

IS THAT A THREAT?: *ELONIS V. UNITED STATES* AND THE STANDARD OF INTENT FOR TRUE THREAT CONVICTIONS

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INTRODUCTION

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”¹ Even though the Supreme Court has held many regulations of speech constitutional, those laws regulating the *content* of speech garner the strictest standard of constitutional scrutiny. Nevertheless, the Court has ruled that Congress *can* regulate certain categories of speech based on content.² One such category is “true threats” of physical violence, first delineated in *Watts v. United States*.³ In 1939, Congress in-part regulated true threats with 18 U.S.C. § 875(c). Now, in *Elonis v. United States*,⁴ the Court must decide exactly what speech constitutes a “true threat.” Must the speaker have subjectively intended to threaten another person? Or is it enough that a reasonable speaker would have foreseen someone interpreting the speech as a threat?

Elonis is a ground-breaking case. Not only does it mark the first time the Court will consider limits for speech on social media,⁵ but it

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1. U.S. CONST. amend. I.
2. See *United States v. Stevens*, 559 U.S. 460, 469 (2010) (“From 1791 to the present . . . the First Amendment has ‘permitted restrictions upon the content of speech in a few limited areas.’” (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992))).
3. 394 U.S. 705, 708 (1969).
4. No. 13-983 (U.S. argued Dec. 1, 2014).
5. Emily Bazelon, *Do Online Death Threats Count as Free Speech?*, N.Y. TIMES (Nov. 25, 2014), <http://www.nytimes.com/2014/11/30/magazine/do-online-death-threats-count-as-free-speech.html>.

is the Court's first examination of true-threat jurisprudence since 2003's *Virginia v. Black*.⁶ In *Black*, the Court did not decide whether a "true threat" required that the speaker subjectively intend to threaten the listener. *Elonis* places this question directly before the Court.

This commentary will relate the factual background of the case, including the speech that was the basis for Anthony Elonis's indictment. Then it will examine the Supreme Court's protected-speech precedent and its true-threat jurisprudence in particular as well as the Third Circuit's holding in the case below. It then highlights each side's arguments for why the statute and the First Amendment do or do not compel courts to use a subjective-intent standard. After analyzing those arguments in light of *Watts* and *Black* it concludes that the Court will likely reverse the Third Circuit's decision and hold that a finding of subjective intent is required.

I. FACTUAL BACKGROUND

In May 2010, Anthony Elonis's wife of seven years left him, taking their two kids with her.⁷ The following October, Elonis was fired from his job at Dorney Park & Wildwater Kingdom, an amusement park in Allentown, Pennsylvania, because of a photograph he had posted on Facebook taken during his office's Halloween party.⁸ The photo showed Elonis in a costume, holding a knife to a coworker's throat with the caption, "I wish."⁹ His boss saw the post and fired him that same day.¹⁰

Two days after he was fired, Elonis took to Facebook. He first posted about his former employer, Dorney Park,¹¹ imagining the fear his former coworkers must feel not knowing whether he still had keys to the gates.¹² He also posted about his estranged wife: "[i]f 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."¹³ He posted more about his wife in comments on her sister's status updates.¹⁴ For

6. 538 U.S. 343 (2003).

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

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

example, when his wife's sister posted about going Halloween costume shopping with his children, Elonis commented, "Tell [my son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [my wife's] head on a stick?"¹⁵ He also posted in October 2010:¹⁶

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.¹⁷

As a result of these statements, a state court issued Elonis's wife a restraining order against him on November 4, 2010.¹⁸ In response, Elonis posted again on November 7, this time an adaptation of the *Whitest Kids U' Know* sketch "It's Illegal to Say . . .":¹⁹

Did you know that it's illegal for me to say I want to kill my wife?

It's illegal.

It's indirect criminal contempt.

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.

I'm not actually saying it.

I'm just letting you know that it's illegal for me to say that.

It's kind of like a public service.

I'm letting you know so that you don't accidently go out and say something like that.

Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.

That's illegal.

Very, very illegal.

But not illegal to say with a mortar launcher.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See *Whitest Kids U' Know: I Want to Kill the President* (Fuse broadcast Apr. 24, 2007), available at <https://www.youtube.com/watch?v=QEEOvyGbbtY>.

Because that's its own sentence.

It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.

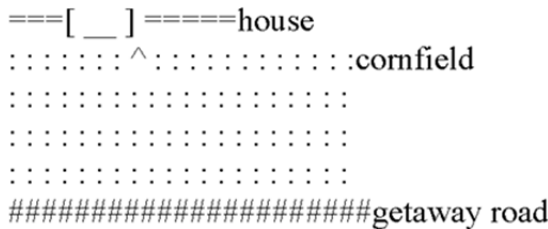
Perfectly legal.

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.

Insanely illegal.

Ridiculously, wrecklessly, insanely illegal.

Yet even more illegal to show an illustrated diagram.



Insanely illegal.

Ridiculously, horribly felonious.

Cause they will come to my house in the middle of the night and they will lock me up.

Extremely against the law.

Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.²⁰

And on November 15, Elonis posted threats to both his wife and to local law enforcement on Facebook:²¹

Fold up your PFA and put it in your pocket
 Is it thick enough to stop a bullet?
 Try to enforce an Order
 That was improperly granted in the first place
 Me thinks the judge needs an education on true threat jurisprudence

20. *Elonis*, 730 F.3d at 324–25.
 21. *Id.* at 325–26.

And prison time will add zeroes to my settlement

Which you won't see a lick

Because you suck dog dick in front of children

And if worse comes to worse

I've got enough explosives to take care of the state police and the sheriff's department

[link: Freedom of Speech, www.wikipedia.org]²²

Elonis's November 16 Facebook post was the basis of Count Four, threats to a kindergarten class:²³

That's it, I've had about enough

I'm checking out and making a name for myself

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?²⁴

After monitoring Elonis's public Facebook posts, FBI agents went to his house to interview him, but Elonis closed the door on them once they had identified themselves and confirmed that he was "free to go."²⁵ He then returned to Facebook and posted the following, which became the basis for Count Five, threats to an FBI agent:²⁶

You know your shit's ridiculous when you have the FBI knockin' at yo' door

Little Agent Lady stood so close

Took all the strength I had not to turn the bitch ghost

Pull my knife, flick my wrist, and slit her throat

Leave her bleedin' from her jugular in the arms of her partner

[laughter]

So the next time you knock, you best be serving a warrant

And bring yo' SWAT and an explosives expert while you're at it

Cause little did y'all know, I was strapped wit' a bomb

22. *Id.*

23. *Id.* at 326.

24. *Id.*

25. *Id.*

26. *Id.*

Why do you think it took me so long to get dressed with no shoes on?

I was jus' waitin' for y'all to handcuff me and pat me down

Touch the detonator in my pocket and we're all goin'

[BOOM!]²⁷

Elonis was arrested on December 8, 2010.²⁸ The grand jury indicted him on five counts of making threatening communications in violation of 18 U.S.C. § 875(c).²⁹ His pre-trial motion to dismiss the indictment was denied.³⁰ At trial, a jury acquitted Elonis on Count One, threatening the patrons and employees of Dorney Park, but convicted him on Counts Two through Five: threatening his wife, the employees of the Pennsylvania State Police and Berks County Sheriff's Department, a kindergarten class, and an FBI agent.³¹ The court then sentenced him to forty-four months in prison, followed by three years of supervised release.³² His post-trial motions were denied and he appealed his conviction to the Third Circuit.³³

II. LEGAL BACKGROUND

A. *Interstate Communications*

Elonis was convicted under 18 U.S.C. § 875(c), which provides “[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.”³⁴ The statute was enacted in 1939³⁵ in the wake of laws aimed at extortion in kidnapping cases.³⁶

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 327.

31. *Id.*

32. *Id.*

33. *Id.*

34. 18 U.S.C.A. § 875(c) (West 2014).

35. Pub. L. No. 76-76, 53 Stat. 742 (1939).

36. *See, e.g.*, Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649, codified at 18 U.S.C.A. § 876 (West 2014).

B. *Reading in a Mens Rea Requirement*

Mens rea is Latin for “guilty mind.”³⁷ The mens rea requirement is fundamental in criminal law. It takes the form of the varying intent requirements, such as intent, knowledge, recklessness, and negligence, which a legislature may attach to conduct it proscribes. Even where a statute does not specify a mens rea element, the rule is for courts to nonetheless presume “that some form of scienter is to be implied,” absent a clear instruction from Congress to the contrary.³⁸ At trial, the prosecution is responsible for proving the relevant intent requirement beyond a reasonable doubt.

The Court has explained that another presumption “requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”³⁹ Secondly, Congress is presumed to act purposefully when it uses particular language in one section of an Act but omits it from another.⁴⁰

Section 875(c) does not include a subjective-intent requirement. One of its predecessors dealing with demands for ransom, however, 18 U.S.C. § 876 required finding “intent to extort.”⁴¹ This raises the question of whether Congress meant to depart from the subjective-intent requirement it used in § 876, or whether it merely no longer felt it necessary to include these exact words.

C. *Unprotected Speech*

The Supreme Court has historically understood the First Amendment to prohibit content-based restrictions on speech.⁴² The reasoning for the presumption is the first-principles notion “that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁴³

37. 9 OXFORD ENGLISH DICTIONARY 609 (2d ed. 1989).

38. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994).

39. *Carter v. United States*, 530 U.S. 255, 256–57 (2000) (quoting *X-Citement Video*, 513 U.S. at 72).

40. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983).

41. *See* 18 U.S.C.A. § 876(b) (West 2014) (“Whoever, with intent to extort from any person any money or other thing of value, so deposits . . . any communication containing any threat to kidnap any person . . . shall be fined under this title or imprisoned not more than twenty years, or both.”).

42. *See Ashcroft v. ACLU*, 542 U.S. 652, 660 (2004) (holding that the government bears the burden of showing the constitutionality of content-based restrictions on speech).

43. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

However, as cherished a refrain of liberty as the First Amendment is, the right has always been qualified.⁴⁴ Among the legitimate purposes for which the Court has permitted restricting speech based on content is “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”⁴⁵ The common law carved out exceptions for such content-based restrictions as obscenity, defamation, and incitement,⁴⁶ and the Court endorsed those exceptions with a few of its more famous one-liners, including Justice Stewart’s “I know it when I see it” regarding obscenity⁴⁷ and Justice Holmes’s “falsely shouting fire in a theater” regarding incitement.⁴⁸

In *Watts v. United States*, the Court found another exception for “true threats” of physical violence.⁴⁹ The speaker in *Watts* was protesting the Vietnam War at a rally in Washington, D.C. He told a crowd, “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.”⁵⁰ The Supreme Court reversed his conviction for making a threat against the President finding that the statement was political hyperbole and thus not a true threat.⁵¹ Critical to the Court’s decision in *Watts* was the context of the statement, the expressly conditional nature of the statement, and the reaction of the listeners—the crowd had laughed in response.⁵²

D. *Virginia v. Black*

After its 1969 decision in *Watts*, the Supreme Court did not revisit the true threat exception until 2003.⁵³ In *Black*, the Court defined a

44. See *United States v. Stevens*, 559 U.S. 460, 469 (2010) (“From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas.”).

45. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

46. *Stevens*, 559 U.S. at 468–69 (collecting authorities).

47. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

48. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

49. *Watts v. United States*, 394 U.S. 705, 708 (1969) (finding that a statute criminalizing threats against the life of the President was constitutional, but that “[w]hat is a threat must be distinguished from what is constitutionally protected speech”).

50. *Id.* at 706.

51. See *id.* at 708 (reasoning that “[the Court] must interpret the language Congress chose ‘against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open’” (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

52. *Id.*

53. See *Virginia v. Black*, 538 U.S. 343 (2003) (holding that a Virginia statute banning cross-burning was unconstitutional because it failed to distinguish between protected and unprotected speech).

true threat as a statement “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.”⁵⁴ The Court added that intent to carry out the threat is not required because the threat alone causes harm in addition to any violence that may follow. The words themselves are harmful. Therefore, a prohibition on true threats “protects individuals from the fear of violence and the disruption that fear engenders.”⁵⁵

In *Black*, the defendant led a Ku Klux Klan rally in an open field by a state highway and burned a twenty-five to thirty-foot cross,⁵⁶ which the sheriff was able to observe from the side of the road as cars passed.⁵⁷ The defendant was convicted under a Virginia statute that criminalized burning a cross in public “with the intent of intimidating any person.”⁵⁸ The same statute also provided that the public cross-burning “shall be prima facie evidence of an intent to intimidate.”⁵⁹ The Court held this “prima facie evidence” provision facially unconstitutional because it “ignore[d] all the contextual factors that are necessary to decide whether a particular cross burning was intended to intimidate . . . [t]he First Amendment does not permit such a shortcut.”⁶⁰

E. Circuit Precedent Before and After Virginia v. Black

From 1964 to 1976, four circuit courts of appeals considered convictions under § 875(c),⁶¹ deciding, in the words of the Ninth Circuit, that “intent to threaten is an essential element of the crime.”⁶² But, over time, this intent requirement fell by the wayside. Before the Supreme Court decided *Black*, the Third Circuit had ruled in *United States v. Kosma*⁶³ that a true threat requires:

[T]he defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by

54. *Id.* at 359.

55. *Id.* at 344 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

56. *Black*, 538 U.S. at 348.

57. *Id.* at 348–49.

58. *Id.* at 348 (quoting Va. Code Ann. § 18.2-423 (West 1996)).

59. *Id.*

60. *Id.* at 367.

61. See Brief for Petitioner at 25–26, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983).

62. *United States v. LeVison*, 418 F.2d 624, 626 (9th Cir. 1969).

63. 951 F.2d 549 (3d Cir. 1991).

those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion.⁶⁴

Thus, the Third Circuit rejected a subjective-intent requirement for threats against the President and instead required proof that the speech was objectively threatening.⁶⁵ Though *Kosma* dealt with 18 U.S.C. § 871, in *United States v. Himmelwright* the Third Circuit held *Kosma*'s true-threat analysis also applies to § 875(c).⁶⁶

The Fourth, Sixth, and Eighth Circuit have likewise upheld objective-intent standards. Those circuits considered *Black* and did not find the decision to require a subjective intent to threaten.⁶⁷ Only the Ninth Circuit has found the true threats definition in *Black* to require that the speaker subjectively “intend for his language to threaten the victim.”⁶⁸ The Ninth Circuit reasoned that the prima facie evidence provision made the Virginia statute unconstitutional “because it effectively eliminated the intent requirement.”⁶⁹

III. HOLDING

The issue before the Third Circuit in *United States v. Elonis* was whether the Supreme Court's decision in *Virginia v. Black* required proof of a speaker's subjective intent to threaten for a conviction under 18 U.S.C. § 875(c). If *Black* did so require, the decision would overturn circuit precedent that “a statement is a true threat when a reasonable speaker would foresee the statement would be interpreted as a threat.”⁷⁰ The Third Circuit held that *Black* did not alter its precedent,⁷¹ reiterating that this standard protects non-threatening

64. See *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (adopting a reasonable-person test in accordance at the time with the Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits). The Ninth Circuit currently uses a subjective intent test, which it set forth in the aftermath of *Black* with its decision in *United States v. Cassel*, 408 F.3d 622, 631 (2005).

65. *Kosma*, 951 F.2d at 557.

66. *United States v. Himmelwright*, 42 F.3d 777, 783 (3d Cir. 1994).

67. See *United States v. White*, 670 F.3d 498, 509 (4th Cir. 2012) (finding that the Court in *Black* did not indicate “it was redefining a general intent crime such as § 875(c) to be a specific intent crime”); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) (deciding that “the position reads too much into *Black*”); *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013) (holding the government does not have to prove a defendant's subjective intent).

68. *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005).

69. *Id.* at 632 (citing *Virginia v. Black*, 538 U.S. 343, 385 (2003) (Souter, J., concurring in the judgment in part and dissenting in part)).

70. *United States v. Elonis*, 730 F.3d 321, 323 (3d Cir. 2013).

71. *Id.* at 332.

speech while simultaneously addressing the harm caused by true threats.⁷²

The court concluded that *Black* was not dispositive because the Virginia statute required subjective intent to intimidate. Thus, the Court could not have rejected an objectively-threatening standard just by striking down the statute.⁷³

Regarding the Supreme Court's general description of true threats as encompassing "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,"⁷⁴ Judge Scirica, writing for the court, read the definition narrowly to mean only "that the speaker must intend to make the communication,"⁷⁵ which he distinguished from an intent to be understood.⁷⁶

By extending the requirement to a subjective intent to threaten, the court reasoned, "speech that a reasonable speaker would understand to be threatening" would be protected and individuals suffering from "the fear of violence" and the "disruption that fear engenders" would not be protected.⁷⁷ The court could not tolerate such a result.

Finally, the court decided that the reasons Virginia's prima facie evidence provision was unconstitutional did not disturb circuit precedent.⁷⁸ The court contrasted the prima facie evidence provision—which the *Black* Court labeled an impermissible shortcut—with the reasonable-person standard, which includes considering context "to determine whether the statement was a serious expression of intent to inflict bodily harm."⁷⁹ Using this reasonable-person standard, the Third Circuit concluded that its consideration of the context of Elonis's speech was sufficient to avoid the pitfall the *Black* Court identified.

72. *Id.*

73. *Id.* at 329.

74. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

75. *Elonis*, 730 F.3d at 330.

76. *See id.* ("It would require adding language the Court did not write to read the passage as 'statements where the speaker means to communicate and intends the statement to be understood as a serious expression of an intent to commit an act of unlawful violence.'" (quoting *Black*, 538 U.S. at 359)).

77. *Id.* (quoting *Black*, 538 U.S. at 360).

78. *Id.*

79. *Id.*

IV. ARGUMENTS

A. *Elonis's Arguments*

Elonis advances two arguments. First, as a matter of statutory interpretation, he argues that the text of 18 U.S.C. § 875(c) requires proof of a speaker's subjective intent to threaten.⁸⁰ Second, he maintains that, without the subjective-intent requirement, § 875(c) criminalizes negligent speech, which would violate the First Amendment.⁸¹ Running through both of these arguments is a quote from Justice Breyer's concurring opinion in *United States v. Alvarez*⁸²: "mens rea requirements . . . provide 'breathing room' . . . by reducing an honest speaker's fear that he may accidentally incur liability for speaking."⁸³

Elonis argues that the plain meaning of § 875(c) requires proof of a speaker's subjective intent to threaten.⁸⁴ Because the statute does not define the word "threat," Elonis claims that it should be interpreted according to its "ordinary, contemporary, common meaning,"⁸⁵ for which he enlists the help of the Oxford English Dictionary,⁸⁶ Webster's New International Dictionary,⁸⁷ and Black's Law Dictionary.⁸⁸ Each includes an intent component in the definition of "threat."⁸⁹ For example, Black's Law Dictionary in 2004 defined "threat" as "[a] communicated intent to inflict harm or loss on another."⁹⁰

Next, Elonis contends that even though § 875(c) does not define "threat," neighboring sections that also address the communication of threats include subjective-intent components.⁹¹ For example, Elonis cites § 876, which prohibits demands for ransom "with intent to extort." Because Congress passed § 875(c) after § 876, and because it

80. Brief for Petitioner, *supra* note 61, at 22.

81. *Id.* at 34.

82. *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (Breyer, J., concurring).

83. *Id.* at 2553.

84. Brief for Petitioner, *supra* note 61, at 22.

85. *Id.* at 22–23 (quoting *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014)).

86. See Brief for Petitioner, *supra* note 61, at 23.

87. *Id.* Webster's New International Dictionary in 1954 defined "threat" as "an expression of an intention to inflict loss or harm on another by illegal means, esp[ecially] when effecting coercion or duress." WEBSTER'S NEW INT'L DICTIONARY 2633 (2d ed. 1954).

88. See Brief for Petitioner, *supra* note 61, at 23.

89. *Id.*

90. BLACK'S LAW DICTIONARY 1519 (8th ed. 2004).

91. See Brief for Petitioner, *supra* note 61, at 24.

did not expressly say it was removing a defendant's subjective intent from the definition of "threat," *Elonis* asserts that it was expanding on its earlier legislation. Therefore, "threat" kept its meaning.⁹²

From 1964 to 1976, four circuit courts of appeals determined "intent to threaten is an essential element of the crime" under § 875(c).⁹³ *Elonis* maintains that these cases were never overruled, but that, over time, circuits initially requiring showings of both subjective and objective intent began only using the objective test.⁹⁴

The last statutory-interpretation argument *Elonis* makes comes from a principle distinction between criminal and civil law in the United States.⁹⁵ As the Supreme Court stated in *Morissette v. United States*,⁹⁶ the criminal law requires actus reus and mens rea, a bad act and a bad thought.⁹⁷ Injury alone is not enough.⁹⁸ *Elonis* takes from this rule the canon that the "existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence,"⁹⁹ and argues that even if § 875(c) does not specify a mens rea, the Court should nonetheless "presum[e] that some form of scienter is to be implied."¹⁰⁰ *Elonis* maintains that Congress must explicitly dispense with such an intent requirement; because it did not do so when it passed § 875(c), the Court should read a subjective-intent standard into the statute.¹⁰¹

As a First Amendment matter, *Elonis* argues that, without the requirement of a speaker's subjective intent to threaten, § 875(c) criminalizes negligent speech, which is unconstitutional.¹⁰² *Elonis* begins with the rule "that content-based restrictions on speech be presumed invalid, and that the government bear the burden of showing their constitutionality."¹⁰³ The Court in *Watts v. United States*¹⁰⁴

92. *Id.* at 24–25.

93. *Id.* at 25 (quoting *United States v. LeVison*, 418 F.2d 624, 626 (9th Cir. 1969)).

94. *Id.* at 26.

95. *See id.*

96. 342 U.S. 246 (1952).

97. *Id.* at 251.

98. *See id.* at 250 ("The contention that an injury can amount to a crime *only* when inflicted by intention is no provincial or transient notion.") (emphasis added).

99. Brief for Petitioner, *supra* note 61, at 26 (quoting *Staples v. United States*, 511 U.S. 600, 605 (1994)).

100. *Id.* at 27 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994)).

101. *Id.*

102. *Id.* at 34.

103. *Id.* at 34–35 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)).

104. 394 U.S. 705 (1969).

made an exception to the rule for “true threats” of physical violence.¹⁰⁵ But Elonis emphasizes that it is a limited exception, contrary to most First Amendment doctrine.¹⁰⁶

Elonis argues that the exception for true threats does not remove negligent speech from First Amendment protection.¹⁰⁷ In the first place, there is “no established tradition of subjecting speech to criminal liability as a ‘threat’ absent a subjective intent to threaten; to the contrary, history suggests such an intent is a fundamental prerequisite to imposing liability.”¹⁰⁸ Elonis cites encyclopedias, treatises, and Section 212.5 comment 1 of the Model Penal Code for the proposition that it was not an indictable offense at common law to make a threat if the only result was that it elicited fear in the listener.¹⁰⁹ Some states passed laws criminalizing threats when the result amounted to disturbance of the public peace,¹¹⁰ but even then, Elonis contends, the threat “*must be intended to put the person threatened in fear of bodily harm.*”¹¹¹

Secondly, Elonis looks to the other types of speech for which the Court has deemed sanctions constitutional—including incitement, defamation of public figures, fraudulent fundraising calls, and false statements.¹¹² Elonis claims that the Court has consistently required proof of a prohibited intent.¹¹³ For incitement, for example, the defendant’s “advocacy of the use of force . . . [must be] directed to inciting or producing imminent lawless action.”¹¹⁴ For defamation of public figures, the speaker has to have acted with “actual malice.”¹¹⁵ In each example, Elonis asserts that, although the requirements may protect some harmful speech, the requirements ultimately “exist[] to allow more speech.”¹¹⁶

105. Brief for Petitioner, *supra* note 61, at 35.

106. *See id.* (listing obscenity, defamation, and incitement as some of the few other areas where the Court has permitted content-based restrictions on speech).

107. *Id.* at 36.

108. *Id.* (applying Justice Kennedy’s reasoning in *United States v. Alvarez*, 132 S. Ct. 2537, 2554 (2012)).

109. *See id.* at 36–37.

110. *See id.* (quoting 2 FRANCIS WHARTON, CRIMINAL LAW & PROCEDURE § 803 (Ronald A. Anderson ed., 12th ed. 1957)).

111. *Id.* (quoting 2 WHARTON, *supra* note 110 (emphasis added)).

112. *Id.* at 39.

113. *Id.*

114. *Id.* (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

115. *Id.* at 41 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

116. *Id.* at 43 (quoting *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (opinion of Kennedy, J.)).

Finally, *Elonis* argues that the Court's precedent in *Virginia v. Black* established the "impermissibility of allowing liability for speech without proof of wrongful intent."¹¹⁷ In *Black*, the Court described true threats as "encompass[ing] 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."¹¹⁸ *Elonis*, emphasizing the word "means," thus draws the Court's attention to the speaker's subjective intent to communicate "a serious expression," unlike Third Circuit's holding below—that the speaker only had to intend to communicate.¹¹⁹

B. *The Government's Arguments*

The Government makes both statutory-interpretation argument and First Amendment arguments. First, it argues that a subjective intent to threaten is not an element of § 875(c), and thus the statute only requires a mens rea of general intent.¹²⁰ Second, it argues that "[t]rue threats, whether or not subjectively intended as such, lie 'outside the First Amendment.'"¹²¹

The Government argues that the text of § 875(c) makes no mention of a subjective-intent requirement.¹²² However, it prefaces its statutory interpretation argument by rebutting *Elonis*'s contention that, without a subjective-intent requirement, speech would be impermissibly chilled.¹²³ The Government narrows the purpose of the statute, stating that "[s]ection 875(c) reaches only 'true threat[s]'; it does not reach jest, 'political hyperbole,' or 'vehement,' 'caustic,' or 'unpleasantly sharp attacks' that fall short of serious expressions of an intent to do harm."¹²⁴

It is a canon of statutory interpretation that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act," it does so purposely.¹²⁵ Because the statute does not have an express mens rea element, the Government,

117. *Id.*

118. *Id.* (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)) (emphasis in original).

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

120. Brief for Respondent at 18, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983).

121. *Id.* at 35 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

122. *Id.* at 18.

123. *See id.* at 21 ("A defendant is always free to explain his intention in making a particular statement, and a jury must weigh the defendant's explanation of his intent.").

124. *Id.* at 19 (citing *Watts v. United States*, 394 U.S. 705, 706–08 (1969)).

125. *Id.* (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted)).

like *Elonis*, argues that one must be inferred.¹²⁶ But, unlike *Elonis*, the Government urges the Court to infer a general-intent requirement,¹²⁷ as opposed to reading a subjective-intent requirement into the statute.¹²⁸ The Government emphasizes that the statute’s neighboring sections expressly mention specific intent requirements, and thus Congress intentionally dispensed with such a requirement in § 875(c).¹²⁹

The Government argues that *Elonis*’s proffered definitions of “threat” do not support finding a subjective-intent requirement in the text of the statute.¹³⁰ Instead, the dictionary definitions *Elonis* cites better support understanding a threat as “the *message* that is ‘express[ed]’ or ‘communicated.’”¹³¹ In other words, the Government insists that a threat is in the eye of the person threatened. In its brief, the Government gives the example of someone who receives a death threat in the mail: he would call it a threat, even if he did not know the sender or the sender’s intent.¹³²

The Government further argues that the purpose of the statute was to remedy the “undue narrowness of the existing specific-intent requirement for threat prosecutions.”¹³³ Before Congress passed the predecessor of § 875(c), federal law prohibited sending threats with an intent to extort, and the Department of Justice asked Congress to supplement the law to make it “more flexible.”¹³⁴ Accordingly, the Government concludes that the Court should interpret § 875(c) consistent with this request.

The Government’s last statutory-interpretation argument is that reading § 875(c) to define a general-intent offense satisfies the presumption in favor of scienter.¹³⁵ “The presumption in favor of scienter . . . ‘requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”¹³⁶ For a § 875(c) conviction, all the defendant must

126. *Id.* at 21.

127. *Id.* at 28.

128. Brief for Petitioner, *supra* note 61, at 22.

129. Brief for Respondent, *supra* note 120, at 23.

130. *Id.* at 24.

131. *Id.* at 25 (emphasis in original).

132. *Id.*

133. *Id.* at 27.

134. *Id.* at 25–26.

135. *Id.* at 28.

136. *Id.* (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000) (citations omitted)).

know are the facts that make his conduct illegal.¹³⁷ Thus, a speaker would only need to know that “he transmitted a communication and that he comprehended its contents and context.”¹³⁸ In this way, a defendant would not be convicted “based on a fact . . . beyond [his] awareness.”¹³⁹

As a First Amendment matter, the Government argues that true threats fall outside of constitutional protection “because the harms that true threats inflict—fear and disruption[]—take place regardless of the speaker’s unexpressed intention.”¹⁴⁰ Thus, the Government puts the focus on the statement’s impact on the listener, as “[a] statement that is threatening to a reasonable person has little legitimate expressive value.”¹⁴¹ To avoid the harm done by true threats, the Government argues that Congress can eliminate them as a mode of speech without infringing on the First Amendment.¹⁴²

The Government distinguishes a speaker’s subjective intent to threaten¹⁴³ from the criteria listed by the Court in *Watts*. Whether a true threat exists depends on the statement’s “context,” its “expressly conditional nature,” and “the reaction of the listeners.”¹⁴⁴ Citing *Virginia v. Black*, the Government additionally emphasizes that the Supreme Court has not yet finished defining the category of true threats.¹⁴⁵ Combining its understanding of these cases, the Government argues that when the Court uses the word “encompass” in its description,¹⁴⁶ it means that there can be other kinds of true threats, besides intimidation, for which conviction does not require proving a defendant’s subjective intent to threaten.¹⁴⁷

V. ANALYSIS

The Court should hold that proof of a defendant’s subjective intent to threaten is required for conviction under § 875(c). Both sides

137. *Id.*

138. *Id.* at 29.

139. *Id.*

140. *Id.* at 35.

141. *Id.* at 36.

142. *Id.* at 37 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)).

143. *See id.* at 40 (“The Court did not look to the speaker’s subjective intent to threaten.”).

144. *Id.* (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)).

145. *Id.* at 41–42.

146. “True threats’ *encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence.” *Virginia v. Black*, 538 U.S. 343, 359 (2003) (emphasis added).

147. Brief for Respondent, *supra* note 120, at 41.

argue for the Court to read some level of mens rea into the statute. Importantly, it is unlikely in practice that instituting a subjective-intent requirement, rather than the Third Circuit's test, would result in significantly fewer convictions under the statute.¹⁴⁸ And with little difference in outcomes, other factors should persuade the Court to affirmatively hold that conviction under § 875(c) requires proving subjective intent.

The Government seems to fear that the subjective-intent requirement could allow a defendant to testify to an unexpressed, innocuous intent, and thereby avoid conviction. But in its own words, “[w]hat a speaker’s unexpressed intent *cannot* do . . . is convert statements that a reasonable person would understand as threatening, in context, into innocuous statements or merely letting off steam.”¹⁴⁹ The government means to forbid the use of an unexpressed intent to exculpate a speaker, but the word “cannot” more accurately means that it is impossible for *any* unexpressed intent to which the speaker testifies to automatically exculpate him.

Concretely, even if a defendant testifies to an innocuous intent at trial, his subjective intent to threaten can be *proven* with evidence. This way, it is still left up to the jury to make a credibility determination, weighing the defendant’s stated intent along with any other evidence of his unexpressed intent in order to ultimately decide his subjective intent. Here, despite Elonis’s disclaimers in his posts and his use of parody and music, it is not impossible that he might have nonetheless been convicted upon a finding of him having a subjective intent to threaten his wife. Such a finding could be based, for example, on how he treated his wife in the past or what he told others about their relationship.

Several factors weigh in favor of finding a subjective-intent requirement, and each will be discussed in turn. First, a hypothetical application of an objective test to the facts in *Black* shows that such a requirement would have disincentivized legitimate political speech. Second, balancing the obligations such a requirement would impose on the government versus potential speakers, the government would

148. In addition to the reasons discussed here, Professor Kenneth Karst argues that the current law on true threats decides cases based on the specific facts before the court, and not by means of any strict adherence to precedent. He concludes this does not mean “surrender[ing] to lawlessness,” but rather just that judges will have to judge. Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1411 (2006).

149. Brief for Respondent, *supra* note 120, at 21 (emphasis added).

have less of a burden in proving subjective intent than potential speakers would have in calculating their risk. Third, the Court's general description of true threats in *Black*, although it is not binding here, can only be read grammatically such that the speaker must mean to "communicate" intent to threaten.

A. Hypothetical Application of Objective Intent to the Facts in Black

The Government asserts that *Black* struck down a Virginia statute because the statute lacked a requirement that the state provide any amount of context. So long as an objective test involves some contextual investigation, then it passes muster under the First Amendment. But the facts of *Black*, viewed in light of an objective test, might still fail to differentiate between protected political speech and a type of true threat; this can be illustrated by applying the objective-intent standard from the Third Circuit as set forth in *United States v. Kosma*.¹⁵⁰ In Judge Scirica's words, "a statement is a true threat when a reasonable speaker would foresee the statement would be interpreted as a threat."¹⁵¹

In *Black*, the sheriff was able to observe the defendant burning a twenty-five to thirty-foot cross from the side of a state highway where cars were passing. If at least some of the Ku Klux Klan members at the cross-burning were "reasonable" and they were also aware of their reputation, then—to apply the Third Circuit's objective-test—they are guilty of making a true threat so long as they would have foreseen the cross-burning being interpreted as a threat. Next to the highway, some "reasonable" Klan members would have to have foreseen at least one passing car taking the cross-burning to be a threat. In essence, their reputation precedes them and all but prevents a jury from ever distinguishing political speech from intimidation. In this way, the objective test prohibits a group like the Ku Klux Klan from *ever* legally burning a cross in public, an issue that looks eerily similar to the one the Court spotted with the prima facie evidence provision.¹⁵² If, however, a subjective-intent standard applies, the jury would still be free to infer from the location of the rally that the defendant subjectively intended to intimidate, knowing passing cars

150. 951 F.2d 549 (3d Cir. 1991).

151. *United States v. Elonis*, 730 F.3d 321, 323 (3d Cir. 2013).

152. *See Virginia v. Black*, 538 U.S. 343, 365 (2003) ("The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision . . . blurs the line between these two meanings of a burning cross.").

would notice the cross-burning. Thus, the cross-burner could still be convicted. An objective standard would have provided some context, but not enough to protect politically legitimate speech.

B. *Balancing Obligations*

The Government's contention that a threat, regardless of the speaker's subjective intent to threaten, is harmful in its own right is reasonable but breaks down in application. Most critically, it raises alternative obligations. On the one hand, under an objective standard, a speaker has an obligation to foresee how his words may be taken, which, as Elonis points out, is increasingly difficult in the rapidly expanding universe of social media.¹⁵³ On the other hand, the government can put on evidence to prove that a speaker subjectively intended to threaten the listener, and it would have to present evidence to meet an objective standard anyway. Thus, balancing these alternative obligations, the cost to the government is arguably much lower than to potential speakers.¹⁵⁴

C. *"Communicate" is Acting as a Transitive Verb*

Finally, although it was not decisive in *Black*, the Court's general description of true threats is exactly the kind of foothold the Court can use here to find a subjective-intent requirement. Again, the Court described true threats as encompassing "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."¹⁵⁵ Judge Scirica argued below that the Court's description in *Black* should be read only to require proof that the speaker intended to communicate. But this assertion does not make sense grammatically. The verb "communicate" could be taken to be intransitive, thus not requiring a direct object if it were at the end of

153. See Brief for Petitioner, *supra* note 61, at 49–50 (arguing that the lack of "tone" and "mannerisms" on the Internet multiplies the potential for misunderstanding, and even emoticons, invented to add context, are subject to interpretation (quoting Kyle A. Mabe, *Long Live the King: United States v. Bagdasarian and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 GOLDEN GATE U. L. REV. 51, 88 (2013))).

154. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 316–17 (2001) ("Speakers will have difficulty telling in advance what will be construed as a threat by a jury, and therefore may be deterred from speaking even where their speech is not negligent."). The article additionally criticizes the objective test for allowing the possibility for speakers to be convicted, "even where the speaker had no expectation that the alleged victim would hear the statement." *Id.* at 288.

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

the sentence. But, because the sentence continues and there *is* a direct object—“a serious expression of an intent”—and no other intervening verb to take responsibility for it, the most natural reading of “communicate” is as a transitive verb. The Court’s description, then, effectively translates to a requirement that a speaker intend to threaten.

CONCLUSION

The Third Circuit’s decision in *Elonis* was appropriate given ambiguous Supreme Court precedent. But now the Court will likely use this opportunity to establish a clear precedent and reverse the Third Circuit for three reasons. First, an objective-intent requirement would not have distinguished between permissible and impermissible speech in *Black*. Second, in most cases the government should be able to prove subjective intent as easily as proving an objective threat. And third, the most natural reading of the Court’s own description of true threats implies a subjective-intent finding. For these reasons, the Court will likely hold that a speaker must subjectively intend to threaten to be convicted under the statute. The Court will likely reverse *Elonis*’s conviction.