

PROSECUTING ONLINE THREATS AFTER *ELONIS*

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INTRODUCTION

In *Elonis v. United States*,¹ the Supreme Court failed to decide exactly *which* mens rea standard the government must prove when it prosecutes an individual for making an online threat under 18 U.S.C. § 875(c).² Three standards were in play: specific intent, recklessness, and what was characterized as either general intent or negligence. The Court's majority held that the last of these is precluded, but left lower courts to face a seemingly broad decision between the two remaining options: whether to require the government to prove defendants threatening individuals online were *reckless* regarding their choice of words, or whether they *specifically intended* their words be interpreted as threats.

Part I of this Essay discusses the holding in *Elonis v. United States*. Part II presents the three potential mens rea standards for online threats and shows how each standard either over- or under-protects some online speech, and proves unsatisfactory as a one-size-fits-all solution. Part III suggests that instead of deciding which standard is best for *all* online threats, lower courts should adopt libel law's distinction between public and private targets,³ and similarly apply a heightened mens rea standard of specific intent only when the speech at issue targets public figures.⁴

Distinguishing between threats against public and private figures, and tailoring mens rea accordingly, is the best approach in light of core First Amendment principles. A Facebook post containing violent language about one's elected representative implicates free speech values in a way that an otherwise similarly threatening post targeting one's ex-wife does not. It will not always be easy, but drawing this distinction will allow courts to achieve the best balance between freedom of speech values and the need to

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¹ 135 S. Ct. 2001 (2015) [<http://perma.cc/L282-ED3X>].

² See *infra* Part I.

³ See *infra* notes 45–48 and accompanying text.

⁴ Distinguishing between “private” and “public” is more art than science, but, like in the libel context, courts will develop precedent based on individual facts. See Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y.L. SCH. L. REV. 81, 82 (2005) (“In spite of the complexities involved in making judicial assessments of public or private figure status, the Supreme Court’s commitment to the public figure doctrine has remained unwavering for over 30 years.” (citations omitted)) [<http://perma.cc/XNY2-F4D5>]. For a brief discussion of the basic framework for making this determination, see *infra* notes 18–19 and accompanying text.

prevent intense psychological harm.

I. *ELONIS V. UNITED STATES*

18 U.S.C. § 875(c), the statute at issue in *Elonis*, prohibits “transmit[ting] in interstate . . . commerce any communication containing . . . any threat to injure the person of another.”⁵ Anthony Elonis was charged under this statute for threatening others online via several violently worded Facebook posts referencing various individuals—his ex-wife, law enforcement officers, and schoolchildren.⁶ The court instructed Elonis’s jury that the government must prove a reasonable listener would have perceived his posts as a “serious expression of an intention to inflict bodily injury or take the life of an individual.”⁷ The court rejected Elonis’s request for an instruction that would have required the government to prove Elonis *specifically intended to threaten* his targets.⁸ This denial allowed the government to discount Elonis’s testimony during trial—during which he claimed the posts were some mixture of art and therapy⁹—and argue in closing “it doesn’t matter what [Elonis] thinks.”¹⁰ He was convicted on four counts, and acquitted of one.¹¹ On appeal, he argued the given instruction was insufficient under both the statute and the First Amendment.¹²

Chief Justice Roberts, writing for a seven-Justice majority, reversed Elonis’s convictions, holding that the given jury instruction, which he questionably characterized as requiring only negligence,¹³ was insufficient to sustain a conviction under the statute. The Court declined to articulate which mens rea standard *was* required, leaving an open question, both on remand in Elonis’s case and more generally for all prosecutions of online threats under 18 U.S.C. § 875(c): what mens rea standard applies to those who threaten others online?

II. MENS REA MATTERS: THREE UNSATISFACTORY UNIVERSAL STANDARDS

There are three potential mens rea standards discussed in *Elonis*. First, Elonis argued that the government must prove the speaker specifically

⁵ 18 U.S.C. § 875(c) (2012) [<http://perma.cc/CX27-AV8H>].

⁶ *Elonis*, 135 S. Ct. at 2005–07 (providing details of the Facebook posts relating to Elonis’s indictment).

⁷ *Id.* at 2007 (quoting jury instructions).

⁸ *Id.*

⁹ *See id.* at 2005–06.

¹⁰ *Id.* at 2007.

¹¹ *Id.*

¹² *Id.*

¹³ Chief Justice Roberts characterizes it as negligence-based because it uses a reasonable actor, like traditional negligence determinations, *id.* at 2011, but the standard is only used to determine whether the speech *is* a threat, not to determine anything with respect to the speaker’s actions (e.g., if they were unreasonable). In other contexts (e.g., obscenity, fighting words) the standard is objective, yet survives First Amendment scrutiny and is not characterized as merely negligence. *See id.* at 2027 (Thomas, J., dissenting).

intended to threaten his target.¹⁴ Second, Justice Thomas adopted the government’s position in his dissent, finding the trial court’s articulation of a general intent standard satisfactory.¹⁵ Finally, Justice Alito, concurring in the judgment, opined that the First Amendment requires the government to prove *Elonis* was reckless as to whether his posts constituted threats.¹⁶ As proposed universal standards for online threats, each standard leaves something to be desired, showing the need for the hybrid standard introduced in Part III.

All three standards elide a distinction between online threats directed at public figures and those directed at private individuals. Searching for a bright-line rule separating private from public figures is quixotic, but the Court has endorsed the following distinction:

For the most part those who attain [the status of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.¹⁷

The prominence obtained must be “especial”: someone cannot be a public figure whose public profile is “much like those of countless members of his profession.”¹⁸ The difference between public and private figures affects the First Amendment calculus: the target’s identity can serve as a useful proxy for whether the speech attacking him or her has broader significance. This follows from the understanding that violent-sounding words directed against a public figure, although expressed in threatening language, may in fact communicate some inchoate political idea with broader significance, a notion with which other people can agree or disagree. (As will be discussed in Part II.C, libel law relies on this distinction, imposing a heightened mens rea standard when the target of the libel is a public figure.)

A. Specific Intent

The most defendant-friendly standard would require proof that the speaker specifically intended to threaten his target. In its amicus brief, the American Civil Liberties Union (ACLU) explained: the Internet is the quintessential public forum, and as a medium its speech is “often

¹⁴ *See id.* at 2012 (majority opinion) (stating *Elonis* opposed recklessness standard at oral argument).

¹⁵ *Id.* at 2018 (Thomas, J., dissenting)

¹⁶ *Id.* at 2015–16 (Alito, J., concurring in part and dissenting in part).

¹⁷ *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) [<http://perma.cc/KXL5-TUXX>] [<http://perma.cc/3KZ2-UGTY>]).

¹⁸ *Id.* at 135.

abbreviated, idiosyncratic, decontextualized, and ambiguous . . . [subjecting it] to multiple interpretations,”¹⁹ therefore courts must “ensure adequate breathing room” for “core political, artistic, and ideological speech.”²⁰

A specific intent requirement, however, would overprotect threats directed at private targets, which have negligible First Amendment value. The ACLU’s arguments are not terribly persuasive as applied to posts like *Elonis*’s, which he asserts were either artistic or therapeutic;²¹ Justice Alito is correct that a “fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech.”²² That *Elonis* targeted private individuals against whom he had personal grudges²³ means “[t]here is no threat to the free and robust debate of *public issues*; there is no potential interference with a meaningful dialogue of *ideas*; and the threat of liability does not pose the risk of a reaction of self-censorship *on matters of public import*.”²⁴

B. General Intent

The government, and Justice Thomas, took the opposite position on the proposed-mens-rea spectrum, arguing—as most Courts of Appeals weighing in have²⁵—that First Amendment concerns are sufficiently addressed by the *objective* definition of “threat.” This definition, in the view of these proponents, adequately protects the speaker from being silenced by easily offended listeners.²⁶ Thus, under the government’s position, the instruction at issue in *Elonis*, whether characterized as requiring proof of general intent or negligence, should have been

¹⁹ Brief of the American Civil Liberties Union et al. as Amicus Curiae Supporting Petitioner at 6, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 4215752 [https://perma.cc/LY3N-7G6Q].

²⁰ *Id.* at 5. See generally Paul T. Crane, Note, “True Threats” and the Issue of Intent, 92 VA. L. REV. 1225 (2006) [http://perma.cc/CQ63-55VM]; Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 217 (discussing *Virginia v. Black*, 538 U.S. 343 (2003) [http://perma.cc/Y9UW-5YV5], and stating “both the Commonwealth of Virginia and the *Black* majority (and, perhaps, the *Black* dissenters as well) believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate”) [http://perma.cc/F6J8-9T2U].

²¹ See *Elonis*, 135 S. Ct. at 2005–06 (majority opinion).

²² *Id.* at 2017 (Alito, J., concurring in part and dissenting in part). Obscenity law also embraces an objective definition of art. See *Miller v. California*, 413 U.S. 15, 24–25 (1973) (holding work that “appeals to the prurient interest, . . . describes, in a patently offensive way, sexual conduct[,] . . . [and that], taken as a whole, lacks serious literary, artistic, political, or scientific value” can be prohibited consistent with the First Amendment (citations omitted)) [http://perma.cc/X2N8-SKG5].

²³ *Cf. Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011) (noting “no pre-existing relationship or conflict between [the speaker] and [the target of the speech] that might suggest [the speaker’s] speech on public matters was intended to mask an attack on [the target] over a private matter”) [http://perma.cc/Q4LG-PY5H]. The schoolchildren are an exception, as he had never met them, but his threat did not carry any detectable political message.

²⁴ *Id.* at 1215–16 (emphasis added) (citations and internal quotation marks omitted).

²⁵ *Elonis*, 135 S. Ct. at 2018 (Thomas, J., dissenting).

²⁶ See *id.* at 2027–28 (discussing objective definition of “fighting words” and “obscenity”; suggesting threats should be treated similarly) (citations omitted).

permissible, especially in light of the extensive harm caused by online threats.²⁷ The damage to victims, including long-lasting psychological harm, does not depend on the speaker's state of mind.²⁸ Online threats also chill speech of both their targets and those who remain silent to avoid a similar fate.²⁹ In-person threats also chill speech of their targets, but the public nature of many online threats suggests their chilling effect on third-party observers is likely stronger than their offline counterparts. More broadly, of what value are posts reasonably conveying a serious expression of an intention to inflict bodily injury or take the life of an individual? Note that the government's concerns apply equally to threats targeting private and public figures.

This approach has considerable appeal, especially as applied to private threats like *Elonis*'s. However, as a proposed universal standard that would apply to threats against public figures, it is in serious tension with First Amendment precedent, specifically the Court's imposition of heightened mens rea requirements for libel, both in civil and criminal contexts.³⁰ Libel too has an objective element, that of the truth or falsity of the statement,³¹ raising the question: why protect demonstrably false statements of fact that injure the reputation of another? The Court has answered: ensuring no chilling of protected speech requires "breathing space" for speakers, created by precluding liability unless speakers were negligent (private target) or reckless (public target) with respect to *the risk of falsehood*.³² But, as Justice Thomas points out, the Court has declined to accord this mens rea buffer to speakers of fighting words or makers of obscenity, who are protected only by those categories' objective definitions.³³ So, are online threatening statements more like libelous ones, on the one hand, or fighting words and obscenity, on the other?

Threats, libelous statements, and fighting words all have targets, and obscenity does not. The identity of targets helps segregate statements into categories more (and less) worthy of protection; because obscenity lacks

²⁷ See generally Brief of the National Network to End Domestic Violence, et al. as Amici Curiae in Support of Respondent at 2–3, 10, *Elonis v. United States*, 135 S.Ct. 2001 (2015) (No. 13-983), 2014 WL 5013749 (describing harms to victims such as reducing "ability to sleep, eat, and work") [<http://perma.cc/P76A-BPAE>].

²⁸ See *id.* at 2–3.

²⁹ See, e.g., Catherine Buni & Soraya Chemaly, *The Unsafety Net: How Social Media Turned Against Women*, THE ATLANTIC (Oct. 9, 2014), <http://www.theatlantic.com/technology/archive/2014/10/the-unsafety-net-how-social-media-turned-against-women/381261> (describing deterrence and chilling impact) [<http://perma.cc/MFQ7-H5GT>].

³⁰ See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (extending to criminal prosecutions the *New York Times v. Sullivan*, 376 U.S. 254 (1964) [<http://perma.cc/AC6D-FCG9>], rule requiring a false statement about a public official be made with "actual malice" in order to grant civil damages) [<http://perma.cc/U4AQ-BV9X>].

³¹ See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (describing California's libel law) [<http://perma.cc/B6R6-ESFE>].

³² See *infra* notes 44–47 and accompanying text.

³³ See *Elonis v. United States*, 135 S. Ct. 2001, 2027–28 (2015) (Thomas, J., dissenting).

this feature, treating all of it the same makes sense. While online threats, libelous statements, and fighting words all risk upsetting public order, the key First Amendment distinction between these categories of speech is the nature of the risk. In prosecuting fighting words, the government is protecting the speaker: his words could get *him* beaten up.³⁴ On the other hand, in prosecuting libel and online threats, the government is protecting the target.³⁵

This difference matters, because the First Amendment protects “vehement, caustic, and [] unpleasantly sharp attacks *on government and public officials*”³⁶ to a greater extent than those on private ones.³⁷ In other words, the Court has required public figures to endure harsher treatment than private figures. Treating threatened public figures like public targets of libel is consistent with First Amendment principles: both are subject to (sometimes severe) psychological distress, yet the statements at issue are sometimes indistinguishable from those truly worth protecting. With libelous statements, the mens rea standard protects the possibility that the libelous statement is true, though not provable. With threats, the standard should protect expressions of outrage against a public figure, the public figure’s actions, or the public figure’s ideology.³⁸

Giving wide berth to these statements ensures consistency with the Court’s goal “to protect even hurtful speech on *public issues* to ensure that we do not stifle *public debate*.”³⁹ Note that this analysis might not extend to face-to-face threats, at least not to those made in private. (It doesn’t even properly include all “online threats,” but only publicly viewable ones. Even on social media there are private channels of communication: a threatening Direct Message on Twitter, even one directed at a public figure, does not merit protection even if an identically worded one in a publicly viewable tweet would.⁴⁰ Threats made through the latter avenues more closely resemble face-to-face threats and similarly do not merit a heightened level of protection.)

Public, online threats raise First Amendment issues. Therefore, even if an objective definition adequately protects the speech of online bullies who

³⁴ Cf. *Cohen v. California*, 403 U.S. 15, 20 (1971) (fighting words, “when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction [against the speaker].”) [<http://perma.cc/7UUS-2ZDU>].

³⁵ Cf. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 290–91 (2001) (listing four rationales for prosecuting threats).

³⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasis added).

³⁷ See *infra* notes 45 and 48 and accompanying text.

³⁸ See *infra* Part III (describing threats as potential ideas in more detail).

³⁹ *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (emphasis added).

⁴⁰ See, e.g., *About Direct Messages*, TWITTER, <https://support.twitter.com/articles/14606> (last accessed August 2, 2015) (stating Twitter users can “use Direct Messages to have private conversations with [other] Twitter users about Tweets and other content.”) [<http://perma.cc/CFH3-CYQR>]. A similar dichotomy exists with in-person statements: compare someone encountering a Senator on a cul-de-sac and threatening her with that same person yelling those same words at her at a populated rally for her reelection.

target private individuals, this standard (and its lack of a recklessness mens rea requirement) underprotects the words of those openly attacking public targets.

C. Recklessness

Between the defendant's specific-intent and Justice Thomas's general-intent standards, Justice Alito charts a middle course, advocating for a recklessness requirement. He asserts that "recklessness regarding a risk of serious harm is wrongful conduct,"⁴¹ and that this standard will not result in wrongfully convicting someone for protected First Amendment expression.⁴² In finding it provides "adequate breathing space" in the threat context, Justice Alito invokes *New York Times Co. v. Sullivan*, yet elides its crucial distinction⁴³: the First Amendment requires public officials to demonstrate a speaker's recklessness before they can recover damages for statements made "relating to [their] official conduct."⁴⁴ Ten years after *New York Times*, the Court held that, with respect to statements made about private individuals, the First Amendment imposed only a negligence standard on libel suits.⁴⁵

Justice Alito also relies on⁴⁶ *Garrison v. Louisiana*, which extended the reasoning of *New York Times* to criminal prosecutions,⁴⁷ but that case's holding and reasoning, like in *New York Times*, depended on statements targeting *public figures*. In *Garrison*, the Court rejected the lower court's conclusion that the defendant's statement constituted "purely private defamation,"⁴⁸ suggesting, consistent with civil libel case law, that a lesser standard would have applied had it been so. Justice Alito would collapse this distinction as applied to online threats, suggesting the justification for it no longer applies, or does not apply to online threats. But as this Part has argued, and as Part III will further demonstrate, it does.

III. A HYBRID APPROACH

Courts can more precisely balance the First Amendment interests of the speaker against the need to protect the target from threats of harm by using a two-part approach. This approach should focus on the identity of the target and impose a higher mens rea standard when the target is a public figure. This section will explain why this is a distinction with a difference, albeit only from society's—and not the target of the threat's—perspective.

⁴¹ *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part).

⁴² *See id.* at 2016.

⁴³ *Id.* at 2017 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)).

⁴⁴ *New York Times Co.*, 376 U.S. at 279–80.

⁴⁵ *Gertz v. Robert Welch*, 418 U.S. 323, 347 (1974).

⁴⁶ *Elonis*, 135 S.Ct. at 2015.

⁴⁷ *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

⁴⁸ *Id.* at 76.

The harm to the threat's target is the same, but threats directed at public figures more likely involve *public* issues, and as such deserve some First Amendment protection, despite the serious harm to innocent victims threats predictably cause.⁴⁹

Angry online speech attacking public figures is more likely to convey an idea on important public issues than that targeting private individuals; thus, it is more deserving of First Amendment protection. The Court has recognized that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”⁵⁰ In the context of threats, this means that there is a greater risk a “threat” against a public official is not solely a “threat,” but also an entry into the marketplace of ideas (albeit a frightening one). Someone writing something threatening about Barack Obama online, especially if the two have never met, might very well be expressing some rudimentary political opposition; someone threatening his ex-wife is almost certainly not.⁵¹ The words of the threat are more worthy of Constitutional protection in the first instance than in the second, and using the identity of the target allows courts to distinguish between the two without evaluating the content of the speech.

For better or worse, the First Amendment requires that public figures withstand more severe verbal and written abuse than private individuals. That speech targets a public figure is a sufficient but not necessary condition for bestowing First Amendment protection on it. Even if the target is a private one, if speech has even a faint political or ideological bent to it, the First Amendment will shield it. For example, the funeral for Marine Matthew Snyder became a target for the Westboro Baptist Church, which stirred up publicity and then picketed his funeral (standing about 250 feet outside of it), singing hateful songs throughout.⁵² The Court, while acknowledging that Westboro's speech “is certainly hurtful and its contribution to public discourse may be negligible,” found that it “addressed matters of public import” and did so “on public property [and] in a peaceful manner.”⁵³ Therefore, despite testimony that the speech caused Snyder's father Albert “emotional anguish [that] had resulted in severe depression and had exacerbated pre-existing health conditions,” the speech was fully protected by the First Amendment, precluding even civil liability.⁵⁴

Threats, like libel, are exceptions to the First Amendment's

⁴⁹ Cf. *supra* notes 28–30 and accompanying text (describing harm from online threats).

⁵⁰ *Garrison*, 379 U.S. at 74–75.

⁵¹ Cf. Kyle A. Mabe, Note, *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, 57–58 (2013) (advocating specific intent requirement for threats against the President or presidential candidates for this and other reasons) [<http://perma.cc/F7NC-WXLK>].

⁵² *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

⁵³ *Id.* at 1220.

⁵⁴ *Id.* at 1214, 1220.

prohibition on content-based restrictions,⁵⁵ so they need not be protected in an absolute manner like the nonthreatening and nonlibelous opinion statements of the Westboro Baptist Church. Yet the same rationale that moved the Court to protect hate speech in that case, the fear of “stifl[ing] public debate,”⁵⁶ even when the “debate” at issue is a one-sided screed, suggests caution when prosecuting online threats. Remaining true to the First Amendment’s animating principle requires mens rea protection for speakers of online threats against public officials.

CONCLUSION

Since *Elonis* held general intent insufficient for online threat prosecutions under 18 U.S.C. § 875(c), lower courts are left with two mens rea options. Federal courts need not decide whether Justice Alito’s recklessness standard or the more protective specific intent requirement strikes a better balance *for all online threats*; each court should focus on the precise threat before it and, guided by libel case law, decide whether the target is a private individual or a public figure. After making this determination, courts should instruct juries on recklessness when the threat is to a private individual, and on specific intent when the defendant has targeted a public figure.

That is not to say the Court in *Elonis* got it right; in fact, I think it did not. *Elonis* targeted private individuals, and did not appear to raise any issues of “public import” with his threats that would make them at all analogous to the Westboro Baptist Church’s funeral-protest speech. As such, the analogy to libel law would suggest an *affirmance* of his conviction: the objective-listener requirement, coupled with general intent negligence, adequately protects the limited First Amendment values at stake in his posts. His threats against his ex-wife, among others, are no more valuable than demonstrably false statements of fact harming the reputation of a private individual: they both cause serious harm and do not add anything appreciable to the public marketplace of ideas, so a negligence-type standard should be acceptable. Following from this, online threats against public figures or threats that implicate broader public issues should require the Government to prove recklessness on the part of the speaker.⁵⁷

⁵⁵ *Elonis v. United States*, 135 S. Ct. 2001, 2027–28 (2015) (Thomas, J., dissenting).

⁵⁶ *Snyder*, 131 S. Ct. at 1220.

⁵⁷ Of course, none of these First Amendment strictures restrain the private social media companies that created the platforms for all the threatening language discussed in this Essay; they can do much more than the government can to stop it (or at least quickly remove it). *Cf., e.g.*, Editorial, *Hate Speech on Facebook*, N.Y. TIMES, May 31, 2013, <http://www.nytimes.com/2013/05/31/opinion/misogynist-speech-on-facebook.html> (discussing how Facebook “belatedly moved to further restrict hate speech that glorified violence against women” after advocacy groups gathered petitions and alerted advertisers) [<http://perma.cc/9MXY-AGLW>].