

# *Elonis v. United States: Why the Supreme Court Punted on Free Speech*

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. HISTORICAL BACKGROUND .....	3
III. FACTS & PROCEDURE .....	6
IV. ANALYSIS .....	9
A. <i>The Majority Opinion</i> .....	9
1. A Ruling on Statutory Grounds .....	9
2. A Lack of Constitutional Analysis .....	11
B. <i>Justice Alito’s Concurrence in Part and Dissent in Part</i> .....	12
C. <i>Justice Thomas’s Dissent</i> .....	13
V. IMPACT .....	13

## I. INTRODUCTION

Imagine you are an artist and you wake up in the morning eager to share your newest masterpiece with millions of people online. By 8:00 a.m. you have eaten, dressed, and shared your newest piece with the world. By noon, you have been handcuffed, arrested, and charged with a federal crime. The First Amendment forbids the government from interfering with the freedom of speech of all Americans,<sup>1</sup> so you can freely post, share, and create your art, or have discussions and air grievances about your life and the world around you. But how far does that guarantee go? Throughout American history, courts have struggled to balance the importance of free speech against the safety of the American people and society overall.<sup>2</sup> When the

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1. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech”); see also *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938) (holding that freedom of speech is a fundamental right and that the First Amendment’s protection extends to any state or government action).

2. See Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 274–75 (2009) (noting that, historically, federal courts have “wrestled” with free speech and analyzing prominent free speech issues considered and decided within the twenty-first century).

issue involves threats—even those delivered through artwork or jokes—courts continue to fumble in their quest to clarify how much free speech is enough.<sup>3</sup>

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Supreme Court had a chance to interpret the boundaries of a federal statute forbidding threats transmitted in interstate or foreign commerce and to consider the constitutional implications of regulating such threats.<sup>4</sup> In its statutory analysis, the Court hesitated to declare how the law should be applied, and instead, only provided guidance as to how it should not be.<sup>5</sup> It likewise refrained from any further analysis on constitutional grounds, adhering to its practice of abstention when the case may be resolved on other grounds.<sup>6</sup> By proceeding in the above manner, the Court did little to clarify a circuit split on the issue that continues to result in the disparate treatment of Americans' free speech rights throughout the country.<sup>7</sup>

This note examines the Supreme Court's decision in *Elonis*, specifically the impact of the Court's refusal to rule determinatively on either statutory or constitutional grounds, and attempts to determine what guidance, if any, the Court's decision provides for future prosecutions under 18 U.S.C. § 875(c) ("Section 875(c)"). Part II begins with a review of the Court's history of regulating free speech through the "true threats" doctrine and analyzes the issues raised in *Elonis* in light of that doctrine. Part III provides the facts relevant to the *Elonis* decision. Part IV discusses and critiques the Court's majority, concurring, and dissenting opinions; and Part V predicts the decision's impact on First Amendment jurisprudence and society as a whole.

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3. See generally Part V.

4. See *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015) (interpreting 18 U.S.C. § 875(c) (1994), which states in part "[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").

5. *Elonis*, 135 S. Ct. at 2013 (Alito, J., concurring in part, dissenting in part) (remarking that the Court fell short, as its traditional duty has always been to determine what the law is).

6. See *id.* at 2023 (Thomas, J., dissenting) (quoting *Salinas v. United States*, 522 U.S. 52, 59–60 (1997)).

7. *Id.* at 2013–14 (Alito, J., concurring in part, dissenting in part) (referencing the current circuit split on both statutory and constitutional issues in similar cases and noting that confusion is certain to remain concerning the level of intent required by 18 U.S.C. § 875(c) (1994)); see also Paul T. Crane, "True Threats," and the Issue of Intent, 92 VA. L. REV. 1225, 1235–37 (2006) (examining the disparate treatment of defendants based on the objective and subjective approaches chosen by courts throughout the country on the issue of how to prosecute true threats cases).

## II. HISTORICAL BACKGROUND

The First Amendment prohibits the government from making any laws or taking any actions that abridge the American people's freedom of speech.<sup>8</sup> However, the right to free speech is not absolute, and over time the Supreme Court has allowed government action to curtail a few select categories of speech as a means to balance moral and social interests.<sup>9</sup>

Among the expressions not completely protected by the First Amendment are those the Court classifies as "true threats."<sup>10</sup> It has defined true threats as "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."<sup>11</sup> It has likewise clarified that this does not mean that a speaker must intend to carry out such threats.<sup>12</sup> Accordingly, Congress has the power to create laws proscribing speech that meets the true threat definition.<sup>13</sup>

The statute in question in the *Elonis* case, Section 875(c), is arguably enabled by the true threats doctrine as it bans "threat[s] . . . to injure the person of another."<sup>14</sup> The first issue presented by that case involves the level of intent required by Section 875(c).<sup>15</sup> For a defendant to be found guilty

8. U.S. CONST. amend. I; *see also* Stone, *supra* note 2, at 274 (remarking that the First Amendment's prohibition against "Congress" passing laws that abridge freedom of speech applies to federal, state, and local governments as well).

9. *Virginia v. Black*, 538 U.S. 343, 358–59 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992)). The Supreme Court has considered a few categories of speech to be unprotected by the First Amendment within reason, because they possess a limited social value. *Id.* Accordingly, any benefit they bring is far outweighed by societal and governmental interests in preserving order and morality. *Id.* Examples of such categories include fighting words and speech that is likely to incite imminent violence. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) and *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942)).

10. *Id.* at 359 (citing *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 373 (1997); *Madsen v. Women's Health Ctr., Inc.* 512 U.S. 753, 774 (1994); *R.A.V.*, 505 U.S. at 388; and *Watts v. United States*, 394 U.S. 705, 708 (1969)).

11. *Black*, 343 U.S. at 359.

12. *Id.* at 359–60. The court has explained that this is because the threats themselves function as affronts to individuals or groups and create personal costs and disruptions whether or not the actions they propose are carried out. *Id.* Others have noted that threats also incur social costs, costs that are often tied to their investigation and prevention. Crane, *supra* note 7, at 1231.

13. *United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012), *aff'd*, 810 F.3d 212 (2016); *see generally* Crane, *supra* note 7.

14. *Elonis v. United States*, 135 S. Ct. 2001, 2004 (2015); *see also id.* at 2018–19 (Thomas, J., dissenting).

15. *Id.* at 2008–09.

under that statute, three elements must be proved: (1) that a transmission in foreign or interstate commerce occurred; (2) that such communication included a threat; and (3) that the threat was to kidnap or injure another person.<sup>16</sup> However, because this criminal statute fails to include an express state of mind requirement, problems arise in determining the level of *mens rea*<sup>17</sup> necessary to find an individual guilty.<sup>18</sup> In the absence of an express scienter requirement on the face of a criminal statute, courts will interpret that statute with the mental requirement that they deem appropriate to establish culpability.<sup>19</sup> But courts do not always reach identical conclusions and a split has developed between the circuits over the level of mental culpability attached to the elements of 875(c)—specifically with regard to the communicating a threat element.<sup>20</sup>

Though there are idiosyncratic differences between the jury instructions on either side of the split, the basic disagreement surrounding this issue can be distilled to one question: Is this crime a general intent crime, requiring only that the defendant knew he transmitted the communication and that he understood those words in the context they were transmitted; or is it a specific intent crime, requiring the defendant to have subjectively intended

16. Karen Rosenfield, *Redefining the Question: Applying Hierarchical Structure to the Mens Rea Requirement for Section 875(c)*, 29 CARDOZO L. REV. 1837, 1844–45 (2008). The third element listed will not be discussed further because if the speech at issue is determined to be a threat, the facts of this case are such that that it is clearly satisfied. *See infra* Part III.

17. For the purpose of this article, the terms “mens rea,” “scienter,” and phrases like “mental state requirement” will be used more or less interchangeably to refer to the level of intent or knowledge of wrong-doing required to establish culpability with regard to a specific criminal law.

18. *Elonis*, 135 S. Ct. at 2008. Traditionally, to establish guilt with respect to a criminal offense, the defendant must be found to have both satisfied the *actus reus*, or physical components of a crime, and the *mens rea*, the mental state component. Rosenfield, *supra* note 16, at 1840. The Model Penal Code presents four main levels of culpability (in order from the most culpable to the least): “Purposely,” or with the object of engaging in such conduct or achieving a certain result; “Knowingly,” if he is aware that the required circumstances of a crime exist or that his conduct is of the proscribed nature; “Recklessly,” if he appreciates an unjustifiable risk and acts regardless, causing the prohibitive result; and “Negligently,” if he should have been aware of an unjustifiable risk he was taking, which caused the prohibitive conduct, as judged by a reasonable person standard. Model Penal Code § 2.02. The Model Penal Code also provides that when a level of culpability is not provided, a person will generally be held liable when acting recklessly, knowingly, or purposely. *Id.*

19. *Elonis*, 135 S. Ct. at 2003 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)).

20. Rosenfield, *supra* note 16, at 1845. All sides of the Circuit split agree that this statute is not one of strict liability, as that resolution is generally disfavored in statutory interpretation of this kind. *Id.* at 1846.

to threaten another person or group?<sup>21</sup> Interpreting *Virginia v. Black*, 538 U.S. 343 (2003), a majority of the circuit courts that have addressed this issue have held that general intent is enough.<sup>22</sup> These courts have found that in order to satisfy the *mens rea* requirement implicit in Section 875(c)'s transmission element, a speaker need only communicate knowingly.<sup>23</sup> With respect to the element of making a threat, proponents of this general intent theory are confident that all that is necessary to determine culpability, regardless of the speaker's subjective intent, is an objective look at a speaker's actions.<sup>24</sup> In contrast, the Ninth and Tenth Circuits agree that Section 875(c) requires an element of specific intent, and hold that a speaker must have subjectively intended his communication as a threat before guilt can attach.<sup>25</sup> These two circuits argue that criminal defendants should

21. *Elonis*, 135 S. Ct. at 2018 (Thomas, J., dissenting); see also Crane, *supra* note 7, at 1243–50 (noting the different standards used by the general intent jurisdictions in establishing guilt based on the context of the transmission, including the reasonable listener, reasonable speaker, and reasonable neutral third party standards).

22. See *United States v. White*, 670 F.3d 498, 512 (4th Cir. 2012), *aff'd*, 810 F.3d 212 (2016) (interpreting Section 875(c) in applying an objective standard to determine whether a communication contained a threat); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) (adopting the general intent framework and requiring only that a reasonable person would foresee that the statement in question would be interpreted as a threat by those to whom it was directed); *United States v. Francis*, 164 F.3d 120, 122–23 (2nd Cir. 1999) (finding a general intent standard to be sufficient because, as interpreted, the Supreme Court's true threats doctrine only requires an objective look at the content of an alleged threat); *United States v. Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997) (adopting a standard wherein defendants are guilty if they should have known that their statements would be seen as threats by those to whom they were directed); *United States v. Myers*, 104 F.3d 76, 81 (5th Cir. 1997) (reasoning that Section 875(c) is a general intent crime, as evidenced by the absence of any statutory language indicating a specific required level of intent); *United States v. Himelwright*, 42 F.3d 777, 783 (3d Cir. 1994) (rejecting a subjective intent theory); *United States v. DeAndino*, 958 F.2d 146, 149–50 (6th Cir. 1992) (holding that Section 875(c) requires general intent based on a reading of the statute's plain language).

23. See, e.g., *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012) (citing *White*, 670 F.3d at 509). The purpose of this distinction, for example, is to provide a safeguard to the unwitting mail carrier, if she was truly unaware of the contents of the mail that she was required to deliver. See *X-Citement Video, Inc.*, 513 U.S. at 69; see also Crane, *supra* note 7 at 1235 (holding that this requirement also provides a safeguard against a transmission resulting from coercion, duress, or mistake).

24. Crane, *supra* note 7 at 1235. This reinforces the idea that the threat is a crime in itself, and should be punished based on the harm it does to others and society regardless of the subjective intent of the person that delivered it. *Id.*; see also *id.* at 1243–50 (showing again that the courts that abide by the general intent approach use various points of view to provide an objective look at the speaker's actions: the objective listener, speaker, or a neutral party).

25. *Elonis*, 135 S. Ct. at 2018 (Thomas, J., dissenting) (noting that the Ninth and Tenth circuits are outliers); see also *United States v. Heineman*, 767 F.3d 970, 975, 982 (10th Cir. 2014) (holding that true threat jurisprudence requires a defendant's subjective intent to communicate a threat);

receive an extra veil of protection because the nature of their alleged crimes interferes with the First Amendment's guarantee of free speech.<sup>26</sup>

The second issue *Elonis* presented involves the constitutionality of Section 875(c) under the Supreme Court's true threats doctrine and whether the Constitution requires some threshold level of intent.<sup>27</sup> The legal community privy to this debate looked to the Court in *Elonis* for clarification on both issues.<sup>28</sup> However, the Court resolved *Elonis* solely on statutory grounds, declaring that Section 875(c) implied a certain level of *mens rea* and pointing to a range of viable levels of intent that lower courts might conclude satisfy the statutory requirement.<sup>29</sup> Thus, it dismissed any hope lawyers, lower courts, and scholars had that it would clarify unanswered questions regarding its "true threats" doctrine.

### III. FACTS & PROCEDURE

After his wife left him and took their two children, Anthony Douglas Elonis began listening to more violent music and posting the similarly

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United States v. Twine, 853 F.2d 676, 681–82 (9th Cir. 1988) (holding that Section 875(c) is subject to the defendant's diminished capacity defense, because the statute is a subjective intent crime).

26. Crane, *supra* note 7, at 1236. Proponents of this theory emphasize the importance of preserving freedom of speech and largely reject the general intent position because it may support convictions in the case of negligent or unaware defendants if a jury finds they should have known they were sending threats. *Id.* at 1236–37. Additionally, under the specific intent theory, certain legal defenses would be available to those mentally incapable of understanding their actions' ramifications. *Id.* at 1236. Under the general intent position, those same mentally incapable individuals would be denied these defenses. *Id.*

27. See *Elonis*, 135 S. Ct. at 2024 (Thomas, J., dissenting) (addressing *Elonis*'s argument regarding the First Amendment implications within Section 875(c)); see also Case Comment, *Federal Threats Statute—Mens Rea and The First Amendment—Elonis v. United States*, 129 HARV. L. REV. 331, 331 (2015) (asserting that even if the Court decided that subjective intent is not required by Section 875(c), an issue remains as to whether the First Amendment would allow that ruling).

28. See Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 PACE L. REV. 366 (2014) (citing the impending *Elonis* decision in connection with the true threat doctrine's ambiguities); John Browning, *#Snitches Get Stitches: Witness Intimidation in the Age of Facebook and Twitter*, 35 PACE L. REV. 192 (2014) (noting that the Court's grant of certiorari in *Elonis* indicated a focusing of the debate over where the lines are drawn in the true threats cases involving public officials); Mark Walsh, *A 'Facial' Challenge*, ABA J., Oct. 2014, at 22 (noting that *Elonis* provided the court with a chance to weigh in on internet based threats). *But see* *Elonis*, 135 S. Ct. at 2014 (Alito, J., concurring in part, dissenting in part) (referencing the dearth of guidance the majority's opinion provides the legal community in dealing with *Elonis*'s communication as a true threat).

29. *Elonis*, 135 S. Ct. at 2012–13.

violent lyrics to his own songs on Facebook.<sup>30</sup> Although his lyrics depicted violent themes and seemed to be directed at people in his life, he often included disclaimers that the names he mentioned were fictitious and that he used his art as a form of therapy.<sup>31</sup> Around Halloween in 2010, Elonis posed for a picture holding a toy knife against a female co-worker's neck.<sup>32</sup> Unbeknownst to her, he posted it to Facebook with the caption "I wish."<sup>33</sup> As a result, he was fired from his job.<sup>34</sup> He responded with another post, stating "I have sinister plans for all my friends," and "[y]'all think it's too dark and foggy to secure your facility from a man as mad as me?"<sup>35</sup>

Shortly thereafter, Elonis posted an adaptation of "a satirical sketch he and his wife had watched together."<sup>36</sup> In the adaptation, his pseudonym, "Tone Elonis," explained that it is illegal to say "I want to kill my wife" or "I really, really think someone out there should kill my wife," but not to tell someone that saying those things is illegal.<sup>37</sup> Elonis's adaptation also included an accurate, detailed "illustrated diagram" of his wife's house and the statement, "the best place to fire a mortar launcher at her house would be from the cornfield behind it."<sup>38</sup> After viewing his posts, Elonis's wife felt extremely fearful for her safety and obtained a restraining order.<sup>39</sup> Angered by this process, Elonis posted "[f]old up your [protection-from-abuse-order] and put it in your pocket, [i]s it thick enough to stop a bullet?" and "I've got enough explosives to take care of the State Police and the Sheriff's Department."<sup>40</sup>

In the same month, Elonis posted "I'm checking out and making a name for myself, [e]nough elementary schools in a ten-mile radius to initiate the

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30. *Id.* at 2004–05.

31. *Id.* at 2005.

32. *Id.* This picture was taken at the amusement park at which Elonis and his co-worker worked, during a "Halloween Haunt" event. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* This became the basis for Count One of the Government's Section 875(c) Complaint against Elonis. *Id.*

36. *Id.* The original sketch was about the legality of vocalizing threats to kill the President of the United States. *Id.*

37. *Id.*

38. *Id.* He posted this text along with a video of the original sketch, substituting his wife for the President. *Id.* This Facebook post became the basis for Count Two. *Id.*

39. *Id.* at 2006.

40. *Id.* The Court considered this text a threat directed at police officers and it became the basis for Count Three. *Id.*

most heinous school shooting ever imagined.”<sup>41</sup> By this time, his former boss had notified the FBI about his threatening posts, and Special Agent Denise Stevens had begun monitoring his Facebook activity.<sup>42</sup> After the school shooting post, Agent Stevens and her partner visited Elonis.<sup>43</sup> In response to this visit, Elonis posted yet another diatribe, which included references to slitting Agent Stevens’s throat and threats to wear explosives if the FBI returned to his house for further investigation.<sup>44</sup>

A grand jury indicted Elonis on five counts of making threats in violation of Section 875(c), and he was convicted in the District Court on four of those five counts.<sup>45</sup> Elonis appealed but the Third Circuit affirmed the lower court’s conviction.<sup>46</sup> With regard to *mens rea*, that circuit’s precedent required only that Elonis (1) intentionally communicated words that he understands, and (2) that a reasonable person in Elonis’s shoes would have foreseen that his statements would be interpreted as threats by those to whom they were directed.<sup>47</sup> In other words, it required only general intent.

In February of 2014, Elonis filed a petition for writ of certiorari, presenting the following question:

Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant’s subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a “reasonable person” would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.<sup>48</sup>

The Court granted review, requesting that the parties additionally brief and argue “[w]hether, as a matter of statutory interpretation,” Section 875(c)

41. *Id.* These words became the basis of Count Four. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2006–07. This language provided the basis for Count Five. *Id.*

45. *Id.* at 2007. Elonis was only acquitted of Count One—threatening his co-workers and amusement park patrons. *Id.*

46. *Id.*

47. *Id.* The standard adopted within that circuit represents the reasonable speaker standard, as a subpart of the general intent school of thought. See Crane, *supra* note 7.

48. *Petition for Writ of Certiorari*, *Elonis v. United States*, 135 S. Ct. 2001 (Feb. 14, 2014) (No. 13-983), 2014 WL 645438.

requires proof of a “subjective intent to threaten.”<sup>49</sup>

#### IV. ANALYSIS

##### A. *The Majority Opinion*

###### 1. A Ruling on Statutory Grounds

In an opinion written by Chief Justice Roberts, the Court first reviewed the basic statutory construction principle, laid out in *Morissette v. United States*, 342 U.S. 246, 250 (1952), that a “wrongdoing must be conscious to be criminal.”<sup>50</sup> It noted that a criminal statute must generally be read to require some level of criminal intent,<sup>51</sup> and that this typically requires that defendants are at least aware of the facts that make their actions wrongful or illegal.<sup>52</sup> The Court acknowledged that a general intent standard is sometimes sufficient for guilt to attach,<sup>53</sup> but it also cautioned that general intent is not always effective in preventing the successful prosecution of those that a statute was not meant to punish.<sup>54</sup> The Court went on to explain

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49. *Elonis v. United States*, 134 S. Ct. 2819 (Mem), (June 16, 2014) (No. 13–983) (granting certiorari).

50. *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015).

51. *Id.* (noting that “the general rule is that a guilty mind is a necessary element in the indictment and proof of any crime”). The Court acknowledged that an exception to this general rule occurs when Congress intentionally dispenses with a criminal statute’s the *mens rea* component. *Id.* The Court clarified that, here, it declined to “adopt such a sweeping interpretation” of Congress’s intent because there was no clear indication that Congress intended that result. *Id.* (internal quotations omitted).

52. *Id.* The Court clarified that this does not mean defendants need to be aware of the laws that they have violated. *Id.*

53. *Id.* at 2009–10. For example, in one case the Court found that the prosecution had sufficiently proven the necessary *mens rea* when it showed that a bank robber had knowingly removed items of value from a bank by force, despite failing to prove that the robber had specifically intended to steal or purloin. See *Carter v. United States*, 530 U.S. 255, 269–71 (2000).

54. *Elonis*, 135 S. Ct. at 2010 (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952), wherein the Court held that a defendant’s knowing taking of spent shell casings from a government bombing range was insufficient to uphold a conviction absent knowledge that they were not abandoned; *Liparota v. United States*, 471 U.S. 419, 420 (1985), wherein a defendant’s knowing possession and use of food stamps was held to be insufficient to uphold a conviction absent the defendant’s knowledge that such possession was unauthorized; *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513 (1994), wherein a defendant’s knowing sale of particular items was insufficient to uphold a conviction unless the defendant “knew that the items [were] likely to be used with illegal drugs”).

that when it must read a *mens rea* requirement into a statute that is silent on the issue, it should apply only the mental state necessary to “separate wrongful conduct from otherwise innocent conduct.”<sup>55</sup>

Addressing *Elonis*’s conviction, the Court explained that “[t]he presumption in favor of a scienter requirement should apply to *each* of Section 875(c)’s statutory elements.”<sup>56</sup> Both parties and the Court agreed that the first element of Section 875(c), “the transmission of a communication,” required merely knowledge.<sup>57</sup> But the Court clarified that the “crucial element separating legal innocence from wrongful conduct” was not that the defendant knew he was “communicating something,” but whether the defendant was aware of “the threatening nature” of his communication—an issue addressed in the statute’s second, “contains a threat” element.<sup>58</sup>

In addressing Section 875(c)’s “crucial” second element, the Court found that the Third Circuit had eschewed any requirement of a subjective mental state.<sup>59</sup> The lower court had instead affirmed that the question of whether *Elonis*’s posts contained a threat was rightly determined under a reasonable person standard—by asking the jury not whether *Elonis* intended for his posts to be threats, but whether a reasonable person in *Elonis*’s shoes would have understood his posts to be threatening.<sup>60</sup> This, the Court said, reduced *Elonis*’s “culpability on the all-important element of the crime” to something akin to an objective, civil negligence standard.<sup>61</sup> The Court emphasized its reluctance to apply a negligence standard to criminal statutes, and rejected such a purely objective standard by reaffirming the principle that “wrongdoing must be conscious to be criminal.”<sup>62</sup> Recalling the traditional notion that the general purpose of federal criminal liability is to punish an individual for “an evil intent actually existing in his mind” and not

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55. *Id.* at 2010; *see also Carter*, 530 U.S. at 269 (holding that the level of *mens rea* that should be read into a statute should be “only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct”) (internal quotations omitted).

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

57. *Id.*

58. *Id.* The Court dismissed the Government’s argument that general intent distinguished between a guilty person and, for example, a foreigner, mailing an envelope without understanding its contents or an individual mailing an envelope without knowing what was inside. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The jury had been specifically instructed that “the Government need prove only that a reasonable person would regard *Elonis*’s communications as threats.” *Id.*

62. *Id.* at 2011–12.

the mere result of his actions, the Court declared that “what *Elonis* thinks does matter,” and it reversed his conviction because the lower courts did not take his state of mind into account.<sup>63</sup>

The Court did not actually announce what level of *mens rea* courts should apply to Section 875(c)’s second element.<sup>64</sup> Instead, frustratingly, it specifically noted that it would not decide whether “recklessness” would suffice because the parties did not amply argue the issue until oral arguments, and even then, it was not argued sufficiently.<sup>65</sup> With this, the Court revisited its practice of reserving opinion until an issue is argued in a lower appellate court, and left those lower courts to decipher what the law is based on this opinion.<sup>66</sup>

## 2. A Lack of Constitutional Analysis

Chief Justice Roberts concluded his analysis by stating that given the Court’s disposition in reversing the case on statutory grounds, “it is not necessary to consider any First Amendment issues.”<sup>67</sup> He refused to acknowledge or address any of *Elonis*’s constitutional arguments, many of which surrounded the weight given to a mandatory subjective scrutiny of his actions.<sup>68</sup> While a constitutional analysis of this case could have provided clearer guidelines for determining appropriate levels of culpability for this statute and for true threats jurisprudence in the future, instead, the case was merely remanded for reconsideration absent the possibility of conviction under a negligence standard.<sup>69</sup> Nonetheless, one dissenting opinion and one opinion concurring in part and dissenting in part have provided at least some persuasive authority on both matters.

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63. *Id.* at 2011 (internal quotations omitted).

64. *Id.*

65. *Id.* at 2013. Chief Justice Roberts emphasized this as the Court’s “usual practice of awaiting a decision below and hearing from the parties,” in order to produce the correct decision. *Id.*

66. *Id.*

67. *Id.* at 2012.

68. *Id.* at 2004.

69. *See United States v. Elonis*, 841 F.3d 589, 601 (3d Cir. 2016) (affirming *Elonis*’s original conviction on remand).

*B. Justice Alito's Concurrence in Part and Dissent in Part*

Justice Alito's discontent is immediately recognizable in his prediction that this case will have regrettable consequences and produce continued inconsistency moving forward.<sup>70</sup> Agreeing with the majority's opinion that negligence is not enough, he pursued the question of whether a recklessness standard would be sufficient.<sup>71</sup> Pointing to precedential authority that upholds a recklessness standard as sufficient to warrant death penalty convictions where defendants' disregard for a known, unjustifiable risk resulted in great harm,<sup>72</sup> Justice Alito concluded that a state of recklessness meets the moral culpability standard that negligence does not.<sup>73</sup> He asserted that when a person recklessly conveys a threat, he passes the wrongful conduct threshold by delivering his message because "[h]e [was] aware that others could regard his statements as a threat."<sup>74</sup>

He then asked whether a recklessness standard would be in line with the Court's analysis of the First Amendment as it relates to the protection of free speech.<sup>75</sup> Examining *Elonis's* contention that his posts were a form of artistic expression and comparing those posts to the art of well-known musicians, Justice Alito argued that given the context, forum, and audience of *Elonis's* statements, *Elonis* had but a slight claim to artistry because his statements, "pointed directly at [his] victims, . . . [and were] much more likely to be taken seriously."<sup>76</sup> On balance, this was not enough to allow *Elonis's* statements the shield of the First Amendment.<sup>77</sup> Furthermore, Justice Alito concluded that because recklessness has been shown to establish culpability for offenses significantly more grave than threats, and

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70. *Id.* at 2014 (Alito, J., concurring in part, dissenting in part). He further remarked that attorneys and judges will still be left to guess the correct outcome to this issue in the future. *Id.*

71. *Id.* at 2015.

72. *Id.* at 2014; *see also* *Tison v. Arizona*, 481 U.S. 137, 157 (1987) (holding that "reckless disregard for human life" may warrant use of the death penalty).

73. *Elonis*, 135 S. Ct. at 2014–15 (Alito, J., concurring in part, dissenting in part).

74. *Id.* at 2015.

75. *Id.* at 2016.

76. *Id.* at 2016–17 (describing *Elonis's* speech as involving a mere "fig leaf of artistic expression").

77. *Id.* at 2016–17 (noting that there was evidence *Elonis* made sure his wife saw his posts and citing to an amicus brief by the National Network to End Domestic Violence for the proposition that "threats of violence and intimidation are amongst the favored weapons of domestic abusers"); *see also supra* note 9 and accompanying text (explaining that true threats have been historically excluded from protection under the First Amendment because any benefit they bring is far outweighed by societal interests).

because *Elonis* had not established that his speech merited full First Amendment protection, the lower court should re-try his case with the option of convicting him under a recklessness theory.<sup>78</sup>

### C. Justice Thomas's Dissent

Justice Thomas disagreed completely with the majority's view that negligence is not sufficient to find culpability in this case.<sup>79</sup> He argued that the Court had previously only required defendants to know the facts which make their conduct illegal, and that general intent had always been the Court's default rule when statutes that address speech have lacked a scienter requirement.<sup>80</sup> With this in mind, Justice Thomas read Section 875(c) to require only general intent and noted that such a requirement might also include a negligence standard because no additional mental state is required to establish guilt.<sup>81</sup>

His analysis continued with a historical breakdown of true threat jurisprudence extending back to eighteenth century common law.<sup>82</sup> Referencing *Black*, Justice Thomas argued that because Section 875(c) proscribes true threats, as long as such a threat is present, *Elonis* is not protected by the First Amendment.<sup>83</sup> He concluded by expressing his displeasure with the Court's failure to completely resolve the issues. In sum, he opined that as long as Section 875(c) falls within the narrow exception of a true threat, the convictions that it produces are not precluded by the Constitution.<sup>84</sup>

## V. IMPACT

With regard to Section 875(c) going forward, Justice Alito raised the valid point that lawyers and courts will remain lost<sup>85</sup> because the Court's

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78. *Id.* at 2017.

79. *Id.* at 2018 (Thomas, J., dissenting).

80. *Id.* at 2019–20; *see also* *Rosen v. United States*, 161 U.S. 29, 30 (1896) (affirming a conviction where defendant knew the contents of mail he was sending but not that it was considered obscene by statute).

81. *Elonis*, 135 S. Ct. at 2022 (Thomas, J., dissenting).

82. *Id.* at 2024–25.

83. *Id.* at 2027.

84. *Id.* at 2028.

85. *See generally id.* at 2014 (Alito, J., concurring in part, dissenting in part) (discussing the

partial answer has only minimally narrowed the issue.<sup>86</sup> Instead of a circuit split between subjective intent jurisdictions and general intent jurisdictions, the way the *Elonis* case was handled will likely result in a split between subjective intent jurisdictions and general-intent-absent-the-possibility-of-negligence jurisdictions. With that in mind, there is a strong possibility that the Court will soon face the very similar question of whether recklessness will suffice for conviction under 875(c).<sup>87</sup>

However, by denying lower courts the use of a negligence standard, the Court has at least lessened the risk that those who threaten unwittingly will be convicted.<sup>88</sup> It has reiterated the principle that absent some clear indication by Congress to the contrary, a perpetrator must do something wrong to incur criminal liability.<sup>89</sup> This theoretically strengthens First Amendment jurisprudence by proxy, as it may chill future attempts to prosecute individuals for artistic expression or other speech that lacks a clearly blameworthy intent. It also reaffirms the notion that even distasteful expression can be innocent. While the Court may have gained more time to consider the larger issues by punting on the big questions, the *Elonis* decision has strengthened the layer of protection that safeguards our speech. Such enhancement, whatever its form, is increasingly important as technological advances constantly expand our realm of speech and increasingly facilitate its mass dissemination.

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“Court’s refusal to provide an answer”). Scholars will also continue to scrounge for a consistent interpretation of true threats. *See, e.g., Federal Threats Statute—Mens Rea and The First Amendment—Elonis v. United States, supra* note 27, at 336–38 (attempting to fill in the holes *Elonis* left regarding the definition of true threats by urging a comparison to the Court’s previous handling of obscenity cases).

86. *See* *United States v. Elonis*, 841 F.3d 589, 601 (3d Cir. 2016) (affirming *Elonis*’s original conviction on remand and declaring that the improper jury instruction provided represented harmless error objective).

87. *See* *United States v. White*, 810 F.3d 212, 221 n.3 (4th Cir. 2016).

88. *Elonis*, 135 S. Ct. at 2011; *see also* *United States v. Martinez*, 800 F.3d 1293 (11th Cir. 2015) (vacating a defendant’s conviction, post-*Elonis*, reasoning that her indictment based on her e-mailed response to a radio show failed to meet the required level of *mens rea* demanded by *Elonis*).

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

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