson, who on seeing, for example, a "No Smoking" sign is not likely to notice its lack of mention of any mental state. That same layperson might also wonder how a person can intentionally transmit a communication that contains a threat (as opposed to a person who, for example, mails an envelope not knowing it contains a letter that contains a threat) and yet not intend to communicate a threat. Illustrating the difficulty, when at oral argument, Elonis's counsel argued that the law of threats must consider the author's intent, not just "whether a reasonable person would foresee that the listener would be placed in fear." Transcript of Oral Argument at 7, *Elonis*, 135 S. Ct. 2001 (No. 13-983). Justice Sotomayor asked, "But—I mean, how is that different from what you intend?" *Id.* Elonis's counsel did not attempt to show there is a difference, but argued instead that to convict the defendant on the basis of what a "reasonable person" would foresee would be to apply an impermissible "negligence standard." *Id.*

argument that the use of the word "threat" itself imposed an intent requirement.[45] Elonis's cited dictionary definitions, Roberts stated,

> speak to what the [allegedly threatening] statement conveys—not to the mental state of the author. For example, an anonymous letter that says, "I'm going to kill you" is "an expression of an intention to inflict loss or harm" regardless of the author's intent. A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.[46]

But sending a communication that contains a threat and is received as a threat would not establish a violation of § 875(c), Roberts's example showed, because those facts would not "speak . . . to the mental state of the author," and that state cannot be inferred, apparently, from those facts.[47]

"The fact that the statute does not specify any required mental state," Chief Justice Roberts continued, "does not mean that none exists."[48] Roberts then quoted *Morissette v. United States*,[49] stating, "We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'"[50] In *Morissette*, Justice Jackson summarized, with typical eloquence, the principle "universal and persistent in mature systems of law"—that "wrongdoing must be conscious to be criminal."[51] The Court, therefore, Roberts stated, will "generally 'interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.'"[52] This does not mean that "a defendant must know that his conduct is illegal before he may be found guilty"—that would violate the "maxim 'ignorance of the law is no excuse'"—but it does require a defendant to "'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime."[53]

45. *Id.*
46. *Id.*
47. *See id.* The Court also rejected the government's *expressio unius* argument that the explicit requirement of intent in § 875(c)'s companion provisions, which prohibit threats made with an "intent to extort," showed that the absence of such a requirement in § 875(c) meant that none was intended. *Id.* All that demonstrated, the Court said convincingly, was that § 875(c) is not limited to threats to extort. *Id.*
48. *Id.* at 2009.
49. 342 U.S. 246 (1952).
50. *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette*, 342 U.S. at 250).
51. *Morissette*, 342 U.S. at 250, 252.
52. *Elonis*, 135 S. Ct. at 2009 (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994)).
53. *Id.* (quoting Staples v. United States, 511 U.S. 600, 608 n.3 (1994)).

In *Morissette*, the Court held that the defendant could not be convicted of "knowingly" converting another's property if he did not know that the items he took (spent shell casings on a government firing range) were another's property because he believed they had been abandoned.[54] Following *Morissette*, in *United States v. United States Gypsum Co.*[55] (not cited in *Elonis*), the Court held that a mens rea requirement had to be read into the Sherman Antitrust Act, a criminal statute.[56] As in *Morissette*, this meant the prosecution was required to show the defendants knew "that the proscribed effects would most likely follow" their actions but did not have to show that the defendants acted with the intention of violating the statute—with the "conscious object" of producing the proscribed effects.[57]

After discussing *Morissette*, the *Elonis* Court reviewed a series of cases illustrating the *Morissette* principle that a mens rea requirement will ordinarily be read into a federal criminal statute.[58] The cases the Court referenced do not seem, however, to support—and *United States Gypsum* and others seem to reject—the subjective intent standard the *Elonis* Court effectively imposed. For example, in *Liparota v. United States*,[59] a statute made it a crime to "knowingly" use or possess food stamps in "any manner not authorized" by statute or regulations.[60] Relying on *Morissette* and *United States Gypsum*, the *Liparota* Court held that a mens rea requirement should be read into the statute, rejecting the government's argument that it was enough for it to show the defendant's unauthorized possession of the stamps.[61] The Court also held that the government had to prove that the defendant "knew his conduct to be unauthorized."[62] In *Elonis*, the Court considered the government's argument to be "similar to its position in" *Liparota*, and thus rejected it.[63] *Liparota*, however, held only that the defendant

54. *Morissette*, 342 U.S. at 271.
55. 438 U.S. 422 (1978).
56. *Id.* at 435–36.
57. *Id.* at 444.
58. *Elonis*, 135 S. Ct. at 2009–11.
59. 471 U.S. 419 (1985).
60. *Id.* at 420.
61. *Id.* at 424–26.
62. *Id.* at 425. The Court's analogy to the crime of receiving stolen goods seems questionable in that it may be possible to know that goods are stolen without knowing that receiving stolen goods is illegal, but to know that a transaction was unauthorized is to know, it would seem, that it is illegal. As the Court pointed out in a later case, the *Liparota* Court held as it did "despite the legal cliché 'ignorance of the law is no excuse.'" Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009). This does not affect the Court's holding, however, that the government did not have to show that the defendant intended to violate the law. *See Liparota*, 471 U.S. at 434 (stating the prosecution was not required to introduce "evidence that would conclusively demonstrate [the defendant's] state of mind").
63. *Elonis*, 135 S. Ct. at 2009.

had to be shown to know a fact that was an element of the offense.[64] The case, in fact, strongly supported the government's argument in *Elonis* by rejecting the claim that the government had to show that the defendant did an act "purposely intending to violate the law."[65]

For another example, Roberts cited *Posters 'N' Things Ltd. v. United States*,[66] in which a statute made it "unlawful" to sell "drug paraphernalia" in interstate or foreign commerce, with "drug paraphernalia" defined as "'any equipment, product, or material of any kind which is primarily intended . . . for use' with illegal drugs."[67] The Court held that the statute was "properly construed as containing a scienter requirement," but "proof that the defendant acted knowingly [was] sufficient to support a conviction."[68] As in *United States Gypsum*, the government did not have to show that the defendant acted "with the 'conscious object' of producing [proscribed] effects."[69] It was enough that he knew that "the proscribed effects would most likely follow," because "action undertaken with knowledge of its probable consequences . . . can be a sufficient predicate for a finding of criminal liability."[70] The government therefore had to prove that the defendant "knew that the items at issue are likely to be used with illegal drugs," but did not have to prove "an intent on the part of the defendant" that they "be used with drugs" or that he acted "with the 'purpose' that the items be used with illegal drugs."[71]

The *Poster 'N' Things* Court supported this holding by citing *Hamling v. United States*,[72] another case discussed in *Elonis*, which held that in a prosecution for mailing obscene material, the government did not have to prove that the "defendant knew the materials at issue met the legal definition of 'obscenity.'"[73] It was "sufficient for the government to show that the defendant 'knew the character and nature of the materials' with which he dealt."[74] In its argument in *Elonis*, the government relied on *Hamling* and *Posters 'N' Things* to show that it did not have to prove that Elonis knew his communications were threats and had an intent to threaten,[75] but as discussed below, the Court not only rejected this argument but also

64. *Liparota*, 471 U.S. at 433.
65. *Id.* at 422.
66. 511 U.S. 513 (1994).
67. *Id.* at 517 (quoting 21 U.S.C. § 857(a), (d) (1988) (current version at 21 U.S.C. § 863)).
68. *Id.* at 523 (quoting United States v. Bailey, 444 U.S. 394, 408 (1980)).
69. *Id.* (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978)).
70. *Id.* (quoting *U.S. Gypsum Co.*, 438 U.S. at 444).
71. *Id.* at 518, 523–24.
72. 418 U.S. 87 (1974).
73. *Posters 'N' Things*, 511 U.S. at 524–25 (citing *Hamling*, 418 U.S. 87).
74. *Id.* at 525 (quoting *Hamling*, 418 U.S. at 123).
75. Elonis v. United States, 135 S. Ct. 2001, 2011–12 (2015).

held that *Hamling* supported requiring the government to prove an intent to threaten.[76]

Finally, Roberts cited two more cases necessitating a showing that a criminal defendant had knowledge of a crucial fact that defined the offense. In *United States v. X-Citement Video, Inc.*,[77] the Court held that to convict a defendant for illegally using a minor in a sexually explicit film, the government had to show that the defendant knew that the person in question was a minor, because that was "the crucial element separating legal innocence from wrongful conduct."[78] In *Staples v. United States*,[79] the Court similarly held that to convict a defendant for illegally possessing a machinegun, the government had to show that he knew that his gun had rapid-fire capacity, a defining characteristic of a machinegun.[80] The cases say nothing about proof of an intent to commit the offense.

The Court in *Elonis* concluded that "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from "otherwise innocent conduct."'"[81] In some cases, such as *Carter v. United States*,[82] which involved a statute that prohibited taking property by "'force and violence,' . . . a general requirement that a defendant act knowingly is itself an adequate safeguard"; it is not necessary for the government to prove that the defendant "ha[d] the intent to steal."[83] In other cases, such as one that involves a statute that simply prohibits the taking of money, the *Carter* Court had hypothesized, "to require that the defendant possess general intent with respect to the actus reus—i.e., that he know that he is physically taking the money—would fail to protect the innocent actor," such as a "defendant who peaceably takes money believing it to be his."[84] In the latter case, it would be necessary to require "specific intent—i.e., that the defendant take the money with 'intent to steal or purloin.'"[85]

76. *Id.* at 2012.
77. 513 U.S. 64 (1994).
78. *Id.* at 73.
79. 511 U.S. 600 (1994).
80. *Id.* at 619.
81. Elonis v. United States, 135 S. Ct. 2001, 2010 (2015) (quoting Carter v. United States, 530 U.S. 255, 269 (2000)).
82. 530 U.S. 255.
83. *Elonis*, 135 S. Ct. at 2010 (citing *Carter*, 530 U.S. at 261, 269).
84. *Carter*, 530 U.S. at 269.
85. *Id.* (quoting 18 U.S.C. § 2113(b) (1994)). A simpler solution, it would seem, would be to hold, as in *Morissette*, that he was not shown to meet the general intent requirement of taking the money "knowingly." *Cf.* Morissette v. United States, 342 U.S. 246, 271 (1952) ("[I]t is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.").

The *Elonis* Court thus managed to find a case that spoke of an enhanced mens rea requirement of specific intent to commit a crime, albeit only in a piece of dictum that merely follows the result of *Morissette*. *Carter*'s actual holding is that the mens rea requirement ordinarily read into federal criminal statutes does not require proof of a defendant's specific intent to commit the crime, that proof of a knowing act is enough.[86] *Carter* cited no case upholding its speculation that an enhanced "specific intent requirement" may sometimes be necessary to separate wrongful from otherwise innocent conduct, and the *Elonis* Court cited no example of the Court reversing a conviction because of a failure by the government to prove a defendant's intent to break the law.

Having surveyed the cases to determine the applicable law, the Court undertook to apply it in *Elonis*. "Section 875(c)," the Court reiterated, "requires proof that a communication was transmitted and that it contained a threat."[87] Quoting *X-Citement Video*, the Court stated

> [T]he "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." The parties agree that a defendant under § 875(c) must know that he is transmitting a communication. But communicating something is not what makes the conduct "wrongful." Here "the crucial element separating legal innocence from wrongful conduct" is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat.[88]

The required mental state, the Court went on to state, is "awareness of some wrongdoing."[89] The defendant must, therefore, be shown to be aware of the fact that the communication contains a threat.[90]

But how can a legally competent English speaker intentionally issue a communication that contains a threat and not be aware of wrongdoing—that it, in fact, contains a threat? The answer, apparently, is that a threat is what a reasonable person would consider a threat and a defendant may not be a reasonable person and therefore may not be aware that the communication contains a threat.[91] A "'reasonable person' standard is a familiar feature of civil

86. *See Carter*, 530 U.S. at 269–70.

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

88. *Id.* (citations omitted) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)).

89. *Id.* at 2011 (quoting Staples v. United States, 511 U.S. 600, 605–06 (1994)).

90. *See id.*

91. *See* United States v. Twitty, 641 F. App'x 801, 805 (10th Cir. 2016) ("[D]etermination of a defendant's subjective intent for purposes of *mens rea* often

liability in tort law," the Court pointed out, "but is inconsistent with 'the conventional requirement for criminal conduct—awareness of some wrongdoing.'"[92] Therefore, the Court concluded, having liability for threatening turn on what a reasonable person would consider a threat, "regardless of what defendant thinks,"[93] would "reduce[] culpability on the all-important element of the crime to negligence."[94] "[A]nd," the Court continued, "we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes.'"[95]

The Court's quote linking a general intent mens rea requirement to a negligence standard was taken from Sixth Circuit Judge Sutton's *dubitante* opinion in *United States v. Jeffries*.[96] In *Jeffries*, the defendant, a father in a custody dispute, wrote and performed song lyrics on YouTube that included threats on the presiding judge's life.[97] Affirming his conviction under § 875(c), the Sixth Circuit, in a unanimous opinion also written by Judge Sutton, held that "[t]he communication must be viewed from an objective or reasonable person perspective," making "[t]he defendant's subjective intent in making the communication . . . irrelevant."[98] This holding echoed those in every other circuit at that time, with the exception of the Ninth.[99] It also upheld a previous Sixth Circuit opinion,[100] *United States v. DeAndino*.[101] In *DeAndino*, the Sixth Circuit reversed a district court holding that "a defendant could be convicted only if she 'willfully threatened or intended to threaten'" because "nothing in the statutory text indicated 'a heightened mental element such as specific intent.'"[102]

Speaking only for himself, Judge Sutton then added a *dubitante* opinion in *Jeffries*, in effect dissenting from the opinion he had just written for the court.[103] Relying on the fact that dictionary definitions of the word "threat" "include[] an intent component," Sutton stated that "subjective intent is part and parcel of the meaning of a communicated 'threat' to injure another."[104] He continued,

requires consideration of the mental state of an *unreasonable* person, whose words, through objectively threatening, may [not be] . . . subjectively intended [as] threats.").

92. *Elonis*, 135 S. Ct. at 2011 (quoting *Staples*, 511 U.S. at 606–07).

93. *Id.*

94. *Id.* (quoting United States v. Jeffries, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., dubitante opinion)).

95. *Id.* (quoting Rogers v. United States, 422 U.S. 35, 47 (1975) (Marshall, J., concurring)).

96. 692 F.3d 473.

97. *Id.* at 475 ("Take my child and I'll take your life.").

98. *Id.* at 477.

99. *Id.* at 479.

100. *Id.* at 478.

101. 958 F.2d 146 (6th Cir. 1992).

102. *Jeffries*, 692 F.3d at 478 (quoting *DeAndino*, 958 F.2d at 147–48).

103. *See id.* at 483 (Sutton, J., dubitante opinion).

104. *Id.* at 483–84.

"Background norms for construing criminal statutes point in the same direction. Courts presume that intent is the required mens rea in criminal laws . . . ."[105]

The *Elonis* Court, however, rejected the argument that the definition of "threat" includes an intent component.[106] More importantly, "[b]ackground norms" do not indicate—and courts do not ordinarily presume—that mens rea requires showing a "subjective intent" to violate the law.[107] On the contrary, they almost uniformly presume and apply, as Judge Sutton did in his opinion of the court, a requirement of only an intentional or knowing act that fits the definition of the crime.[108] *Morissette*, the only case cited by Judge Sutton as supportive of his subjective intent requirement,[109] said nothing of subjective intent and held only that a defendant must be shown to know the elements of the crime.[110] Furthermore, *United States Gypsum* made explicit that the mens rea required by *Morissette* did not require a showing that a defendant acted with subjective intent.[111]

Rogers v. United States[112]—the source of the statement by Justice Marshall that the Court "ha[d] long been reluctant to infer that a negligence standard was intended in criminal statutes"[113]—involved a conviction under 18 U.S.C. § 871(a) for making oral threats "to take the life of or to inflict bodily harm upon the President of the United States."[114] The defendant was a "34-year-old unemployed carpenter with a 10-year history of alcoholism" who claimed he was Jesus Christ and that China had a bomb that only he knew about.[115] He told a police officer that he opposed President Nixon's trip to China and was "going to Washington . . . to beat his ass off. Better yet, [he would] go kill him."[116] He intended to "walk" there from Shreveport, Louisiana, "because he didn't like cars."[117]

Concurring in the Court's reversal of the conviction on other grounds, Justice Marshall stated that the statute should not be given an "objective construction" totally disregarding the speaker's intent.[118] Marshall wrote he would require "proof that the defendant intended to make a threatening statement, and that the statement he

105. *Id.* at 484.
106. *See* Elonis v. United States, 135 S. Ct. 2001, 2008 (2015).
107. *See Jeffries*, 692 F.3d at 479.
108. *Id.* at 478.
109. *Id.* at 484 (Sutton, J., dubitante opinion).
110. *See* Morissette v. United States, 342 U.S. 246, 271 (1952).
111. United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978).
112. 422 U.S. 35 (1975).
113. *Id.* at 47 (1975) (Marshall, J., concurring).
114. *Id.* at 36 (majority opinion) (quoting 18 U.S.C. § 871(a) (1970)).
115. *Id.* at 41–42 (Marshall, J., concurring).
116. *Id.* at 42.
117. *Id.*
118. *Id.* at 46.

made was in fact threatening in nature."[119] He agreed, however, that, "[p]lainly, threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out."[120] The statute, he concluded, "was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself."[121] Marshall's comment on the need to consider a speaker's intent was made in the context of a conviction based on preposterous statements by an obviously mentally unstable defendant that could not, any more than the defendant's comments in *Watts*,[122] reasonably be considered threats. Thus, the problem was not disregarding the defendant's intent, but disregarding that his comment was not "in fact threatening in nature."[123] The Court did not hold otherwise.

The *Elonis* Court also cited *Wharton's Criminal Law*, which states, "It has been suggested that the criminal law should not take cognizance of 'negligence.' Since mere inadvertence is involved, the threat of punishment cannot operate as a deterrent."[124] "However," the treatise continues (whatever its relevance), "the prevailing modern view is that criminal law's recognition of negligence may serve a generally useful purpose."[125]

Finally, the Court cited *Cochran v. United States*,[126] for its statement that a defendant might in some cases "face 'liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind.'"[127] The Court's actual holding in *Cochran*, however, was that a defendant could not be convicted of acting with an "intent to defraud" on the basis of his signing a report that contained false statements made by others that he did not know were false.[128]

It would be difficult to cite a Supreme Court opinion more apparently desperate to find, and more unsuccessful in finding, a supporting precedent than the Court's opinion in *Elonis*. The Court's wide-ranging search failed to produce a single example of a case where a court reversed a conviction because that conviction was based

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119. *Id.* at 47.
120. *Id.* at 46–47.
121. *Id.* at 47.
122. In *Watts*, the Court dismissed as "political hyperbole" statements made by an 18-year-old man "during a public rally on the Washington Monument grounds" that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers." Watts v. United States, 394 U.S. 705, 706, 708 (1969).
123. *Rogers*, 422 U.S. at 47 (Marshall, J., concurring).
124. 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 27 (15th ed. 1993); *see* Elonis v. United States, 135 S. Ct. 2001, 2011 (2015).
125. 1 TORCIA, *supra* note 124, § 27.
126. 157 U.S. 286 (1895).
127. *Elonis*, 135 S. Ct. at 2011 (quoting *Cochran*, 157 U.S. at 294).
128. *Cochran*, 157 U.S. at 294.

on a negligence standard. The closest it came was Judge Sutton's twice-cited *dubitante* opinion, making that opinion without a doubt the most influential *dubitante* opinion in the history of the Court.

The Court then turned to specifically refuting the government's argument. Although the government was "at pains" to deny it, the Court said, its argument that Elonis could be convicted on a showing that he "knew the contents and contexts of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats" was simply an argument based on the "negligence standard."[129] In support of its argument, "the government relied most heavily," the Court said, on *Hamling v. United States*, in which, as we have seen,

> the Court rejected the argument that individuals could be convicted of mailing obscene materials only if they knew the "legal status of the materials" distributed. . . . It was instead enough for liability that "a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials."[130]

It was also enough, therefore, the government argued, for it to show that Elonis knew the character and nature of his posts, that they could reasonably be interpreted as threats; it did not have to also show that he had an intent to threaten, i.e., that he knew his posts were threats as a matter of law.[131]

The Court responded that *Hamling* not only failed to support the government's argument, but, by a seeming sleight-of-hand, purported to show that it actually supported the Court's requirement of a subjective intent to break the law.[132] Its convoluted argument (not made by Elonis) was as follows:

> [T]he Court in *Hamling* approved a state court's conclusion that requiring a defendant to know the character of the material incorporated a "vital element of scienter" so that "not innocent but calculated purveyance of filth . . . is exorcised." In this case,

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129. *Elonis*, 135 S. Ct. at 2011. Justice Thomas denied that the general intent requirement, which he favored, was a "negligence standard":

> Requiring general intent in this context is not the same as requiring mere negligence. Like the mental-state requirements adopted in many of the cases cited by the Court, general intent under § 875(c) prevents a defendant from being convicted on the basis of any *fact* beyond his awareness. In other words, the defendant must *know*—not merely be reckless or negligent with respect to the fact—that he is committing the acts that constitute the *actus reus* of the offense.

Id. at 2022 (Thomas, J., dissenting) (citations omitted).

130. *Id.* at 2011–12 (majority opinion) (quoting Hamling v. United States, 418 U.S. 87, 121, 123 (1974)).

131. *Id.* at 2012.

132. *Id.*

> "calculated purveyance" of a threat would require that Elonis know the threatening nature of his communication. Put simply, the mental state requirement the Court approved in *Hamling* turns on whether a defendant knew the character of what was sent, not simply its contents and context.[133]

Hamling approved of the state court conclusion that in a prosecution for mailing obscene material, the state statute required the government to show that the defendant was "in some manner aware of the *character* of the material,"[134] meaning only, the state court made clear, that he knew that it was "obscene, lewd, and lascivious," not that he knew that it was legally obscene.[135]

There is no basis for the Court's statement that "the mental state requirement the Court approved in *Hamling* turns on whether a defendant knew the character of what was sent, not simply its contents and context," with "character" meaning, according to the Court, its legal status.[136] The *Hamling* Court, however, explicitly stated to the contrary that "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials."[137] The whole point of *Hamling* was to reaffirm the holding of *Rosen v. United States*—that in an obscenity case it was enough for the government to prove that the defendant knew "the contents of the material," that is, its "obscene, lewd, and lascivious . . . character," (the facts); it did not have to also prove that he knew that it "could be properly or justly characterized as obscene," (the law).[138] The need for a precedent often produces some straining, but to read *Hamling* as supporting a requirement of an intent to break the law is to stand it on its head.

Additionally, as previously discussed, *Posters 'N' Things* corroborates that *Hamling*'s requirement that a defendant know "the character" of the material in question did not mean that he had to know that material's legal status. "As in *Hamling*," the *Posters 'N' Things* Court stated, "it is sufficient for the Government to show that the defendant 'knew the character and nature of the materials' with which he dealt"—i.e., that they were "likely to be used with illegal drugs."[139] The prosecution did not have to also show that the

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133. *Id.* (quoting *Hamling*, 418 U.S. at 122).

134. *Hamling*, 418 U.S. at 122 (quoting Mishkin v. New York, 383 U.S. 502, 510 (1966)).

135. *Id.* at 121 (quoting Rosen v. United States, 161 U.S. 29, 42 (1896)). "The inquiry under the statute," the state court said, "is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character." *Id.* at 120 (quoting *Rosen*, 161 U.S. at 41).

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

137. *Hamling*, 418 U.S. at 123.

138. *Id.* at 120.

139. Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 524–25 (1994) (quoting *Hamling*, 418 U.S. at 123).

defendant had "specific knowledge that the items are 'drug paraphernalia' within the meaning of the statute."[140]

In his dissent in *Elonis*, Justice Thomas relied on *Rosen* to show that the mens rea requirement the Court read into a federal criminal statute only required a showing of "general intent"—an intentional act done with knowledge of "the facts that make his conduct illegal"—not that the defendant knew its legal status.[141] The *Elonis* Court attempted to dispose of *Rosen* by stating that the case merely rejected an "'ignorance of the law' defense."[142] The question in *Rosen*, however, as the Court pointed out in *Hamling* and as Justice Thomas now argued in *Elonis*, was whether the government had to show that the defendant "knew or believed that such [material] could be properly or justly characterized as obscene."[143] As the *Hamling* Court pointed out, "[t]he Court rejected this contention," and has held ever since that there is no requirement "as a matter of either statutory or constitutional interpretation, . . . that the prosecution must prove a defendant's knowledge of the legal status of the materials he distributes."[144]

Therefore, the *Elonis* majority concluded, Elonis's conviction must be reversed.[145] Instructing the jury that the government "need prove only that a reasonable person would regard Elonis's communications as threats . . . was error," because it failed to require the jury to consider his "mental state."[146] "[W]hat [Elonis] thinks," the Court insisted, "does matter."[147] Elonis had further argued that a finding of recklessness would also not be sufficient, but the Court refused to address the issue as it had not been briefed or argued.[148] What the majority opinion "makes clear," the Court stated, is "that negligence is not sufficient to support a conviction under Section 875(c), contrary to the view of nine Courts of Appeals" (as if this final point bolstered, rather than cast doubt on, the Court's conclusion).[149]

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140. *Id.* at 524. The Court's imaginative "calculated purveyance" argument in *Elonis* was an original. Elonis's counsel did not argue that *Hamling* supports his position, and his only response to the government's reliance on *Hamling* was that "this Court has not applied the government's broad reading of *Hamling*" in another case. Reply Brief for the Petitioner at 11, *Elonis*, 135 S. Ct. 2001 (No. 13-983).

141. *Elonis*, 135 S. Ct. at 2019–20 (Thomas, J., dissenting).

142. *Id.* at 2012 (majority opinion).

143. *Id.* at 2020 (Thomas, J., dissenting) (quoting Rosen v. United States, 161 U.S. 29, 41 (1896)).

144. *Hamling*, 418 U.S. at 120–21.

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

146. *Id.* While the jury was instructed to consider whether Elonis transmitted his communications "intentionally," it was not instructed to consider whether he did so with "intent to threaten." *Id.* at 2007.

147. *Id.* at 2011 (alteration in original).

148. *Id.* at 2012.

149. *Id.* at 2013. Elonis's Petition for a Writ of Certiorari cited cases from eight circuits that "adopted an objective standard" for defining a true threat

III.

Justice Alito wrote a separate opinion concurring in the Court's reversal of Elonis's conviction but dissenting from its refusal to adopt recklessness as a sufficient mental state to support a conviction.[150] "Conviction under § 875(c)," he wrote, "demands proof that the defendant's transmission was in fact a threat, i.e., that it is reasonable to interpret the transmission as an expression of an intent to harm another."[151] As the government had supplied that proof, it might have seemed that should have ended the case, but Alito agreed with the Court that it should add to § 875(c) a requirement of "some sort of mens rea for conviction."[152] He also agreed, implicitly, that Elonis's conviction was based on "negligence" and concluded that "a serious offense against the person," like § 875(c), "that lacks any clear common-law counterpart should be presumed to require more" than negligence, which may not be "morally culpable."[153]

"Once we have passed negligence, however," Alito continued, "no further presumptions are defensible," for "[t]here can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct."[154] To require more than recklessness, he concluded, would be to "step[] over the line that separates interpretation from amendment."[155]

This new and original mens rea theory seems to have no relation, however, to the facts of the case. There would seem to be no reason to doubt that Elonis engaged in morally culpable, wrongful conduct, and it is difficult to see what interest is served by reversing his conviction—clearly not his estranged wife's.[156] Alito's refusal to step over the line separating interpretation from amendment would be more convincing if he had not stepped over it by adding to § 875(c) a

under a variety of statutes. Petition for Writ of Certiorari at 17, *Elonis*, 135 S. Ct. 2001 (No. 13-983). The exceptions to this majority rule were the Ninth and Tenth Circuits, which held that under *Black* true threats were only exempt from First Amendment protection when an "intent to threaten" was shown. United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005); United States v. Cassel, 408 F.3d 622, 631 (9th Cir. 2005). *But see* United States v. Bagdasarian, 652 F.3d 1113, 1118 (9th Cir. 2011) (stating a criminal threat statute required both objective and subjective elements be met); United States v. Romo, 413 F.3d 1044, 1052 (9th Cir. 2008) (using an objective standard in a criminal threat case). In addition, the Seventh Circuit had stated that under *Black* it was "more likely" than not "that an entirely objective definition [was] no longer tenable." United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008).

150. *Elonis*, 135 S. Ct. at 2013–14 (Alito, J., concurring in part and dissenting in part).

151. *Id.* at 2014.

152. *Id.*

153. *Id.* at 2015.

154. *Id.*

155. *Id.*

156. *See id.* at 2016–17.

requirement of more than intentional transmission of unambiguously threatening statements.

Justice Alito also believed that his acceptance of a recklessness standard made it necessary to face the constitutional question raised.[157] He concluded that *Black* confirmed that true threats do not have constitutional protection and pointed out that Elonis's wife testified that his posts "made her feel 'extremely afraid' and 'like [she] was being stalked.' Considering the context, who could blame her?"[158] The Third Circuit, Alito believed, should be given the opportunity on remand to consider whether Elonis's conviction could be upheld under a recklessness standard or on harmless error grounds.[159]

Only Justice Thomas dissented from the Court's reversal of Elonis's conviction.[160] He agreed that the Court had previously established a "presumption in favor of scienter" in interpreting federal criminal statutes, but argued that standard required only proof of "general intent."[161] This presumption, Thomas continued, ordinarily only required that "'the defendant . . . know the facts that make his conduct illegal,' . . . he need not know that those facts make his conduct illegal."[162] *Rosen v. United States* illustrates this, he said, even in a statute regulating speech.[163] In that case, the defendant had to be shown to know the contents of the materials, the facts that defined the offense, but not that they were obscene under the law.[164] This was reaffirmed in *Hamling* and supported by lower court rulings interpreting similar statutes.[165] In *Ragansky v. United States*,[166] the Seventh Circuit interpreted a statute predating § 875(c) that prohibited "knowingly and willfully" threatening the President "to require proof of only general intent."[167] Interpreting the same statute in *United States v. Stobo*,[168] a district court held there was no need to prove intent "to menace the President," because "[t]he effect upon the minds of the hearers, who cannot read [the defendant's] inward

157. *Id.* at 2016.
158. *Id.* at 2016–17 (alteration in original).
159. *Id.* at 2017–18.
160. *Id.* at 2018 (Thomas, J., dissenting).
161. *Id.* at 2019.
162. *Id.* (first quoting Carter v. United States, 530 U.S. 255, 268 (2000); and then quoting Staples v. United States, 511 U.S. 600, 605 (1994)).
163. *Id.* at 2020–21, 2023.
164. *Id.* at 2020.
165. *Id.*
166. 253 F. 643 (7th Cir. 1918).
167. *Elonis*, 135 S. Ct. at 2020 (Thomas, J., dissenting). *Ragansky* stated that a threat is made willfully "if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution." *Ragansky*, 253 F. at 645. Thomas noted, however, that in *Watts* the Court expressed "grave doubts" about this definition of "willfully." *Elonis*, 135 S. Ct. at 2026–27 (quoting Watts v. United States, 394 U.S. 705, 707–08 (1969)).
168. 251 F. 689 (D. Del. 1918).

thoughts, is precisely the same."[169] "At a minimum," Thomas concluded, "there is no historical practice requiring more than general intent when a statute regulates speech."[170]

Justice Thomas refuted the Court's attempt to show that *Hamling* approved of a requirement of more than general intent.[171] The Court argued that "the mental state approved in *Hamling* . . . 'turns on whether a defendant knew the character of what was sent, not simply its contents and context.'"[172] Whatever the Court meant by this distinction between "character" and "contents and context," Thomas responded, "'[c]haracter' cannot mean legal obscenity," i.e., a requirement of more than general intent, "as *Hamling* rejected the argument that a defendant must have 'awareness of the obscene character of the material.'"[173]

Thomas found the Court's "treatment of *Rosen* . . . even less persuasive."[174] As *Hamling* showed, he said, the *Rosen* Court did not merely reject an "ignorance of the law" defense, as the majority of the Court claimed.[175] It rejected the defendant's claim that he could not be convicted of mailing obscene material "unless he knew or believed that such paper could be properly or justly characterized as obscene."[176] Thomas argued this was akin to Elonis's equally invalid argument that he could not be convicted of making a threat under § 875(c) if his "subjective belief of what constitute[d] a 'threat' differ[ed] from that of a reasonable jury."[177] Thomas's conclusion that "today's decision is irreconcilable with *Rosen* and *Hamling*"[178] seems hard to avoid.

After discussing the First Amendment issue at length, Justice Thomas, following the "traditional rule that only a narrow class of true threats, historically unprotected, may be constitutionally proscribed," rejected Elonis's claim that his "threatening posts were nevertheless protected by the First Amendment."[179]

IV.

The essence of *Elonis* is its rejection of the general intent mens rea requirement adopted by almost all the federal circuits for § 875(c) cases and its substitution of the requirement of showing a subjective intent to threaten. At the same time, however, the Court made clear

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169. *Elonis*, 135 S. Ct. at 2021 (Thomas, J., dissenting) (quoting *Stobo*, 251 F. at 693).
170. *Id.*
171. *Id.* at 2022.
172. *Id.*
173. *Id.* (quoting Hamling v. United States, 418 U.S. 87, 120 (1974)).
174. *Id.*
175. *Id.* at 2023.
176. *Id.* (quoting Rosen v. United States, 161 U.S. 29, 41 (1896)).
177. *Id.*
178. *Id.*
179. *Id.* at 2024, 2028.

that this enhanced mens rea requirement would be met by a showing that Elonis transmitted his communications "for the purpose of issuing a threat, or with knowledge that the communication [would] be viewed as a threat."[180] This raises the question, how can a defendant transmit a communication that contains a threat and yet not intend to threaten or know that it will be viewed as a threat—especially in Elonis's case, after his wife obtained a protective order against him? The answer, the Court's holding indicates, is that because a threat is what a reasonable person considers a threat, it is necessary to consider the possibility that the defendant, though legally competent, may not be a reasonable person.[181] He might, the theory is, have failed to recognize that his communication would be seen as a threat and merely acted negligently,[182] which does not show the required degree of awareness of wrongdoing.[183]

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180. *Id.* at 2012 (majority opinion).

181. *See id.* ("In this case, 'calculated purveyance' of a threat would require that Elonis know the threatening nature of his communication. . . . The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error.").

182. As Judge Sutton, the source of the "negligence standard" objection, explained in a post-*Elonis* case, "[h]aving liability turn on a 'reasonable person' standard . . . permits criminal convictions premised on mistakes—mistaken assessments by a speaker about how others will react to his words." United States v. Houston, 792 F.3d 663, 687 (6th Cir. 2015).

183. Professor Seana Shiffrin has expressed the view that this argument is invalid on purely moral grounds. *See* Seana Shiffrin, *The Moral Neglect of Negligence* 3–4, 36 (Univ. of Cal. L.A. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 16-19, 2016), http://ssrn.com/abstract=2766494. She writes,

> Putting aside the legal issues about statutory interpretation, I'm more interested in the moral interpretation of Mr. Elonis' conduct. To focus only on the morality of his threatening behavior as such, assume that Mr. Elonis would not have realized his fantasies. In one version of the events, his victims' terror mattered enough to him to try to bring it about. In another version, his victims meant so little to him that they did not penetrate his self-absorbed bubble of rage; he either didn't register their predictable terror or didn't register it as providing [a] subjectively decisive reason to alter his conduct. Both versions of his behavior involve subordinating the vulnerabilities and interests of others to his perceived interest in voicing his self-indulgent and horrific fantasies, and both versions would show a culpable imperviousness to the evidently more important needs of others. I am hard pressed to say one version of the story is morally worse than another. Both pathways to others' terror, one malicious and one negligent, are morally awful in different ways.
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> . . . .
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> . . . I resist the idea that it would have been morally worse if Mr. Elonis intended to threaten his wife than if he intended to vent his all-consuming anger publicly but paying no attention to who would read his on-line posts, he was unaware that his online rantings ran a substantial risk of threatening his wife. These are different, but both scary, forms of moral monstrosity.

On the facts of this case, this reasoning seems a triumph of theory over reality and common sense. The imposition of a subjective intent-to-threaten mens rea requirement into § 875(c) cases—the invention of a single judge in a *dubitante* opinion—was based on a unique and baseless reading of *Morissette*, which made no mention of a subjective intent requirement (a requirement that was also explicitly rejected in *United States Gypsum*).[184]

Morissette held that a defendant could not be convicted on the basis of an innocent mistake.[185] Elonis's behavior cannot be comparably characterized as innocent,[186] and to excuse his threats as being based on a mistake would be inconsistent with the very fact he understood and spoke English. In any event, Elonis did not claim that he did not intend to threaten his wife or did not know that she would feel threatened (despite his knowing that she had obtained a protective order against him) but only that he issued the communications for "therapeutic" reasons—to relieve his "pain"—thinking it was protected by the First Amendment if he was emulating rappers.[187] That alleged justification was not only consistent with, but likely dependent on, Elonis intending to threaten his wife and knowing she would feel threatened.

The fact that a large majority of circuit courts over many years almost unanimously saw no serious danger of convicting an innocent defendant under § 875(c) by using a general intent standard should have created a strong presumption of that standard's correctness. The Court's preemptory, seemingly almost lighthearted, dismissal of "the view of nine Courts of Appeals"[188] reflects an excessive accommodation to the possession and exercise of unreviewable power.

That there is something basically wrong with the *Elonis* decision is indicated by how easily it can be avoided and how difficult it apparently is for lower courts to understand or believe. Whatever the Court hoped to achieve by reversing Elonis's conviction, it did not change the result of the case.[189] On remand, the Third Circuit saw no need to remand the case to the district court for retrial.[190] It had no

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Id. at 3–4, 36 (footnotes omitted).

184. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978).

185. Morissette v. United States, 342 U.S. 246, 271 (1952).

186. Justice Thomas made this point bluntly with the following hypothetical:

> [T]here is nothing absurd about punishing an individual who, with knowledge of the words he uses and their ordinary meaning in context, makes a threat. For instance, a high-school student who sends a letter to his principal stating that he will massacre his classmates with a machine gun, even if he intended the letter as a joke, cannot fairly be described as engaging in innocent conduct.

Elonis, 135 S. Ct. at 2023 (Thomas, J., dissenting).

187. *See id.* at 2005–07 (majority opinion).

188. *Id.* at 2013.

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

190. *See id.*

difficulty in reinstating Elonis's conviction on all four counts by simply disposing of the defective jury charge as "harmless error"—just as Justice Alito had suggested.[191] On the count involving Elonis's wife, the court found that

> the evidence surrounding [Elonis's] posts unequivocally demonstrate[d] the jury would have convicted Elonis were it required to find that he either knew his ex-wife would feel threatened by the posts or that he purposely threatened her. . . . [I]t is not at all credible that Elonis did not know his ex-wife would interpret them as threats.[192]

The court noted this position was "less credible still" after Elonis "attended the court proceeding at which [his wife] sought a restraining order against him . . . . No rational juror could conclude otherwise."[193]

In *United States v. White*,[194] the Fourth Circuit similarly affirmed a defendant's conviction by holding that the district court's failure to inform the jury of the need to find "that the defendant subjectively intended the communication as a threat" was harmless error because it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[.]"[195] Then, taking a position at odds with *Elonis*, the court held the "message at issue" could show the required intent: "In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury."[196]

Nonetheless, the outcome of *Elonis* will substantially weaken § 875(c)'s protection against threats by making prosecutions more

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191. *See id.*

192. *Id.* at 598–99.

193. *Id.* at 599.

194. 810 F.3d 212 (4th Cir. 2016).

195. *Id.* at 221 (alteration in original) (quoting Neder v. United States, 527 U.S. 1, 9 (1999)).

196. *Id.* at 222 (quoting Pope v. Illinois, 481 U.S. 497, 503 (1987)). An *Elonis*-based reversal and remand will not, however, necessarily lead to the reaffirmation of a conviction on harmless error grounds in cases not involving unambiguous threats. In *United States v. Houston*, 792 F.3d 663 (6th Cir. 2015), a unanimous Sixth Circuit, in an opinion by Judge Sutton—who may have seen *Elonis* as a vindication of his *Jeffries dubitante* opinion—held the defendant was entitled to the opportunity to convince a jury that his statements (made to his girlfriend, not the victim, in an overheard telephone conversation) were "ranting and raving rather than expressing an intent to cause harm." *Id.* at 668. In *United States v. Twitty*, 641 F. App'x 801 (10th Cir. 2016), the Tenth Circuit similarly reversed a defendant's conviction and granted a new trial, pointing out that his communications were "angry, hyperbolic, and bizarre" and "far from unambiguous." *Id.* at 805; *see also*, United States v. Martinez, 800 F.3d 1293, 1295 (11th Cir. 2015) ("The indictment fails to allege Martinez's *mens rea* or facts from which her intent can be inferred, with regard to the threatening nature of her e-mail.").

difficult. In an amicus brief in *Elonis*, the National Network to End Domestic Violence pointed out (as many courts including the Supreme Court also have) that "[t]he fear and disruption caused by threats of violence do not derive from the speaker's private motivation . . . . A statement that a reasonable person would interpret as a threat to hurt or to kill causes fear and disruption regardless of the speaker's motivation."[197] "The threat alone," it quoted the Eighth Circuit, "is disruptive of the recipient's sense of personal safety and well-being and is the gravamen of the offense."[198] As the Supreme Court put it in *Black*, "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[199]

Perhaps even more important, the impact of *Elonis* has already extended beyond § 875(c) into other areas of criminal law, complicating prosecutions by providing defense counsel with a new basis for objecting to convictions in an almost endless variety of situations. In *People v. Relerford*,[200] for example, a "general stalking" statute that prohibited conduct that a defendant "knows or should know" would cause a "reasonable person to . . . suffer emotional distress" was held unconstitutional in the wake of *Elonis*, because it permitted convictions "premised solely on how [the defendant's] posts [would] be understood by a reasonable person."[201] The statute's failure to require that a defendant "actually intend to inflict emotional suffering on a person" meant it "lack[ed] a *mens rea* requirement" in violation of the Due Process Clause of the Fourteenth Amendment.[202]

People v. Sanson[203] dealt with a statute that made it a misdemeanor for a driver to fail to yield to a pedestrian who has the right of way if a resulting injury was due to "the driver's failure to use due care," that is, the "care which is exercised by reasonably prudent drivers."[204] A New York City Criminal Court held the statute "unconstitutional on its face. . . . under both the state and federal constitutions" because, as in *Elonis*, it permited convictions on the

197. Brief of Amici Curiae The National Network to End Domestic Violence et al. in Support of Respondent at 18, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983).
198. *Id.* at 17 (quoting United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991)).
199. Virginia v. Black, 538 U.S. 343, 360 (2003) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).
200. 56 N.E.3d 489 (Ill. App. Ct. 2016).
201. *See id.* at 494–96.
202. *Id.* at 495–96.
203. 33 N.Y.S.3d 883 (N.Y. Crim. Ct. 2016).
204. *Id.* at 885–86.

basis of "a civil tort liability negligence standard instead of a standard that utilized a culpable *mens rea*."[205]

In *United States v. Wright*,[206] an army officer convicted of "seven specifications of maltreatment of subordinates" argued on appeal to the U.S. Army Court of Criminal Appeals that his conviction should be reversed, because "when a statute is silent as to intent, it must be read to require more than mere negligence, in accordance under the principles enunciated in *Elonis*."[207] The court held that "broadly applicable [mens rea] requirements" must be read into a criminal statute that "does not contain them," but only "'that *mens rea* which is necessary to separate' wrongful conduct from innocent conduct" should be inferred.[208] "In some instances"—contrary to *Elonis*—a finding that "the defendant possessed 'general intent,'" that is, "knowledge of certain facts," would be "enough to ensure that innocent conduct [was] separated from wrongful conduct."[209]

Elonis seems to be an example of Supreme Court decision-making at close to its worst, overturning and complicating settled law with little apparent justification by relying on precedents that do not seem to support it and questionable distinctions of precedents that seem to contradict it. As is perhaps to be expected of law made by lawyers, clarity, simplicity, and the avoidance of litigation do not necessarily receive the highest priority.

CONCLUSION

In *Elonis*, the Court rewrote § 875(c) to avoid the First Amendment issue possibly implicated in *Black*—the issue the *Elonis* case was brought to resolve. The bewildering result provides strong support for the view that instead of straining to avoid a constitutional question, the Court would usually do better by answering it.[210] The First Amendment is beyond the scope of this Article, but it does not appear that the issue would have been serious or complex enough to justify the Court's strenuous effort to avoid it. As Professor Schauer pointed out, "That threats are not protected by the First Amendment seems so intuitively obvious that one searches in vain for a First Amendment case even raising the question whether the person who *says* 'your money or your life' has a nonlaughable defense to a criminal

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205. *Id.* at 887.

206. United States v. Wright, No. ARMY 20130296, 2016 CCA LEXIS 438 (A. Ct. Crim. App. July 21, 2016).

207. *Id.* at *1, *4.

208. *Id.* at *5 (first quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994); and then quoting Carter v. United States, 530 U.S. 225, 269 (2000)).

209. *Id.* at *5–6 (quoting United States v. Caldwell, 75 M.J. 276, 281 (C.A.A.F. 2016)).

210. *See* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405–06 (2002) (describing "the canon of construing statutes to avoid constitutional doubt" as "wholly illegitimate").

prosecution."[211] A better way to protect the innocent—better than making § 875(c) a subjective intent offense—would be for the Court to state with greater clarity the meaning of a "true threat."[212]

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211. Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 210.

212. For a good discussion reaching a different conclusion, see generally Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225 (2006) (concluding "[a] speaker should not become a criminal simply because of the effect of his words" due to the "substantial risk of suppressing ideas" such an approach creates (quoting Cohen v. California, 403 U.S. 15, 26 (1971))).

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